THE ADMINISTRATION OF MILITARY JUSTICE BY COURTS - MARTIAL WITH SPECIAL REFERENCE TO INDIA

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CERTIFICATE

This is to certify that the dissertation entitled " The Administration of Military Justice by Courts-Martial with Special Reference to India " is a research work done by Mr. Rakesh Kumar Mehta. It is being submitted in partial fulfilment of degree of Master of Philosophy in the Division of International Legal Studies, School of International Studies, Jawaharlal Nehru University, New Delhi during 1992-94 under my supervision. This is his original work and has not previously formed the basis for the award of any degree to him. It is recommended that this dissertation be placed before the examiners for evaluation.

V.S.Mani
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Supervisor

PREFACE

The courts should render justice according to law is an ancient mantra. Justice means giving every person his due and to provide with a sense of satisfaction according to law. The underlying assumption is that the law is clear, unambiguous and simple. Various tribunals known as courts-martial administer justice in the armed forces. They are basically ment for the enforcement of discipline, which is axiomatic in any armed forces. A different set of legislation is designed to fulfill this objective. Though its features are generally similar to those of Indian Legislation, it possesses certain distinguishing features. Among them are the unity of command, stringent discipline and unquestioning obedience of superiors.

The object of Military Law is two-fold: firstly, it provides for a sound system of administration of justice in the Armed forces; and, Secondly, it ensures maintenance of the highest standard and discipline among its members. Indian military law is contained in the Army Act 1950, the Air Force Act 1950, and the Navy Act 1957, and the rules framed thereunder.

The laws governing the armed forces personnel have been subjected to legal scrutiny by the civil courts. High courts and the Supreme Court of India are frequently approached for seeking interpretation of a number of provisions relating to disciplinary processes and the military justice system. Therefore, it has been felt that an enquiry is essential to find out the drawbacks if any in the military justice system. For this purpose an attempt is made here to make a comparative analysis of the laws relating to the dispensation of justice by courts-martial in the three armed services in India and also in the armed forces of

some other countries. It suggests certain reforms in the Indian system, especially in the light of the reforms introduced in the administration of military justice in other countries.

My studies have been possible with the assistance and cooperation of a number of persons, who need special mention.

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I shall feel rewarded if my efforts prove useful to the men in uniform and others who are in any way interested in the study of the practice of the military justice system.

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CONTENTS

ABBREVIATIONS

Addl	Additional
AFA	Air Force Act, 1950
AIR	All India Reporter
SLJ	All India Services Law Journal
SLR	All India Service Law Reporter
ALJ	Allahabad Law Journal
AR	Army Rule, 1954
Art.	Article
AJAG	Assistant Judge Advocate General
AFR	Air Force Rules
BLR	Bombay Law Reporter
Capt.	Captain
COS	Chief of Staff
COAS	Chief of Army Staff
CNS	Chief of Naval Staff
CO	Commanding Officer
Cr.L.J.	Criminal Law Journal
Cr.L.R.	Criminal Law Reporter
Cdr	Commander
CrPC	The Code of Criminal Procedure
CM	Courts-Martial
DAJAG	Deputy Assistant Judge Advocate General
DJAG	Deputy Judge Advocate General
DCM	District Court-Martial
DB	Division Bench
FB	Full Bench

GCM	General Court-martial
GOC-in-C	General Officer Commanding-in-chief
HC	High Court
IPC	The Indian Penal Code
ILR	Indian Law Reporter
JA	Judge Advocate
JAG	Judge Advocate General
JCO	Junior Commissioned Officer
Lt.	Lieutenant
Lt. Col.	Lieutenant Colonel
Maj.	Major
Maj. Gen.	Major General
MML	Manual of Military Law, 1983
MIML	Manual of Indian Military Law
MLJ	Madras Law Journal
NCO	Non Commissioned Officer
Notes on IM & AF Law	Notes on Indian Military and Air Force Law
OR	Other Ranks
RA	Regulations for Army, 1987
RI	Rigorous Imprisonment
SCM	Summary Court-martial
Sec.	Section
SLR	Service Law Reporter
SGCM	Summary General Court-martial
SRO/SRO's	Statutory Regulations and Orders
SC	Supreme Court
U/S	Under Section
Vol.	Volume

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CHAPTER I

INTRODUCTION

The main purpose of law is to provide justice to all people without any discrimination so that they can maintain their faith in the rule of law. Justice Holms rightly holds that law is not a custom made garment ; life of Law is not logic, it is experience. In line with this saying a large number of studies have been carried out on the application and impact of law.

The present study is designed to find out whether the personnel of the Indian armed forces receive justice under the existing system ? Is the military justice system in India adequate, clear and simple? Is it comparable with military justice system of other countries?

The rising incidents of cases of the armed forces personnel coming before the High Courts and Supreme Court with writ jurisdiction under Articles 226 and 32 of the constitution, challenging what they call illegal verdict or denial of justice in service matters have raised important questions. Has the administration of justice system in the armed forces become out of tune with the present milieu ? Should any of the fundamental rights including the right to a fair trial, be denied to a member of armed forces, especially when depriving him of his life and liberty? There are some sensitive questions, too. Have the armed forces officers, as leaders of men, failed to develop a healthy, positive and helpful attitude towards the Legitimate aspirations of the subordinates ? Are they free from bias ? Are they objective in their judgments ? And, above all, do they have the moral courage to stand up to the establishment when required? These questions do come up for serious discussion.

We shall examine these questions by a comparative study of the administration of justice by courts-martial in the three services of the defence force in India. We shall look at the means available to a soldier convicted by a court-martial to seek judicial intervention. We shall also carry out a comparative study of military justice systems of a few other democratic countries, in order to identify their progressive features in this field. The Indian soldier from the mutiny days to the present has been subject to a system of rules and regulations administered by military authorities to maintain discipline, honour and security within the armed forces. The body of rules has been largely comprised of international customs and British precedent. From the beginning it included the institution of court-martial to exercise criminal jurisdiction over the members of the armed forces.

The aim of the military justice has been to balance maximum military performance with maximum justice. But because of the need to achieve the former, it has often been thought necessary to sacrifice a degree of the latter. Thus, Justice Black has stated that military law "emphasizes the iron hand of discipline more than it does even scales of justice" and that "[i]n the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual." The special needs of the military discipline and the administration of military justice by courts-martial have been accorded constitutional recognition in India by Articles 33 and 227(4) of the constitution.

An Army without discipline is an ineffective institution. Military justice contributes towards discipline in two important ways ; first it enables a commander to deal with wrongdoers ; and second it protects the innocent. Therefore, military justice system has a very old origin. According to George E. Wilson, an Army JAGC officer of the United States, "as a system, military justice springs from ancient times. The military tribunal can be traced back to a period considerably earlier than the birth of the Christ."

Military justice does not merely promotes discipline, it also promotes higher performance, efficiency, organisation and cooperation through its detailed regulatory apparatus. It thus helps to increase general combat capacity. It establishes order and discipline by forbidding actions detrimental to the interests of national defence and by making servicemen liable for breaches of military regulations.

Military justice is administered either by commanders at various levels by virtue of the powers vested in them under the provisions of the legislation applicable to them or by the tribunals constituted under the provisions of that legislation. Under the military justice system, the officers presiding over the court-martial act as an independent judges in their individual capacities. Simultaneously, they remain superior officers of the accused. Such a dual-hat approach is not in existence in the civil jurisdiction. Once a civil judge gives a decision, he ceases to be concerned with him. In the armed forces, on the other hand, the accused remains with the judge/officer who had tried him, in all times to come unless the accused is sent out of the service. Thus, military justice is administered by the officers serving with the accused in the same forces. The of-

fender and the judge continue to remain comrade-in-arms, unlike civil judiciary. It must not only be good but appears to be good.

There are two competing views about the administration of criminal law under the military justice system. One focuses on discipline and the other on justice. The former holds that military justice ought to be exclusively a responsibility of military command and if it should be employed for the purpose of enforcing discipline. Its proponents believe that over protection of soldiers threaten the very functioning of the military. They say that it is essential to have prompt and effective remedies which can only be achieved from the tribunals composed of men of swords. According to them, an army without discipline is more dangerous to the civil population (including that of its own country) than to the enemy. The public interest in army discipline is therefore entitled to greater weight than the rights of an accused in the military. For the maintenance of discipline in the armed forces, the necessity demands speedy conviction and stern penalties.

The High Courts and Supreme Court have always relied upon the need for maintaining discipline to justify the constitutional "exception" under Article 33 of the constitution.[1]

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1. In few cases, however, the higher courts have modified the scope of their interference by reviewing the court-martial proceedings and emphasising the preeminence of constitutional standards in military cases. Although recognizing that the demands of military discipline often necessitated separate standards the court have, in few cases, reviewed constitutional issues, if they had not been fully and fairly considered by the military courts.

The need for discipline in many cases justifies less protection to the rights of military command. Certain rights of the personnel in the armed forces are perforce conditioned to meet certain overriding demands of discipline and duty. The best statement on the "military discipline" argument might be that it demands and justifies a procedure which while it need not and should not increase the possibility of unjust conviction, does lessen the chance of unjust acquittal.

The contending view is that military justice should not simply be a tool of the commander to enforce discipline, but a system of law which recognizes the rights of the individual soldier and, to the extent possible, provides him the constitutional protection enjoyed by civilians. The proponents of this view believe that servicemen's rights should be sufficiently protected. Its supporters argue that the system of Military Justice should recognize the rights of individual soldier and the constitutional protection similar to civilians, contend that all over the world people are fighting for their fundamental rights ; that the same can be guaranteed to an armed forces personnel by a judicial body independent of military courts. According to them, in the name of discipline one cannot overlook the concept of a fair trial and deprive a person of his life and liberty specially when he is guarding the life and liberty of the people of the nation. A person cannot be condemned in the name of discipline without giving him full opportunity to defend himself. The talk of balancing discipline and justice is a mistake. The two are inseparable. Correlation never promotes the development of discipline. A military trial should not have a dual function : instrument of discipline and instrument of justice. It should be

an instrument of justice only ; and in fulfilling this function ; it will hopefully promote discipline.[2]

Deprivation of life and liberty must be preceded by an enquiry ensuring fair procedure. There is no doubt that the need for the maintenance of discipline in any armed forces is axiomatic but it is not advanced by injustice[3]. In many countries the armed forces personnel are much better placed in so far as fundamental rights and personal liberty are concerned. Their armed forces laws have undergone a sea change alongwith the progressive changes in jurisprudence. In India, apparently no substantial change has taken place and the heritage is maintained. Interestingly, ever since India became independent, the law of the armed forces in England have changed tremendously in order to incorporate many progressive features. In Col. PPS. Bedi V. Union of India[4], the Supreme Court of India observed that in the larger interest of the national security and military discipline, Parliament in its wisdom may restrict or abrogate fundamental rights, but this process should not be carried so far as to create class of citizen not entitled to the benefits of the liberal spirit of the constitution. Justice D.A. Desai and A.N. Sen have stated that in the procedure for trial of an

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2. West more land, Military Justice - A commander's view point, 10 Amer. Cr.L.Rev. 5,8(1971).

3. Robert Sherill, Military Law is to Justice as Military Music is to music, 62-67(1970). Mr. Sherill was a harsh critic of American Military Criminal Law during the Vietnam era. He states, " one favoured military method of conditioning a man into docility or to make trial and punishment not only arbitrary but unpredictable.

4. 1982(2)582, SC.

offence by the criminal court and the court-martial is apt to generate dissatisfaction arising out of the differential treatment. Justice Y.V. Chandrachud once stated that army is always on the alert for repelling external aggression or suppressing internal disorder, so that peace-loving citizens enjoy a social order based on the rule of law, and the same cannot be denied to the protectors of this order.[5]

How to reconcile freedom of the individual with the needs of military discipline has therefore been a challenging task. We can make a modest attempt by addressing two general questions:

(a) Should the military continue the practice of existing system?

(b) If so, are further procedural reforms needed to improve the system?

While it may be argued logically that the military justice system which has endured in this country for almost fifty years must have some merit, it can also be forcefully argued that the military has remained stead fastly devoted to the system on the basis of the tradition alone, without regard to its obvious archaic nature. Neither argument is wholly correct. The fact is that Military Justice system, as well as its adaptation to changing needs, is a necessity.

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5. Y.V. Chadrachud CJ in Lt. Col. PPS. Bedi V. Union of India and others, supra note 4 at page 616.

CHAPTER II

THE NEED OF THE MILITARY JUSTICE

By necessity, the armed forces constitute a specialized society, separate from civilian society. Again by necessity, it has developed its own laws and traditions. Their overriding thrust is to ensure obedience. No question can be left open as to the right to command in the soldier. The rights of persons in the armed forces are conditioned to meet certain overriding demands of discipline and duty.

When a person joins armed forces he assumes all those duties and responsibilities which are imposed by military law. Since military society differs from a civilian society, both cannot be governed by the same rules. The obligations of a military person, whether imposed voluntarily or involuntarily, demand more than what is demanded from anyone else, since the armed forces personnel are subject not only to the common law of the land but also to the military law. Also, unlike other professions, the armed forces require instant obedience to commands. Hesitation or failure to comply with order may endanger the Lives of Commanders. It may also affect the success of an operation. In any armed forces the need for discipline is fundamental. It cannot be maintained by the civilian criminal process, which is neither swift nor certain. Military discipline has been a major factor in the splendid history of the Indian armed forces. Today it is much more important than ever before, primarily because the armed forces have to deal with much more complicated tasks in an extremely difficult international situations, as well as in many sensitive domestic crises. Therefore every commanding officer considers discipline a number one priority. A military commander has many administrative responsibilities to manage the personnel

and property under his control. Frequently the commander is personally accountable for substantial amounts of government property, including arms, tools, equipment, and even real estate. Consequently he requires extensive authority to administer such property, to see that both personnel and equipment are "fit to fight", and to fulfill the discipline aspect to ensure the health and safety of his command. Thus, this military necessity grows out of:

(a) the Commander's responsibility to maintain good order and discipline and

(b) his responsibility for the health, safety, welfare, morale and combat readiness of his command.

For the maintenance of discipline, which is necessary for the maintenance of military effectiveness, the military law of India has been enacted. Although the military law is characterised by almost the same features as the Indian legislation generally, it possesses some distinguishing features, including unity of command, stringent military discipline[1] and unquestioning obedience of superiors by subordinates. It is contained in the

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1. "Discipline", is a state of mind which leads to willingness to obey an order no matter how unpleasant or dangerous the task to be performed. This is not a characteristics of Civilian Community. Development of this state of mind among soldiers is a command responsibility and a necessity.
[Powell Report (USA) to the secretary of the Army by the committee on the Uniform Code of Military Justice Good order and Discipline in the Army (18 Jan 1960)]

Army Act of 1950, the Air Force Act of 1950 and the Navy Act of 1957 and the rules framed thereunder. These enactments and the rules are protected by Article 33 of the Constitution of India.

The main object of these Laws are to identify certain offences which are essentially offenses against military law[2] and triable by military courts (for instance, matters of discipline). They also include certain offences which are also crimes under the common law. With regard to these offences the jurisdiction of the military courts is concurrent with that of the ordinary courts of the land. In such cases, provisions have been made to resolve the conflict of jurisdiction ; military offences are triable by military courts, and civil offences are triable by civil courts. For example, questions of military duty as well as discipline are within the sole purview of military courts, whereas matters like murder, culpable homicide not amounting to murder, rape (unless such offences are committed during active service or at any place outside India or at a frontier post specified by the Central Government) fall within the purview of courts outside the heirarcy of military courts. Civil courts may have to exercise jurisdiction to determine who are persons subject to military law and whether a given proceeding alleged to depend on military law is justified by the rules of law which govern the military. The tasks which a citizen may be called

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2. Certain military offences like absence without leave, desertion, insubordination, cowardice, mutiny and the like have no civilian analogous. The adjudication of guilt or innocence and the assessment of appropriate punishment may require experience and knowledge not commonly possessed by civilian judges.

(Professor Joseph W. Bishop, Jr. Perspective, the case for military justice, MLR, 1973, p.215)

upon to perform as a soldier, and the circumstances under which such tasks may have to be performed, call for a high degree of discipline. The maintenance of such discipline, requires a special code of conduct to define soldiers' duties and to prescribe punishment for their breach. So certain acts are crimes when committed by serviceman but not so when committed by civilians. The military must not only instill strict order and obedience into its fighting men, but it must do so systematically, so that men have a full sense of loyalty to the system. In other words, the readiness and efficiency of the military system largely depends on two things : first, the respect, prestige and support from citizens to the men in uniform ; and second, the performance of professional duties by the men in uniform, especially during an armed conflict with an enemy.

The men in uniform are subject to several restrictions on their freedoms and they face problems typical to their profession. They form a group of persons having higher criminal potential than the citizenry at large. It is, therefore, essential to have a separate system of justice where more acts are forbidden and punishment is more severe than in civil life. In order to achieve the aim of "discipline in the armed forces", justice is administered by various tribunals. They are vested with various powers, depending on the nature and gravity of offences and ranks of the accused persons. These tribunals are called courts-martial in the "Army", "Navy" and "Air Force". They are constituted under respective Acts as mentioned above.

A question arises as to why do we need military tribunals apart from civil courts ! In Ram Sarup V. Union of India[3], the Supreme Court of India recognised the necessity of trial of service personnel by courts-martial is preference to trial by Civil Courts. It's preferences was based on three factors :

(a) Consideration of maintenance of discipline ;

(b) Special category of persons against whom the offences are committed ; and

(c) nature of the offences.

The exigencies of service can alone be a factor in establishing separate military tribunals. Offences may be committed while the accused may be in a camp or when his unit may be on the march. It would lead to great inconvenience if the accused and witnesses of the incident were left behind for the purpose of trial by any criminal court. Such a court, unlike a court-martial, is bound to take longer time, on account of procedure for trial and consequent appeals and revisions. The exigencies of the service in the armed forces require speedier trials. The dilatory procedures of the ordinary courts are particularly unsuitable for the disposal of disciplinary cases.

Besides convenience, there is also the necessity of trying the offender according to a military rather a civilian viewpoint. For one thing, the persons hearing the case may understand better and may be more responsive to the problems involved. For another, the institutional framework of the military law may present problems for a civilian Courts. In comparison to a civilian court, a military tribunal is better versed with the intricacies

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3. 1965, Cr.L.J. P.240 SC.

of military matters and, therefore, is often better equipped to deal with cases of denial of procedural due process of law in the broad context of military system.

In short, the administration of military justice is placed in the hands of military officers and military tribunals not only because it is more convenient but also because military courts are closer to the problem of maintaining discipline particularly in combat areas and assessing appropriate punishment.

The following characteristics distinguish military justice from civilian justice:

The whole process of military justice, from investigation through trial by court-martial to the sentencing, is rarely prolonged. It provides swifter mode of trial. Few of the legal protections flowing from the fundamental rights (Part III of the Constitution of India) are found in the military Law. There are no warrants for search or for arrest, no bail and no right to appeal. A court-martial require no prior indictment, and is always conducted by the accused's seniors, not his peers. A large number of acts that would be legal in civil life are criminal in the military. The military substantially curtails free exercise of speech, travel, privacy and leisure. In comparison to the civilian life, the military punishment is much more severe. The deterrent effect of the criminal law is considered basic to maintaining military discipline. Courts-martial are not fully independent of the commander's influence. The commander investigates the crime, prosecutes the accused, appoints members to the court and controls these officers' future careers to some

extent. The court usually consists of military men with practically no legal training. The lack of independence of the commanding officer, the lack of legal competence of court, and the absence or the duty to make a speaking order may produce results of different kind, in contrast to the judgements of civilian criminal court.

These characteristics suggest that a court-martial is an instrument of the military executive power having no relation in law, with the judicial establishment of the country. Yet, within its field of action, it is a court of law and justice, like any civilian tribunal. As a court of law it is bound, like any court, by the fundamental principles of law ; and in the absence of any special provisions in the military code, it is obliged to observe the rules of evidence which are also applicable in the civilian courts. As Blackstone describes, the court-martial is a court <u>suigeneris</u>. By the term of its statutory oath, it is required to adjudicate between the state and the accused without partiality, favour and affection. If any doubt arises in this regard, then, "according to conscience and the custom of war in like cases".

The court-martial is strictly a criminal court. It has no jurisdiction in civil matters. It can neither enforce a contract nor collect a debt. It cannot award damages to an individual. Its judgements is not a civil verdict. Thus its sole function is to award punishment after the ascertainment of guilt.

The superior civil court, ie , the Supreme Court and the High Courts have no appellate jurisdiction over the offences

tried by court-martial. The jurisdiction of the Supreme Court to grant special leave to appeal under Article 136 of the constitution does not extend to any judgement, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the armed forces. Similarly, the power of superintendence over all courts and tribunals possessed by every High Courts does not apply to any court or tribunal constituted by or under any law relating to the armed forces. The only way by which the decision of a court-martial can, to a very limited extent, be challenged is under the writ jurisdiction of the Supreme Court and the High Courts under Articles 32 and 226 of the constitution, respectively.

The general complaint against the military tribunals is that they have a strong departmental bias. Most of the trial result in conviction. Length pretrial proceedings and procedures in the form of court of enquiry and preparation of summary of evidence result in tendency to make the accused to plead guilty ; otherwise, it is generally thought, he could have established his innocence. The absence of trained judicial officers to sit as president and members in the court-martial and also the absence of any speaking order are some of the striking features of the court-martial system. Moreover, all the three arms of the Military have different systems of justice. The provision of the Indian Army and Air Force Acts of 1950 are almost identical, but those of the Indian Navy Act of 1957 differ in respect of the court-martial procedure. These differences create confusion and present obvious dissimilarities among the three systems, though the basic aim of the all the three is the same, ie, to achieve and maintain discipline. The next chapter deals with all these aspects of the court-martial system.

CHAPTER III

THE COURTS-MARTIAL SYSTEM IN INDIAN ARMY , AIR FORCE AND NAVY

In this chapter we shall discuss the administration of military law by courts-martial in the three services of the Indian armed forces. It has been divided into six different sections. Composition and powers of the courts-martial have been explained in section (i). Courts-martial being tribunal of special and Limited jurisdiction, are convened strictly in accordance with statutory requirements. The jurisdictional aspects have been covered under section (ii). Procedures at trial by court-martial have been extensively dealt in section (iii). Section (iv) deals in post-trial review procedures. A comparative assessment and an appraisal of the courts-martial system have been discussed in section (v) and section (vi) respectively.

(i) THE COMPOSITION AND POWERS OF COURT-MARTIAL IN INDIA

Kinds of Courts-Martial

According to the Army Act, the Indian Army has four kinds of courts-martial[1], namely General Court-martial (GCM), District Court-martial (DCM), Summary General Court-martial (SGCM), and Summary Court-martial (SCM).

According to the Air Force Act, there are three kinds of Courts-martial[2] is the India Air Force. General Court-martial, District Court-martial, and Summary General Court - martial.

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1. Chapter XII and XV of the Army Act.
2. Chapter V of the Air Force Act.

In accordance with the Navy Act, 1957, the Indian Navy has two types of Courts-martial, Court-martial[3] (CM) and Disciplinary Court[4] (DC).

The court-martial system in India was transplanted by the Britishers. It was adopted and recognized by Section 73 of the Government of India Act, 1833. The Act had empowered the Governor General-in-Council to legislate for the whole native Army. The laws so made were given general application to all native officers and soldiers whereever serving. The Article of war were formulated in 1845. The same were amended by Act XII of 1984, and these, as amended by various minor amending Act, provided the statutory basis of the Indian military Code until 1911 when the Indian Army Act was passed. The 1911 Act consolidated then existing laws as applicable to the Indian Forces. On the attainment of Independence and the comming into force of the constitution, the parliament of India passed the Army Act and the Air Force Act in 1950 and the Navy Act in 1957. These Acts inherited the system of trial by court-martial as previously established.

The courts-martial in the Army and in the Air Force are by and large identical except the summary court-martial which exists in the former only. The court-martial of these two are different from those is the Navy. The basic aim of all the three services under the respective act is to maintain discipline among their personnel for the smooth functioning of the armed forces.

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3. Navy Act Section 97.

4. Navy Act Section 95 and 96.

Let us discuss each one of these courts is brief[5]. General Court-Martial : This is the highest Court-martial under the Military Law in India. It may be convened[6] by the Central Government, the Chief of the Army Staff or an officer empowered

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5. For purposes of easy reference, provisions dealing with the convening, composition, powers etc. of the different types of court-martial in the three services are tabulated below:

Type of cm (court martial	Convening Army	Air Force	Navy	Composition Army	Air Force	Navy	Powers Army	Air Force	Navy	Confirmation Army	Air Force	Navy
GCM	S.109 S.110 AR 37	AFR43	-	S.113 S.114 AR.40	AFRr 46,48	-	S.118	S.118	-	S.154 S.153 .158 .157 AR.70	AFRr 79.81	-
DCM	S.110 S.111 AR 37	AFR43	-	S.114 S.115 AR40	AFRr 47,48	-	S.119	S.119	-	S.155 S.154 .158 .157 AR 70	AFRr 79-81	-
SGCM	S.112 S.113 AR.151	AFR.130	-	S.115 S.116 AR151	AFR 130	-	S.118	S.118	-	S.157 S.156 .158 .157 AR.151	AFR 79-81	-
SCM	S.116 AR.106 to 113	-	-	S.116			S.120	-	-	S.161	-	-
CM	-	-	97	-	-	97	-	-	97	-	-	-
DC	-	-	96	-	-	96	-	-	96	-	-	-

6. The word 'convene' means to assemble or to call together, therefore to convene a court would mean to assemble the court. The officer who convenes the court-martial is known as 'convening officer'. The convening officer is empowered to convene a court-martial by a court-martial warrant. If the convening officer is of the opinion that the case should be tried by a court-martial, he will settle or approve the charges on which the accused is to be tried and will insert upon the charge sheet an order that the accused is to be tried by the (description) court-martial, which he has decided to convene. The order on the charge sheet shall bear the signature and designation of the convening officer or by a staff officer "for" the convening officer and also the place and date. This is called the Convening Order.

is this respect[7] by a warrant[8] of the chief of the Army Staff[9]. By virtue of President of India's constitutional position as Commander-in-chief of the armed forces[10], he can also order statutory court-martial for the three services, though the respective acts do not provide expressly for such a provision. Under the respective acts, an officer empowered to convene a court-martial is called the convening officer or the convening authority. He is issued with a necessary warrant empowering him to convene the particular description of court-martial. He is enjoined upon a duty to satisfy himself of certain conditions and adhere to the procedure as prescribed under the respective Act

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7. An officer cannot convene or confirm a court-martial outside the jurisdiction limit of his command. In S. N. Purandare V. Union of India, 1988, Cr.L.J, 714. The Delhi High Court held that the order of the COAS empowering the field officer, commanding Sub Area or the officer on whom his command may devolve during his absence, not under the rank of field officer, from time to time, to convene GCM for trial of any person under his command, is valid under section 109 of the Army Act.

8. Such a warrant is usually given to all General officers Commanding -in-chief, Commands, Corps Commanders, Divisions and Area-Commanders, Independent Sub Area and Independent Brigade Commanders. In the Air Force, a warrant form is issued by the CAS to AOs C-in-C of Commands and to the AOA.

In Amarendra Nath Das V. Union Of India, 1977 Cr.L.J 493(Cal), the Calcutta High Court held that in granting a warrant, it should be clearly shown that during the absence of the officer to whom such warrant is issued, the powers therein conferred may be exercised by the officer on whom the command dissolves, if he is not under a specified rank. It is therefore, common to address such a warrant issued to an officer by designation of this office and not by name. Warrant issued need not name the officer authorised.

9. Section 109 of the Army Act and section 110 of the Air Force Act.

10. Constitution of India, Article 53(2).

and the rules and regulations made thereunder[11] before convening a court-martial.

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11. It is the duty of the convening officer to satisfy himself that the charges to be tried by the court are for offences within the meaning of the Army Act, that the evidence justifies trial on those charges and when he is not so satisfied, he should order the release of the accused,or refer the case to the superior authority. He should also satisfy himself that the case is a proper one to be tried by the kind of court-martial which he proposes to convene. He should also appoint officers to form the court. It has been held by the High Court of Rajasthan in CWP No. 2273\1986, decided on 15 Dec 88 (un reported), that where the convening officer did not perform the duties enjoined on him by the statute and did not appoint personally, the officers to constitute the court, the order convening the court-martial is liable to be set aside.

Before giving a direction to commence a trial, the convening officer, must satisfy himself in the following matters :

(i) That the charge sheet is properly signed and dated by an officer in actual command of the unit to which the accused belongs,

(ii) That the section of the Act under which each charge is framed is entered in the margin opposite the charge to which it refers,

(iii) In all cases for trial by GCM, and in all cases of indecency, fraud, theft (except ordinary theft) and civil offences and in all other cases which present doubt or difficulty, the charge sheet and summary or abstract of evidence are submitted to the deputy or Assistant Judge Advocate General concerned before a trial is ordered,

(iv) That the court which he has decided to convene is properly composed in accordance with the respective Act,

(v) That no officer is detailed to serve on the Court who is eligible or disqualified, eg. In a case of striking a superior officer at a social get together, all the officers attending the said function would be regarded as interested, and are therefore disqualified,

(vi) The convening officer must ascertain whether the accused desires to have defending officer assigned to him to assist him at his trial, and if so, must endeavour to meet his wishes,

(vii) When the accused has been remanded for trial by his commanding officers, the convening authority must ensure that an officer has been deputed to give a copy of the summary of evidence to the accused and the rights of the accused for the preparation of defence and being assisted or represented at the trial have been explained to him by that officer, and

(viii) That he holds the necessary court-martial warrant empowering him to convene the description of court-martial that he considers appropriate.

A GCM must consist of atleast five officers[12]. Each one of them must hold a commission[13] for not less than three years, and not less than four of those officers must not be below the rank of captain[14]. Normally the members of a Court are senior to the accused officer.

A GCM has power to try any person[15] subject to the Army/Air Force Act for any offence punishable therein and award

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12. It is desirable that every court should consist of an uneven number of officers. If originally more than the legal minimum members are detailed and during the trial due to sickness or otherwise a member is incapacitated, the court can proceed with the trial, provided the number does not fall below the legal minimum. The retired member, however, cannot subsequently rejoin the court.

13. Commissioned service means, any period during which an officer has held a commission in any of the three services shall count as commissioned service under S.109 of the Army Act, but no account shall be taken of an ante date of seniority.

14. Section 113 of the Army Act, Section 114 of the Air Force Act. An officer below the rank of Captain cannot be detailed as a member of GCM for trial of a field officer. See also Army rule 40(3). Appointment of JA at a GCM is a legal necessity, see Army Act section 129.

In Major Manohar Lal V. Union of India, 1971(1) SLR. 717 the Punjab & Haryana High Court, held, that according to Army Act, 1950 and the Rules framed thereunder, a captain is eligible to be made a member of the GCM and merely because the convening officer did not append the certificate that an officer of the rank of the accused was not available does not make the constitution of that GCM invalid nor can it be held that the finding given by it was without jurisdiction or that the proceedings of the trial before it were null and void. The petitioner had no say in the constitution of the GCM and having suffered that trial, the proceedings thereof could not have been declared null and void on highly technical ground.

Similarly in Lt. Col AS Bhadury V. Union of India, 1986 (4) SLR. 791, the Calcutta High Court observed that "Section 113 prescribes the minimum experience that each should possess, ie, each must have held a commission for a period not less that 3 years, and thirdly the minimum qualifications that the members should possess, ie, that at least four should hold a rank not below that of captain."

15. This power extends only to the convening of courts for the trial of officers and men of their own command.

any sentence authorised thereby[16]. There is no limitation on the powers of the GCM to award sentence. It may award any sentence authorised under the Army/Air Force Act.

District Court-Martial : DCM may be convened by an officer having power to convene a general court-martial or by an officer empowered to do so by warrant of any such officer[17]. A DCM can be convened by the chief of the Army Staff, by holders of A-1

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16. The matter of award of death sentence by court-martial was discussed before the Jammu and Kashmir High Court in the case of Ranbir Singh V. General Court Martial, writ petition No 144 of 1986, 1991, Cr.L.J, 2850. The court inter-alia observed, "The general principle is that this court normally cannot interfere with the sentence awarded after confirmation of the conviction. It also cannot be denied that the quantum of punishment is within the jurisdiction and discretion of the court-martial with which the constitutional courts would normally not interfere. However, if the sentence is proved to have been awarded against the provisions of law prevalent in the country, same can be corrected by this court as all the action of the authorities under article 12 of the constitution of India are subject to the judicial review". Quoting the observations of the supreme court in Ranjit Thakur V. Union of India, AIR. 1987, SC. 2386 and those of Bhagat Ram V. State of Himachal Pradesh, AIR. 1983 SC. 454, the High Court observed, "The Well recognised principle of law in this country in that death sentence can be awarded in the rarest of the rare cases when the alternative option is unquestionable foreclosed. To ascertain as to how the GCM awarded the death sentence, the High court perused the summing up of the Judge advocate and remarked that the JA failed in his duty to inform the court about the legal position prevalent. With the result that extreme penalty of death sentence was imposed upon the petitioner obviously ignoring the judgements of the supreme court and law applicable in the country. Consequently, the High court, while upholding the conviction of the petitioner under S.302 of IPC, modified the sentence of death to that of imprisonment for life. The matter of award of sentence of death was again agitated before Punjab & Haryana High court in the case of Sowar Ram Singh V. Union of India, CWP No. 5636 of 1991 (Unreported). The High court after discussing the case of Bachan Singh V. State of Punjab, AIR. 1980, SC 989, inter-alia observed, " A different procedure is prescribed to be followed by the GCM in the rules framed under the Army Act.....even the GCM is required to take into consideration the provision of section 354(3) of the CrPC or the principle enunciated therein in the matter of awarding sentence to the accused under section 302 of the IPC. Apart from that the supreme court having declared the law in the matter of awarding sentence to an accused under S.302 of the IPC, keeping in view of the provisions of S.354 (3) of the CrPC, the same is applicable to all the courts in the country including the GCM." Accordingly the High Court Converted the death sentence into imprisonment for life.

