CHAPTER IV
TRIALS BY COURTS MARTIAL : AN ASSESSMENT

A. Under the Indian Military Law

Introduction

“In the civil courts, it may be an axiom that it is better for nine morally guilty men to go free than that one innocent man should suffer; in the military courts, the reverse is considered desirable”.

J.A.G. Griffith

We have seen development of system of Courts-Martial while dealing with the history of military law. King Gustavus Adolphus of Sweden was of the view that the persons composing of a Court-martial should be men of very high integrity, order and discipline. He was of the view that the court-martial should be composed of the highest possible functionaries of the Army. During the siege of Riga, Poland in 1621, he issued his Articles for the maintenance of order. These provided for a regimental (lower) court-martial. The President of this tribunal was the regimental commander and the court’s members were elected individuals from the regiment. The standing court-martial (the higher court) was presided over by the Commanding general and its members consisted of high-ranking officers. Article 142 provided, “In our highest Marshall Court, shall our general be President; in his absence, our Field Marshall; when our general is present, his associates shall be our Field Marshall first, next to him our General of the ordnance, sergeant Major Generall, Generall of the Horse, Quarter Master Generall; next to them shall sit our Muster-Masters and all our Colonells, and in their absence their Lieutenant Colonells, and these shall sit together when there is any matter of great importance in controversie.” If a gentlemen or any officer was summoned before the lower court to answer for a matter affecting his life or his honour, the issue was referred to the higher, or standing court for litigation.
While adversely commenting on the justice in the Army delivered through Courts-martial, the Supreme Court in the case of *Lt Col PPS Bedi V UOI* AIR 1982 SC 1413, observed that the Army, with its total commitment to national independence against foreign invasion must equally be assured of the prized liberty of individual member against unjust encroachment. It was said that the court-martial should strike a balance between military discipline and individual personal liberty. And door must not be bolted against principles of natural justice even in respect of army tribunal (court-martial). Any unnatural distinction or differentiation between a civilian offender and an offender subject to the Act would be destructive of the cherished principle of equality, the dazzling light of the constitution which illumines all other provisions.

In the judgement quoted ibid, the Apex court observed that even though it was pointed out that the procedure of trial by court-martial is almost analogous to the procedure of trial in ordinary criminal courts, they recalled what Justice William O’ Doughlas “that civil trial is in an atmosphere conducive to the protection of individual rights while a military trial is marked by the age-old manifest destiny of retributive justice”. As per them, “the very expression “Court-Martial” generally strikes terror in the heart of the person tried by it. And somehow or the other, the trial is looked upon with disfavour ‘Tough Test for Military Justice’¹. Further they quoted the case of *Reid Vs Covert*, (1957) 1 Law ed 2d 1148, in which Justice Black observed at P. 1174 as under:-

“Courts-martial are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of “Command Influence”. In essence, these tribunals are simply executive tribunals whose personnel are in the chain of command. Frequently, the members of the court-martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings

¹ Time Magazine, PP 42 & 43.
in short, for their future progress in the service. Conceding to military personnel that high degree of honesty and sense of justice which nearly, all of them undoubtedly have, the members of a court-martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges”.

Classification of Courts Martial

We have four types of Courts Martial under Army Act 1950 –
(a) General Court-Martial;
(b) Summary General Court-Martial;
(c) District Court-Martial; and
(d) Summary Court-Martial.

Courts-Martial-impermanence of Courts-martial

As mentioned above, the courts-martial are ad hoc bodies, which come into existence only when there is a need to have a particular kind of court-martial to assemble, depending upon the gravity of the offence (s) committed in juxtaposition of the circumstances of the case. It is unlike the courts of ordinary criminal justice which are of permanent nature. Moreover, the courts-martial, which, though, are deemed to be criminal courts within the meaning of the Criminal Code and the proceedings conducted by them, are deemed to be judicial proceedings, but going by the true spirit in which they come into being, they are basically executive in nature. This view would find support from the fact that the manpower or the personnel constituting there are drawn from the executive wing of the Army. Same is true of the Indian Navy and Air Force. Such personnel are laymen drawn from various walks of life, be it Infantry, Artillery, Armoured Corps or the Army Service Corps etc. They cannot be expected to have the expertise or legal acumen of civilian judges.

2 AA. S. 108.
Convening of Courts-Martial

A General Court Martial may be convened by the Central Government or the Chief of the Army Staff or by any officer empowered in this behalf by warrant of the Chief of the Army Staff.3 The chief of the Army Staff has issued warrants to convene General Courts-Martial to the officers not below the field rank Commanding Independent Brigades, divisions/areas and higher formations. To convene such a court-martial, 'A-1'' warrants have been issued to such authorities.4 A Summary General Court-Martial may be convened by an officer empowered in this behalf by an order of the Central Government, or of the Chief of the Army Staff or on active service, the officer commanding the forces in the field, or any other officer empowered by him in this behalf; or an officer commanding any detached portion of the regular army on active service when, in his opinion, it is not practicable, with due regard to discipline and the exigencies of the service, that an offence should be tried by a General court-martial5. As to the District Court-Martial, it may be convened by an officer having power to convene a General Court Martial, or an officer empowered in this behalf by warrant of an officer having power to convene a General Court Martial6. In case of a Summary Court Martial, the commanding officer alone constitutes the court but in that the proceedings shall be attended throughout by two other persons who shall be officers or Junior Commissioned Officers (JCOs) or one of either, and who shall not, as such, be sworn or affirmed7. However, if the Summary Court Martial is not attended by the aforesaid persons, the court shall lack jurisdiction to conduct the proceedings8. These persons attending the proceedings do not have any right to vote nor is their opinion binding upon the officer holding the trial.

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3 AA.S. 109.
5 AA. S. 112.
6 AA. S. 110.
7 AA. S. 116 (2).
8 Note 3 (b) to AA. S. 116.
In the case of *Maj Sodhi GS Vs UOP*, it was held by the Supreme Court that there was no noticeable defect observed in the convening order since the same was ultimately deemed to have been signed by the convening officer himself and not by the officer who had investigated the case. Mere issuance of the charge sheet or an indication of the names of the members who were to constitute the court martial could not have rendered the convening order invalid. (Petition dismissed on 30 November 1990).

In the case of *Dass Amrendra Nath Vs UOI*\(^9\), it was held by the Calcutta High Court that a warrant authorising an officer to convene a General Court Martial need not be by name.

The Central Government or the Chief of the Army Staff always retain powers to convene a court martial. Convening a Court Martial during active service under Section 62 of the Army Act (1911), Central Government or the Commander in Chief can empower an officer to convene a court martial to try a person whether the latter be on active service or otherwise. On active service, others may convene a court martial, who cannot do so in peace time. The Central Government or the commander in chief can empower an officer to convene a court martial at all times whereas the officer commanding the forces in the field can only empower an officer to convene such a court only on active service\(^11\).

While convening a Court-Martial, it is incumbent upon a convening officer to personally satisfy himself that personnel (officers) being appointed on a court martial are competent to sit on a court-martial. He cannot delegate this responsibility to any of his staff officers. In the case of *UOI Vs Goswami Harish Chandra Col*\(^12\), it was held by the Supreme Court that vide Army Rule 37, it is incumbent upon the convening officer to satisfy himself that the case is a proper one to be tried by the kind of court-martial he proposes to convene. Even if

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\(^9\) Supreme Court WP (Cri) No 478 of 1989 & cri MP No 8905 of 1990.

\(^10\) 1977 Cri LJ 493 (Calcutta). Also see Malhotra AK, Brig (Retd) V UOI, Madras High Court WP No 628 of 1991.

\(^11\) Kartar Singh Sardar Jit Singh V Emperor, AIR 1946 Lahore 103-10, 47 Cri LJ 1022 (FB).

\(^12\) Supreme Court Cri Appeal No 102 of 1994.
assuming that the Lieutenant General passed an oral order to convene a court martial, there is no corresponding record to support such a view. The form for assembly of court martial was not contemporaneous to such oral order, if any. In the absence of record whatever to show that the appointment of the personnel of the Court Martial was by the Lieutenant General, we are not persuaded to accept the contention that the requirement of Army Rule 37 were fully satisfied. (The appeal was dismissed on 28 April 1999).

**Court Martial Jurisdiction in India**

(a) **Nature of Courts - martial jurisdiction.**

The nature of Court - martial jurisdiction is entirely penal or disciplinary in nature. It means the power to hear a case and to render a legally competent decision. It does not have power to adjudge the payment of damages, collection of private debts, ordering a criminal for feature of seized property.

(b) **It applies in all the places and persons subject to the Act**¹

Subject to the provision of the Army Act 1950, jurisdiction of Courts-martial does not depend on where the offence was committed. It applies in all the places, but it application may be limited by some of its provisions. The location of an offence is often importance in the application of jurisdiction.

The jurisdiction of a Court - martial with respect to offences under the Army Act is not affected by the place where the Court - martial sits, except as otherwise expressly required under the Act. Unlike under the uniform Code of Military Justice, Courts - martial under the Indian Army Act do not have power to try certain persons for violations of laws of war and for crimes or offences against the law of the territory occupied as an incident of war or belligerency whenever the

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local civil authority is superseded in whole or part by the military authority of the occupying power.

Section 2 (1) of the Act confers jurisdiction irrespective of the place. The words ‘wherever they be’ occurring in the Section ibid describe that the Army Act which is a special law has extra territorial application in as much as a person subject to it continues to be so subject at all the times irrespective of the place where he is serving e.g. whether he in India or otherwise. His liability to punishment under the Act therefore remains unaffected by the place where commits the offence.

(c) Jurisdiction as to person

Contrary to the practice in the civil court where place of offence would decide about the jurisdiction a particular court would have, in the case of the Armed Forces, it is not so Section 124 of the Act clearly declares that any person subject to the Act who commits any offence against it may be tried and punished for such offence in any place whatever. Section 2 (1) of the Act provides that the following persons shall be subject to this Act, wherever they may be, namely:

(a) Officers, Junior Commissioned Officers (JCOs) and Warrant Officers of the regular Army;

(b) Persons enrolled under this Act;

(c) Persons belonging to the Indian Reserve Forces;

(d) Persons belonging to the Indian Supplementary Reserve Forces when called out for service or when carrying out the annual test;

(e) Officers of the Territorial Army, when doing duty as such officers, and enrolled persons of the said Army when called out or embodied or attached to any regular forces, subject to such adaptations and modifications as may
be made in the application of this Act to such persons under Sub-
Section (1) of Section 9 of the Territorial Army Act, 1948 (I. VI of 1948);

(f) Persons holding commissions in the Army in India Reserve of Officers,
when ordered on any duty or service for which they are liable as members of
such Reserve Forces;

(g) Officers appointed to the Indian Regular Reserve of Officers, when
ordered on any duty or service for which they are liable as members of such
Reserve Forces;

(h) (omitted)²

(i) Persons not otherwise subject to military law who, on active service, in
camp, on the march or any frontier post specified by the central Government
by notification in this behalf, are employed by, or in the service of, or are
followers of, or accompany any portion of the regular Army.

(2) Every person subject to this Act under clauses (a) to (g)³, of Sub – Section (1)
shall remain subject until duty retired, discharged, released, removed, dismissed
or cashiered from the service.

The words ‘duly retired, discharged, released, removed, dismissed or
cashiered’ indicate that a person cannot terminate his subjection to Army Act
unilaterally. Cessation of subjection to Army Act must take place in one of the
ways mentioned in this clause and after properly following the procedure laid
down in the Army Act and the Rules made thereunder. A short service officer, as
soon as he takes up the commission, will become subject to Army Act and by
virtue of Section 2 (2) he will remain so subject until duly discharged. Such a
person 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 rules made thereunder.
There can be no automatic discharge by reason of the expiry of his term of the

². Omitted by Adaptation of Laws (No 3) order, 1956.
³. Substituted by Adaptation of Laws (No3) order, 1956.
commission and unless he is released by the Army authorities he cannot be considered as not subject to Military Law and discipline.\(^{3(a)}\)

Indian Supplementary Reserve Force is no more in existence and there is no class of persons who are subject to the Army Act under this clause. The terms ‘Officers of the Territorial Army’ includes JCOs of that Army as well.\(^4\) Under clause (f) above, Army in India Reserve of officers’ force is also no more in existence and there is no class of officers subject to the Army Act under this clause. Personnel mentioned in clause (g) above are subject to the Army Act only when ordered on duty or service for which they are liable as members of such reserve forces. Officers of the regular Army who retire on pension or gratuity have a liability to serve in the reserve until they reach the specified age limits. Person commonly known as ‘followers’ under clause (i) are civilians and are not ordinarily subject to Army Act unless they have been enrolled under it, but in the interest of discipline and security, it is obviously necessary that they and other civilians who accompany any portion of regular Army should be subject to military discipline on active service and in certain other circumstances. This clause provides for such subjection. All persons, civilian officers and subordinates, who are subject to Army Act under this clause are deemed to be of a rank inferior to that of a non-commissioned officer (NCO), unless the Central Government have under Army Act Section 6(1) issued a notification regarding the manner in which such persons shall be so subject\(^5\) under which civilian government servants are classified as officers, JCOs, WOs and NCOs according to their total monthly emoluments, the status so conferred is personal and does not give them power of command over others nor does it make them ‘superior officer’ within the meaning of the Army Act.\(^6\)

\(^{3(a)}\) Chatterjee R. v Sub-Area Commander, Madras 1951 Cr LJ 827.
\(^4\) Section 2(b) of TA Act, 1948.
\(^5\) Army Act Section 6 and Government of India Notification SRO 325 of 1975.
\(^6\) Army Act 1950, Sec 3 (xxiii), Note 24.
(d) Subjection of Civilians to Army Act

Further, subjection of civilians in government service to the Act under clause (i) does not preclude their being dealt with departmentally under their civil disciplinary regulations but if they are dealt with under the military law, the procedure to deal must be in accordance with the Act the Rules made thereunder.\(^7\) A person subject to the Act cannot terminate his subjection unilaterally; cessation of such subjection must take place in one of the ways mentioned in Sub-Section (2) of Section 2 of the Act.

Validity of Section 125 of the Act was tested in the case of a civilian’s subjection to the Act in the case of Ram Sarup Vs UOI.\(^8\) While holding the jurisdiction of the Court-Martial in the case of ibid, the Supreme Court of India held in this case that the provisions of AA Section 125 are not discriminatory in nature and do not infringe the provisions of Article 14 of the Constitution. As per the Court, each and every provision of the Act is a law made by the Parliament and that if any such provision of the said Act tends to affect the fundamental right under Part III of the Constitution, that provision does not, on that account, become void as it must be taken that the Parliament has thereby, in the exercise of its power under Article 33 of the Constitution, made the requisite modification to affect the respective fundamental right. The court observed that there could be a variety of circumstances which may influence the decision as to whether the offender is to be tried by the Court Martial or criminal court and the military officers who are charged with the duty of exercising discretion are to be guided by the circumstances and the exigencies of service, maintenance of discipline in the Army, speedier trial, nature of the offence and person against whom the offence is committed.

In the Army units besides combatants, a number of civilians are also employed. They are mainly employed in units like ordnance Depots, EME Workshops and Military Engineering Service. Further, some civilians are also

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employed with army units as 'followers'. In the ordinary course, these civilians are not subject to the Army Act. They become subject to the Army Act only when the conditions specified in Clause (l)(i) of the this section become operative. Ordinarily, these persons are not dealt with under the provisions of Army Act. However, when the conditions mentioned in Clause (i) are operative, it is possible to initiate proceedings against them under the Army Act. It must be noted that subjection of these civilians to Army Act does not preclude their being dealt with departmentally under their disciplinary regulations. But if they are dealt with under military law, the procedure laid down in the Army Act and the Army Rules must be scrupulously followed. It is, however, important to know that for bringing these civilians under the provisions of the Army Act, it is not necessary that they themselves should be on 'active service'. It is enough if they form part of a unit which is on active service. In the case of Gopal Upadhyaya Vs Union of India,\(^9\) the Supreme Court has held that 'camp followers' like carpenters, tailors, cooks etc. who are required to follow or accompany armed personnel who are 'on active service', 'in camp', 'on the march' or 'at any frontier post', fall within Army Act Section 2(1) (i) and are subject to Army Act and rules made thereunder. It is not necessary that such personnel should themselves be on 'active service', 'in camp', 'on the march' or 'at any frontier post', but that it is enough if they can be required to follow or accompany armed personnel who are 'on active service', 'in camp', 'on the march' or 'at any frontier post'. An interesting point came up for consideration before the High Court of Judicature, at Allahabad, in the case of Om Prakash Kansal Vs Commander, Meerut Sub Area\(^10\) viz. whether persons belonging to MES become subject to the Army Act while they are on active service? In this case, the petitioner was appointed in MES for a period of two months by the Chief Engineer of Central Command. He entered into a contract by which he undertook to proceed on field service or to any station in or out of India to which he might be ordered. While so employed, he was tried by court-martial for disobedience of orders. He was sentenced to imprisonment for three years, which was reduced to one year by the competent authority. While serving his term, he approached the High Court on the ground that he was not subject to Indian Military Law and that

\(^9\) AIR 1987 SC 413.
\(^{10}\) CR MISC. Case No 978 of 1943.
his detention was illegal. Although the case was decided under Indian Army Act 1911, the legal provisions being the same in the Army Act 1950, the judgment of the court is relevant. After examining the contention of the rival parties, the court *inter alia* observed—"It is argued on his behalf that he was employed by the Government of India in a civilian capacity merely to assist the Army by carrying on certain duties as a civilian on their behalf. The argument is based upon the allegation that the Military Engineer’s Service is purely civil service which has been created by the Government of India to undertake engineering work on behalf of the Army. There seems to us to be no force in this contention. It appears from the rules and regulations which have been produced before us that the Military Engineer Service is under the control of the Engineer-in-Chief who is attached as an Adviser to the staff of the Commander-in-Chief. There can be no doubt, it appears to us, that the persons employed in the Military Engineer Service are appointed by officers in the Army, that they are controlled by such officers and that they are paid through the Army. We have no doubt that this is not a separate Civil Department which merely acts through its own officers at the request of the Army when need arises. It is a department which acts directly under the control of the Army. It seems to us that any person who acts under such control, that is, under the control of commissioned officers of the Army, must be said to be employed by, or to be in the service of, His Majesty’s Forces. The definition also in clause (c) is extremely wide. It includes any person also who accompanies any portion of His Majesty’s Forces. We understand that any person who is allowed to go with His Majesty’s Forces on active service or to be with His Majesty’s Forces on such active service would come within the definition. It is perhaps somewhat surprising at first sight that a civil engineer employed at Meerut should come under the provisions of the Army Act, but the reason, we think, is that the definition of ‘Active service’ is now somewhat artificial and technical. No surprise would be felt if an engineer employed to assist the Army was under Military law in some locality where fighting was in fact taking place. Owing to the definition of ‘active service’ now in force the position of the applicant was no different in Meerut from what it would have been if he had been in an area where fighting was in fact taking place. We are satisfied that the applicant was subject to the provisions of
the Indian Army Act and therefore, that there is no force in this application which we hereby reject.”

The matter pertaining to subjection of civilians serving with the Defence Forces also came up for consideration before the Supreme Court of India in the case of **OKA Nair Vs Union of India**. In this case, the appellants were office-bearers of the civil employees’ unions in various centres of the defence establishments of Secunderabad and Hyderabad. They filed a writ petition in the High Court of Andhra Pradesh to impugn the authority of the Commandants in declaring their unions as ‘unlawful associations’. The main ground taken by the Appellants was that the action of the respondents was highly improper and violative of their fundamental rights under the Article 19(i)(c) of the Constitution. The respondents in their reply affidavit averred that the civilians in the defence establishments were governed by the Army Act and were duly prohibited by the rules framed thereunder from joining or forming trade unions. The associations were formed by them in breach of the legal provisions, and were, therefore, validly declared illegal. The Single Judge and the Appellate Bench of the Andhra Pradesh High Court dismissed the petition and the appeal respectively. On being dissatisfied with the judgment of the Andhra Pradesh High Court, the petitioners appealed to the Supreme Court. While dismissing their petitions, the Supreme Court observed – “In enacting the Army Act 1950, in so far as it restricts or abrogates any of the fundamental rights of the members of the Armed Forces, Parliament derives its competence from Article 33 of the Constitution. Section 2(1) of the Act enumerates the persons who are subject to the operation of this Act. According to sub-clause (i) of this section, persons governed by the Act, include persons not otherwise subject to military law who, on active service, in camp, on the march or at any 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 any portion of the regular Army.” The members of the Unions represented by the appellants obviously fall within this category. It is their duty to follow or accompany the armed personnel on active service of, or in camp or on the march. Although they are non-combatant and are in some matters governed by

11 **AIR 1976 SC 1179**
the Civil Service Regulations, yet they are integral to the Armed Forces. They answer the description of the 'members of the Armed Forces' within the contemplation of Article 33. Consequently by virtue of section 21 of the Army Act, the Central Government was competent by notification to make rules restricting or curtailing their fundamental rights under Article 19(1)(c).  

(e) **Application of the Act to Certain forces under the Central Government**

The Central Government may, by notification, apply, with or without modifications, all or any of the provisions of this Act to any force raised and maintained in India under the authority of that Government and suspend the operation of any other enactment for the time being applicable to the said force. Accordingly, this Act has been made applicable to the Assam Rifles,12 Civil General Transport Companies,13 General Reserve Engineer Force14 (GREF) and Rashtriya Rifles15.

(f) **Subjection of Army Act extends to an offender who ceases to be subject to the Act.**

Where an offence under this Act had been committed by any person while subject to this Act and he has ceased to be so subject, he may be taken into and kept in military custody, and tried and punished for such offence as if he continued to be so subject. The aforesaid provision is subject to the provision that the trial of such person has to commence within a period of three years after he had ceased to be subject to this Act. The above stipulation is not applicable for an offence of desertion, fraudulent enrolment or for any of the offences mentioned in Section 37 or shall affect the jurisdiction of a criminal court to try any offence triable by such court as well as by a court-martial. When a person subject to this Act is sentenced by a court-martial to imprisonment for life or imprisonment, this

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11a See Maj Gen AC Mangala’s book titled ‘Military Law in India’, pp 9 to 11.
12 See SROs 117 of 28 March 1960 and 318 of 06 December 1962 as amended by SRO 325 of 31 August 1977. Also AA Sec 4 of the Act, Supra.
13 See SRO 122 of 22 July 1950 as amended by SRO 282 of 17 August 1960. Also see Sec 4 of the Act, supra.
14 SROs 329 and 330 of 23 September 1960. Also see AA Sec 4 of the Act, Supra.
15 SRO 51 dated 30 July 1991. Also see AA Sec 4 of the Act, Supra.
Act shall apply to him during the term of his sentence, though he is cashiered or dismissed from the Army, or has otherwise ceased to be subject to this Act, and he may be kept, removed, imprisoned and punished as if he continued to be subject to this Act. When a person subject to this Act is sentenced by a Court-martial to death, this Act shall apply to him till the sentence is carried out.\textsuperscript{16} It was held in the case of \textit{Hari Narain Vs UOI}\textsuperscript{17} that once the disciplinary proceedings have been initiated by the Court-Martial, those would continue even after retirement of the incumbent. Hence, the contention of the petitioner was not accepted in view of the provision contained in AA Sec 123 (1). Accordingly, the petition was dismissed vide order of the court dated 11 September 1987.

\textbf{(g) Adjustment of Jurisdiction between Courts-Martial and Criminal Courts}

\textbf{Choice between Criminal Court and Court Martial}

When a criminal court and a Court-Martial have each jurisdiction in respect of an offence, it shall be in the discretion of the Officer Commanding the Army, army corps, division or independent Brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be instituted, and if that officer decides that they should be instituted before a Court-Martial, to direct the accused person shall be detained in military.\textsuperscript{18}

\textbf{Whether discretion with the Commanding Officer arbitrary.}

It is often said that the discretion vested in the military commander is arbitrary, unguided and not controlled in any manner. Although the language of Section 125 does not specify the manner in which the specified Commander will exercise his discretion, nevertheless there is a little doubt that the discretion is

\textsuperscript{16} AA Sec 123.
\textsuperscript{17} Rajasthan High Court, Jodhpur CSA No 765 of 1987.
\textsuperscript{18} AA Sec 125. For corresponding provisions in other Acts, see Air Force Act Sec 124, BSF Act, Sec 80, NSG Act (S.77) and the Coast Guard Act Sec 71. Also see Appx III of Regulations for the Navy (Statutory).
judicial. It is neither arbitrary nor controlled. While taking decision under Section 125 of the Army Act, the appropriate Commander will be guided by the exigencies of the military service, requirements of discipline and various other factors relevant to the case. Subject to the provisions of Army Act Section 70, all civil offences can be tried by Court-Martial. However, criminal Courts have concurrent jurisdiction to try such offences. Where there is a dual jurisdiction, the choice initially lies with the prescribed military officers to decide whether an accused should be dealt with by a Court-Martial or criminal Court. The Supreme Court has held that the discretion to be exercised by the military authority specified in Army Act Section 125 cannot be said to be unguided by any policy laid down by the Act or uncontrolled by any other provisions. The provisions of the Section are not discriminatory and do not infringe the provisions of Article 14 of the Constitution. Case based entirely on circumstantial evidence and involving several complicated questions of law should be tried by criminal court and not by Court-Martial.

The Prescribed officer for the purpose of Section 125 is the Officer Commanding the Brigade or Station in which the accused person is serving, except where death has resulted from the alleged offence, in which the lowest competent military authority is the Officer Commanding the Division/Area or Independent Brigade.

A soldier may be tried by Court-Martial in the following types of cases :-

(a) When an offence is committed during the course of duty.

(b) When most of the witnesses of the cases are military personnel.

(c) When an offence is committed in or near the cantonment area and necessity of discipline require that the offender is tried by Court-Martial.

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19 Ram Sarup Vs Union of India AIR 1965 SC 247.
20 RS Bhagat V Union of India AIR 1981 Del 191.
21 AR 197-A.
(d) When classified matters, essential for the defence of the Country, are to be examined at the trial.

(e) When speedy disposal of the case is necessary for maintenance of discipline in the Army.

(f) When the offence is committed against another serviceman.

(g) When the offence is committed due to the conditions of the service.

-- Cases when a person subject to the Act may be tried by Criminal Court

The following may be the circumstances when a person subject to the Act may be tried by a Criminal Court:

(a) When the offence is committed in civil locality and most of the witnesses of the case are civilians.

(b) When the offence is time-barred for trial under the Act.

(c) When the offence is committed by a person subject to the Act together with persons who are not subject to the Army Act and it is desirable to try them jointly.

(d) When an offence is committed against a civilian and in the opinion of the Criminal Court (or as directed by the Central Government), it is advisable to try the offender by Criminal Court.

(e) When appropriate military authority decides that offender be tried by Criminal Court.
(f) When appropriate military authorities, considering the facts of the case, decide to abstain from directing that the accused be tried by Court-Martial.

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**Rules regarding adjustment of jurisdiction of civil and military courts over military personnel accused of civil offences.**


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**Duty of Magistrate when a person subject to the Army Act is brought before him**

When a military person is brought before a Magistrate and charged with an offence for which he is liable to be tried by Court-Martial, the Magistrate shall before so proceeding give written notice to the Commanding Officer of the accused and until the expiry of fifteen days from the date of service of such notice, shall not proceed to try such person or to inquire with a view to his commitment for trial by the Court of Sessions. The words ‘jurisdiction’ in this Section really signifies the initial jurisdiction to take cognizance of a case. It refers to the stage at which the proceedings are instituted in a Court and not Criminal Court and the Court-martial to decide the case on merits\(^{22}\). The Kerala High Court had held that in respect of trial of offence under the penal Code committed by persons subject to the Army Act, both Court – martial and Criminal Court have concurrent jurisdiction\(^{23}\).

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\(^{22}\) Delhi Special Police Establishment Vs Lt Col. SK Loniya AIR 1972 SC 2548.

\(^{23}\) Subramanian V OC Armoured Static Workshop 1979 CrLJ 617.
-- Power of Criminal Court to require delivery of offender

When a Criminal Court having jurisdiction is of the opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, require the Officer referred to in Section 125 of the Act, at his option, either to deliver over the offender to the nearest magistrate to be proceeded against according to law, or to postpone proceedings pending reference to the Central Government.

In every case, the said officer shall either deliver over the offender in compliance with the requisition, or shall forthwith refer the question as to the Court before which the proceedings are to be instituted for the determination of the Central Government, whose order upon such reference shall be final.24

In the case of Roshan Lal Vs State25, the Delhi High Court held that although the offence of rape was committed 'on active service' is triable by Court-martial, a case where the accused was handed over to the police without being detained in military custody, the Criminal Court is competent to try him. In such a case, Army Act Section 126 need not be invoked. In another case, the Supreme Court had held that surrender of the accused to the civil authorities to be dealt with by the latter, after being made aware of the nature of the offence against the accused is a clear indication that the military authorities decided not to try him by Court-martial. In such a case there is no need for the magistrate to comply with Army Act Section 126. Similarly, inquest by the Civil Police is not indicative of such decision by the military authority. In the case of Som Datt Datta Vs Union of India26, the Supreme Court had held that merely because the police officer conducted inquest of the dead body and sent for chemical examination, does not mean that the competent military authority decided to hand over the case to the Criminal Court. The mere intimation of the Commanding Officer to the Criminal

24 AA Sec 124 of the Act, Supra.
25 1971 CrLJ 554.
Court that the accused would be tried by Court-martial does not divest the jurisdiction of the Ordinary Criminal Court. If inspite of such an order, the Criminal Court holds the view that the case should be tried by it, and if, there is no legal hindrance for the CO in differing from the earlier discretion in this regard, in such a case, reference to Central Government is not warranted.

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**Rules with regard to adjustment of jurisdiction – not mandatory if no prejudice caused**

Failure of Court in not observing provisions of Cr PC and Rules made thereunder regarding adjustment of jurisdiction was held as not amounting to illegality vitiating trial especially when no prejudice is caused to the accused.

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**Magistrate to stay proceedings on receipt of notice from CO**

In a case where the CO of the accused sent written notice to the magistrate for trial of the accused by Court-martial and the magistrate did not stay the proceedings, the High Court held that, in such a case, the magistrate must stay the proceedings and hand over the accused to military authority for trial. In the case of Capt UR Roy Choudhary *Vs State*, the Calcutta High Court held that the provisions of Army Act Section 125 are mandatory. Judge of special Court assuming jurisdiction without complying with such mandatory provisions will be acting without jurisdiction. Section 549 (1) of the CrPC (now Section 475 of the said Code) and rules made thereunder include judges of Special court as well. Offences under the Indian Official Secrets Act, 1923 are triable both by Magistrate as well as by Court-martial. A Court-martial can try an offence even when no cognizance thereof was taken by the Magistrate. For such a case, notice to the magistrate is not required.

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30. 1976 CHJ 796.
31. AK Rana *Capt V Union of India* 1982 Cr.LJ (NOC) 120 Del.
Notice to the Commanding Officer is a necessary condition for the magistrate

Where the magistrate had not passed any order, in writing giving reasons for coming to the conclusion that he should deal with the matter without being moved by the Army authorities and also that notice as required was not given, it was held that the magistrate’s order committing the accused to the Court of Sessions for trial was without jurisdiction

Civil Court has no right to take cognizance of an offence against army persons without compliance of Section 475 of the CrPC. Case of Brig HC Joshi & Elisa and Others in the High Court of Guwahati dated 28 August 1986 (unreported) refers.

Whether compliance of Army Rule 22 necessary where case taken over from the magistrate?

The Supreme Court has held that when the accused is handed over by the magistrate to the competent military authority, it is for his trial by Court martial or other effective proceedings. 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. The Court also held that the Army authority is not entitled to ignore the proceedings taken by the magistrate where he has taken cognizance of the offence and gave his finding that there was a case for trying the accused. Army Rule 22 and related rules cannot be invoked.

In the case of Major SP Chadha, the Supreme Court had held that after opting for trial of the petitioner (respondent) by a Court-martial under the Army Act, he could be later on sent back by the Army authority to the Ordinary Criminal

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32 NF Chand v State of U.P. 1987 CrLJ 637
33 Union of India v Maj SK Sharma AIR 1987 SC 18
34 1991 Cr LJ 494
Court for standing trial of the same offence and Section 121 of the Army Act has no application in the present case.35

--- Procedure for resolving conflict of jurisdiction

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 Criminal Court. Where a person subject to the Army Act is brought before a magistrate, he shall, before proceeding against such a person, give a 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. When due to peculiar circumstances of the case, a Criminal Court is of opinion that the offender should be tried before it, the military authority should hand over the offender to the Criminal Court, for trial. Where the military authorities do not wish to handover the offender to the Criminal Court, they should make a reference to the Central Government for decision where the competent military authority knowing full well the charge against the accused and investigation that was being conducted by the police released the accused from their custody and handed him over to the civil authority, the magistrate is justified in proceeding on the basis that the military authority had decided that the accused need not be tried by Court-martial.36 When an offence falls within the jurisdiction of the Criminal Court and a Court-martial, it is not open to the Criminal Court to call for the case before itself merely because it is of the opinion that the conduct of the proceeding before a Court-martial lacks propriety in some respect.37

--- Position of the Judge Advocate and Members of the Court Martial

Trials by Courts Martial are somewhat different to that trials held in the civil courts. However, the procedure adopted by a Court-Martial to reach its findings contains the same principles of natural justice and to the same extent as found in the trial procedure of a civil court. The trial by a Criminal Court in the civil is

35 Also See 'Military Law in India' by Maj Gen AC Mangala, pp. 152 to 156.
37 SR Nagial v GOC 36 Inf Div. 1977 CrLJ 299.
either by a judge or a jury. The Court Martial procedure in India is like that of a jury trial. In the U.S.A. also, though it is trial by a jury under the Uniform Code of Military Justice, but it has also been provided therein that trials in the Armed Forces there are also held exclusively by a Military Judge, provided the accused opts in writing to be tried by the Military Judge alone unless restricted otherwise in case of offences punishable with a capital sentence. We shall deal with this aspect more at an appropriate stage subsequently. As in the case of a jury trial, Court Martial is composed generally of more than one member, with the exception of Summary Court Martial where the Commanding Officer alone constitutes the Court, though there are otherwise, two officers and/or JCOs in attendance. While the General Court Martial (GCM) consists of a minimum of five members whereas the composition of the Summary General Court Martial (SGCM) and that of District Court Martial (DCM) consists of a minimum of three members. No legal qualification has been prescribed for the members of the Court Martial. They are laymen pooled in from various arms/services. For instance, in a GCM, it may consist of one officer each from Infantry, Artillery, Armoured Corps, Engineers and Army Service Corps. They, however, have to satisfy certain essential requirements before they are appointed as members of the Courts-Martial. Army Act Section 113 provides, "A General Court Martial shall consist of not less than five officers, each of whom has held a commission for not less than three whole years and of whom not less than four are of a rank not below that of a Captain. A Summary General Court Martial shall, however, consist of not less than three officers." In the case of District Court Martial, the composition is same as that of the SGCM except that each of the members must have held a commission for not less than two whole years. Besides the members of the jury, there is also a judge in a jury trial. In the case of a GCM, SGCM and DCM, we have a Judge Advocate instead of a judge. While attendance of a Judge Advocate (JA) is a legal necessity in a GCM, whereas in a SGCM and DCM is optional, though a desirable requirement. There has hardly been any such case, where a Court Martial has been held in the absence of a Judge Advocate. However, the main difference in a jury trial and the trial by a Court Martial is that the members of the jury give verdict only on facts

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38 AA Sec 115 of the Act, supra.
39 AA Sec 114 of the Act, Supra.
40 AA Sec 129
and the legal matters are decided by the judge, whereas, in a Court Martial trial, all matters of law as well as of facts are decided by its members. The Judge Advocate performing the function is neither a judge nor an Advocate, is merely a legal adviser of the Court Martial.

