CHAPTER-VII

EPILOGUE

The study of administration of military law in the context of constitutional imperatives has been revealing in many ways. The military law is primarily contained in the three enactments, namely, The Army Act, 1950, The Air Force Act, 1950 and the Navy Act, 1957. These laws have practically the same age as the Indian Constitution. The Constitution has grown rapidly during the last four decades but the same cannot be said in regard to the three primary enactments in the field of armed forces. The fact of the matter is that these enactments have practically remained unamended during this entire period of forty years. One might say that forty years is not a long period for the growth and development of any branch of law. On the other hand, it would be relevant to keep in mind that most of the branches of law have undergone evolutionary metamorphosis. This is understandable as the law has undergone rapid changes not only in India but in other parts of the world also during the second half of the twentieth century. This has been so because the very concept of the state has changed during this period. The state used to play a very limited role in the first part of this century whereas the role of the state has multiplied manifold in the second part of this century. In short, the change has been from police state to social welfare state. Law in order to dialogue with justice must have pace with the heart beat of the state. It would not be wrong to say here that the military law has not been able to keep pace with this development in India.
Chapter one traces the origin and the development of military law in India. This, therefore, does not warrant any summing up. The only point that needs to be made is that neither in the pre nor in the post-constitutional period full attention has been devoted to the development of military law. It has remained more static than dynamic. The reason for the same has been that this area has been treated like the exclusive domain of the defence services and not to be the part of the constitutional stream. Unless this mask of exclusiveness is uncovered, it is likely that the development of military law would continue to be sheltered development.

The need for separate military courts is understandable. It certainly would not be desirable to subject the persons belonging to the defence service to the ordinary courts of the land. Dicey of course would not agree with this viewpoint but the special needs and requirements of the defence services cannot be overlooked. Defence services constitute a separate class and therefore, fall within the reasonable classification as contemplated under article 14 of the Constitution. The need for separate courts does not by itself mean that they can have any kind of composition for the same. The fundamental requirement of any system of courts is that it should be able to render justice which is fair impartial and not arbitrary and fanciful.

The court-martial, as the provisions exist can include even an officer who may be junior in rank to the officer who is to be tried by it. This is a serious infirmity in the composition of
the court-martial. Such a court cannot inspire confidence. Even otherwise it can lead to indiscipline and insubordination which demolishes the very foundation of the forces. The inclusion of junior officers on the military courts under all circumstances be avoided.

The system of summary court-martial deserves special mention. It is presided over by the commanding officer of the unit. In fact he combines in himself the positions of the prosecutor and the judge. This goes contrary to the basic tenent of justice. A judge can never be the prosecutor. Therefore, there is a need for change in this regard. This assumes seriousness in the context of that summary court-martial enjoys very wide powers exercisable without following the due process of law.

Normally summary trials in the civil are meant for petty offences whereas it is not so in case of the summary court-martial. It is suggested that like in the United States an option even should be provided for engaging the defence counsel at summary court-martial.

The analysis of the different courts-martial indicates that legally qualified officers are not required to man them. This is not a healthy trend. Courts-martial deal with serious offences leading to severe punishments. Some times highly technical points are involved. In such situations, it is essential that legally trained persons should be associated. There association would help in the proper application of law. This in turn would require that military law school should undertake to train the officers in the field of military law and other allied laws so that they are well equipped to handle all kinds of cases.
The military courts as also the criminal courts often have concurrent jurisdiction. This results in jurisdictional conflicts. In order to minimise these conflicts it is suggested that if an offence has been committed by a person subject to military law within the territorial boundaries of army authorities, such a person should be tried by the military court. If the offence has been committed outside the territorial boundaries, he should be tried by the criminal court. If the offence has been committed by a group of persons some civilians and some military men in that case the trial should be conducted by the criminal court even if the offence had been committed within the territorial boundaries of the army authorities. In cases where intricate questions of law are involved, they should be tried by the criminal courts. The army authorities themselves should in such cases refer them to the criminal court.