17. Section 110 of the Army Act and Section 111 of the Air Force Act.

warrants and by officers empowered by warrant[18] of these officers. Normally every brigade commander and every Sub-Area Commander issued with warrant[19] by his divisional or Area Commander, as the case may be are authorized to convene a DCM. A DCM consists of not less than three officers[20] each of whom must have held a

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18. The empowering warrant is generally issued to Sub Area/Brigade commanders and equivalent Commanders and is known as B-1 warrant. For the form of warrant, see MML vol. iii, p.752.

19. A warrant issued under section 109 and 110 may contain such restrictions or conditions as the officer issuing it may think fit. Restrictions, if any, are clearly specified in the warrants Administrative restrictions issued from time to time, which do not form part of the warrants are not legally binding on the confirming officer. Such instructions are complied with as matter of good order and discipline rather than a requirement of law. One usual form of restriction is to limit the power to an officer not below a specified rank.

20. Even though the definition of the term 'officer' includes an officer of the regular army and of the navy under certain prescribed conditions, members of a court-martial convened under the Air Force act normally are to consist only of Air Force officers. The same is applicable under the army act.

commission for not less than two years[21].

A DCM has the power to try any person subject to the Army or Air Force Act as the case may be, other than officer or a junior commissioned officer for any offence made punishable therein and to pass any sentence authorized by the Act other than a sentence of death, imprisonment or confinement for a term exceeding two

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21. Section 114 of the army act and section 115 of the Air Force act.

For the composition of DCM see also rule 39 and para 459 of the regulations for the army. The presence of a judge advocate at a DCM is not necessary, see section 129 of the army act. As to the composition of a DCM, the members of the court may belong to the same corps or department as that to which the accused belongs, but where practicable they should belong to different corps or departments. The president is not appointed by name, the senior member sits as president and may be of any rank. The members of the court may be mentioned by name in the convening order, or their rank and the unit to which they belong may alone be stated.

As to the ineligibility and disqualification of officers to sit as members of court-martial, the following persons are disqualified in the case of a DCM or GCM :

(a) The convening officer,

(b) The Prosecutor,

(c) A witness for the prosecution,

(d) The commanding officer of the accused or an officer who investigated the charges before trial or took down the summary of evidence,

(e) The company, squadron, battery commander or other commander who made preliminary enquiry into the case or was a member of a previous court-martial which tried the accused in respect of the same offence,

(f) An officer who was a member of court of enquiry into the matters on which charges against the accused are founded,

(g) An officer who has personal interest in the case, and

(h) Provost marshal or assistant provost-marshal.

Where the convening officer finds it impracticable to follow the ordinary rules as to the appointing members from different corps, vide army rule 40(1), or as to the rank of members, vide army rule 40(3), he should state his opinion in the convening order. The declaration as to military exigencies dispensing with certain rules should be in a separate order (see Army Rule 36). In Capt Ram Kumar V. UOI, AIR. 1985, Delhi 374, while deliberating on Army Rule 40, Sub Rule (1), the Delhi High Court held that subrule can be departed from if the convening officer finds that is not practicable to comply with it.

years. A DCM cannot sentence a warrant officer to imprisonment[22].

Summary General Court-Martial. A SGCM may be convened[23] by :

(i) an officer empowered in this regard by an order of the Central Government or of the chief of the Army Staff,

(ii) On active service[24], the officer Commanding the force in the field , or any officer empowered by him in this regard,

(iii) An officer commanding any detached portion[25] of the regular army on active service when in his opinion it is not practicable with due regard discipline and exigencies

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22. Section 119 of the Army Act, section 120 of the Air Force Act. If the DCM passes a sentence of death or imprisonment for life or sentence a warrant officer to imprisonment, it will be wholly illegal and must be sent back for revision by the confirming officer and if wrongly confirmed, action should be taken to substitute a valid sentence. However, a sentence of imprisonment for a period of three years to a NCO or Aircraftman being in excess of the punishment authorised by law can be varied by the confirming officer to any sentence authorised by, i.e, imprisonment not exceeding two years and confirmed.

23. In the convening order, the members are appointed by names etc, or only their ranks and units mentioned. In the later event the ranks, names, etc. of the members of the court as constituted are recorded in the proceedings. The convening order is signed by a person legally authorised to do so, ie, by the convening officer himself or "for" him by a staff officer or by a staff officer himself as such. See also rule 41 of the army. In the Air Force the convening order for SGCM is to be signed personally by the officer convening the court. Another officer cannot sign it on his behalf.

24. "Active service", as applied to a person subject to the respective Acts, means the time during which such person -

(a) Is attached to, or forms part of, a force which is engaged in operations against an enemy, or

(b) Is engaged in military operations in, or is on the line of march to a country or place wholly or partly occupied by an enemy, or

(c) Is attached to or forms part of a force which is in military occupation of a foreign country.

25. " Officer Commanding any detached portion of the Air Force", the term detached portion as used in S.113(c) AFA is not identical to the term 'detachment' as used in S.4 (xv) AFA. while the term 'detachment' as used in S.4 (xv) AFA, implies a part of the unit which has been detached for some specific duties. S.113 (c) have power to convene a SGCM, provided that the conditions specified in that subsection are fulfilled.

of service, that an offence should be tried by GCM[26].

All the above three clauses specify authorities competent to convene SGCM. Officers specified in clause (ii) and (iii) are empowered to convene SGCM only on "Active Service", under clause (iii) a SGCM can be convened only when it is not practicable with due regard to discipline and exigencies of service to try the offender by GCM. The object of this provision is to provide for the speedy trial of offences committed abroad or on active service. SGCM is normally coincident with active service but the Central Government or the COAS can empower an officer to convene a court-martial to try a person whether the latter be on active service or not. On the other hand the officer commanding force in the field can only empower an officer to convene such a court on active service[27].

A SGCM consists of at least three officers [28]. It has same powers as a GCM. It may try any person subject to the respective

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26. Section 112 of the Army Act, section 115 of the Air Force Act. For authorities empowered to convene a SGCM, under the Air Force Act, S.113AFA.

27. see Kartar Singh Sardarjit Singh V. Emp., AIR (1946), lah 103

For the definition of "Active Service", see Army Act Section 3(1) and section 9. If the troops on board a ship are on "Active Service" the officer commanding troops can convene a SGCM for trial of an offender on board.

28. Section 115 of the Army Act and Section 116 of the Air Force Act. Presence of judge advocate is not a legal necessity at SGCM. However, a judge advocate is invariably detailed. An officer with less than one years commissioned service can legally sit as a member in view of S.116 Air Force Act. However there would hardly be an occasion to detail an officer as member who has less than three years commissioned service. Any available officer, other than provost marshal, assistant provost-marshal, a prosecutor or witness for the prosecution may be appointed a member of the court, but see Rule 142, Air Force Rules which makes inter-alia Rule 81, Air Force Rule (member or prosecutor not to confirm a proceedings) applicable, so far as practicable, to a SGCM.

act for an offence punishable therein and award any sentence authorized thereby[29].

Summary Court-Martial : SCM is peculiar to the Indian Army, as there is no corresponding provision in the Air Force or in the Navy. It basic aim is to strengthen the hands of the regimental commanding officer[30] for the maintenance of discipline of the troops under his command. He alone constitutes the court[31] and has the sole right to decide the findings and sentence. SCM can

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29. Section 118 of the Army and Air Force Act.

Apart from GCM, SGCM is also the highest tribunal and has power to try any person subject to the Army Act irrespective of rank. It can try any offence punishable under the Army Act. However, as the accused's rights to put up his defence are considerably curtailed during trial by SGCM, it should be convened either on active service, or under extraordinary circumstances. In respect to award of any 'sentence authorised thereby', reference should be made to the charging sections see Ss.34-71 of the Army Act and Ss. 73-79 of the Air Force Act. Sentence of death cannot be passed without the concurrence of all members of the court. see S.13 (2) and (3) of the Air Force Act.

30. For definition of Commanding officer, see Army Act Section 3(v). A medical officer commanding a hospital or other medical unit is the 'Commanding officer' of medical personnel under his command and is also, for the time being the 'Commanding officer' of a person subject to Army Act not belonging to the medical, who is patient in, or is employed in, that hospital or medical unit and may either himself dispose of a charge against such person or refer it for disposal, after the person has left the hospital or medical unit, to the officer commanding the corps, department or detachment to which such persons belongs or is attached, but the medical officer in charge of a regimental medical establishment or of a person who is a patient in, or is employed in, the medical unit to which the establishment belongs.

31. The officer holding the trial is called the court, who records, or cause to be recorded, in the english language, the transaction of every summary court-martial. The evidence are taken down in a narrative form in as nearly as possible the words used; but in any case where the court considers it material, the questions and answers are taken down verbatim. The evidence not understood by the court are translated to him.

be held by the Commanding Officer of any Corps, department or detachment of the regular army to which the accused belongs[32]. The proceeding are attended throughout by two other persons who can be officers or junior commissioned officers one of either, and they are as such neither sworned nor affirmed. They have no right to vote is determining either the findings or the sentence[33]. Unless two officers or JCOs or one of them attend the trial, the court will have no jurisdiction. Such officers or JCOs may or may not belong to the unit of the accused. These `persons attending the trial' do not, in fact, constitute the court and do not play an effective role in the proceedings. If

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32. In Vidya Prakash V. Union of India, AIR. 1988 Cr.L.J. 705, the supreme court held that the commanding officer of the corps, Department or detachment of the regular army to which the delinquent army soldier belongs, is quite competent in accordance with the provisions of the Army Act section 116 to constitute SCM and as such the constitution of SCM by the co or the Corps cannot be questioned as illegal or incompetent. In case of GCM or DCM or DCM, Army Rule 39(2) is applicable and the commanding officer is not competent to convene GCM or DCM.

The Delhi High Court in Ram Chander V. Union of India, 1989 Cr.L.J. 1950 has held that in a case where the commanding officer (co) proceeded on annual leave and officiating commanding officer held trial and recorded most of the evidence by the time co resumed duties, co can take on and continue with the trial even thereafter. There is no irregularity in continuing the trial. It is not necessary that co should have started the trial denovo.

For 'Corps' see Army Rule 187(3) , and for 'Department' see Army Section 3(ix). 'Detachment' means every separate body of persons subject to army act which is not a corps or department.

An officer of the Indian Navy or the Air Force may become a co of a person subject to the Army Act when such person is serving under conditions prescribed in Army Rule 188.

33. Section 116 of the Army Act.

one of them is appointed `interpreter', he is sworn in or affirmed[34] ; otherwise there is no such requirement under the Army Act. SCM can pass any sentence[35] that could be awarded under the army act in respect of the offences[36] charged except a sentence of death or imprisonment for a term exceeding one year. But where officer holding the SCM is below the rank of Lieutenant-colonel, he cannot award any punishment exceeding a sentence of three months imprisonment[37].

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34. The commanding officer should, as a general rule, take the interpreters oath or affirmation himself, in addition to the oath or affirmation prescribed in Army Rule 109 for the Court. In the rare cases where the commanding officer does not know the language of the accused, he should appoint a competent interpreter. Whoever interprets any evidence must be sworn or affirmed as an interpreter before doing so. See also Army Rule 149.

35. When several accused persons are tried separately upon charges arising out of the same transaction, the court may, if considers it to be desirable in the interest of justice, postpone consideration of any sentence to be awarded to any one or more such accused persons until the trials of all such accused persons have been completed.

36. Unless there are strong reasons due to gravity of the offence or otherwise to remand an accused for trial by DCM/GCM, such offence can be adequately punished by a SCM. Officer's commanding unit when determining by what court the accused should be tried, should bear in mind, that the legislature, in conferring upon them the powers of SCM, intends that they will exercise these powers. In ordinary circumstances the following offences cannot be tried by SCM :

(i) Offences punishable under sections 34, 37 and 69, and

(ii) Any offence against the officer holding the court.
The above offences can also be tried by SCM after obtaining approval of the officer empowered to convene a DCM or on active service a SGCM. Further, when there is a grave reason for immediate action and reference cannot be made without detriment to discipline to the officer empowered to convene a DCM or, on active service, a SGCM, for the trial of the alleged offender the above offence can be tried by SCM. In such cases an explanatory memorandum in terms of Army Rule 130 should be attached to the SCM proceedings. The co is the sole judge to decide whether the offence should ordinarily be tried only after reference and sanction. If it should subsequently appear to superior authority that his action was not justified, this should merely be viewed as a grave irregularity for which the co may be held responsible but it does not affect the legality of the finding or sentence. Where, however, the officer holding the trial loses sight of the law, and tries an accused without considering whether an emergency exists or not, the trial is illegal.

37. Section 120 (4) and (5) of the Army Act.

SCM may be quashed where the provisions of the Army Act in respect of SCM are not complied with[38] and the proceeding are conducted in such a manner which are neither fair nor judicial[39].

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38. In Uma Shankar Pathak V. Union of India 1989 (3) SLR. 405, the proceedings of summary court-martial were questioned before Allahabad High Court. The main points raised by the petitioner pertained to non-compliance of Army rules 34 and 115, with regard to the non compliance of rule 115 (2), the court observed that a bald certificate by the commanding officer that "the provisions of Army Rule 115 (2) are hereby complied with" is not enough. The record of proceedings itself must explicitly state that the court had fully explained to the accused, the nature and meaning of the charge and made him aware of the difference in procedure. The questions and answers put to the accused have to be reproduced by the court verbatim. The SCM in question had not done any such thing. With regard to noncompliance of Army Rule 34, the court observed that the requirement that atleast 96 hours notice should be given to the accused, is mandatory. That being so, the breach of rule 34 must be held to vitiate the entire trial. On fact, the court found that the petitioner was informed of the charge only 8 hours before the trial was to commence. Considering the facts and circumstances of the case, the court reached the conclusion that there was breach of rule 34 and 115 (2) and on breach of either of the rules, the proceedings were liable to be struck down. Accordingly, the court quashed the SCM proceedings and directed the reinstatement of the petitioner with all benefits.

39. In Ex. Hav. Prithipal Singh V. Union of India, 1984 (3) SLR., 675 the Jammu & Kashmir high court while setting aside the summary. Court-martial proceedings, held that the petitioner suffered punishment of dismissal from service by a proceedings which was conducted in such a manner which was neither fair nor judicial. The main point agitated were pertained to non-compliance of army rules 115 and 129. After examining the record of the proceedings and hearing the parties, the court observed - "From the perusal of the record it appears that one Mr. Arun Dhar is styled as friend of the accused in terms of rule 129 of the Army Rules. The accused have not opted for the said gentleman and had at no stage demanded assistance of the said gentlemen. On their own, authorities had imposed this gentlemen on the accused to assist him and there is material to indicate that the accused had protested about Mr. Arun Dhar being his friend is terms of Rule 129. The plea of guilt recorded during the proceedings was presented before me in original. In reply to each charge word "guilty" is recorded. But there is no signature either of the accused or of any officer who is purported to have written the word "guilty". There is nothing on this paper to indicate that the accused was advised not to plead guilty as is required under Rule 115 of the Army Rules". Accordingly the court setaside the summary court martial proceedings.

The proceedings of the SCM may be set aside for want of jurisdiction[40]. Such proceedings may be set aside on the merits of the case and not on merely technical grounds. Once tried by SCM and convicted, the accused cannot be tried again for the same offence by GCM after setting aside the conviction of SCM because a trial would be violative of section 121 of the Army Act and Article 20(2) of the constitution of India[41]. SCM proceedings with

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40. Hav Rattan Singh V. Union of India; CA No. 710 of 1991 (Unreported) the trial by summary court-martial was quashed because it was held to be without jurisdiction. The supreme court while examining the summary court-martial proceedings of the said Havildar observed that on the facts contained in the chargesheet the applicant was liable to be changed under section 34 of the Army Act and not under section 36. Had the appellant been charged under section 34 and tried by general court-martial, he would have got an opportunity to be defended by a counsel of his choice. After examining the case the supreme court interalia observed - "the issue is whether the offence is punishable under section 34 or not. Section 36 covers a wide range of offences and the scope of section 34 is limited to a smaller area, where the offence is more serious attracting more severe punishments. If the allegations are assumed to be true, then the appellant, on the militant's opening fire, shamefully abandoned the place committed to his charge and which he was under a duty to defend. Both clauses (a) and (h) are, therefore, clearly attracted. The impugned trial by summary court-martial and the decision thereby must be held to be without jurisdiction and have to be quashed.
(However, as the proceedings were setaside for want of jurisdiction and at the specific request of the counsel of the appellant, the supreme court allowed Army authorities to try the appellant by general court-martial on a charge under section 34 of the army act.

41. In Surinder Singh V. Union of India, MISC. Petition No. 2323 of 1991, the petitioner, approached the Madhya Pradesh High Court, Jabalpur, for setting aside the proceedings of general court-martial which was convened to try him, after setting aside his conviction by summary court-martial. His main contention was that he had already been tried and punished for the same offence by a summary court-martial and retrial was barred by the provisions of Army Act section 121 and Article 20 (2) of the constitution. The Army authorities contended that the proceedings of summary court-martial by which he was tried earlier was quashed for non-compliance of mandatory provisions of army rule 22. As the trial by summary court-martial was without jurisdiction, retrial was not barred. After considering the contentions of the rival parties, the court held that the summary court-martial proceedings could not have been setaside for some technical flaw in procedure at pretrial stage. Even according to section 162 of the Army Act, summary court-martial proceedings can be set aside on the merits of the case and not on merely technical grounds. The court accordingly quashed the general court-martial proceedings as being violative of army act section 121 and article 20 (2) of the constitution.

procedural impropriety vitiates the case, conviction or penalty[42]. Where there are no evidence against the accused for the offence he allegedly committed, the proceedings are liable to be set aside[43].

SCMs are the most frequently utilized courts in the trial of military offenders. They are especially suitable for the conditions of the Army.

Court-Martial Under the Navy Act, the Court-martial[44] may come into existence by an express written direction of the convening authority who is empowered to do so by a commission from the chief of the naval staff and is generally a flag officer[45].

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42. In Sadacharan V. Union of India, Civil Rule Nos 1381/88(unreported) delivered on 15th November, 1991, the court on the contention of the petitioners that the SCM did not properly record the plea of "guilty" allegedly offered by them, interalia held, "whether the plea is clear and unambiguous, or, whether the accused pleads or does not plead intelligibly, will depend on the words used by the accused. A mere entering or recording the word 'guilty' may mean court's own conclusion or interpretation. Therefore, the clause if the accused pleads guilty, the plea shall be recorded as the finding of the court ' means that the court shall record the plea in the words used by the accused, or, the confirming authority to determine whether the plea recorded really amounts to an admission of guilt." Accordingly, the court held that the proceedings suffered from procedural impropriety. The requirement of recording the plea as stated above, is mandatory and violation of it will vitiate the case, conviction or penalty.

43. In L.Nk. Mirza Nazir Ahmed V. Union of India WP No. 317 of 1981, decided on 30 Jan 88 (unreported), the proceedings of summary court-martial were challenged in the high court of Jammu and Kashmir on the grounds that the commanding officer was biased against the petitioner, that the summary of evidence was prepared by him and, therefore, he was not qualified to preside over the court and finally on the ground that there is no evidence against the petitioner. After examining the case, the court repelled the first two contentions but found the third contention tenable because on a charge under section 52 (b) of the Army Act, the proceedings disclosed neither any evidence of entrustment nor of disposal of property by the petitioner. Accordingly, the court set aside the proceeding.

44. The Navy Act, 1957 (act 62 of 1957), Section 93.

45. Id ; Section 97 (2).

It is done by an official letter addressed to the officer who is to be President of the Court[46]. The letter specifically names and identifies by their service numbers the officers who are to serve as members, trial judge advocate, prosecutor etc. Although a minimum of five members is sufficient to constitute a court-martial[47], it is customary to name six or more who may be excused from attendance to perform Naval duties, and are subject to premptory challenge and challenge for cause, where the Court is reduced to less than five, it would constitute a palpable jurisdictional defect. Only officers of the Indian Navy of the rank of Lieutenant or higher rank and of at least twenty-one years of age[48] are qualified to become a member of the court-martial[49]. The President of the court-martial and the majority of its members[50] always belong to the executive branch of the Naval service[51]. A Naval court-martial can try any offence committed by

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46. ID ; Section 97 (12)

47. ID ; Section 97 (6)

48. ID ; Section 97 (7)

49. Officers of the Indian Navy are eligible to sit as members of a court-martial irrespective of the branch of the Naval Service to which they belong provided that the majority of the members of the court-martial including the president, are officers of the executive branch. The following officers are debarred from sitting on a court-martial :

(a) The officer ordering the court-martial,

(b) The officer who was the commanding officer of the ship to which the accused person belonged at the time of the commission of the alleged offence, and

(c) The officer investigating the offence.

50. The members of the court-martial must be drawn from atleast two ships in commission commanded by officers of the rank of lieutenant or higher rank. (S.97(ii) of the Navy Act).

51. In trials for offences under sections 34, 35, 55 and 56 of the Navy Act, 1957, non executive officers are not eligible to sit as a member of the court-martial. (section 97 (10) of the Navy Act).

any person subject to the Navy Act, 1957 and it may award any sentence[52] including a sentence of death, as authorized by the Navy Act[53].

Disciplinary Court : It consists of not less than three and not more than five officers. The majority of the officers including the president are officers of the executive branch of the Naval service, and at least one of the officers composing the Court is superior in rank to the officer under trial and of the rank of substantive or acting commander or higher rank. The officers composing the disciplinary court are named by the authority ordering the same or by an officer empowered in this regard by such an authority[54]. The disciplinary court is convened during active service for the trial of only officers who may be guilty of a disciplinary offence under sections 41,47,48,49,51,52,68, and 74 or any of those sections read with section 75 or 76 of the Navy Act[55], provided that the officer having the power to order a court-martial considers the offence

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52. The findings and sentence of the court-martial under the Navy Act do not require confirmation of the convening authority or any superior authority and become operative the moment they are pronounced except is the case of a sentence of death which requires prior confirmation of the central government before execution. see section 82 (2) and 151 (i) of the Navy Act.

53. Section 93 (i) of the Navy Act 1957.

54. Section 96 (1), (2) and (4) of the Navy Act 1957.

55. These sections are described under chapter viii of the Navy Act and are termed as Articles of war.

Section 41 : Deserting post and neglect of duty.
Section 47 : Disobedience and Insubordination.
Section 49 : Desertion.
Section 51 : Breaking out of ship and absence without leave.
Section 52 : Drunkenness.
Section 68 : Violation of the Act, regulations and orders.
Section 74 : Offences against good order and naval discipline.
Section 75 : Attempts.
Section 76 : Abetment of offences.

to be of such a character as not to necessitate a trial by Court-martial[56].

A disciplinary Court has the power to impose any punishment inferior to detention in the scale of punishments authorised by the Navy Act. The practice and procedure of court-martial applies subject to such modifications as may be prescribed, to the procedure and practice of disciplinary Court[57]. Unlike the civil judiciary, all types of Courts-martial in India are not independent. They have been subject to varying degree of command influence. They are typically adhoc bodies appointed by a military officer from among his subordinates. Except SCM, the members appointed to carry out the function of court-martial are directly under the command of a person who appoints them, and their service careers are in his hands. Under the circumstances, it is difficult to prevent the court-martial from being influenced. The members of a court-martial in the nature of things do not have and cannot have the independence of civilian judges. The principal drawback with court-martial is that they are manned by persons with legal experience. The general complaint against these courts is that they suffer from strong departmental bias. Most of the trials result in conviction. Most persons belonging to armed forces feel that courts-martial have general tendency to uphold administration and return the verdict of guilty. The absence of trained judicial mind in the court-martial have general tendency to uphold administration and return the verdict of guilty. The absence of trained judicial mind in the Court-martial is an important snag in the system. We shall examine whether these allegations are true.

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56. Id ; section 95
57. Id ; section 96 (3) and (5)

(ii) JURISDICTION OF COURTS-MARTIAL

While dispensing justice by courts-martial under the military justice system, the following aspects of jurisdiction are important:

(a) Ratione Personae

(b) Ratione Temporis

(c) Ratione Loci

(d) Ratione Materiae

(e) For the purpose of post trial review, jurisdiction as to the sentence imposed.

(a) Ratione Personae. Every person subject to the respective Acts[1] of the defence services who violates it, is liable to be tried and punished for such violation at any place whatsoever. He remains subject to the Act until duly

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1. Section 2(1) of the Army Act, Section 2 and 3 of the Air Force Act and Section 2 of the Navy Act provides a list of persons who shall be subject to the respective Acts. These Acts also sometimes applies to persons who do not belong to any of the categories as listed in the aforesaid sections, but who are in the service of or followers of or accompany any portion of the regular Army in certain circumstances. These persons come in contact with the Army when it is on 'active service'. It includes followers, contractors, press correspondents and various civil officers who accompany the forces, when they are on the line of march. Even "non-combatants un-enrolled" persons like cooks, chowkidars, laskars, carpenters, mechanics, tailors etc, even though governed by the civil services regulations for purposes of discipline, leave, pay etc, are covered within the expression "persons not otherwise subject of military law" who, on active service, in camp, on the march or at frontier post specified by the Central Government by notification in this behalf, are employed by or are in the service of, or are followers of, or accompany portion of the regular army, such employees are not entitled to form trade unions, being integral to the armed forces and covered by the description of the "members of the armed forces" within the contemplation of Article 33 of the Constitution of India. See Gopal Upadhaya and others V. Union of India, AIR. 1987 SC. 413 relying on Kutilingal Achudan and others V. Union of India, AIR.1976 SC. 1179.

By force of ordinance 10 of 1941, Military Store-keepers attached to or employed with military forces raised in British India, prior to Independence, are deemed to be on active service for the purpose of the Army Act so long as the hostilities continue and hence can be tried by a court-martial.
(See Sachdeo Sharma V. Union of India, AIR. 1964 J&K, 21(22), 1964(I) Cr.L.J 337.)

retired, reemployed, discharged, released, removed, dismissed[2] or cashiered[3] from service. In addition, under the respective acts, every person sentenced to imprisonment or detention, during the term of his sentence, is subject to military law, notwithstanding that he is cashiered or dismissed from the regular force or otherwise ceased to be governed by the respective acts[4]. The provisions of the Army Act can also be applied to any force raised and maintained in India under the authority of the Government of India even if that force may not be a part of the regular army. In such cases the operation of any other enactment shall remain suspended for the time being.

Military jurisdiction commences from the day a soldier is enrolled in the service. As to officers, it commences from the time the oath of office is taken, which coincide's with the

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2. The inclusion of the words 'duly retired, discharged, released, removed, dismissed or cashiered' indicate that a person cannot exclude himself from the Army Act unilaterally. Cessation of subjection to the Army Act must take place in one of the ways mentioned in clause 2(2) after following the procedure laid down in the Army Act and the rules made thereunder. Even a short service officer is subject to the Army Act and by virtue of section 2(2) of the Act he remains so until duly discharged. He cannot contend that he is governed solely by the terms of his contract with the government and not by the provisions of the Act and the rules made thereunder. There can be no automatic discharge by reasons of the expiry of his contract, and unless he is released by the army authorities he cannot be considered outside Military Law and discipline. see Chatterjee R V. Sub-Area Commander, Madras,1951 Cr.L.J.827

3. "Cashiering" can be awarded only to the officers and while sentencing an officer to death or imprisonment for life, the court-martial attempts to ensure that the sentence of cashiering precedes such sentence. A sentence of dismissal and imprisonment awarded to an officer without a sentence of cashiering is invalid. see Saini V. Union of India, 1985 Cr.L.J. 1263

4. Section 123(3) of the Navy Act confers jurisdiction in respect of the persons sentenced to imprisonment or detention and also in respect of every person ordered to be received or being a passenger on board any ship or aircraft of the Navy, to such an extent and subject to such conditions as may be prescribed.

acceptance of the commission[5] or appointment. That status terminates when the person separates from the service. The court-martial jurisdiction generally ceases upon the termination of such status.

(b) Ratione Temporis No trial by court-martial of any person for any offence can commence after the expiry of a period of three years[6] from the date of such offence[7]. The limitation relates to commencement and not to continuation or conclusion of trial[8]. After the expiry of the limitation period the court-

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5. In R. Chatterjee V. Sub - Area Commander, n.2, the court held that SSC officers are officers of the regular army.

6. Section 122(1) of the Army Act, Section 121 of the Air Force Act and Section 79 of the Navy Act.

7. The petitioner successfully invoked the limitation period clause in Lt Col. (TS) H.C. Dingra V. Ministry of Defence, CWP No. 639/88 (Unreported) In the following cases, it was held that after expiry of the period of limitation, the court-martial will have no jurisdiction to try the case even though the accused persons made application that they should be delivered to the military authority prior to the expiry of the period of limitation.

(i) Lt.Col.V.G. Menon V. State of Rajasthan, 1969, Cr.L.J. 509 ; and

(ii) Gulab Nath Singh V. The Chief of the Army Staff, AIR. 1969, Raj. 115(119).

8. In Maj. Gen.M.L. Yadav V. Union of India, Criminal WP 301/1987 (Unreported) the Bombay High Court ruled that a trial cannot be stated to have commenced till the accused has exercised his right to challenge to the constitution of the court, the oath has been administered to the members of the court-martial and the accused has been arraigned before the court. Similarly in Gulab Nath Singh V. The Chief of the Army Staff; 1974 Assam LR. 260, a division bench of the Assam High Court observed that the trial commences only when arraignment is complete and not earlier. Between swearing in of a court under Rule 45, 46 and 47, and the arraignment under Rule 48, there is no other intervening stage, except that of special plea to jurisdiction of a court to try so that it must necessarily be anterior to the stage of commencement of the trial.

martial will ordinarily have no jurisdiction to try the case[9]. Even after his release from the armed forces, a person remains liable to a service trial for a period of six months. After that, however the military jurisdiction ceases to apply to him.

(c) Ratione loci. In respect to jurisdiction as to place, a court-martial assembled at any locality within the territory of India[10], may take cognizance of an offence committed anywhere. Such a court, unlike a civil tribunal, is not restricted by any territorial limitation.

The jurisdiction assumed by a court-martial to try a person under any one of the Acts may relate to any one of the three categories of offences, namely

(i) Military offences, such as misconduct, absence without leave, disobedience of orders, disrespectful conduct to a superior officer, sleeping on post, drunkenness on duty etc.

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9. The period of limitation does not apply to a trial for the commission of the following three offences:

(i) desertion (S.38 of the Army Act and Air Force Act, SS.49&50 of the Navy Act)

(ii) fraudulent enrollment (S.43 of the Army Act and the Air Force Act).

(iii) mutiny (S.37 of the Army Act and the Air Force Act, S.42 of the Navy Act).

10. By virtue of the Air Force and the Army Laws (Amendment) Act, 1975 (Act 13 of 1975), jurisdiction of court-martial in J&K is no longer different from the rest of the country. The J&K High Court acknowledged it in Mahabir Singh V. State, AIR. 1977, J&K, 81.

(ii) Civil offences which are deemed to be offences under the respective acts and charged under section 69[11] of the Army Act.

(iii) Murder, culpable homicide not amounting to murder or rape committed by a person subject to the Act against a person subject to none of the three Acts. The court-martial jurisdiction is applicable to these offences only when they are committed by a military personnel on active service[12] or at any place outside India[13] or at a frontier post specified

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11. Corresponding provision : S.71 in the Air Force Act and S.77 in the Navy Act.
In Piara Singh Rana V. Union of India, 1985 (1) SLR, 236, the Himachal Pradesh High Court ruled that, pursuant to Section 69 of the Army Act, a person who is governed by the provisions of the Army act and who commits any civil offence, triable by a Criminal Court, will be regarded as having committed an offence against the Act, and if charged with such offence under the said section, he is liable to be tried by a court-martial. Section 69 is in the nature of a legislation by reference or incorporation and its provisions are of a substantive as well as procedural nature. Section 6(1) of the Prevention of corruption Act is projected into S.69 of the Army Act by reference or incorporation. There is no requirement of obtaining the previous sanction of the competent authority. Similarly in R.S. Ghalwat V. Union of India, 1981, Cr.L.J., 1646 the Delhi High Court held that an offence under the official secrets Act is civil offence within the meaning of section 3(ii) of the Act. By virtue of Section 69 of the Army Act, that offence is punishable under this Act.

12. The expression "while on active service" covers persons on "casual leave". The expression "service" cannot be given a restricted meaning and it is equated with the expression "on duty". see Pritam Singh V. State 1980 Cr.L.J. 296.