(a) **Term ‘Judge Advocate’ – explained**

The term ‘Judge Advocate’ suggests two functions opposite in nature, being performed by the same individual. It is rather an ambiguous situation. It may convey a meaning that this functionary of the Court-Martial is not a legal adviser to the Court-Martial but may be an advocate to advance the cause of the prosecution as well. According to Lord Cranworth, he described the duties of his duties by calling him ‘Judge advocates’, i.e., a judge called to assist the court, though not forming part of it. The term ‘Advocate’ may be another form of “Advocatus”. As stated above, he forms no function of an advocate or of a judge.

In British Army, prior to 1860, the ‘Judge Advocate’ used to act as a prosecutor in the name of sovereign in the Courts-Martial. As this position was considered to be unjust to the accused and hence in 1860, it was expressly prescribed in one of the Articles of War that he should no longer act as prosecutor.

(b) **Judge Advocate – The Premium Mobile**

Judge Advocate is a very important functionary at a Court-Martial. This officer has been styled by Mc Arthur “the premium mobile”. Adye described him as “the main spring of a Court-Martial – if he errs all may go wrong.” Therefore, it is imperative that the officer appointed as Judge advocate is professionally competent, fair and well-versed in Army Act, Rules, Regulations, Orders and Customs pertaining to the service. In addition, he should also be well-versed with the law of the land.
(c) **Court Should follow the advice of Judge Advocate**

Upon any point of law or procedure, which arises at the trial, the court should be guided by the opinion/advice of the Judge Advocate, which should not be disregarded except for very weighty reasons. The court is responsible for the legality of its decision but it must consider the grave consequences which may result from its disregard of the advice of the Judge Advocate on any legal point. If a Court-Martial acting without jurisdiction, convicts an officer, JCO or other rank, the members of the court may be held liable for damages in a civil court and such liability or at least the amount of damages, may depend upon the question whether they exercised a bonafide judgment, and the fact that they accepted the advice of the Judge Advocate, even if such advice was held to be wrong, might practically exonerate the members from liability. Permission to call and question witnesses should never be refused to Judge Advocate unless the court considers that he is acting improperly or in such a manner as to obstruct the proceedings. The Court should record reasons for refusing permission.

Presence of Judge Advocate at a GCM is a legal necessity and his non attendance will invalidate the proceedings. A Court Martial in the absence of a Judge Advocate if one has been appointed shall not proceed and shall adjourn.\(^41\). Invalidity in the appointment of Judge Advocate does not vitiate the trial provided a fit person has been appointed and subsequent approved of JAG/DJAG has been obtained\(^42\). For substitution of Judge Advocate on death, illness or absence, see AR 104. An officer who is disqualified for sitting on a Court - martial, shall be disqualified from acting as a Judge Advocate at that Court - martial\(^43\).

(d) **Powers and duties of a Judge Advocate**

Powers and duties of a Judge Advocate have been given in Army Rule 105, which are as under:\(^41\)

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\(^{41}\) AR 82(4) of the Rules ibid.
(1) The prosecutor and the accused respectively, at all times, after the judge advocate is named to act on the Court, entitled to his opinion on any question of law relating to the charge or trial, whether he is in or out of the Court, when he is in court, with the permission of the Court.

(2) At a Court Martial, he represents the Judge Advocate General.

(3) He is responsible for informing the court of any informality or irregularity in the proceedings. Whether consulted or not, he shall inform the convening officer and the court of any informality or defect, in the charge, or in the constitution of the court, and shall give his advice on any matter before the Court.

(4) Any information or advice given to the Court on any matter before the court shall if he or the court desires it, be entered in the proceedings.

(5) At the conclusion of the case, he shall sum up the evidence and give his opinion upon the legal bearing of the case, before the Court proceeds to deliberate upon its finding.

(6) The Court, in following the opinion of the Judge Advocate on a legal point, may record that it has decided in consequence of that opinion.

(7) The Judge Advocate has, equally with the Presiding Officer, the duty of taking care that the accused does not suffer any disadvantage in consequence of his position as such, or of his ignorance or incapacity to examine or cross examine witnesses or otherwise, and may, for that purpose, with the permission of the Court, call witnesses and put questions to witnesses, which appear to him necessary or desirable to elicit the truth.
(8) In fulfilling his duties, the Judge Advocate must be careful to maintain an entirely impartial position.\textsuperscript{44}

The Court deliberates on its finding(s) in the closed court in the presence of the Judge Advocate vide AR 61 (1). Thus, the advice rendered by the Judge Advocate plays an important role at the trial in swaying the minds of the members of the Court Martial and if his advice is against the law or the principles of justice, equity and fair-play, which might have affected the finding(s) of the Court, the matter, if taken to a High Court or Supreme Court, such Court can also examine it to see whether the verdict of the Court martial would be sustainable legally.

(e) Judge Advocate should be impartial

All the qualifications specified in AR 39 (2), which apply to the members of the Court martial, also apply to the Judge Advocate. Although, the accused has no right to object to the Judge Advocate, it is necessary that he should be impartial as also appears to be so. He should be free of all suspicion, bias or prejudice. When a Judge Advocate was found to be unduly friendly with the prosecutor, the proceedings of the Court martial were quashed on the ground that the Judge Advocate did not seem to be impartial.\textsuperscript{45}

In the case of \textit{Trilochan Joshi Vs Union of India}\textsuperscript{45(a)}, the Delhi High Court had held that the Judge Advocate performs no functions either of an advocate or of a judge. He used to be a crown prosecutor but in the course of time, he ended up as an adviser. Judge Advocate is, thus, not a judge as the one in trial by jury except in the sense that he has to maintain an entirely impartial position and his addresses cannot be styled as or in the nature of directions. The court deliberates on its finding(s) in the closed court in the presence of the Judge Advocate, vide Rule 61 (1). Thus, the quality of his advice has a very crucial role in the trial in

\textsuperscript{44} AR 105 of Army Rules 1954. For corresponding provisions in other Acts, See Air Force Act (Sec 128), the Navy Act (Sec 99), the BSF Act (Sec 83), the NSG Act (Sec 80), the Coast Guard Act (Sec 73) and British Army Act (Sec 104).

\textsuperscript{45} Maj Sansar Chand V Union of India 1980 (3) SLR 124 (HP).

\textsuperscript{45(a)} 1983 CriLJ NOC 109 (Delhi)
swaying the minds of the members of the Court martial and if his advice is potently contrary to law and may have affected the verdict of the Court martial, the High Court will be entitled to see whether or not to sustain the verdict. The advice of the Judge Advocate or verdict of the Court cannot be quashed simply because he had not dealt with certain alleged alterations in the register or certain contradictions in the statements of some witnesses. The conduct of the Judge Advocate after reading his advice in the open court and in sitting in the closed court is a course permissible under Rule 61 (1).

The Rajasthan High Court in the case of Mohan Rao P and ten others, with regard to whether the Judge Advocate would be disqualified on the alleged ground of bias, had held that the Judge Advocate is not a member of the Court martial. His presence is required by Army Act Section 129. It is obligatory that the Judge Advocate must be associated with every GCM and the accused cannot challenge the authority of the Judge Advocate as he can do in respect of members of the Court martial vide Army Act Section 130. A Judge Advocate is required to sum up the evidence and advise the Court upon the law relating to the case. As laid down in Army Rule 61, the Court shall deliberate on its finding in closed court in the presence of the Judge Advocate. Various duties which are to be performed by the Judge Advocate are very important. His advice has crucial role in the trial. As such if a Judge Advocate is found to be biased or prejudiced, or even there is likelihood of bias and the Judge Advocate becomes hands-in-glove with the prosecution or becomes personally interested in the trial of the case to see that the accused are convicted, it can be assumed that the Judge Advocate is biased and such person would positively incur disqualification to be associated with the court in the trial by GCM. It was held in the instant case that in the circumstances as alleged by the petitioner even if assumed to be true and correct, the facts stated would not constitute any bias against the petitioners. It is a common practice in the cases of criminal trials, where there are more than one accused, in which one of the accused absconds, then the trial is conducted in the absence of the accused and the finding is recorded by the Magistrate or Sessions Judge, as the case may be, and the same judge is competent to try the accused who is later on arrested.

Rajasthan High Court (Jaipur Bench) Di Civil petition No400/1988. Order was delivered on 26 May 1988.
and put under trial for the same offence. In this case, the High Court did not find any irregularity or illegality in the manner in which the Judge Advocate acted.

In the case of *Bhagat R S Lt Col V Union of India*[^45][^46], the Delhi High Court had, however, held that it was misdirection by the Judge Advocate which led to the erroneous conclusions of law and facts reached by the Court-martial. The argument of the respondent that misdirection is no ground for issuing writ of certiorari to a quasi-judicial tribunal, was not valid. The nature of misdirection is also relevant. Hence, the failure on the part of the Judge Advocate must be held to have caused serious prejudice to the accused.

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**TRIALS BY COURTS MARTIAL AND THEIR PROCEDURE**

As we have seen earlier, there are four kinds of Courts martial under the Army Act 1950. These are General Courts-martial, Summary General Courts-martial, District Courts-martial and Summary Courts-martial[^46]. There are three types of Courts-martial in Air Force, namely General Courts-martial, District Courts-martial and Summary General Courts-martial. Navy has two types, namely Court-martial and Disciplinary Court. In the BSF, they have General Security Force Courts, Petty Security Force Courts and the Summary Security Force Courts. The NSG have the General Security Guard Courts, Petty Security Guard Courts and Summary Security Guard Courts and the Coast Guard has only one Court called ‘Coast Guard Court’.

[^46]: For corresponding provisions in other Acts, see the Air Force Act (S.109), the BSF Act (S.64), the NSG Act (S.61) and the British Army Act (S.84).
Convening and Composition of Courts - martial

(a) General Courts - martial (GCM).

A General Court - martial may be convened by the Central Government or the (Chief of the Army Staff) (COAS) or by an officer empowered in this behalf by warrant of the Chief of the Army Staff.

Officers Commanding the Army, Corps, Division/Area, Independent Brigade and equivalent Commanders have been issued warrants by the COAS to convene GCM. In the case of SN Purandave Vs Union of India\textsuperscript{47}, Delhi High Court had 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 Army Act Section 109.

The order of the Chief of the Army Staff empowering the Field Officer Commanding the 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 who is subject to military law and charged with any offence mentioned in the Act and is liable to be tried by a General Court Martial is valid under Army Act Section 109. Therefore, on transfer of the Field Officer, his successor not below the rank of Field Officer would be fully authorized to convene the GCM\textsuperscript{47(0)}.

(b) Appointment of Convening Officer as Confirming Officer

In the case of Gian Chand Vs Union of India\textsuperscript{48}, it was held by Delhi

\textsuperscript{47} 1988 CrLJ 714
\textsuperscript{47(a)} Purandave SN Major V UOI, 1988 CrLJ 714 (Delhi).
\textsuperscript{48} 1983 CrLJ 1059.
High Court there is no impropriety in the same officer being empowered under Army Act Section 109 as well as under Army Act Section 154. Just as under the Central Civil Services (classification, Control and Appeal Rules), it is the disciplinary authority who initiates the disciplinary proceedings and subsequently, after the inquiry is completed also imposes the penalty. Similarly, in the present case, it is the Commanding Officer who has been empowered to convene the General Court martial as well as to act as the confirming authority. Furthermore, the reading of the two Sections, namely Sections 109 and 154 would show that the said Sections expressly postulate the Central Government itself being the convening authority as well as the confirming authority. There is no reason why one officer cannot be delegated with both the powers.

(c) Investigating Officer not to act as Convening Officer

If the Officer on whom the Command devolves is the CO of the person to be tried or an officer who has investigated the case, he cannot afterwards act as Convening Officer in the same case, but must refer to a Superior authority. An officer cannot convene or confirm a Court martial held outside the territorial limits of his command. An interesting question arose in the case of **Maj SK Sharma Vs Union of India** by Delhi High Court. In this case, it was contended that where GOC-in-C of a command had formed and expressed definite opinion about the culpability of the petitioner while examining the case against him in his administrative capacity, the commander-in-chain, serving under the said GOC-in-C were disqualified to initiate action against the petitioner. The Court, inter alia, observed that, "Instead of the CO at the unit level, and then the convening officer, independently and objectively satisfying themselves whether the charge should be proceeded with, the highest military authority in the command, the GOC-in-C, had unequivocally expressed his decisive opinion on the matter. Thus, in the present case, the process prescribed under the Army Rules was inverted. In these circumstances, it is hard to brush aside the petitioner's plea that the various

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89 RA Para 449 (b).
officers involved in the proceedings, who were all subordinate to and under the direct military control of Lieutenant General Chiman Singh, had no real option but to fall in line with his unquestionable opinion. Even if it be said that the petitioner has not made out a case of actual bias, there is no escape from the conclusion that the disciplinary proceedings stand vitiated by a real and strong likelihood of bias in this case*. It is respectfully submitted that the decision of the High Court is not reasonable. Such things frequently happen in the armed forces. In all Commanders, working independently under a Senior Commander, are to be disqualified as being biased simply because a Senior Commander had expressed an opinion in the matter, the progress of disciplinary cases would be seriously hampered in the armed forces.

(d) **Duty of Convening Officer**

It is the duty of a 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 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 (CWP No 2273/1986, decided on 15 Dec 88) that where the Convening Officer did not perform the duties enjoined on him by the statute and did not appoint officers personally to constitute the Court, the order convening the Court is liable to be set aside51.

(e) **Warrant to convene Court – martial need not be by name**

It has been held that it is not necessary that the Warrant to convene a General Court martial should be by name of the authority exercising the same52.

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52 Dass Amarendra Nath V UOI; 1977 CriLJ 493 (Cal). Also see Malhotra AK, Brig (Retd) V UOI, Madras High Court WP No 628 of 1991.
In the case of *Sodhi G S, Maj Vs UOF*\(^53\), it had been held by the Apex Court that there was no noticeable defect in the Convening Order since it was deemed to have been signed by the Convening Officer and not by the officer who investigated the case. Mere issuance of the charge sheet or an indication of the names of the members who are to constitute the Court cannot render the convening order invalid.

A Brigadier who, in his officiating capacity as GOC of a Division had not dealt with the case in question, cannot be said to be disqualified from serving under Army Rule 39 (2) on a Court-martial as member\(^54\).

In the case of *Budhwar R S, Maj Vs UOF*\(^55\), the Delhi High Court had held the signing of the Convening Order by the Staff Officer on behalf of the Convening authority was in order since there had been no violation of the statutory rules. The court also pointed out that assuming even if there had been any infirmity in issuing the Convening Order; the same could not be agitated in a Writ Petition at that belated stage so as to conclude that the entire proceedings were vitiated as the petitioner fully participated in the GCM and raised no plea at any stage.

However, in the case of *Union of India Vs Goswami Harish Chandra, Col* \(^56\), the Supreme Court took a view that the satisfaction by the Convening Officer as to the existence of a prima facie case against the accused and that the charges framed against the accused were proper is necessary condition to be satisfied. The facts of the case, in brief were that the respondent had challenged in a writ petition the entire court martial proceedings as also the order as to punishment. The High Court had upheld the contention about the constitution of the Court – martial not having been done by the Commanding Officer and the consequential violations of Army Rule 37 (3). The order for the assembly of the GCM was signed by a Colonel as Officiating Brig ‘A’ for General Officer Commanding 1 Corps. The said order was in an appropriate form prescribed

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\(^53\) Supreme Court WP(Cr) No 478 of 1989 and Cri MP No 8905 of 1990.

\(^54\) Rana Ashok Kumar, Capt V UOF, 1982 Cri J NOC 120 (Delhi).

\(^55\) Delhi High Court Cri WP No 205 of 1993. (Petition was dismissed on 24 Feb 1995).

\(^56\) Supreme Court Cri Appeal No 102 of 1994.
under the rules, namely IAFD – 916. Admittedly, there was no order in the
file containing the signature or initial of 'Lt Gen’ or any record to show that the
members of the Court – martial were appointed by the 'Lt Gen’. The High Court
quashed the proceedings as well as the order of punishment. Aggrieved by the
order, the appellants Union of India preferred a special leave petition. It was held
by the Supreme Court that under Army Rule 37, the Commanding Officer
(Convoking Officer) has to satisfy himself that the case is a proper one to be tried
by the kind of Court – martial which he proposed to convene. The contention that
Sub Rule 37 (3) is only procedural in nature and that there is need for application
of mind by the Commanding Officer in the matter of appointment of the personnel
of the Court – martial loses its relevance. Even if assuming that 'Lt Gen’ had
passed an oral order, there is no record of any kind whatsoever to prove it. The
form of assembly of Court – martial was not contemporaneous to such order, if
any. In the absence of any record whatever of the personnel of the Court martial
was by the 'Lt Gen’, we are not persuaded to accept the contention that the
requirement of Rule 37 were fully satisfied57.

Composition of Courts Martial

(a) General Court Martial

A Court would have no jurisdiction if each member has not held a
commission for the required period or if its composition differed in any respect
from that of the Convening Order. Section 113 of the Army Act lays down
minimum for composition of the GCM58. It has to be read with Army Rule 40,
which lays down additional requirements in the case of trial of officers. The
question sometimes arises as to whether a GCM, which though composed of in
accordance with the provisions of Army Act Section 113 but omits to comply
provisions of Army Rule 40 would be in order ? This matter had come up for
consideration before the Punjab and Haryana High Court in the case of Maj

57 Appeal by the Union of India was dismissed on 28 April 1999.
58 For composition of the GCM, See also Army Rule 39, 40 and RA Para 460. For corresponding provisions in
other Acts, See Air Force Act (S.114), the Navy Act (S.97), the BSF Act (S.68), the NSG Act (S.65), the Coast
Guard Act (S.65) and the British Army Act (S.87).
The facts of the case above before the Punjab and Haryana High Court were that a General Court Martial was convened by the General Officer Commanding to try the accused officer who held the rank of Major. The General Court Martial after trial found the accused ‘Not Guilty’ of the charges. The General Officer Commanding – in – Chief held the proceedings null and void and ordered fresh trial on the ground that one of the members of the Court – martial was of the rank of Captain who was lower in rank to that of the accused and no certificate was recorded that an officer of the rank of the accused was not available. The second GCM held the accused ‘Guilty’ of the charges. It was held that according to Army Act 1950 and the Rules made thereunder that a Captain is eligible to be a member of the GCM and merely because that 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 Court – martial 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. The second trial of the petitioner was held to be without jurisdiction and the sentence imposed on the petitioner as a consequence of that trial was wholly illegal. Whereas, the Calcutta High Court in the above referred case observed – “Section 113 prescribes firstly the minimum number required for a valid Court – martial, and secondly, prescribes the minimum experience that each should posses i.e, each must have held a commission for a period for not less than three years, qualifications that the members should posses i.e, that at least four should hold a rank not below that of Captain. Rule 40 (2), however, deals with a different aspect. It lays down that members of the Court – martial must not be lower in rank than that of the officer who is being tried by them. This is an additional requirement. Section 113 stops after laying down minimum rank of officers constituting a Court – martial and it

59 1971(10) SLR 717.
60 1986 (4) SLR 791.
does not deal with any other aspect of the constitution of Court - martial, e.g. the further question of the ranks of the members of the Court - martial vis-à-vis that of the officer being tried by them. This aspect is left to the Rules. Section 191 (2) (c) of the Act expressly confers power to frame rules providing for the convening and constitution of the Court - martial. If the legislature was of the view that Section 113 was exhaustive, the Rules for the constitution of the Court - martial would not have been framed. It was held that there was no conflict between Rule 40 (2) and Section 113 and Section 191 (2) (e) of the Act and such an interpretation is fully consistent with the principle that a man should be tried by his peers. A substantive Lieutenant Colonel can be tried by members of the Court - martial who are of substantive rank of Lieutenant Colonel or of higher rank. He cannot be tried by a Major. It is submitted that the view of Calcutta High Court is correct.

-- Desirability of detailing more members than minimum

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 cannot, however, rejoin the Court subsequently.

-- Waiting members

Waiting members can be detailed to replace absentees or those members who are successfully challenged before the court is affirmed/sworn.

-- Commissioned Service in Navy and Air Force

Any period during which an officer has held a commission in any of the three services shall count as commissioned service under this Section, but no account shall be taken of any ante date of seniority.
An officer below the rank of Captain cannot be detailed as a member of a General Court – martial for the trial of a field officer. Army Rule 40 (3) refers. In addition to the restrictions as to the ranks of officers appointed to serve on Courts – martial, which are prescribed by the Army Act and the Rules made thereunder, it is necessary that whenever an officer of the rank of Colonel or above is available to sit as presiding officer of a General Court – martial, an officer of lower rank will not be appointed. Whenever a General Court – martial may have to be so detailed that an officer below the rank of a Colonel will be the senior member and consequently its presiding officer, the convening officer must obtain the prior sanction of his next Superior authority and state in the order convening the Court that such sanction has been obtained.

When the CO of a Corps is to be tried, as many members as possible will be officers who have held or are holding commands equivalent to that held by the accused.

In the case of a GCM, when a trial is likely to be prolonged, it will usually be expedient to form the Court of a larger number than the legal minimum, and two or four additional members should be detailed. Waiting members should also be detailed to meet reduction by challenge.

For a District Court Martial (DCM), the legal minimum will ordinarily be sufficient; but if necessary a larger number may be detailed, and waiting members provided. For the trials of doubtful or complicated cases, a DCM should, when possible, consist of five officers. When the minimum number is detailed, not more than one member should be a subaltern.

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[62] RA Para 460(a), (b) & (d).
(b) **Composition of a District Court – martial and Summary General Court – martial (SGCM)**

A DCM shall consist of not less than three officers, each of whom has held a commission for not less than two whole years\(^{63}\).

A summary General Court – martial shall consist of not less than three officers\(^{64}\).

**Presence of Judge Advocate at a Court – martial**

While appointment of Judge Advocate at a GCM is a legal necessity, it is not so in the case of DCM or SGCM. It may be mentioned that it is always desirable to appoint a Judge Advocate (JA) at these Courts – martial as well. It has been experienced that there has been hardly a DCM or SGCM where JA was not detailed.

**Summary Court martial (SCM)**

A Summary Court –martial may be held by the Commanding Officer of any Corps, department or detachment of regular army and he shall alone constitute the Court.

The proceedings of the SCM shall be attended by two other persons who shall be officers or Junior Commissioned Officers or one of either, and who shall not as such be sworn or affirmed\(^{65}\).

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\(^{63}\) AA Sec 114 & 115. For corresponding provisions, see Air Force Act (S.115), the BSF Act (S.69), the NSG Act (S.66) and British Army Act (S.88). See also AR 39 and RA Para 460.

\(^{64}\) For corresponding provisions, See Air Force Act (S.116), the Navy Act (S.96) and British Army Act (S.89). Also see Army Rule 151.

\(^{65}\) 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.

\(^{65}\) AA Sec 116. For corresponding provisions, See BSF Act (S.70) and NSG Act (S.67). Also see ARs 106 to 133 and RA Paras 447 and 448.
(a) **History of Summary Court martial**

This court was not introduced into the regular army till after the mutiny of the greater part of the Bengal Army in 1857. The discipline of the regular Indian Army had, for sometime before that catastrophe, seriously deteriorated and it was noticed that the irregular troops and more especially the Punjab irregular force, were in this respect in a much better state than their comrades in the regular army. After the suppression of the mutiny, the reason for this difference was sought, and if found to be largely due to the position of comparative significance occupied by the commandant of a regular regiment, who had practically no power to punish or reward his own men. In contrast to this, the CO of a regiment of the Punjab irregular Force had almost absolute power in that regiment, and could, under the system prevailing in the Force, himself deal properly and effectively with all military offenders. This system appears to have had its origin in the union, frequent in those days on the Frontier, of the functions of the Deputy Commissioner, political officer and military commandant, in one and the same person. This union enabled the CO as such to convict and sentence a military offender and thereafter, to issue a warrant for the execution of his sentence which was respected by the civil and military official as emanating from him in his civil and magisterial capacity. When a new Indian Army came to be organized on the ruins of the old, it was realized that the hands of the regimental CO must be strengthened if the evils which had led to the practical disappearance of the Bengal army were to be avoided. With this object, Summary Courts – martial, at first, introduced tentatively and were in 1869 definitely established as part of the legal machinery of the Indian army. They have proved particularly suited to the conditions of our Army and are now the tribunals by far the most frequently utilized for the trials of military offenders.
(b) **Commanding Officer of Medical Unit**

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 CO of a person subject to the Army Act, not belonging to the medical unit, who is a 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 troops, department or detachment to which such person belongs or is properly attached, but the medical officer in charge of a regimental medical establishment is not, unless the establishment is detached, be a Commanding Officer for the purpose of the establishment or of any person who is a patient in, or is employed in that establishment.

(c) **Persons attending trial**

Though the CO alone constitutes the Court and has sole right to decide the finding and sentence, the proceedings should be attended throughout by two persons as laid down in Sub – Section (2). Unless two officers or JCOs or one of either attend the trial throughout, the court will have no jurisdiction. Such officers or JCOs may or may not belong to the unit of the accused. As the persons attending the trial do not constitute the court and do not play any effective role in the proceedings, they are not required to be sworn or affirmed. However, if one of them is appointed as 'interpreter', he must be sworn or affirmed as such.

In the case of **Vidya Prakash Vs Union of India** 67, the Supreme Court has held that the CO 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 Army Act Sect 116 to constitute SCM as such the constitution of

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66 For definition of 'Commanding Officer', See AA Sec 3 (v).

67 AIR 1988 CrnLJ 705.
SCM by the CO of the 'Corps' cannot be questioned as illegal or incompetent. In case of GCM or DCM, Army Rule 39(2) is applicable and the CO is not competent to convene a GCM or DCM.

The Delhi High Court in another case has held that in a case where CO proceeded on annual leave and the officiating CO held the trial and recorded most of the evidence by the time the CO resumed duties, the CO can take on and continue with the trial even thereafter. There is no irregularity or illegality in continuing the trial. It is not necessary that the CO should have started the trial de novo.

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

**Power of Courts Martial**

A General or Summary General Court Martial shall have power to try any person subject the Army Act for any offence punishable therein and to pass any sentence authorized thereby. A GCM or SGCM is the highest tribunal. Civil offences, when charged under Army Act Section 69 of the Army Act can also be tried by GCM, SGCM or DCM, subject to the restrictions laid down in Army Act Section 70.

**(a) Death Sentence - Award of**

Although in appropriate cases, General or Summary General Court – martial is empowered to award death sentence, the discretion must be exercised judiciously and in conformity with the law laid down by the Supreme Court. The matter of award of death sentence by Court – martial came up for consideration before the Jammu and Kashmir High Court in the case of *Ranbir Singh Vs*

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*For “Corps” and “Department”, See AR 187 (3) and AA Sec 3 (ix) respectively.*
General Court - martial 69 (Writ Petition No 144 of 1986). In this case, the petitioner had committed murder of one Captain Mitra. The General Court - martial proceedings were inter alia challenged on the grounds that the Court - martial did not pass a speaking order; that a counsel of the petitioner’s choice was not made available to him; that he was not afforded full opportunity to produce his defence; that the evidence produced before the court was not adequate to find the petitioner guilty, and that the death sentence awarded was uncalled for and in excess of the jurisdiction of the Court -martial. After considering the matter in detail the High Court rejected the contentions of the petitioner on all the points, except the one pertaining to award of death sentence. 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 question of choice and 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 Vs Union of India70 and those of Bhagat Ram Vs State of Himachal Pradesh71 the High Court observed – “The well recognized principle of law in this country is that death sentence can be awarded in the rarest of the rare cases when the alternative option is unquestionably foreclosed72. To ascertain as to how the General Court – martial awarded the death sentence, the High Court perused the summing up of the Judge Advocate and remarked – “The detailed summing up address of the Judge Advocate in the instant case, Ex. U, attached with the proceedings of the GCM shows that he has advised the presiding officer of the court about the facts and circumstances of the case but failed in his duties to guide the court properly regarding the sentence provided for the offence of murder in view of the judgments of the Supreme Court which were binding and were law in the country. The Judge Advocate was under

69 1991 Cr LJ 2850.
70 AIR 1987 SC 2386.
71 AIR 1983 SC 454.
72 AIR 1980 SC 898.
an obligation to inform the court that upon conviction of the petitioner the Court martial was to award the death sentence only if they found the case of the petitioner to be the 'rarest of the rare cases' but not otherwise. It was his duty to bring to the notice of the court the changed position of law on the basis of the pronouncements of the judgments of the Supreme Court and latest developments in the criminal law in the country while administering justice. The Judge Advocate 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 judgments of the Supreme Court and law applicable in the country". Consequently, the High Court, while upholding the conviction of the petitioner under Section 302 of RP, 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 Vs Union of India73. The High Court after discussing the case of Bachan Singh Vs State of Punjab74 inter alia observed "A different procedure is prescribed to be followed by the GCM in the rules framed under the Army Act. Though Section 354(3) is contained in the Code of Criminal Procedure but the matter dealt therewith is not a procedural matter, but is a basic principle of criminology which is to be kept in view while trying an accused under Section 302, Indian Penal Code. The provision of Section 354 (3), Cr. P.C., are to be read into the provisions of Section 302, Indian Penal Code, as has been observed by the Supreme Court in Bachan Singh's case, referred to above. That being the position, even the GCM was required to take into consideration the provision of Sec 354 (3) of the Cr. P.C. or the principle enunciated therein in the matter of awarding sentence to the accused under Section 302 of the Indian Penal Code. Apart from that the Supreme Court having declared the law in the matter of awarding sentence to an accused under Section 302 of the Indian Penal Code keeping in view the provisions of Section 354 (3) of the Cr. P.C., the same is applicable to all the Courts in the country including the GCM. This view further finds support from the judgment of Jammu & Kashmir High Court in Ranbir CWPNo 5636 of 1991.

73 CWP No 5636 of 1991.
74 AIR 1980 SC 989.
Accordingly the High Court converted the death sentence into imprisonment for life.

A District Court-Martial shall have power to try any person subject to the Army Act other than an officer of a JCO for any offence punishable therein, and to pass any sentence authorized by this Act other than a sentence of death, imprisonment for life, or imprisonment for a term exceeding two years provided that a district Court Martial shall not sentence a warrant officer to imprisonment.

With regard to powers of a Summary Court-martial, it may try any offence punishable under the Army Act subject to provisions of Army Act Section 120 (2) which states that when there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district Court-martial or on active service a Summary general Court-martial for the trial of the alleged offender, an officer holding a Summary Court martial shall not try without such reference any offence punishable under any of the Sections 34, 37 and 69, or any offence against the officer holding the Court. A Summary Court martial may try any person subject to this Act and under the command of the officer holding the Court, except an officer, junior Commissioned officer or Warrant officer. It may pass any sentence under the said Act, except a sentence of death or imprisonment for life or of imprisonment for a term exceeding the limit in Sub-section (5) which shall be one year if the officer holding the Summary Court-martial is of the rank of Lieutenant Colonel above, and three months if such officer is below that rank.

The discipline of the regular army depends in a great measure on the SCM. When a person amenable to Army Act has committed an offence which is ordinarily triable by SCM, a CO when determining by what court the accused is to be tried, must bear in mind that the legislature, in conferring upon him the powers, intends that he shall exercise those powers.

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Singh Vs General Court martial.  Accordingly the High Court converted the death sentence into imprisonment for life.

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75 1991 Cr LJ 2850.
76 AA Sec 119.
77 AA Sec 120.
Though a SCM may, subject to the provisions of Sub - Section (2), try an offence punishable under the Army Act, it is obvious that its powers of punishment are insufficient for many of grave offences known to military law. COs should, therefore, notwithstanding the increased powers of Summary trial vested in them, submit to higher authority any cases which appear to require more exemplary punishment than a SCM can award. It should, however, be remembered that even a comparatively slight punishment promptly inflicted is often more deterrent than a heavier one which follows long after the offence.

The CO is the best and sole judge, at the time, of the necessity which justified him in trying, without reference cases, which should ordinarily be tried only after reference and sanction. If it should subsequently appear to the 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 nor, in ordinary circumstances, furnish reasons for setting aside the trial, in whole or in part. Where, however, the officer holding the trial loses sight of the law and tries without considering whether an emergency exists or not, the trial would be illegal78.

In the case of K Mohan Vs Union of India79, it was held by the Madras High Court that the petitioner had not availed a statutory right of appeal provided for before challenging the validity of conviction and sentence awarded by Summary Court martial. Accordingly, his petition was dismissed.

The Allahabad High Court had held in the case of ex Gunner Sher Singh Vs Union of India80 that there was neither any defect in the department inquiry nor was there any violation of procedure of law while imposing sentence of dismissal on the delinquent employee. He had been given due opportunity in accordance

78 See AR 130 for certificate to be attached to the proceedings by the officer holding the trial when he tries without reference.
79 Madras WP No 5677 of 1990. Petition was dismissed on 30 October 2000.
80 Allahabad civil misc WP No 35346 of 1997. This writ petition was dismissed by the High Court on 10 January 2001.
with the procedure and the sentence awarded was not disproportionate or harsh. In this case, the petitioner had been awarded 28 days rigorous imprisonment for disobeying a lawful command and while undergoing the said punishment he became violent and removed iron bars fitted in the cell after which he had been tried by SCM.

In another case, the Allahabad High Court held that the sentence of dismissal awarded to the delinquent on finding him guilty of the charges under Army Act Sections 36 (d) and 63 cannot be assailed as harsh or excessive in nature. Leaving sentry post at the officers' Mess was a grave offence infliction of sentence of dismissal cannot be said to be disproportionate.81

(b) Counsels in General, Summary General and District Courts Martial

In every General, Summary General and District Courts Martial, the counsel shall be allowed to appear on behalf of the Prosecutor as well as the accused provided the convening officer may declare that it is expedient to allow the appearance of counsel thereat and such declaration may be made as regards all the aforesaid courts martial held in any particular place, or as regards any particular Court martial, and may be made subject to such reservation as to cases on active service or otherwise, as deemed expedient.

There is no restriction as to the number of counsels engaged in a case. Counsel for the defence, though not bound to such strict impartiality as the prosecutor, must nevertheless recollect that he is assisting in the administration of justice and must not be guilty of any unfairness or want of candour in his conduct of the case. In his address he will have the same liberty as the accused (See AR 77 (3); but he should exercise more restraint in commenting on the acts of persons not before the court.82

81 Rana Hariram Singh v UOI, Mil L J 1999 All 31.
82 AR 96 and Note (2) thereto.
Requirements for appearance of counsel

An accused person intending to be represented by a Counsel shall give to his CO or to the Convening Officer the earliest practicable notice of such intention and, if no sufficient notice has been given, the court may, if thinks fit, on the application of the prosecutor, adjourn to enable him to obtain, a Counsel on behalf of the prosecutor at the trial.

If the convening Officer so directs, counsel may appear on behalf of the prosecutor, but in that case, unless the notice referred to in Sub-para above has been given by the accused, notice of the direction for the counsel to appear shall be given to the accused at such time (not in any case less than seven days) before the trial, as would, in the opinion of the court, have enabled the accused to obtain counsel to assist him at the trial.

The counsel, who appears before a Court-martial on behalf of the prosecutor or accused, shall have the same rights as the prosecutor or accused for whom he appears, to call, and orally examine, cross-examine and re-examine witnesses, to make an objection or statement, to address the Court, to put in any plea and to inspect the proceedings and shall have the right otherwise to act in the course of the trial in the place of the person on whose behalf he appears, and he shall comply with these rules as if he were that person and in such case that person shall not have the right himself to do any of the aforesaid matters except as regards the statement allowed by clause (a) of Sub-rule (2) of rule 58 and clause (b) of rule 59 or except so far as the court permits him so to do.

When counsel appears on behalf of the prosecutor, the prosecutor, if called as a witness, may be examined and re-examined as any other witness and Sub-rules (5) & (6) of rule 56 shall not apply.

When the Convening Officer intends to appoint or apply for the services of an officer of the JAG's Department or an officer holding legal qualifications to act
as prosecutor, similar notice should be given to the accused to enable him, if he so desires, to obtain counsel to represent him at the trial.

It may be mentioned that there has hardly been a case where services of an officer of the Judge Advocate General’s (JAG’s) Department were employed, either as a prosecutor or as a defending officer unlike the Uniform Code of Military Justice, under which an officer for the prosecution and the defence is provided. The provisioning of such officer to the accused, be it an officer accused or an enlisted personnel, is free of cost. In addition, the accused may have the services of additional defence counsel or Assistant defence counsel at his own cost. This aspect shall be covered in detail subsequently.