Section 127 of the Army Act has serious implications. It envisages that a person who may have been tried by the court-martial and convicted or acquitted can still be tried by a criminal court for the same offence and on the same facts though with the previous sanction of the Central Government. The sanction of the Central Government would depend upon the recommendation of the military authorities. This would hardly be a safeguard against the possible misuse of the power vested under this section. It is unfair and unjust to subject a person to a trial by the criminal court when he has been already punished by the courts-martial. This amounts to double jeopardy. Accordingly, section 127 needs to be amended.
Section 160 of the Army Act read with rule 68 of the Army Rules deals with the revisional power of the court-martial. The confirming authority can refer back the case for revision with or without direction to take fresh evidence. In case there is no direction regarding fresh evidence, the same court deliberates its findings in closed court in order to decide about the revision of its earlier findings and sentence. This means that the court-martial can change the finding from not-guilty to guilty or increase the sentence already awarded. This change is of serious consequences and yet the provisions of law do not contemplate any opportunity to be afforded to the concerned person. Such exercise of revisional power would be of arbitrary nature and, therefore, hit by article 14 of the Constitution. It is suggested that in the event of exercising a revisional power, it should be encumbrant upon the court-martial to provide due opportunity to the concerned person.

Accordingly, the necessary provision in this regard should be added in the Army Act. It is further suggested that if the finding of the court-martial is 'Not Guilty', such a finding should not be required to be confirmed. This is because many a time it causes hardship. The confirming authority invariably refuses to confirm the finding which means that a person who was found 'Not Guilty' by the court-martial is found by the confirming authority as 'Guilty'. Moreover, the confirming authority does not provide any opportunity to the accused. Therefore, the finding of 'Not Guilty' should not be required to be
confirmed. There is still another lacuna. The finding of 'Not Guilty' is sent back to the court-martial by the confirming authority directing to exercise the revisional power. Once again the court-martial confirms the finding of 'Not Guilty'. In such a situation also, there should be no requirement of confirmation.

The military law does not specify the time limit within which the confirming authority is to decide. Many a time undue delay is caused and the matter is allowed to linger on. This is an important step in the whole process of trial. Therefore, it is suggested that some reasonable time limit (three months) be stipulated within which the confirming authority must take the decision.

Fundamental rights occupy a place of importance under the Indian Constitution. The Constitution establishes a direct link between the fundamental rights and the citizenry. The members of the armed forces have been treated somewhat differently in this regard. Under article 33, the Parliament has been empowered to restrict or abrogate the fundamental rights in order to ensure (i) the proper discharge of their duties and (ii) the maintenance of discipline among them. This provision has been a subject matter of numerous cases which have come before the High Courts and the Supreme Court. Somehow, the courts in India have misconstrued this provision. It is no doubt true that the Parliament has been given the power to restrict or abandon the fundamental rights vis-a-vis the defence services. This power is exercisable within the limitation carved out in article 33 itself. The important limitation
which would be clear from the bare reading of the article itself is that the Parliament can exercise the power in order to ensure the two objectives. Any law enacted by the Parliament restricting or abandoning the fundamental right which is not in furtherance of the said objectives, such a law would be violative of article 33 itself. It needs to be understood that the framers of the Constitution never intended to delink or to divorce the defence services from the application of fundamental rights. Persons belonging to the defence services are a part of "We the people of India". Understandably the intention of the framers was to only restrict the application of fundamental rights to the extent the special needs of the armed services are concerned. Therefore, sooner the Indian Courts particularly the apex court realises the exact scope of article 33, the better it would be.

The Constitution guarantees the fundamental right to equality. It also forbids discrimination only on the ground of sex. Women have been taking active part in many spheres of human activity. So far they have been kept out from the defence services except the medical corps. In view of the changed environment, there is need for giving serious thought and consideration to the inclusion of women at least in certain spheres of activity in the defence services.