13. When a person subject to the Army Act commits an act or omission in a foreign country then his liability shall be determined according to the said act if the said act/omission is an offence under the Civil Law of that country, but not that of India, the person concerned cannot be charged under S.69 of the Army Act, though a charge may be framed under S.63 of the Army Act.

by the Central Government. Otherwise ordinary criminal courts[14] have jurisdiction over these offences.

(d) Ratione Meteriae. In respect to the jurisdiction of the offence charged, the respective acts caters three categories of offences namely:

(i) Those which are purely military, i.e. offences committed by a person subject to the Act, triable by a court-martial in respect whereof specific punishments have been assigned. These are offences of misconduct in the presence of enemy, mutiny, desertion, absence without leave, disobedience of orders, disrespectful conduct to a superior officer, sleeping on post, drunkenness on duty etc.,

(ii) Civil offences committed by a person subject to the respective Acts at any place in or beyond India, but deemed to be offences committed under the Act and, if charged under section 69 of the Army Act, section 71 of the Air Force Act or Sections 77 and 78(1) of the Navy Act, are triable by court-martial. A person who commits any civil offence i.e. an offence which is triable by a criminal court will be regarded by a fiction as having committed an offence against the Act and, if charged with such offence under the aforesaid sections is liable to be tried by court-martial. There is no requirement of obtaining the previous sanction of the competent authority.[15]

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14. In Major K.P. Obana V. Union of India, WS NO 8388/88 decided on 12th December 1988 (unreported), the High Court of Karnataka held that Section 70 of the Army Act bars the jurisdiction of a court-martial to an offence of attempt to commit rape if that offence was not committed by the person concerned while on active service or at any place outside India or at a frontier post specified by the Central Government by notification in this behalf. The Allahabad High Court also gave a similar ruling in State V. Jaikaran Singh, AIR. 1955 (NUC) Allahabad 1721.

15. Piara Singh Rana V. Union of India, n.11.

(iii) Offences of murder, culpable homicide not amounting to murder or rape committed by a person subject to the act against a person not subject to the Army, Navy or Air Force Act. Except when these offences are committed whilst on active service or at any place outside India or at a frontier post specified by the Central Government by notification, these are not triable by a court-martial, but are triable only by the ordinary Criminal Courts.

Conflict of Jurisdiction. Where a civil offence is also an offence under the respective Acts or deemed to be an offence under the respective Acts, both an ordinary criminal court as well as a court-martial would have concurrent jurisdiction to try the person concerned. Sections 125[16] and 126[17] of the Army Act

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16. According to Section 125 of the Army Act, which deals with the discretion of military authorities, there is no compulsory duty upon the prescribed military authority in cases where a criminal court and a court-martial have concurrent jurisdiction in respect of the offence to direct in which court the proceedings shall be instituted. Hence, if the military authorities have decided not to try the accused by court-martial, the magistrate need not comply with Army Act S.126. Initiation of proceedings in a criminal court in respect of such an offence without any decision by the prescribed military authority is not illegal. see Joginder Singh V. State of Himachal Pradesh AIR. 1971 SC. 500. In Col. OG Menon & others V. State of Rajasthan, AIR. 1969 Raj.115(118), the Rajasthan High Court held that the discretion exercised by the military authority about the forum of the trial of a military personnel cannot be said to be final and the criminal court is within its right to question it. The mere intimation of the commanding officer does not divest the criminal court of its jurisdiction.
The constitutional validity of S.125 of the Army Act was challenged in the case of Ram Swarup V. The Union of India, AIR. 1965, SC. 247 (251-3) on the ground that its provisions are discriminatory and contravene the provisions of Article 14 of the constitution in as much as it is left to the unguided discretion of the officer mentioned in that section to decide whether the accused person would be tried by a court-martial or by a criminal court. The Supreme Court held that section 125 of the Army Act cannot be said to infringe the provisions of Article 14 of the constitution.

17. Corresponding provisions are sections 124 and 125 in the Air Force Act and Appx.III of the regulations for the Navy (Statutory).

are designed to deal with such cases of conflict of jurisdiction[18]. If a person commits an offence for which he could be tried under the Criminal Procedure Code and also by a court-martial, it will be for the military authorities to decide whether he should be tried by a court-martial[19]. If military

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18. The word "jurisdiction" in section 125 of the Army Act signifies the initial jurisdiction to take cognizance of a case. It refers to the stage at which proceedings are initiated in a court and not to the jurisdiction of the ordinary criminal court and the court-martial to decide the case on merits. see Delhi Special Police Establishment V. S.K. Loraiya, AIR. 1972, SC. 2548.

19. A soldier may be tried by court-martial in the following types of cases :-

(i) When offence is committed during the course of the duty.
(ii) When most witnesses of the case are military persons.
(iii) When offence is committed in cantonment area (or near a cantonment) and necessity of discipline demands that soldier be tried by court-martial.
(iv) When classified documents essential for the defence of the country are to be examined during trial.
(v) When speedy disposal of the case is necessary for maintenance of discipline.
(vi) When offence is committed due to the conditions of the service.
(vii) When offence is committed against a serviceman.

A Soldier may be tried by a criminal court in the following types of cases :

(i) When offence is committed by a soldier in combination with persons who are not subject the Army Act and it is necessary to try all the offenders jointly.
(ii) When offence is committed against a civilian and in the opinion of criminal court (or Central Government) it is advisable to try the offender by criminal court, when offence is committed in civil locality and the witnesses of the case are also civilians.
(iii) When offence has become time barred.
(iv) When appropriate military authority decides that offender be tried by a criminal court.
(v) When appropriate military authorities well-knowing the facts of the case, abstain from directing that the accused be tried by court-martial.

(Source : A.C.Mangla, Maj-General, Ex JAG Army Commentary on Military law in India, Eastern Law House 1992, p.152, 153)

authorities decide that the accused should be tried by a court-martial, they may request the magistrate to deliver the accused for trial by a court-martial[20].

Procedure for resolving conflict of jurisdiction. Section 126 of the Army Act lays down the procedure for resolving conflict between a criminal court and court-martial. Although under section 125, army authorities have discretion to decide whether the accused should be tried by criminal court or court-martial, this section clearly lays down that in appropriate cases criminal court may, by written notice, require the concerned military officer either to deliver over the offender to the nearest Magistrate for trial by criminal court or to postpone the proceedings pending a reference to the Central Government. On receipt of such a requisition from a criminal court, the army officer

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20. In Subramaniam V. OC Armoured Static Workshop, 1979, Cr.L.J 617, the Kerala High Court held that in respect of trial of offence under the IPC committed by persons subject to the Army Act, both court-martial and criminal court have concurrent jurisdiction. However, in Lt Col R.S. Bhagat V. Union of India, AIR. 1982 Delhi 191, a single judge of Delhi High Court held that in a case of theft involving complicated questions of law and based entirely on circumstantial evidence, the proper court to try is criminal court and not court-martial. But in Capt A.K. Rana V. Union of India, 1982, Cr.L.J. (NOC)120 Delhi, the Delhi High Court held that offences under the official secrets Acts are triable both by Magistrate as well as court-martial. Court-martial can try offence even when no cognizance thereof was taken by magistrate. Serving notice to the magistrate is not required. In Union of India V. Major S.K. Sharma, AIR. 1987 SC. 1878 the Supreme Court held that when the accused is handed over by the Magistrate to a competent military authority, it is mandatory for the military authority to communicate to the Magistrate whether the accused has been tried by court-martial or other effective proceedings have been taken against him. see also, C. Ramanujam V. Mysore, AIR. 1962 Mys. 196(197).

concerned, unless he makes a reference to the Central Government, shall suspend the proceedings and hand over the offender as per the requisition. The procedure for resolving conflict of jurisdiction between a criminal court and court-martial can be summarised as under:-

(a) In the first instance it is in the discretion of the army authorities to decide as to whether the accused should be tried by a court-martial or by a criminal court (Section 125 of the Army Act).

(b) Where a person subject to Army Act is brought before a Magistrate, he shall, before proceeding against such a person, give written notice to the CO of the accused and until the expiry of 15 days from the date of service of such notice, shall not proceed to try such person (see Adjustment of Jurisdiction Rules, 1978)[21].

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21. The Central Government has framed the Criminal Courts and courts-martial (Adjustment of Jurisdiction) Rules, 1978 under Section 475(1) of the Criminal Procedure Code. This section empowers the Central Government to make rules consistent with the code and the Army, Navy and Air Force Acts, providing for the trial of persons subject to military, naval or air force law, by a court to which the code of criminal procedure applies or by a court-martial and it also provides that when any person is brought before magistrate charged with an offence for which he is liable to be tried either by a court to which the code of criminal procedure applies or by a court-martial, such magistrate shall have regard to the rules. For applicability of these rules, it is necessary that both ordinary criminal court as well as the court-martial should have jurisdiction. In Major E.G. Barsey V. The State, AIR. 1961, SC. 1762 (1772) a question was raised whether a special judge appointed under the criminal law (Amendment) Act was required to follow the procedure prescribed by section 475 of the CrPC. and the rules framed there under. The Bombay High Court held that the provisions of section 475 of CrPC. did not apply to special judges appointed under the Criminal Law (Amendment) Act. The matter went up to the Supreme Court which upheld the decision of the Bombay High Court. But in 1975, Calcutta High Court held in V.R. Choudhary V. State of West Bengal, (1975)79 CWN 804, that special courts also falls within the ambit of the word "Criminal Court" as used in Section 126(1) of the Army Act.

(c) When due to peculiar circumstances of the case a criminal court is of the opinion that the offender should be tried before it, the military authorities should hand over the offender to the criminal court for trial.

(d) Where military authorities do not wish to hand over an offender to criminal court, they should make a reference to the Central Government. The decision of the Central Government on such a reference from military authorities shall be final and binding on both the parties.

Where competent military authorities knowing well the charge against the accused and the investigation that was being conducted by the police, release the accused from the military custody and hand him over to civil authority, the Magistrate is justified in proceeding on the basis that the military authorities had decided that the accused need not be tried by court-martial. Compliance of Army Act Section 126 is not required.

When an offence falls within the jurisdiction of both of the Criminal Court and a court-martial, it is not open to criminal court to call for the case before itself merely because it is of opinion that the conduct of the proceeding before a court-martial lacks propriety in some respect.

Jurisdiction as to sentence. The maximum punishments prescribed by parliament in the punitive sections of the respective acts are jurisdictional and that any part of a sentence which is in excess thereof is void and un-enforceable. However, the portion of an excessive sentence which is within the authorized maximum, is not necessarily void or un-enforceable. In dealing with problems of jurisdiction as to the sentence, not only care of punitive sections of the Act are taken into consideration but care is also

exercised not to exceed the maximum punishment imposable by a summary or district court-martial where their sentences are under consideration.

Imposition of unauthorized punishments, punishment not commensurate with the offence committed, to exceed the maximum punishment etc are the issues where the jurisdiction as to the sentence play an important role and many a times the sentence of a court-martial has been altered or varied on the grounds of its being excessive or illegal[22].

22.In the case of Ranjit Thakur V. Union of India, AIR. 1987, SC. 2386, the Supreme Court, while considering the doctrine of proportionality in the matter of awarding punishment under the Army Act, observed, that " the question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, is part of the concept of judicial review ....." Similarly in Bhagat Ram V. State of Himachal Pradesh, SLJ. 1983 (1) SC. 323, the Supreme Court held that the penalty imposed must be commensurate with the gravity of the misconduct, and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the constitution. Applying the above principles in Ex Naik Sardar Singh V. Union of India, Cr. ANo. 67 of 1991, the Supreme Court set aside the punishment awarded by summary court-martial and remanded the matter to the court for awarding lesser punishment.

(iii) PROCEDURES AT TRIAL BY COURTS-MARTIAL

The procedure at a court-martial could be devided into three parts :

(a) Pre-trial procedure ,

(b) Procedure during a trial , and

(c) Procedure after the trial ,

As we have discussed earlier, Army, Air Force and Navy provide for different type of court-martial. In respect of their procedures, however they have rules of common origin and officers taking part in the administration of justice have similar responsibilities and duties in almost every case. Because of these similarities, this part of the chapter deals with the court-martial procedures of all the three services in terms of their various stages. Discussion here will be confined to the Army since Air Force Law is largely identical to that governing the Army and there being difference in respect to Naval Law, occasional reference has been made.

The first step towards bringing an offender to justice, under the military code, is to order his arrest or confinement. A person charged with an offence under the respective Act may be taken into the respective forces custody [1] by the order of any

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1. For a definition of custody, See Army Act Section 3(xIII), Air Force Act Section 4 (V) and Navy Act Section 3(12). Military custody as has been defined in section 3(XIII) of the Army Act means, the arrest or confinement of a person according to the usages of the service and includes Naval or Air Force custody. The expression "usages of the service" refers to the mode and manner of arrest and confinement, and not to usages under which a person can be kept in custody or confinement. see State V. K.M. Nanavati, AIR. (1960) Bom. 502 (FB). Military Custody was described in a case reported in ILR (1976) 2 Delhi 691 (DB) wherein the Delhi High Court held that Military Custody may mean open or close arrest at the discretion of a superior officer. A person under close arrest does not go out of his quarter or his place of confinement except to take on exercise.

superior officer.[2] Such an action is by no means obligatory and it depends on the sound discretion of the person empowered to arrest[3]. A person charged with a minor offence is not "ordinarily

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2. "Superior officer" is defined in section 3(XXIII) of the Army Act as "When used in relation to a person subject to this Act, includes a junior commissioned officer, warrant officer and a non-commissioned officer, and, as regards persons placed under his orders, an officer, warrant officer, petty officer or non-commissioned officer of the Navy or Air Force, [Under the Navy Act, see section 3(24).

3. The following authorities are competent to arrest a person subject to the respective Act .

(a) Any superior officer (when the person to be arrested is charged with an offence) under section 101 of the Army Act, section 102 of the Air Force Act and Section 84 of the Navy Act,

(b) Any officer, whether superior or not (when the person, being an officer, is engaged in a quarrel, affray or disorder) under section 101(3) of the Army Act, section 102 (3) of the Air Force Act,

(c) A police officer or magistrate on receipt of written request by the commanding officer under section 104 of the Army Act/105 of the Air force Act/Section 83 of the Navy Act,

(d) Authorities receiving report of desertion (in the case of deserters)under section 105(I) of the Army Act and section 106 of the Air Force Act,

(e) Any police officer (in case of a person reasonably believed to be subject to the Army Act and also believed to be a deserter or traveling without authority,

(f) Civil police (for civil offences) under the powers given to them by Crpc,

(g) Provost marshal, which includes Naval and Air Force Provost personnel and persons assisting them or acting under their orders,(is case of a person who commits or is charged with an offence)under sections 3(XX) and 107(3) of the Army Act, section 108 of the Air Force Act and section 89 of the Navy Act, and

(h) A court-martial while exercising powers under Army Rule 150 (I), Army Rule 150.

placed under arrest" [4]. Basically, custody includes an "open arrest" and a "closed arrest" [5]. The restrain imposed under either type is according to the usages of the service and its regulations. Under a closed arrest a person is usually confined to a room. He remains under the escort of a person of equal rank. Under an open arrest he remains under a moral restraint not to go beyond a certain area, usually the camp/ship/barracks etc. The arrest of an officer is generally "open", but it may be "closed" at the discretion of the superior officer considering the nature and the gravity of the offence.

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4. Respective armed forces Act do not make it obligatory to arrest in any specific case. Nevertheless, considering the requirement of justice and discipline, arrest is natural in the following cases:-

(a) When an offence is punishable with death, imprisonment for life or imprisonment exceeding seven years,

(b) When considering the nature of offence and requirement of discipline, it is necessary to place the offender under arrest,

(c) When the offender deliberately undermines discipline,

(d) When the offender is of violent disposition,

(e) When the offender is likely to absent himself with a view to avoid trial,

(f) When the offender is likely to influence witnesses or temper evidence, and

(g) When there is a reasonable apprehension that the offender may harm himself.

5. The method of arresting a person subject to the Army Act is informal. Neither the offences are classified as cognizable and non-cognizable nor any warrant is issued for carrying out arrest, There are no provisions relating to bail and the offender is also not required to be produced before any magistrate within a period of twenty-four hours of his arrest. An order for the person can be oral or written. Army Act Section 101 (custody of offender) are not discriminatory in view of Article 33 of the constitution which confers express power on parliament to make laws restricting and/or abrogating fundamental rights part III of Constitution.

The next step in the administration of justice is an investigation into the alleged offence and involves the following :

(a) Notification to the accused that compulsory self-incrimination is prohibited and that he has a right to receive assistance of an officer before he answers any questions,

(b) Examination of witnesses,

(c) Forwarding charges to a higher authority, and

(d) Serving charges to the accused,

Throughout this process, the accused is afforded the basic rights guaranteed to him under the Constitution of India and more. Pursuant to these rights :

(a) The charges against an accused under military custody are investigated within forty-eight hours[6] of the fact of his arrest being known to the commanding officer.

(b) Detention in military custody beyond two months of an accused who is not on active service and in whose case a court-martial is not assembled, requires the sanction of the Chief of Staff of the respective armed forces. Any detention beyond three months requires the approval of the Government of India.

(c) The accused is protected from compulsory self incrimination under the respective Acts. A suspect is advised prior to questioning of the offences of which he is suspected, that he has a right to remain silent, and anything he says may be used against him.

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6. Sundays and other public holidays are excluded when computing the period of forty-eight hours, though they are not so excluded for any other purpose, eg, time reckended for purposes of punishment of any deduction of pay.

(d) An accused is advised of the offences with which he is charged. He is afforded with an officer of his choice to assist him.

(e) Investigation always take the form of an inquiry according to the respective Acts[7]. During the investigation, the suspect has the right to cross-examine[8] any witness interviewed during investigation and to present any witness on his behalf and make any statement in his defence [9].

(f) Before the trial is convened the accused is afforded proper opportunity of preparing his defence and allowed free communication with his witnesses and with any one whom he may wish to consult. The accused is given an opportunity to furnish the names of witnesses whom he wishes to call in his defence and for whose attendance "reasonable" steps are taken.

Commanding officers have the prerogative of initiating investigation proceedings. They are obligated to follow the rules and regulations laid down in the Act. A commanding officer receiving information concerning an alleged offence may initiate pretrial proceedings only after following the appropriate judicial procedure.

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7. In Rai DSC, Mag.Gen. V. GCM, Fort St.George,Madras; Madras High Court WP Nos 3067 and 3068 of 1084 (order dt 25 Apr 1984), the Madras High Court held that the court of inquiry cannot substitute for a preliminary investigation, a holding of which is an essential pre-requisite before a summary of evidence. The court of inquiry procedure is not a sine-quanon of the constitution of court martial.

8. The same is not applicable under the Navy Act wherein the suspect has no right to cross examine any witness.

9. Natural justice requires that no person shall be condemned unless he has been given an opportunity to explain.

In brief, an investigation [10] consists of the following steps : interrogation of the informant, the complainant, the suspect, and other parties concerned, and the examination of the evidence. In order to examine the evidence and the circumstances of a crime, the commanding officer may make on-site inspection, he may summon witnesses, and he may also call experts to render impartial opinions. During the course of investigation, the commanding officer can arrest, search, seize, and confine a suspect. In India, unlike other countries, an accused does not have the constitutional right to counsel [11]. After the pretrial investigation, the commanding officer decides whether to pursue the case by himself or under the supervision of the convening authority.

After the investigation , if the commanding officer determines that the case is fit for trial, he has to apply for trial [12] within the prescribed period to the appropriate conven-

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10. There is nothing like police posts and stations in armed forces. Similarly, there is no provision for first information report (FIR) in the Army Act. The proceedings usually start with information of any offence reaching a commanding officer.

11. The accused cannot claim to be represented by legally qualified counsel at the hearing of the charge at the recording of evidence.

12. According to regulation 148 of the regulations for the Navy part II (statutory) the commanding officer is required to make a application for the trial of an offender by court-martial in the following cases:-

(a) When an offence has been committed which is beyond his powers to try,

(b) When he considers that an offence has been committed by a Sailor/Jawan/Airman which is beyond his power to punish adequately,

(c) When any offence has been committed which he considers ought to be tried by a court martial,

(d) If the accused has exercised option in accordance with the rules and regulations, to be tried by court-martial, or

(e) When so directed by his superior authority.

ing authority by forwarding the charges along with necessary papers[13].

It is the duty of the convening authority to determine whether the trial should be held and if so by what type of court-martial. Before taking decision, he invariably obtains a pretrial legal advise from the department of the Judge Advocate General (JAG). Following the advice, the case may be investigated further, disposed of summarily, or brought to trial before an appropriate court, or dismissed[14].

After reviewing the charges, if the convening authority and staff judge advocate believe that the charges are warranted, the appointed Judge-Advocate serves a copy of the charge-sheet to the accused[15]. The accused then has a period of minimum ninty-six hours before any formal court action is taken against him. During this period, the defence is free to examine all papers accompanying the charge and to include a list of the probable witnesses to be called by the prosecution. The accused has the right of securing witnesses in his defence by furnishing a list of their names and locations to the Judge-Advocate. The task of contacting and securing the witnesses falls upon the Judge-

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13. Allied papers consist of Circumstantial letter, Summary of evidence of each prosecution witness in support of the charges, and a list of exhibits which the prosecutor proposes to put in evidence.
see Regulations 153 and 154, Regulations for the Navy Part II (Statutory)

14. Under the respective Acts, the convening authority has an unfettered discretion to arrive at his own findings based on facts and evidence adduced before him. If he finds a person not guilty of the offence, he is bound to dismiss the charge.
In the Navy the duties of the convening authority has been laid down in Regulations 156,157 and 158 of the Regulations for the Navy Part II (Statutory).

15. See Regulation 169 of the Regulations for the Navy Part II (Statutory).

Advocate. The right of the accused to a speedy trial is paramount and, therefore, a timely disposition of cases is given priority over all other matters.

Proceedings are conducted in open court and in the presence of the accused except when the court is deliberating on any matter. At any stage of trial, the court can order that the public generally or any part thereof, or any particular person, will not have access to the courtroom if that is necessary or expedient to the public interest or in the interest of justice [16]. The following officers play vital roles during trial by court-martial :

(a) Presiding Officer. At every court-martial, the senior member is termed as the presiding officer [17]. He is responsible for ensuring that the trial is conducted in accordance with the provisions of the respective Acts, rules made thereunder and in a manner befitting a court of justice [18]. He

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16. Sections 98 and 100 of the Navy Act 1957

17. Sections 128,129 and 97(12) of the Army, Air Force and Navy Acts respectively. Under the Navy Act, the senior member is termed as the president of the court-martial.

The term senior member may be defined as, "every superior officer shall be deemed to be senior to every inferior officer, irrespective of number of years for which he might have put in service in the Army." Thus every major shall be deemed to be senior to every captain, and every captain senior to every lieutenant. In between the officers of the same rank, seniority is determined by the number of years for which a rank was held.

18. Rules 76 and 83 of the Army Rule and Air Force Rules respectively. These rules apply to the SGCM also. See regulation 175 of the regulations for the Navy, part II statutory under the Indian Navy.

has a duty to see that the accused has a fair trial, and that the latter does not suffer any disadvantage in consequence of his position as a person under trial, or of his ignorance or of his incapacity to examine or cross-examine witnesses, or otherwise [19]. Additionally, the Presiding officer has to safeguard the dignity of the court and the solemnity of its proceedings. He speaks and acts for the court in each instance where a rule of action has been prescribed by law or regulations.

(b) Judge-Advocate. An officer who is not "disqualified from serving on a court-martial" and "in the opinion of the Judge-Advocate General" possesses "necessary qualifications" can be designated as the judge-advocate at a trial. In practice, only officers of the JAG department perform such duty. Unlike the Military Judges in the United States Army, who have almost the same powers and prerogatives as judges of federal district courts, a judge-advocate under the Indian armed forces acts as an adviser to the members of the court who alone are judges of questions of fact and law[20]. However, the court is always guided by the advice of judge-advocate. The members of the court do not normally disregard his advice except for very weighty reasons. They also consider the grave consequences which may result from their disregard of the judge-advocate's advice on a legal

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19. Under the Navy Act, the responsibility of the President includes that the customary ceremonial for court-martial are observed. See Regulation 175, Regulations for the Navy part II (statutory).

20. Under the Army and the Air Force Act, questions of law are decided by the court-martial, whereas under the Navy Act, the Trial Judge Advocate alone decides the questions of Law.

point. Though he has no judicial power to act independently in deciding the findings or the sentence, his opinion on question of law, practice or procedure play a decisive role[21].

The respective Acts provide that every GCM Shall and every DCM or SGCM may, be attended by a Judge-Advocate[22]. He has the responsibility to notify :

(i) The court of any irregularity in the proceedings, and

(ii) The convening authority of any defect in the charge or composition of the court. He is to maintain an impartial position[23]. Along with the presiding officer, the judge-advocate has the duty to take care that the accused doesnot suffer any disadvantages in consequence of his position as such or of his ignorance or incapacity to examine or cross-examine witnesses.

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21. If a court-martial, acting without jurisdiction or in excess of jurisdiction, convicts an officer, JCO or other rank, the members of the court may be held liable for damages in a Civil court. Such liability, or atleast the amount of damages, may depend upon (a) the question whether they exercised a bonafide judgement, and (b) the fact whether they accepted the advice of the Judge-Advocate. Even if such advice was held to be wrong, might practically exonerate the members from liability.

22. Under section 99 of the Navy Act, it is mandatory that a judge-advocate from the Naval Law cadre (there is no separate JAG Branch in the Navy, unlike in the Army) is appointed as the trial judge-advocate who should be in possession of Law degree. His presence is a legal necessity.

23. In Trilochan Singh V. UOI, 1983 Cr.L.J. NOC 109, Delhi High court observed, "the judge advocate has to maintain an entirely impartial position and his addresses cannot be styled as or in the nature of directions. The court-martial deliberates on is findings in the closed court in the presence of the judge advocate, vide rule 61(I). Thus, the quality of his advice has a very crucial role in the trial in swaying the minds of the member of the court-martial and if his advice is patently contrary to Law and may have affected the verdict of the court-martial, High Court will be entitled to see whether or not to sustain the verdict."

At the conclusion of the case, the Judge-Advocate sums up the evidence and advises the court on the law applicable to the case. In preparation of his address, he is not guided by any written instruction. He attempts to make his address as instructive and as comprehensive as possible. The Judge-Advocate is one of the important functionary at a court-martial[24].

(c) The Prosecutor. In a court-martial, the prosecutor is generally a service officer, designated by the convening authority or the Commanding Officer. He records the summary of evidence. He is expected to know the provisions of the Act, rules and regulations and the law of evidence, though he may not be legally qualified. In practice, officers of the JAG department are not generally designated for such a duty because of the conflict with their duties regarding the pre-trial and post-trial matters. Officers having legal qualification, the necessary aptitude and training are rare in other branches and in many cases remain busy on more important duties. Exigencies of service generally do not allow them to act as a prosecutor. Ultimately, therefore, the court may have a prosecutor who may not be fully qualified for the job.

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24. This officer has been styled by Mc Arthur as "the primum mobile". Adye described him as "the mainspring of a court-martial, if he errs, all may go wrong".

As to the powers and duties of Judge Advocate, See Army Rule 105. Sections 101,105,113,114,116 to 118, 120,121 and 128 of the Navy Act explains the duties of the trial judge advocate during the trial section 128 of the Air Force Act is couched in similar terms. For the duties of the trial Judge Advocate, prior to the commencement of the trial under the Naval Law, see Regulations 169,170 and 171 of the Regulations for the Navy part II (statutory).

The prosecutor is responsible to assist the court in the administration of justice, to behave impartially to bring the whole transaction before the court and not to take unfair advantage or suppress any evidence in favour of the accused. He cannot refer to any matter not relevant to the change. He can be stopped by the court for want of fairness or moderation on his part.

(d) Defence Counsel/Defending Officer. The accused is allowed great latitude in making his defence. The court may caution him as to the relevance of his defence but should not, unless in special cases, stop his defence solely on the ground of irrelevance.

The accused is provided with an officer of his choice, who is called "defending officer" or "the friend of the accused", to represent him at the trial, "if a suitable officer should be available". If service exigencies preclude designating of such an officer, the trial may proceed without a defence counsel. The defending officer could be any officer subject to the Act. He need not be a legally qualified person. The accused may, at his own expense, engage a civilian counsel who is termed as defence counsel. In that case the accused cannot as a matter of right also have a defending officer. In practice, officers of the JAG department are neither designated nor allowed for the defending officers duty. The accused invariably has a defending officer who is not legally qualified or not fully qualified for the job. A civilian counsel worth the name is generally beyond his means.

The defending officer/defence counsel has thus a much larger scope in defending the accused under the respective Acts.

B. Procedure during the Trial. On the date and the time appointed for the trial, the members of the court-martial, the waiting/spare members appointed for the trial and the judge-advocate, if any, assemble in the closed court. The senior member of the court takes over as the presiding officer and other members take their seats according to their army rank. The convening order, the charge-sheet and the summary of evidence[25] or a true copy thereof, are placed before the court. The court then satisfies to its legal constitution, amenability of the accused and validity of the charges. Thereafter, the prosecutor, the defending officer/defence counsel and the accused take their respective places allotted to them[26]. The formal proceedings commence with two preliminary things : Objections relating to the composition of the court and solemn declarations.

Objection relating to the composition of the court. After the assembly of the court-martial, the presence of any member[27] of the court may be objected to by the accused on a ground relating to his competency to act as an impartial judge[28].

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25. In a Naval court-martial, the summary of evidence is never given to the court at any stage whatsoever. The sequence of events and the ceremonials to be followed are provided in Appendix III to Regulations of the Navy, part II (Statutory).

26. In the Navy, the court satisfies to its legal constitutions, amenability of the accused and validity of the charges in the presence of the accused, prosecutor and the defending officer/defence counsel.

27. In Major General M.L. Yadav V. UOI, MISC. writ petition No 301 of 1187 decided by the Bombay High Court on 27.7.1987, held that a trial cannot be said to have commenced till such time as the accused had exercised his right of challenge to the members of the court-martial.

28. According to Navy Act Section 103, at trials held to investigate charges of stranding and hazarding of ship, where two court-martial are often held, to try the navigator and the captain, and in similar cases, where individuals are tried separately, on the same set of facts, the president and members of the second court should take care not to attend the first court as spectators, as this would obviously afford subsequent ground for objection, as to their competence to act impartially.

Objections and the reply thereto are heard and recorded. The remaining members of the court, in the absence of the challenged officer, decide on the objection[29], by vote. If the objections are allowed, the vacancy created is filled in by the senior most of the waiting officer[30]. When no challenge is made, or when challenge has been disallowed, or when the place of every

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29. Army Act, section 130, Air Force Act, section 129, Navy Act, Sections 102 and 103.

(i) Under the Navy Act, the trial judge-advocate can reject summarily without reference to the members of the court any objection not made on the ground of impartiality. An officer objected to on ground of personal enmity, prejudice or malice or for having formed and expressed an opinion on the case. President/Presiding officer can also be challenged and removed at the outset of the trial.

(ii) In Capt. Ram Kumar V. COAS, AIR. 1985, Del. 375, a question arose whether on objected member can consider objection against other member ! It was contented by the petitioner that he had objected to two members of the court-martial and one of them could not participate in the decision of the objection to the other. In other words, both should have been excluded altogether from ruling on his challenges. While disposing of the officer's objection the court held that, "it is clearly stated in section 130(2) of the Army Act that on objection against one officer shall be decided by 'the remaining officers of the court' in the absence of the challenged officer. The position is made even more clear by clause (c) of the proviso to Rule 44 of the Army Rules which says that 'the remaining officers' of the court 'shall' in the absence of the 'challenged officer' vote on the disposal of the objection 'Notwithstanding that objections have also been made to any of those officers'. There is a great sense in these provisions, because otherwise an accused be merely objecting to all the officers constituting the court could completely dislodge the court. Hence the position is that the officer objected to must not be present in the closed court when objection in his respect is being considered by the court, but remaining members should be present, i.e. who have not retired upon objections to them being allowed, must vote on disposal of the objection. As to the procedure for challenge of members of court, see Army Rule 44, Air Force Rule 133 and section 129 of the Air Force Act.

30. If there is no officer in waiting available and the court is reduced to below the legal minimum in number, it must adjourn for the purpose of appointment of fresh member, and if the court is not so reduced, it should ordinarily adjourn unless it is of the opinion that, in the interest of justice and for the good of the service, it is not expedient to do so (Army Rule38). see PPS Bedi, Lt Col, Kukereti,PP, Capt and Chopra, CK, Capt V. UOI, AIR. 1982 SC. 1413,1983, wherein it was held that the requirement of asking accused whether he objects to any officer is mandatory.

officer successfully challenged has been filled in by another officer to whom no objection is made or allowed, the court proceeds with the trial.

(i) Solemn Declaration : Before the court proceeds to try the person charged, an oath is administered to the members[31] and also to the judge advocate. If any other officer under instruction is also there, he is also administered the oath or affirmation prescribed for them[32]. An interpreter and a shorthand writer are also administered the oaths as prescribed for them. Usually these oaths or affirmation are done by the judge-advocate if there is one, or in his absence by the presiding officer or some other person empowered by the court to administer such oath or affirmation[33]. An oath or affirmation is administered, if so required by the Act, to every witness before he gives evidence[34]. If a civilian

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31. Members of the court-martial are administered of oath or affirmation in the order of their seniority and according to the peculiar ceremonies of their religion or is such manner as they deem binding on their conscience.
Rule 45 of the Army rules, Rule 53 of the Air Force Rules and Section 104 of the Navy Act. In Major General Yadav's case, n.27, the Bombay High Court held that a trial cannot be said to have commenced till such time the members of the court-martial had been given the oath or affirmation.