-- **Counsel for prosecution and accused**

The counsel appearing on behalf of the prosecutor shall have the same duty as the prosecutor, and is subject to be stopped or restrained by the court in the manner provided in Sub – rule (2) of rule 77.

The counsel appearing on behalf of the accused has the like rights, and is under the like obligations as are specified in Sub – rule (3) of rule 77 in the case of the accused. If the Court asks counsel for the accused a question as to any witness or matter, he may decline to answer, but he must not give to the Court any answer or information which is misleading.

-- **General rules as to Counsels**

Counsel, whether appearing on behalf of the prosecutor or of the accused, shall conform strictly to these rules and to the rules of Criminal Courts in India relating to the examination, cross examination, and re-examination of witnesses, and relating to the duties of a counsel. Counsel should not state as a fact any matter which is not proved, or which he does not intend to prove in evidence, nor

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83 AR 97 and Note thereto.
84 ARs 98 & 99 and Note to AR 99 refers.
should he state what in his own opinion as to any matter of fact before the Court. In a question to a witness he should not assume that facts have been given in evidence which have not been so given, or that particular answers have been given contrary to the fact. Counsel should treat the Court and Judge Advocate with due respect, and should, while regarding the exigencies of his case, bear in mind the requirements of military discipline in the respectful treatment of any Superior officer of the accused who may attend as a witness.

--- Qualifications of Counsel ---

Neither the prosecutor nor the accused has any right to object to any counsel if properly qualified. Counsel shall be deemed to be properly qualified if he is a legal practitioner authorized to practice with right of audience in a Court of Sessions in India, or if, he is recognized by the convening officer in any other country where the trial is held as having in that part, rights and duties similar to those of such legal practitioner in India and as being subject to punishment or disability for a breach of professional rules.

--- Defending Officer and friend of the accused ---

At any General, District or Summary General Court martial, an accused person may be represented by an officer subject to the Act who shall be called “the defending officer” or assisted by any person whose services he may be able to procure and who shall be called “the friend of the accused”. It shall be the duty of the Convening Officer to ascertain whether an accused person desires to have a defending officer assigned to represent him at his trial and, if he does so desire, the convening officer shall use his best endeavours to ensure that the accused shall be so represented by a suitable officer. If owing to military exigencies, or for any other reason, there shall in the opinion of the convening officer, be no such officer available for the purpose, the convening officer shall give a written notice to the presiding officer of the Court – martial and such notice shall be attached to the

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85 AR 100 and Notes thereto.
86 AR 101.
proceedings. The defending officer shall have the same rights and duties as appertain to counsel under these rules and shall be under the like obligations. “The friend of the accused” (in case of a trial by Summary Court martial) may advise the accused on all important points and suggest the questions to be put to the witnesses, but he shall not examine or cross-examine the witnesses or address the Court.

It was held by the Supreme Court in the case of Major General Inder Jit Kumar Vs Union of India that claiming of violation of principles of natural justice cannot be said to be justified when the accused officer did not engage a defending officer being provided by the Convening Officer.

In the case of Sita Ram Prasad Vs Union of India, the facts of the case were that the defending officer of accused’s choice was not available. The officer of accused’s choice was, however, not willing to defend the accused. Hence, another officer was provided to the accused against whom the accused did not raise any objection during the trial. There was also no bias made out on the part of that officer who was defending the accused at the trial. It was held by the Court that no interference with the proceedings was warranted on the ground that the defending officer provided to the accused was not of his choice.

In the case of Rajan VC and another Vs Union of India, the High Court had held that the services of a defence counsel could not be thrust upon the accused who were not willing to utilize the services of the advocates.

In another case, it was held by the Court, where permission to engage his counsel was withheld by the military authority, that the principles of natural justice had been vitiated since the accused had a right to engage his counsel.

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87 ARs 95 and 129.
88 AIR 1997 SC 2085. Petition was dismissed on 25 August 1998. Also see Bebal Anil ex Major V UOI, Delhi High Court, CWP No 2155 of 1993.
89 1988 Lab IC 52 (NOC).
90 1995 (3) ALD 859 (Andhra). Petition was dismissed on 30 August 1995.
91 Bhose DP V UOI ; 1989 Lab IC 1789.
The Allahabad High Court in the case of Sudhir Singh, ex Cfn Vs Union of India92 had held that provisioning of a Counsel at state expense was a mandatory requirement to be met by the military authority in accordance with Para 479 of the Regulations for the Army, Revised Edition, 1987 in view of quantum of punishment awardable for the offence. Hence, the retrial of the individual was ordered since the proceedings stood vitiated due to the procedural irregularity as mentioned above. Similarly, the provision of Army Rule 129 was held to be mandatory in character in the case of Union of India and others Vs Rameshwar Mahato, where non provisioning of ‘friend of the accused’ to the accused vitiated the trial93.

-- Qualification and duties of members of the Courts - martial

The duty of appointing members to serve on the Court martial devolves on the Convening Authority. He must appoint as members of a Court – martial such eligible officers as, in his opinion, are best suited for the duty by reason of age, education, training experience, length of service and above all judicial temperament. All of these factors are to be considered but none of them is to be viewed as mandatory. A young officer with legal qualification may be a better choice to be detailed as a member as compared to one who though has put in a longer service span but has no legal qualification.

-- Affirmative disqualifications

An officer is not eligible for serving on a Court – martial if he is an officer who convened the Court ; or who is a prosecutor or a witness for the prosecution ; or who investigated the charges before trial, or took down the Summary of evidence, or was a member of a Court of inquiry respecting the matters on which the charges against the accused are founded, or was the squadron, battery, Company or other Commander, who made preliminary inquiry into the case, or was a member of a previous Court – martial which tried the accused in respect of

92 Allahabad High Court CWP No 1676 of 1995.
93 1993 Allahabad Weekly cases 883.
the same offence; or who is the CO of the accused, or of the Corps to which the accused belongs; or who has a personal interest in the case. The provost-martial or assistance provost-martial is also disqualified from serving on a General Court-martial or district Court-martial.

The term ‘eligible’ is used with reference to an officer being subject to Army Act and of the necessary standing; that is to say, it refers to the status of the officer, and involves no personal considerations. The term ‘disqualified’ is used with reference to the personal qualification of an officer. Except so far as provided in Army Rule 40, the Corps to which an officer belongs is immaterial as regards his eligibility or qualification to serve on a Court-martial.

The term "personal interest" will extend even to a remote or very small interest, e.g. in a charge relating to the theft of a sum of money, however small, belonging to an officers' Mess, or a club, every officer of that mess or club has a personal interest, and is, therefore, disqualified. A merely technical interest has been held to disqualify a person from holding a judicial position, e.g. a person who holds, as trustee or otherwise on behalf of others money in which he has no beneficial share himself, nevertheless has a personal interest in any charge relating to that money.

An officer should not be detailed to sit on any Court-martial until regarded by his CO as competent to perform so important a duty.

**Trial Procedure - Preliminaries**

On the assembly of the Court-martial, the Convening Order, the charge sheet, the summary of evidence and the names, ranks and Corps of the officers appointed to serve on the Court are placed before it. The Court has to satisfy itself that the Court has been convened in accordance with the Army Act and the Army Rules. Then it satisfies that it consists of a number of officers not less than the legal minimum and (except as provided in Rule 38) not less than the number detailed. The officers constituting the Court should be eligible and not disqualified
within the meaning of Army Rule 39 for serving on that Court – martial and that those officers should be of the required ranks. If there is a Judge Advocate (as stated above it is mandatory to appoint a Judge Advocate at a GCM, whereas it is not so in the case of a SGCM and DCM though it is desirable to do so at those Courts – martial as well) that he is duly appointed and not disqualified from acting at the Court Martial. With regard to the Judge Advocate, it has, nowhere been provided in the statute i.e Army Act 1950 or the rules made thereunder that there is any service stipulation, like in the members of the GCM, laid down. The only condition required for an officer to be appointed as a Judge Advocate is that he has to be a law graduate from one of the universities recognized by the Bar Council of India and secondly, he has to be certified to be fit by the Judge Advocate General or his Deputy at the Command Headquarters to discharge the duties of a Judge Advocate. However, of late, there has been some change in this regard as held by the Courts of the land. It was held by the Delhi High Court in the case of *Sepoy Ranjit Singh Vs Union of India*\(^94\) that the three years service condition is equally applicable for the Judge Advocate as well who is serving on the GCM. Since in the instant case it was not done, the trial proceedings were quashed since vitiated due to the aforesaid reason. As regards the satisfaction of the Convening Officer as to the appointment of the member in relation to compliance of Army Rule 37, the Madhya Pradesh High Court in the case of *Joginder Singh Vs Union of India and others*\(^95\) had held that before convening the Court – martial, he has to satisfy that the charges to be tried by the Court are for the offences within the meaning of the Army Act and that the evidence justifies a trial on those charges. Such a satisfaction has to be recorded. In this case, the order passed by the Deputy General Officer Commanding does not indicate any such satisfaction, hence condition precedent to exercise of power under Rule 37 (1) and (2) was not adverted to, rendering the order for assembly of the Court illegal on this ground alone.

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94 Delhi High Court, CWP No 2937 of 1995. Date of decision 18 May 2002. Also see Union of India and another Vs Charanjit Singh Gill and others (J 2000 (5) SC 135).
95 Madhya Pradesh High Court, Writ Petition No 5100 of 1989, decided on 04 December 2001. Also see Union of India and others V HC Goswami (1999) 4 SCC 375.
The Court, thereafter, is to satisfy themselves that the accused appears to be a person subject to the Army Act and to the jurisdiction of the Court; and that each charge discloses an offence under the Army Act which should be framed in accordance with the Army Rules; and should be so explicit as to enable the accused readily to understand what he has to answer. If due to any reason, the Court is not satisfied on the above aspects, it may adjourn and report its opinion to the convening authority. In case, one or more of the members detailed are found to be ineligible or disqualified from serving on the Court-martial, the waiting members, in accordance with and relevance to the ranks and seniority of the retiring members, should take place and that the fact that the waiting members have taken their place shall be recorded in the proceedings.

(a) **Opening of Court**

The prosecutor and prosecution Counsel and the defending officer and/or Defence Counsel take their places and the accused alongwith the escort are marched in before the Court and take their seats next to the Defending Officer and/or Defence Counsel. The shorthand writer, if any, and the interpreter, if any, take their places.

The public including the press may be permitted inside the Court-martial room so far as the accommodation permits. At this time, it is customary not obligatory, for the witnesses to be present in the court from the time when the accused is brought in until after the members have been sworn; they must then withdraw and should not, as a rule be allowed to be in the court when not under examination. After the court is declared open, it is usually the Judge Advocate, or in his absence, the Presiding Officer, who reads out the convening order. The same is marked as 'k' to the proceedings. Though the Convening Order should preferably be signed by the Convening Officer but his Staff Officer may also sign the same provided the contents thereof have been duly approved by the Convening Officer concerned.

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96 ARs 41 & 42.  
97 Para 40, Chapter IV, MML, Vol I.  
98 Para 39, Chapter IV, MML, Vol I.
With regard to approval of the Convening Order and the signature of the Convening Officer thereon, the Supreme Court had occasion to examine the matter. The facts of the case in brief were that after his trial by General Court Martial, the accused officer was sentenced to be cashiered and to suffer rigorous imprisonment for two years. The said sentence was confirmed by the confirming authority. In the writ petition, the High Court had held that the constitution of the Court – martial was not done by the Commanding Officer (read Convening Officer) and, thus, Rule 37 (3) of the Army Rules was violated. Consequently, it was held that the Court – martial had no jurisdiction to proceed with the trial and the entire proceedings was, therefore, vitiated. In the result, the High Court quashed the proceedings as well as the order of punishment.

Aggrieved by the aforesaid order, the Union of India preferred this appeal by special leave. It was held by the Supreme Court that admittedly, there was no record whatever in the file to show that the personnel of the Court – martial were appointed by or nominated by the ‘Lt Gen’ (Convening Officer). The order for assembly of the General Court martial did not contain either the signature, or the initial of the ‘Lt Gen’. It was signed only by the Colonel and non else. In the circumstances, the said order cannot be considered to be an order evidencing the appointment of personnel of the Court – martial by the ‘Lt Gen’. The Court further stated that there was no dispute before them that under Rule 37, the Commanding Officer (read Convening Officer) has to apply his mind to satisfy himself that the charges to be tried by the Court are for offences within the meaning of the Act and that evidence justified the trial on those charges. It was also admitted that the Commanding Officer (Convening Officer/authority) has also to satisfy that the case is a proper one to be tried by the type of Court – martial which he proposes to convene. However, the learned Counsel for the appellants contended that Sub – rule (3) of Rule 37 was only procedural in nature and that there was no need for application of mind by the Commanding Officer (read Convening Officer) in the matter of appointment of the personnel of the Court – martial. The Court held that the contention loses its relevance in the present case in view of the categorical stand taken by the appellants that there was an order by
the Commanding Officer (read Convening Officer) appointing or detailing the officers to form the Court - martial. According to the learned Counsel as stated earlier, the form for assembly of Court - martial is the only relevant form and when it is signed by an officer on behalf of the 'Lt Gen' (the Convening Officer), that is the sufficient proof of the appointment of the personnel of the Court - martial by the 'Lt Gen' (read Convening Officer). The Court were unable to accept this contention in view of the fact that the said form does not contain either the signature or the initial of the 'Lt Gen' (Convening Officer). Even assuming that the 'Lt Gen' (Convening Order) passed an Oral Order, there is no record of any kind whatever to prove it. The form for assembly of Court - martial was not contemporaneous to such oral order, if any. In the absence of any record, whatever to show that the appointment of the personnel of the Court - martial was by 'Lt Gen', (Convening Officer) we are not persuaded to accept the contention of the appellants that the requirements of Rule 37 were fully satisfied. They said that it was unnecessary for them to consider whether Sub - rule (3)of Rule 37 required an order in writing or not in view of the specific stand taken by the learned counsel for the appellants in that case that there was an order in writing and the said order was nothing else but the form for assembly of the Court - martial99.

If there has been a Court of Inquiry respecting the matter on which the accused appears before the Court, the prosecutor should hand over to the Court a list of the names of officers comprising the Court of Inquiry, and the presiding officer should compare the names of the officers who sat on the Court of Inquiry with those now composing the Court, insert an asterisk after the words “ Rule 41 and 42” on page ‘A’ of the proceedings, and enter in red ink and sign a foot-note at the bottom of the first page of the proceedings to the following effect :-

“I have satisfied myself that none of the members detailed as members of this Court have previously served upon any Court of Inquiry respecting the matters forming the subject of the charge (charges) before this Court – martial”.

Signature of Presiding Officer

99 Union of India V Goswami Harish Chandra ; 1999 (4) SLR 365 (SC).
(b) **Objection to the members and arraignment of the accused**

After the name of the Presiding Officer and members of the Court have been read over in the hearing of the accused, the following question is to be put to the accused:

"Do you object to be tried by me as Presiding Officer or by any of the officers whose names you have heard read over?"

If the accused makes any objection, he must state the names of the officers to whom he objects before any objection is disposed of. The objection in respect of the officer of the lowest rank is disposed of first. The procedure adopted when an officer is objected to is that the accused should state the names of all the officers objected to before any objection is disposed of. The accused should state the reasons for his objection. The accused may call any person to give evidence in support of his objection and such person may be questioned by the accused and by the Court. The reply of the officer objected to should also be heard and recorded. The Court should be closed and all officers present (other than the officer objected to) shall dispose of the objection. If the objection to a member is allowed, the presiding officer should appoint one of the waiting members to fill the vacancy. Ordinarily, the Presiding Officer should select one officer of the corresponding rank to the retiring officer. If there is no waiting member available to fill the place of the retiring officer, the Court should adjourn and report to the Convening authority. When a waiting member is appointed to the Court, the accused should be asked whether he objects to the new member. This is to ensure that the waiting member is eligible and not disqualified for sitting on the Court. The accused may make a special plea to the effect that the Court has no jurisdiction to try the accused on any charge. (AR 51). Or, if the accused persists in objecting to the whole court collectively, the court may treat the objection as made to all the members individually and the procedure provided by AR 44 should be strictly followed. The accused however, cannot object to the Judge Advocate
since there is no provision to that effect\textsuperscript{100}. As per the existing provisions of law, an officer belonging to the Judge Advocate General's Department or if no such officer is available, an officer approved of by the Judge Advocate General or any of his deputies can be detailed to serve on a Court – Martial. However, the outlook of the courts of the land is different in this regard. The two judgements i.e, \textit{Union of India and another Vs Charanjit Singh Gill and others (Jt 2000 (5) SC 135)} and \textit{Ex Sepoy Ranjit Singh Vs Union of India (Delhi High Court) CWP No 2937 of 1995} fully demonstrate this. In the former case, it was observed by the Supreme Court that the Judge Advocate, who though does not form part of the Court Martial as such, is an integral part thereof, particularly in Courts Martial which cannot be conducted in his absence. With the role assigned to him, a Judge Advocate is in a position to sway the minds of the members of the Court Martial as his advice cannot be taken lightly by the persons composing the court, who are admittedly not law knowing persons. As per them, a 'fit person' mentioned in Army Rule 103 is referable to Army Rule 39 and 40. A person fit to be appointed as Judge Advocate is such officer who does not suffer from any ineligibility or disqualification in terms of Army Rule 39 alone.

They were of the view that Army Rule 102 unambiguously provides that “an officer who is disqualified for sitting on a Court-Martial shall be disqualified from acting as a Judge Advocate in a Court-Martial.” A combined reading of rules 39, 40 and 102 suggests that an officer who is disqualified to be a part of Court-Martial is also disqualified from acting and sitting as a Judge Advocate at the Court-Martial. It follows, therefore, that an officer lower in rank than the officer facing the trial cannot become a part of the Court-Martial and similarly officer of such rank would be disqualified from acting as a Judge Advocate at the trial before a GCM. The court further observed that the accused is entitled to the opinion/advice of the Judge Advocate. Seeking advice from a person junior in rank may apparently be not possible ultimately resulting in failure of justice. The court held that the Judge Advocate, though not forming a part of the court, yet being an integral part of it, is required to possess all such qualifications and be

\textsuperscript{100} ARs 44 and AA Sec 130. Also see AR 38.
free from the disqualifications which relate to the appointment of an officer to serve on the Court-Martial.

It is humbly submitted that the view of the Hon’ble Court with regard to issue of appointment as Judge Advocate seems to be erroneous in nature. An officer of the Judge Advocate General’s Department has altogether a different role to perform at a Court Martial as compared to the officers pooled in from various arms and services to serve on the Court Martial as members of the jury. They are laymen, coming from varied disciplines such as infantry, artillery, Army Service Corps and Army Medical Corps etc. They hardly know anything about law. On the contrary, the officer being appointed as Judge Advocate is a law graduate who is certified to be ‘fit’ by either by the Judge Advocate General himself or by any of his deputies to discharge the duties of a Judge Advocate at a Court Martial. The ‘rank’ of this officer is immaterial. The main thing to be considered is a ‘certification’ by a competent authority viz. the Judge Advocate General or any of his deputies as to his ‘fitness’. Army Act Section 129 refers. Hence, comparison of officers constituting the Court Martial with that of the Judge Advocate so far as their conditions of ineligibility/disqualifications are concerned, would neither be correct nor legally sound, in view of their distinct roles at the Court Martial, unless it is made out that the Judge Advocate has a personal interest in the case or any other ground which may be against the principles of natural justice, equity or fairplay. It is a common knowledge that such an authority would never appoint an officer, having due regard, not only to the status of the accused but also to the gravity of offence(s) alleged to have been committed, who is not considered to be fit in all respects to discharge duties of a Judge Advocate. Further, if we peep into some developed military judicial systems of the World, such as the United States, we would know that before a Military Judge (equivalent to ‘Judge Advocate’) is appointed as such at a trial, whether at a General Court Martial or Special Court Martial, he has to be certified to be ‘fit’ by the respective Judge Advocate General to discharge his duties. ‘Rank’ of such officer nowhere finds mention. Similarly, under the British Military Law, the accused cannot object to the Judge Advocate at the trial unlike the members of the Court – martial. Rules of Procedure, Rule 32 refers. If the judgement ibid of the Hon’ble Apex Court is to be relied upon, (which
in any case is binding in nature), the administration of justice in the Army/defence services would become rather difficult. In the event of an officer of a requisite rank not being available to act as Judge Advocate due to exigencies of public service etc, a certificate rendered by the Convening Officer to that effect would also not be of any help since such officer would be 'ineligible' and such 'ineligibility' cannot be cured if the spirit of the judgement is to be followed. The aforesaid judgement in my opinion, therefore, would need a relook.

After the oath or affirmation, the accused is arraigned on each of the charges separately. Arraignment consists of calling upon the accused his number rank, name and description as given in the charge – sheet. The charge(s) are read over to him and then he is asked whether he is guilty or not guilty of the charge. The accused has to plead to the charge(s) personally and not through his defending officer or Counsel. The accused is arraigned by the Judge Advocate and, in his absence, by the Presiding Officer1.

(c) **Manner of compliance of rule 52 (2)**

While commenting on the certificate viz, “The accused having pleaded guilty to the charge, the provisions of Army Rule 52 (2) are complied with” in the Court – martial proceedings, the High Court of J&K in the case of **Bhagwan Singh Vs Union of India**, observed that the document does not show as to whether or not the charges were explained to the petitioner, who is not at all conversant with English, the language in which they were framed. It also does not show as to whether or not the Judge Advocate had satisfied himself that the petitioner had understood the charges before pleading guilty to them. It does not show that he had informed the petitioner that he could be convicted on the basis of his plea of guilty without recording any other evidence. Nor does it transpire from the said document that he had gone through the summary of evidence to arrive at the conclusion as to whether or not the petitioner was required to be advised to withdraw his confession. On the other hand, the certificate appended to the aforesaid confession reveals that the Judge Advocate assumed automatic

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1 AR 48 and Notes thereto.
compliance of Rule 52 (2), on the petitioner's pleading guilty to the charges. He, in our opinion, clearly slipped into an error\(^{(a)}\). Accordingly, the High Court quashed the GCM proceedings. It is, therefore, necessary that the certificate in terms of Rule 52 (2) is comprehensive and clearly indicative of the fact that the sub-rule has been properly complied with. A bald assertion in the proceedings as to compliance of the sub-rule is adequate

(d) Objection to Charge

The accused can object to the charge on the ground that the charge does not disclose an offence under the Army Act or that the charge has not been framed in accordance with the Army Rules. If such an objection is raised then the Court, after hearing any submission which may be made by the Prosecutor or by or on behalf of the accused, shall consider objection in the closed Court and shall either disallow the objection and proceed with the trial; or allow the objection and adjourn to report to the convening authority; and adjourn to consult the convening authority. If it appears to the court that there is a mistake in the name or description of the accused in the charge sheet so as to correct that mistake, this may be done at any time during the trial, provided that 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 mistake having been made. If it appears to the court that in the interest of justice that any addition to, omission from, or alteration in the charge are required, the court may adjourn and report these matters to the Convening Authority. The accused, the Judge Advocate or any member of the Court may bring to the notice of the Court such defects in the charge. Such defects must be brought to the notice of the Court, before they have commenced to hear any witness, but it may be before or after the arraignment. On such report being made to the Convening authority, the Convening authority may direct a new trial to be commenced or amend the charge and order the trial to proceed with the amended charge, after due notice to the accused\(^{2}\).

\(^{(a)}\) 1983 Cr.L.J. 1368
\(^{2}\) ARs 49 and 50 and Notes thereon.
(e) **Special plea to jurisdiction and plea to the charge**

Special plea to jurisdiction of the court is an objection of the accused to the right of the court generally to try the accused on any charge, such as a plea that the court is improperly constituted in respect of the rank or number of the members; or that the accused is not amenable to the jurisdiction of the court. If such a plea is raised, the court shall receive evidence offered in support of the plea on oath/affirmation; any evidence offered by the prosecution in disproof or disqualification of the plea; any address by or on behalf of the accused; and any reply by the prosecutor. If the court overrule the plea, they shall proceed with the trial and if they allow the special plea, they shall record their decision; the reasons for it, and report to the Convening Officer and adjourn. If the court is in doubt as to the validity of the plea, it may refer the matter to the Convening authority and adjourn; or record a special decision with respect to the plea and proceed with the trial. If the court allows the special plea, the Convening authority shall either forthwith convene another court for the trial of the accused; or order the accused to be released. If the court allows the special plea it shall not require any confirmation.

If the accused refuses to plead or does not plead intelligibly a plea of 'Not guilty' will be entered in such cases. After the plea of 'Guilty', before recording a finding of guilty, the presiding officer or the Judge Advocate shall ascertain that the accused understands the nature of the charge; and shall inform him of the general effect of that plea; and in particular of the meaning of the charge (s) to which he has pleaded 'guilty'; and of the difference in, procedure on the plea of 'Guilty' and 'Not Guilty', and shall advise him to withdraw that plea if it appears from the Summary of Evidence that the accused ought to plead 'Not Guilty'.

(f) **Plea in bar of trial**

Plea in bar of trial can be offered on the grounds that he (the accused) has been previously convicted or acquitted of the offence by the Competent Criminal Court or by a Court – martial, or has been dealt with summarily under Section 80,
83, 84 or 85, as the case may be, for the offence, or that a charge in respect of the offence has been dismissed as provided in Sub-rule (2) of Army Rule 22; or the offence has been pardoned or condoned by competent military authority; or the time which has elapsed between the commission of the offence and the commencement of the trial is more than three years and the limit of time for trial is not extended under Army Act Section 122. When such a plea is made, the accused must plead either "guilty" or "not guilty" and offer the plea in bar at the same time. On such a plea being made, the Court shall receive any evidence offered in relation to the plea and hear any address by or on behalf of the accused, and any address by the prosecutor in reference to the plea. If the court finds plea in bar proved, it shall record their finding and notify it to the confirming authority, and either shall adjourn or, if there is any other charge against the accused, whether in the same or in a different charge sheet, which is not affected by the plea in bar, may proceed with the trial of the accused thereon. If on the notification of their finding to the confirming authority, the plea in bar is not confirmed, the confirming authority may order the Court to reassemble and proceed as if the plea had not been proved. If the Court finds the plea in bar not being proved, they shall proceed with the trial, but such a finding shall be subject to confirmation like any other finding of the court.

In the case of Sekhon JS, Lt Col Vs Union of India, the facts of the case were that the offence of which the petitioner was charged was said to have been committed in November 1994 while the Court-martial was convened in March 1998. He contended that the trial was clearly barred by limitation. The petitioner had raised the plea in bar of trial before the Court-martial also and produced evidence also. The GCM after hearing the argument and appreciating the evidence returned a finding rejecting the plea in bar of trial under Section 122 of the Army Act and ruled that the trial was within jurisdiction. A question arose whether those finding could be interfered with in exercise of power of judicial review.

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3 J&K High Court (at Jammu) OWP No 1100 of 1998.
The Court held that the question was considered by the Supreme Court in *Union of India Vs Himat Singh Chahar*, 1999 (4) SCC 521 and in the *Union of India Vs Major A Hussain*, 1998 (1) SCC 537. So, the conclusion is that plea in bar under Section 122 of the Army Act having been raised before the Court – martial which the Court – martial rejected after appreciating the evidence, this Court in the exercise of power of judicial review cannot re-appreciate the evidence especially when it is not a case of no evidence or wrong application of law.

**(g) Alternative charges**

When two alternative charges are preferred and the accused pleads 'not guilty' to the charge which alleges the more serious offence and 'guilty' to the other, the Court shall try him as if he had pleaded 'not guilty' to all the charges. If there are alternative charges and the accused pleads 'guilty' to the more serious of the alternative charges, the prosecutor can withdraw the less serious charges of the alternatives. The fact of such withdrawal should be recorded in the proceedings.

It is mandatory to record finding on the charges in the alternative as well vide Army Rule 62 (1) and Note 45 (c) of Notes on Army and Air Force law.

**(h) Withdrawal of Plea of 'Not Guilty'**

If the accused has pleaded 'not guilty' to any charge, he may withdraw that plea and plead 'guilty' to the charge at any time during the trial, subject to the compliance of Army Rule 52 (2) and (4) and the Court will record a plea and finding of 'guilty'.

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4. Also see AIR 1999 SC 1980.
6. See ARs 54 (2) and 52 (3).
(i) **Procedure after plea of 'Not Guilty'**

After recording a plea of Not Guilty, the accused must be asked the following question: "Do you wish to apply for an adjournment on the grounds that any of the rules relating to procedure before trial have not been complied with, and that you have been prejudiced thereby, or on the ground that you have not had sufficient opportunity for preparing your defence?" If the accused applies for such adjournment, the court shall hear any statement or evidence in support of the application, and any statement of the prosecutor or in evidence thereto, and the court may grant such adjournment as may appear to them in the circumstances, to be proper. Thereafter, the case for the prosecution should be presented as follows. Firstly, the prosecutor may, if he desires, and shall, if required by the court, make an opening address. Evidence for the prosecution shall then be taken. If the prosecutor gives evidence, he should give next after his address. He may be cross examined by or on behalf of the accused, and asked to make any statement which might be made by a witness on re-examination.

(j) **Plea of no case**

A 'plea of no case' is a submission by the accused or on his behalf that the accused has no case to answer, and therefore should not be called upon for his defence, because the prosecution have not produced evidence in support of one or more essentials in the charge. This submission must be to the effect that there is no evidence at all on the point or points, and not that the evidence is untrustworthy. A submission should not be made as a matter of course, because if obviously groundless, it may indicate that there is no other or only a weak defence to the charge. At the conclusion of the case for the prosecution, if the defence submits that there is no case for the accused to answer, the prosecutor may reply. The court may decide that there is no case to answer without hearing

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7 AR 56.
the case for the defence. If the court comes to such a conclusion, it may record a finding of 'Not Guilty'.

(k) **Defence case**

At the close of case for the prosecution, the following three questions must be asked of the accused by the Judge Advocate or the Presiding Officer: Firstly, "Do you intend to call witness(es) in your defence?" Secondly, "Is he (are they) witness(es) as to character only?" and thirdly, "Have you anything to say in your defence?" The object of putting these three questions to the accused will unfold the further course of action in the trial. The subsequent procedure if the accused does not intend to call witness(es) to the facts of the case will be that the accused may make an oral statement or one in writing. If he wants to make a statement he should do so immediately after the close of the evidence for the prosecution. It may be made on oath or affirmation. The court may question the accused as provided for in Army Rule 58 (2) (a). The accused may, if he wishes, call witnesses as to his character. The prosecution may make a final address. The accused or defending officer/defence counsel may make a closing address. If the accused intends to call witnesses as to the facts of the case, the procedure will be that the accused or his representative may make an opening address. The accused may make an oral statement or one in writing. It may be made on oath or affirmation. The court may then question the accused as provided for in Army Rule 59 (b). The accused shall then call witnesses including witnesses as to character. The defence may make a closing address. The prosecutor may reply. The accused cannot be called as a witness except on his own request in writing. If the accused does not decide to come as a witness in his defence, no adverse inference can be drawn in such cases. Further his failure shall not be made 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 together with him at the same trial.

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8 AR 57.
9 AR 58.
(l) Special rules of evidence

Army Act Section 142 provides certain presumptions. An Army List, purporting to be published by authority, shall be evidence of the following facts, namely: status and ranks of the officers, JCOs and WOs mentioned therein, appointments held by them and the corps, battalion, arms or branch of the service to which they belong. An apprehension certificate may be signed by any of the following persons, namely, any officer who apprehends a deserter/absentee, the CO of a person subject to the Army Act who apprehends a deserter/absentee, the CO of that portion of the Regular army to which portion the deserter/absentee surrenders and police officers not below the rank of officer in charge of a police station. The following facts may be proved by a duly signed apprehension certificate, namely the fact of surrender or apprehension, the date of such surrender or apprehension, the place of such surrender or apprehension and the manner in which the deserter/absentee was dressed at the time of surrender/apprehension. Ballistics expert examination report, chemical analyser’s report, finger print expert’s report etc can be given in evidence without calling their authors as witnesses10.

(m) Finding of the Court

The Court has to deliberate and take decision as to finding (s) in the closed Court in the presence of the Judge Advocate and officer under instruction, in any11. The finding on each charge must be decided by an absolute majority of the opinions of the members of the Court, taken in succession, beginning with the junior in rank. If there is an equality of votes, the accused shall be deemed to be acquitted. The presiding officer does not have a casting vote12 or second vote in the case of finding. This is the reason why we have to have odd number of

10 AA Sec 142.
11 AR 61(1).
12 Casting vote is a vote which the person entitled may cast when the balance of votes on both sides may be equal. On matters other than challenge, finding or sentence, the presiding officer shall have a casting vote. See also AA Sec 132 (4).
members constituting the Court, for example, a minimum of three or five in case of a DCM/SGCM or five or seven in case of a GCM. If the Court have arrived at a decision as to the facts which they find to be proved and are in doubt as to whether the accused can legally be found guilty, they may adjourn and refer the matter to the convening authority setting out the facts that they find to be proved.\textsuperscript{13}

Prior to the amendment of Army Rule 62, the reasoned order in support of the finding(s) was not required to be given. Its validity had been upheld by the Jammu and Kashmir High Court in the case of \textit{Dav Ghulam Mohammed}.\textsuperscript{14}

\textbf{(n) Need for definite finding}

The fact of the case of \textit{Baldev Singh Vs Union of India}\textsuperscript{15}, was that there was a scuffle between the deceased and the accused and the bullet from the rifle got fired during the scuffle. The Delhi High Court had held that the Court martial was required to give a definite finding which they didn’t do. Resultantly, the court held that the finding of the Court martial under Section 304, Pt II of the IPC was not sustainable.

\textbf{(o) Brief reasons for finding(s)}

It was alleged by the petitioner that the reasons given in support of the findings did not justify the findings. It was held by the Court that the reasons to be given in the support of the findings need not be elaborate. They found the court having given brief reasons in support the findings and that the Court was not in a position to re-appreciate the evidence on which the finding were based.\textsuperscript{16}

\textsuperscript{13} AR 62.
\textsuperscript{14} 1987 CriLJ 1899 (J&K).
\textsuperscript{15} 1999(8) SLR Delhi 125.
\textsuperscript{16} Sekhon JS, Lt Col V Union of India, Jammu CWP No 1100 of 1998.
Every member of the Court must give his opinion by word of mouth after determining the sentence. The opinion is taken in succession, beginning with the member lowest in rank. A member who has voted for an acquittal must vote on the question of sentence notwithstanding. The Presiding Officer does not have a casting vote with regard to the voting on the sentence. In the case of a sentence of death, it shall not be passed on any person without the concurrence of two-thirds at least of the officers sitting on the Court in the case of a GCM. In the case of SGCM, a sentence of death shall not be passed unless all the members concur. Where an accused appears before a Court-martial on several charges, the Court must award one sentence in respect of all the charges on which he is found guilty. The Court – martial while awarding imprisonment should bear in mind that sentences of imprisonment, unless for one or more years exactly, should if for one month or upwards, be recorded in months. Sentences consisting partly of months and days should be recorded in months and days. The nature of imprisonment viz. ‘rigorous’ or ‘simple’ should invariably be mentioned in the sentence. If the Court inadvertently omits to specify the nature of the imprisonment, the sentence is treated as one of ‘simple imprisonment’. Sentences of simple imprisonment are inexpedient and inconvenient of execution and normally should not be passed, except in exceptional circumstances with due regard to the rank of the accused and the nature of the offence committed. An officer shall be sentenced to be cashiered before awarding him the punishment of imprisonment. WOs and NCOs should be reduced to the ranks and such reduction should precede the sentence of imprisonment.

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Notes:

17. Note 8(g) to AA Sec 71.
18. Note 8(c) to AA Sec 71.
19. AA Sec 74.
(q) **Death penalty**

In the case of *Rai Devendra Nath, L/Nk Vs Union of India*20, the Allahabad High Court had held that the Court martial should have had taken into consideration the general law applicable to criminal cases. Aspects like cold-blooded murder, absence of provocation, helplessness of the victims and many such circumstances are given due weightage before deciding on the death penalty which should only be given in a rarest of the rare cases. Accordingly, the imposition of death penalty was interfered with, holding that the right punishment for the offence should have been imprisonment for life. The Court order was delivered on 06 January 2000.