The members of the defence services under the Indian Constitution can continue only as long as they enjoy the 'pleasure' of the President. This has been clearly provided under article 310.
and reinforced under section 18 of the Army Act. The limitations and protections envisaged under article 311 in regard to civil servants have not been specifically extended in case of the defence services. On the other hand section 19 read with rule 14 warrants a show cause notice to be given before a person belonging to the defence services can be dismissed or removed. In fact rule 14 envisages a trial by the court-martial unless the Chief of the Army Staff or the Central Government finds it inexpedient and impracticable to hold such a trial. The President cannot exercise his pleasure in his personal capacity as under the Constitution he acts on the aid and advice of his council of ministers. Section 19 of the Army Act requires the Central Government to follow the procedure provided in rule 14 of the Army Rules. The cases which have come in this regard before the High Courts and the Supreme Court have not appreciated the constitutional legal position in the totality of statutory provisions. Each decision has been viewed in the context of a specific provision and not in the light of the rest of allied provisions. Therefore, it is suggested that sections 18 and 19 of the Army Act need to be amalgamated in order to clearly provide that the power is to be exercised in the light of the procedure contemplated under rule 14 of the Army Rules. It would be unreasonable, unjust, unfair, arbitrary and fanciful if the absolute doctrine of pleasure is applied in the case of the members belonging to the defence services. It would not be desirable as such to extend article 311 in favour of the defence services because of the special needs of the discipline in regard to them.
This does not mean that no opportunity need be given before imposing the major punishment. Rule 14 contains the bare minimum by way of protection for the members of the defence services. In fact, the rule is not being applied in actual practice as it envisages. It makes a provision for holding of a court-martial before the imposition of the major punishment. If the rule is followed in letter and spirit, the persons belonging to the defence services would be sufficiently protected.

The principles of natural justice have come to play a very important role in every sphere of State activity. Natural justice requirements have been extended from judicial to quasi-judicial and from quasi-judicial to administrative functions. The courts in India have extended the applicability of the principles of natural justice to the military area as well. Rules of natural justice are flexible in scope. They are not hard and fast. They are tailored according to the needs of the situation. Therefore, complete exclusion of natural justice principles would have been a detrimental and a retrograde step. In this context, it would be relevant to specifically highlight a particular situation which needs immediate attention.

The courts-martial are not required to record reasons even while imposing the death penalty. Even if the court-martial reaches a just and fair conclusion yet the non-recording of reasons is unjust and unfair. Justice is not only to be done but it must manifestly seem to have been done. Recording of reasons or the passing of a speaking order is safeguard against
the possibility of abuse or misuse of the power. Even otherwise also, one must know the reasons as to why the matter has been decided in that particular manner. Therefore, it is suggested that it should be mandatory to record reasons in regard to the findings of the courts-martial.

The system of military justice as envisaged under the military laws is not wholesome. In any civilised legal system, one right to appeal is essential. Otherwise there would be no regular system of rectifying the errors committed by the trial court. In India from the decision of the court-martial, there is provision for making representation before the confirming authority as also before the Central Government. There is no regular military court of appeal envisaged. Such a provision exists in other developed systems of law. Equally, there is strong need for military court of appeal in India as well. It is suggested that the necessary provision should be incorporated in this regard. This would help in scrutinizing the findings of courts-martial and wherever there has been an error, the same to be rectified. Such a court of appeal be provided at each command level.

The military jurisdiction has not been completely delinked from judicial review by the courts in India. It is healthy to find that the High Courts under article 226 and the Supreme Court under article 32 have the jurisdiction over the military authorities and the courts. Both these articles of the Constitution are the backbone of judicial review. They are instrumental in ensuring rule of law in every nook and corner of
State activity including the area covered by the military law. It would be relevant to mention here that the courts have not acted in a conservative manner while exercising authority within the ambit and scope of these two articles. This trend is a welcome trend particularly in view of article 227(4) and article 136(2), under these two provisions the jurisdiction of the High Courts and of the Supreme Court has been excluded over the courts and tribunals constituted by or under any law relating to armed forces. These two provisions do not preclude the jurisdiction exercisable under articles 32 and 226. The decisions of the High Courts under article 226 can further be scrutinized by the Supreme Court under article 136 in exercise of the power of special leave to appeal. It is relevant to mention here that the decision of the High Court is not that of a Court constituted by or under the military law. It is only such decision which have been excluded from the special leave to appeal jurisdiction of the Supreme Court under article 136(2). In view of this position, judicial review has been rightly retained by the framers of the Indian Constitution.

Military law in India needs overhauling. So far during the last four decades no serious effort has been made to undertake this exercise. The present study has focussed some of the areas which need a change. It is suggested that this exercise should be undertaken without delay. There is considerable amount of reluctance on the part of military authorities in this regard. This reluctance is not healthy. In order to keep the stream of justice flowing and to provide reasonable ventilation to those who serve the nation, it is imperative to introduce certain reforms which are overdue.