32. Army Rule 46 and Air Force rule 53 ; the forms of oaths to the various functionaries connected with the court martial are given in Army rule 45 and 46. These oath define the duty which those who take them have to discharge. In substance they have remained the same in the last 200 years, and contain the measure and method of justice to be administered by them in court-martial.

33. Army Rule 47 and Air Force rule 55. Section 104 and 108 of the Navy Act.

34. Section 110 of the Navy Act
The oath and affirmation is not administered on a child witness who is under twelve years of age and the court-martial is of opinion that though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation.

witness refuses to take oath or to make an affirmation or gives false evidence, he may be punished under the respective Acts[35].

After the completion of these formalities, the trial enters into a substantive stage. The sequence of events in the procedure of the court could be broadly divided into two broad points, viz, the opening of the formal proceedings and reading of charges[36], and the remainder of the proceedings. These two have the following stages :

(i) Arraignment of the Accused. Opening of the formal proceedings commences with the arraignments[37] of the accused. During the arraignments, the accused can plead guilty, not guilty or guilty to a Lesser offence. Before his plea is recorded, the court satisfies itself whether the

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35. See Army Rule 150(3) and Air Force Rule 129. For corresponding provisions, see section 113 of the Army Act and section 104 and 110 of the Navy Act 1957.

36. In the Navy, the sequence of events and the ceremonials to be followed are provided in Appendix III to Regulations for the Navy, Part II (Statutory).

37. "Arraignment" consists of :
(i) Calling upon the accused by his number (if any), rank, name and description as given in chargesheet and asking him, "is that your number, rank, name and unit" (or description),

(ii) Reading the charge to him and translating it in the language of the accused, if necessary, and

(iii)asking him whether he is guilty or not guilty.
Where two or more persons are jointly charged and tried for the same offence, each is separately arraigned. Where there are more chargesheet than one against an accused, he must be arraigned and tried upon the first charge-sheet before arraignment and trial upon the second and subsequent charge-sheets.

accused has understood the charges in respect whereof which his plea is being recorded [38].

The accused may object to the charge on the ground that it does not disclose any offence under the Act[39] or is not in accordance with the rules or regulations. The court, after hearing any submission which may be made by the prosecutor or by or on behalf of the accused, considers the objection in the closed court and either disallows it and proceeds with the trial or allows it and adjourns to report to the convening authority or if it is in doubt, it may adjourn to consult the convening authority [40]. Thereafter the trial commences only when arrangements is complete and not earlier[41].

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38. Rule 48 of the Army rules, Rule 56 of the Air Force rules and section 105 of the Navy Act.

39. In Mohan Rao P, Naik and ten others V. UOI, Rajasthan High Court, DB Civil Petition No 400/1988 (date of order 26 May 88) (Unreported) the Rajasthan High Court held, that the charge should be specific and must be clear, precise and accurate because fair hearing pre-supposes a precise and definite catalogue of charges so that the person charged may understand and effectively meet them. If the charge is imprecise, or indefinite, it may prejudice the case of the defence and the resulting enquiry would not be fair and just enquiry. The court observed that the trial had commenced, the prosecution was required to prove the case beyond any doubt which he failed to do so, the accused were entitled to the benefit of doubt.

40. In the Navy, the sequence of events and the ceremonials to be followed are provided in Appendix III to Regulations for the Navy, Part II (Statutory)

41. In Gulab Nath Singh V. The chief of the Army Staff, 1974 Assam L.R. 260, the Assam High Court held that, between swearing in of a court under Army Rules 45,46 and 47, and the arraignment under Rule 48, there is no other intervening stage, except that of special plea to jurisdiction of a court to try so that it must necessarily be anterior to the stage of commencement of the trial. Thus, there being no other stage between swearing in and arraignment and swearing in being under section 113(i), prior to commencement of the trial, the trial can be held to commence only upon arraignment and not before. The honourable court further held, that "Considering the entire scheme of the Army Act and Army Rules, the trial of an accused person by a general court-martial commences only when his arraignment is complete and not before. Similarly in Major Gopinathan, V. State of Madhya Pradesh, AIR. 1963 MP 249, 1963(2) Cr.L.J. 161, held that the framing of charge is a step taken after investigation but before a trial by court martial and is not a step necessary for the initiating of the proceeding for the trial of a person by court-martial under the Army Act.

(ii) Amendment of the charge/charge sheet. Prior to the examination of witnesses[42], if it is apartment to the court that in any charge, any addition to, omission from, or alteration [43] in, is required to be made in the interests of justice, it can report its opinion to the convening authority and adjourn. The convening authority can either order a new trial or amend the charge and order the trial to proceed with such amended charge after giving notice to the accused[44]. If there is any mistake in the name or description of the accused in the charge-sheet, the court can amend the charge-sheet to correct that mistake [45].

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42. The term "witness" means witnesses on the substance of the charge, and not those persons who are called to testify in the context of objections to members or with respect to special plea to the jurisdiction of the court. see Army Rule 41 and Air Force Rule 49.

43. If the addition, omission or alteration can be made by means of a special finding under Army Rule 62(5), it will not usually be necessary to have the charge amended, but if the date is material or if any addition is required to be made to the particulars of the charge, it will be safer for the court to adjourn and apply for amendment. If the charge appears not to disclose an offence under the Act, the court must adjourn. see Army Rule 49 and Air Force rule 57.

44. In NK/CLK Manoharan V. GOC ATNK & K Area and others, Madras High Court, WP No 4775 of 1983 and NK/CLK Manoharan V. Commander T&K Sub Area, Madras High Court, WP No 864 of 1983, the Madras High court found that the prosecutor, after opening the case sought an amendment to correct defects in the charge-sheet. The court-martial referred the matter to the convening authority. The petitioner filed writ petition on the ground that the trial court alone is competent under Army Rule 50 (2) to amend a charge and that by the amendment in question, the Madras High Court held that the prosecutor, after opening the case, is entitled to ask the court to amend the charge. In its opinion the petitioner's contention that his right of defence was sought to be denied was not correct because question of putting forward the defence or plea of alibi had not yet come.

45. A mistake in name or description will only be amended if it is clear to the court that the accused is the person intended to be charged in the charge-sheet, and that he is not prejudiced in his defence by the mistake. In the Navy the trial judge advocate is empowered to amend the charge-sheet any time during the trial but prior to the commencement of summing up by the prosecutor and defence. see Regulation 182, Regulations for the Navy part II (Statutory)

Special Plea to the Jurisdiction

The accused can make a special plea to the general jurisdiction of the court-martial on the ground concerning the constitution of the court or claiming that he is not subject to military law. If he does so and the court considers that it has no jurisdiction, it shall receive any evidence offered in support together with any evidence adduced by the prosecutor and any address by or on behalf of the accused and reply by the prosecutor [46]. If the court over rules the special plea, it proceeds with the trial [47]. If the court allows the special plea, it records its decision and the reasons for it and reports it to the convening authority and adjourns ; such decision does not require confirmation. The convening authority either convenes another trial of the accused or orders the accused to be released [48]. If, however, the court is in doubt as to the validity of the plea, it may refer the matter to the convening authority, ad-

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46. A plea regarding general jurisdiction that is relating to the right of the court generally to try the accused on any charge at all, is separate from any plea which relates only to the particular charge on which the accused is brought before the court. Under the former he may plead, for example, that the court is improperly constituted in respect of the number of members, or that the accused is not amenable to the court.

47. The confirmation of the finding, after a plea of the jurisdiction has been overruled, will have the effect of confirming the decision of the court in overruling the plea. If, however, the confirming officer is of the opinion that the plea is valid and should have been allowed, he must refuse to confirm the findings of the court. In that case another court may be convened.

48. If the court allows the plea, the decision of the court cannot be overruled, but another court may be convened.

journing for that purpose or may record a special decision with respect to such plea,and proceed with the trial [49].

Plea in Bar. The accused, at the time of plea of "guilty" or "not guilty" to a charge for an offence, can make a plea in bar of trial on the grounds specified in Rule 53 of the Army Rules[50] and Rule 61 of the Air Force Rules. The court-

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49. If a special plea to the jurisdiction were raised, for example, on the ground that the accused was not subject to the Army Act, and the validity of the plea was in doubt, the court might record a special decision to that effect, stating that it had nevertheless decided to proceed with the trial. The procedure, in effect, transfers the decision regarding the validity of the plea to the confirming officer, who should act as if the plea had been overruled.

50. The accused can offer a plea in bar on the following grounds

(i) That he has been previously either convicted or acquitted of the same offence by a competent court, ie, either a criminal court or court-martial having jurisdiction, or

(ii) That he had been previously dealt with summarily under the provisions relating to summary powers under sections 80,82 to 85 of the Army Act, or

(iii)That a charge in respect of the offence in question had been dismissed by the commanding officer during the investigation by him, or

(iv) That the offence had been pardoned or condoned by the competent military authority, or

(v) That the trial is barred by limitation under the Act.
see Section 122 of the Army Act, Section 121 of the Air Force Act, Section 79 of the Navy Act.

For the purpose of sub para (iv) above, condonation means such conduct on the part a competent authority, ie, an authority having power to determine that the charge should not be proceeded with, as is consistent with subsequent trial of the offender, and as it would make it inequitable to do so. Condonation must be deliberate and intentional with full knowledge of the facts. In the course of condonation if a competent authority removes an accused officer, or allows him to resign, the latter should not afterwards be tried by a court-martial for his earlier offence. The fact that after the trial, but before the confirmation, the accused has been employed in active operations does not affect the legal validity of the sentence, but affords a ground for pardon.
In N P Singh V. UOI, Delhi High Court, WP No. 324/79 (Unreported) the Delhi High Court held that the imposition of penal deduction under Army Act Section 91(8) doesnot amount to a trial and hence no plea in bar can be raised. Section 91 speaks about deduction from pay and allowances of persons other than officers.

martial considers the plea and if the facts stated by the accused are sufficient to support the plea, it receives evidence[51] and hears any address made by him on his behalf. It also allows the prosecutor to make the plea, if any. If the plea of the accused is proved, the court records its findings and notifies the convening authority.

It may either adjourn the trial or, if there is any other charge which is not effected by the plea in bar, proceed with the trial of the accused on that charge. If the plea in bar is not confirmed, the court may be reassembled by the convening authority. In other words, the decision of the confirming authority in this respect can overrule the decision of the court. If the court finds that plea in bar is not proved, it proceeds with the trial.

Its finding is subject to confirmation by convening authority like any other finding of the court.

General Plea of Guilty or Not Guilty. If no special plea to the general jurisdiction of the court is made, or if such plea is overruled or is otherwise dealt with under Rule 51 of the Army Rules, the accused person is free to plea guilty or not-guilty. If he refuses to plead or does not plead intelligibly[52] either one or the other, a plea of "not guilty" is recorded on each charge separately[53].

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51. The evidence will be taken on oath or affirmation.

52. If the accused pleads inarticulately or in some language not understood by the court, he will not have pleaded intelligibly and a plea of "not guilty" will be entered.

53. Army Rule 52(I) & Air Force Rule 60(I). Under the Navy Act, when the accused pleads "guilty", for procedure see section 105(2),(3),(4) and 119 of the Navy Act part II (Statutory)

Guilty and Not Guilty Plea Procedure. If the accused pleads guilty, the plea is recorded as the finding of the court. Before its recording, the president, or the judge-advocate on behalf of the court, is to ascertain whether the accused understands the nature of the charge and its elements, the difference in procedure and his right to withdraw the plea if from the summary of evidence it appears that he ought not to have plead guilty[54]. If, from his statement or from the summary of evidence or otherwise, it appears that he did not understand the effect of his plea, a plea of not guilty is recorded [55]. If the plea of guilty

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54. See Army Rule 52(2) and Air Force Rule 60(2). This direction is to prevent the accused pleading guilty under misapprehension. For example, a man charge with wilfully injuring state property may, under misapprehension plead guilty because the property was in facts stolen, though, when he received it, he did not know it to be a stolen property. So, again on a charge of desertion the plea of "Guilty, but I intend to return" amounts to a plea of "not guilty", as the intention not to return is generally an essential element in the offence of desertion. In such a case, the presiding officer must explain to the accused that he must plead "not guilty".
A plea of "Guilty" is only to be taken to the extent to which it is pleaded. Thus a man arraigned upon a charge of losing by neglect a number of articles, who pleads guilty in respect of some of those articles only, must be taken to have pleaded "Not guilty" regarding the remaining articles. But as no procedure is prescribed in the rules whereby a special finding may be recorded on a plea of guilty, it would be the duty of the court to try the accused upon the actual charge on which he was arraigned. If necessary the court must make a special finding under Army rule 62(5). Corresponding provision in Air Force is Air Force Rule 71(5).

In Lt Col. R. S. Bhagat, V. UOI, AIR. 1982 Delhi 191, The Delhi High court held that a need for special finding under Army Rules 62(4) and 62(5) is a statutory requirement.

55. See Army rule 54(5) and Air Force rule 62[3(c)].
The following examples, are cases in which a plea of "Guilty" should be altered to a plea of "Not guilty":

(i) Sepoy A, charged with desertion (not being desertion to avoid a particular service, states : "I always mean to come back".

(ii) Sepoy B, charged with using criminal force to his superior officer, states, "I only did it to defend myself after he had struck me".

The test to be applied in all such cases is not whether the court believes the statement, but whether, if the statement were true, it would be a very defence to the charge. In doubtful cases, the plea of "Guilty" should be altered to a plea of "Not guilty".

is finally accepted then no evidence is submitted by the prosecution. The court refers to the summary of evidence for details of the offence without formal proof of its content. The accused has a right to make a statement in mitigation and may also call witnesses to testify about his character. The prosecution then produces previous record of service of the accused, former convictions, if any and the period of custody the accused spent awaiting trial. After receiving all the data, the court determines the sentence.

Procedure when the accused pleads "Not Guilty". In the case of a plea of not guilty, it becomes the duty of the prosecutor to prove the charge against the accused beyond reasonable doubt. The prosecutor makes an opening address[56] and calls his witnesses[57] who are examined individually on oath. They are then cross examined by the defending officer/defence counsel and reexamined by the prosecutor. the court or the judge-advocate[58] may then

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56. Army Rule 56(3) and Air Force Rule 64, Navy Act section 106(2) . In difficult and complex cases, the prosecutor should always make an opening address so that the members of the court may be enabled to understand the general nature of the allegations. He must be careful to refrain from making any assertion which he does not propose to substantiate by evidence. [see Army rule 92(4)]

57. The prosecutor is not bound to call all the witnesses for the prosecution whose evidence is in the summary or abstract of evidence or who are going to be called by the accused. Ordinarily the prosecutor should call those witnesses who are expected to be cross-examined by the accused. He should secure their attendance. see Army Rule 134 and Air Force Rule 112.

58. Army Rule 142 and Air Force Rule 120. It is desirable that any question should be put after the conclusion of the examination, cross-examination and re-examination (if any) of the witness. Questions may be put in such a manner that the evidence of the witness may be aclearly recorded.

put any question. Thereupon the witness is excused [59].

The evidence is mostly recorded in "narrative form in as nearly as possible the words used" by the witness. This procedure is repeated in the case of all prosecution witnesses [60].

Defence of the accused. The main principle of justice, namely that every accused ought to have an opportunity of being heard before he is condemned, is observed in proceedings before court-martial. After the completion of evidence of the prosecution, the accused is given an opportunity to raise his defence. He may examine any witness [61], including witnesses as to his character, in his defence[62]. The accused is permitted to make a

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59. Rules 141(2) and (4) and Air Force Rule 119.
After questioning the witness and recording the evidence, it is readover and interpreted to the witness in open court and certificate is appended to this effect at the end of the evidence. [This provision is not applicable under the Navy Act, since the deposition of witness is recorded in question and answer form and the same is recorded verbatim] When the evidence of a witness has been read out to him, he should be asked whether it is correct. Any material alteration or explanation should be inserted at the end of the record of his evidence, and not by way of interlineation or erasure. If a witness makes any explanation or correction, the prosecutor and the accused, or counsel/defending officer may respectively examine the same.

60. In a case where one of the prosecution witnesses was not available and the court adjourned sine die to procure her attendance and remained adjourned for almost four months which gave the accused a cause for complaint, it was held by the Delhi High Court that there is no power to adjourn the hearing sine-die, see Lt. Col. R. S. Bhagat V. Union of India, 1981(I) SLR. 93 (Delhi) Under the Army Rule 82. When a court is assembled and the accused has been arraigned, the court shall continue the trial from day to day unless on adjournment is necessary for justice or that such continuance is impracticable.

61. The accused is required to give to the prosecutor or the court a list of the witnesses whom he intends to call. However, he alone has the responsibility to secure the attendance of any witness whose evidence is not contained in the summary or abstract and for whose attendance the accused has not requested for steps to be taken to procure his attendance.

62. Even if the accused has stated that he does not intend to call any witnesses to the facts of the case, he is not prevented from calling one before the evidence for the defence is completed. This is possible, for example when unexpected witnesses become available. As to the recalling of witnesses and the calling of witnesses in reply, See Army Rule 143 and Air Force Rule 121.

statement[63], if he desires so, in respect of the charge or charges. Such statements can be made orally or in writing, but no oath is administered to the accused[64]. The court or the judge-advocate, if any, may question the accused for the purpose of enabling him to explain any circumstances mentioned in his statement or in the evidence against him. The accused doesnot render himself liable by refusing to answer such questions or by giving answers to them which he knows not to be true, though the court may draw such inference form such refusal or answers as it thinks fit[65]. Where an accused voluntarily wants to examine himself, he is included in "any witness". An accused is a competent witness for the defence and may give evidence on oath or affirmation. He may testify in respect of the charges made against him or any person charged together with him at the same trial, provided that:

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63. The accused has the right of making statements which are unsupported by evidence. Any statement of the facts, though not on oath, upon which the accused relies for his defence, must be taken into consideration by the court, who may draw the reference from it [See Army Rule 61(i), Air force Rule 70] If the statement is made orally, it should be taken down verbatim, so far as it states the facts which are within the personal knowledge of the accused and which are the basis of his defence. If made in writing, the statement shall be read and attached to the proceedings. The accused cannot be questioned by the court or any other person upon statement or address.

64. The prohibition of administering an oath may be justified in the sense that an accused cannot be forced to be a witness against himself.

65. Army Rule 58(2)(a) and Air Force Rule 66(4). Under the Navy Act, the provisions of "defence of accused", has been explained under section 111 (6to9) of the Navy Act.

(a) He shall not be called as a witness except on his own request in writing, or

(b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the court or to give rise to any presumption against himself or any person charged with him at the same trial.

At this stage it is open to the accused to raise a plea of "no case", whereby he can argue that even if all the prosecution evidence to be true, no prima-facie case is made out against him which necessitates his reply. The accused and the prosecutor are heard on such a plea. If the court allows the same, they would record a finding of "Not Guilty" in respect of any one or more charges to which the plea relates[66]. In case the court rejects the plea, it has to follow the procedure for the taking down of verbatim, the statement of the accused, if any, and his evidence. The procedures for the examination of defence witnesses and prosecution witnesses are same. Before examining witnesses, the accused or his counsel or defending officer may make an opening address[67].

Summing Up. Where the accused does not produce any evidence and prefers to make a statement, then the prosecutor sums up the

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66. Army Rule 57, Air Force Rule 65 and section 111 (1) to (5) of the Navy Act

67. Army Rule 59(a) and Air Force Rule 66(I). Defending officer/Defence counsel are not permitted in an opening address, to state regarding facts which they do not intend to prove in evidence. see also Army Rules 95 (3) and 100.

entire case[68]. The defence, in turn, addresses the court in reply[69]. However, if the accused adduces evidence as to the facts, irrespective of his making a statement, the defence has to first sum up the case. The prosecutor, then, has the right to a final reply[70].

Summing up by the Judge Advocate. After the addresses of the prosecutor and the accused, the judge advocate sums up the case of both the parties. He reads and explains the charges and the relevant provisions of law. He also explains the legal issues in the case and sums up the evidence on each of the issues of fact that arise for the consideration of the court. After the judge-

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68. Army Rule 58(c) and Air Force Rule 67(3). If the prosecutor's address is in writing, it should be read by the prosecutor and handed over to the court for attachment to the proceedings. See also Army Rule 92(4). In Summing up the address, the prosecutor must confine his remarks to the evidence given by the witnesses. He must not strain or overstate that view of the facts which were earlier presented to the court and also he must not state any new facts which have not been given in evidence. Any deviation by the prosecutor in these matters or any want of moderation, may lead to the setting aside of the proceedings if it appears that injustice has been done thereby to the accused. It is the duty of the court, as far as possible, to prevent the prosecutor from transgressing in any of these respects.

69. Army Rule 58(d), Air Force Rule 67(4) and section 111(9) of the Navy Act.
Defending officer may not state as a fact any matter which has not been proved in evidence; the same restriction is placed upon a defence counsel.

70. Army rule 59(d) and (e), Air Force Rule 68(3), 68(4), and section 111(9) of the Navy Act.

advocate's summing up, no other address is allowed[71].

Consideration of findings. After the judge advocate's summing up, the court is closed for the consideration of the findings in the presence of the judge advocate[72]. The findings are reached by a majority of votes with a statutory quorum in the case of a death sentence. The opinion of each member of the court as to the findings is given orally on each charge separately[73].

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71. Army Rule 60, Air Force Rule 69 and Section 113 of the Navy Act. The judge-Advocate, if one is present in a case, has a right to sum up the case in open court. It is his right as well as his duty to advice the court upon matters of law relating to evidence before it, both for the prosecution and the defence. In summing up the evidence, the judge-advocate ought to be careful not to indicate to the court any opinion which he himself may have formed as regards to the facts. Under Army Rule 114, the summing up may be done orally. In practice, it is invariably in writing. The powers and duties of a judge-advocate have been laid down in Army Rule 105.

72. Army Rule 61(I), Air Force rule 70 and section 116 of the Navy act. In the Navy, the consideration of the finding is in the absence of trial judge-advocate. (Section 116(2) of the Navy Act)
While considering the findings, the presiding officer should initiate the deliberations of the court by a statement of the order in which they should be considered. If, for example, the charge is made under section 41(I) of the Army Act, (Disobedience of lawful command), he shall ask the court to discuss bearing of the evidence upon the following questions:

(a) Whether a command was given ?
(b) Whether it was a lawful command ?
(c) Whether it was given by the superior officer of the accused?
(d) Whether it was disobeyed by the accused ?
(e) Did the accused, by his manner or conduct, show a willful defiance of authority ?
(f) Did the accused know that the person giving the order was his superior officer ?

If the court is doubtful whether the actual offence charged is proved or whether the particulars of the charge have been satisfactorily established in evidence, it must consider its power of making special finding, either under section 139 of the Army Act or Under Army Rule 62(4). As to the form and record of finding, See Army Rule 62.

73. According to Army Rule 61(2) and Air force Rule 70(2), the opinions of the members must be given orally. As to taking opinions of members, see Army Rule 87 and Air Force Rule 94.
For the provisions of "drawing up of the finding", see section 118 of the Navy Act.

The finding on each charge is recorded simply as a finding of guilty or not guilty [74]. If the court has any doubts with regard to any charge whether the facts proved the accused guilty or not under the Act, it may before recording a finding on that charge, refer the matter to the confirming authority for an opinion. In that reference the court sets out the facts which it finds to be proved and may, if necessary, adjourn for the purpose[75]. After completing deliberations on the findings [76], the court is reassembled and the finding on each charge is announced in open court as subject to confirmation by the confirming authority[77].

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74. Army Rule 62(I) and Air Force Rule 71(I) This includes alternative charge, except in the case which falls under Army Rule 52(3). In the case of acquittal on every charge, the presiding officer must put date and sign the proceedings. The Judge-Advocate, if any, must also sign them. see also Army Rule 63.
In R. Shanmugam V.Officer Commanding. 65 Coy ASC Madras, 1984(I) SLR. 108, the Madras High Court held that it is not necessary to setout elaborately the evidence on the basis of which the conclusion is arrived at. Similarly in Dhar Ghulam Mohd V.Union of India, 1987 Cr.L.J. 1899 (J&K), the court held that a finding recorded by a court-martial shall not be rendered arbitrary by the mere fact of its not being supported by any reason.

75. Army Rule 62(3) and Air Force Rule 71(3). Before referring to the confirming authority under this provision, the court must have arrived at a decision as to the facts which they find to be proved, and the opinion of the confirming authority will be sought as to whether, upon the facts so found to be proved, the accused can legally be found guilty. The court cannot refer a matter to the confirming authority for any opinion regarding the facts, of which it is the sole judge. The opinion of the confirming officer should be read upon the reassembly of the court. It should also be attached to the proceedings.

76. Army Rule 62(10) and Air force Rule 71(9). The finding is announced forth with, of course subject to confirmation. If votes on finding are equal on a charge, then accused must be acquitted. see Army Rule 62(2) and Air Force Rule 71(2).
The presiding officer has no casting vote according to Army Act Section 132(4)/Air Force Act, section 131(4)/Navy Act Section 124. Voting starts with the junior most officers in succession. see Army Rule 87/Air Force Rule 94.

77. Army Rule 62(10)
For the provisions of announcement of the finding under the Navy see section 117 of the Navy Act.

C. Procedure After the Trial : If the court-martial doesnot find the accused guilty, the presiding officer shall sign the finding and the proceedings, upon being signed by the judge advocate, if any, are, thereafter submitted for confirmation[78].

When an accused is found " guilty ", the court takes evidence and records :

(a) the general character[79], age, service, rank and any recognised acts of gallantry or distinguished conduct of the accused,

(b) any previous conviction either by a court-martial or a criminal court and any previous punishment awarded to him by an officer exercising authority under sections 80, 83, 84 or 85 of the Army Act, as the case may be,

(c) Length of time the accused has been under arrest or confinement[80] on any previous sentence, and

(d) any military decoration, or military reward[81], of which he may be in possession or to which he is entitled. Evidence of these matters may be given by a witness verifying a statement which contains a summary of the entries in the regimental book respecting the accused and identifying the

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78. Army Rule 63, Air Force Rule 72 and section 118(4) of the Navy Act. There is no confirmation procedure under the Navy Act. After the finding of acquittal the court is dissolved.

79. The court will always take evidence as to the character of the accused, unless the circumstances rendered it impracticable to do so. In the latter event they will record reasons of such impracticability. Evidence on the matters referred to in Rule 64(1) should not be given by a member of the court. The court cannot take oral evidence that the accused is of bad character, they will be cross-examined by the prosecutor with a view to testing their veracity and thereby indirectly bringing out evidence of bad character. Witnesses as to character can also be called during the hearing of the case for the defence at any stage before the finding.

80. The court will also consider the length of time during which the accused has been detained awaiting trial.

81. For a definition of "military reward", see Army Act Section 3 (xiv)

accused as the person referred to in that summary. The ac-

cused may cross-examine[82] any such witness and may produce evidence in rebuttal. He finally addresses the court in mitigation of the punishment[83].

Consideration of Sentence. The table of punishments includes death, imprisonment, detention, dismissal and a few other Lesser punishments such as reprimand. If the officer is convicted and subject to imprisonment, a punishment of dismissal from service automatically results and reduction in rank in the case of Non-commissioned officer/airmen/sailors etc. Imprisonment in all cases is executed in civil jails since there are no adequate facilities in the armed forces for that purpose. Subject to statutory limitations, a court martial has absolute discretion to determine the punishments. The sentence is considered in closed court with the judge advocate present in the court. All the members, whether they had voted for the conviction or not, would be required to vote in respect of the sentence. The court is required to award a single sentence in respect of all the offences of which the accused is found guilty [84]. The sentence arrived

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82. Previous conviction of the accused may be proved by the production of a verbatim extract from the regimental book duly completed by the officer-in-charge of those books. see Army Act Section 142 (3) and (4). As the witness producing the extract from the regimental book and the statement as to it should be the adjutant or some other officer. There is no objection to the prosecutor giving such evidence. see Army Rule 56. Whoever he might be, he must be sworn in as any other witness. He may be cross-examined by the accused and questioned by the court.

83. Army Rule 64 and Air Force Rule 73. The court must record evidence of general character in order to determine the sentence, and enable confirming officer to consider the sentence. The accused is entitled to make a statement of mitigation. For the provisions of "evidence of character and previous convictions" see section 119 of the Navy Act.

84. Army Rule 65, Air Force Rule 74 and Section 120 of the Navy Act.

at is entered into the proceedings[85] and authenticated by the presiding officer and the judge advocate, if any, by affixing their signatures thereto. The proceedings are then forwarded to the convening authority for confirmation[86].

Recommendations to Mercy. The court may recommend mercy for the convict[87]. If it does so, it gives reasons thereof and the number of opinions by which the recommendation to mercy or any question relative thereto, is adopted or rejected. All that is also entered into the proceedings[88].

Announcement of Sentence. The sentence[89] together with any recommendation to mercy and the reasons therefor are announced in the open court. The sentence is announced as subject to confirmation [90]. A court-martial is empowered to make such recommenda-

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85. Sentences should be recorded in months, unless they are for one or more years exactly. Sentences consisting partly of months and partly of days should be recorded in months and days. A month means a calender month.

86. Army Rule 67 (2)

87. A recommendation to mercy is appended to the sentence. It forms part of the proceedings of the court. In view of the discretion of the court in the matter of awarding sentence, a recommendation to mercy may be made in exceptional cases only. It is usually made only when the court, though unwilling to pass a lenient sentence, takes into account special circumstances and the character of the accused and then feels that the offence should be considered a venial and that he should not suffer the full penalty commensurate with the offence.

88. Army Rule 66 (2) and Air Force Rule 75 (2). A recommendation to mercy is a matter which the court has to decide under Army Rule 87 (1)/Air Force Rule 94.

89. Punishments awardable by court-martial are mentioned in section 71, read with section 72 to 74 of the Army Act. For corresponding provisions, see section 73 read with section 74 to 76 of the Air force Act; and Section 81 read with section 82 of the Navy Act. For the form of records, see MIML

90. The sentence is announced in open court as subject to confirmation. The presiding officer/JA signs and dates the proceedings at the end of the sentence and thereafter proceedings are transmitted for confirmation.

tion, explanation or other remarks as it may deem proper. Thus, it may comment unfavourably upon the prosecutor or it may recommend that an officer or soldier compromised by the evidence be brought to trial by court-martial. It may reflect upon certain action, discipline or want of discipline developed by the testimony. While giving a mild sentence, the court-martial generally adds that it has been lenient because of certain circumstances, such as that the accused has undergone a long confinement before trial or he has rendered valuable services prior to the offence or is young or inexperienced[91]. Responsibility to give effect to the sentence lies with the convening authority.

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91. See Regulations for the Navy, Part II statutory Regulation 193. For the provisions of Announcement of the sentence, see Section 121 of the Navy Act. Under the Navy Act, after the sentence is announced, the court is dissolved and the proceedings are transmitted to the Judge Advocate General at Naval Headquarters. see section 128 of the Navy Act.
The question of sentence has been a matter of litigation :

In Ajmer Singh, etc V. UOI , AIR. 1987, SC. 1646, 1987 Cr.L.J. 1877, the Supreme Court held that the provision for set of contained in sec. 428 CrPc can never be attracted in the case of persons convicted under Army Act, Navy Act or Air Force Act and sentenced by court-martial to undergo imprisonment.

In Sohan Singh V. General Officer Commanding, 1987 (1), CLR. 380 (J&K) the Jammu and Kashmir High Court held that the period of detention undergone by the accused during investigation, inquiry or trial under the Army Act, cannot be setoff against the period of imprisonment imposed upon him on conviction by court-martial. It was further held that the provision of sections 397-A of J&K CrPC (corresponding to section 428 CrPC is not available to an Army personnel tried and sentenced under the Army Act.

In Ramani TS V. Supdt.of Prisons, Madras, 1984 Cr.L.J. 892 (Madras), the Madras High Court held that the accused is not entitled to set off of pre-conviction detention under CrPC section 428.

In Ajit Kumar V. UOI and Ram Sarup (rep by his wife) V. UOI AIR. 1988, SC. 283 held that a person convicted and sentenced by the General court-martial under the Army Act is not entitled to the benefit under section 428 of the CrPc of set off his pre-trial detention against the sentence of imprisonment. The fact that he is Lodged in the Civil prisons, would not entitle him to the benefits of section 428 just like any other convict in the jail. He may be entitled to remissions as provided in the jail manuals. The Army Act is a special enactment applicable to persons covered under section 2 thereof. It also provides special procedures for court-martial. Therefore, persons convicted and sentenced thereunder could not seek aid and of section 428 of CrPC.

In Jesuratram FR V. UOI, 1976 Cr.L.J. 65 (Delhi), the Delhi High Court held that period of pre-conviction detention cannot be set off against the period of sentence under the Act. Denial of benefit does not vitiate Arts. 14, 21 and 33 of the constitution.

(iv) REVIEW PROCEDURE UNDER THE MILITARY JUSTICE SYSTEM

The decision of the courts-martial are not appealable in the civil courts. Of course law makes an effort to provide adequate safeguards to ensure military justice. These decisions of court-martial are subject to review within the military justice system. We shall examine whether the so called "review" is at par with the review by civil judiciary.