(r) **Confirmation of finding and the sentence**

The central government or any officer empowered in this behalf by warrant of the Central government may confirm the findings and sentences of a GCM. The Central government has issued two types of warrants, namely ‘A-2’ Warrant (issued to the Chief of the Army Staff) and ‘A-3’ Warrant (issued to the officers commanding divisions, areas and higher formations) for confirmation of the GCM proceedings21. Any officer having powers to convene a GCM; or any officer empowered in this behalf by warrant of an officer having power to convene a GCM. This warrant is called ‘B-1’ warrant. The convening officer or if the convening authority so directs by an authority superior to him may confirm the finding and sentence of SGCM22.

The confirming authority, while confirming the finding(s) and sentence of a Court – martial has many options depending upon the merits of the case. Firstly, it may confirm the finding and sentence of the Court ; or he may withhold confirmation of the finding and the sentence ; or reserve confirmation for the

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21 AA Sec 154.
22 AA Sec 157.
Superior authority; or commute, remit or mitigate any sentence; or order revision of the finding and/or the sentence; or he may vary the sentence in excess of law; or suspend temporarily a sentence of imprisonment or imprisonment for life till the orders of the authority specified in Section 182 have been obtained or he may formally express a sentence which had been informally expressed.

In the case of *Mohammed Yakub Khan Vs King Emperor*[^26], it was held by the Court that the Court martial proceedings would be final only when confirmed, subject to power of revision and that there was no room for an appeal to His Majesty in Counsel in the scheme of the Act.

The Allahabad High Court had held in the case of *Dharam Pal Kukrety Vs COAS*[^27] that after the revision, the confirming authority has no option but to confirm the verdict. It is submitted that the aforesaid view of the Court does not inspire confidence since in addition to confirmation of the proceedings, he can as well not confirm the same, which action will depend on the facts and circumstances of each case. Rightly so, the Supreme Court subsequently had overruled the decision of the said Court[^28] and had held that after non-confirmation of finding of 'Not guilty' on revision, it was open to the Central Government or 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 Court-martial. The confirming authority, if dissatisfied with the finding on revision, can refer the case to its Superior authority but cannot withhold confirmation and order retrial by another GCM[^29].

[^23]: AA Sec 158.
[^24]: AA Sec 160 read with AR 68.
[^25]: AR 73.
[^26]: AIR 1947 PC 87 (88).
[^27]: 1978 SLJ 266 (All).
Revision – necessarily for revision of the sentence

In the case of Harish Uppal, Capt Vs Union of India\[30\] it was held that confirming authority can himself mitigate or remit or commute the punishment awarded by the Court – martial. Therefore, when a sentence is directed to be revised by the confirming authority, it necessarily means that the authority considers that the punishment awarded by the Court – martial is not commensurate with the gravity of offence committed and it should, therefore, be revised upwards. It further held that the law does not require the confirming authority to give hearing to the petitioner (accused) either before ordering revision under the Army Act Section 160 (1) or before confirming the revised sentence.

Revision order – should not be in the form of an order

Revision orders have become subject matter of controversy before civil courts. It has been ruled that the language used in the revision order should not create an impression that members of the Court – martial are being coerced to follow a definite course. In number of 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. Unwarranted observations must be avoided. Undisguised opinions on merits of the case should be restrained. Apart from language, nature of evidence should not be discussed\[31\]. However, with regard the revision of the sentence, the Supreme Court had held that merely showing that the punishment awarded by the Court was not commensurate with the gravity of the offence committed, would be in accordance with law. In the case of Harish Uppal, Capt Vs Union of India\[32\], the Supreme Court had held that such a direction should be supported by reasons as to why punishment awarded was wholly inadequate. An order under Army Act Section 160 is a sort of application for revision by the confirming authority. The statute thereupon casts a

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30. 1973 CriLJ 274.
32. 1973 CriLJ 274.
duty on the Court-martial to reconsider its earlier finding or sentence but the Court-martial is not obliged to change its earlier view.

(u) **Pre-confirmation petition – Stage of consideration**

The power under Army Act Section 160 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 powers under Army Act Section 160.33 In the above case, it was also held that where the Court-martial had enhanced the sentence on revision and passed unduly harsh sentence, in the absence of any plea of mala fides against members of the Court-martial having been taken or proved, there can be no judicial review of such a decision. However, the observations of the Supreme Court in the case of *Ranjit Thakur Vs Union of India*34, give an impression that unduly harsh sentence can be judicially reviewed.35

It is permissible for a confirming officer to cancel his minute of confirmation and order revision before the proceedings are promulgated. If the proceedings are confirmed in error, those can subsequently be confirmed by the Superior military authority.36 If a confirming officer purports (by way of commutation) to substitute a valid sentence, a sentence which the court had no power to award, it is not subsequently open to the confirming authority to pass a valid sentence as, in such a case, neither the original sentence, since it has been commuted, nor the new sentence since it is illegal can stand. The conviction, however, would remain good in such a case.37

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33 Gian Chand V UOI, 1983 Cri LJ 1059 (Delhi).
36 Note 2(a) to AA Sec 153.
37 Note 6 (e) to AA Sec 158.
(v) **Grounds for non confirmation**

The confirmation of the proceedings of a Court – martial should be withheld in a case where provisions of the Act relating to jurisdiction have been contravened; or where evidence of a nature prejudicial to the accused has been wrongly admitted; or where the accused has been unduly restricted in his defence; or where a finding of guilty has been arrived at with the exception of certain words of the charge, and these words so far describe the essence of the offence, that the finding with the words omitted fails to disclose an offence of which the Court could legally have convicted the accused; or where a special finding of guilty fails to disclose an offence of which the court could have legally convicted the accused; where the charge is bad in law, even though the accused has pleaded guilty or where there has been such a deviation from the Rules that injustice has been done to the accused.

(w) **Substitution of finding and sentence**

The authorities specified in Army Act Section 179, while substituting a new finding for the Court’s finding must bear in mind that the finding to be substituted is such which could have been validly made by the Court on the charge; and that it should appear from the facts on record that the court must have been satisfied of the facts establishing the offence of the finding proposed to be substituted.

While substituting a new sentence, it should be borne in mind that the new sentence shall not be higher in the scale of punishments for which the new punishment is substituted; and that the new sentence shall not be in excess of the punishment for which the new punishment is substituted.
The facts of the case in the case of Major Charanjit Lamba Vs Union of India and others were that the petitioner was tried by GCM on two charges under Sections 52 (f) and 45 of the Army Act. GCM found the petitioner not guilty of the second charge but guilty of the first charge. He was awarded for forfeiture of ten years past service for the purpose of pension. Revision of the finding and the sentence was ordered by General Officer Commanding (GOC) Maharashtra and Gujarat Area. The GCM, on reassembly, found the petitioner guilty of both the charges and sentenced him to be dismissed from the service. The GOC now on receipt of the proceedings reserved the findings and sentence of the Court for confirmation by Superior military authority i.e. GOC-in-C Southern Command. The petitioner contended that since the GOC-in-C Southern Command, e only had power to order revision he could not confirm the proceedings of the Court martial. It was held by the Court that Army Act Section 154 provides that proceedings of GCM can be confirmed either by the central government or by an officer appointed by it by a warrant. Such an authority would also be the revising authority. Both GOC Maharashtra and Gujarat Area (M&G Area) and GOC-in-C Southern Command are holders of such a warrant. The expression, “an authority” which makes the final confirmation in Court martial proceedings is not synonymous with the expression confirming authority as used in Army Act Section 154. This is apparent from Army Rule 70 which provides that the confirming authority upon receiving proceedings of a GCM or DCM may either make or refuse the confirmation or reserve it for superior authority. Since GOC-in-C Southern Command was both confirming and superior authority, it was perfectly permissible for GOC M & G Area to have reserved confirmation for GOC-in-C Southern Command.

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40 Criminal Writ petition No 489 of 1997 (judgment delivered on 15 Sep 98).
B. COURT MARTIAL PROCEDURE UNDER THE BRITISH MILITARY LAW

The trial by one's own peers is an Englishman's fundamental right - - - the lamp that shows that freedom lives.

Lord Devlin in 'Trial by Jury'

(i) Introduction

The composition of Courts-martial and the procedure followed during the trials is very akin to our system of trial by Courts-martial. In fact, our military finds its origin in the British Military Law, similar to our system of Courts-martial, under British military justice, they too have General Courts-Martial, District Courts-Martial and Field General Court Martial (FGCM) (As against Summary General Court Martial in our law). They, however, do not have Summary Courts-Martial but have Summary trials under the Commanding Officer and Superior military authorities.

A person subject to military law who is to be tried by Court-martial may be brought before a GCM or a DCM or when on active service, in certain circumstances before a FGCM. Every Court-martial depends for its jurisdiction upon the order which brings it into being, namely the Convening Order issued by an officer authorized under Army Act 1955, so to do42. A GCM may be convened by an officer authorized by warrant from Her Majesty or by an officer, not below the rank of Colonel, holding a delegated warrant from an officer so authorised43. A DCM may be convened by an officer authorized to convene a GCM; by an officer not below the rank of Captain who has been authorized in writing by an officer authorized to convene GCsM; or by a General Officer or a brigadier commanding a body of troops; or by the officer acting in that body of troops in the commander's place44. A FGCM may be convened by a Commander of a body of the regular

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42 For forms of convening order, see Rules of Procedure (RP) Army, Schedule 4(1) (Army Form (AF) A 47 and A3).
43 AA Sec 1955, S.86(1).
44 AA Sec 1955, S.86(2).
forces on active service who had directed that the charge should be tried by a FGCM. Warrants have been issued to the commanders of troops who have direct access to the Ministry of Defence in disciplinary matters and to the Major General Commanding the Household Division and the Commandant – General Royal Marines. Warrants from Her Majesty, delegated warrants and authorizations to convene DCsM may contain reservations or special provisions and they may be addressed to an officer by name or by designation of his office; they may give authority to a person performing duties of the office named or the Successor in the office.

(ii) Jurisdiction of GCsM, FGcsM and DCsM

A GCM and A FGCM can try any person subject to military law for any office created by Army Act 1955, Part II, and, in certain circumstances for offences created by the Army Reserve Act 1950 and the Auxiliary Forces Act, 1953, subject to the following exceptions:-

(a) they cannot try the civil offences mentioned in Army Act 1955, Section 70 (4)\(^{15}\) if committed in the United Kingdom.

(b) they cannot try a civilian to whom Army Act 1955, Part II, applies by virtue of Section 209 for a 'military offence' other than those provided for in Sub – section [2] of that Section except when the force to which such civilian is attached is on active service.

(c) Army Act 1955, Section 132, imposes a limitation of time after which proceedings cannot be commenced. The general rule is that in the case of military offences the period is three years unless there is a different

\(^{15}\) It reads, "A person shall not be charged with an offence against this Section committed in the United Kingdom if the corresponding civil offence is treason, murder, manslaughter, treason – felony or rape or an offence of genocide or an offence under Section 1 of the Biological Weapons Act, 1974. In this Section, the reference to murder shall also apply to aiding, abetting, counseling or procuring suicide. It is intended to protect the jurisdiction of the civil Courts in England and Wales, Scotland and Northern Ireland and the Isles of Man and the Channel Islands. However, if such offences are committed abroad, then those may be charged in United Kingdom and tried by Courts Martial."
limitation of time in respect of the corresponding civil offence. There are exceptions to the general rule, the principal being the offences of mutiny and desertion; A further exception arises where a retrial is authorized by Court-Martial Appeal Court (CMAC) or the Defence Council.

(d) they cannot try an accused for an offence if he has already been tried for the same offence or had that offence taken into consideration by a civil Court or any Court–martial, etc.

In certain circumstances, persons who have ceased to be subject to military law may be brought to trial by Court–martial. An accused cannot be tried by FGCM unless he is under the command of the Convening Officer. A GCM cannot award any of the punishments set out in Army Act 1955, Section 71 (with certain additions which are dealt with in the notes to that Section). A FGCM can award the same punishments as a GCM except that when it is composed of two members only, the maximum punishment which it can award is two years imprisonment.

A DCM cannot try an officer. It can try a Warrant Officer (WO) but its powers of punishment are limited. Its powers of punishment in respect of NCOs and soldiers are limited to a maximum of two years imprisonment and for this reason it cannot try the civil offences for which there is a fixed punishment in excess of two years imprisonment.

A Court–martial can try a person who has ceased to be subject to military law provided that the trial has commenced within six months of his ceasing to be so subject. In certain circumstances, such a person can be tried even though he has ceased to be subject to military law for more than six months and for that reason Army Act 1955, Ss 131 & 132 should be consulted as mentioned above.

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36 See Section 70 of the Act Supra.
37 See CMAC, Sections 20 (1), and AA 1955, Section 113(A) (1).
38 Army Act 1955, Section 134.
39 See Ss. 131 & 132.
40 See S. 84(2) of AA 1955.
A Court-martial cannot try a person for any offence of which he had already been acquitted or convicted by a Court-martial under AA 1955, the Naval Discipline Act (NDA) 1957, the Air Force Act (AFA) 1955 or by a competent civil Court or where the offence has been taken into consideration by these Courts (unless in the case of a Court-martial that taking into consideration has been annulled by the confirming officer or a reviewing authority) or where the charge has been dismissed or dealt with summarily by a CO or an Appropriate Superior Authority (ASA) or where the offence has been condoned by the CO. This prohibition does not apply where there has been no valid trial, e.g. where the Court was not properly constituted, unless the conviction is quashed by CMAC, nor does it apply where the finding has not been confirmed, or where the CMAC or Defence Council has ordered a retrial.

Members of the army reserve and TA personnel are liable to trial by Court-martial in certain circumstances for offences committed under the Reserve Forces Act 1980 (RFA) even though they were not, at the time of the commission of the offence, subject to military law.

Offences can be tried by Court-martial wherever committed and may be tried at any place, within or without Her Majesty’s dominions which may be specified in the Convening Order. Where a Court-martial is convened in one place it may be ordered during the trial to sit in another place or the Court may itself sit in another place if is in the interest of justice so to do.

A Ship’s Commandant may be given a delegated warrant to convene GCsM or an authorisation to convene DCsM by the officer under whose command he was before departing on the voyage. The delegated warrant or authorization remains in force so long as the ship is ‘trooping’ unless its base port is changed and as a result of the change the new port is in another command.

51 The power of condonation should only be exercised in exceptional circumstances after advice of Directorate/Director of Legal Services (DALS) had been obtained. The fact that the offence is condoned must be formally announced to the officer or soldier and a record made of what has been done. See also R V Bisset.
52 Court Martial Appeal Act 1968 (CM (A)), Section 19 (1), and AA 1955, Section 113 (A) (1).
53 RFA 1980, SS. 76 & 106 respectively.
54 AA 1955, See 91.
(iii) Constitution of Courts – martial

A GCM must consist at least of five offences, each of whom must have held a commission in any of Her Majesty’s naval, military or air forces for a period amounting in aggregate to not less than three years and subject to what is stated below must be subject to military law. The President of the Court must be appointed by name and should not be below the rank of a field officer, though a Captain can, in certain circumstances be appointed. Normally, he should be of the rank of Colonel or above. Not less than four of the members must be of the rank not below that of Captain. It is desirable that the members of the Court should belong to different units. On the trial of the member of the TA, when not called for permanent or home defence service, at least one member of the Court should be from the TA. QR makes special provision for the trial of the member of the Women’s services.

Members should be of equal or superior rank to the accused if he is an officer and an officer under the rank of Captain must not be a member of the Court trying an officer above that rank.

Officers of the Corps of Royal Military Police (RMP) and officers attached to that Corps should not sit on Courts – martial, nor should officers of the Royal Army Chaplains Department (RA.Ch.D).

The convening officer may detail a CO to appoint an officer of a specified rank as a member (e.g., “A Captain to be appointed by the Officer Commanding 1st Battalion, The Loamshire Regiment”). Certain officers are disqualified from sitting as members as given in the succeeding paragraphs. A Judge Advocate must be appointed to sit on every GCM. A naval or Air Force officer who is subject to military law may sit as president or member.

55 Ibid, S. 87 (2).
56 Ibid, S. 87 (4).
57 Queen’s Regulations (QR) (1975) 6.102.
58 Ibid. 6.107.
59 Ibid. 6.108.
60 AA. 1955. S. 87(6).
With regard to constitution of DCsM, the provisions as to constitution of a GCM, as referred to in Para above, if appropriate, may also be for DCsM except that:-

(a) the legal minimum of members required is three instead of five;
(b) the length of commissioned service is two years instead of three; and
(c) AA 1955, S.88 makes no provision for ranks of members.

In addition, where a DCM consists of three officers, not more one of them should be a subaltern. A Judge Advocate may be appointed to sit on a DCM.

A FGCM consists of a President and not less than two other officers who must, subject to what is said in Para below. In certain circumstances, such a court may consist of president and one other officer. The President, who must not be below the rank of Captain, must be named in the convening order but the members may be appointed as given Para above. The provisions, so far as the women are concerned are the same as those for a GCM. In view of AA 1955, S.90 (1), the convening officer cannot sit unless he has certified that it is not practicable to appoint another officer as president. A Judge Advocate may be appointed to sit on a FGCM.

(iv) **Naval and Air Force members**

Where there is not a sufficient number of military officers or naval or air force officers subject to military law with suitable qualifications, the convening officer may, with the consent of the proper naval or air – force authority appoint a naval or, as the case may be, air force officer to be president or a member. The provisions as to the length of commissioned service are equally applicable to such officers if they are appointed and they must also be of corresponding rank to the ranks provided in AA 1955, SS. 87 – 89.

\[\text{AA 1955, S.89.}\]
\[\text{RP 22 (1) (f).}\]
\[\text{AA 1955, S.90(3).}\]
(v) **Disqualification of members**

Officers who may be eligible as indicated in paras above to sit as members of the GCsM and DCsM may, however, be disqualified from serving on a particular Court – martial. The following classes of persons are disqualified:

(a) the convening officer;
(b) an officer, who has, between the time the accused was charged with the offence and the date of the trial, been his CO;
(c) any officer who had investigated the charge whether as a subordinate Commander or as an officer taking the summary of evidence or making the abstract of evidence;
(d) any officer who had convened or who had been a member of the Board of Inquiry or regimental inquiry into matters relating to the subject matter of the charge.

An officer who had personal interest in the case should never sit as president or member of a Court. If such an officer is appointed, the president should appoint a waiting member to take his place under RP 26 (2) (b). It is undesirable that an officer who had been a member of a Court which has been dissolved should sit on another Court to try the same charge (s).

(vi) **Duties of Convening Officer**

On receipt of an application for a Court – martial under RP 13, 18 and 21, the convening officer should satisfy himself that the charge discloses an offence under AA 1955 and that it is framed in accordance with RP. He must satisfy himself that the evidence disclosed in the summary or abstract of evidence is sufficient to justify trial. In order to assist him in coming to a proper conclusion, he may seek advice from DALS in any case, and must do before ordering trial unless the CO or ASA had already done so64. He should not normally delay the convening of a Court – martial even if he detects matters showing culpable neglect.

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or improper conduct on the part of superiors of the accused. If he is of the opinion that the case is one which should be dealt with summarily by a CO or by an ASA, he may, instead of convening a Court—martial, take the necessary steps accordingly. Alternatively, he may direct that a different charge should be preferred if the evidence justifies such a course. If he considers that the charge should be dismissed or stayed, he will refer it back to the CO under AA 1955. S.80. If he considers that the accused should be tried by GCM and that he does not himself hold a warrant to convene such a Court, he should refer the case to an officer having authority to do so.

An accused should not be sent for trial by Court—martial unless there is a reasonable probability that he will be convicted. It should, however, be borne in mind that where the charges of fraud or conduct of an indecent in nature are preferred, the Court—martial may afford the only means to the accused of clearing his character, particularly having regard to the power of a Court—martial to "honorably acquit".

(vii) Considerations before convening a type of Court—martial

In deciding whether an accused should be tried by a GCM or DCM, where the circumstances permit trial by either of these tribunals, the convening officer will bear in mind:

(a) the nature of the offence ;
(b) the prevalence of the particular offence charged ;
(c) the general state of discipline in his command ;
(d) the character of the accused ; and
(e) the maximum sentence which can be imposed having regard to any sentence which the accused is already serving.

When on active service, the Commander of a body of the regular forces may, if in his opinion it is not possible without serious detriment to the public service to convene a GCM or DCM, order trial by FGCM even if he has power to convene a GCM or DCM65.

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65 Ibid, S.84(2).
(viii) **Order for trial by Court martial**

The convening officer, or a staff officer on his behalf, will make an order on the charge-sheet directing trial by Court martial. A convening officer will consider whether the charge upon which the accused is to be brought to trial are all to be contained in one charge-sheet or whether they should be inserted in different charge-sheets. Where an accused is ordered to be tried on a number of charges in the same charge-sheet he may apply to the convening officer or at the trial for some of the charges to be tried separately.

If the convening officer has ordered trial on separate charge-sheets he will direct in which order the accused is to be tried and may direct the prosecutor that, in the event of a conviction on all or some of the charges in the first charge-sheet, he need not proceed on the charges contained in the others.

Two or more accused may be tried jointly on one charge or, in certain circumstances, on separate charges. Where there is at least one joint charge, the charge-sheet may contain additional charges against one or more of the accused alleging offence committed separately provided they are founded on the same facts or form part of a series of offences of the same or similar character.

Where two or more accused are to be tried jointly, any of them may apply to the convening officer or at the trial to be tried separately.
(ix) **Convening orders**

Once it is decided that an accused will be tried by Court–martial, an order for the assembly of the court, known as the convening order, will be issued. This order will be signed by the convening officer or by a staff officer, who should sign as being authorized to sign on the convening officer’s behalf.

(x) **Papers for members, etc**

The convening officer is responsible for ensuring that the president, members and Judge Advocate (if appointed) receive the papers referred to in R.P. 22 (1) (i), (j) and (l). These should be sent as soon as possible after the court has been convened. He is also responsible for ensuring that the prosecutor and the accused have copies of all papers to which they are entitled.

**PREPARATION OF DEFENCE**

(xi) **Information to be given to accused**

As soon as possible after the accused has been remanded for trial by Court–martial, and at least twenty–four hours before the trial, he must be given a copy of the charge–sheet and of the summary or abstract of evidence.

The copy of the summary or abstract which the accused receives should be unexpurgated but showing the passages (if any) which have been expurgated from any copy given to the president. In the case of the copy abstract it should include any statement made by the accused under R.P. 10(2) and any statements of defence witnesses submitted by the accused under R.P. 10(3).
He must also, if he so requires, be informed of the name of the president and the ranks, names and units of the members and waiting members of the court which is to try him.

When being served with a copy of the charge — sheet and summary or abstract of evidence, the accused should be explained by an officer the charges and his rights as to calling witnesses, etc.

An accused must be given proper opportunity to prepare his defence, including free communication with his defending officer or counsel and, subject to R.P. 90(2), with any witnesses.

If the prosecution is to be conducted by an officer with legal qualifications or counsel, notice must be given to the accused to enable him to employ counsel, if he so desires.

(xii) Representation of the accused

The accused may defend himself or he may be represented by a defending officer or counsel. If he refuses to have a defending officer or counsel he should be asked to sign a certificate to that effect.

If the accused states that he desires an officer to defend him and names a particular officer, the convening officer should, subject to the exigencies of the service, appoint that officer.

Where an accused instructs counsel he should give notice to the convening officer under R.P. 79 (3).

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78 Ibid., 25.
79 R.P. 25 (1) (c).
80 Ibid. 25 (1) (a).
81 Ibid., 25 (1) (c).
82 Ibid., 25 (1) (b).
Where an accused appears by counsel he may still have a defending officer to assist his counsel, but in that event the defending officer has no right of audience.

(xiii) Qualifications, duties of counsel and defending officer

In certain circumstances legal aid may be granted to an accused if he cannot afford to employ counsel. Qualifications of counsel are set out in R.P. 79 (1).

A defending officer has the same rights and duties as counsel.

(xiv) Severance of charges

If an accused is charged on a charge-sheet containing a number of charges and considers that he will be prejudiced in his defence if they are all tried at the same time, he may apply in writing to the convening officer to be tried separately on any charge on the charge-sheet. If this application fails he can at the trial make similar application to the court under R.P. 40.

If an accused is charged jointly with another and considers that he will be prejudiced in his defence if tried jointly, he may apply in writing to the convening officer to be tried separately. If this application fails he can at the trial make an application to the court under R.P. 39.

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83 Q.R. 788 and App. X. A.C.O. after complying with A.A. 1955, s. 77 (3), should, in cases where para. 4(a) or (b) and/or 5(a) or (b) of the App. Are applicable, call the accused’s attention to the App., see Q.R. 788A.
84 R.P. 79 (2).
85 Ibid. 25 (1) (h).
86 Ibid. 25 (1) (g).
(xv) Assembly of court

Before the assembly of the court the president should read the charge-sheet and, where there is no Judge Advocate appointed, the copy of the summary or abstract of evidence and satisfy himself as to the legal requirements to prove the charges.

The members should read the relevant sections of AA 1955, relating to the charges contained in the charge-sheet, a copy of which they will have received.

On assembly, the members of the court take their seats in accordance with their seniority; the Judge Advocate, if any, being seated on the right of the president.

The convening order and the charge-sheet87 are to be produced by the president. Where there is a Judge Advocate, he should be in possession of the copy of the summary or abstract of evidence and should ensure that it is not read by the president or the members of the court. Where there is no Judge Advocate, the expurgated copy of the summary or abstract of evidence should be in the possession of the president who should ensure that it is not read by the members of the court.

At this stage no one should be in the court room except the president, members, the Judge Advocate, if appointed, and any waiting members.

87 Where there is more than one charge-sheet, see note 13 to R.P. 22.
(xvi) Form of proceedings

The form of record of proceedings for Courts - martial is prescribed in R.P. Sch. 488 and will be followed. Variations to the forms are to be found in the notes to R.P. In the case of F.G.Cs.M., R.P. 92(2) makes modifying provisions.

(xvii) Inquiry as to composition of court

The court will satisfy itself that it had been duly convened under AA 1955 and R.P., that the president and members have the requisite commissioned service and that they are qualified to sit on the particular court89.

(xviii) Inquiry as to legal minimum of members

The court will next satisfy itself that the legal minimum of members had been detailed and is present. If the legal minimum has not been appointed or is not present90 the court must adjourn. If any member who had been appointed is absent, the president may appoint a duly qualified waiting member to take his place91.

If more than the legal minimum number of members had been appointed and one is not present and there is no waiting member the court should adjourn to consult the convening officer as there may be some reason for a greater number of members than the legal minimum being appointed92.

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88 A.F. A9.
89 R.P. 26 (1).
90 AA 1955, SS. 87(1), 88(1) and 89(1) respectively.
91 R.P. 26 (2) (a).
92 Q.R. 800.
(xix) Inquiry as to eligibility and qualifications of members

The court will satisfy itself that the president and members are of the required rank and that they are eligible and not disqualified from sitting.

If it appears that one of the members appointed has a personal interest in the case, has shown bias or had been a member of a previous court which tried the accused for the offence, the president should under R.P. 26 (2) (b) appoint a duly qualified waiting member in his place.

(xx) Judge Advocate

The court will satisfy itself, if a Judge Advocate has been appointed that he has been duly appointed under AA 1955, and that he is not disqualified.

(xxi) Amenability to jurisdiction

When the court is satisfied as to its constitution it will consider whether the accused is amenable to its jurisdiction, i.e., that he is subject to military law or is liable to be tried under AA 1955, S. 131 or S. 209 or under A.R. Act 1950, or Aux. F. Act 1953.

(xxii) Inquiry as to validity of charge

The court will examine the charge-sheet and satisfy itself that the charge discloses an offence under AA 1955, or (in the case of men of the army reserve or the T.A.V.R.) under A.R. Act 1950, or, as the case may be, Aux. F. Act 1953, and is framed in accordance with R.P.

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93 AA 1955, SS. 87, 88 and respectively ; see also Q.R. 793 (rank of president of G.Cs.M.) and 802 (in the case of D.Cs.M).
94 AA 1955, S. 90 (2) ; see also para. 19.
95 Ibid., S. 139.
96 Ibid., S. 90 (2) ; see also Para 19.
97 R.P. 26 (1).
98 Ibid., 26 (1) (g) ; see, where there is a second charge – sheet against an accused, not e13 to ibid., 22.
If the court is not satisfied in any matter it should adjourn and report to the convening officer.99

**(xxiii) Powers of adjournment**

A Court of Martial has wide discretionary powers of adjournment if not satisfied on any matter.99A

Circumstances may arise which render adjournment compulsory, e.g., if the president is not eligible or is disqualified, or if the court is reduced below the legal minimum.

Any adjournment other than adjournments from day to day, with the reason therefore, should be reported to the convening officer.

**(xxiv) Appearance of accused, etc**

When the court is satisfied that it is legally constituted, that the accused is amenable to its jurisdiction and that the charges are in order, the president will order the court to the opened. The accused will then be brought before the court with his escort. The prosecutor and the defending officer or counsel, will take their places in court.

It is customary, though not obligatory, for the witnesses to be brought into court at this stage in order that they may see and hear the court sworn. After the court is sworn they should withdraw and should not normally be permitted to remain in court when not giving evidence, unless given permission by the court.2

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1, 2: Ibid., 26(4).
4: Ibid., 52.
(xxv) Opening of the Court

The prosecution and the defence having taken their places, the public may be admitted so far as accommodation permits.

A Court-martial is an open court but it had statutory powers to sit in camera, if such a course is necessary or expedient in the interest of the administration of justice or if the security of the state is involved. A court may sit in camera if a witness could not, by reason of its distressing nature, give his evidence in public and the absence of such evidence might obstruct the course of justice.

In addition to this power of sitting in camera the court may be closed at any time to enable the members to deliberate in private.

The Criminal Justice Act 1925, s. 41 prohibits the taking of photographs within the precincts of a court and consequently it would be contempt of a Court-martial to take photographs of it. Similar observations apply to the drawing or painting of pictures of a Court-martial in the court.

(xxvi) Objection by the accused to members of court

When everybody who has business with the court is present, the convening order will be read by the president or by the Judge Advocate, if one is appointed, and the president and members will answer to their names, the accused being asked whether he objects to being tried by any of them. The accused is entitled to object on reasonable grounds.
Where an accused objects to being tried by the court as a whole on the grounds that he is not amenable to trial, the objection should not be taken until he is arraigned. This procedure does not seem to be good in the eyes of law since it restricts the accused to raise objection at this stage. Presuming that the accused wishes to engage his counsel pursuant to appearance of counsel for the prosecution and he has objected to his arraignment in the absence of his counsel, disregarding his objection can amount to causing prejudice to the accused, resulting in vitiating the proceedings at a subsequent stage.

AA 1955, S. 92 and R.P. 27 deal with the method of inquiry into and disposing of objection to members.

If an objection to the president is upheld the court must adjourn and report to the convening officer; 6 if the objection to a member is upheld, a qualified waiting member (if one has been appointed) may be appointed by the president to take his place, but if there is no waiting member and the court had fallen below the legal minimum number of members, it must adjourn and report to the convening officer.

An accused has no right of objection to a Judge Advocate or an officer under instruction.

(xxvii) Trial of more than one accused

Where more than one accused is ordered in one convening order to be tried by the same court, but on separate charge sheets, they may all be brought before the court for the reading of the convening order, but any objection by an accused will be dealt with separately.

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7 Under R.P. 36.
8 Ibid., 27 (9).
9 Ibid., 32
10 For procedure in this case, see ibid., 33.
(xxviii) Swearing of the court

When the court is finally constituted the president will direct all persons to stand and, in the case of males (other than the escort), remove headdresses. The president and members of the court, and any Judge Advocate (if not exempted)\textsuperscript{11}, officers under instruction and interpreter will then be sworn in accordance with R.P. 28 - 31\textsuperscript{12}. Before an interpreter is sworn an accused must be given an opportunity to object to his so acting\textsuperscript{13}.

(xxix) Oaths and affirmations

The form and manner of administering oaths and affirmations are prescribed in R.P.\textsuperscript{14}.

The oath may be taken in such form and manner and with such ceremonies as the person to be sworn declares to be binding on his conscience\textsuperscript{15}.

A person may make a solemn affirmation instead of taking the oath\textsuperscript{16}.

If the oath is not administered as required by R.P. to the president, members or Judge Advocate, the court is not properly constituted.

(30) Person appointed to make verbatim record

A shorthand writer or other person appointed to record the proceedings verbatim is not required to be sworn\textsuperscript{17} but the accused must be given an opportunity to object to him before he acts\textsuperscript{18}.

\textsuperscript{11} See AA 1955, S. 93(1A). Judge advocates who are members of the judicial staff of J.A.G. are not required to be sworn, since they are appointed to their office by the Lord Chancellor and may be removed for misbehaviour.
\textsuperscript{12} Ibid., S. 93(1) and R.P. 34.
\textsuperscript{13} Ibid., 31(2).
\textsuperscript{14} Ibid., 34 and Sch. 6.
\textsuperscript{15} Ibid., 34 (1) proviso.
\textsuperscript{17} Not (now) being specified in AA 1955, S. 93(1), See also R.P. 31A(1).
\textsuperscript{18} Ibid., 31A(2).
(xxxii) Absence of members during trial

If, after a trial has begun, the president, a member or the Judge Advocate is unable to attend, the court must adjourn and the president or senior member report to the convening officer, except where the court is not reduced below the legal minimum by the absence of a member19.

Once the accused has been arraigned no officer can be added to the court19.

ARRAIGNMENT OF ACCUSED

(xxxii) Arraignment of accused

The court having been sworn, the accused is arraigned on the charges contained in the charge – sheet. If there is more than one charge – sheet the court will proceed with the trial to finding on the first charge – sheet before the accused is arraigned on the charges contained in any subsequent charge - sheet20.

The arraignment consists first, of the reading to the accused of the commencement of the charge – sheet and asking him whether he is the person named therein as the accused and second, of the reading of each charge separately to the accused and calling upon him to plead to it. The arraignment is conducted by the president or by the Judge Advocate, if one is appointed.

Where two or more accused are being tried jointly, one accused may apply to be tried separately on the grounds that unless so tried he will be prejudiced in his defence21.

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19 Ibid., 88.
20 Ibid., 35; see, where there is a second charge – sheet against the accused, note 13 to ibid., 22.
21 Ibid., 39 and 81 (where there is a Judge Advocate he will decide the issue).
Where there are several charges in a charge-sheet the accused may, before pleading to the charges, apply for separate trial on any charge on the grounds that unless so tried he will be prejudiced in his defence. An application under R.P. 39 or 40 may be made even if the accused had unsuccessfully made an application to the convening officer under R.P. 25 (1) (g) or (h) as the case may be.

Where, after hearing addresses for the defence and prosecution, the court allows the submission, the trial proceeds on the remaining charges up to finding and then the other accused is tried separately, or the accused is tried on the other charges as if they were in a separate charge-sheet.

(xxxxiii) Plea to the jurisdiction

An accused, before pleading to any charge, may offer a plea to the jurisdiction of the court on the grounds that he is not liable to be tried by Court-martial, that he was not subject to military law when he committed the offence or that the CO had not investigated the case as required by R.P. 7-13.

(xxxxiv) Objection to the charge

Before pleading to any charge an accused may object to it on the grounds that it does not disclose an offence which can be made the subject of trial by Court-martial or that it had not been framed in accordance with R.P. If, after hearing arguments, the court disallows the objection, the trial will proceed. If the objection is allowed the court may amend the charge or report to the convening officer. If the court is in doubt, it may, in any event, report to the convening officer who may amend the charge.