In the Army and the Air Force, the proceedings of the DCM, GCM, and the SGCM are subject to legal scrutiny by the Deputy Judge Advocate General (DJAG) of the command concerned. Only after that these proceedings are confirmed or recommended for confirmation by the appropriate authority[1].

The proceedings requiring confirmation by the Central Government or the chief of the Army Staff are subject to legal scrutiny by the Ministry of Law or the Judge Advocate General of the Army as the case may be, before confirmation. If the proceedings disclose legal lacunas, resulting into injustice to the accused, the appropriate authority may pass such orders as considered fit[2]. If the proceedings are found illegal or unjust, the same may be annulled by the appropriate authority[3].

In the Navy[4], all trial proceedings whether by courts-martial or by disciplinary courts, are reviewed by the Judge Advocate General of the Navy either on his own motion or on application of the aggrieved person. The JAG Navy transmits the report of such review along with such recommendations as may

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1. Regulations for the Army, para, 469.

2. Army Act sections 164 and 179, Air Force Act sections 161 and 171, and Navy Act Sections 162 and 163(1).

3. Army Act Section 165, Air force Act Section 162.

4. No corresponding provisions exists in the Army and Air Force Acts.

appear just and proper to the chief of the Naval Staff for his consideration and for such action as the chief of the Naval Staff may think fit.[5]

Where the aggrieved person has made an application under Navy Act Section 161 (1), the JAG, Navy may, if the circumstances of the case so require, give him an opportunity to be heard either in person or through a legal practitioner or an officer of the Indian Navy.[6]

The procedure of affording personal hearing to the accused by the JAG, under the system of Judicial review is not available under the Army and Air Force Act, whereas the provisions relating to confirmation and revision of court-martial proceedings available under the Army and Air Force Act does not exist under the Navy Act. We shall examine the same in succeeding paragraphs. Sections 153 to 159 of the Army Act deals with confirmation of finding and sentence.[7]

The proceedings of a General Court-martial (GCM), District court-martial (DCM) and Summary General Court-martial (SGCM) are transmitted to the confirming authorities[8] for confirmation. Only after that they can be considered final and subject to

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5. Navy Act Section 160.

6. Navy Act Section 161(2). It is important to note that an order of acquittal passed under the Navy Act, 1957, cannot be set aside.

7. Corresponding provisions in Air Force are Sections 152 to 159.

8. For details regarding the authorities empowered to confirm findings and sentence of general, district and summary courts-martial, see Army Act, sections 154, 155 and 157 respectively. In Gian Chand V. Union of India, 1983, Cr.L.J. 1059 Delhi, the Delhi High Court held that convening authority can be appointed as confirming authority. Neither the act nor the rules prohibit the same authority from being appointed as convening as well as confirming authority.

revision, if any.[9] Findings or sentence of Summary court-martial (SCM) do not require any confirmation.[10] The sentence of court-martial under the Navy Act, 1957, is not subject to confirmation and takes effect immediately on pronouncement by the court-martial except in the case of a sentence of death which requires confirmation of the Central Government before execution.[11]

The findings and sentence of a court-martial under the Army and Air Force Act are interlocutory and inchoate confirmed.[12] The findings recorded by a GCM are in the nature of recommendations, which may or may not be accepted by the authorities empowered to confirm the findings and sentence. A confirming authority can remit, mitigate or commute sentence awarded by a court-martial. He has no power to enhance sentence. Further, a confirming officer cannot substitute a special finding on any charge of the court's finding ; he can only confirm or reserve

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9. At any time before promulgation, the confirming authority may cancel his minutes of confirmation and revoke the minutes, or order a revision.

10. The proceedings of SCM cannot be sent back for revision ; they do not require confirmation. Any Sentence passed by SCM should be put into execution forthwith.

11. Section 82(8) of the Navy Act. The question to provide for revision and confirmation of the findings and sentence of a naval court-martial was considered at the time of passing of the Navy Act, 1957. It was agreed that there was no adequate reason to provide for confirmation since the existing naval procedure gave power to the convening authority or the senior officer present not to put a sentence into effect, should he doubt its legality and provision empowering the Central Government or the Chief of the Naval Staff to reduce or remit the sentences. so far as acquittals are concerned, these are final under the Navy Act.

12. In Ashok Kumar Rana, Capt V. Union of India, Cr.L.J. NOC. 120 (Delhi), the Delhi High Court held that the findings and sentence being inchoate unless confirmed. Writ petitions challenging the same were considered to be a premature act and the High Court did not entertain the petition. The same view has been reiterated by Madras High Court in Brig AK Malhotra V. Union of India ; WP NO. 628 of 1991 (unreported). See also section 153 of the Army Act and section 152, of the Air Force Act.

confirmation for superior authority or he can send back for revision, or refuse to confirm. In the eventuality of non-confirmation of the proceedings, the accused could be retried on the charges. The different High Courts of the country have held that since there is no specific provision in the Army Act for a retrial, the confirming officer cannot go on ordering retrial ad-infinitum till he gets a finding of his liking[13].

On conclusion of the trial, the proceedings are delivered by the Judge Advocate to the DJAG command who carries out the legal scrutiny of the proceedings and issues a report on trial (post trial advise) to the confirming authority. In this report the DJAG command shall advice :

(a) Confirmation of the findings and sentence,

(b) Revision of the findings or sentence or both, or

(c) Non-confirmation of the proceedings.

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13. (a) See G.B.Sing, Sqn Ldr V. Union of India, 1973 , Cr.L.J. 485 (Allahabad)

(b) Manohar Lal V. Union of India, 1971, 1 Serv. L.R. 717 Punjab and Haryana High Court.

(c) Subedar Surat Singh V. Chief Engineer, Protect (Beacon) AIR. 1970, J & K 179, Jammu and Kashmir High Court.

If the findings are sent back for revision[14], the court has to reassemble[15] in open court[16].

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14. Section 160 of the Army Act and section 159 of the Air Force Act.

15. A court cannot be reassembled more than once for revision, whether of finding or of sentence. Section 160 of the Army Act is silent as to the powers of the confirming authority, as to what it can order, if it is dissatisfied with the finding of the GCM which is sent for revision under the provisions of section 160 (1) of the Army Act. Obviously, the power of revision can be exercised only once. In Dharam Pal Kukrety V. COAS 1978, SLJ, 266 (All), Allahabad High Court held that "The Army Act does not contemplate successive trials by a court-martial till a verdict acceptable to the confirming authority is received. Section 121 of the Army Act prohibit a second trial by a court-martial for the same offence. Section 160(1) of the Army Act is in the nature of an exception to the law laid down by section 121 of the Army Act and must be restricted to the actual language employed in the section. The net result is that if there is a second verdict by a court-martial, consequent to a direction by the confirming authority for revision of the earlier verdict, the confirming authority has no option but to confirm the verdict." However, the supreme court subsequently overruled the decision of the Allahabad High Court and in COAS V. D.P. Kukrety, AIR. 1985, SC. 703, the Supreme Court held that after 'non-confirmation' of finding of 'not guilty' on revision, it was open to the Central Government or Chief of the Army Staff (COAS) to have recourse to Army Rule 14 and issue show cause notice for termination of service on the ground that it was inexpedient or impracticable to bring the respondent to trial by a court-martial.
In Harish Uppal, Capt V. Union of India, 1973, Cr.L.J., 274 the Supreme Court has held that the Law does not require the confirming authority to give hearing to the petitioner (accused) either before ordering revision under Army Act Section 160 (1) or before confirming the revised sentence.

16. The court should be re-assembled as soon as practicable. If the court upon re-assembling is reduced by death or otherwise, below the legal minimum (vide Army Act Section 160 (3)), it cannot proceed with revision and the proceedings must be returned to the confirming authority. in such a case, as no revision has taken, the original finding and sentences will stand and will be dealt with by the confirming authority.

The revision order[17] is read out in the open court and if the court is directed to take fresh evidence[18] such evidence are taken there. The court then deliberates on its findings in closed session. If it does not adhere to its earlier finding's, it may revoke them and the related sentence[19] and record new findings.[20]

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17. (a) In a number cases, it has been held that observations in revision orders should be precise and to the point without directing or influencing the court to arrive at a particular finding. There should not be unwarranted observations. Undisguised opinions on merits of the case should be restrained. Apart from language the nature of evidence should not be discussed. see Avtar Singh Nb. Sub. V. UOI, 1989, Cr.L.J. 1986 and Maj V.K. Sood V. UOI, CR No. 1351/86 of Gauhati High court (unreported)

(b) An order under Army Act Section 160 is an application for revision by the confirming authority. The statute casts a duty on the court-martial to reconsider its earlier finding or sentence, but the court-martial is not obliged to change its earlier view. see Gian Chand V. UOI, 1983 Cr.L.J. 1059 Delhi,8.

18. The evidence referred to in Army Rule 68 (1) is evidence of the facts relating to the charge, and must not be taken on revision unless specifically ordered. see Army Act, Section 160(1). If a court brings in a finding of " Not guilty" against the weight of the evidence the court may be re-assembled and the confirming officer may give his views of the evidence directing the attention of the court to any special point which it appears to have failed to appreciate. A finding of insanity may also be sent back for revision.

19. In Capt Harish Uppal, n.15, a question arose as to whether sentence could be enhanced if it was sent for the revision. The court held that when a sentence is directed to be revised by the confirming authority, it necessarily means that the confirming authority considers that the punishment awarded by the court-martial is not commensurate with the offence and it should therefore be revised upwards. To object to this is to object to the provisions of Section 158 itself.

20. If the revised finding is that of an acquittal or a finding of insanity, no sentence is involved. If a court on revision revokes, their original finding on any charge, the original sentence will automatically fall to the ground and if the revised finding entails, a sentence, the court must pass the sentence afresh. If the courts omits to do so, the accused is not legally under any sentence and the confirming officer may return the proceedings with direction to the court to complete the revision and pass sentence. This will not be a second revision which is prohibited by Army Act, Section 160 (1), which provides for one revision only.

If such new findings involve a sentence, then the court may pass sentence afresh. Where the sentence alone is sent back for revision, the court is not empowered to revise the findings. After the revision, they are transmitted for confirmation.[21] The object of revision is generally to cure the facts in the finding or sentence, or both. The confirming officer[22], however, by partial confirmation or by exercising his power under Army Rule 72(I) or Army Rule 73 can often correct mistakes made by the court, and thus obviate the inconvenience of re-assembling the court for revision. A confirming officer cannot sent back part of a finding or sentence; if he thinks that a part only requires revision, he must always return the whole, pointing out the part which in his opinion, requires revision.

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21. Rule 68 of the Army Rules. In Gian Chand, n.8, the Delhi High Court held that the power under Act Section 160 (Revision) has to be exercised before confirmation of finding and sentence. In case there is a pre-confirmation petition under Army Act Section 164 (1), the occasion to consider such a petition will arise only after the court-martial has reconsidered the matter. Otherwise, there would not be an occasion for confirming authority to exercise its power under Army Act Section 160.

22. The confirmation of the court-martial proceedings ought to be withheld in the following cases :

(a) where the provisions of the Army Act relating to jurisdiction have been contravened. See Army Act Sections 109 to 115, 118, 119 and 128 to 132.

(b) where evidence of a nature prejudicial to the accused has been wrongly admitted.

(c) where the accused has been unduly restricted in his defence.

(d) where a special finding of 'guilty' fails to disclose an offence of which the accused could have been legally convicted by the court.

(e) where the charge is bad in law, even through the accused has pleaded 'guilty'.

(f) where there has been such a deviation from the Army Rule that injustice has been done to the accused.

The proceedings of the GCM are submitted by the judge-advocate at the trial for review to the office of the judge-advocate general branch at command level who are duty bound to forward the same to the confirming officer.

The proceedings of the DCM are sent by the presiding officer or the Judge Advocate directly to the confirming officer. In all cases where the sentence amounts to dismissal or higher punishment of the accused, the confirming officer takes advice of the deputy or assistant judge advocate general of the command before confirmation or reservation of confirmation for superior authority. The confirmation, non-confirmation or reservation are entered into and form part of the proceedings.[23] The charges, findings and sentence, as well as any recommendation to mercy, together with the confirmation or non confirmation of the proceedings, are promulgated in such a manner as the confirming authority may direct. If no direction is given, the promulgation is done according to the custom of the service.[24] Until promulgation, confirmation is not complete. In other words findings and sentence are not deemed confirmed until their promulgation[25]. Any time before the promulgation, the confirming authority may cancel his minutes of confirmation and may also revoke the minutes and order a revision in terms of section 160 of the Army Act and Army Rule 68..ls1

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23. Army Rule 70.

24. In the absence of any direction by the confirming authority, the usual custom of the service as to promulgation will be followed. But a written notice to the offender of charge, etc, will be sufficient promulgation under this rule.

25. Army Rule 71.

If the proceedings are confirmed by an officer without having powers to do so, his act and the subsequent promulgation are null and void. Indeed it is open to the proper authority to confirm the same later on[26].

The court martial proceedings, together with the confirmation and promulgation minutes, are transmitted without delay to the JAG in the Army Headquarters through the DJAG of the command concerned. After promulgation, the power of the confirming officer in that capacity ceases. The power to mitigate, remit or commute sentence can only be exercised by one of the authorities mentioned in Army Act section 179[27]. Under Army Act section 183, a confirming officer may also direct that an offender sentenced to life imprisonment be not committed to jail until the orders of the authority/officer specified in Army Act section 182[28] are obtained. If he himself is an authority under Army Act section 182, he has further powers under that section.

There is a provision under the Army Rules for mitigation of sentence on partial confirmation. In cases where a sentence has been awarded by a court-martial in respect of several charges and

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26. A member of court-martial, or an officer who has acted as a prosecutor at a court-martial, shall not confirm the finding or sentence of that court-martial, and where such member or prosecutor becomes the confirming officer on the case, he shall refer the finding and sentence of the court-martial to a superior authority competent to confirm the findings and sentences of the like description of court-martial.

27. Following authorities are mentioned in Army Act Section 179 : The Central Government or the Chief of the Army Staff, the officer commanding the army, army corps, division or independent brigade. The corresponding provision in the Air Force is section 177.

28. The corresponding section in the Air Force is section 180.

the confirming authority has confirmed the findings on some but not all of such charges, then that authority will take into consideration the fact of such non-confirmation. If it was considered just, he may mitigate, remit, or commute[29] the punishment. Further in cases where a sentence has been awarded by a court-martial in respect of several charges and that sentence has been confirmed, but when anyone of such charges or the findings whereon is found to be invalid, then the officer[30] having power to mitigate, remit, or commute the punishment will take into consideration the fact of such invalidity. If he considered it just, he may mitigate, remit or commute the punishment.

In this connection he will take into account of the offences in the charges which with the findings thereon are not invalid. The punishment, as modified, shall be valid[31] as if it had been originally awarded only in respect of those offences. Where the sentence of a court-martial is informally pronounced, the confirming authority may vary the form so that it could be properly expressed. If the punishment is in excess of the one authorised by the law, the confirming authority may vary the sentence, so that the sentence shall not be in excess of the punishment

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29. As to the meaning of mitigation, remission and commutation, see Army Act, Section 158, Air Force Act Section 157.

30. The prescribed authority derives the ordinary powers of mitigation, etc, from Army Act, section, 179-181. (Corresponding provisions under the Air Force Act are sections 177 to 179.

31. As to the substitution of a valid sentence for an invalid one, see Army Act Section 163 and Air Force Act, Section 160.

authorised by law ; and the confirming authority may confirm the findings and the revised sentence of the court-martial[32].

Critical Appraisal of confirmation procedure under the Army and Air Force Act. The law relating to confirmation is more in the nature of administrative discharge rather than a judicial function. The officer who discharges the function of confirmation of court-martial proceedings under the Army and the Air Force Act, though independent of the members of the court, he is the military hierarchy by whom the court has been originally convened and he is a non-judicial authority. The power to discharge the function of confirmation is totally left to the discretion of a person which lacks legal expertise. As a result several problems in the process of confirmation exists [33] : First, at the stage of confirmation, the accused cannot pointout any illegality or irregularity committed during the trial. Unlike judicial review in the Navy, no personal hearing is given to the accused in the Army and Air Force even for heavy punishments. Even if the accused represents, is challenging a fait accompli. This tantamounts to a denial of due process. Additionally, there is no provision for any speaking order in the process of

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32. The object of the Army Rule 73 is to prevent the proceedings of court-martial from being rendered invalid when they cannot be sent back for revision without great inconvenience to the public service. It will not exonerate the accused from blame. If the confirming officer decides to act under this rule, instead of ordering a revision of the sentence, he should call the attention of the members of the court to the informality or irregularity of the sentence. Under this rule, the confirming officer cannot vary an illegal sentence, eg, a sentence of imprisonment awarded by a DCM to a warrant officer, a sentence of reduction to the ranks awarded to a Lance-naik or a sentence of 'confinement to the Lines' awarded to a soldier. In such cases, the court must be re-assembled for the purpose of passing a valid sentence.

33. In Col. P.P.S. Bedi and others V. Union of India, AIR. 1982, SC. 1413, 1983 Cr.L.J. 647, it was held by the supreme court that in respect of punishment under Army Act, no appeal or review is provided which is a serious Lacuna. Confirmation proceedings under Section 153 of the Army Act is not sufficient.

confirmation. The recommendations/advice of the Judge Advocate General's department to the confirming authority in the process of confirmation also create problem. Each service has a selected cadre of legally-qualified officers, who carryout pre-trial scrutiny of the cases for the guidance of the convening authorities. They act as trial judge advocate at the trials by court-martial. They advice the courts on legal aspects of the conduct of trials. They also carry out post-trial scrutiny of the cases for the benefit of the confirming authority. Unlike many countries, Judge Advocate General departments in India at the command level is a small organisation without division of labour in functional terms such as the "pretrial section", "Post trial section", etc. The work of both the pre-trial and post-trial advice is supervised by one Judge Advocate stationed in the command. He prepares reviews of all court-martial proceedings for the convening authority. He also renders legal opinions and deals with petitions arising out of court-martial trials, Probably for these reasons, the system of review of findings and sentence of a court-martial does not command the same amount of confidence as a review by an independent body.

Limitations are intrinsic in the nature of the process in which the confirmation pronouncement take place. They are grounded on the fundamental and commonly accepted norms of jurisprudence. For example, it is the function of the confirming authority to ascertain and apply the proper law applicable to the facts of each case coming before it and also to interpret it before confirming the proceedings. However, being a non judicial mind, how far he can make the proper law applicable to the fact remains questionable. Further, it is difficult to convince

that an authority who convenes a court-martial, selects its members and also has direct command over court members, shall carry out the function of confirmation without bias. Under such circumstances, the convening authority could be categorised as an interested party and, as such, should not be given the responsibility to carry out the confirmation process. A system of justice administered by one of the interested parties is always questionable and is inherently unfair.

Critics say that confirmation proceedings under section 153 of the Army Act are not judicious. Often justice is sacrificed at the after of military discipline.

In referring a case to trial, the convening authority finds a probable cause to believe that the accused has committed an offence. Simultaneously, in post-trial action, the same officer confirms the findings and sentence by convincing himself that the guilt of the accused has been proved. If he is not convinced, he sends back the case for revision. Therefore, consistency requires that once the court-martial is convened by an authority, he should be kept away from all further participation in the case. The deterrent, corrective and rehabilitative benefits of punishment are all too often diluted by such a system which doesnot appear to be fair and just.

In order to improve the efficacy of the system, it is recommended that an independent agency be established to review confirmed court-martial proceedings. Until the establishment of that body, two arrangements may be made. First, there should be a provision for judicial review under the Army Act and the Air Force Act, Second an Armed Services Board of Review should be constituted. It should consist of one legal officer from each service. The Board may review such proceedings as may be referred to it by the respective services Judge Advocates General.

Or, the Board may grant review in appropriate cases at the request of the accused when the finding involve an error of law or when material irregularity are discovered in the proceedings of the trial resulting in a miscarriage of justice. Such Board would not only provide double scrutiny of the proceedings, but would also reinforce the confidence of a servicemen in the fairness of the system.

Judicial Review under the Navy Act. All court-martial proceedings are statutorily reviewed by the Judge Advocate General in the Navy either on his own or on application made to him within the prescribed time[34] by any person aggrieved by the finding or sentence of the court-martial. The Judge Advocate General may give the convicted person an opportunity of being heard in person or through an advocate or an officer of the Indian Navy[35]. After carrying out the judicial review, the Judge Advocate General forwards a report to the Chief of the Naval Staff. On review, the Central Government or the Chief of the Naval Staff after taking into consideration of the recommendation by JAG, takes decision and accordingly the same is

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34. The prescribed time is twenty days.

35. See section 160 of the Navy Act, 1957.

The Army Act and the Air Force Act do not provide for statutory judicial review of court-martial proceedings by the Judge Advocate general of the Army and Air Force respectively. Although, before confirmation, all proceedings of court-martial are reviewed by an officer of the JAG's Department of Army and Air Force, there is no provision in the Army Act and the Air Force Act to give an opportunity to the aggrieved person of being heard in person or through a legal practitioner.

informed to the convicted person[36]. It is not essential that the judicial review is to be carried out only if a convicted person make an application for Judicial review. The JAG (NAVY) is empowered to undertake such exercise suo-moto also. Infact, it is mandatory to carry out judicial review of all proceedings of trials by court-martial or by disciplinary court under the Navy Act 1957. The JAG must make an initial review of every record of trial by court-martial. He cannot go outside the record for evidence of guilt. Further he cannot recommend to alter a finding of not guilty or increase any sentence. On the recommendations of JAG, the CNS and the Central Government has the power to approve only such findings of guilt and so much of the sentence as they find it to be correct in law and fact. They may decrease or suspend a sentence other than a death sentence, or dismiss the changes. It is impossible for an accused to suffer detriment because of action taken by the JAG under the judicial review power. The JAG, Navy, performs an important function in the operation of the system of judicial review.

Appraisal :` Some criticisms have been made against judicial review in the Navy, for it does not seem to be just and reasonable. Often it is pointed out that judicial review is a limited

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36. (i) According to Section 161 (1) of the Navy Act, on receipt of the report and recommendations, if any, the Chief of the Naval Staff must, in all cases of capital sentence and in all cases where the court-martial is ordered by the president, and may, in other cases, transmit the proceedings and the report to the Central Government together with such recommendations as he may deem fit to make.
(ii) An order of acquittal passed under the Navy Act cannot be set aside. The finding of 'not guilty' is final. It can never be revised or set aside by any authority whatsoever.

concept. Critics point out that it is not an adequate substitute for a regular appeal. The power of reviewing authority is confined to making of a report with recommendations. The final decision even after the judicial review rests with a non-judicial authority. The power of a judicial review has been brought into its present prominence mainly by the interpretative efforts of officials connected to it, in order to safeguard the basic rights of Naval personnel against legislative violations and executive encroachments with due process of law. Inspite of being a valuable safeguard to provide a forum for relief to the aggrieved persons, judicial review cannot be equated with a regular appeal.

Further judicial review takes time. Till the proceedings of the trial are compiled, the review cannot take place. Ironically, the compilation takes long time. It is a lengthy process. By the time it is completed, the purpose is defeated. For example, in the post-trial confinement, a relief in the form of review has been considered by many to be inadequate. In such cases, a situation arises when a convicted sailor or an officer wants his sentence to be deferred pending review, and the convening authority decides that the individual should be confined while awaiting review. Not only is the serviceman being incarcerated during the review, but once the case is reviewed, there is literally no remedy for illegal confinement. The confinement issue becomes moot. The review, under the circumstances, is said to be carried out only for the abuse of discretion which does not serve any purpose to the accused. In addition, the final outcome of the judicial review comes out from a non-independent executive authority which poses a problem of delineation between executive power and judicial authority. For the

effective functioning of the system, it is essential that a correct and precise line be drawn between the two. That will help to avoid the extreme consequences of either judicial repudiation of executive tiat or executive transgression of judicial decision. The main question is not whether there should be judicial review under the Act, but to see how effective it should be to fulfill its purpose.

SUMMATION : It is clear from the foregoing discussion that the existing provisions of confirmation and judicial review in all the three services in India are inadequate and they are a poor substitute for a regular appeal. Further, there is no right of appeal[37] to an appellate court, although certain powers, analogous to appellate powers vested in the superior civil courts, have been specified which may be exercised by the Central Government, the Chief of the Army Staff or other prescribed officers. The right of appeal, as a rule, can be conferred by statute only. Therefore, unless the respective legislation provide for such right, no appeal would lie against the decision of a court-martial.

The constitution of India expressly excludes the power of the Supreme Court to grant leave to appeal from any judgement, decree or determination, sentence or order, in any cause or matter, made by a tribunal constituted by or under any law relating to the Armed Forces. Similarly, the High Courts have also

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37. In England there was no right of appeal to any court (Civil or military) against the decision of a court-martial. The law has, however been changed by the court martial (Appeal) Act 1951. In the United States also the Uniform Code of Military Justice set up the court of Military Appeals which started functioning wef 25 July 1951.

been precluded from exercising any powers of superintendence over any court or tribunal constituted by or under any law relating armed forces. Notwithstanding these exclusions and despite the absence of a right of appeal, military tribunals are subject to the control or supervision of the superior civil courts to a limited extent. The proceedings in which such control and supervision are exercised in the form of civil proceedings are either preventive in character, ie, restraining the commission or the continuance of an injury, or they are remedial in nature, ie, affording remedy for an injury actually inflicted. Broadly, the civil jurisdiction is exercised against a court-martial in application of "prerogative writs in actions for damages."

(v) COMPARATIVE ASSESSMENT

The Army and the Air Force Acts were passed almost simultaneously by the parliament in 1950. Generally, they are on similar lines except with regard to summary court-martial. The Navy Act was passed seven years after the two Acts. It has many progressive provisions which are missing in other two Acts. Ironically, in the absence of a uniform code for the three services[1], one question is raised as to why the progressive features of the Navy Act could not be incorporated into the other two Acts when the basic role of the three services is the same. It would be worthwhile to examine the salient points of difference between the three Acts in respect of the court-martial procedure. These are discussed in succeeding paras.

1. Whereas the Navy Act has made statutory provisions for the main steps of the court-martial procedure, the Army and Air Force Acts, have left that to the Rules.

2. For the purpose of pre-trial procedure, the Navy Act expressly mention the officer who can issue a warrant for the arrest of an accused. But there is no provision for issuing warrant of arrest under the Army Act. An officer can be taken into custody by the order of any superior officer.

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1. At the time of introduction of the Navy Act, Late Pandit Jawahar Lal Nehru, the then Prime Minister of India, had remarked that the progressive provisions of the Navy Act should be incorporated into the Acts of the other two services. Consequently, a committee was constituted for drafting a unified code for the three services. However, the draft produced by the committee over a period of one decade was not accepted by the Government of India.

3. Under the Army Act, there are four type of court-martial, viz, GCM, SGCM, DCM and SCM. The Air Force Act provides for three types of courts-martial, viz, GCM, SGCM, and DCM and SCM. Whereas the Navy Act envisages only one court-martial known as court-martial. This court can be generally compared with GCM of the Army and Air Force. In addition to "Court martial", the Navy Act provides for a "Disciplinary Court".

4. In the Army and Air Force, summary of evidence against an accused is required to be recorded in his presence during the pretrial procedure. In the Navy, an accused does not have that opportunity and he cannot cross-examine the witness.

5. Under the Army Act, the Commanding Officer is competent to conduct summary court martial of persons under his command (except officers, JCOs and Warrant Officers). He can award imprisonment upto one year, if he is of the rank of Lt.Col. and above, and upto three months, if he is below such rank. Under the Air Force Act, Commanding Officer has no power to conduct summary court-martial. There is no concept of summary court-martial in the Navy. The trial by summary court-martial[2] does not come upto the recognized standards of justice because there is

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2. When the Navy Act, was being piloted through the Parliament, there was a suggestion that instead of Liberalizing the Law, a provision should be made for summary court-martial. V.K. Krishna Menon, then Defence Minister, rejected this suggestion by saying that it was neither helpful nor desirable for a civilized society like ours, to have summary trials. [Speech made by V.K. Krishna Menon, Minister of Defence in Rajya Sabha on 14 August 1957; Cyclostyled Debate, P.288 (Unpublished)].

no prosecutor and some of the functions of the prosecutor are performed by the court itself. The accused is not entitled to defend himself by a counsel or a defending officer.

6. Under the Navy Act, the majority of the members of the court-martial, including the President, has to be officers of the executive branch of the Naval service, whereas there is no such restriction under the Army and Air Force Acts.

7. Under the Army and Air Force Acts, the SGM and the DCM may or maynot be attended by Judge Advocate. As a result, these court-martial have often to sit without the assistance of a Judge-advocate even though a SGCM is held only in time of war and a DCM has limited powers of trial and punishment. Under the Navy Act, every court-martial has to be attended by a person who shall be either Judge Advocate in the department of JAG of the Navy or any competent person appointed by the convening officer. Therefore even a civilian can be appointed as Trial Judge Advocate in the Navy.

8. The qualifications and duties of the Judge Advocate General (Navy) and the officers of his department are specifically enumerated in chapter 28 of the Navy Act. In the Army and Air Force, the qualifications and the duties of the Judge Advocate General are not specified in the Acts. The office of the JAG is not statutory in these two services.

9. Under the Army and Air Force Acts, a Judge Advocate acts as an adviser to the court on questions of facts as well as Law. He has no authority to decide even intricate questions of Law. Questions of Law under the Army Act are decided by the court-martial. Under the Navy Act, on the other hand, the judge advocate alone decides questions of Law arising in the course of trial, questions as to the relevancy of facts, the admissibility

of evidence, and the propriety of the questions asked by or on behalf of the parties. In addition, the trial judge advocate in the Navy performs numerous other duties. Some of which are not being performed by the Judge advocate of the Army or the Air Force.

10. Unlike the Navy Act, the Army and Air Force Acts, provide that the trial judge-advocate shall be present when the court deliberates on the findings.

11. Under the Navy Act, whenever the trial judge-advocate feels that arguments and evidence concerning the admissibility of evidence or arguments in support of an application for separate trials or on any other points of law should not be heard in the presence of the court, he may advice the president of the court accordingly. The president of the court shall make an order for the court to retire or direct the trial judge-advocate to hear the arguments at some other convenient place. Such powers are not existing in the Army or in the Air Force.

12. Under the Navy Act, all proceedings of trials by court-martial or disciplinary court are reviewed by the JAG Navy. He does so either on his own motion or on the application of any person aggrieved by any sentence or finding. There is no provision in the Army and Air Force Acts to give an opportunity to the aggrieved person. The system of review of the findings and sentence of a court-martial by the convening officer or superior officer in the Army and Air Force Acts does not command the same confidence as a review by an independent body would. Another draw-back of this system is that review proceedings are not held without delay.

13. Unlike the Army Act, the Navy Act defines important offences, viz mutiny, desertion and drunkenness.

14. There are different scales of punishment for similar types of offences in three services. Based on the recommendations of Sir Arthur Trevor Harries, the Chief Justice in 1953, the chief of staff of the three services had agreed on a common scale of punishment incorporated in the Navy Act. However , the present position is that the punishments prescribed in the Navy for offences such as " desertion", "striking Superior officer", "disobedience," "falsification of documents" and absence without leave are comparatively lenient than those prescribed in the Army and Air Force.

15. A Naval Court-martial is empowered to punish for a contempt of court, but no such provision exist under the Army and Air Force Acts.

16. Powers of Court-martial when certain offences are committed by persons not subject to Naval law, when any such offence as is described in sec 165 of this Act, or sec. 193, sec. 194, sec. 195, sec. 199, sec. 200, sec. 228, sec. 463 or sec. 471 of the Indian Penal Code is committed by any person not subject to Naval Law in or in relation to a proceeding before a court-martial, such court-martial or the officer ordering the same if such court-martial is dissolved, may exercise the powers under section 340 of the code of Criminal Procedure, 1973 as if it or he were a criminal court within the meaning of that section. Army and Air Force courts-martial cannot take cognizance of offences against civilians but Naval Courts-martial can do.

17. Under the Army Act, the findings and sentence of court-martial, except those of summary court-martial, are not valid till the same are confirmed by the confirming authority. Under the Navy Act, the finding of 'Not guilty' is final.

18. Under the Army Act and Air Force Act, the finding and sentence of court-martial, except those of summary court-martial, can be revised once by the order of the confirming officer. Under the Navy Act, there is no provision for revision of finding or sentence. At the conclusion of the trial, the court-martial is dissolved and it can in no circumstances be reassembled to modify its verdict.

19. In the Navy Act, the finding and sentence are required to be signed by all the members of the court and countersigned by the trial judge advocate. Under the Army and Air Force Acts, only the presiding officer and the judge advocate are required to sign the last page of the proceedings, i.e. findings in case of finding of "Not Guilty", otherwise the sentence.

20. After the prosecution has closed the case, the accused (whether or not he called any defence witness) could make an oral or written statement on the charges against him. No oath is administered to the accused. Under the Army and Air Force rules, the court or the judge-advocate, if any, may question the accused for the purpose of enabling him to explain any circumstances appearing in his statement or in the evidence against him. Of course, the accused may refuse to answer those questions. There is no such questioning takes place under the Naval Law.

21. Under the Army and Air Force rules, an accused can offer a plea in bar of the trial on certain grounds. There is no such provision under the Navy Act.

22. It is obligatory on the part of the president of the Naval Court-martial to report and inform of the finding and sentence to the convening authority as soon as the court is dissolved. There is no corresponding provision under the Army and Air Force rules

or regulations.

23. The Army and the Air Force have a procedure for promulgation of the finding and sentence and recommendation to mercy, if any, together with the confirmation or non-confirmation of the proceedings. But the Navy does not.

24. Provisions relating to pardons, remissions and suspension of sentences in the Army and Air Force are almost similar to these in the Navy, except that the latter are broad based and exhaustive.

25. The summary powers of punishment of a commanding officer under the Navy Act are more extensive than under the Army Act. He can award upto three months imprisonment or detention to a sailor subject to the approval by the administrative authority. Under the Army Act, his powers of punishment in relation to persons other than the commissioned officers, are restricted to twenty eight days imprisonment in military custody or detention. Under the Air Force Act, the commanding officer is not authorised to award any imprisonment.

It is evident from the above that the provisions of the Army and Air Force are by and large identical, whereas those of the Navy have large areas of variation.

(vi) APPRAISAL OF THE COURT-MARTIAL SYSTEM

For quite some time, Indian military justice has been the target of a rolling barrage of criticism. The quality of that criticism has ranged from the informed and often reasonable, such as the articles of renowned Professors, to the ignorant and often retired military personnel and few other cantankerous critics in the form of High Courts and Supreme Courts judgements whose point of view have been warped by their having some actual knowledge of the subject.

How far these critics are correct is worth examining.

As noted earlier, the judicial process followed by the armed forces has many features of the code of criminal procedure and the advantage of speedy justice. Evidence given before a court-martial is governed by the Indian Evidence Act. However, the system of court-martial today is not consistent with many recognised principles of justice when compared with the military justice system of some of the developed countries and even some developing countries.

The court-martial system in India is the legacy of the English legal system. Few steps have been taken to modernise it whereas the British military justice system has completely changed over the years. We have not incorporated many progressive features of criminal law which have evolved during the last four decades. While the Law Commission of India, in its 125 report, examined in detail the problems confronting our judiciary, nothing worthwhile has been done to correct the centuries-old judicial system in our armed forces. In England, an independent judiciary, ie, Court-Martial Appellate Court, has been established but no such attempt has been made in India despite

obiter dictum by the Supreme Court in Lt. Col. P.P.S. Bedi case.[1] In any progressive system of administration of Justice, the right to appeal is recognised in order to meet a perverse decision based on error either of fact or law. There must be means by which a convict can test, outside the military legal system, the legality of a division against him. He does not have those means in India except for the writ of "certiorari", "prohibition", "mandamus", or "habeas corpus". Under the writ jurisdiction, however, the civil courts (High Courts and the Supreme Court have a very limited jurisdiction. The constitution of India clearly spells out that the High Courts do not have power of superintendence over court-martial (Article 227(4) of the constitution). The position is different in other countries. In England, for instance, the armed forces personnel are much better placed insofar as fundamental rights and personal liberty are concerned. For example, the Appellate court is presided over by a High Court judge and a military man can directly appeal to the House of commons if he feels that he has been wronged. The United States too have similar facilities. The Judge advocate General Department in the US as well as in England are free from the control of Army.

Thus there have been reforms in the military justice systems in many countries but not in India. The following lacunas remain in the Indian court-martial system:

1. An armed forces personnel, if arrested[2] by armed forces

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1. AIR. 1982, Delhi 191
2. The word "arrest" means apprehension or restraint or the deprivation of one's personal liberty partially or fully. In service parlance, an arrest whether open or close, amounts to military custody. In legal sense, arrest implies in taking into custody of person under authority empowered by law for the purpose of holding or detaining him to answer a charge. The words "custody" and "arrest" are not synonymous. In every arrest there is custody, but the vice versa is not true. A custody may amount to arrest in certain cases but not in all.

authorities, has no right to apply for bail to any court.

2. An accused awaiting trial while in close custody, cannot be kept more than 90 days[3] without proper sanction of the Central Government. But there have been instances of great delay in convening court-martial. This tantamounts to a denial of accused person's right to a speedy trial. In addition he loses all pay while under close arrest awaiting trial which results in conviction[4]. Longer the arrest, greater the loss of his pay.

3. The President and other members of the court-martial are required to deliberate on both facts and law. They are neither legally qualified nor trained in the administration of justice. They are simply trained as a soldier.

4. The court-martial is akin to a jury trial, but with a difference, It is the judge of a fact and law, and it decides on sentence, It can disregard the judge-advocate's advice on the applicable law. Strange situations might arise in interlocutory matters. A submission of no case to answer at the close of the prosecution case is not made to the judge advocate in the absence of the court - it is made to the court who are jury, and they can disregard thejudge advocate's advice on the law may be faultless.

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3. If custody beyond a period of 60/90 days is considered necessary, steps should be taken to obtain the sanction well in advance. An accused should not be kept in prolonged custody in anticipation of a sanctions. Detaining an accused in custody beyond 60 or 90 days without sanction, makes such detention illegal and ex.post facto sanction would not render such detention legal.
In Hussainara Khatoon and others V. State of Bihar, AIR., 1979, SC. 1369, the Supreme Court stressed the need for speedy trial and held that pre-trial detention of persons for period longer than what they would have been sentenced if convicted is illegal, being in violation of Article 21 of the constitution. The court added that the state cannot avoid its constitutional obligation to provide speedy trial to an accused by pleading financial or administrative inability.

4. Section 90(b) and 91(b) of the Army Act ; section 91 of the Air Force Act ; and section 28 of the Navy Act.

It may be that there was no case to answer and yet the court-jury may hold that there was, and convict the accused. Suppose an evidence of a confession is tendered against the accused and he challenges its admission because it was not made voluntarily. In the Army, the examination on the voirdire takes place in the presence of the court. If the accused is asked by the prosecuting officer, "alright but is the confession true?" and he answers "Yes", it is extremely unlikely that the court will be inclined to acquit the accused even if it excludes the confession as not being voluntary.

5. Military justice system has no body of case law to rely upon. It establishes no precedent.[5].

6. A District Court-martial in Army or Air Force often lack the assistance of a legal expert. In addition, it often produces complicated legal proceedings wherein complex legal problems of admissibility of evidence and interpretation of laws and regulations always arise. Clearly, the absence of a Judge advocate is felt there.

7. There is no prosecutor at the summary court-martial and some of the functions of the prosecutor are performed by the court itself. Also the accused is not entitled to defend himself by counsel or by a defending officer. Moreover a summary court-martial is not strictly governed by the rules of evidence.

8. In a court-martial, generally the President and the members of the court expect a judge advocate to sum up atleast as competently as a session judge. But the problem is that while a civil judge has many years of experience, judge advocate usually

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5. JAG Griffith, Justice and the Army, 10 MLR, 297 (1947)

has little or no experience of that kind. Judges and barristers in the civil have continuity of work, but judge advocates do not. Judge advocates do not control a court as a civil judge. They are often junior in rank to the President and sometimes to the Prosecutor. In many cases the judge advocate's summing up has been successfully attacked, and this can be expected to continue.

9. The members of the court-martial appear to act as both judges and jury. Yet they are unlike a jury because in a majority of cases a finding of guilty is `possible without unanimity'. Often the seniority gap is so wide between one member and another that it is difficult to believe that they can work as competent jury which a court-martial in reality is.

10. In civil courts, there is well known axiom that it is better for nine guilty men to go free than to make one innocent man suffer. In the court-martial the reverse is considered desirable. As JAG Griffith said "The military court is not interested in axioms, it is not interested in justice; it is vitally interested in the effect of acquittals on other members of its community"[6]. The system seems to believe deterrent theory of punishment.

11. The Judge-advocate performs duties of conflicting nature in the military justice system. He is a staff officer, a legal adviser to the convening authority, etc. In pretrial matters, he examines the summary of evidence, finalises the charges, advises the prosecutor and writes reports on applications for trial and also acts as a trial judge advocate. The officers of the JAG's department later advises the convening authority on confirmation

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6. Supra n.5

and review of the court-martial proceedings. In order to make it sure that justice is not only done but is also seen to be done, these duties should cease to be combined in one office. The Pre-trial duties should be carried out by a separate and different department.

12. The President and members of the court-martial are not independent persons. They come under the command control of the convening officer. The said officer also selects the prosecutor and the Judge-advocate for the purpose of conducting a trial. They all are subject to the full command of the officers who appoints them, and their service careers are in his hands. In the name of Commander's responsibility for good order and discipline, there are possibilities of commander exercising unnecessary influence under the existing system.

13. The Commander has a duty to find out the specifications of the alleged offence and that there is a prima-facie evidence to support the charges against the accused. These determinations involve legal principles that the ordinary commander is ill equipped to handle. In this respect, he is dependent on the advise of the staff Judge advocate who, in advising his Commander, consciously or unconsciously colour his legal opinion to reflect what he believes the commander will decide on his own.

14. Under the powers of review of a court-martial's verdict, the sentences of the guilty are often disproportionate to the gravity of crimes. The revision of sentence of a court-martial, ordered by the convening officer, gives an impression that the convening authority is not satisfied with the sentence. Instead of invoking the said provision, he shows his displeasure with the

court. As a result, the court feels compelled to alter the sentence and make it more severe.[7]

15. Though the procedure is provided for raising objection to the members constituting court-martial, but the accused cannot do the same if he wants to challenge the authority of the Judge advocate.[8] At times, Judge advocate may be biased or prejudiced. He may be personally interested in the trial, to see that the accused is convicted. Under such circumstances, he should be disqualified to be associated with the trial by GCM.

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7. In Captain Harish Uppal V. Union of India AIR. (1973) SC. 258 at pp 262-63 where the officer was tried by summary General Court-Martial and sentenced to be cashiered, the General Officer commanding the division, Maj General R.D. Hira, feeling dissatisfied with the sentence, directed the revision of the sentence by making the following order :

"It would be appreciated that the charge of which the accused was convicted is of a very serious nature. The punishment of Cashiering, therefore, awarded for the offence appears be palpable lenient . The maximum punishment provided for the offence under IPC Section 392 is 10 years R.I. Even though the proper amount of punishment to be inflicted is the least amount by which discipline can be effectively maintained, it is nevertheless equally essential that punishment awarded should be appropriate and commensurate with the nature and gravity of the offence and adequate for the maintenance of high standard of discipline in the Armed Forces .... There are certain norms and standards of behaviour laid down in the Armed forces for strict adherence by persons who have the honour to belong to the corps of officers of the Indian Army. A person of the rank of an officer, who indulges in such as offence, should therefore, be awarded suitable punishment. In the course of Six years commissioned service, he had once been convicted under Army Act Section 41(2) for disobeying a lawful command given by his superior officer in the execution of his duties for which he was severely reprimanded on 13 June 70. The accused or his defending officer/counsel should be given an opportunity to address the court, if so desired. The court should then carefully consider all the above and should they decide to enhance the sentence, then the fresh sentence should be announced in open court as being subject to confirmation."

In the face of such strong observations by the GOC-in-C, the officers' constituting the court could have felt compelled to enhance the sentence. And the revised sentence of 2 years rigorous imprisonment awarded to the officer could not be regarded as a free act of the court-martial.

8. In Mohan Rao P.Naik and ten others V. Union of India, The Rajasthan High Court, Jaipur,DB Civil petition No 400/1988 (date of order 26 May 1988) held, that the presence of the judge advocate in a trial is required by section 129 of the Army Act, and that judge advocate must be associated with every General Court Martial. Under section 130 of the act a note is appended which states that the accused has no right to object to the Judge advocate.

16. Critics says that any review at the convening authority's level is an "anachronism" that it should be eliminated in its entirely. The main reason is that the commander is poorly equipped by training or judicial temperament to decide if the findings and sentence are correct in law.[9]

17 There is no right of appeal against a court-martial.[10] Further the constitution of India excludes the power of Supreme Court to grant leave to appeal from any judgement, decree or determination, sentence or order, in any cause or matter, made by a tribunal constituted by or under any law relating to the armed forces. So also the High courts have been precluded from exercising any power of superintendence over any court or tribunal constituted by or under any law relating to the armed forces.

18. A convict under the military justice system can submit a petition to the chief of the respective services or the Central Government against the finding or sentence or both, but he has no right to be heard when such a petition is considered.[11]

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9. Report to Hon. Wilbur. M. Brucker, Secretary of the Army, by the committee on uniform code of Military Justice, " Good order and discipline in the Army" , p.161 (18 January 1860) (commonly cited as the Powell Report).

10. The CrPC, Chapter xxix. In Lt Col. Prithi Pal Singh Bedi V. Union of India 1982(2) SLJ, 582, the Supreme Court observed that the absence of even one appeal with power to review evidence , legal formulation, conclusion and adequacy or otherwise of punishment is glaring lacuna in a country where a counter part civilian convict can prefer appeal after appeal to hierarchy of courts.

11. Section 164 of the Army Act. See also regulations for the Army, para 365 (1987) ; Section 161 of the Air Force Act ; and section 162 of the Navy Act.

19. In the Army and Air Force, all court-martial proceedings are reviewed by the Judge Advocate-General or his deputies in order to ensure that no irregularity or miscarriage of justice has occurred, but such an exercise takes place in the absence of the convicted person and he is not aware of what is being done.

20. There is no provision for free legal aid by a qualified counsel to the accused either before or during the trial. An accused may be represented at his trial by a civilian counsel at his own expenses. It is generally observed that very few accused can afford to do that. The absence of a properly organised system to provide adequate facilities for the defence of an accused is contrary to the constitutional right to counsel in criminal proceedings.[12] It is now settled law that the government has an obligation to offer legal aid to impoverished accused in many types of cases, especially those including the death penalty. This is also true in other cases where by reason of the youth of the accused or his mental condition, or the failure of the system to look after his rights, a trial without counsel would not be fair.

21. The charges against the accused are investigated by the commanding officer, If the accused is remanded for recording of summary or abstract of evidence to be taken, the accused has no right to be represented by a counsel or take any assistance of an officer.

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12. Article 22(1) of the Constitution of India ; and see Janardana Reddy V. State of Hyderabad AIR. (1951) SC. 217 ;
See also,
Gopalan V. State of Madras (1950) S.L.J. 174 where Patanjali Sastri J. Stressed the point of legal aid.

22. Summary of evidence is generally taken down by an individual with little knowledge of the criminal law and as a result, even inadmissible evidence sometimes appear in the summary. Further the person taking the summary is actively engaged in the investigation of the case, and at a latter stage, invariably he becomes the prosecutor. Under these circumstances, he is likely to be prejudiced against the accused.

23. Often the responsibility of recording summary of evidence is entrusted to an officer so young in service that his protests of inadequacy are scarcely audible.

24. Under the Navy Act, the summary of evidence takes the form of abstract, which is not recorded in the presence of the accused.[13] Unlike the Army and the Air Force, the accused cannot cross-examine the witnesses when their summary of evidence is being recorded. This is against the rule of law. The accused has got every right to demonstrate that he is innocent and the case deserves dismissal if decided by the competent authority, without going through further process.

25. There is no provision for speaking orders under the Air Force and the Navy Acts and the accused does not even know as to what law the court members actually applied in determining his fate.

26. Often some commanders have been using courts-martial as personal disciplinary weapon, ignoring even such rights as the presumption of innocence, onus of proof on the prosecution and benefit of doubt.[14]

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13. Regulations for the Navy, Part II, regulations 149 (1965)

14. Quoted in an Article, "The serviceman's Rights". The Times weekly (13the August 1965), see also "Dissent and Discipline in the thinking man's Army", editorial, Life Magazine, p.28 (May 26, 1969).

27. Inadequately trained personnel in the pretrial investigation causes delay in military justice. As a result, a Commander has to make arrangements with whomever he can. Further, Pretrial confinement policies are not uniform but are left for determination by an officer exercising court-martial jurisdiction.

28. Unlike the US, there is no unified code for the three services which could provide some inbuilt mechanism to redress the grievance of armed forces personnel in India. Uniform code would remove disparity in laws and the legal system among the three services.

29. There is no formal law teaching of the military officers although a commanding officer is given powers to sentence an accused to dismissal and one year R.I. against which there is no appeal. The officers of the Judge advocate general branch, who are posted at the higher headquarters, are of relatively junior rank. Consequently, they are often bullied by the senior commanders to render legal advice as they dictate. A vast number of armed forces personnel does not know about their rights, they have little knowledge or resources to use the legal system, and they are certainly not in a position to afford an adverse legal system verdict[15].

30. A Judge advocate, who is also a member of the armed forces stationed among and mixing socially with other officers, cannot be entirely free from the military ethos and he may well hear discussion about a case on which he must later advise a court-martial.[16]

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15. Lt Gen Wag Pinto (Retd.), "Military Judicial System," Civil & Military Law Journal, Vol 24, 1988, P.181.
16. Gordon borrie, "Court-Martial, Civilian and civil liberties" Vol 32, MLR, p.46 (1969)

31. The court-martial system often works under "command influence" as its members are picked up by an army commander who also brings the charges against the accused. The suggestions that the members of the court-martial should have fair knowledge of the Army laws and that they should not be form the same command as those facing trial have not found favour with the authorities.[17]

32. There have been feelings of "justice hurried is justice burried."

Summation : In view of the foregoing lacunne, the system is widely regarded arbitrary. Although its description as "drum head justice" is overdrawn there are glaring deficiencies.

Prior to independence the armed forces legal system in India was designed by the Britishers to be effective, prompt and discipline oriented, this being the most powerful and potent weapon for the armed forces. It was considered to be unduly harsh and against the interest of the Indian soldiers. After independence, the system has not changed much, especially in comparison with the military justice systems of other countries and also in comparison with the civil administration of justice in India itself. While a civilian accused enjoys a number of constitutional rights, a military accused is subject to almost same harsh process and treatment which was prevalent under the British Raj. Indian military law should have been amended in accordance with the spirit of Indian democratic traditions and constitutional guarantees. But it did not. As a result, it is antiquated and

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17. B.M. Sinha, Justice under Military Law, Indian Army Judicial System, Civil and Military Law Journal, Vol. 23 (1987).

weighed heavily against the accused. On the other hand, the other democratic countries like the United States and the United Kingdom have carried out large scale revision of their respective military laws to bring them in line with the changing conditions and concepts of penology.

According to Justice Jaswant Singh, a former Chief Justice of Punjab and Harayana High Court, the Army laws have become "archaic" and whenever the courts interfere or pass an order not liked by the authorities concerned, they are done with the "best of motives", keeping in view the provisions of the prevalent laws.

The winds of change are blowing over the country have not entered the close and sacrosanct precincts of the armed forces, as far as administration of justice through court-martial is concerned. The universally accepted dictum that justice must not only be done but it must seem to be done holds good with greater vigour in the case of court-martial, where the judges and the accused don the same dress, have the same mental discipline, have a strong hierarchical subjugation. A feeling of bias in such circumstances is inevitable[18].

The dispensation of justice system must be brought into conformity with the liberty oriented constitution of India and the rule of law, which are the uniting and integrating forces in our society. The Indian military law must be amended on the lines of UK and the USA legislation, in order to ensure that disciplined and dedicated Indian armed forces may not nurse a

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18. D.C.Jain, Military law needs a second look, Civil and Military Law Journal Vols. 21 & 22, 1985-86, P.143.

grievance that the substance of justice and fair play is denied to them. Armed forces are always on the alert for repelling external aggression and suppressing internal disorder, so that peace loving citizens could live in a stable society governed by the rule of law, the same should not be denied to them.

In brief, there is an urgent need to review the whole disciplinary codes of the three services in the light of reforms made in the ordinary criminal law and also in the military codes of other countries. As a prologue to any future reforms, certain suggestions have been made in the last chapter.

CHAPTER IV

CONTROL OF COURTS MARTIAL UNDER THE WRIT JURISDICTION

This Chapter will examine the scope and nature of the writ jurisdiction of courts-martial, assess the significance of the enlarged writ jurisdiction, and indicate future areas of adjudication. This examination will preface a preliminary consideration of extraordinary relief by the writs and will include a review of the salient characteristics of several extraordinary writs and their judicial construction.

The armed forces, the world over are governed by their respective special codes of discipline. The same position is constitutionally recognised in India. The special laws enacted for armed personnel provide for the constitution of adhoc military tribunals or courts martial to deal with military offences. These tribunals have been placed beyond the superintendence or appellate jurisdiction of the Indian Supreme Court and High courts through specific constitutional provisions. A person subject to the Army Act, Navy Act and Air Force Act cannot prefer an appeal either to the Supreme Court or to any High court against his conviction by court martial or against any sentence awarded, or against any order made by courts martial. Specific provisions have been made to this effect in Article 136 and Article 227(4) of the Constitution. Article 136(i) has conferred on the Supreme Court a power to grant special leave to appeal from any judgment, degree sentence or order passed or made by any court or tribunal. clause (2) of this article, however, does not extend this power to any judgement, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the armed forces. Similarly, Article

227(i) confers on all High Courts power of superintendence over all courts and tribunals subordinate to them. Clause (4) of this article, however, excludes this power over any court or tribunal[1] constituted by or under any law relating to the armed forces. Article 33 of the Constitution provides that Parliament may by law determine to what extent any of the rights conferred by Part III of the Constitution (fundamental rights) shall apply to the members of the armed forces. In view of the said provision, a valid law made by the competent parliament adversely affecting the fundamental rights cannot be challenged as being void on the ground that it takes away, curtails or interferes with any of these rights. This, however, does not mean that in respect of the armed forces, The jurisdiction of the Supreme Court under Article 32 or that of the High Courts under Article 226 is totally excluded.[2]. A well settled legal position appears to the that if there is a valid enactment by Parliament, such an enactment cannot be challenged for being violative of any of the provisions of Part III of the Constitution. However, an individual action taken by the competent authority can always be

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1."Tribunal" meaning of : The expression 'Tribunal' as used in Article 136 of the constitution does not mean the same thing as "court" but includes. Within its ambit, all adjudicating bodies, provided they are constituted by the State and are invested with judicial as distinguished from purely administrative or executive functions. The only courts or tribunals, which are expressly exempted from the purview of Article 136, are those which are established by or under any law relating to the Armed Forces as laid down in Clause(2). See Mehta Durg Shankar V. Raghuraj Singh and others, AIR. 1954, SC. 520

2. Article 32 of the Constitution of India empowers the Supreme Court to issue writs such as habeas corpus, certiorari, mandamus, prohibition or quo-warranto for the enforcement of fundamental rights. Similarly Article 226 bestows similar power to High Courts.

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challenged before a High Court or before the Supreme Court if it is violative of any of the fundamental rights.[3]. The Constitution makers wanted to confer the maximum possible autonomy on the military authority and still ensure the rule of law and prevent injustice to the members of the armed forces. In order to strike a balance between the need of the military system and preservation of military traditions, and also the need to ensure the rule of law and justice to the members of the armed forces, it has been provided that High Courts shall have power to issue writs to grant relief to the members of the armed forces under Article 226 of the Constitution.[4] Besides the constitutional provisions, the Code of Criminal Procedure [5] gives power to the High Court to issue writ in the nature of habeas corpus and recognises and safeguards the inherent right of the High Court to make such orders in order to secure the ends of justice or to prevent abuse of the process of any court including court martial.[6]

In the absence of any appellate jurisdiction against the conviction or sentence by court martial, the writ jurisdiction safeguards the fundamental rights of the personnel of the armed

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3. In Uppal Harish, Capt V. UOI, AIR. 1973, SC .250, 1973 SCC (Crim) 268 held that a petition filed under Article 32 of the constitution, the Supreme Court can only consider whether any fundamental right of the petitioner has been violated and only article relevant is Article 21.

4. In Umarsaheb V. Kadalakar (1969) I SCC 741 : AIR. 1970 SC.61 Article 226, held, this power is exercised to ensure that all courts and tribunals remain "within the bounds of their authority and do their duty in a legal manner.

5. The Code of Criminal Procedure, 1898 (Act V of 1898) Section 491 and 561-A.

6. The General Court-Martial, even though a Tribunal is an " authority" under Article 236 of the constitution, the High Court can exercise the powers to issue writs on court-martial under Article 226 of the Constitution. see Suri Parvesh Chander, Major V. UOI, Gujarat High Court : LPA 297/1983 (unreported)

forces and a person subject to any armed services Act may move the Supreme Court or any High Court for the enforcement of his fundamental rights violated by a court martial [7] or any service authority. In recent years petitions for extraordinary relief by the writ jurisdiction have been filed by the armed forces personnel with increasing frequency.

The extraordinary relief under the writ jurisdiction is available in the following circumstances :

(a) High Courts or the Supreme Court may make an interlocutory intervention in proceedings going on before a court martial to prevent jurisdictional excess or usurpation of power by the convening authority of court martial.

(b) High Courts or Supreme Court may require action over judicial agency under the military justice system which had a duty to act but refused to do so in the prescribed manner.

(c) High Courts or Supreme Court may intervene in the process of judicial review of the legality of findings and sentence under the Navy Act. [8]

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7. UOI V. Kharod, V.J. Major ; Gujarat High Court, LPA No 244/1985 in sca No 497 of 1981 (unreported case), the Gujarat High Court held that the courts-martial set up under the Army Act, amenable to the writs of mandamus, prohibition and certiorari under Article 226 of the Constitution.

8. JUDICIAL REVIEW. Mr Justice Ranganathan of Delhi High Court, while granting relief to the petition in Capt O.P.Handa V. Union of India, Civil Writ Petition 1270 of 1978 (unreported) observed that JAG ought to have examined the evidence to see if the findings of the court-martial were justified and also he should atleast marshall the evidence, sum up the Petitioner's grievances and Leave it to the CNS to decide the matter.

(d) High Courts or Supreme Court any intervene in the process of confirmation of the legality of findings and sentences under the Army Act and the Air Force Act.

The writ jurisdiction is exercised under exceptional circumstances, where the only satisfactory remedy is by way of such a prerogative writ. Hence, unless there is a manifest perversity of justice , or the situation is so serious from the legal point of view that the non-issue of the writ would amount to placing a seal of approval on a grave and serious dereliction of the well-known principles of justice, the power is not ordinary exercised.[9] If the impugned order is manifestly contrary to law or principles of natural justice, it can be interfered with by the High Courts under writ jurisdiction and in such circumstances there is no need to invoke and exhaust[10] an alternative remedy even if it is available.

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9. Shri Ambica Mills Co. V. S.B. Bhat and others , AIR. (1961) SC. 970 ; see also Satya Narain Laxmi Hedge V. Mallikarjun Bhawanappa, AIR. (1960) SC. 137

10. Subedar Surat Singh V. Chief Engineer Project ; Becon (1970) Cr.L.J. 1610 at p. 1613, see also Calcutta Discount Company Ltd V. Income Tax Officer AIR. 1961 SC. 372 wherein the Supreme Court held that the existence of an alternative remedy is not always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action. Also in Collector of Monghyt V. K.P. Goenka ; AIR. (1962) SC 1694, it was held bu the Supreme Court that High Court has certainly a discretion to grant relief under Article 226 of the constitution even if there are other alternative statutory remedies. Similarly in Major S.C.Sarkar V. Union of India, AIR. 1973, MP. 191, the Madhya Pradesh High Court held that where there is an opportunity and the party who comes to the High Court without availing of it, has to show that his case is such that the court should hear him and give him the relief which he has not sought even though permitted by statute. see also Assistant Collector of Customs V. Soorajmull Nagarmull, AIR. 1952, Cal 656. In 1989, the Supreme Court, in Uma Shankar Pathak V. UOI & Ors 1989 (3) SLR 405, held alternative remedy is not an absolute bar to the exercise of writ jurisdiction, writ is maintainable.

The jurisdiction of every court martial (tribunal) is limited. If it fails to observe its limitations, it would amount to acting without jurisdiction or in excess of jurisdiction as the case may be.[11]

There are several instances of such excesses. For instance, a court-martial will act without jurisdiction if deals with a person not amenable to the respective acts of the armed forces as if he were so amenable[12]. A court-martial will act without jurisdiction if it is not properly convened, or is not properly constituted ; if for instance, the number of members is below the legal minimum or if the members are not duly qualified to act or if the president of the court-martial is not of the proper rank or has not been properly appointed[13]. Again, a court-martial will act without jurisdiction if it convicts an individual of an offence which is not an offence under the respective acts of the

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11. In Subhash Chandra Sarkar V. UOI, supra note 10, the Madhya Pradesh High Court held that where a Tribunal acts (a) without or in excess of its jurisdiction or (b) acts in contravention of the rules of natural justice or (c) commits an error apparent on the fact of the record, High Court under Article 226 of the constitution can always issue writs.

12. In Fazullar Rehman and Mohd. Akhtar V. Commander, Allahabad Area, Cr. Misc. Cases No 396 and 397 of 1941 decided on 2.6.1941, the writ of habeas corpus was granted and the prisoner was discharged from the custody since the petitioners belonging to the MES were held not on active service and consequently not amenable to the jurisdiction of the military authorities.

13. In Sahab Dayal Sharma V. UOI & Ors. 1987 LAB I.C. 843, with reference to Air Force Act (45 of 1950), SS.III, 191-Air Force Rules (1969), Rule 43, the High Court held that the convening of district court-martial rests solely in convening officer. Exercise of power by his subordinate officer not permissible not with standing practice and usage, being contrary to Act and Rules.

armed forces[14]. An officer who confirms the proceedings of a court-martial without having an authority to do so acts without jurisdiction,[15] and an officer who (with authority) confirms proceedings is equally responsible with the members of the court-martial if they have acted without or in excess of jurisdiction.

Numerous military persons approach High Courts and the Supreme Court for redressal of their grievances against court-martial system under the writ jurisdiction. Among the most often encountered in the military practice of law are the writs of mandamus, prohibition and habeas corpus.

MANDAMUS. The writ of mandamus is a command issued from a court of competent jurisdiction to an inferior court or officer, requiring the performance of a specified act which the court or officer has a legal duty to do.[16] Mandamus is an extra ordinary writ, issuable only where there is a no other complete and

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14. In the case of Major K.P.Obanna V. UOI Ws No 8388/88 decided on 12 December 1988 (unreported) the High Court of Karnataka has held that Section 70 of the Army Act bars the jurisdiction of a court-martial for trying an offence of attempt to commit rape if not committed while on active service or any place outside India or at a frontier post specified by the Central Government by notification in this behalf. Similar ruling was given by Allahabad High Court in the case of State V. Jalkaram Singh, AIR 1955 (NUC) All 1721.

15. As to who are confirming officers, see the Army Act 1950, sections 153 to 157.

16. In Sharma Virendra, Capt V. UOI ; Rajasthan High Court Jodhpur, Civil WP NO 88 of 1985 (DB) date of order 20th July 1988, (unreported) the petitioner, a captain in the Army was brought to trial by a General Court-martial. During the pendency of the trial, High Court directed that the petitioner be provided with a defending officer of his choice subject to his availability and willingness. The accused submitted a number of names according to his choice but none of them was appointed as a defending officer. However, the accused was provided with a defending officer who was not of his choice. the court-martial concluded and the proceedings were sent for confirmation. Rajasthan High Court held that the writ is maintainable and no effect shall be given to the earlier finding of the court. The petition is allowed to nominate and consult his counsel who would be permitted to appear before the court-martial. the cross-examination and re-examination of witnesses would take place again. The finding may be recorded afresh.

adequate remedy. The writ is available to compel both the performance of public duty and the exercise of judicial discretion. The writ of mandamus is not to establish a right, but to enforce a clear and complete right already established. Under the military justice system, the use of mandamus in place of appellate jurisdiction has primarily been to confine an inferior court to a lawful exercise of its prescribed jurisdiction, or to compel it to act when it has a duty to act.

In court-martial cases, Mandamus is available to require exercise of jurisdiction where there is a refusal to act. It can be used in exceptional cases of peculiar emergency since the method of appeal against the court-martial is manifestly not there. In order to invoke this remedy, it is essential that there must be a specific legal right to have the act performed, and there must be no other equally convenient and effectual remedy available.[17]

PROHIBITION The writ of Prohibition is a command to an inferior tribunal to not to do something it is about to do. It is available only where there is no other adequate remedy. Prohibition is used to prevent a tribunal having a judicial or quasi-judicial powers from exercising jurisdiction over matters outside its proper cognizance. The use of the writ is exclusive. The

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17. In Dev Anand Singh V. UOI, 1987, Cr. L.J.9(J&K), the Jammu and Kashmir High Court held that before invoking article 226, the petitioner ought to exhaust alternative remedy under the Army Act. Similarly In Suri Parvesh Chandra, Major V. UOI; Gujrat High Court, LPA 297/1983 (Unreported), while dismissing the petition by order dt 15 July 87, the Gujrat High Court held that as the appellant has not availed of the opportunity to seek remedy under Army Act Section 164 and 165, and has not exhausted all the available remedies, this court should not exercise the special prerogative jurisdiction under Article 226 of the constitution.

writ may relate either to person or subject matter.[18] High courts and the Supreme Court have the power to prevent a court-martial from exceeding its statutory jurisdiction. This writ forbids the court to proceed further in the matter, or to exceed the bounds of its jurisdiction, and, if want of jurisdiction in the inferior court be once shown, any person aggrieved by the usurpation of jurisdiction is entitled to an order as a matter of right. This writ has been granted in quite a few court-martial cases.[19]

The writ of prohibition is not granted for irregularity[20] in the proceedings or wrong decision on merits ; or when it be of no use, as for example, after a sentence has been carried into execution. If a lower court acts within its jurisdiction, prohibition does not lie, no matter how erroneous the judgement of the

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18. Dhingra HC, Lt Col (TS) V. UOI, 1988(2) Delhi Lawer (DB) 109. In this case the trial by Court-martial of the petitioner could not be convened because of time bar show cause notice was issued under section 19 read with Army Rule 14 for termination of service on the grounds of alleged misconduct. Delhi High Court held that in purported exercise of administrative power under rule 14, in respect of allegations of misconduct triable by General Court-martial, the authorities cannot override the statutory bar of Sub-Section(1) of section 122. No administrative act or fiat can discard, destroy or annul a statutory provision. This statutory provision cannot be set at naught or circumvented merely on an administrator's opinion that it is "impracticable" to hold a trial by a general court-martial as the accused officer has refused to waive the Statutory bar of Limitation prescribed for such a trial.