22 R.P. 40 and 81 (where there is a Judge Advocate he will decide the issue).
23 Ibid., 36.
24 Ibid., 37.
25 See Para. 48 as to amendment of charge-sheet.
(xxxv) **Amendment of charge – sheet**

On an objection being made or at any time during the trial before finding, the court has certain powers to correct a mistake in the charge - sheet.\(^{26}\)

Where a Judge Advocate is present, the court may, at any time before finding, make additions to, omissions from, or alterations to a charge if such an addition, omission or alteration can be made without unfairness to the accused.\(^{27}\)

If, at any time before finding, the court is of the opinion that an amendment to the charge is necessary in the interests of justice, it may adjourn and consult the convening officer who may take the steps described in R.P. 83(3).\(^{28}\)

( xxxvi) **Plea in bar of trial**

An accused may, before pleading to a charge, offer a plea in bar of trial on the grounds that :-

(a) he had previously been acquitted or convicted of the offence ;
(b) his offence had been taken into consideration by a Court - martial or a civil court ;
(c) he had been dealt with summarily for the offence ;
(d) the offence has been condoned by his commanding officer;\(^{29}\) or
(e) trial is barred owing to lapse of time.\(^{30}\)

The court will hear evidence and arguments on this plea and, if disallowed, the court will proceed with the trial. If it is found proved the court will adjourn and report to the convening officer. Where there is a Judge Advocate, the

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26. R.P.83(1).
27. Ibid., 83(2).
28. Ibid., 84.
29. AA 1955, S. 134(1).
30. Ibid., SS. 132(1) and (3), 134 (3) and C.M.(A) Act, S 20(1).
president may, under R.P. 81, direct him to decide the issue. If there are other charges in the charge sheet in respect of which no plea is made, the court may proceed with the trial on those charges.31

(xxvii) Recording of pleas

Any plea, objection or application having been disposed of, the accused’s general plea to the charge will be recorded.32 If he refuses to plead or pleads unintelligibly, a plea of not guilty must be recorded.33 It may be pleaded on an accused’s behalf that he is unfit to plead by reason of insanity, in which event provision is made in AA 1955, S. 116, and R.P. 89.

In certain circumstances an accused may plead guilty to a charge other than that preferred or to the charge subject to exceptions and variations.32

(xxviii) Mixed pleas

If an accused pleads guilty to some charges in the charge sheet and not guilty to others and the court accepts his pleas of guilty, the trial will proceed upon the charges in the charge sheet to which he has pleaded not guilty up to and including the finding before the court proceeds further with the pleas of guilty.34

Where an accused pleads guilty to the first two or more charges laid in the alternative and the court accept that plea, the prosecutor will withdraw the other alternative charges.35

31 R.P.38.  
32 Ibid., 41.  
33 Ibid., 42(4).  
34 Ibid., 44.  
35 Ibid., 43.
Where an accused pleads not guilty to the first of two or more charges laid in the alternative but guilty to one of the others, the court may record a plea of not guilty to all the charges or may, with the concurrence of the convening officer, find the accused not guilty of the more serious charge and accept the plea of guilty on the less serious.35

PROCEDURE ON A PLEA OF GUILTY

(339) Plea of guilty

When an accused pleads guilty to a charge or pleads guilty to another offence in respect of which the court could find him guilty under AA 1955, S. 98, or to a charge with exceptions under R.P. 41(2), the court must, before accepting the plea, explain to him the nature of the charge and the effect of his plea, etc.36 He should be reminded that if the plea of guilty is accepted no witnesses will be called, but that the court will, after hearing the facts of the case, consider what sentence should be awarded. He should also be informed that he is entitled to make a statement in mitigation of punishment and call witnesses as to his character.37

The court must not accept a plea of guilty in a case where the maximum punishment for the offence with which the accused is charged is death.38

If the president is of opinion that an accused should not plead guilty to a charge he should enter a plea of not guilty but this should not be done because the accused had made a statement at the summary of evidence or on some other previous occasion which is inconsistent with a plea of guilty if at the trial the accused retracts the statement made at the summary, etc.

35 R.P. 42(1).
36 Ibid., 45.
37 Ibid., 42(2).
(xli) **Procedure on plea of guilty**

Where the court records a plea of guilty and after the court has satisfied itself that the accused understands the nature of the plea, the summary or abstract of evidence will be read. In complicated cases the prosecutor may, instead of reading the summary or abstract of evidence, outline the facts to the court.

If there are deficiencies in the evidence witnesses may be called.

The defence may make a statement in mitigation of punishment and call witnesses as to character.

If it appears from the statement of the accused or any plea in mitigation of punishment or from the summary or abstract of evidence that the accused did not understand the effect of his plea, the court should enter a plea of not guilty and proceed with the trial.

An accused may at any time alter a plea of not guilty to one of guilty, including a plea of guilty to a lesser offence under R.P. 41(2).

If a plea of guilty on the more serious of several charges laid in the alternative is altered to one of not guilty the alternative charges which were withdrawn on the plea being accepted must be reinstated.

(xlii) **Adjournment of trial on plea of not guilty**

Before proceeding with the trial on a plea of not guilty, an accused will be asked whether he wishes to apply for an adjournment on the grounds that he has

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39 Ibid., 42 (2) (a) and 46 (2).
40 Ibid., 46.
been prejudiced by non-compliance with any of the rules relating to procedure before trial or that he has not had sufficient opportunity to prepare his defence. If the court considers that he has been prejudiced either by non-compliance with any of the rules or because he has not had time to prepare his defence it will grant an adjournment if the interests of justice so require41.

(xlii) Opening address

The prosecutor should normally make an opening address explaining the charge and outlining the facts and the evidence which he proposes to call to prove those facts42. He must not make reference to matters which he does not intend to prove43. The address may be in writing, in which case it will be attached to the record of the proceedings, or it may be oral43.

During the course of his address and during his conduct of the proceedings, the prosecutor must behave as an officer of justice whose duty it is to lay all relevant facts before the court to enable it to ascertain the truth. He must behave with scrupulous candour, fairness and moderation45.

(xliii) Witnesses for the prosecution

After the opening address has been made the prosecutor will call the witnesses for the prosecution. Each witness will be sworn unless: -

(a) he objects to being sworn, in which case he will be permitted to make a solemn affirmation47;

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41 R.P. 47.
42 Ibid., 48(1)
43 Ibid., 78(1) c.
44 Ibid., 92(1) (d).
45 Ibid., 78.
46 Ibid., 51.
(b) he is a child too young to understand the nature and meaning of an oath.  

The examination of witnesses will be conducted by the prosecutor who must be careful to refrain from asking leading questions. After giving evidence-in-chief the witness may be cross-examined by the defence and after such cross-examination he may be re-examined by the prosecutor on matters arising out of cross-examination, but not otherwise.

At the conclusion of the examination, cross-examination and re-examination, the president, members and Judge Advocate, if any, may question the witness and the prosecutor and the defence may ask any questions arising out of such examination.

The members of the court should be careful when questioning a witness to ensure that they do not ask any questions which might result in inadmissible evidence being given. Normally the question should be asked by the president.

If an objection is taken to a question by the witness, the court or the opposite party, the objection will be dealt with at that time.

If a Judge Advocate is present he may decide the matter in the absence of the court. The court may order the witness to leave the court when the matter is discussed.
Recording of evidence

If no person is appointed under R.P. 31A to record the proceedings verbatim, the evidence given by a witness will be recorded in narrative form in the first person; it should not be taken down by way of question and answer unless the court, the prosecutor or the defence think it is necessary. It should be recorded by the Judge Advocate if there is one, otherwise by the president. A member may record it but the president remains responsible for its accuracy.

Reading over the evidence

Except where a person appointed under R.P. 31A is present, the evidence of a witness as recorded will be read over to him before he withdraws.

Interpreter’s duties

Where an interpreter is employed care must be taken to ensure accurate translation and to guard against misconception of the true meaning of any expression arising out of incompetence or possible bias of the interpreter. Many interpreters are inclined to carry on a conversation with the witness and then to state in indirect speech what the witness purports to say. Interpreters should be told that they must truly translate the question and then the answer in the first person. In other words, the interpreter is merely a mouthpiece for the person examining and the person being examined.

A member of a court is not disqualified from acting as an interpreter, but it is undesirable that he should do so.

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Ibid., 92(1) (b).
Ibid., 77(d).
Ibid., 55.
(xlvii) Documentary evidence and exhibits

Certain books, documents, etc., are made admissible in evidence by virtue of AA 1955, SS. 190A 198, 198A and 198B. They may either speak for themselves, e.g., those admissible under S. 198(6) and (7) in which case there is no need for a witness to produce them, or where, e.g., they refer to an accused, it may be appropriate for them to be produced by a witness who states that the description of the person named therein is that of the accused as known to the witness.

A written statement put in under C.J.A. 1967, S. 9, as modified and applied by AA 1955, S. 99A56, is made an exhibit to the proceedings and is not produced by a witness57. Certain other statutes make documents admissible (e.g., affidavits under the Bankers' Books Evidence Act 1879). They, like written statements, are made exhibits.

Whether produced by a witness or not, a documentary exhibit, so far as its nature permits, must be read aloud in court and not merely handed in. If produced by a witness, it will normally be he who reads it; if not, it will be read by the party to the proceedings who is putting it in, or his advocate.

Where a retrial is authorized by C.M.A.C or the Defence Council, the record of the evidence given by any witness at the original trial may, in certain circumstances, be read as evidence at the retrial58.

All documents and other exhibits put in will be dealt with as described in R.O. 93.

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56 See, further, App. V.
57 R.P. 57.
58 C.M.(A) Act, Sch.1, para.3.
(xlvi) **Procedure on incidental questions**

If during the course of a trial where there is no Judge Advocate, an objection is taken on a point of law, evidence or procedure, the party raising the objection is entitled to address the court. In appropriate case, evidence may be called. The opposing party is then entitled to address the court and the party raising the objection may then reply. The decision of the court will be recorded and announced in open court.

(xlvii) **Procedure on objection to statement**

A frequent example of objections being taken is an objection by the defence to the admissibility of a statement made by an accused to the police or to some other person in authority on the ground that it was not made freely and voluntarily. As, however, it is for the prosecution to establish affirmatively by the evidence of witnesses that the statement was free and voluntary, the procedure to be followed in such a case is as follows:

(a) after the objection has been taken, the prosecution continues to examine in chief the witness called to produce the statement in order to lay a proper foundation for the admissibility of that statement; the defence then proceed to cross-examine the witness as to any circumstances affecting its admissibility;

(b) the examination, cross-examination and re-examination (or questions by the court pursuant to R.P. 54, if any) are directed solely to the issue of the admissibility of the statement and all evidence heard at this “trial within a trial” must be confined to this issue;

(c) after giving his evidence on this issue, the witness leaves the court;

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50 See Ch. V, paras, 84 – 96.
(d) the prosecutor calls any other witnesses he may wish to give evidence as to the admissibility of the statement. These witnesses may similarly be cross-examined, re-examined, etc.;

(e) the defence call any witnesses (including the accused) they may wish as to this issue;

(f) the defence may address the court;

(g) the prosecutor may address the court; and

(h) the defence may reply.

After all the evidence and addresses have been given, the court will deliberate in closed court and will, after having recorded their decision, announce it in open court. If the court decides that the statement is admissible, the witness who was to produce it returns into the witness box, produces the statement and continues with such other evidence as he may have to give. If, on the other hand, the court decide that the statement is inadmissible, the witness will go back into the witness box and continue to give his evidence (if any) on other matters, making no reference to the rejected statement. After completing his evidence-in-chief in this way, the witness may now be cross-examined, re-examined, etc., as to the general aspects of the case.

(l) **Procedure if there is a Judge Advocate**

When a Judge Advocate is present and any objection is taken other than as stated in Sub – paras, (a) – (e) below the procedure will be the same as described in para. 61 of the Manual of Courts – Martial except that after any reply by the party raising the objection, the Judge Advocate may sum up on the objection. The
advice given by the Judge Advocate on this as on all other matters should be accepted unless the court has weighty reasons for not doing so\textsuperscript{60}.

Where:-

(a) an accused, before pleading to a charge, offers a plea in bar of trial in accordance with R.P. 38; or

(b) at a joint trial application is made by an accused to be tried separately in respect of some of the charges contained in a charge-sheet; or

(c) any question of admissibility of evidence arises; or

(d) a submission is made to the court by the defence at the end of the prosecution case that the prosecution has failed to establish a prima facie case for the accused to answer; or

(e) an application is made by a party calling a witness for permission to treat that witness as hostile;

The president may direct that he and the members and the officers under instruction shall withdraw while the Judge Advocate hears the arguments and any evidence which may be relevant. After hearing the arguments, etc., the Judge Advocate will give his ruling and, if necessary, his reasons, and thereupon he will request the president and members of the court to return and his ruling will be announced by him and recorded. This ruling will be followed by the court\textsuperscript{61}.

\textbf{(li) Time and place of trial}

R.P. 85 makes provision for the sittings of the court and R.P. 86 for adjournments.

\textsuperscript{60} R.P. 80 (3).
\textsuperscript{61} Ibid., 81.
Where a court considers it necessary to view any place or thing, it may do so at any time before the finding, but there must be present at such a view not only the president and members of the court and the Judge Advocate, if any, but also the prosecutor, the accused and his defending officer or counsel62.

(lii) Submission of no case

At the close of the case for the prosecution, the defence may submit that the evidence so far adduced does not disclose a prima facie case against the accused and he should not, therefore, be called upon for his defence. If there is a Judge Advocate present, the president may direct him to determine this issue in the absence of the court. The occasions upon which such a direction is given are, however, likely to be rare63. The prosecutor may answer the submission and the defence may reply. Where there is a Judge Advocate present and he has not been directed by the president to determine the issue in the absence of the court, he may, if he thinks it necessary, sum up on the submission. The court will then close to consider the submission, the Judge Advocate, if any, being present64.

If the court finds in favour of the submission it will acquit the accused of the charge and if there are no other charges release him; but the submission will not be allowed if the court could, on the evidence adduced, bring in a special finding65. If the court does not find in favour of the submission it will over-rule the submission and proceed with the trial.

(liii) Opening of defence

At the close of the case for the prosecution and after any submission of no case has been disallowed, the accused will be asked by the president or Judge Advocate, if any, if he wishes to give evidence on oath, make an unsworn

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62 Ibid., 87.
63 R.P. 81 (f) and the notes thereto.
64 R.P. 58.
65 Special finding, see ibid., 2(1)
statement from where he stands or says nothing. He must be told that if he gives evidence he is liable to be cross-examined and questioned by the court, but that, on the other hand, if he makes a statement not on oath, he cannot be asked questions by anybody. The court should further point out that evidence on oath will carry more weight than a statement made not on oath. The accused will also be asked whether he wishes to call any witnesses as to the facts or as to character. The answers will be recorded on page "D3" of A.F. A9.

(liv) **Procedure on case for the defence**

If the accused states that he intends either to call a witness other than himself as to facts or to put in a statement under R.P. 57 as to the facts, the defence is entitled to make an opening address, briefly outlining the facts which it is intended to prove.

(lv) **Evidence for the defence**

The accused, if he is going to give evidence and call witnesses as to facts other than himself, should, after the opening address give evidence before the other witnesses.

The procedure as to examination, cross-examination, etc., follows the procedure in the case of a witness for the prosecution.

If the accused makes a statement not on oath, he cannot be examined, cross-examined or questioned by anyone.

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66 Ibid., 59.
67 Ibid., 63.
68 For the reason for this, see note 1(a) to ibid., 60.
69 Ibid., 60(2).
Where the accused is undefended he must be allowed latitude in making his defence\textsuperscript{70}.

**(lvi) Recalling of witnesses and evidence in rebuttal**

The court may also allow the prosecutor to recall or call a witness after the evidence for the defence to give evidence on any matter raised by the defence which could not reasonably have been foreseen or which could not properly have been mentioned earlier by the prosecutor\textsuperscript{71}.

At any time before finding or, if there is a Judge Advocate, before he has summed up, the court may call or recall witnesses if it is considered in the interests of justice to do so\textsuperscript{72}.

**(lvii) Stopping case if evidence not sufficient**

A court may, at any time, after the evidence for the prosecution is closed, stop the case on any charge if it is of opinion that the accused could not be found guilty of the charge and there is no power to make a special finding\textsuperscript{73}.

**(lviii) Closing address**

The defence will in all cases make their closing address to the court after the closing address of the prosecution\textsuperscript{74}.

The prosecutor, in his closing address, may comment on the evidence, if any, of the accused and the witnesses for the defence, but he may not comment on the

\textsuperscript{70} Ibid., 77(b).
\textsuperscript{71} R.P.61
\textsuperscript{72} Ibid., 56(1).
\textsuperscript{73} Ibid., 58(4).
\textsuperscript{74} Ibid., 62.
fact that the accused has not given evidence himself or called his wife as a witness.

In no case, may the prosecutor or the defence in the course of an address state as a fact any matter which has not been proved.

The addresses may be in writing or may be given orally. If in writing they are attached to the record of the proceedings. If given orally they may be recorded.

**Summing up by Judge Advocate**

When the closing addresses (if any) have been made, the Judge Advocate, if any, will sum up the evidence and advise the court upon the law relating to the case. The Judge Advocate will maintain an entirely impartial position but he may, in his own discretion, comment on the failure of the accused or his wife to give evidence. If he does so, however, he must point out that the accused and his wife are not bound to give evidence. He should not refer in his summing up and before the court makes its finding, to matters which have been revealed to him when sitting alone under R.P.81.

**DELIBERATION OF FINDING**

**Finding in closed court**

If a Judge Advocate is present, he will, after he has summed up, retire from the court. To enable the court to deliberate on the finding in closed court, the

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75 Criminal Evidence Act, 1898 S. 1, proviso (b).
76 R.P.78(1)(c).
77 Ibid., 92(1) (d).
78 Ibid., 64 and 80 (4). It is the duty of the prosecutor, defending officer or counsel to draw the attention of the Judge Advocate to any error he may make in his summing up.
R.V. Southgate ; R.V. Lane.
80 R.P. 65.
president will either order the court to be closed or retire with the members and officers under instruction to convenient retiring room81.

(lxi) Consideration of finding

When deliberating on its finding, the court must bear in mind the principles of English law as under :-

(a) the accused is presumed innocent until he has been found guilty ;82
(b) the onus of proof is on the prosecution ; 82
(c) the court may, with certain exceptions, convict on the uncorroborated evidence of one witness83; and
(d) they must not be influenced by extraneous considerations84.

Having found the accused not guilty of a charge, the court will also consider if the accused’s honour was likely to have been affected and whether his conduct has in fact been above reproach. If it does so find, it may honourably acquit85.

(lxii) Special findings on the charge

In certain circumstances, where an accused is charged with one offence, the court may convict him of another offence instead of finding him not guilty of the offence charged 86, e.g., where an accused is charged with desertion, he may be found not guilty of desertion but guilty of attempting to desert or of absence without leave.

81 AA. 1955, S. 94(3) and R.P. 65(2).
82 Ch. V, para 12.
83 Ibid., para. 56.
84 Ibid., para. 17.
85 R.P.66(2) (b).
86 AA.1955, S. 98 and Sch.3.
(lxiii) **Special finding as to the particulars**

During the deliberation on the finding, the court may find that the facts proved in evidence differ from those alleged in the particulars but that the facts proved are sufficient to prove the offence stated and that the difference is not so material as to prejudice the accused in his defence87. In this event, the court may record a special finding, e.g., on a charge of desertion, the court may find that the charge was proved but the period of desertion was shorter than that alleged in the particulars. Again, where an accused is charged with the theft of a number of articles, the court may find that though the accused stole some of them he is not guilty of stealing others, in which case the latter articles will be omitted in the finding88.

(lxiv) **Reference to Judge Advocate before finding**

If there is a Judge Advocate, the court may seek his advice during the course of its deliberations on the finding. In this event, the advice will be asked for and given in open court89.

Each member will give his opinion by word of mouth on each charge separately, commencing with the junior90. If the votes are equal the accused will be acquitted91. A majority of votes decides the issue, except that where the only punishment which can be awarded for the offence is death, the finding of guilty must be unanimous; if there is only a majority verdict for a conviction, the court will be dissolved and the accused may be re-tried92.

The court must make a finding on every charge upon which the accused was arraigned, except where he has been found guilty of the more serious of two or

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87 Ibid., S.103(2)(k) and R.P.66(3).
88 For specimen findings, see ibid., Sch. 4(7).
89 Ibid., 65(3) and 80(4).
90 Ibid., 66(1).
91 AA. 1955, S.96.
92 AA. 1955, S. 96.
more charges laid in the alternative; in that event no finding will be recorded on any alternative charge placed later in the charge-sheet.

The president will ensure that no officer under instruction gives any indication of his views on the finding of the court until after the court has reached its finding.

(bxv) Announcement of finding

The court having come to a finding, the president will cause the court to be opened and will, if a Judge Advocate was appointed, request him to take his seat. The finding will then be announced by the president in open court. A finding of guilty or special finding will be announced as being subject to confirmation.

If the accused has been acquitted on all the charges in a charge-sheet and there is not a second charge-sheet, he will be released. In that event, the record of the proceedings will be dated and authenticated by the signature of the president and Judge Advocate, if any, and forwarded as directed in the convening order.

If there is a second charge-sheet the trial on that charge-sheet, unless withdrawn under R.P. 82, will proceed in accordance with the procedure described in this chapter.

(bxvi) Power of Judge Advocate on finding

If a Judge Advocate is present and a finding of guilty or a special finding is announced which, in his opinion, is contrary to the law relating to the case, he will, in open court, once more but not more than once more, advise the court what

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findings are, in his opinion, open to it. The court will then, in closed court, reconsider the finding\(^{09}\).

\textbf{(lxvii) Not guilty by reason of insanity}

Where the court finds that the accused is not guilty of the offence charged by reason of insanity, their finding will be announced in open court. This finding, like a finding that the accused is unfit to stand trial\(^{1}\), requires confirmation.

**PROCEEDINGS ON CONVICTION**

\textbf{(lxviii) Evidence as to character on conviction}

After an accused has been found guilty on any charge (whether or not he has pleaded guilty thereto) and the findings on all the charges and charge-sheets against him have been announced, the court will, for the purpose of considering its sentence, take and record evidence as to the military character, age and service of the accused, etc., as prescribed in R.P. 71\(^2\).

The accused may call evidence as to his good character and may make a plea in mitigation of punishment\(^3\).

\textbf{(lxix) Postponement of sentence}

Where several accused are tried separately by the same court on charges arising out of the same transaction, the court may postpone the consideration of sentence until finding(s) have been reached in all the cases.\(^4\)

\begin{footnotesize}
\begin{enumerate}
  \item Ibid., 80(5).
  \item AA. 1955, S. 116(1).
  \item On a plea of guilty the procedure laid down in R.P. 71(1)-(4) is carried out after the evidence and statement in mitigation, see ibid., 45(4). But as to civilian accused, see ibid., Sch. 9, Para. 9, contained in the Civ Suppl.
  \item Ibid., 71(5).
  \item Ibid., 75.
\end{enumerate}
\end{footnotesize}
(lxx) Taking into consideration other offences

Where an accused has been convicted of an offence he may request the court to take into consideration in deciding on its sentence other offences committed by him if they are of the same or similar nature to the offences on which he has been convicted5.

DELIBERATION ON AWARD OF SENTENCE

(lxxi) Deliberation on sentence

After hearing evidence as to character, etc., the president will cause the court to be closed for the deliberation on sentence or will retire with the court to a convenient retiring room for that purpose. The Judge Advocate, if any, and the officers under instruction will remain in closed court6.

The president will be careful to ensure that during the deliberation on sentence the officers under instruction do not express any opinion lest they influence the court7.

(lxxii) Discretion as to sentence

Punishments which may be awarded by Court-martial are those set out in A.A. 1955, S.718. A court has absolute discretion as to its sentence save in the following circumstances :-

(i) An officer convicted under A.A. 1955, S.64, must be sentenced to be dismissed from Her Majesty’s service with or without disgrace;

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6 R.P.73.
7 Ibid., 24(2) and 77(c).
8 As to civilian accused, see AA. 1955, S. 209(3)(a), (aa) and (ab), and, generally, the Civ. Suppl.
(ii) an accused convicted of treason under A.A. 1955, S.70, must, subject to (c) below, be sentenced to death;

(iii) sentence of death may not be passed on a person who was under 18 at the time of the offence;

(iv) an accused convicted of murder must, unless under 18 at the time of the offence, be sentenced to imprisonment for life;

(v) an accused under 17 cannot be sentenced to imprisonment, and there are restrictions on awarding such a sentence to an accused between 17 and 21;

(vi) a D.C.M has limited powers of punishment;

(vii) a F.G.C.M. has limited powers of punishment if it consists of less than three officers;

(viii) a Court-martial sitting to revise a finding of guilt may not award a sentence greater or more severe than that it awarded originally; and

(ix) in the case of a retrial authorized by C.M.A.C. or the Defence Council, the Court-martial cannot on conviction pass a sentence of greater severity than that passed on the original conviction.

AA. 1955, S.71A(3).

Ibid., S.70(3)(aa).

Ibid., S.71A(1).

Ibid., S.71A(2).

Ibid., S.85(2).

Ibid., S.85(3).

Ibid., 109(5).

C.M.(A) Act, Sch. 1, para.4.
One sentence only may be awarded in respect of all the offences of which the accused has been found guilty and in respect of any offences which the accused has asked to be taken into consideration, but the sentence may, subject to AA. 1955, S. 71, consist of more than one punishment17.

Where a soldier other than one who is continuing in the service under AA. 1955, S. 8, or A. &A.F.A. 1961, S, S.6, or A.T.S.R. 1967, r..11, has been convicted of desertion he will automatically forfeit service for the period of his absence18.

Where the accused is under a suspended sentence the court may act in accordance with AA. 1955, S. 120(5)(a)19. The court may also order a sentence of imprisonment or detention to begin to run from the expiry of any sentence of imprisonment or detention which the accused is already serving and where the accused is convicted by a G.C.M or F.G.C.M. of two or more offences against AA. 1955, S. 70 the court may order sentence of imprisonment in respect of those offences to run consecutively20. Otherwise all sentences of imprisonment and detention run from the beginning of the day on which the sentence was announced21, unless the sentence is suspended before being put into execution22.

Where the accused is convicted of stealing, handling, etc., or the court at his request takes an offence of that kind into consideration, the court may also order restitution or compensation23.

When an accused is sentenced out of the United Kingdom to imprisonment or detention for more than 12 months, the court may recommend that he should not be required to be removed to the United Kingdom until he has served a specified portion of his sentence24.

17 R.P. 74.
18 AA. 1955, S. 17(1).
19 See notes to that section.
20 AA. 1955, S.118A.
21 Ibid., S.118(1).
22 Ibid., SS. 118(2) and 120(2) ; for form of order see R.P., Sch. 5(5).
23 AA. 1955, S. 138 ; for form of order , see R.P., Sch 5(7).
24 AA. 1955, S. 127(4) ; for form of recommendation, see R.P., Sch. 5(6).
Considerations affecting sentence

A Court – martial awarding sentence should take into consideration the following points:-

(a) Punishment is among the means available for the maintenance of discipline.

(b) In general, the kind and amount of punishment awarded should be the least which will achieve its purpose.

(c) The sentence awarded in each case must be decided on the merits of that case, and must represent what is warranted both by the seriousness of the offence and the deserts of the individual offender. It must not be determined by applying an arbitrary “tariff” (such, for example, as one day of detention for each day of absence without leave) derived from what are thought to be similar cases. Nevertheless, in order that fairness may be seen to be achieved, a measure of consistency in sentencing as between comparable cases must be sought. This will necessitate the court having some knowledge of the prevailing standard of punishment for the type of offence in question. (In sentencing for civil offences, this standard will be that which prevails in the English civil courts, as to which regard should be had to the advice of the Judge Advocate). This, however, should only be the starting point in the process of deciding the kind and amount of punishment to be awarded in the case, before the court proceeds to make allowance for the factors which are peculiar to that case and which, when balanced one against another, may call for a sentence more or less severe than might have been awarded.

(d) The factors which are peculiar to individual cases may include the following:-
(i) Premeditation, which in general aggravates the seriousness of an offence.

(ii) Provocation, which in general mitigates the seriousness of an offence.

(iii) Differing degrees of involvement between two or more offenders concerned in the commission of an offence (e.g., one may have been the organizer and prime mover while the other played a minor role under his influence); this may call for a distinction in punishment between them.

(iv) Differing degrees of responsibility arising from differences in rank or age. In general, it is proper to assume that a N.C.O who commits an offence jointly with a private soldier would bear the greater responsibility and should therefore suffer the greater punishment. On the other hand, a young and inexperienced N.C.O may be influenced and led astray by a private soldier who is older and more experienced than himself. Similarly, as between joint offenders of equal rank, differences of age and experience should be taken into account in assessing their relative culpability.

(v) Previous convictions in the Army or in civil life, especially for the same type of offence as that of which the offender has been found guilty by the Court-martial. Conversely, proper weight should be given to the previous good character of the accused.

(vi) Prevalence of the offence, when evidence has been given after finding that the prevalence of the offence has been declared in standing or other orders published locally and that these have been brought to the notice of the offender.
(vii) Active service, see AA 1955, S. 71(5) (a). The higher fine permitted can only be awarded where evidence has been given or judicial notice taken that the offence was committed on active service. Even then, the award of a fine above the usual limit is not mandatory.

(viii) Period in arrest while awaiting trial. This is not treated as part of a custodial sentence, because every sentence takes effect from the day on which it is awarded. The time spent in arrest before trial should, however, be taken into account when deciding upon the sentence to be awarded.

A court must not assume that the convening officer’s decision to send the case for trial indicates that he took a serious view of the matter and increase the punishment awarded on that account. Nor is the fact that the offender elected to be tried by Court-martial a ground for increasing his punishment. In every case the court must award such punishment as the members consider to be just and proper.

(e) Advice is also given in Q.R. (1975) 6. 120-6. 123 which will further assist a court in its deliberations.

(f) The court will need to decide not only the amount but also the kind of punishment to be awarded, i.e., custodial, or non-custodial. If the former, whether imprisonment or detention, and if the latter, which of the several available is appropriate, and also whether some combinations of the punishments provided by AA 1955, S. 71 should be awarded.

(g) Imprisonment, Custodial Order and Detention. These differ both in their purposes and in their effects.

(i) Imprisonment. This is designed for the punishment of serious offences, whether civil or military. As it necessarily entails dismissal from Her Majesty’s service (see AA 1955, S. 71(3) ) it must be awarded
only to an offender whom the court is satisfied has, by the military offences or civil offences which he has committed, merited a custodial sentence and shown his unsuitability to be retained in the army, or who stands convicted of one or more civil offences for which, if he had been tried by a civil court, he might have received a sentence of imprisonment.

(ii) **Custodial Order.** Where an offender aged 17 or over, but under 21 has been convicted of an offence punishable by imprisonment, the court may (by AA. 1955, S. 71AA in the case of a person subject to military law, and by AA. 1955, Sch. 5A, paragraph 10 in the case of a civilian), make instead a Custodial Order. Such an Order is a less punishment than imprisonment, but like a sentence of imprisonment it entails dismissal from Her Majesty’s service (see AA. 1955, S. 71(3) as applied by S. 71AA (5)). The effect of the order is to sentence the offender to borstal training or civil detention in a detention centre (or equivalent institution in Scotland or Northern Ireland). The order is limited to two years, and is made for a specified maximum period, thus allowing earlier release if the offender’s conduct or circumstances merit. Custodial orders inevitably involve confinement with offenders sentenced by the criminal courts so should not be made unless the circumstances of the offence or the offender make detention (with or without dismissal) unsuitable in his case.

(iii) **Detention.** This was introduced (and is still primarily used) to provide a means of reforming and rehabilitating a person who is in danger of becoming a bad and useless soldier and converting him into a good one and not as a more lenient form of custodial punishment. In general, therefore, a court should consider awarding detention to an offender whom it is desired to retain in the army. Nevertheless, there are soldiers to whom it is correct to award detention even though their offences render them unfit to be retained and many even warrant an express sentence of dismissal: these are offenders who
merit punishment by a custodial sentence, but for whom neither imprisonment nor a Custodial Order (if they are of eligible age for it) is regarded as appropriate, for example because the offences of which they have been convicted are of a purely military, as distinct from a criminal character.

(iv) **Amount of detention.** Detention cannot be awarded for a term exceeding two years (AA. 1955, S. 71(1) (e)). In considering the amount to be awarded, a court should remember that an offender sentenced to detention for 12 months or more (even though the court does not couple with this a sentence of dismissal) will normally be discharged from the Army (see Q.R. (1975) 9.404 (e) (3). Further, the court should bear in mind that a sentence which (allowing for the time spent in transferring the offender to the Corrective Training Centre and remission) will entail a stay in the Corrective Training Centre of more than about six months may fail to achieve its primary purpose of rehabilitation, as experience has shown that after that period has been served the rehabilitatory effect of the regime progressively diminishes. In appropriate cases, the power to award a fine as well as detention should not be overlooked, provided due regard is paid to the financial difficulty which may then confront the offender after his release, especially if he has a family.

(h) **Dismissal with Disgrace and Dismissal.** These two punishments are less than imprisonment and the Custodial Order, but greater than detention. When a court sentences an accused to imprisonment or makes a Custodial Order in respect of him, each of which carries with it dismissal, and in any other case where the court concludes that his offences are such that the accused ought not to remain in the service, it has to decide whether simple dismissal from Her Majesty’s service will suffice or whether the offender should be dismissed with disgrace. The most important consideration in making this decision is, of course, the gravity, nature and the number of offences for which the accused is sentenced. Other considerations are his previous record and character and his status. For example, offences which
would call for the dismissal with disgrace of an officer or warrant officer might not do so in the case of a private soldier.

As a guide, a Court-martial which has decided that an accused should be dismissed should sentence him to be dismissed with disgrace if it considers that he has behaved really disgracefully, unless there are personal or other mitigating factors strong enough to cause it to consider that it is possible to avoid adding this strong expression of disapproval to the dismissal. It should be borne in mind that the severity of a sentence of dismissal with or without disgrace standing alone varies greatly in the case of different accused. While it would be a severe punishment to some, to others it will be only a light punishment, or even, in some cases, a welcome means of obtaining a discharge without payment. It should also be remembered that dismissal may affect the accused’s prospects of civil employment and that the rehabilitation period after which the conviction need not be disclosed is seven years in the case of simple dismissal and ten years in the case of dismissal with disgrace.

(i) Fine, Of all the non-custodial punishments which are available, a fine is the most flexible. It also has the advantage over a custodial punishment that it does not entail the loss of the offender’s services while he is undergoing punishment with the consequent increase in the workload of his fellows. The award of a fine to a soldier already in financial straits, or to one who has shown himself to be inept in the management of his affairs, may, however, aggravate his situation and thus be self-defeating. In general, the amount of a fine should reflect the seriousness of the offence and the degree of culpability of the offender, and not necessarily the amount of any financial loss resulting from the offence.

(j) A court-martial, in determining sentence, should have in mind the indirect consequences of the punishment contemplated, e.g., automatic discharge where applicable (see (g) (i) and (iii) above), loss of trade pay and effect on promotion prospects and pension.
(k) **Provocation;** while provocation is no defence to any charge except one of murder (where its effect may be to reduce the offence to manslaughter) it may, for example, on a charge of striking at properly take into consideration in mitigation of punishment.

(l) **Previous convictions;** a habitual offender deserves more punishment than an infrequent offender, and a first offender should, if possible, be treated leniently.

(m) **Prevalence of offence;** where evidence has been given after the finding that a particular offence is prevalent and the attention of the accused has been called to the order stating this fact, a more severe punishment should be awarded.

(n) **Active service;** the higher fine which by AA. 1955, S. 71(5)(a) may be awarded to an accused on active service cannot be awarded unless evidence has been given or judicial notice has been taken that the accused was on active service on the day on which the offence was committed.

The court must always award such punishment as the members consider to be just and proper and must not presume that the convening officer, in sending the case for trial, took a more serious view of the facts.

**Recommendation to mercy**

The court may, in passing sentence, make a recommendation to mercy, but in view of the discretion of the court in the matter of awarding sentence, such a recommendation would be unusual, except in cases where the court can award only one punishment. Any recommendation must form part of the proceedings and the reasons for it must be recorded.