19. In Delhi Spl Police Estab. V. S.K. Loraiya, Lt Col. 1973 Cr.L.J. 33, AIR. 1973 SC. 2548, the Supreme Court while referring to Army Act Section 125, held that the word 'Jurisdiction' in section 125 signifies the initial jurisdiction to take cognizance of a case. It refers to the stage at which proceedings are instituted in a court and not to the jurisdiction of the ordinary Criminal Court and the court-martial to decide the case on merits. Section 549 (1) CrPC should be constructed in the light of section 125 of the Army Act. Both the provisions have in mind the object of avoiding a collision between an ordinary Criminal Court and a court-martial. So both of them should receive a similar construction.

20. In G.S. Sodhi V. UOI (1991) 2SCC 371, AIR. 1991, SC 617, the Supreme Court held that merely on the ground of some irregularity, the proceedings of a court-martial cannot be held to be vitiated unless notable defect has been proved.

Lower Court. Prohibition is primarily a restraining rather than a corrective remedy,[21] and is, in essence the converse of the writ of mandamus, which is compulsive.[22]

Applications for a writ of prohibition to restrain court-martial have been few and usually unsuccessful.

CERTIORARI : It is a writ whereby the Supreme Court or the High Courts direct the judges or officers of inferior courts, commanding the latter to certify and return the record of a matter, eg, a conviction or an order pending before them to the end that more sure and speedy justice may be done. If the conviction or order

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21. In Nagial Sewa Ram V. UOI ; 1983 Cr. L.J. 1789 (J&K), the Jammu and Kashmir High Court held that a High Court exercising its extraordinary writ jurisdiction is competent to quash an order which is based upon no evidence at all. However as regards an order based on insufficient evidence, it has certainly no power to interfere with it, even if it, on its own appraisal of the evidence comes to a contrary conclusion. So long as there is some Legal evidence to justify the impugned finding, the High Court will be powerless to interfere with it in its writ jurisdiction.

In Rana Ashok Kumar. Capt V. Union of India ; 1982 Cr. L.J NOC 120 (Delhi), the Delhi High Court found that the court-martial had convicted an accused on the basis of his confession. Full opportunity was given to an accused at the trial to show that the confession was not voluntarily given. Delhi High Court concluded that they will not interfere under Article 226. What the High Court has to see under Article 226 is whether the accused was given full opportunity by the court-martial to show that the confession was not voluntary. Hence the petition was dismissed.

22. Mandamus was allowed in JC Sharma V. Union of India, 1985 Cr.L.J. 696 (Him). The Himachal Pradesh High Court held that under Army Act Section 164(2) while conferring a right to present a post confirmation petition on a person, it does not prescribe any period of Limitation. The Law imposes no time Limit for the exercise of such right and the performance of such a duty. The court viewed that under the circumstances when dismissal of petition without considering relief was sought, mandamus can be issued.

by the inferior court is found to be bad in law, it will be quashed.[23] It involves a Limited review of the proceedings of an inferior tribunal, and Lies only to inferior courts and officers exercising judicial and quisijudicial powers. It is an extraordinary writ, available only where there is no other plain and adequate remedy, by appeal or otherwise. High Courts have a general superintending control over inferior tribunals. This control does not entirely takes away a statutory declaration that the judgements of a court-martial shall be final. However,

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23. In Himmat Singh Chahar V. Union of India and others WP NO 1511 of 92 (Before the High Court of Judicature at Bomabay; unreported), the petitioner was tried by court-martial at Bombay on 29.4.1991 to 16.5.91 for an offence punishable under section 354 of the IPC in conjunction with section 77(2) of the Navy Act 1957. He was found guilty of the said charge and was sentenced to undergo rigorous imprisonment for a term of two years as a Class II prisoner, be dismissed from the Naval Service, to be reduced in rank to Radio Operator (Telegraphist) First Class, to be deprived of First Good Conduct Badge and to suffer the consequential penalties involved. Pursuant to the judicial review by JAG(N) on 29 Oct 1991, the sentence was reduced to nine months rigorous imprisonment by an order dated 7.11.91. Vide judgement and order of 6.10.93 the High Court came to the conclusion that the credibility of the evidence is such that the charge could not be establish on the basis of the material. The court also observed that the available evidence, the surrounding circumstances, and the supportive evidence, even if taken comulatively, are insufficient to establish the charge in question. The High Court held that the authorities were wrong in having recorded a finding of guilt against the respondent on the strength of the material produced in the court-martial proceedings in that view of the matter the subsequent order passed will also be required to be quashed. In the circumstances the court allowed the writ petition and quashed the order of the court-martial. Similarly in Rajinder Nath Kumrah, Capt V. Union of India, 1982 (1) SLR. 556 (Delhi), the case was brought under Article 226 of the constitution to question the application of the TA, ACT 1948, Section 6 and 19 and Army Rules 14 and 15(1) (6). In this case, the petition was served with a show cause notice for removal from service in view of his shortcomings pointed out in his record of service. He asked for clarification of some points. The Government, without making clarification, treated his prayer for clarification of matter as his explanation and removed him from service. The Delhi High Court held that the order of removal was bad. Also in Virendra Kumar, Capt V. UOI , AIR. 1981, SC, 947, wherein the petitioner was dismissed under Army Rule 15 and 15A, the Supreme court felt that the procedure had not been followed therefore the order of the Chief of the Army Staff was set aside.

certiorari is a revisory writ to correct errors of Law apparent on the record. This characteristic of certiorari makes it available to obtain review of appealable or otherwise unreviewable decisions in terminated cases. A writ of certiorari is maintainable even where no injury takes place. Mere threat of damage is enough to cause injury so as to sustain maintainability of a writ petition.[24] High Courts can also grant interim relief during

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24. In Major Dharam Pal Kukreti V. Union of India ; 1978, LAB. I.C 9 at P.14. an officer was subjected to trial by a court-martial which acquitted him. The convening authority refused to confirm the verdict and directed its revision on reassembly, the court-martial reaffirmed the verdict of not guilty. The convening authority, considering the verdict to be perverse, forwarded the proceedings to the Chief of the Army Staff with a recommendation that the officer should be discharged from the service under Army Rule 14. Accordingly, a show cause notice was issued to the officer. He challenged the same before the Allahabad High Court, raising a question as to the maintainability of the writ. A Division bench of the Allahabad High Court held that injury must be defined in the Legal sense to cover both 'damnum' and 'injuria' under common law. The word 'injury' must be interpreted to mean a wrongful invasion of legal rights and is not concerned with the actual hurt or damage suffered from the invasion of such legal rights. It can include damage without injury. Where the show cause notice against removal from service was issued without jurisdiction, it cannot be said that the petitioner delinquent suffered no injury by the mere issue of show cause notice and that he could have shown cause against the said notice and he would have a remedy against the ultimate order of removal by filing a writ petition, it was held by the High Court that the court should not drive the petitioner into the precarious condition. The notice issued without jurisdiction must be quashed at that stage itself and the officer could no longer be put into jeopardy by submitting his reply to the show cause notice. The Supreme Court in Chief of the Army Staff V. Major Dharam Pal Kukreti, 1985 (1) SLR, at p.660 ; agreed with the above view and held that where the threat of a prejudicial action is wholly without jurisdiction, a person cannot be asked to wait for the injury to be caused to him before seeking the court's protection.

pendency of a writ petition.[25] Application for a writ of certierari to review court-martial have been in the past and barring few, were usually unsuccessful.[26]

The writ of prohibition is the counterpart of the writ of certiorari, which too is issued against the action of an inferior court. However, there is a difference between the two. If an inferior court takes up for hearing a matter where it has no jurisdiction, a writ of prohibition can be issued for forbidding that court from continuing the proceedings. On the other hand,

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25. In Harish Chandra Goswamy V. Union of India & Others,1990 Cr.L.J. NOC 131 Delhi, an officer from the defence services challenged the orders and sentences awarded in the General Court Martial proceedings against him. The High Court of Delhi held that it could examine the correctness of the proceedings and findings recorded by the General Court Martial and also could grant interim relief during the pendency of main writ petition under its writ jurisdiction.

26. In Ram Swarup V. Union of India , 1965 (1) Cr.L.J. 236, the petitioner applied to the Supreme Court for a writ of certiorari to set aside the order of the Central Government confirming the findings and sentence of the court-martial on the ground that the provisions of the Army Act, 1950 under which he was tried, violated his fundamental rights guaranteed under part III of the constitution. The Supreme Court went through the various contentions of the petitioner and were satisfied with their constitutional validity and dismissed the petition. Similarly in Mehnga Singh Gill V. Union of India, writ petition No.5583/68 decided by the Andhra Pradesh High Court on 30 Dec 1968 , an application for a writ of certiorari was refused because the petitioner, a person, subject to Navy Act, 1957, had been validly tried and convicted by a court-martial at Visakhapatnam. (An appeal against the dismissal of the petition was also disallowed by the same High Court. Writ appeal No 16169 decided on 27th January, 1969. Similarly application for a writ of certiorari was refused by the Supreme Court in the case of Som Datta V. Union of India, 1969, Cr.L.J. 663 and by the Orissa High Court in the case of S.C. Patnaik V. UOI , 1969 Cr.L.J. 930

if the inferior court, court hears the matter and gives a decision, a writ of certiorari can be issued by the Supreme Court quashing the decision of the inferior court on the ground of want of jurisdiction.[27]

In Sarkar Subhash Chandra, Major V. Union of India[28], the Madhya Pradesh High Court held that though a court-martial is not a tribunal subordinate to the High Court under Article 226, the High Court can issue a writ of certiorari against an order passed by the court-martial. Similarly, the Delhi High Court had granted a writ of certiorari against the decision of the chief of the Army Staff in altering the grading awarded to a Lt Col from 'B - fit for promotion' to 'R- unfit', observing that the chief had no such authority under the Army Act or the rules and regulations framed thereunder.[29] The court ruled that the administrative instructions are of a general nature affecting the conditions of service, a breach of which would result in violation of Article 16 of the constitution. It also held that High Court, under its writ jurisdiction, can give a relief in relation to the said instructions even though those instructions may be of administrative nature.

In Major Ramesh Chander V. General Officer Commanding-in-Chief, Northern Command[30], where the promotion of the officer

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27. See generally Hari Vishnu Kamath V. Syed Ahmed Ishaque,(1955) 1 SC.R . 1104 at 1117-1118.
In the case of Subedar Surat Singh V. the Chief Engineer Project, Beacon, n.10(a) , the Jammu and Kashmir High Court granted a writ of certiorari against the order of the confirming authority because the latter exceeded his jurisdiction in ordering a retrial of the petitioner even when he was found "not guilty" by the Court-martial on two occassions.

28. Supra n. 10

29. Shyam Kumar V. Union of India, 1982 (1) SLR. 845.

30. 1977 (2) SLR. 864 (J & K).

after promulgation was cancelled because of the discovery of some misconduct for which criminal investigations were started, the J & K High Court quashed the cancellation order by a writ of certiorari , holding that the order of promotion once passed cannot be cancelled or kept in abeyance on the ground of some pending enquiry or investigation,. It also held that the petitioner could be deprived of the same only in accordance with Law.

If the proceedings of a court-martial are without jurisdiction or if they suffer from any patent illegality, the High Court can exercise the power under Article 226 and it cannot be stated that such proceedings should be allowed to culminate in ultimate orders and then to allow the aggrieved person to come to High Court for voicing the very same grievance.[31] It would patently be a futile process.

In Uma Shankar Pathak V. Union Of India[32], the non-compliance of Army Rules in respect of summary court-martial vitiated the entire trial. On the basis of facts, the court found that the petitioner was informed of the charge only eight hours before the commencement of the trial. Considering the facts and circumstances of the cases, the court concluded that there was a breach of Rules 34 and 115 (2) and, accordingly quashed the summary court-martial.

In the case of Surinder Singh V. Union of India[33], the petitioner approached the Madhya Pradesh High Court, Jabalpur, for setting aside the proceedings of a GCM which was convened to try

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31. Rai DSC, Maj Gen V. GCM, FORT St. George, Madras High Court WP NO 3067 and 3068 of 1984 (Order dt 25 Apr 1984).

32. 1989 (3) SLR 405

33. Misc petition No 2323 of 1991 (unreported)

him, after setting aside his conviction by summary court-martial. His main contention was that he had already been tried and punished for the same offence by a SCM and that his retrial was barred by the provisions of the Army Act Section 121 and Article 20(2) of the constitution. The respondents contended that the proceedings of SCM was quashed for non-compliance of mandatory provisions of Army Rule 22. As the trial by SCM was without jurisdiction, retrial was not barred. After considering the contentions of the rival parties, the High Court held that the SCM proceedings could not have been setaside for some technical flaw in procedure at pretrial stage. Even according to section 162 of the Army Act, SCM proceedings can be set aside on the merits of the case and not on merely technical grounds. The court accordingly quashed the GCM proceedings as being violative of Army Act section 121 and Article 20(2) of the constitution .

In Commander Ranvir Kumar Sinha V. Union of India,[34] a writ petition was filed under Article 22 of the constitution against the verdict of the court-martial, later confirmed with a modification by the Chief of the Naval Staff (CNS) vis-avis the charges found established against the petitioner. The Division Bench of the High Court of Bombay on 18/19.12.90 exonerated the appellant on two charges Levelled against him.

A writ of certiorari was allowed in a case [35] where the Supreme Court found that the punishment awarded by the court-martial was not commensurate with the offence committed by the

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34. Criminal writ petition No 1377 of 1988 ; Before the High Court of Judicature at Bomaby (unreported)

35. Ex Nk. Sardar Singh V. Union of India , criminal Appeal No. 67 of 1991, AIR. 1992 SC. 417.

accused and the doctrine of proportionality of sentence was taken into consideration. In this case the appellant was carrying seven extra bottles of rum without the necessary permit. He was carrying rum in connection with the marriage of one of his relations. The extra bottles were collected by him on the basis of chits given to him by various officers. He was tried by SCM and awarded three months R.I. and dismissal from the service. Considering the nature and circumstances of the case, the court held that the punishment awarded to the appellant was severe and also violative of Section 72. Their lordships set aside the punishment of three months RI and dismissal from the service and remanded the appellant to the court-martial for awarding any lesser punishments with due regard to the nature and circumstances of the case and in the light of the observation made by the Supreme court.

HABEAS CORPUS : The writ of habeas corpus is issued form a court of competent jurisdiction to an officer or person who is detaining a person, requiring that the detained person be brought before the court for the purpose of enquiry into the legality of detention. Supreme Court considers this writ to be the highest remedy in law for any person imprisoned.

Under the military justice system, any person who considers himself to be in an illegal custody by an order of a court-martial or other military authority can apply for a writ of habeas corpus. If there is no legal justification for the detention the respondent party is ordered to release the petitioner. The remedy of habeas corpus is not available to one who is properly detained under military arrest or is serving a legal sentence of a court-martial. However, the jurisdiction of a court-martial may be required into and if a prisoner was not amenable to such

jurisdiction [36] he may be free.

In the S.P.N. Sharma case, the petitioner was a pilot officer in the Indian Air Force. He was found guilty for committing the crime charged under section 71 and 42 (e) of the Air Force Act, 1950 and was awarded a rigorous imprisonment for fourteen years. After the confirmation of the sentence, he was committed to the civil prison. The petitioner challenged the findings and sentence of the court-martial on the ground that Rules 88, 89 and 112-A of the Air Force Rules, 1950, were Ultravires, as they were violative of Articles 14 and 22(1) of the constitution. He also challenged the confirmation of the said sentence as ultravires on the ground of its violations of Articles 14, 21 and 22 of the constitution, as also contrary to the provisions of the Air Force Act and the rules framed thereunder. He applied for the writ of habeas corpus. After going through the various contentions of the petitioner, the Delhi High Court dismissed the petition, observing that the petitioner was a prisoner in detention in execution of a sentence imposed by a properly constituted court-martial whose sentence was prima facie, perfectly legal. The observations in the S.P.N. Sharma's case were cited with approval in the case of Flying Officer Sundarajan V. Union of India[37] which was decided by a full Bench of the Delhi High Court. While dismissing the petition, the court observed that the remedy of a writ of habeas corpus is not available to test the propriety or legality of the verdict of a competent court.

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36. S.P.N Sharma V. Union of India, (1968) Cr.L.J. 1059

37. AIR. 1970 Delhi 29.

The court is not entitled to go into the regularity of steps taken by the court-martial in the course of trial or by the confirming authority in the finding and sentence which do not go to their jurisdiction.

The writ of habeas corpus is remedial and not punitive. It is inapplicable if the illegal detention has ceased before the application for writ is made [38]. Within the scope of habeas corpus, the High Court cannot sit as a court of appeal. If there was legal evidence available on which a finding could be given, the sufficiency or otherwise is for the authority to decide and the High Court cannot substitute its opinion for that of court-martial[39]. Once it is shown that the court-martial properly convened and constituted has passed an order in pursuance of which the petitioner is being held, no relief would be possible as the Supreme Court or the High Court cannot go into the question of sufficiency of evidence. In such cases the conviction by a competent court would be a sufficient answer to the petition under section 491, Cr.P.C.[40]

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38. Smt Thockchom Ningol Kangujam Ongbi Thoibi Devi V. General Officer Commanding, Manipur Sector, 1982 Cr.L.J. 1675.

39. Ghalwat RS V. Union of India. 1981, Cr.L.J. 1646

40. Kartar Singh V. imperator, AIR. 1946 Lahore, 103 at P. 111, 47 Cr.L.J. 1022 as quoted in 1981 Cr.L.J. 1654 (Delhi)

Where a court-martial has acted within its jurisdiction neither the merits of the conviction nor the propriety of the sentence could be reviewed by the Supreme Court upon an application for either certiotari or habeas corpos[41]. When a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a civil court to grant the writ simply to revaluable the evidence[42]. Where proceedings have been initiated and are taking due course, the question of issuing a writ of Habeas Corpus does not arise[43].

Summation: A review of the extraordinary remedy of writs shows that two of them, certiorari and habeas corpus, check finally adjudicated proceedings, where no further right of appeal exists. In the case of certiorari, the attack is direct and proceedings involve no new parties. It reviews the record of inferior courts for apparent errors of law. Habeas Corpus, on the other hand checks the proceedings of court-martial. New parties and issues are involved but the question of guilt or innocence is not involved. A determination that restraint is illegal can have the collateral effect of invalidating the proceedings of the court-martial concerned.

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41. Canadian case of Exparte Forgan as quoted in 1981 Cr.L.J. 1655 (Delhi)

42. Burn V Wilson (1952) 346 V. 137 as quoted in para 20 of 1981, Cr.L.J. 1655 (Delhi)

43. AIR 1986, SC 1060

By issuing the writs of prohibition or mandamus a superior court makes an intervention in the proceedings of an inferior court. The superior court may make an interlocutory intervention by writ of prohibition whereby it may terminate the proceedings without jurisdiction. By a writ of mandamus, a superior court can compel the exercise of jurisdiction by a lower court which failed to act. All the writs have certain common characteristics, as well as many distinctions. Two of the common characteristics are fundamental because they affect the grant of extraordinary relief in any case. First, the granting of a writ is an act of judicial discretion. Second, this extraordinary remedy is not available if any other adequate remedy is available.

Though court-martial is not a Tribunal subordinate to the High Court under Article 227(4), it is amenable to the jurisdiction of the High Court under Article 226. The power to issue a writ to restrain a court-martial from acting in excess of its authority can be exercised only under Article 226 or Article 32 of the constitution of India. Inspite of the exclusion process by Article 227(4), he High Court can exercise the power to issue writs on the court-martial under Article 226. The powers under Article 226 are wider than those under Article 227 of the constitution.

The High Courts and the Supreme Court are competent to accord relief against unauthorised and illegal acts of military authorities, affecting fundamental rights of military personnel even though they may be in military service. Where fundamental rights have been violated and the proceedings are void-abinitio, a High Court can interfere. If the proceedings of a court-martial are without jurisdiction or suffer from any patent

illegality, the High Court can exercise its writ jurisdiction under article 226[44]. Further, if the decision of a court-martial is an outrageous defiance of logic, it would not be immune from correction by a High Court or the Supreme Court. If it is irrational or perverse, judicial review is always permissible. No immunity can be claimed on the ground that the proceedings had been taken under the court-martial proceedings and therefore, it was not subject to judicial scrutiny. Like every action of the governmental authority, the action of the armed forces authorities are also subject to a judicial review under Articles 226 and 32 of the constitution. But if Parliament has enacted a statute and the provision of that statute have been compiled with, the constitutional validity of that Statute cannot be challenged on the ground that it is violative of any of the fundamental rights under part III of the constitution. However, an individual act taken by an authority under the Act can always be challenged on the ground that it is contrary to law, not " Under the Act" but dehors the Act malafide, arbitrary, unreasonable, capricious or otherwise ultravires.

With respect to the sentence awarded after the confirmation of a conviction, the general principle is that the High Courts and the Supreme Court normally do not interfere with the question of choice and quantum of the punishment which is within the jurisdiction and discretion of every court-martial. However, if the sentence is proved to have been awarded against the provisions of the law prevalent in the country, it can be corrected by the High Courts as all the actions of the authorities under

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44. Madras High Court WP NOS 3067 and 3068

Article 12 of the constitution of India are subject to judicial review.

The writs under the constitution of India have been the legislatively approved source of procedural guarantees designed to achieve the rational ends of justice. The doctrine that a Supreme court to the court-martial tribunal may by writ, properly aid its potential jurisdiction, is highly significant in a consideration of the power conferred by the constitution. This aspect of the constitution makes it possible for the Supreme Court/High Courts to intervene at interlocutory stages of court-martial proceedings. However, the High Courts jurisdiction to do that is rather Limited. The court can interfere only if there is a blatent violation of the principles of natural justice, irrationality and perversity, lack of jurisdiction and error apparent on the face of the record. Otherwise the word of the court-martial is final and the disciplinary jurisdiction of the court-martial is made virtually water tight, subject to the statutory remedy.

The High Courts are normally slow in examining the merits of interlocutory orders specially where statutory remedy is available, unless the legal necessity demands (otherwise) in the interest of justice. The High Courts and the Supreme Court cannot act as a court of appeal. They can neither go into evidence[45] nor appraise the evidence on record[46].

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45. AIR., 1973, SC., 258 at p.262

46. 1980 (3) SLR. Himachal, 135

The sufficiency of evidence or otherwise is for the authority to decide and the High Court cannot substitute its opinion for that of the Court-martial[47]. As discussed earlier the High Courts cannot exercise any superintendence over the court-martial. Similarly, the provisions regarding appeal or special leave to appeal to the Supreme Court shall not apply to any judgement, determination decree or sentence or order passed or made by any court or any tribunal constituted by or under any law relating to the armed forces. Inspite of all these limitation the armed forces personnel, have, of late been invoking the writ jurisdiction to seek redress of their grievances against the verdicts of the court-martial. With few exceptions, in almost all the cases the apex court has denied relief. By invoking wide and discretionary writ jurisdiction however, the civil courts have in many cases been issuing interim, often exparte stay orders, though in the end either the petitions are withdrawn by the petitioners or dismissed by the courts because of the Courts' Limited jurisdiction to interfere.

An other reason for the poor record of intervention through the writ jurisdiction is that petitioners make vague allegations. Infructuous interim orders affect the discipline of the armed forces. It is not suggested here that the writ jurisdiction of the Supreme Court and the High Courts should be denied to the petitioners in suitable cases. Infact these courts have themselves emphasised repeatedly the constitutional position regarding the limited scope of their interference with the findings and

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47. 1981, Cr.L.J. 1646 (Delhi)

sentences passed by a court-martial. What is suggested here is that, unless the balance of convenience is in the favour of a petitioner whose interests may be irrevocably jeopardised by giving effect to a court-martial verdict, no stay order should be passed by the Supreme Court/High Courts prior to the finalisation of the court-martial proceedings and certainly not exparte. For, this will have the effect of thwarting a perfectly sound and independent judicial system which the courts are actually supposed to uphold. The High Court should await finalisation of the service judicial process. After all, a court-martial may itself find the petitioner "not guilty" thereby leaving him with no cause of action to move a High Court or the Supreme Court.

CHAPTER V

MILITARY JUSTICE SYSTEM IN THE UK AND USA

In this chapter we shall discuss the Military justice systems in the UK and USA to find out the progressive features they have incorporated in their system in the last few decades.

The British contribution to the development of the Court-martial is very rich. Intact, the British system initiated the pattern for various military justice systems[1]. All the three services of the British armed forces provide for the system of court-martial under three different legislation. The Army Act of 1955[2] provides for trial either by general court-martial or district court-martial, or, in special circumstances by field general courts-martial.

A district court-martial is a body of three officers which may try private soldiers and non commissioned officers and impose imprisonment or detention to a maximum of two years, reduction in rank, or a fine. DCM is presided over by an officer of the rank of major or above and it may be assisted, where the nature of the case so requires, by a judge-advocate, an independent legal advisor to the court.

A general court-martial invariably sits with a judge-advocate and consists of five officers. It tries serious cases and has jurisdiction over all persons subject to military law.

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1. It is said that, " The British system of Military Justice was an unwitting midwife to the American Court-martial.

2. Army Act, 1955, as amended by the Armed Forces Acts of 1966, 1971, 1976, hereafter referred to as the Army Act.
Discussion here will be confined to the Army since Air Force Law is largely identical to that governing the Army and there appears to be Little difference in respect of Naval Law for which occasional reference will be made.

The British Act of 1955 is very specific in its recital of qualifications for court members. Both types of court-martial may try civilians abroad if they come within the provisions of the Army Act. Court-martial under the British military justice system can try only those offences which are specified in the Army Act. These offences may range from disobedience, absence without leave and desertion, to serious non-military criminal offences, such as misappropriation of funds, criminal breach of trust etc. Section 70 of the Act provides that any person subject to Military Law who commits a civil offence whether in the United Kingdom or else where, shall be guilty of an offence against this section. A soldier who assaults or steals from another soldier may therefore be tried by court-martial for that offence under section 70. A finding by such a court-martial will be treated as if it were made by a civil court, and so any conviction will be notified to the Criminal Record Officer[3].

Court-martial findings are subject to confirmation by the officer who convened the particular court, and legal advice is available from the office of the Judge Advocate General.

A convicted soldier may present a petition to the confirming officer. Subsequently the case may be reviewed by higher authority. The convict may appeal against his conviction to the court-martial Appeal Court. A soldier sentenced to imprisonment will serve his sentence in a civil prison, whilst one sentenced to detention, if of sufficient duration, will be committed to the Military correction training centre.

Until 1951, a Soldier Convicted by a court-martial had no right to appeal. It was because of the recommendations of the

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3. Report of select committee, H.C. Paper No 429, (1975-76) at page 131.

Lewis Committee[4], that the court-martial (Appeals) Act was passed in 1951. The 1951 Act provided a right of appeal :

(a) If a conviction involves a sentence of death,

(b) If the court of appeals thinks that the finding of the court-martial is unreasonable or cannot be supported by the evidence or involves a wrong decision on a question of Law, or if there was a miscarriage of justice.

In considering whether to give a leave to appeal, the Act provided that the court must have regard to the opinion, if any, of the Judge Advocate General on the fitness of the case for appeal[5]. The court of appeals may, however, dismiss the appeal if it considers that no substantial miscarriage of justice had occurred[6].

The decision of the Court of Appeals is subject to an appeal to the House of Lords either at the instance of the accused or that of the prosecutor where the court-martial appellate court has granted leave to appeal to the House of Lords or the House of Lords has itself given a leave to appeal. Such leave would not be granted unless the court-martial certified that the appeal

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4. In 1966, the Lewis committee, with the experience of Second World War behind it, unanimously recommended a right of appeal. The reason behind the recommendation was that in the matter of legal safeguards, citizens should be no worse off when they are in the armed forces than in civil life unless consideration of discipline or other circumstances make such a disadvantage inevitable. In England the problem of justice in the armed forces had been considered by the Darling Committee in 1919, an inter departmental committee in 1925, the Oliver Committee in 1938, the Lewis Committee in 1948 and the Pilcher Committee in 1950, all of whom made recommendations and published detailed reports.

5. The Court-Martial (Appeals) Act, 1951, Section 3 to 5

6. Id ; Section 5, see also R. Tucker , 36 Cr.App. R.192 (1952) ; RV Mahoney All. ER. 799 (1956)

involved a point of Law of general public importance and that it appeared to that court or to the House of Lords that the point is one which ought to be considered by that House.

According to the Army Act, the rules of admissibility of evidence to be observed at a court-martial are the same as those applicable in British civil court[7]. Hence a wrongful admission or rejection of evidence would render the case susceptible to judicial review, if the decision of the case depended upon that evidence.

In 1968, the British Government enacted the court-martial (Appeals) Act which governs the rights and formalities of appeal. It generally follows the pattern set in appeal in Civilian Courts. Leave to appeal must be given by the Court-Martial Appeal Court even on a point of Law on which there is an automatic right of appeal in Civilian Cases. The members of the appellate courts-martial are those persons who are eligible to sit in the Court of Appeal (Criminal Division), and the former is truly a civilian court. Further, appeal may, as in civilian case, be taken to the House of Lords.

The appellate court has a power of full judicial review unhampered by any procedural clap-trap. It consists of judges of Court of Appeal and such of the judges of the Queen's Bench Division as the Lord Chief Justice may nominate.

Court of Military Appeal (CMA) in England is responsible for the administration and operation of the entire system of military justice. CMA jealously guards its own powers and prerogatives. Its members are truly neutral and legally trained judicial

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7. Army Act, n.2, section 99(1)

officers. Now-a-days only a small number of applications for judicial review[8] go to the High Court, because of the court-martial appellate court which is considered as a body able to correct errors of Law. An appeal to this court avoids the need for a soldier to argue that the error has taken the court-martial outside its jurisdiction and that his " Civil rights " have been affected by the sentence of the court-martial. When a soldier is convicted by his Commanding Officer or when the court-martial Appeal Court (in the case of a soldier) is refused leave to appeal, the convict may seek intervention of the High Court for judicial review.

Judge Advocate General department in the UK is free of Army Control by virtue of the applicable laws in the armed forces. Independence and professionalism of judge-advocate are noteworthy. Since 1955 judge-advocates are civilian barristers. They are appointed by the Lord Chancellor. Their status is roughly equivalent to that of Civilian judges. They don't form part of the armed services. For these reasons the standard of direction and summing up by the Judge advocates in the UK is very high.

If an individual[9] acts without or in excess of jurisdiction and commits an assault, false imprisonment, or other Common Law wrong and a soldier's civil rights are thereby affected, he is liable to pay damages. These liabilities persists even if the injury purports to be done in the course of actual military discipline.

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8. Prerogative writs of certioraris, prohibition and mandamus in UK are termed as " applications for judicial review ".

9. The individual in question may be Commanding Officer or indeed, a member of a court-martial.

The liability of tort in cases involving the armed forces : Crown Proceedings (Armed Forces) Act 1987 has repealed Section[10] of the Crown Proceedings Act 1947 (exclusions form liability in tort in cases involving the armed forces) whereby the latter ceased to have an effect except in relation to anything suffered by a person in consequences of an act or commission committed before 15 May 1987. The 1987 Act also provides for the revival of the said section of the 1947 Act in certain circumstances.

By virtue of these provisions, the armed forces personnel in England are much better placed so far as fundamental rights and personal liberty are concerned. The Laws relating to Armed Forces there keep themselves in tune with the progressive changes in jurisprudence.

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10. Section 10 (2) of the Crown Proceedings Act 1947 provided, no proceedings in tort shall Lie against the crown for death or personal injury due to anything suffered by a member of the armed forces of the crown if

(a) that thing is suffered by him in consequence of the nature or condition of any such land, premises, ship, aircraft or vehicle as aforesaid, or in consequence of the nature or condition of any equipment or supplies used for the purposes of those forces ; and

(b) the (secretary of State) certifies as mentioned in the preceding subsection ; nor shall any act of omission of an officer of the Crown subject him to liability in tort for death or personal injury, in so far as death or personal injury is due to anything suffered by a member of the armed forces of the crown being a thing as to which the conditions aforesaid are satisfied.