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25 Q.R. 808
26 R.P. 74.
Voting on sentence

The president and every member of the court, whether or not he has voted for an acquittal, must vote on the sentence, the junior first giving his opinion. In the case of an equality of votes the president has a second or casting vote. Save that a sentence of death must be unanimous.27

Announcement of sentence, etc

The sentence, having been decided upon, will be recorded in the proceedings together with:

(a) any recommendation as referred to in para. 89 above, and

(b) any recommendation to mercy and the reasons therefor.

The record will be signed and dated by the president and Judge Advocate, if any. The president will then cause the court to be re-opened and will announce the sentence of the court (with any recommendations) and that it is subject to confirmation. The president will announce that the trial is concluded. The Judge Advocate, if any, or the president, will then forward the proceedings in accordance with the directions contained in the convening order.

CONFIRMATION AND REVISION

Conviction, etc., not valid until confirmation

Finding of guilty, special findings and sentences consequential thereon, findings that an accused was unfit to stand trial and findings of not guilty by reason of insanity are not valid until confirmed by a confirming officer.

27 AA 1955, S. 96.
28 For forms of sentence, see R.P., Sch. 5.
29 AA 1955, S. 97(3) and R.P. 76(1).
30 Ibid., 76.
31 Special finding, see ibid., 2(1).
32 AA 1955, S. 107(2) and R.P.95.
33 AA 1955, S. 116(1) and (4).
34 Ibid., S. 116(2).
As to findings on matters arising during a trial such as an objection to a charge, see R.P. 95(3).

(lxxvii) Confirming officers.

The findings and sentence of a Court – martial may be confirmed:-

(a) by the officer who convened the Court - martial, unless he is precluded from confirming it in his delegated warrant or authorization to convene;

(b) any officer superior in command to the officer who convened the court; or

(c) any successor of the officers referred to in (i) and (ii) and any officer exercising the functions of those officers;

but the following officers cannot confirm:

(a) a member of the Court – martial;

(b) an officer who as C.O investigated the charges or who for the time being is the accused’s C.O; or

(c) an officer who investigated the charge as an A.S.A.

Where an accused has been tried by G.C.M or D.C.M convened on board ship and he has been disembarked before the finding and sentence have been confirmed, they may be confirmed by any officer with the power to confirm in the area in which the accused disembarks. A ship’s commandant cannot, in view of AA. 1955, S. 111(2) confirm the finding and sentence if he is also the CO of the accused.

35 Ibid., S. 11, but see, in the case of G.Cs.M., the proviso to S-S.(2).
A sentence of death cannot be carried into effect (subject to what is said in AA. 1955, S. 112(3)) if it was confirmed by an officer below the rank of general officer until it has been approved by a general officer or, in certain circumstances, by a flag or air officer of corresponding rank. Where a sentence of death is passed in a colony it cannot generally be carried into effect until approved by the Governor.

**(lxxix) Powers of confirming officer.**

Upon receipt of the proceedings the confirming officer may:

(i) withhold confirmation if he thinks the finding of the court is under all the circumstances of the case unsafe or unsatisfactory, etc;

(ii) confirm the finding and sentence;

(iii) reserve the finding and/or sentence for confirmation by higher authority;

(iv) substitute another finding, if such a finding could have been validly made by the court on the charge before it, and he is of opinion that the court must have been satisfied of the facts necessary to justify such a finding;

(v) substitute for a finding of guilty on any charge a finding of guilty on a charge alternative thereto if he is of opinion that the court must have been satisfied of the facts necessary to justify such a finding and where he does; so, substitute a sentence which is not of greater severity than that for which it is substituted.

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37 Ibid., 1955, S. 112.
38 Ibid., S.110.
(vi) where a sentence is invalid, confirm the finding and substitute a valid sentence;  
(vii) direct the court to revise their finding if it appears to him that it is against the weight of evidence or that some question of law was wrongly determined;  
(viii) when confirming the sentence remit all or part of any punishment or commute such punishment to one or more punishments lower in the scale of punishment;  
(ix) if he thinks that the court erroneously exercised its power to take offences into consideration, annul the taking into consideration any orders dependent on it;  
(x) when confirming a sentence postpone the carrying out of the sentence;  
(xi) when confirming a sentence of imprisonment or detention passed on a warrant officer, NCO or soldier, order that it be suspended;  
(xii) where an accused has been sentenced by a court held out of the United Kingdom to imprisonment or detention for more than one year, direct

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90 Ibid., S. 109(1).  
91 Ibid., S. 110(4)(A).  
92 AA. 1955, S.120(2).
that all or part of the sentence (not exceeding 2 years) shall be served out of the United Kingdom;

(xiii) where the accused is under a suspended sentence act in accordance with AA. 1955, S. 120(5)(b); or order restitution of property or compensation if an accused has been convicted of stealing, handling etc., property.

(*** Revision of finding and sentence. ***)

Where a court is ordered to reassemble for the purpose of revising its finding under AA. 1955, S. 109, it will reassemble in closed court, the Judge Advocate, if any, not being present. If it adheres to its original finding or it substitutes another finding which it could have originally come to, it will then, if necessary, reconsider the sentence, the Judge Advocate, if any, being present.

No evidence may be heard on revision.

The decision of a court on revision need not be announced in open court.

Having regard to the wide powers of a confirming officer to substitute findings, a revision of a finding of a Court – martial will be infrequent.

(*** Non-confirmation and re-trial. ***)

Where a confirming officer decides to withhold confirmation, the accused may be tried by another court for the offence because he is deemed not to have been tried at all unless the finding is confirmed. In this event the convening order for the second court must be issued not later than 28 days after promulgation of the decision to withhold confirmation.
Re-trial should not be ordered unless D.A.L.S. has been consulted\(^{18}\).

(lxxxii) Petitions.

AA. 1955, S. 108, and RP. 100 make provision for petitions to be presented against findings and sentence both before and after confirmation. These enactments must be read in conjunction with the provisions of C.M. (A) Act, and C.M.A.R. which deal with petitions which are a necessary preliminary to bringing a case before the C.M.A.C.

PROMULGATION

(lxxxiii) Promulgation of finding, etc.

The finding and sentence must be promulgated to the accused\(^{49}\).

In addition to the promulgation of the finding and sentence, the following other matters must be promulgated to the accused:-

(i) any action taken on review\(^{50}\);  
(ii) confirmation or otherwise of a finding that an accused was unfit to stand his trial or was not guilty by reason of insanity\(^{51}\);  
(iii) any direction by a confirming officer or reviewing authority that all or part of a sentence of imprisonment or detention shall be served out of the United Kingdom\(^{52}\);  
(iv) approval of any matters arising during the trial such as a submission under R.P. 38\(^{53}\); and  
(v) non-confirmation of a finding or sentence\(^{54}\).

\(^{19}\) AA. 1955, S.140 and R.P. 95 (7).  
\(^{50}\) AA. 1955, S. 113(6).  
\(^{51}\) Ibid., S.116(1)(2) and (5) and R.P.95(7).  
\(^{52}\) AA. 1955, S. 127(6).  
\(^{53}\) Ibid., S.140 and R.P.95(7).  
\(^{54}\) AA. 1955, S. 110.
Methods of promulgation are dealt with in Q.R. (1975) 6.130.

As confirmation, etc., is not complete until promulgation, the confirming officer or reviewing authority may alter his minute of confirmation or review before promulgation.

**REVIEW OF FINDINGS AND SENTENCES**

**(lxxxiv)** **Review of findings and sentence.**

A finding or sentence which has been confirmed may be reviewed by a reviewing authority at any time. If a petition has been presented under AA. 1955, S. 108, then the finding and sentence must be reviewed as soon as may be after the presentation of the petition unless steps have been taken by the accused to bring the matter before the C.M.A.C.

A sentence of death passed on a person on active service, however, need not be reviewed in certain circumstances.

**(lxxxiV)** **Reviewing authorities**

The reviewing authorities are:-

(i) Her Majesty;

(ii) the Defence Council or an officer appointed for the purpose by them; and

(iii) any officer superior in command to the confirming officer.

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55 Ibid., S.113.

56 The Army Board is empowered to discharge this function. See D.(T. of F.) A. 1964, S.1(5).

57 See AO 104 of 1956, as amended by AO 88 of 1957 and AOs 14 and 70 of 1964, which contain appointments by the Army Council. By virtue of D.(T. of F.) A, 1964, S. 3(4), these appointments continue to have effect as if made by the Defence Council.
(lxxxvi) **Powers of reviewing authorities.**

A reviewing authority may:-

(i) quash the finding and the sentence relating to it;

(ii) quash the sentence;

(iii) annul the taking into consideration of offences by the court and any orders dependent thereon;

(iv) substitute a finding which was open to the court on the charge before it;

(v) substitute for a finding of guilt on any charge a finding of guilt on a charge alternative thereto;

(vi) substitute a valid for an invalid sentence;

(vii) remit or commute punishment;

(viii) direct if the confirming officer has not done so where an accused has been sentenced out of the United Kingdom to imprisonment or detention for more than one year, that all or part of the sentence not exceeding two years shall be served out of the United Kingdom;

(ix) if neither the court nor the confirming officer has ordered a suspended sentence to be put into execution, act in accordance with AA. 1955, S. 120(f).
(x) order restitution or compensation where an accused has been convicted of stealing, handling, etc., if the court or the confirming officer has not already done so^61;

(xi) suspend a sentence of imprisonment or detention passed on a warrant officer, NCO or soldier ^62.

(xii) determine a suspended sentence of imprisonment or detention^62; or

(xiii) in the case of Her Majesty or the Defence Council^63 only, authorize a retrial in cases to which AA 1955, S. 113A(1), applies.

Any action taken on review resulting in an alteration to the finding or sentence must be promulgated to the accused^64.

**RECONSIDERATION OF SENTENCE**

(lxxxvii) **Reconsideration of sentence.**

A sentence of imprisonment or detention may be reconsidered by an officer, not below the rank of brigadier or corresponding rank specified in regulations made by the Defence Council^65.

An officer reconsidering a sentence may remit that sentence in whole or in part^66.

^61 Ibid., S. 138(7).
^62 Ibid., S. 120.

^63 Including by virtue of D. (T. of F.)A. 1964 S. 1(5), the Army Board.
^64 AA. 1955, S. 113(6).
^65 See ibid., S. 114 and AO 11 of 1972; see also App. III.
^66 AA. 1955, S. 114.
(lxxiv) **Commencement of sentence.**

Sentence of imprisonment and detention commence on the day on which they were originally pronounced by the court, except :-

(i) where the sentence was suspended \(^{67}\), or

(ii) when C.M.A.C. under C.M (A) Act, S. 11(2), otherwise direct, or

(iii) when a sentence of imprisonment or detention is ordered to begin to run from the expiry of a sentence of imprisonment or detention which the accused is already serving \(^{68}\).

A sentence of dismissal of an officer takes effect on the date notified in the London Gazette which is the date of promulgation.

A Sentence of reduction in rank takes effect from the date on which the sentence was originally pronounced \(^{69}\).

These provisions apply even if the sentence was varied on confirmation \(^{70}\) or review \(^{71}\).

(1xxxviii) **Execution of sentence of imprisonment and detention.**

A sentence of imprisonment may be served in a civil prison in the United Kingdom \(^{72}\), in a military \(^{73}\) or air-force prison \(^{74}\), or outside the United Kingdom in an overseas establishment \(^{75}\).

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\(^{67}\) Ibid., S. 118(2).

\(^{68}\) AA 1955, S. 118A.


\(^{70}\) AA 1955, S. 110.

\(^{71}\) Ibid, S. 113.

\(^{72}\) In certain circumstances a person serving a sentence in a civil prison may be transferred to a borstal institution or a detention centre, see note 4(b) to A.A 1955, S. 71A.

\(^{73}\) AA 1955, S. 122, and I & D (A)R 1956.

\(^{74}\) There are at the present time (1977) no military or air-force prisons in the U.K.

\(^{75}\) AA 1955, S. 126, and I & D (A)R 1956.
Except where an order is made under AA 1955, S. 127(4), a convicted person will not serve a sentence of more than one year's imprisonment or detention out of the United Kingdom76.

A sentence of detention may be served in a military or air-force corrective training centre or detention barrack77 but will not be served in a civil prison in the United Kingdom or in a military or air-force prison except as provided in the proviso to AA. 1955, A. 124, though it may in certain circumstances be served in an overseas establishment not being a prison75.

(bxxxx) **Duration of sentence of imprisonment or detention.**

Where a soldier serving a sentence of imprisonment or detention escapes provision is made for the sentence not to run while he is unlawfully at large78.

A person serving a sentence of imprisonment or detention can be released on compassionate grounds; if he is so released the period of his release will not count towards the period of his sentence.

If a sentence of imprisonment or detention on a soldier is suspended after it has been put into execution the sentence ceases to run.

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76 AA. 1955, S. 127.
77 Ibid., S. 122, and I & D. (A) R. 1956.
78 AA. 1955, S. 119.
C. TRIAL BY COURTS MARTIAL UNDER THE AMERICAN MILITARY JUSTICE

"The discipline necessary to the efficiency of the army required other and swifter modes of trial than are furnished by the common law courts."

Winthrop

Classification of Courts –Martial

In each of the armed forces, there are the same kinds of Courts –martial, designated by the same names. They are of three types; general, special and summary Court martial, in the order of their status and powers. A general Court martial (GCM) consists of a law officer (Military judge) and any number of members not less than five, and has wide powers. A special Court – martial (Special CM) has no law officer (Military judge) consists of any number of members not less than three and has moderate powers, whereas a Summary Court – martial (SCM) consists of one commissioned officer and has very narrow powers.

Nature of Courts martial and their status under the American judicial system.

A Court – martial is not one of the Courts established under the judiciary article, Article III of the constitution and is not a permanent court like the federal courts. It is a part of the judicial branch of the government. Of the land and naval forces provided for by the congress under the express legislative power conferred by the constitution and recognized in the exception in the Fifth Amendment. It is a lawful tribunal, with power to determine any case over which it has jurisdiction, which jurisdiction is wholly penal or criminal. A Court – martial comes into existence as a judicial tribunal when the qualified persons who comprise it,

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79 UCMJ, Article 16(1).
80 UCMJ, Article 16(2).
81 UCMJ, Article 16(2).
82 U.S. Constitution expressly exempts cases arising in the land or naval forces.
having been duly appointed by the convening authority empowered to do so, are sworn.

Appointment of General Courts Martial

GCsM may be convened by the President of the United States; the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, and except when the Coast Guard is operating as a part of the Navy, the Secretary of the Treasury; the CO of a territorial Department, an Army Group, an Army, an Army Corps, a Division, a separate Brigade or a corresponding unit of the Army or Marine Corps; the Commander-in-Chief of a fleet, the CO of a Naval Station or larger shore activity of the Navy beyond the continental limits of the United States; the CO of an air command, an air force, an air division, or a separate wing of the Air Force or Marine Corps; such other COs as may be designated by any of the Secretaries of Departments, enumerated above; any other CO in any of the armed forces when empowered by the President.

Appointment of Special Courts Martial (Spl CM)

Special Courts martial may be convened by any person who may convene a GCM; the CO of a district, garrison, fort, camp, station, Air Force base, auxiliary airfield or other place where members of the Army or Air Force are on duty; the CO of a Brigade, regiment, detached battalion or corresponding unit of the Army; the CO of a Wing, group or separate squadron of Air Force; the CO of any naval or coast guard vessel, shipyard, base or station, the CO of any marine brigade, regiment, detached battalion or corresponding unit, the CO of any marine barracks, wing, group, separate squadron, station, base, auxiliary airfield or other place where members of the Marine Corps are on duty; the CO of any separate or detached command or group of detached units of any of the armed forces.
placed under a single commander for this purpose; the CO or officer in charge of any other command when empowered by the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force or, except when the Coast Guard is operating as a part of the Navy, the Secretary of the Treasury.

**Appointment of Summary Courts Martial (SCMs).**

Summary Courts Martial may be convened by any person who may convene a GCM or special CM; the CO of a detached company or other detachment of the Army; the CO of a detached squadron or other detachment of the Air Force; the CO or officer in charge of any other command when empowered by the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or, except when the Coast Guard is operating as a part of the Navy, the Secretary of the Treasury. It appears no similar provision has been provided for the Navy and the Marine Corps. This will need to be catered for by the Secretary of the Navy to delegate corresponding powers in similar situations as that of the Army and the Air Force.

**Exclusion of Accuser as Convening Authority of General and Special Court Martial.**

An accused is forbidden to convene a GCM or spl CM. This restriction is not made applicable to the convening of an SCM as a matter of law and the fact that an SCM was convened by the accuser will not have the effect of invalidating the judicial proceedings; but inasmuch as competent authority superior to the accuser has power to convene that Court-martial, the ethical practice is the making of a request by the accuser to such superior that the latter convene the SCM and this practice should be followed whenever circumstances permit. The mere fact that an officer signs the formal charges and specifications upon which the accused is to be tried does not make of him an accuser within the Code definition of the term. If he is merely performing an official act, with no more than an official interest in

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85 See UCMJ 23, Articles 502, 507 to 509.
86 See UCMJ 24 and Article 508.
87 See House Hearings 849 – 850.
the case, his power to convene the Court – martial is not thereby restricted. Effect of failure to observe restriction can render judicial proceedings void from the very beginning.

Composition of Courts – Martial

(a) Composition of a General Court Martial

A GCM is composed of a law officer (Military Judge) and any number of officers not less than five. The law officer is an integral part of the Court – martial, although he is not a member of the court and does not vote. If a challenge directed to the law officer is sustained, the Court – martial is incomplete and cannot act judicially until another law officer is appointed and sworn.

(b) Composition of a Special Court – martial

A Special Court – martial is composed of any number of members not less than three. Though a law officer was not a requirement under the UCMJ but subsequently vide the Military Justice Act 1968, this problem has been overcome by providing a military judge (law officer) from the Judge Advocate General’s Deptt concerned, besides other improvements carried out in the military justice which shall be discussed later in the relevant chapters.

In relation to the Special Court – martial, the Military Justice Act 1968 provides that legally qualified counsel must represent an accused before such Court – martial empowered to adjudge a bad conduct discharge ; in other special Courts – martial, legally qualified counsel must be detailed to represent the accused unless unavailable due to military conditions. In addition, a military judge must preside over a special Court – martial empowered to adjudge a bad conduct discharge unless unavailable because of military conditions.

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88 UCMJ 26(b).
(c) **Composition of a Summary Court – Martial.**

The uniform code places no restrictions on the rank of the commissioned warrant officer who is appointed as a Summary Court – martial.

The Military Justice Act, 1968 bars trial by Summary Court – martial where there is no right to defence counsel, no independent judge and no jury if the accused objects.

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**Eligibility for service on general and special Courts – martial.**

No person who is not on active duty is eligible to serve on a Court – martial. When on active duty, however, commissioned officers, Commissioned Warrant Officers, Warrant Officers and enlisted persons are eligible, subject to certain restrictions dependent upon the class to which the accused belongs, to sit as members of general and special Courts – martial of any armed force, without regard to whether they are members of the same armed force as that of the Convening Officer or as that of the accused.

If the accused is a cadet, aviation cadet, midshipman, warrant officer or civilian, only commissioned officers, commissioned warrant officers and warrant officers may be members. If the accused is an enlisted person, enlisted persons as well as commissioned officers, commissioned warrant officers and warrant officer may be members.

Retired and reserve officers, when on active duty, are eligible to serve on courts martial.

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90 Ibid., p. 84.
91 UCMJ 25; House Hearings 1139.
92 Kahn Vs Anderson, 255 U.S. 1, 41 Sup. Ct. 244 (1921); Aderhold Vs Menefee, 67 F.2d 345 (C.C.A. 5th 1933); MC Rae V. Henkes, 273 F. 108 (C.C.A. 8th, 1921), cert denied; 258 U.S. 624, 42 Sup Ct. 317 (1922).
Eligibility for service as a Summary Court - martial.

Only commissioned officers and commissioned warrant officers who are on active duty are eligible for service as Summary Court - martial.  

Rank or rating of members.

As a matter of general rule, no person in the armed force shall be tried by any member who is junior in rank or grade to him. Seniority is determined by relative rank in the case of commissioned officers and commissioned warrant officers, and by relative rating or grade in the case of enlisted persons. There is an 'escape clause' attached to it giving discretion to the convening authority to even detail members who may not be meeting the aforesaid criteria in the general rule. The decision of the convening authority is conclusive. The fact that a member of a Court - martial is junior in rank or grade to the accused is not a ground for challenge and if the challenge is based upon bias, it is, like a challenge to any member, is a matter for the final determination of the Court - martial.

Qualifications of members.

The convening authority must appoint as members of a Court - martial such eligible persons as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service and judicial temperament. All of these factors are to be considered, but none is to be viewed as mandatory. A prominent young attorney recently commissioned without any prior service may be the best qualified member available to the convening authority.

Enlisted persons from units other than that to which the enlisted accused belongs are qualified to serve as members of the general or special court - martial if the accused has personally requested in writing that enlisted persons serve on it. Such a request by the enlisted accused will have to be made prior to his arraignment. If the request is made and

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93 UCMJ, 25(a).
granted, at least one-third of the total membership of the court-martial must be composed of enlisted persons.94

Affirmative qualifications

(1) An otherwise eligible enlisted person cannot serve as a member of a court-martial if the accused belongs to the same unit. The purpose of this disqualification is to avoid prejudice, either for or against the accused, which experience has shown is likely to develop in an integrated body of troops in which the members live and work in close association with each other.95

(2) An otherwise eligible person cannot serve on a general or special court-martial, either as a member or as a law officer (Military Judge), if he is the accuser. An accuser is defined as a person who signs and swears to charges or who directs that charges nominally be signed and sworn by another, or who has an interest other than an official interest in the prosecution of the accused. The mere fact that an officer signs the formal charges and specifications upon which the accused is to be tried by court-martial does not make of him an accuser, within the meaning of the code's definition. If he is merely performing an official act, with no more than official interest in the case, he is not thereby disqualified.

(3) An otherwise eligible person cannot serve on a general or special court-martial as a member or a law officer, if he is to be a witness for the prosecution.

(4) If he has acted as investigating officer or as counsel in that case. The danger of such knowledge creating a formed opinion in the mind of one whose duty it is to act impartially and judicially is too great.

94 UCMJ 25 (c)
96 House Hearing 849 – 850.
The Law Officer (Military Judge).

A law officer is an official of a general or special court – martial and a constituent part of that Court - martial98. The law officer is the legal arbiter in proceedings before the above – stated Courts – martial, and for many purposes, holds a position analogous to that of a judge in a federal district court which is trying a criminal case99. In the absence of a law officer, a general or special Courts – martial cannot receive evidence or act judicially; it can only adjourn until a law officer is present, because a law officer performs a judicial function100.

Qualifications and appointment.

The law officer is appointed by the Convening Authority at a general or special Court –martial. The law officer must be certified to be qualified for such duty by the Judge Advocate General of the armed force of which he is a member. In addition, he must be a member of the bar either of a federal court or of the highest court of the state of the United States. An otherwise eligible law officer is, however, disqualified to act as such in a case when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

Normally, his appointment is shown in the precept (Convening Order) but it can be done in a separate document also.

Duties.

(1) He is intended to function, so far as practicable in a military environment, in a manner analogous to that of a civilian judge. He rules upon interlocutory questions, other than challenges, 1rising during the proceedings, and his rulings on questions, other than on a motion for a finding of not guilty or on the question of the accused’s

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98 UCMJ 1(12) and 16(1).
99 House Hearings 1153.
100 House Hearings 1154.
sanity, is final, constituting the ruling of the court. He instructs the court as to the elements of the offence(s) and charges the court as to the presumptions of innocence, reasonable doubt and benefit of doubt. He puts the finding(s) of the court in a proper form. After checking the record of the proceedings, he authenticates it by affixing his signature.

(2) He is not a member of the Court and does not vote with the members. Except for putting the finding(s) in proper form, he does not consult the members of the court in the absence of the accused, trial counsel and the defence counsel. If a member objects to the ruling of the law officer on a motion for a finding of not guilty or on the question of accused's sanity, the Court is closed and the members alone vote to sustain or to overrule the ruling of the law officer. On challenges, including a challenge directed to the law officer, the law officer has no power to rule, and the decision is made by vote of the members.

The role and status of law officers (military judges) after the Military Justice Act, 1968.

Through the Military Justice Act, 1968, the participation of the law officers in Courts-martial has increased, enhancing their prestige, safeguarding their independence from unlawful command influence. In this context, the old designation of the law officer is changed to “military judge” wherever it appears in the uniform code or elsewhere in the law. They will preside over Courts-martial to which they are assigned much as a federal district judge does, with roughly equal powers and functions. They will, for example, rule with finality on all questions of law, decide on requests for continuances, rule on challenges to members, instruct the members on the applicability of law, and under new provisions, discussed below, conduct pretrial sessions without the attendance of members of the court for the purpose of ruling on preliminary matters and performing generally the

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1 UCMJ 51(b); House Hearings 1154.
2 The Military Justice Act, 1968 (Hereafter called MJA) SS.2(1), 2(20), 3.
functions performed in pre-trial sessions conducted by federal district court judges.

As noted above, the Uniform Code has always required that a law officer be detailed to a general Court–martial but not to a special Court–martial. There was need to appoint law officers for these Courts–martial as well as they were empowered to adjudge bad conduct discharges. The armed forces had opposed such a requirement. However, the Department of Defence had supported a proposed amendment to the uniform code to permit the trial of the accused servicemen by general and special Courts–martial consisting of a law officer sitting alone much as a federal district Court judge may conduct a trial without a jury. The bill was passed by both the Houses and enacted into law.

Now a military judge has been assigned at special Courts–martial except when one is unavailable because of physical conditions or military exigencies, in which case a written explanatory statement by the Convening authority must be appended to the record. The senate report emphasizes that military judges must be assigned to all such courts, if at all possible, because of seriousness of a punitive discharge, and particularly since, under other provisions of the Act, both the government and the defence will now be represented by lawyers in such trials. It was contemplated that, as in the case of assignment of lawyer defence counsel to special Courts–martial other than those empowered to adjudge punitive discharges, the unavailability exception will be reserved for cases of legitimate impossibility and that the appellate decisions on this provision will so ensure.

In all other special Courts–martial, military judges may be detailed, but need not be. Although this aspect is left to the unguided discretion of the convening authorities, I believe the use of military judges in all special Courts–martial will greatly increase in the years ahead, particularly for the trial of cases involving factual and legal problems probably too difficult for a legally untrained special Courts–martial president to handle, and particularly since, under the provisions of the Act increasing the availability...

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3 Ibid., S.2(5).
of lawyer defence counsel, most special Courts – martial will now have lawyers representing both sides.

The stature and independence of military judges is sought to be enhanced by another provision of the Act which in fact enacts into law the general principles of the “Independent field judiciary”\(^5\). This system, which has already been adopted administratively by some of the armed forces, involves the assignment of military judges in each service to a separate unit under the command of the Judge Advocate General of that service. The intent is to provide for the establishment within each service of an independent judiciary composed of experienced judge advocates certified for duty as military judges on general Courts – martial, who are assigned directly to the Judge Advocate General of that service and responsible only to him for direction and fitness ratings and who perform only judicial duties. Rules for designating and detailing military judges for duty on special Courts – martial are left subject to regulations to be promulgated by the secretaries of the service, thus permitting the establishment of special lists of junior judge advocates who can be utilized for other legal duties while serving as military judges of special Courts – martial in preparation for later assignment to general Courts – martial. This system would greatly enhance the quality and prestige of military judges and would further ensure their independence from improper command influence by removing them from the normal chain of command.

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**Trial by the Military Judge alone.**

Perhaps the most innovative and potentially beneficial provision of the Act is the one amending the Uniform Code to permit the convening of a general or Special Court – martial consisting of a military judge sitting alone much as a federal district court judge may try a case without a jury. The armed forces which vigorously supported this provision, anticipate that his provision would result in great reduction in both the time and man-power normally expended in trials by Courts – martial.\(^5\) For example, the vast

\(^5\) MJA S.2(9).
majority of cases in which the accused wishes to plead guilty will probably be tried by these single-officer Courts.

This amendment provided that a case could be referred to a single-Officer Court, if the accused before the court is assembled, so requests in writing, and the military judge approves. Before he makes such a request, the accused is entitled to know the identity of the military judge and to have the advice of the counsel. This is true for the special Court-martial as well. This provision is modelled generally after rule 23(a) of the Federal Rules of Criminal Procedure. It differs in a major respect, however, in that it does not require the consent of the convening authority to refer a case to a single-officer court, whereas rule 23(a) requires that both the Court and the government must consent to waiver by the defendant of trial by jury. There are significant differences between the civilian community and the military community which seemed to be making such an exact parallel in procedures inadvisable. In federal civilian criminal trials, the jury is selected from a broad base of eligible persons pursuant to a detailed federal statute designed to ensure complete impartiality.

There are no such safeguards in the selection of members of a Court-martial. Furthermore, the command structure in the military presents a possibility of undue prejudicial influence over the court by COs that is not present in civilian administration of justice. It would, thus, seem unwise to limit the election of the accused to avoid trial by a Court-martial whose members he might consider to be prejudiced against him. In any case, the military judge, after having heard arguments from both trial counsel and defence counsel concerning the appropriateness of trial by a military judge alone, would be in the best position to protect the interests of both the government and the accused.

 Trial Counsel

(a) Qualifications.

“Trial Counsel” is the title of the position held by the leader of the prosecution staff in a GCM or Spl CM. The trial counsel of the GCM must

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be certified as competent to perform his duties by the Judge Advocate General of the armed force of which he is the member. In addition, he must be either a graduate of an accredited law school and a judge advocate or law specialist or be a member of the bar of a federal court or the highest court of the state. If they are graduates of accredited law schools, they meet this qualification. An accredited law school is one which meets the standards established by and holds a certificate of accreditation from the association of American law school. There is no requirement of the Code that a trial counsel be an officer or even that he be a member of one of the branches of the armed forces or that he be subject to the Code.

If he has acted as investigating officer, law officer or court member in a case, he cannot lawfully act subsequently as the trial counsel in that case. If a person has acted in any capacity for the defense in a case, he is forbidden to act for the prosecution, as the trial counsel or otherwise, in that case. It will be fatal error to appoint as trial counsel the person who represented the accused at the pre-trial investigation. The last prohibition is based upon a general principle of ethics adopted by the legal profession, and it is not subject to waiver by the accused.

A trial counsel should be fair and free from bias, prejudice or hostility but he is not subject to challenge.

(b) Appointment.

(1) A trial counsel for each General and Special Court Martial is appointed by the convening authority. If the convening authority deems it necessary, he may, in his discretion, appoint one or more assistant trial counsel. The trial counsel appointed for a general court martial must be qualified and lack of availability of qualified persons to fill that position is not a ground for exception. If a qualified trial counsel is not available, the general court martial cannot proceed.
(2) A trial counsel is to be appointed for each general and each Special Court-martial. His appointment is normally to be embodied in the precept or order, along with his qualifications.

(c) Duties.

(1) The duties of a trial counsel are somewhat analogous to those of a prosecuting attorney and of a clerk of the court in a federal district court trying a criminal case. He prosecutes in the name of the United States, and also, under the direction of the Court, prepares the record of the proceedings. When charges are referred to trial, it is his duty to bring the accused to trial under them without any unnecessary delay. If a number of cases are pending, he determines the order in which such cases shall be tried.

(2) Prior to trial, the trial counsel examines the convening order and the charges and specification. If errors are found, technical or substantive, or if correct would affect any person, offense or matter not included in the original draft, the document must be returned to the convening authority. As soon as the charges are free from error, he serves a copy of the same on the accused. He notifies all about the time and place set for the meeting of the Court-martial.

(3) If prior to trial, the trial counsel discovers a matter which would preclude or would make inadvisable the trial of the accused as ordered, it is his duty to make his discovery to the convening authority for the latter's decision. Such action is appropriate when it appears that the accused was or is insane, or the sole witness to a material fact has disappeared or has repudiated his statement as to the fact, or when the requirement of Article 32 of the Uniform Code relating to the pre-trial investigation either have not been complied with or have been complied with so insubstantially as to create the possibility of prejudice to the accused.

(4) During trial, the trial counsel executes all orders of the court, and, under its direction, keeps or superintends the keeping of the record of

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12 UCMJ 38(a).
the proceedings. His primary duty is to prosecute the case, but while he has no obligation to advise the defence, he must be guided by the basic rule of fairness. He must not suppress evidence favourable to the defence.

(5) After the trial, he notifies the convening authority of the result of the case. When the record of the proceedings has been authenticated, he delivers it to the convening authority and furnishes to each accused person tried in that case, a copy of the record.

(d) **Defence Counsel**

Defence counsel is a person appointed for each general and special court – martial by the convening authority for the purpose of giving to the accused persons brought before that Court – martial the assistance of legal advice and representation. In addition, the accused may have civilian counsel to assist him. The accused may act his own counsel\(^{13}\).

-- **Qualifications.**

(i) The defence counsel of counsel of a General and Special Court Martial must be certified as competent to perform his duties by the Judge Advocate General of the armed force of which he is a member. Like the trial counsel, he must either be a graduate of an accredited law school and a judge advocate or law specialist, or be a member of the bar of a federal court or of the highest court of the state.

(ii) If a person has acted as investigating officer, law officer, or court member in a case, he cannot, unless expressly requested by the accused, lawfully act subsequently as the defence counsel in that case\(^{14}\).

(iii) If the trial counsel is a person fully qualified to act as counsel, the defence counsel being appointed by the convening authority must be a person similarly qualified.

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\(^{13}\) Decisions of Board of Reviews, Branch office of the JAG, Army, European Theater of operations (E To) 163.

\(^{14}\) UCMJ 27(a).
-- Appointment

Defence counsel at the general or special Court martial is appointed by the convening authority. The convening authority may appoint one or more assistant defence counsel, if he deems it necessary.

-- Duties

(i) The duties of a defence counsel are same as those of a counsel for the defendant in the trial of a criminal case before a federal district court. He is appointed to ensure compliance with constitutional rights of the accused to assist him in defence and he is obligated to protect interests of the accused by all honourable and legitimate means known to the legal profession. His personal opinion of the guilt or innocence of the accused is immaterial, should in no way be disclosed to the court, and should be entirely divorced from his duties in defending the accused to the best of his ability. He is not allowed to accept any fee for his services, either from the accused or from any other person.

(ii) Immediately, on his appointment as defence counsel, he should so inform the accused. He should inform the accused that the latter has a right to select civilian or military counsel in lieu of or in addition to the appointed defence counsel. He should prepare the case, seek interviews with the witnesses, whether for the prosecution or for the defence. He should make timely request upon the trial counsel to secure the attendance of defence witnesses. If the accused is an enlisted person, he should advise the accused of his right to have eligible enlisted persons as members of his court martial.

(iii) If the accused opts for the services of a particular military counsel, he should be made available. Such request should be routed though normal channels. In case of an adverse response, appeal can lie to the next superior officer. Such adverse decision for non availability of officer
is not reviewable by Board of review nor appealable by Court of Military Appeals except upon showing of abuse of discretion\textsuperscript{15}.

(iv) Civilian or military counsel so selected by the accused need not be members of any bar or graduates of any school or qualified in any manner to undertake the defence of the accused.

(v) The affirmative disqualifications prescribed for a defence counsel appointed by the convening authority do apply to civilian or military counsel selected by the accused but the very fact of selecting individual counsel constitutes an express waiver of such of the disqualifications. Thus, a person who has acted as investigating officer, law officer or court member in a case can serve as individual counsel for the accused when selected as such by him. But if the individual counsel selected has acted in any capacity for the prosecution in a case, however, he is disqualified to act for the defence, and this disqualification is not subject to waiver by the accused.

\textbf{Absent and additional members.}

There are but three allowable grounds which make lawful the absence of a member of a GCM or Special Court-Martial after the accused has been arraigned. The first is physical disability; the second a sustained challenge and the third a lawful order of the convening authority\textsuperscript{16}. The convening authority can so excuse a member for a good cause\textsuperscript{17}. But this discretion is not absolute in nature and is subject to review. If a member withdraws after participation in the judicial action of the court, the error would be fatal and it cannot be corrected by an order of the convening authority issued nunc pro tunc and dated back to the beginning of the trial.