MILITARY JUSTICE SYSTEM IN USA

The US court-martial system was modeled on the British Articles of War that the continental congress adopted almost verbatim in 1775 for the continental Army. The British Articles of war, in turn, were influenced by prior codes issued by various continental and English Commanders, especially the 1621 military justice code of Gustavus-adolphus of Sweden. The eighteenth century articles provided procedures for simplified, non-legalistic tribunals consisted of officers subject to administrative control by the commander. It covered substantive offences, including Civilian Offences like murder, rape and larceny and also military offences like disobedience, disrespect to officers and unauthorized absence. Punishments included death, corporal punishment, incarceration, fines and dishonorable discharge.

The American Articles of War were modified in 1798, 1806, 1874 and 1920. They were replaced by the uniform code of Military justice (UCMJ) by congress in 1950[1] and made applicable to all the uniformed services and the coast guard.

Prior to 1950, an American in uniform had been at the mercy of legal procedures, changed much since the revolutionary war. These procedures were originally designed for mercenaries-not for soldiers of us citizenship. They were antiquated and unjust. After World War II, therefore, a great protest against them came from returning veterans who demanded reforms which could guarantee basic principles of due process of Law to servicemen. There outcry resulted in the adoption of the UCMJ[2].

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1. 10 U.S.C.A. Section 801-940
2. Professor Edmund M. Morgan, "The Background of the Uniform Code of Military Justice " (1953) p. 169, vol 6, VAN, D.L.REV, White " The Uniform Code of Military Justice; The Background and the problem" St. John's L. REV. 197, 198-209, Vol. 35 (1961)

It represented a revolution in military law and in many respects, contained safeguards of due process of Law which were not then guaranteed even in Civilian Courts. For example, the right to seek assistance of legally-qualified counsel was made mandatory in GCM Cases[3]. The Administration of Military Justice was left in military hands, except for the creation of a three-judge civilian court of Military Appeals to review certain Court-martial conviction. "Law Officers" were appointed to perform many of the functions of judges also. The right to a legally qualified lawyer was granted. "Command Control" was retained by leaving to Commanders the power to appoint from subordinates the investigating officer, counsel and Court members (with a right for an enlisted accused to request that one third be enlisted members[4]).

The UCMJ extended court-martial jurisdiction over both service members and certain classes of civilians[5]. Over a period

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3. UCMJ, Section 27

4. In general terms, enlisted members means, Non Commissioned Officers.

5. In respect of the court-martial jurisdiction, the supreme Court of the US found unconstitutional the extention of jurisdiction over discharged service member for crimes committed while on active duty.
(United States Ex. rel. Toth V. Quarles, 350 U.S.11, 76 S.Ct.1, 100L.Ed. 8 (1955). It held the same in respect of Civilian dependents overseas in peacetime (Reid V. Cover, 354 US.1, 77 S.Ct.1222.1L.Ed.2d 1148(1957).

The court of Military Appeals also held that civilian employees of the Military overseas could not be subjected to court-martial, see (United States V. Averette, 19 USCMA 363(1970) . Finally, the supreme court held that court-martial may not exercise jurisdiction over non "Service connected" offences by service members such as rape committed by a serviceman on off-past, see O.Callahan V. Parkar, 395 U.S. 258, 895, Ct. 1683, 23 L.Ed. 2d 291 (1969)
The Court of Military Appeals has reversed itself several times over the question whether drug-related offences committed off-past by service members are "Service Connected" so as to allow court martial jurisdiction. In a ruling it answered in the affirmative, see United States V. Trottier, 9 M.J.337(CMA,1980)

of time, many advances were made in the administration of criminal justice by Civilian Courts. But they were not reflected in military court proceedings. In order to attain parity with the Civilian Criminal justice, the UCMJ was amended and the Military Justice Act was enacted in 1968[6].

The Military Justice Act along with the UCMJ, governs the military justice system in the US. The UCMJ provides three military criminal courts : The General Court-Martial, the Special Court-Martial and the Summary Court-Martial.

1. **The General Court-Martial**[7] : It is the highest military trial Court which consists of not less than five members and a legally-trained law officer. This court is the court of general criminal jurisdiction which is normally used to try serious crimes and is empowered to adjudge all sentences authorized by

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6. Along with some amendments in the Military Justice Act (82 Stat. 1335 (1968)), the U.C.M.J is the current statutory template for Military justice and the conduct of court-martial. The provisions of the U.C.M.J had been earlier codified at 10 U.S.C. (United States Code) section 801-940. Thus Article 1 of the UCMJ is 10 U.S.C Section 801 (1976); Article 140 is 10 U.SC section 940 (1976), and so on. In military practice, provisions of the code are more commonly cited to the U.C.M.J than to the United States Code.
While the U.C.M.J. provides only a statutory framework, the US Manual for court martial (1960) provides a detail guide for conducting court-martial. If the procedural guidance of the manual is in conflict with provisions of the U.C.M.J. then the latter will prevail. The U.S. President's authority to promulgate the Manual stems from Article 36 of the U.C.M.J. Accordingly he has the authority to promulgate an authoritative manual of procedure for the military justice system covering not only trial procedures but all pre-and post-trial procedures relating to military offences. The fair and efficient operation of the military justice system is dependent upon the authoritative guidance provided to members of the armed forces by the manual.

7. The current court-martial remains a temporary tribunal, convened by a commander to hear a specific case. It is not a part of the federal judiciary. Nor is it subject to direct federal judicial review (Burns & Wilson, 346 U.S.137 (1953)) & (Hyatt V. Brown, 339 U.S. .103 (1950)) But it is strictly a court of criminal jurisdiction, and its findings are binding on other federal courts (see article.76, U.C.M.J.)

the UCMJ including Life imprisonment and death. The Law officer advises the Court on Legal matters and performs some of the functions performed by a judge in civilian criminal trials, although one of the non-Lawyer members of the court is the presiding officer. Both the government and the accused are represented by legally qualified counsel and several levels of appellate review are provided. A verbatim transcript of the proceedings is made available for review purposes.

2. The Special Court-Martial : The Special Court-Martial (SCM) consists of not less than three members. It has jurisdiction over all non-capital offences under the UCMJ but is limited to adjudging a maximum punishment of a bad conduct discharge, forfeiture of two thirds pay per month for six months, confinement for six months. A bad conduct discharge may not be a adjudged unless a verbatim transcript of the proceedings and testimony has been made available to the accused. The accused, prior to the enactment of Military Justice Act of 1968, was not entitled to government appointed legal counsel and, in most cases, he was defended by a non-lawyer counsel. No law officer was assigned to the trial. Except in bad conduct discharge cases, no verbatim record was kept. Hence, appellate review was severely limited by the haphazard and scanty nature of the record.

3. The Summary Court-Martial. It consisted of one non-lawyer commissioned officer who acted as prosecutor, defence counsel, judge and jury. The maximum punishment which could be imposed by this court was reduction in rank, confinement for one month and forfeiture of two-thirds of one month's pay. This was changed in 1968, following the UCMJ. The "law officer" was converted into a "military judge" under the command of the Judge Advocate General of the service rather than that of the Commander; intermediate

appellate tribunals - courts of Military Review-were created in each service; and the right to Lawyer Counsel was extended to the special court-martial. Further changes in the military justice system with affinity to civilian system have been accomplished by the application of constitutional standards to the Military by the court of Military Appeals and also by administrative changes in response to criticisms during the Vietnam war. However, congressional proposals for a broader "Civilization" of military justice were not passed[8].

The appeal against a summary court-martial conviction may be made to the commander who convened the court (He has the power to reverse, reduce, or remit the sentence); and a further petition for review may be lodged with the Judge Advocate General.
The first level of review of a special or general court-martial conviction is done by the convening authority. Also cases in which the sentence was less than six months confinement or a bad conduct discharge are reviewed by a legal officer in the convening authority's Staff Judge Advocate Office, with no further appeals other than a right to petition the JAG. In case of more than six months confinement or a bad conduct discharge, there is an automatic appeal to the Court of Military Review, i.e. a court largely consisting of high-ranking military lawyers appointed by the Judge Advocate General. Finally, the Court of Military Appeals has discretionary power to hear any petition against an unsuccessful appeal to the Court of Military Review. In respect

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8. Federal courts have accorded considerable deference to distinctiveness of military justice, turning back constitutional challenges to imprecise military offences like "conduct unbecoming an officer and a gentleman" and "disorders and neglects to the prejudice of good order and discipline, (Parker V Levy, 417 U.S. 733, 945. Ct. 2547, 41 L.Ed 2d 439 (1947)) and to the denial of right to counsel in the summary court-martial. see Middendorf V. Henry, 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed. 2 d 556(1976))

of claims of denial of constitutional rights, Federal Courts may review court-martial convictions after the exhaustion of military remedies. The Military justice Act of 1968 made the following major changes in the UCMJ.

1. Institutional Changes

It provides that legally qualified counsel must represent an accused before any special court-martial empowered to adjudge a bad conduct discharge. In other special court-martial, legally qualified counsel must be assigned to represent the accused unless counsel were not available because of military conditions. In addition, a military judge must preside over a special court-martial, unless he is not available because of military conditions. The Act has created an independent judiciary for the armed forces, which is composed of military judges who are insulated from the control of line commanders. They preside over military trials with functions and powers roughly equivalent to those exercised by federal district court judges. The Act has modernized military trial procedures to conform closely with federal court practices. It has permitted an accused to waive his trial by the full court and to be tried by a single military judge, much like a civilian defendant who can waive a jury trial in favour of a single judge court.

It has strengthened the bans against command interference with military justice.

In case of an objection by the accused, the Act has barred trials by summary court-martial where there is no right to defence counsel, no independent judge, and no jury.

The Act has transformed the intermediate appellate bodies from "Board of Review" into "courts of military judges". It has

authorized a military form of release from confinement pending appeal, which looks like a bail provision. It has extended the time limit for requesting a new trial, and also strengthened other post-conviction remedies to servicemen.

Finally the most important changes made by the Act is the participation of Law officers in courts-martial, enhanced their prestige and further safeguard their independence from unlawful command influence. They are now designated as military judges and they are commissioned officers, members of the bar of a federal court or the highest court of a state. They are certified for duty as military judges by the appropriate judge Advocate General. Military judges preside over court-martial to which they are assigned much like federal district court judges with roughly equivalent powers and functions. All these have greatly increased the quality and prestige of military judges and also ensured their independence from improper command influence by removing them from the normal chain of command.

2. Procedural Changes

The military justice Act of 1968 has incorporated a number of changes to reduce delay and unnecessary formalities. Major changes include a requirement that a request by an enlisted defendant for non-officer members on the court must generally be made prior to the convening of the members[9], a requirement that members be sworn in before the court is convened[10], elimination of the troublesome and litigation-producing practice of permitting the military judge to confer in closed session with the members concerning the form of the finding[11], authorization for the military judge or member-president of a court-martial to

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9. Military Justice Act, Section 2 (7)
10. Id. Section 2 (18)
11. Id. Section 2 (9)

accept a plea of guilty and enter judgement thereon without the necessity of a vote by members[12], changes in the method of record authentication[13], and a provision for summary record of some general court-martial. Apart from the authorization of single judge trial, the most important provision is the one for amending the UCMJ to authorize the convening by the military judge of a pretrial session with the attendance of members of the court, for the purpose of disposing of interlocutory motions, raising defences and objections, ruling upon other matters that may legally be ruled upon by the military judge, holding the arraignment and receiving the pleas of the accused if permitted by regulations of the secretary concerned, and performing other procedural functions which do not require the presence of court members[14].

As noted earlier, a case may be referred to a single-officer court if the accused makes that request in writing before the court is assembled, and the military judge approves that request. Before the military judge makes such a report, the accused is entitled to know the identity of the military judge and to have the advice of his counsel. The accused has a choice in the case of a special court-martial also if a military judge has been assigned to the court. The provision of a single judge court-martial has resulted in great reduction in both the time and manpower normally devoted in trials by court-martial.

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12. Id. Section 2 (22)

13. Id. Section 2 (23)

14. Id. Section 2 (15)

3. Protections against Command Influence

One of the most troublesome problems in the administration of military justice is that of improper command influence exerted by line commanders against members and legal officers assigned to courts-martial. The provisions of UCMJ article 37 and that of the Military Justice Act restrict that influence. According to these provision, the performance of a serviceman as a member of a Court-martial may not be evaluated in preparing a report on his effectiveness, fitness or efficiency or in determining his fitness for promotion, transfer, or retention in the service. Nor may a serviceman be given a less favourable rating or evaluation because of his zeal in acting as defence counsel in a court-martial[15]. In addition, the "Independent field judiciary" system has ensured the freedom of military judges from pressure by line commanders since the former are assigned by and responsible to the Judge Advocate General only.

Review and Post Conviction Procedures:

Military Justice Act provides a form of release on bail after conviction pending appeal. Further, the convening authority or certain higher commanding officers may, upon the application of the accused, defer the service of a sentence to confinement pending appeal[16]. The deferment comes to an end and the sentence begins to run automatically when the sentence is approved after review and orders are issued for its implementation. The convening authority or the officer exercising general court-martial exercises broad jurisdiction in this regard. Such

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15. MJA Section 2 (13)

16. MJA Section 2 (24)

officers take into consideration all relevant factors in each case and grant or deny deferment in view of the best interest of the individual and the service. The officer granting the deferment or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, has discretion to rescind the sentence any time. The Act also extends the time within which an accused may petition the Judge Advocate General for a new trial. Instead of one year, he has now two years. This is available in all cases.

The Military Justice Act has amended the provisions of the UCMJ. It has established boards of review to review court-martial cases. Accordingly the boards are transferred into " Courts of Military Review " and a single court of Military Review for each armed service has replaced the several boards of review[17]. Each court of Military Review is composed of one or more penals. Each penal is composed of not less than three appellate military judges. In reviewing Court-martial cases the Courts of Military Review may sit as whole or as prescribed by the JAG in accordance with uniform rules of procedure. Each JAG designates one of the appellate military judges as the chief judge of the court of Military Review established by him.

The Chief Judge then determines (a) the penals of the court, (b) the appellate military judges to serve in the court, (c) the appellate military judges assigned to the court to act as the senior judge on each penal. This provision has significantly enhanced the prestige and independence of the appellate bodies

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17. MJA Section 2 (27)

and has promoted uniformity of decision and sound internal administration within the intermediate appellate structure of each service.

In the series of reforms, Military Justice Act of 1983[18] was introduced. Under this Act, the Court of Military Appeals has been placed directly under the supreme court for the purposes of judicial review. This has enhanced the stature, stability and effectiveness of the court of Military Appeals. The supreme-court has been empowered to review decisions of the court of Military Appeals by granting petitions for writs of certiorari[19]. This provision has been designed to meet two concerns : first, the burden imposed on an accused by the costly and time-consuming process to reach the supreme court through collateral review of a court-martial conviction; and second, the absence of any authority of the government to obtain review of the decisions of the court of Military Appeals.

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18. Pub.L.No. 98-209, SC 10, 97 Stat, 1393, 105 (1983). On 6 December 1983, the US President signed the Military Justice Act. Most of the part of the Act came into effect on 1 August 1984. Provision affecting the jurisdiction of the DRB and BCMR'S and the membership of the code committee and establishing a commission to study certain aspects of military justice, including judge alone sentencing and increasing the sentence power of SPCM's, came into effect immediately after the signing of the Act.

19. This provision of Military Justice Act of 1983 became effective on 1 August 1984. The senate Armed Services committee noted in its report that the supreme court may initiate direct review at any time on or after 1 August 1984 and that the legislation contemplates review of decisions from the court of Military Appeals that are issued prior to that date, but the precise details will depend on rules issued by the supreme court for governing submission of petitions for review. see 1983 senate report on Military Justice Act of 1983.

The foregoing inquiry reveals that present system of Military Justice in the US is fair. There is due process for every military service member who is accused of a crime. Apparently England and America have reformed their armed forces laws to introduce many progressive features whereas no substantial changes has taken place in our armed forces laws. Taking into consideration of the progressive features of England and American armed forces law, it is obvious that Indian armed forces laws are lagging behind the former countries laws. Efforts have been made in the concluding chapter to put forth certain suggestion for the reforms in the Indian Military Justice System.

CHAPTER VI

CONCLUSIONS AND SUGGESTIONS

Military justice ought to be effective, efficient and fair, both in times of peace and war. To this end we must constantly strive, as military justice is an important means to promote discipline. To achieve this, the Indian military law should be efficient, fair and consistent with modern and progressive concepts of military justice.

Military law is an important instrument to strengthen the armed forces. With these forces now being equipped with complex weaponry and their effective use being dependent on the coordinated and precise interaction of many persons, the part played by military law has become increasingly important. Military law promotes higher performance, efficiency, organisation and cooperation through its detailed regulatory apparatus. It thus helps to increase general combat capacity. Military law establishes order and discipline by forbidding actions detrimental to national defence and by making servicemen liable for breaches of military regulations.

Military law also has the important role of educating servicemen. Its rules enable servicemen to understand that all legal measures enacted for the sake of national defence are necessary

Military law in India ought to strengthen democratic tendencies in armed forces and to improve the legal status of personnel. Throughout the history of the Indian armed forces, high military discipline has been a major factor contributing to splendid victories on the battlefield. Today military discipline is much more important than ever before, primarily because the armed forces have to deal with much more complicated tasks in an extremely difficult situations, because the character of warfare

is now quite different from what it used to be. Every commanding officer considers discipline his top priority. To keep discipline means to ensure a high level of combat readiness. Simultaneously it is essential that military discipline and rights of individuals should be kept in equilibrium. There should be a balance between (a) the necessity of discipline in armed forces to preserve national security at any cost, because that would ensure enjoyment of fundamental rights, and (b) restrictions on fundamental rights of armed forces who are responsible for national security and these very fundamental rights.

Any unjust rule of Law in the name of maintenance of discipline will definitely subvert discipline and functioning of armed forces[1].

In order to improve the military justice system, many reforms have been suggested at different levels, but the process has been rather slow. We have not been able to act upon many innovating measures which are needed for a proper functioning of the system. No doubt, a few of them have been accepted and implemented but we have neglected to consider many other recommendations. There is a need to reappraise the existing judicial system in the armed forces to bring it in line with modern and progressive concepts of military justice.

Comparing with other countries, the military law system in India is not satisfactory at all. Many other systems are lenient to a suspect, while our is rather harsh and needs completeness, accuracy and further details. In USA, a commander has great .

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1. AIR. 1982, SC. 1437

powers in the judicial area; in India the power of commander is limited to exercising discipline. In many countries, a defence counsel can communicate with his client from the beginning of the confinement. In India assistance of counsel is not permitted at the confinement level. Unlike many other countries, Indian military law does not grant right of appeal to an accused. We have not carried out many procedural reforms as guaranteed in civil courts. Due process safeguards are yet to be streamlined. The study of military law systems of other countries will broaden our knowledge. It is evident from the reforms made in the administration of justice in the armed forces in the United States, England, Australia, etc, that military law in India is not intune with practical and ideological needs of the times. The reforms in the Indian military law should reflect a thoughtful balancing of justice and discipline. Within the first is included safeguards and other values that are part of the criminal law administration of the civilian community. The second ingredient principally requires keen consideration of discipline in the abnormal situation, and limitations arising out of the burdens, realities of military operations and the like. With these objectives the following reforms may be suggested in the court-martial system in India :

1. Actions should be taken at all levels to avoid delays, since deterrent, corrective, and rehabilitative benefits of punishments are all too often diluted by the passage of time and by inaction. To avoid administrative delays, it is essential to position legal clerks/writers on an authorized and permanent basis. To be effective, disciplinary punishment must be imposed in a timely fashion.

2. Concerted efforts should be made to improve and increase training in military justice. Judge advocate should be readily available to assist batallion/squadron/ships or higher commanders.

3. The job performance of judge advocate officers has considerable influence on the formation of attitudes towards military justice. It has its most crucial impact when a judge advocate is serving as Trial Judge advocate. In that case, it is imperative that the armed forces as a whole, view the judge advocate as being above suspicion with regard to his ethics and conduct. These ethical attributes directly relate to job performance and, to a large extent, govern the manner in which the judge advocate generals cadre is accepted by the armed forces.

4. The importance and utility of the judge advocate general department depends upon the professional competence of its members. Efforts should, therefore, be made to provide broad based legal training to them. Substantial facility exists for that in the Indian Army. The JAG department should issue material for the guidance of legal officers, commanders and other officers who many be called upon to do duties of legal nature.

5. Military Justice is often described as the "bread and butter" of the JAG Cadre. In truth, judge advocates perform many functions which are in no way connected with the practice of criminal justice. For example, they have to carry out administrative duties which are carried out by other soldiers. Such functions often play a negative role in the formation of attitudes, as they affect the individual in a personal way. They distract the mind of judge advocate, since he gets less time to concentrate on his primary duties. The judge advocates should be exempted from all extraneous duties.

6. The JAG department should be divided into two separate independent cells. Pre-trial section and the post-trial section. The formers job should be to render pre-trial advice to the convening authorities. It must provide a prosecutor at GCM and important DCM trials. The post-trial section should prepare reviews of all court-martial proceedings, and provide a judge-advocate for all GCM trials and may provide one at the DCM trials.

7. The staff judge-advocate should be charged with the responsibility of finally determining whether the charges are legally correct, and if there is sufficient evidence to support the charges. Only after the satisfaction of judge-advocate in this respect should the case be referred to the commander for his consideration. The experience of the staff judge-advocate should continue to be utilized by calling upon him to give his recommendations to the convening authority concerning the nature of the offence and the level of the court-martial deemed appropriate. The Commander should be left free to decide whether the conduct of the accused had sufficient impact on his command to warrant a trial, and if so, what type of court was necessary to deal with the breach of discipline. The commander would thus be released from the burdensome task of deciding legal questions but would retain the disciplinary power over his command. The staff judge-advocate should be insulated from the commander. His decision on purely legal questions should be final and not subject to review[2].

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2. Major Donald W. Hansen, " The Commander's Judicial function , Their History and future". **In. M.L. Rev.** reproduced in **Civil and Military Law journal** (April-June 1968)

8. The Judge Advocate General in India fulfils some of the highest judicial and advisory functions. In view of his responsibilities and the necessity for complete independence, his qualifications, status and remuneration should be prescribed. He should be appointed by the President of India in consultation with the chief justice of India and should be responsible to the latter in the performance of his duties.

9. In a trial by court-martial, both the judge advocate and the defending officer/defence-counsel should be certified by the judge advocate general or his deputies, as competent to perform their duties, before they are appointed by the commander.

10. An independent agency should be established to review confirmed court-martial proceedings. Constitution of an armed services Board of Review, consisting of one experienced legal officer from each service, may be a practical and economical solution. The Board may review such proceedings as may be referred to it by the respective services Judge advocate general. It may also grant review in appropriate cases upon petition by the accused when the finding involves an error of law or when there is material irregularity in the proceedings of the trial resulting in miscarriage of justice. Such a Board would not only provide double scrutiny of the proceedings, but would also reinforce the confidence of servicemen in the fairness of the system.

11. Consideration should be given to assigning only experienced staff judge-advocate of the rank of Major and above to serve as Judge-advocate in a trial by court-martial. Junior/inexperienced officers should not be assigned when senior judge advocates are available. While the junior judge advocate generally conscientious, he often lacks experience and maturity required for his work.

12. Instead of court-members being selected personally by the convening authority, a random selection system would remove, to some extent, a constant source of criticism.

13. Whenever the prosecution is conducted by a legally qualified officer, the defence of the accused should also be entrusted to an officer who has legal qualifications. Otherwise it would go against the basic principle of the adversary system which requires equal representation of both the parties in the interest of justice. It is, therefore necessary that the services of a competent legal officer are available to the accused for his defence.

14. To prevent the court-members from being improperly influenced by the commander, it is necessary to discontinue his power to appoint them and to remove them. Like US, the effective power of the commander to appoint members to carry out judicial act has been withdrawn. Further, his power to appoint legal personnel of the court has also been withdrawn by the uniform code of military justice in 1951. Both the counsel and the law officer are certified by the Judge Advocate General as competent to perform their duties before they can be appointed by the commander[3].

In this respect the plan proposed by the American Bar Association appears to be representative of all reform movements and is worth consideration;

" The remedy suggested is a simple one ; the power to convene the court, to appoint assigned defence counsel and to order the sentence executed would be taken from the commander and vested in the Army Judge Advocate General's department or its

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3. Uniform code of Military Justice, 1951, Article 27(b) and 26 (a)

equivalent in other services. Commanders who under existing law, convene the court would be required to make available to the Army or higher Headquarters a panel of officers available and qualified for court-martial service. From such panel the Judge Advocate general or his deputy at army or other headquarters would select the general court to adjudicate the cases in a particular division. The court could of course be composed of officers selected entirely from divisions other than division in which they are assigned to preside"[4].

15. Pretrial investigation often consumes substantial resources, presents logistical difficulties, and delays the timely processing and trial of charges. Errors relating to the conduct of the investigation sometimes becomes issues unrelated to the merits of the case. Witnesses are transported around the world, the investigation itself takes the appearance of minitrial. In order to improve the system, these arrangements have to be improved upon.

16. If the law is to have genuine deterrent effect on the criminal conduct, then criminal cases must be tried within 60 days after indictment. In additions to other aspects, it would sharply reduce the crime rate.

17. More rights and legal protections to the individual soldier should be given and the commander's authority to impose immediate disciplinary action for minor offences should be removed from the Acts of three services.

18. A soldier in a court-martial must be provided with meaningful qualified counsel, not proforma representation. The accused

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4. Hearing on HR. 2498 before a sub-committee of the House Committee on Armed forces 81st Congress, p. 728 (1948); see also Keefe & Moskin, " Codified military justice Cornell L.Q, Vol 35, p. 151, 158 (1949)

should be advised well in advance of trial what witnesses will testify against him.

19. The commander should be divested of the power to review court-martial proceedings as he is poorly equipped by training or judicial temperament to decide if the findings and sentence are correct in law. The responsibility should be transferred to the department of the judge advocate general. The accused should have a right to have his case reviewed by the judge advocate-general. He should be entitled to be represented either in person or by the defence counsel or a defending officer at the review stage. The system of judicial review incorporated in the Navy Act should be adopted by other two services, too.

20. The power to setaside a verdict or to order a new trial should be removed from the system although the convening authority should retain his present power to reduce, suspend or commute punishment. He should also have the powers to grant clemency and to approve or disapprove the sentence based on his view of the need for discipline and proper utilization of personnel in his command.

21. With the nature and type of cases coming before SGCM and DCM, it is imperative that legal expertise is available to such courts to determine complicated questions of law and fact that may arise before them. The attendance of a judge advocate in these court-martial should be made obligatory.

22. The system of SCM which was introduced to serve the needs of the mutiny days when certain rough and ready system of punishments had to be resorted to, does not answer the recognized standards of justice in the present day circumstances. Its continuance under the democratic constitution is unreasonable.

Its jurisdiction and powers of punishment must be curtailed. Any punishment involving imprisonment and detention should not be summarily awarded.

23. The practice of judge-advocate retiring with the court when the court is considering its findings can cause misgivings in the mind of the accused. This practice should be abandoned.

24. For the verbatim record of trial, lot of time is consumed by paper work, including the preparation and authentication of the record. The current method of preparing records of trial by short hand writers is not satisfactory. Often it takes considerable time for the compilation of the complete proceedings. Courts should use Dictaphone or audiotape recordings. With the latest technological innovations, copies of the record can be reproduced electronically.

25. While delivering the findings, the court should give a brief statement of the reasons for the findings. The points for determination, the decisions thereon and the record of the substance of evidence on which the decision has taken place should be issued for a majority judgement. Dissenting opinions are to be discouraged. Multiple expression of opinions, prolixity of order should be avoided in this endeavour. A convict may desire to move the higher court in case he finds the order not favourable to him. He may demand a copy of the order immediately. To cater for such needs, while the operative part of the order can be pronounced in the open court at the time of the judgement by a court-martial, some arrangements should have to be made to make the complete order available within a prescribed period.

26. Off late the tendency of seeking justice in the civil courts, on the part of the Armed Forces personnel has increased. In certain cases the High Courts and the supreme court have interfered with the decisions passed by the court-martial and

also with the administrative decisions in respect of dismissal etc. In many cases, the courts have ordered the military authorities to provide relief in such cases. To some extent the above situation has emerged due to mishandling of cases by the concerned authorities or their staff officers because of their ignorance of the legal provisions, misinterpretation of rules, undue delay or arbitrariness, causing panic in the minds of the aggrieved persons which led them to knock the civil courts to seek redress despite adequate remedies available in the respective Acts. This has also resulted into undue hardship to these aggrieved persons and has caused crises of confidence amongst all ranks about the prevalent legal and judicial set up in the Armed Forces. It is, therefore, imperative that all commanders, their staff officers, subordinate staff and all others concerned with the administration of justice in the armed forces ought to be conversant with the practical aspects of military law to ensure administration of speedy and fair justice to all ranks, to restore their confidence in the existing military legal system, to avoid their being demoralised on that account and embarrassment to themselves if their decisions are reversed by the superior military authorities or by the civil courts[5] .

27. In respect of sentencing philosophy to be adopted in the military justice system, deterrence play an important role. Reformation or rehabilitation in a corollary to individual deterrence, and rehabilitation of offenders is certainly a vivid concern. Retribution was, historically, the primary basis for imposing sentence in the military system; its resurging acceptance in the civilian society as well indicates retribution,

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5. Lt Col. G.K. Sharma, study and practice of Military Law, Deep & Deep publications, 1988, p.21.

should not be neglected as a reason for sentencing military offenders.

28. All the three services Acts should be amended so as to provide for a right of appeal against the decision of a court-martial. For this purpose the courts-martial appellate court should be established. That court should comprise of qualified and experienced service officers as also judges drawn from the High Courts. The court of Military Appeals under the uniform code of Military Justice in the USA[6] could be model in this regard.

29. Once the court-martial appeal court is established, the writ-jurisdiction of the High courts under Article 226 of the constitution should be abolished in respect of courts-martial. An appeal against the decision of the court-martial appeal court should only lie to the Supreme Court.

30. Article 136(2) of the constitution should be repealed. The special leave jurisdiction of the supreme court should be extended to court-martial as well. Such leave of appeal could be granted by the supreme court only in exceptional circumstances when either a question of jurisdiction or grave illegality is involved.

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6. The Court of Military Appeals, under the uniform code of Military Justice, has significantly changed the military justice system. It has been re-evaluating the balance between "justice" and discipline. These concepts are inter-related and co-exist in varying degrees in any criminal legal system, but the military has traditionally placed greater emphasis on the latter. The court has been probing the underlying tensions between justice and discipline and is readjusting the mechanism by which they are balanced. The court has felt that considerations of justice must be given greater emphasis. It has concluded that the requirements of justice are too sophisticated to be left to the commander to operate, because he frequently has a natural interest in putting a hidden thumb on the disciplinary side of the scale.
(Captain John S. Cooke, The United States Court of Military Appeals, 1975-77, Judicializing the Military Justice System, 76 Mil. L. Rev. 43, p.52

31. Departments looking after the offenders sent to confinement should encourage the use of correctional custody.

32. There is a need for enacting a uniform-code for the three services of the Armed Forces to remove any disparity and to have uniformity among the military services in India.

33. The defending officer or the defence counsel, as the case may be, should be allowed to confront and cross-examine depositions.

34. The judge Advocate or any individual carrying out legal duties of similar nature in the armed forces should possess requisite legal qualifications before he is appointed to the post at a trial. He should decide all questions of law and his opinion on points of law should be binding on the court. With a strong judge-advocate, it is also necessary that he is assisted in the fact finding process by a competent and impartial prosecutor and defence counsel.

35. A commission, consisting of experts from the Military of Law, jurists, eminent lawyers, academician, ex JAG of the three services, should be appointed to undertake a study on the effectiveness and operation of the administration of military justice and its bearing on good order and discipline in the armed forces. The commission should suggest improvements that should be made in the respective Acts of the armed forces. Its survey should analyse inequities if any that accrue to the Government or to the individuals in the application of the respective Act or judicial decisions stemming therefrom. It should also assess the role of the administration of the military justice in the maintenance of morale and discipline in the military services.

36. Though the system of granting bail, as known to civil law, need not be introduced in Military-Law, the commanding officer should keep offenders awaiting trial in open and not close custody unless the exigencies demand otherwise.

Some of the above mentioned recommendations cannot be effectively implemented without recruiting more officers in the legal cadre and incurring other expenses. Considering the improvements these recommendations may bring to the administration of justice and the consequent effects they may have for the betterment of the system and on the morale of the servicemen, the expenses shall be negligible and should be considered as a worthwhile investment. The system must be streamlined thoroughly so that it can cope effectively with a worsening situation without sacrificing its well-earned reputation.

If these reforms are carried out, most of the defects of the court-martial system in India would disappear and little ground would be left for complaint about the injustice of the court-martial system. The introduction of these reforms would allow an accused in the military to have certain basic safeguards similar to these available to a civilian arraigned on an offence before the civil court. In this regard the law should maintain a fair balance between those who are in power and those who are subject to power.

As long as military justice remains consistent with the military paramount need to maintain a disciplined force responsive to military command under fire, both the military and the individuals serving in it would benefit from the reforms of procedures. Such procedural reforms will not jeopardize military discipline. On the contrary, most evidence show that fair disciplinary practice increase service loyalty, while repression and

harassment often undermine it. In the better educated "thinking man's Army" of today, the solution lies not in heavy-handed oppression, but in more intelligent leadership from officers[7].

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7. Dissent and Discipline in the Thinking Man's Army", editorial, **Life** (May 26, 1969), p.20

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