The convening authority may, by an order amending the precept or order convening the court, appoint additional members. Such an amendatory order can be issued initially only. Members should not added

\textsuperscript{15} 69 BRD 191.
\textsuperscript{16} UCMJ 29 (a).
\textsuperscript{17} Ibid.
to a Court – martial during the course of a trial unless the number of members has fallen below the quorum.

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**Jurisdiction of Courts Martial**

**(a) As to persons**

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**Classes of persons subject to Uniform Code.**

There are twelve classes of persons enumerated in the Uniform Code as subject to that Code. They are;

1. All persons belonging to the regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; all volunteers from the time of their muster or acceptance into the armed forces of the United States; all inductees from the time of their actual induction into the armed forces of the United States and all other persons lawfully called or ordered into, or to duty or for training in the armed forces, from the dates they are required by the terms of the call or order to obey the same;

2. Cadets, aviation cadets and midshipmen;

3. Reserve personnel while they are on inactive duty training authorized by written orders which are voluntarily accepted by them, which orders specify that they are subject to Uniform Code;

4. Retired personnel of a regular component of the armed forces who are entitled to receive pay;

5. Retired personnel of a reserve component who are receiving hospitalization from an armed force;

6. Members of the fleet reserve and Fleet Marine Corps reserve;

7. All persons in custody of the armed forces serving a sentence imposed by a Court – martial;

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UCMJ 2. See 701.
(8) Personnel of the Coast and Geodetic Survey, Public Health Service and other organizations when assigned to and serving with the armed forces of the United States;

(9) Prisoners of War in the custody of the armed forces;

(10) In time of War, all persons serving with or accompanying an armed force in the field;

(11) Subject to the treaty of or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary of a Department and which is without the continental limits of the United States and without the following territories: that part of Alaska east of Longitude 172 degree West, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico and the Virgin Islands;

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories; that part of Alaska east of Longitude 172 degree West, the Canal Zone, the main groups of the Hawaiian Islands, Puerto Rico, and the Virgin islands.

-- Additional persons subject to Court – martial jurisdiction

(1) Any person charged with having committed, while in a status in which he was subject to the Uniform Code, an offence against the Code on which the applicable statute of limitations, if any, has not run, punishable by confinement of five years of more, and for which the person cannot be tried in the federal or state Courts19;

19 UCMJ 3 (a).
(2) All persons discharged from the armed forces subsequently charged with the offence of having fraudulently obtained the said discharge, and on which offence the applicable statute of limitations has not run;20

(3) Former officers who have been dismissed by order of the President and who make application for trial;

(4) Violators of the laws of War;

(5) Persons who have been dismissed or discharged in accordance with a Court - martial sentence and whose petition for a new trial on grounds of newly discovered evidence or fraud on the Court have been granted21.

--- Persons on Active Duty

By far the largest class of persons subject to Court - martial jurisdiction is that which is composed of persons on active duty in the armed forces. The class includes officers, cadets, aviation cadets, midshipmen, warrant officers and enlisted personnel, de jure or de facto, whether regular, reserve, volunteer, inducted, or retired of the Army, Navy, Air Force, Marine Corps or Coast Guard during the period that they are on active duty.

If it can be determined that a person is on active duty in the armed forces, then it follows that he is subject to the uniform code and hence amenable to Courts - martial. When a person is enlisted, or appointed as an officer, he is a member of the service from the time that he takes the oath. If a person is drafted, he is a member of the service from the time that he is actually inducted into one of the armed services. For failure to report for induction, for refusal, after reporting, to be examined, and for other violations of the provisions of law authorizing the draft, a draftee may be prosecuted in the civil courts, but cannot be tried by a Court -martial. Mere acceptance by the draftee by the armed forces is not enough ; the Supreme Court has held that acceptance and induction are separate processes and
that, if the prescribed ceremony of induction included the administration of oath, the draftee was not “actually inducted” until he had voluntarily taken that oath. The induction process is usually left to be prescribed by the President.22

Jurisdiction: As to Time

Dismissed officers

Former officer of the armed forces who were dismissed in time of War by order of the President are civilians, and they are not, as a class, subject to the Uniform Code. Special jurisdiction is granted to a general Court – martial so convened to try the former officer, and the fact that such application was made raises a conclusive presumption that the former officer has waived the right to plead any applicable statute of limitations.23 However, as per Mr Wirt, Attorney General, in construing the Articles of War 1874, Article 103, where limitation for trial was two years, the limitation thereby prescribed was absolute in all cases and could not be waived. The reason assigned for this opinion was in effect that the article was an enactment based on considerations of public policy, being intended not solely for the benefit of the accused, but to secure that prompt and certain prosecution of military offences which is essential to maintain discipline of the service; and that, therefore, it was to be regarded as prohibitory not only upon the United States but upon the accused also. The view of Mr Wirt that the limitation was not waivable, was, for a considerable time, recognized in the War department as established law. If this view as to the effect of the Article is correct, it would mean that this limitation as to the time is to be regarded as jurisdictional. In 1880, however, the district court for the Southern district of New York apparently took this view in Davison’s case24, but the judgment in that case was reversed on appeal, where it was in substance held that this limitation was not a jurisdictional objection but a “matter of defence” the Court adopting the view in Bogart’s25 and White’s26

23 UCMJ. 4(a).
24 In re Davison, 4 Fed 507.
25 In re Bogart, 2 Sawyer 397.
cases. In these cases and subsequently in Zimmerman’s case, the courts in effect, overruled Mr Wirt’s opinion and treated the military statute of limitation as the United States and state statutes of limitations relating to crimes are ordinarily treated viz. not as a restriction on the power of the court, but as a provision solely or mainly for the benefit of the accused, to be taken advantage of by him at his option, by way of defence in the form of a special plea, or on the general issue. These rulings have now apparently settled the law upon the question involved.

A similar view was taken by the Delhi High Court holding that the object of Section 122 of the Army Act 1950 is to ensure that the delinquent officer is not kept in suspense and uncertainty for more than three years. The period of limitation prescribed is for the benefit of the accused; but if the delinquent officer is ready to undergo a trial by Court martial, Section 122 will not come in the way. Mandatory character of the Section suggested by use of words, “no trial by Court-martial for any offence shall be commenced”, is to be understood in the context of prejudice likely to be caused to the service person. In other words, the said section creates a vested right in a delinquent officer but being only a statutory right; the same can be waived by the charged officer. However, the above decision was overruled by a Division Bench (DB) of the same court in the case of Lt Col (TS) HC Dhingra Vs Ministry of Defence. Hence, under the Army Act, the question of limitation as to time is jurisdictional and no trial by Court-martial of any person subject to the Army Act 1950 can be commenced on expiry of a period of three years.

--- Time when the Statute of Limitations begins to run

The period of the statute of limitations begins to run, as to any particular offence, not at the time the offence was discovered or the time when the convening authority obtains his first knowledge of the commission

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26 In re White, 9 Sawyer 49 : 17 Fed 723.
27 In re Zimmerman, 30 Fed 176.
28 Harbhajan Singh Vs Union of India, 1982 (2) SLR 782 at p. 792.
29 CWP No 639/88.
30 Also See Lt UG Menon Vs State of Rajasthan 1969 CrLJ 509 ; Gulab Nath Singh Vs COAS, AIR 1969 Raj 115 (119).
of the offence but at the time the offence was actually committed. This is true with respect to offences involving frauds as well as other offences.

-- Nature of the Statute of Limitations

A statute of limitations applicable to criminal prosecutions is an act of grace\(^{31}\) whereby the sovereign through its legislative action, grants amnesty by surrendering the right to prosecute under certain conditions. It is founded on the theory that prosecutions should not be allowed to ferment endlessly and then to explode only after witnesses and proofs necessary to the protection of the accused have by sheer lapse of time passed beyond availability\(^{32}\). The enactment of a statute is a recognition of this theory, and a notification that a fixed and positive period of time gives to an accused the right to have the proofs of guilty considered as destroyed. Such a statute is now favoured by the law, and will be given a liberal construction in favour of the accused. It creates in him a substantial right, and places upon the prosecution the burden of proving any exceptions in the statute. The bar of the statute is available to the accused under a plea of not guilty or under a special plea, but it is a matter of defence and is waived by a failure to interpose it.

-- Circumstances which suspend the running of the statute of limitations

There are three circumstances under which the running of the statute of limitations will be suspended in all the cases. These are (1) the absence of the accused from the territory in which the United States has the authority to apprehend him, (2) the custody of the accused by civil authorities, and (3) the custody of the accused by the enemy. In addition, if the offence charged involves fraud against the United States or government property, or a war contract, the running of the statute is suspended until three years after the termination of hostilities.

Although escape from custody or confinement is an offence against the Uniform Code, to which a two years period of limitation is applicable, the nature of escape as it relates to prisoners of War or spies, makes that offence inapplicable to them. It is generally a rule of international law that a prisoner of War who has successfully escaped, that is, who has got beyond the reach and power of the nation which had detained him, and who is again captured, may not be punished for his prior escape, although he may be subjected to closer confinement to prevent a repetition of the act.

No person who has deserted from the armed forces is relieved from Court martial jurisdiction by a separation from any later period of service. A person charged with desertion or absence without leave in time of War, or with aiding the enemy, mutiny or murder may be tried and punished at any time without limitation.

-- Military Law in time of War

We shall now see the jurisdiction of the military law on the statute on limitations for trial as jurisdiction over civilians during War. In United States Vs Anderson, the facts of the case were that Clayton Anderson of U.S. Army absented himself without authority on November 3, 1964. Over two years later, he surrendered to civilian authority, who sent him to the military authority. He was tried by Court martial. Though he had been charged for desertion but the Board of Review found him guilty of lesser offence of unauthorized absence (AWOL). U.S. Court of military appeals also affirmed Anderson’s conviction, though the statute of limitations provided two years time during peace time for commencing disciplinary proceedings, which was inapplicable during War. Therefore, the decision in Anderson’s case apparently extends to application of military law to many American civilians in Vietnam who were subject to such jurisdiction prior to November 3, 1964.

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33 Exception (e) to discussion on Rule 202 of Rules of Courts Martial – 1984 (R.C.M).
Since “in time of War”, provisions of Uniform Code of Military Justice were designed to meet the exigencies of that occasion, it seems reasonable for congress to direct that when any situation exists, in which the President, who is the C-in-C, determines that the increased military discipline is required for efficient control of the armed forces, he may by executive order impose all provisions of Uniform Code of Military Justice which currently are invoked “in time of War”. The Uniform Code could provide that the executive power would remain in effect until revoked by subsequent order or by congressional resolution. A companion provision could provide that formal declaration of War by congress also would activate the same special provisions.

These changes in the Uniform Code would answer many of the objection to the present formula. First, in cases like Anderson, it would eliminate the need for judicial determination of the existence of War when there has not been a formal declaration. The elusive standard now used for such judicial conclusions could be discarded. Second, the military need to insure discipline during combat and comparable situations short of declared war would be satisfied by presidential determination that such a need, in fact, exists.

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Court – Martial for civilian accompanying the armed forces in Vietnam

Accordingly to Fredrick Bernays\textsuperscript{35} of District Bar Columbia, replying to a question recently raised in the pages of the American Bar Association Journal, Mr Wiener argued that was there doubt that the civilians accompanying the U.S. armed forces in Vietnam might be Court – martialled under the Uniform Code and under the constitution. In the case, John Keffe was of the view in a trial that the civilian employees of the armed forces could not be subjected to trial by Court – martial in peace even for non capital offences\textsuperscript{36}. He concluded his discussion as under:-

\textsuperscript{36} Mc Elroy Vs U.S. ex rel Guagliardo, 361 U.S. 281 (1960).s
“This leads me to observe that we are right back where Fredrick Bernays Wiener of District of Columbia Bar found himself when he argued: Reid V Convert at the 1956 term. His monumental research of the judicial precedents will stand us in good stead if any when the services elect to Court – martial civilians in Vietnam”.

In Reid Vs Covert37, Kinsella Vs Singleton38 and Grisham Vs Hagan39, which relate to trials of civilians under Article 2 (11) of Uniform Code, (10 U.S.C Section 802 (11)) none considered the wartime jurisdiction under Art 2 (10), which provides that “In time of War, persons serving with or accompanying an armed force in the field” are subject to trial by Court martial.

The significant points in the present connection are, one, that the war jurisdiction was expressly approved in Reid Vs Covert and two, that War’ in the context of every American military Code has always included ‘undeclared War’.

In Reid Vs Covert, Professor John Keefee cites the Supreme Court of U.S. at pages 33 to 35 as under :-

“There have been a number of decisions in the lower federal courts which have upheld military trials of civilians performing services for the armed forces, “in the field” during time of War. To the extent that these cases can be justified, in sofaras they involved trials of persons who were not members of the armed forces; they must be on the government’s ‘War powers’. In the face of an actively hostile enemy, military commanders necessarily have broader powers over persons on the battlefront. The extraordinary area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rule”.

The government has urged that the concept, "in the field" should be broadened to include 'dependents' accompanying the military forces overseas under the conditions of world tension which exist at the present time.

--- Limitations on jurisdiction over civilians

Court-martial jurisdiction over civilians under the code is limited by judicial decisions. The exercise of jurisdiction under Article 2 (a) (11) in peacetime has been held to be unconstitutional by the Supreme Court of the United States. Before initiating Court martial proceedings against a civilian, relevant statutes and decisions need to be examined.

--- Liability to military duty

Accordingly to opinion of the Judge Advocate General, it must be conceded that the government has a right to demand the services, in time of War, of any of its citizens, whether physically fit or not.

(c) Jurisdiction: As to offences and punishments

Offences triable by Courts-martial may be classified as violations of the treaties or conventions of the United States whenever adopted, during the time such treaties or conventions are in force; violations of the criminal laws of the United States, whenever enacted, during times such laws are in force; violations of such criminal laws of a State, Territory, District, or possession of the United States in which the act or acts or omissions occurred as were in force on June 25, 1948 and at the time the violations occurred, and which have been adopted as federal law applicable to federal reservations within the perimeter of such State, Territory, District or possession; violations of the laws, orders, regulations; or Treaties and Conventions from the American legal viewpoint are synonymous.

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Exception 2 (b) (4) to Rule 202 of RCM.
JAG's opinion (1918 Op. JAG 152) March 5, 1918.
Conventions are multilateral treaties. The federal constitution mentions only treaties and describes them as part of the supreme law of our land\footnote{U.S. Const art. VI.}.

The criminal laws of the United States are to be found mainly in the federal criminal Code (Title 18, U.S. Code). All crimes and offences, not capital, named or defined and made punishable by that code are made offences against the Uniform Code by Art. 134.

The federal law is extended beyond the specific enactments of congress to include a considerable body of the laws of States and Territories and of the District of Columbia by the operation of a statute commonly known as the Assimilative Crimes Act. The principal effect of the Act is to incorporate by reference the criminal laws of the several states in force on June 25, 1948, the date of the Act, into the federal criminal code, and to make such laws, to the extent of such incorporation, laws of the United States and applicable to places under the exclusive or concurrent jurisdiction of the United States within the geographical limits of a State. The acts or omissions which occur in such areas and which violate the local laws in force on the said date, and also in force at the time they occurred, become offences against the federal law by virtue of the Assimilative Crimes Act and against the military law by virtue of Article 134 of the Uniform Code.

The principal offences against the laws of war are: killing of wounded, refusal of quarter, treacherous request for quarter, maltreatment of dead bodies, ill-treatment of prisoners of War, firing on undefended places, abuse of the flag of truce, firing on the flag of truce, misuse of red cross emblem, bombardment of hospitals, poisoning of wells and streams, pillage or purposeless destruction, ill-treatment of inhabitants in occupied territory and sinking of merchant vessels without warning etc.
-- Adjustment of jurisdiction between Court - martial and Civil Court

All offences against the Uniform Code are known as military offences. Some are exclusively military offences and over them military authorities and Courts - martial have exclusive jurisdiction. Some offences are not exclusively military offences and over these both military authorities and Courts - martial have concurrent jurisdiction with the civil Courts. In any particular instance, the Court whose jurisdiction first attaches to an alleged offender is generally entitled to proceed with the case, and it is within the power of that court initially to determine whether the offence then alleged is within the jurisdiction of the Court. Desertion is purely a military offence and no civil Court has the power to try it, but inciting members of the armed forces to desert is not a purely military offence and may be punished under the federal Criminal Code in the district courts of the United States or under the Uniform Code. A person generally, and if by an act or omission he violates the code and the local criminal law, the act or omission may be made the basis of the prosecution before a Court - martial or before a proper civil tribunal, and in some cases before both. The Secretary of the Department has powers to prescribe the circumstances under which, and the conditions on which, a member of the armed forces accused of an offence against civil authority may be delivered upon request to the civil authority for trial. A member of the armed forces so accused has no right to trial by Court - martial in lieu of a trial by a civil Court, even though the offence be one which may be tried by either tribunal/Court.

45 See S.2012 of the Code.
46 UCMJ 14.
As to punishments

For the purpose of delimiting the jurisdiction of the various types of Courts martial, offences may be classified as to punishments. Such offences may be classified into two groups: (1) Offences against the laws of war, which carry punishments permitted by the law of war, and (2) Offences against the Uniform Code proper, which carry the punishments prescribed therein. Offences against the Uniform Code may be further subdivided into capital offences and non-capital offences. Capital offences may be further subdivided into those which carry a mandatory punishment and which do not carry a mandatory punishment.

The only capital offences carrying a mandatory punishment are as follows: being found acting as a spy\textsuperscript{47}, premeditated murder\textsuperscript{48}, and murder while engaged in burglary, sodomy, rape, robbery or aggravated arson\textsuperscript{49}. The offence of being found acting in the capacity of a spy is the only offence carrying a mandatory punishment of death. Offence of murder, premeditated or otherwise, carries an alternative punishment of death or life punishment. While capital offences, not carrying a mandatory punishment are as follows: wartime desertion, wartime assault on a superior officer, wartime willful disobedience of a command of a superior officer, wartime misbehaviour of a solicitation to desert or to mutiny if the offence solicited is attempted or committed, improper use of the countersign, mutiny, sedition, attempted mutiny or sedition, failure to suppress or report a mutiny or sedition, misbehaviour before the enemy, subordinate compelling surrender or attempting to compel surrender, knowingly forcing a safeguard, aiding the enemy, willfully hazarding a vessel and rape. All offences not enumerated above are non capital offences. A capital offence may become non-capital either because the President subsequently prescribes a limitation of punishment below that of death or that the

\textsuperscript{47} UCMJ. 106.
\textsuperscript{48} UCMJ. 118(1).
\textsuperscript{49} UCMJ. 118(4).
convening authority directs that the offence in a particular case be treated as not capital.

_ Jurisdiction of General Court Martial

(As to offences and punishments)

Any offence made punishable by the code is triable by General Court Martial. In addition, a GCM has power to try offences against the laws of war. They have the powers, within certain limitations, to adjudge any punishment not forbidden by the Code. The Code forbids punishment by flogging, branding, marking, tattooing on the body or any other cruel or unusual punishment, including the use of irons, single or double.

_ Jurisdiction of Special Court Martial

(As to offences and punishments)

Special Courts – martial have power to try any non-capital offence made punishable by the Code, and also any capital offence not carrying a mandatory punishment when such offence is referred to such Courts – martial with a direction that it be treated as not capital by an officer empowered so to direct. The special Court – martial has the power within certain limitations to adjudge any punishment not forbidden by the Code except death, dishonourable discharge, dismissal, confinement in excess of six months, hard labour without confinement in excess of three months, forfeiture of pay exceeding two – thirds pay per month, or forfeiture of pay for a period exceeding six months. A bad-conduct discharge may be adjudged by a special Court – martial but only if a proper record of proceedings and testimony before the Court has been made.

_ Jurisdiction of a Summary Court Martial

(As to offences and punishments)

Summary Courts – Martial have the same jurisdiction as to offences as Special Courts – martial have. As to punishments, a Summary Court – martial has the powers, within certain limitations to adjudge any
punishment not forbidden by the Code except death, dismissal, dishonourable or bad-conduct discharge, confinement in excess of one month, hard labour without confinement in excess of forty-five days, restriction to a certain specified limits in excess of two months, or forfeiture of pay in excess of two-thirds of one month’s pay. In addition, the President has prohibited the punishments of confinement, hard labour without confinement, or reduction except to the next inferior grade in the cases of non-commissioned or petty officers above the fourth enlisted pay grade.

Miscellaneous Limitations as to punishments

(a) When accused is an Officer or Warrant Officer

When the accused is a commissioned, commissioned warrant, or warrant officer, he cannot by sentence of a Court-martial be reduced in rank or to an enlisted grade; or to hard labour without confinement; or to confinement or forfeiture of all pay and allowances without dismissal or dishonourable discharge. Where dismissal or dishonourable discharge plus confinement is imposed, the duration of confinement cannot exceed the maximum prescribed for enlisted persons.

(b) Confinement on bread and water

A Court-martial cannot impose confinement on bread and water or on diminished rations as a punishment to be inflicted upon Army or Air Force personnel. Upon other personnel, such punishment is limited to a maximum of thirty days, and cannot be inflicted until there is obtained from a medical certificate containing his opinion as to whether the execution of the sentence would produce serious injury to the health of the accused.

(c) Restriction on limits

Restriction to limits cannot be imposed in excess of two months. This form of punishment is a deprivation of privileges, and does not operate to exempt the offender from any military duty.

50 Manual of Courts Martial (MCM), Para 126 (g).
(d) **Suspension from rank, Command, or duty ; loss of Seniority**

Suspension from rank, command, or duty can be imposed by a Court-martial only on army and Air Force personnel, and upon such personnel loss of numbers, lineal position, or seniority cannot be imposed.

(e) **Confinement at hard labour ; hard labour without confinement**

A Court-martial cannot, by a single sentence which does not include a discharge, sentence an accused to confinement at hard labour greater than, unless the accused is a civilian, a prisoner of war, or a person whose punitive discharge has been executed. A Summary Court Martial cannot impose confinement upon a non-commissioned or petty officer above the fourth enlisted pay grade.

Confinement without hard labour cannot be imposed by a Court-martial, and confinement without a forfeiture or fine should be imposed upon an enlisted person only under unusual circumstances. Hard labour without confinement can be imposed by a Court-martial only upon an enlisted accused, cannot be in excess of three months, and, if imposed by a Summary Court-martial, cannot be in excess of forty five days, or imposed upon non-commissioned or petty officers above the fourth enlisted grade.

(f) **Rights of accused prior to trial**

At or about the time that charges are signed, the accused has the following rights: (1) If placed in arrest or confinement, to be informed of the specific wrong of which he is accused; (2) To be speedily tried or released; to be subjected to no punishment on the charges pending against him other than to arrest or confinement or to minor punishment for infractions of discipline.

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51 MCM, Para 126 (j).
52 UCMJ 10 and 13.
When a formal investigation is ordered, the accused has the following rights: (1) The accused is to be advised of the charges against him; (2) To representation at the investigation by his counsel, civilian if provided by him, military counsel of his own selection, if reasonably available, or military counsel appointed by the officer exercising general Court – martial jurisdiction over the command. (3) Full opportunity to cross examine witnesses against him; (4) full opportunity to present anything he desires in his own behalf, in defence or in mitigation; (5) to have the investigating officer to examine available witnesses requested by the accused; and to have the witnesses who testify, do so in the presence of the accused and, if the accused has requested counsel, his counsel53.

At the time of referral of charges with recommendation for trial by Court – martial, the accused has the following rights: (1) To be furnished with a copy of the charges and statement of the substance of the testimony taken on both sides during the formal investigation; (2) to demand a further or new investigation if new evidence becomes available, or if charges are changed, after investigation, to allege a more serious or essentially different offence54.

(g) **Effect of failure to investigate**

--- **Effect on jurisdiction**

A mere failure to investigate or a failure to follow the requirements of Article 32 regarding the details of a thorough and impartial investigation does not constitute a jurisdictional error. A failure to afford representation at the investigation by counsel or a failure to call the witnesses requested by the accused or a failure to afford the accused full opportunity to cross examine the witnesses against him, however, may result in prejudice to the substantial rights of the accused at the subsequent trial by denying to him a reasonable opportunity to secure witnesses for use at the trial or an opportunity to prepare his defence. If such be the case, and this is a question of fact normally to be determined upon appellate review, it will

53 See UCMJ 30(b) & 32 (b)
54 UCMJ 32 (b) and (c). Also see Para 34 of MCM, United States (1969).
necessitate a delay in the disposition of the case or a disapproval of the proceedings. Pretrial requirements are directory and not mandatory in nature and would, in no way, effect acquisition of jurisdiction of a Court-martial. Non compliance with the prescribed investigative procedure would be fatal error only where substantial rights of the accused were violated. If record of an investigation is pregnant with errors, a disapproval of the proceedings is justified, but a technical error is not sufficient. Where the record of the trial affirmatively showed that no investigation of the charges had been made prior to trial, the Court-martial proceedings were held void ab initio. When, after termination of the formal investigation, charges were redrafted merely to reflect a change in legal conclusion, but no prejudice to the accused could be shown, it was held that a new formal investigation would serve no good purpose.

(b) Charges and Specifications

Before selecting the charge to be preferred, the accuser must analyse the facts in order to determine the particular nature of the offence or offences which have been committed. This he does by a comparison of the apparently provable facts with the essential elements of the various offences.

(i) Avoidance of multiplication of charges

One transaction should not be made the basis for an unreasonable multiplication of charges against one accused. A transaction is, generally speaking, a group of operative facts which have some unity of time and place. An accused who is to be charged with an absence without leave should also not be charged with a failure to report for a routine scheduled duty such as reveille, if the failure to report occurred during the period for which he is charged with absence without leave. For example, the larceny of several articles should not be alleged in several specifications under a charge of larceny, one for each article, when the larceny of all of them can properly be alleged in one specification.

UCMJ 32(d); Also see 5 Bull. JAG, Army 336 (1946); 69 BRD 387; 57 BKJB 327.
(j) **Joinder of minor offences with serious offences**

Ordinarily, charges for minor derelictions should not be jointed with charges for serious offences. A failure to report for a routine roll-call should not be jointed with a charge of burglary. It is not against policy, however, to join minor and serious, however, to join minor and serious offences, if the minor offence serves to explain the circumstances of the greater offence\(^\text{57}\).

(k) **Specific charge preferred to general charge**

When from analysis of the facts it is determined that the accused has violated a particular punitive Article of the Uniform Code, it ordinarily should be charged under that Article rather than under Article 134, i.e., the general Article\(^\text{58}\). The general Article is not intended to be a refuge for an indolent accuser or a haven for an inefficient legal draftsman.

(l) **Effect of erroneous selection**

The technical charge does not affect the jurisdiction of a Court-martial. It is the specification which determines whether an offence cognizable by Courts-martial has been alleged. The designation of a wrong code Article or a failure to designate any Article is ordinarily immaterial, provided that the specification alleges an offence of which Courts-martial have jurisdiction.

**Charges of joint offences**

(m) **Who may be charged jointly**

A joint offence is one which is committed by two or more persons acting together in pursuance of a common intent. Such persons may not be the chief actors or even present at the commission of the offence. A person who counsels, commands, or procures the commission of an offence, although not present at its commission, is punishable as a principal, as is a

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\(^{57}\) MCM Note 26 (c).

\(^{58}\) MCM Note 27.
person who aids and abets the commission of an offence and is present at its commission. All such principals may be charged jointly with the commission of the same offence, but an accessory after the fact cannot be charged jointly with the principal he is alleged to have received, comforted or assisted\(^59\). Offenders are properly jointed if there is a common unlawful design or purpose\(^60\).

**(n) Drafting of Specifications**

**Function of Specification**

(1) A specification must perform three distinct functions as follows:-

(a) It must show that an offence cognisable by Courts martial has been allegedly committed;

(b) It must advise the accused of the issues he must be prepared to meet; and

(c) It must so identify the offence charged that it may be pleaded in bar to a subsequent prosecution for the same offence. Enough at least must be incorporated into a specification to satisfy these three requirements. If any of these requirements is not satisfied, the specification lacks legal sufficiency.

(2) A specification lacks legal sufficiency if the act alleged may have been innocent under certain circumstances and criminal under other circumstances, and the circumstances under which it was committed are not alleged.

(3) A specification should be limited to a statement of one offence only. The use of disjunctive or alternative allegations is to be avoided. Thus, a specification should not allege that the accused “lost or destroyed” certain property. As a rule, the use of conjunctive allegations is bad. Such use ordinarily serves to include more than

\(^59\) MCM 26(d) 157.

\(^60\) Morei Vs United States, 127 F 2d. 827 (CCA 6th 1942); 78 BRD 131, 67 BRD 395. Also see Wharton’s Criminal Law 285 (12th Edition).
one offence in a specification. If two or more acts, however, constitute but a single offence; they may and should, of course, be alleged conjunctively. Certain conclusions, however, are allowable if the alleged act of the accused is not in itself an offence but is made an offence by an applicable statute, including an article of the code, regulations or custom having the effect of law. Words importing criminality, such as "wrongfully", "without authority" or "dishonourably", depending upon the nature of the particular offence involved, should be, used to describe the accused’s acts. Words importing criminality may be safely omitted where alleged act is per se unlawful. Thus, an allegation that the accused destroyed a statement he had previously given to an official investigating officer was held sufficient. But where an act is not per se an offence, words of criminality, such as "wrongfully", "unlawfully" or of a similar import, must be used in the specification to make it an offence.

TRIAL PROCEDURE

Assembly of persons detailed to serve on the General Court-Martial

To start with, a General or Special Court Martial assembles at the time and place of its first session in accordance with the order appointing it. At subsequent sessions, it normally meets in accordance with the instructions issued by the President at the time of adjournment. If such instructions are to meet at the call of the President, the law officer (now called Military Judge) normally confers with the trial counsel to determine the readiness of a case for trial and thereafter notifies the President, who fixes the hour and date of the meeting and advises the trial counsel of his decision in order that proper notice of the meeting may be given to all the persons involved. A Court-Martial may hold session at any hour of the day but should not meet at unusual hours. The duration of the meetings should not be unusually protracted, unless the Court is informed by the convening

\[\text{\footnotesize 61 MCM Note 28(a)(3).} \]
\[\text{\footnotesize 62 Ibid.} \]
\[\text{\footnotesize 63 21 ETo 298.} \]
\[\text{\footnotesize 64 3, Bulletin of Judge Advocate General of the Army, preceded by the Volume Number (Bull. JAG. Army) 380 (1944).} \]
authority that the case is one of extraordinary urgency and such a measure is therefore warranted.

The trial counsel will give timely oral or written notice to the members of the Court and all others concerned, including the law officer (now military judge), all witnesses who are to testify in person, the defence counsel, the officer having custody of the accused, and if required, the reporter, interpreter, guards, clerks and orderlies. The attendance and the security of the accused (the prisoner) is with the officer into whose custody or command, the accused is at the time of trial.

__ Organisation of General Court Martial : Presence of required personnel __

Upon the assembly of the persons involved at the time and place set for a trial, the law officer (military judge) examines the order appointing the Court and makes an informal inquiry of the personnel present to determine that the accused and quorum of the court are present for the trial of the case and that the appointed members of the prosecution and defence present are apparently qualified to conduct the prosecution and defence of the case. In a GCM, the quorum consists of five members, but in determining the presence of a quorum for the trial of an enlisted personnel, the military judge considers whether or not the accused has made request for enlisted members and if so whether one third of the members present are enlisted persons.65

__ Spectators __

As a general rule, the trial by a Court-Martial is a public trial, and the sessions are open. The Manual of Court-Martial, however, authorizes, however, subject to Departmental regulations, the convening authority or the Court to direct that the public be excluded from a trial because of security or for other good reasons.66

65 MCM Not 41(d) and 61(a). Also see Mc Daniel V Hiatt, 78F. Supp 573(MD Pa 1948)
66 MCM Not 53(e).
SEATING ARRANGEMENT

GENERAL COURT MARTIAL

MILITARY JUDGE

WITNESSES

REPORTER

DC

ACCUSED

ASSISTANT DC

1st LT

CAPT

LT COL

COL

MAJ

CAPT

1st LT

TC

ASST TC
Announcement of request for enlisted members

If the accused is an enlisted person, the trial counsel announces whether the accused has made a request in writing that the membership of the Court include enlisted persons. Such a request must be in writing, signed personally by the enlisted accused. The Manual for Courts –Martial States that if such request is not made prior to or at this time, the accused may not thereafter assert his right to have enlisted persons on the Court\textsuperscript{67}.

Challenges

Challenges are of two types, preemptory and for cause. A preemptory challenge does not require any reason or ground, and none need be stated. The trial counsel is entitled to one preemptory challenge, and the accused or, in a joint or common trial, each accused, is entitled to one preemptory challenge. It cannot be used against the law officer; but it may be used before, during, or after challenge for cause, or against a member unsuccessfully challenged for cause, or against a new member if not previously utilized in the trial challenges for cause must be based upon valid grounds, and their validity is determined by the Court\textsuperscript{68}. An automatic challenge for cause is one which is made upon certain grounds which are not disputed, with the result that the challenged member or law officer is excused forthwith\textsuperscript{69}.

(a) When made

Challenges should be made before arraignment, but the Court may permit the challenge for cause to be presented at any stage of the proceedings. A challenge will be so permitted if the challenger has exercised due diligence or if the challenge is based upon any of the grounds which would sustain an automatic challenge. Timely opportunity is given to challenge every new member or law officer (military judge). The fact that a particular challenge for cause has been once adversely determined does not

\textsuperscript{67} MCS Note 61(g).
\textsuperscript{68} UCMJ 41(a).
\textsuperscript{69} MCM Note 620.
preclude the Court from again entertaining it if good cause, such as newly discovered evidence, is shown.\textsuperscript{70}

\textbf{(b) Grounds for challenge for cause}

(1) Grounds for challenge for cause may be divided into two classes. If as a result of the grounds being admitted by the challenged member, such member is excused automatically without the necessity of taking a vote, the challenge may be said to be automatic. If a challenge for cause is based upon any other grounds with a result that, unless it is manifest that a challenge will be unanimously sustained, a vote of the non-challenged members is required, the challenge for cause may be said to be issuable.

(2) The grounds for automatic challenge are as follows:

(a) That the challenged law officer (military judge) is not eligible to serve as law officer (military judge) or member respectively on Court - martial.

(b) That he is not a law officer (military judge) or a member of the Court.

(c) That he is the accuser as to any offence charged.

(d) That he will be a witness for the prosecution.

(e) That he was the investigating officer as to any offence charged\textsuperscript{71}.

(f) That he has acted as counsel for the prosecution of the accused as to any offence charged.

(g) That (upon a rehearing or a new trial) he was a member of the Court which first heard the case.\textsuperscript{72}

\textsuperscript{70} MCM Note 62(d).
\textsuperscript{71} Court Martial orders, Navy (CM) 1-1940, 25.
\textsuperscript{72} BRD 418. But bias against accused be shown, members who tried the accused for a different offence can sit in trial. 3 ETo 195.
(h) That he is an enlisted member who is assigned to the same unit as the accused.

(3) Grounds for issuable challenges are as follows:

(a) That the challenged law officer (military judge) or member has forwarded charges in the case with his personal recommendations concerning trial by Court-martial.

(b) That he has expressed a positive and definite opinion as to the guilt or innocence of the accused as to any offence charged.

(c) That he has acted in the same case as convening authority or as the legal officer or staff judge advocate to the convening authority.

(d) That he will act in the same case as the reviewing authority or as the legal officer or staff judge advocate to the reviewing authority.

(e) That (upon rehearing or new trial) he was the law officer (military judge) of the Court which first heard the case.

(f) That he will be a witness for the defence.

(g) That he testified or submitted a written statement in connection with the investigation of the charges (unless at the request of the accused).

(h) That he has officially expressed an opinion as to the mental condition of the accused.

(i) That, when it can be avoided, a member is junior in rank or grade to the accused.73

73 CMO 1-1940, 24 (Challenge not to be sustained where appointment was dictated by necessity).
(j) That he has a direct personal interest in the
result of the trial.

(k) That he is in any way closely related to the accused.

(l) That he is decidedly hostile or friendly to the
accused.74

(m) That (in a case involving an offence punishable by
death) a member has conscientious scruples against
imposing the death penalty.

(n) That, not having been present as a member when
testimony on the merits was heard, or other proceedings
were had in the case, his sitting as a member will involve
an appreciable risk of injury to the substantial rights of
an accused, which risk will not be avoided by a reading of
the record.

(o) Any other fact indicating that he should not sit.

_ How made_

Challenges must be made to only one person at a time. Ordinarily the
trial counsel first presents the challenges for his side and these are decided
before accused’s challenges are offered. Usually, the military judge is first
challenged, and then the members of the court, beginning with the junior
member. The challenged person ordinarily takes no part of the hearings
upon such challenge except when called upon to testify or make statement
as to his competency. The military judge, however, continues to rule upon
interlocutory questions arising during the hearings although the challenge
was made against him, and although he may, at the time such question
arises, be testifying under oath as to his own competency. The burden of
maintaining a challenge rests upon the challenging party. He may, if he so
desires, withdraw a challenge at any time before the challenged member is
excused or a vote has not been taken by the court upon the challenge.

74 Failure to sustain challenge was held reversible error. CMO 2-1940, 189.
How is it determined

The deliberation and voting upon a challenge is in closed session, and the military judge and the challenged member are excluded. The vote taken upon the challenge is by secret written ballot. The junior member of the court counts the votes, and the count is then checked by the president. A tie vote on a challenge disqualifies the challenged member.

RESPONSIBILITIES OF MILITARY JUDGE DURING THE TRIAL

The added role of the military judge (erstwhile law officer) has been brought out in the preceding pages. Accordingly, his role and responsibilities have been redrafted in the latest manual for Courts-martial, 1984, which are given in the succeeding paragraphs. The military judge is the presiding officer in a Court-martial. He shall determine the time and uniform for each session of a Court-martial. He shall ensure the dignity and decorum of the proceedings. Subject to the Code and the Manual, he shall exercise reasonable control over the proceedings to promote the purposes of the rules and the Manual. He shall rule on all interlocutory questions and all questions of law raised during the trial. He shall instruct the members on all questions of law and procedure which may arise. Subject to Rules for Courts-martial, 1984 (RCM), he shall exercise contempt power.

The Court-martial may act to obtain evidence in addition to that presented by the parties. This right of members is subject to an interlocutory ruling by the military judge. Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final. He may change the ruling made by that or another military judge in the case except a previously granted motion for a finding of not guilty, at any time during the trial. Sessions without members are appropriate for interlocutory questions, questions of law and instructions. Rulings by the President of Special Court-martial without the military judge are, more or less, similar to the military judge when he is present. However in case of a tie vote on a motion for a finding of not guilty
will be a determination against the accused and a tie vote on any other question in determination in favour of the accused.75

Presence of Military Judge, members and counsel

(a) Military Judge.

No Court-martial proceedings, except the deliberations of the members, may take place in the absence of the military judge, if detailed.

(b) Members.

Unless trial is by military judge alone pursuant to request by the accused, no trial may take place in the absence of any detailed member except: Article 39(a) Sessions under RCM 803; examination of members under RCM 911 (d); when the member has been excused under RCM 505 or 911 (f); or as otherwise provided in RCM 1102. No GCM proceeding requiring the presence of members may be conducted unless at least five members are present and, except as provided in RCM 911 (h), no special Court-martial proceeding requiring the presence of members may be conducted unless at least three members are present. Except as provided in RCM 503 (b), when an enlisted person has requested enlisted members, no proceeding requiring the presence of members may be conducted unless at least one third of the members actually sitting on the Court-martial are enlisted persons.

(c) Counsel.

As long as at least one qualified counsel for each party is present, other counsel for each party may be absent from a Court-martial Session. An assistant counsel who lacks the qualifications necessary to serve as counsel for a party may not act at a session in the absence of such qualified Counsel.

75 RCM, Rule 801.
Effect of replacement of member or military judge

(a) Members. When after the presentation of evidence on the merits has begun, a new member is detailed under RCM 505 (c) (2) (B), trial may not proceed unless the testimony and evidence previously admitted on the merits, if recorded verbatim, is read to the new member, or, if not recorded verbatim, and in the absence of a stipulation as to such testimony and evidence, the trial proceeds as if no evidence has been presented.

(b) Military Judge. When, after the presentation of evidence on merits has begun in trial before military judge alone, a new military judge is detailed under RCM 505 (e) (2) trial may not proceed unless the accused requests, and the military judge approves, trial by military judge alone and a verbatim record of the testimony and evidence or a stipulation thereof is read to the military judge, or the trial proceeds as if no evidence has been presented.76

Accused’s request as to trial by Military Judge alone

Before the end of the initial article 39 (a) Session, or in the absence of such a Session, before assembly, the military judge shall ascertain, as applicable whether in a non capital case, the accused requests trial by the military judge alone. Trial by military judge is not permitted in capital cases77 or in Special Courts – martial in which no military judge has been detailed. Request for trial by military judge alone shall be made in writing or shall be made orally which can be taken on record of the proceeding. Upon receipt of a timely request for trial by military judge alone the military judge shall ascertain whether the accused has consulted with his defence counsel and has been informed of the identity of the military judge and of his right to trial by members and approve or disapprove the request in the military judge’s discretion.

76 RCM Rule 805
77 RCM Rule 201 (f) (1) ©.
__ Arraignment

Arraignment shall be conducted in a Court - martial session and shall consist of reading the charges and specifications to the accused and calling on him to plead. The accused may waive the reading. Arraignment is complete when the accused is called upon to plead; the entry of pleas is not part of the arraignment.78

__ Motions

A motion is an application to the military judge for particular relief. A motion may be oral or, at the discretion of the military judge, written. A motion shall state the grounds upon which it is made and shall set forth the ruling or relief sought. The substance of a motion, not its form or designation, shall control. In pretrial motions, any defence, objection or request which is capable of determination without the trial of the general issue of guilt may be raised before trial. Defences or objections based on defects (other than jurisdictional defects) in the preferral, forwarding, investigation or referral of charges must be raised before plea is entered. Such defects could include unsworn charges, inadequate Article 32 investigation and inadequate pretrial advice.79 Similarly, defences or objections based on defects in the charges and specifications (other than any failure to show jurisdiction or to charge, which objection should be resolved by the military judge at any time during the pendency of the proceedings); motions to suppress evidence; motions for discovery under RCM 701 or for production of witnesses or evidence; motions for severance of charges or accused; or objections based on denial of request for individual military counsel or for retention of detailed defence counsel when individual military counsel has been granted must be raised before a plea is entered.

78 RCM Rule 904.
79 RCM, Rule 307; 401 - 407; 601 - 604.
Unless otherwise provided in the RCM, the burden of proof on any factual issue, the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence.\(^{80}\)

In the case of a motion to dismiss for lack of jurisdiction, denial of the right to speedy trial under RCM 707, or the running of the statute of limitations, the burden of persuasion shall be upon the prosecution.

(a) **Ruling on motions**

A motion made before pleas are entered shall be determined before pleas are entered unless, if otherwise not prohibited by RCM, the Military Judge for good cause orders that the determination be deferred until trial of the general issue or after findings, but no such determination shall be deferred if a party's right to review or appeal is adversely affected. Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record.

(b) **Effect of failure to raise defences or objections.** Failure by a party to raise defences or objections or to make requests which must be made before pleas are entered under Sub Sections (b) of Rule 905 of RCM, shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other requests, defences or objections, except lack of jurisdiction or failure of a charge to allege an offence, must be raised before the Court-martial is finally adjourned for that case and, unless otherwise provided in the RCM, failure to do so shall constitute waiver.

(c) **Reconsideration.** On request of any party or *sua sponte*, the military judge may reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge.

(d) **Written motions.** Written motions may be submitted to the military judge after referral and when appropriate, they may be supported by affidavits, with service and opportunity to reply to the

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80 See Military Rules of Evidence (Mil R.Evid.) 104 (a).
opposing party. Such motions may be disposed of before arraignment without a session.

(e) Application to convening authority. Except as otherwise provided in the RCM, any matter which may be resolved upon motion without trial of the general issue of guilt may be submitted by a party to the convening authority before trial for decision. Submission of such matter to the convening authority is not, except as otherwise provided in RCM, and is, in any event, without prejudice to the renewal of the issue by timely motion before the military judge.

(f) Production of statements on motion to suppress. Except as provided in this Sub Section (Rule 905 (k)), RCM, Rule 914 shall apply at a hearing on a motion to suppress evidence under Sub Section (b) (3) of Rule 905. For this purpose, a law enforcement officer shall be deemed a witness called by the Government, and upon a claim of privilege, the military judge shall excise portions of the statement containing privileged matter.

(g) Motions for appropriate relief (Rule 906). A motion for relief is a request for a ruling to cure a defect which deprives a party of a right or hinders a party from preparing for trial or presenting its case. The following may be requested by motion for appropriate relief.

(i) Continuances. A continuance may be granted only by the military judge. The military judge, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just. Article 40 refers. Whether a request for continuance should be granted is a matter within the discretion of the military judge. Reason for continuance may include insufficient opportunity to prepare for trial; non-availability of an essential witness; the interest of the government in the order of trial of related cases; and illness of an accused, counsel, military judge, or member.\(^\text{81}\)}
(ii) Record of denial of individual military counsel or of denial of request to retain detailed counsel when a request for individual military counsel was denied, which was denied when the accused is represented by individual military counsel, and if the accused so requests, the military judge shall ensure that a record of the matter is included in the record of the trial, and may make findings. The trial counsel may request a continuance to inform the convening authority of those findings. The military judge may not dismiss those charges or otherwise effectively prevent further proceedings based on this issue. However, the military judge may grant reasonable continuances until the requested military counsel can be made available if the unavailability results from temporary conditions or if the decision of non-availability is in the process of review in administrative channels.

(iii) Correction of defects in the Article 32 investigation or pretrial advice.

(iv) Amendment of charge(s) or specifications. A charge or specification may not be amended over the accused's objection unless the amendment is minor within the meaning of Rule 603 (a) of the RCM. An amendment may be appropriate when a specification is unclear, redundant, in artfully drafted, or is laid under the wrong article. A specification may be amended by surplusage, or substituting or adding new language. Surplusages may include irrelevant or redundant details or aggravating circumstances which are not necessary to enhance the maximum authorized punishment or to explain the essential facts of the offence. When a specification is amended after the accused has entered upon a plea to it, the accused should be asked to plead anew to the amended specification.
(v) Severance of a duplicitous specification into two or more specifications. Each specification may state only one offence. A duplicitous specification is one which alleges two or more separate offences. Lesser included offences are not separate acts. The sole remedy for a duplicitous specification into two or more specifications, each of which alleges a separate offence contained in the duplicitous specification. However, if the duplicitousness is combined with or results in other defects, such as misleading the accused, other remedies may be appropriate.

(vi) A bill of particulars may be amended at any time, subject to such conditions as justice permits. The purpose of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offence when the specification itself is too vague and indefinite for such purposes.

(vii) Discovery and production of evidence and witnesses.

(viii) Relief from pretrial confinement in violation of RCM 305.

(ix) Severance of multiple accused, if it appears that an accused or the government is prejudiced by a joint or common trial. In a common trial, a severance shall be granted whenever any accused, other than the moving accused, faces charges unrelated to those charged against the moving accused. Such a request should be liberally considered in a common trial and should be granted if a good cause is shown. For example, a severance is ordinarily appropriate when the moving party

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82 RCM, Rule 307 (c) (4).
83 RCM, Rule 907 (b) (3).
(x) Severance of offences, but only to prevent manifest justice.

(xi) Change of place of trial. The place of trial may be changed when necessary to prevent prejudice to the rights of the accused or for convenience of the government if the rights of the accused are not prejudiced thereby. The convening authority may decide about such a course of action, when necessary, as long as the choice is not inconsistent with the ruling of the military judge.

(xii) Determination of multiplicity of offences for sentencing purposes.

(xiii) Preliminary ruling on admissibility of evidence. A request for a preliminary ruling on admissibility is a request that certain matters which are ordinarily decided during trial of the general issue be resolved before they arise, outside the presence of members. The purpose of such a motion is to avoid the prejudice which may result from bringing inadmissible matters to the attention of the court members. Whether to rule on an evidentiary question before it arises during trial on the general issue is a matter within the discretion of the military judge.85

(b) Motions to dismiss (Rule 907).

(i) In general. A motion to dismiss is a request to terminate further proceedings as to one or more charges and specifications on grounds capable of resolution without trial of the general issue of guilt. Dismissal of a specification terminates the proceeding with respect to that specification unless the decision to dismiss is reconsidered and reversed by the military judge. Dismissal of a specification on grounds stated in Sub Section (b) (1) or (b) (3) (A) below does not

84 RCM, Rule 307 © (5) ; 601 (e) (3).
85 See RCM, Rule 905 (b) (3) & (d) ; and Mil. R. Evid. 304 (e) (2) ; 311 (e) (2) ; 321 (d) (2).
ordinarily bar a later Court-martial for the same offence if the grounds for dismissal no longer exist.

(ii) **Grounds for dismissal.** Grounds for dismissal include the following:-

(a) **Non waivable grounds.** A charge or specification shall be dismissed at the stage of the proceeding if the Court-martial lacks jurisdiction to try the accused for the offence or the specification fails to state an offence.

(b) **Waivable grounds.** A charge or specification will be dismissed on motion made by the accused before the final adjournment of the Court-martial in that case if dismissal is required under rule 707; or the statute of limitations (Article 43) has run, provided that, if it appears that the accused is unaware of the right to assert the statute of limitations in bar of trial, the military judge shall inform the accused of his right.

Another waivable ground is that the accused has previously been tried by Court-martial or federal civilian court for the same offence, provided that no Court-martial proceeding is a trial in the sense of Rule 907 unless presentation of evidence on the general issue of guilt has begun; no Court-martial proceeding which has been terminated under RCM 604 (b) or RCM 915 shall bar later prosecution for the same offence or offences, if so provided in those rules. No Court-martial proceeding in which an accused has been found guilty of any charge or specification is a trial in the sense of this rule until the finding of guilty has become final after review of the case has been fully completed and no Court-martial proceeding which lacked jurisdiction to try the accused for the offence is a trial in the sense of this rule. Prosecution is barred by a pardon by the President. A pardon may grant individual a general amnesty. Prosecution is also barred by immunity from prosecution granted by a person authorized to do so. Constructive condonation of desertion established by unconditional restoration to duty without trial of a deserter by a General Court Martial convening authority who knew about the desertion or prior punishments
under Article 13 or 15 of the same offence, if that offence was minor are also barred from prosecution.

A specification may be dismissed upon timely motion by the accused if the specification is so defective that it substantially misled the accused, and the military judge finds that, in the interest of justice, trial should proceed on remaining charges and specifications without undue delay or the specification is multiplicitous with another specification, is unnecessary to enable the prosecution to meet the exigencies of proof through trial, review and appellate action and should be dismissed in the interest of justice. A specification is multiplicitous with another if it alleges the same offence, or an offence necessarily included in the other. A specification may also be multiplicitous with another if they describe substantially the same misconduct in two different ways. For example, assault and disorderly conduct may be multiplicitous if the disorderly conduct consists solely of the assault.86

(i) Pleas (Rule 910)

The accused may plead ‘Guilty” or “not guilty” to a charge. He may plead, by exceptions or exceptions and substitutions, not guilty to an offence as charged, but guilty to an offence included in that offence. A plea to “guilty” may not be received as to an offence for which the death penalty may be adjudged by the Court-martial.

-- Conditional pleas. With the approval of the military judge and consent of the government, an accused may enter a conditional plea of guilty, reserving in writing the right, on further review or appeal, to review of the adverse determination of any specified pre trial motion. In case the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. The Secretary concerned may prescribe as to who may consent for the government, unless otherwise prescribed by the Secretary concerned, the trial counsel may consent on behalf of the government.

86 RCM, Rule 1003 (c) (1) (c) & Rule 908.
If an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.

--- Advice to the accused. Before accepting a plea of guilty, the military judge shall address the accused personally and inform him of and determine that the accused understands the nature of the offence, to which the plea is offered, the mandatory minimum penalty, if any, provided by law and the maximum penalty provided by law; that in General Courts Martial and Special Courts Martial, if the accused is not represented by counsel, he is told that he has a right to be represented by counsel at every stage of the proceedings; that the accused has a right to plead not guilty or to persist in that plea if already made, and that the accused has a right to be tried by Court-martial and that at that trial he has a right to confront and cross examine witnesses against him and the right against self-incrimination. Further he will be informed that if he pleads guilty, there will not be a trial of any kind as to those offences to which the accused has so pleaded, so that by pleading guilty, the accused waives the right described above. Lastly, that if the accused pleads guilty, the military judge will question the accused about the offences to which he has pleaded guilty, and if the accused answers these questions under oath, on the record, and in the presence of the counsel, the accused’s answers may later be used against the accused in a prosecution for perjury or false statement. The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threat or of promises apart from a plea agreement under Rule 705 of the RCM. He shall also inquire whether the accused’s willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or the trial counsel, and the accused or defence counsel. The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea.
In case of a plea agreement (RCM 705), the military judge shall ensure that the accused understands the agreement. If it contains any terms which are unclear or ambiguous in nature, he should obtain clarifications from the parties. In case of any doubt in understanding of the terms in the agreement by the accused, the military judge shall explain those terms to the accused.

Findings based on a plea of guilty may be entered immediately upon acceptance of the plea at Article 39 (a) Session, unless:

1. Such action is not permitted by regulations of the Secretary concerned;

2. The plea is to a lesser included offence and the prosecution intends to proceed to trial on the offence as charged; or

3. Trial is by special Court-martial without a military judge, in which the President of the Court-martial may enter findings based on the pleas without a formal vote except when Sub Section (g) (ii) as given above, applies.

If after acceptance of the plea but before the sentence is announced, the accused requests to withdraw the plea of guilty and substitute a plea of not guilty or a plea of guilty to a lesser included offence, the military judge may, as a matter of discretion, permit the accused to do so.

(j) **Statements by accused inconsistent with plea.** If after finding (s) but before the sentence is announced, the accused makes a statement before a Court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If, following such inquiry, it appears that the accused entered the plea improvidently or through lack of understanding of its meaning and effect, a plea of not guilty shall be entered as to the affected charges and specifications.
Assembly of Court Martial and introduction of evidence. On a plea of not guilty by the accused or when the plea of guilty offered by the accused is altered to not guilty due to various circumstances as discussed above, the trial proceeds further. The military judge shall announce the assembly of the Court - martial.  

Order of examination of witnesses. Witness are usually examined in the following order: witnesses for the prosecution, witnesses for the defence, witnesses for the prosecution in rebuttal, witness for the defence in rebuttal and lastly evidence as per discretion of the military judge evidence as requested by the members. Order may be varied by the court in its discretion, and either or both sides may be allowed to reopen the case after it is closed in order to permit the introduction of testimony previously omitted.

After the military judge has briefed the members of their duties and procedure to be followed during the trial and other appropriate matter, each party may make one opening statement to the Court - martial before presentation of evidence has begun. The defence may like to make its statement after the prosecution has rested, before the presentation of evidence for the defence. The military judge may, as a matter of discretion, permit the parties to address the Court - martial at other times. Counsel should confine their remarks to evidence they expect to be offered, which they believe in good faith, will be available and admissible and the brief statement of the issues in the case.

Each witness must testify under oath. After a witness is sworn, the witness should be identified for the record (with all his particulars as to his name, rank and unit and full address, in case of a civilian). The party calling the witness conducts direct examination of the witness, followed by the cross examination of the witness by the opposing party. Redirect and
re-cross examination are conducted as necessary, followed by any questioning by the military judge and the members.

All documentary and real evidence (except marks or wounds on a person's body) should be marked for identification when first referred to in the proceedings and should be included in the record of trial whether admitted in evidence or not.90 “Real evidence” includes physical objects, such as clothing, weapons and marks or wounds on a person's body. If it is impracticable to attach an item of evidence to the record, the item should be clearly and accurately described by testimony, photographs, or other means so that it may be considered on review. Similarly, when documentary evidence is used, if the document cannot be attached to the record (as in the case of an original official record or a large map), a legible copy or accurate extract should be included in the record. When a witness points to or refers to certain parts of the map, photographs, diagram, chart or other exhibit, the place to which the witness pointed or referred should be clearly identified for the record, either by marking the exhibit or by an accurate description of the witness's actions with regard to the exhibit.

**Views and inspections.** The military judge may, as a matter of discretion, permit the Court-martial to view or inspect premises or a place or an article or object. Such a view or inspection shall take place only in the presence of all the parties, the members and the military judge. A person familiar with the scene may be designated by the military judge to escort the Court-martial. Such person shall perform the duties of escort under oath. He shall not testify but may point out particular features prescribed by the military judge. Any statement made at the view or inspection by the escort party, the military judge, or any member shall be made as part of the record.

When offered evidence would be subject to exclusion upon objection, the military judge may, as a matter of discretion, bring the matter to the attention of the parties and may, in the interest of justice, exclude the evidence without an objection by a party. The military judge should not exclude evidence which is not objected to by a party except in extraordinary circumstances. Counsel should be permitted to try the case and present the

90 See RCM, Rule 1103 (b) (2) (C) (c).
evidence without unnecessary interference by the military judge. The military judge may, as a matter of discretion, permit a party to reopen its case after it has rested.

_ Mistrial (Rule 915)_

The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cause substantial doubt upon the fairness of the proceedings. A mistrial may be declared as to some or all charges, and as to the entire proceedings or as to only the proceedings after findings. The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons. As examples, a mistrial may be appropriate when admissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members or when members engage in prejudicial misconduct. Also a mistrial is appropriate when the proceedings must be terminated because of a legal defect, such as a jurisdictional defect, which cannot be cured, for example, when the referral is jurisdictionally defective. On motion for a mistrial or when it otherwise appears that grounds for a mistrial may exist, the military judge shall inquire into the views of the parties on the matter and then decide the matter as an interlocutory question. A declaration of a mistrial shall have the effect of withdrawing the affected charges and specifications from the Court-martial. Such a declaration shall not prevent trial by another Court-martial on the affected charges and specifications except when the mistrial was declared after jeopardy attached and before findings, and the declaration was the abuse of discretion and without the consent of the defence or the direct result of intentional prosecutorial misconduct designed to necessitate a mistrial.

\[91\] See Mil.R.Evid. 103.
\[92\] See RCM, Rule 905 (g).
Defences

Defences include any special defence which, although, not denying the accused committed the objective acts constituting the offences charged, denies, wholly or partially criminal responsibility for those acts. Such defences are called "affirmative defences". "Alibi" and "good character" are not special defences93. Once a defence under Rule 916 is placed in issue by some evidence, the prosecution shall have the burden of proving beyond a reasonable doubt that the defence did not exist.

A death, injury or other act caused or done in the proper performance of legal duty is justified and not unlawful. The duty may be imposed by statute, regulation or order etc. For example, killing an enemy combatant or otherwise during hostilities or battle is justified.

(a) Obedience to Order. It is a defence to any offence that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary, the lawfulness of an order is finally decided by the military judge.94 An act performed pursuant to an unlawful order is excused unless the accused knew it to be unlawful or a person of ordinary sense and understanding would have known it to be unlawful.

(b) Self Defence. It is a defence to a homicide or assault in which the accused intended to kill or inflict grievous bodily harm that the accused apprehended, on reasonable grounds, that the death or grievous bodily harm was about so be inflicted wrongfully on the accused; and believed that the force the accused used was necessary for protection against death or grievously bodily harm.

The test for the first element of self – defence is objective, thus, the accused’s apprehension of death or grievous bodily harm must have been one which a reasonable prudent person would have held under the circumstances. Because this test is objective, such matters as intoxication

93 RCM, Rule 916. Also see RCM, Rule 701 (b) (1) and Mil.R.Evid. 404 (a) (1).
94 RCM, Rule 801 (e).
or emotional instability of the accused are irrelevant. On the other hand, such matters as the relative height, weight and general build of the accused and the alleged victim, and the possibility of the safe retreat are ordinarily among the circumstances which should be considered in determining the reasonableness of the apprehension of death or grievous bodily harm.

The test for the second element is entirely subjective. The accused is not objectively limited to the use of limited force. Accordingly, such matters as the accused’s emotional control, education and intelligence are relevant in determining the accused’s actual belief as to the force necessary to repel the attack.

(c) **Certain aggravated assault cases.** It is a defence to assault with a dangerous weapon or means likely to produce death or grievous bodily harm that the accused apprehended, on reasonable grounds, that bodily harm was likely to be inflicted wrongfully on the accused: and in order to deter the assailant, offered but did not actually apply or attempt to apply such means or force as would be likely to cause death or grievous bodily harm.

(d) **Other assaults.** It is a defence to any assault punishable under Article 90, 91, or 128 and not listed in Sub Sections (c) (1) or (2) of this rule that the accused apprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused: and believed that the force the accused used was necessary for protection against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm.

(e) **Loss of right to private defence.** The right to self defence is lost and the defences described in subsections (1) to (3) above shall not apply if the accused was an aggressor, engaged in a mutual combat, or provoked the attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, combat, or provocation and before the offence alleged occurred.
(f) **Defence of another.** The principles of self – defence under Sub – sections (b) to (e) above apply to defence of another. It is a defence to homicide, attempted homicide, assault with intent to kill or any assault under Articles 90, 91 or 128 that the accused acted in defence of another, provided that the accused may not use more force than the person defended was lawfully entitled to use under the circumstances.

(g) **Accident.** A death, injury or other event which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner is an accident and excusable. An act is not excusable when the act which caused the death, injury or event was a negligent act.

(h) **Entrapment.** It is a defence that the criminal design or suggestion to commit the offence originated in the government and the accused had no pre-disposition to commit the offence. The “government” includes “agents” or persons of the government. Entrapment occurs only when the criminal conduct is the product of the creative activity of the law enforcement officials.

(i) **Coercion or duress.** It is the defence to any offence except killing an innocent person that the accused’s participation in the offence was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably, continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defence shall not apply.

(j) **Inability.** It is a defence to refusal or failure to perform a duty that the accused was, though no fault of the accused, not physically or financially able to perform the duty. The test of inability is objective in nature. The accused’s opinion that a physical impairment prevented performance of the duty will not suffice unless the opinion is reasonable under all the circumstances. If the physical or financial inability of the
accused occurred through the accused’s own fault or design, it is not a defence.

(k) **Ignorance or mistake of fact.** Except as otherwise provided in this Sub-section, it is a defence to an offence that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offence. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused’s knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defence.

(l) **Lack of mental responsibility.** It is a defence to any offence that the accused was not mentally responsible for it. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacks substantial capacity to appreciate the criminality of that person’s conduct or to conform that person’s conduct to the requirements of law. As used in this rule, the terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise antisocial behaviour.

In partial mental responsibility, it is a mental condition not amounting to a general lack of mental responsibility under the above para but which produces a lack of mental ability at the time of the offence to possess actual knowledge or to entertain a specific intent or a premeditated design to kill is a defence to an offence having one of these states of mind as an element.

The procedure to be followed in such cases is that the accused is presumed to have been mentally responsible at the time of the alleged offence. This presumption continues until some evidence to the contrary is admitted. If a question is raised concerning the mental responsibility of the accused, the military judge shall rule finally whether to direct an inquiry
under Rule 706. Whereas in special Courts martial without a military judge, the president shall rule finally except to the extent that the question is one of fact, in which case the president rule subject to objection by any member.

The issue of mental responsibility shall not be considered as an interlocutory question.

Ignorance or mistake of law, including general orders or regulations, ordinarily is not a defence.

Voluntary intoxication, whether caused by alcohol or drugs, is not a defence. However, evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill is an element of the offence. Although voluntary intoxication is not a defence, evidence of voluntary intoxication may be admitted in estimation.

Motion for a finding of not guilty.\textsuperscript{95}

The military judge, on motion by the accused or \textit{sua sponte}, shall enter a finding of not guilty of one or more offences charged after the evidence on either side is closed and before findings on the general issue of guilt are announced if the evidence is insufficient to sustain a conviction of the offence affected. If a motion for a finding of not guilty at the close of the prosecution case is denied, the defence may offer evidence on that offence without having reserved the right to do so. The motion shall specifically indicate wherein the evidence is insufficient. Before ruling on a motion for a finding of not guilty, whether made by counsel or \textit{sua sponte}, the military judge shall give each party an opportunity to be heard on the matter.

A motion for a finding of not guilty shall be granted only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential elements of an offence charged. The evidence shall be viewed in the light

\textsuperscript{95} RCM, Rule 917.
most favourable to the prosecution, without an evaluation of the credibility of witnesses.

A motion for a finding of not guilty may be granted as to part of a specification and, if appropriate, the corresponding charge as long as a lesser offence charged is alleged in the portion of the specification as to which the motion is not granted. In such cases, the military judge shall announce that a finding of not guilty has been granted as to specified language in the specification and, if appropriate, corresponding charge. In cases before members, the military judge shall instruct the members accordingly, so that any findings later announced will not be inconsistent with the granting of the motion.

A ruling granting a motion for a finding of not guilty is final when announced and may not be reconsidered. Such a ruling is a finding of not guilty of the affected specification, or affected portion thereof, and, when appropriate, of the corresponding charge. A ruling denying a motion of the finding of the not guilty may be reconsidered at any time before findings on the general issue of guilt are announced.

If all the evidence admitted before findings, regardless by whom offered, is sufficient to sustain findings of guilty, the findings need not be set aside upon review solely because the motion for finding of not guilty should have been granted upon the state of the evidence when it was made.

Findings

The general findings of a Court-martial state whether the accused is guilty of each offence charged. If two or more accused are tried together, separate findings as to each shall be made. General findings as to a specification may be guilty, guilty with exceptions, with or without substitutions, not guilty of the exceptions but guilty of any substitutions; or not guilty. Exceptions and substitutions may not be used to substantially change the nature of the offence or to increase the seriousness of the offence or the maximum punishment for it. For example, if 'A' and 'B' are joint accused and 'A' is convicted but 'B' is acquitted of the offence charged. 'A' should be found guilty by excepting the name of 'B' from the
specification as well as any other words indicating the offence was a joint one. If the offence fails to prove the offence charged but does prove an offence necessarily included in the offence charged, the fact finding may by exceptions and substitutions find the accused not guilty of the offence charged but guilty of a lesser offence, which is included in the offence charged.

General findings as to a charge may be guilty, not guilty, but guilty of a violation of Article ____., or not guilty.

**Special findings.** In a trial by Court-martial composed of military judge alone; the military judge shall make special findings upon request by any party. Special findings may be requested only as to matters of fact reasonably in issue as to an offence and need be made only as to offences of which the accused was found guilty. Special findings may be requested at any time before general findings are announced. Only one set of special findings may be requested by a party in a case. If the request is for findings on specific matters, the military judge may require that the request be written. Special findings may be entered orally on the record at the Court-martial or in writing during or after the Court-martial, but in any event shall be made before authentication and included in the record of trial.

Findings may be based on direct or circumstantial evidence. Only matters properly before the Court-martial on the merits of the case may be considered. A finding of guilty of any offence may be reached only when the fact finder is satisfied that guilt has been proved beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason and common sense. A reasonable doubt is not merely a conjecture; it is an honest, conscientious doubt suggested by the evidence, or lack of it, in the case. An absolute or mathematical certainty is not required. It is not necessary that each particular fact advanced by the prosecution which is not an element of offence be proved beyond a reasonable doubt. The fact-finder should consider the inherent probability or improbability of the evidence, using
common sense and knowledge of human nature and should weigh the credibility of witnesses.96

Arguments by Counsels on findings After the closing of the evidence, trial counsel shall be permitted to open the argument. The defence counsel shall be permitted to reply. The trial shall then be permitted to reply. The trial counsel shall then be permitted to reply in rebuttal.

Arguments may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party’s theory of the case. Failure to object to improper argument before the military judge begins to instruct the members on findings shall constitute waiver of the objection.

The military judge may exercise reasonable control over the arguments.97

Arguments may include comments about the testimony, conduct, motives, interests and biases of witnesses to the extent supported by the evidence. Counsel should not express a personal belief or opinion as to the truth or falsity of any testimony or evidence or guilt or innocence of the accused, nor should counsel make arguments calculated to inflame passions or prejudices.

In arguments, counsels may treat the testimony of witnesses as conclusively establishing the facts related by the witnesses. Counsels may not cite legal authorities or the facts of other cases when arguing to members on findings.

Trial counsel may not comment on the accused’s exercise of the right against self incrimination or the right to counsel. MilR. Evid. 512 refers. Trial counsel may not argue that the prosecution evidence is unrebutted if the only rebuttal could come from the accused. When the accused is on trial for several offences and testifies only as to some of the offences. Trial counsel may comment on the accused’s failure to testify as to the others.

96 RCM, Rule 918 and notes thereto.
97 RCM, Rule 801 (a) (3).
When the accused testifies as to the merits regarding an offence charged, trial counsel may comment on the accused's failure in that testimony to deny or explain specific incriminating facts that the evidence for the prosecution tends to establish regarding that offence. Trial counsel may not comment on the failure of the defence to call witnesses or of the accused to testify at the Article 32 investigation or upon the probable effect of the Court-martial's findings on relations between the military and civilian communities. The rebuttal argument of the trial counsel is generally limited to matters argued by the defence. If the trial counsel is allowed to introduce new matters in closing arguments, the defence should be allowed to reply in rebuttal. However, this will not preclude trial counsel from presenting a final argument.

If an objection that an argument is improper is sustained, the military judge should immediately instruct the members that the argument was improper and they must disregard it. In extraordinary cases, improper argument may require a mistrial. The military judge should be alert to improper argument and take appropriate action when necessary.

Instructions by the Military Judge on findings

The military judge shall give the members appropriate instructions on findings. These consist of the statement of the issues in the case and an explanation of the legal standards and procedural requirements by which the members will determine findings. Instructions should be tailored to fit the circumstances of the case, and should fairly and adequately cover the issues presented. These are given after the arguments by the counsels and before the members close to deliberate on the findings, but the military judge may, upon request of the members, any party, or sua sponte give additional instructions at a later time. These instructions shall include the following:

1. A description of the elements of each offence charged, unless findings on such offences are unnecessary because they have been entered pursuant to a plea of guilty;

RCM, Rule 915.
RCM, Rule 919.
(2) A description of the elements of each lesser included offence in issue;

(3) A description of any special defence under Rule 916 in issue;

(4) A description that only matters properly before the Court-martial may be considered;

(5) A charge that the accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond reasonable doubt. In the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favour of the accused and the accused must be acquitted. If when a lesser included offence is in issue, there is a reasonable doubt as to the degree of guilt of the accused, the finding must be in a lower degree as to which there is no reasonable doubt; and the burden of proof to establish the guilt of the accused is upon the government.

(6) He will also give directions on the procedures under Rule 921 for deliberations and voting; and

(7) Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, *sua sponte*, should be given.

Other matters which may be the subject of instruction in appropriate cases include; inference, the limited purpose for which the evidence was admitted, the effect of character evidence, the effect of judicial notice, the weight to be given to a pre-trial statement, the effect of stipulations (Rule 811); that when a guilty plea to a lesser included offence has been accepted, the members should accept as proved the matters admitted by the plea, but must determine whether the remaining elements are established; that a plea of guilty to one offence may not be the basis for inferring the existence of a fact or element of another offence; the absence of the accused from the
trial should not be held against him and that no adverse inferences may be drawn from an accused’s failure to testify. (Mil. E. Evid. 301 (g)).

Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify in what respect the instructions given were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.  

**Deliberations and Voting on finding(s)**

After the military judge instructs the members on findings, the members shall deliberate and vote in a closed session. Only the members shall be present during deliberations and voting. Superiority of rank shall not be used in any manner in an attempt to control the independence of members in the exercise of their judgement.

Deliberations would include free and fair discussion of the merits of the case. Unless otherwise directed by the military judge, the members may take with them their notes, if any, any exhibits admitted in evidence and any written instructions. Members may request that the court-martial be reopened and the portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such request of the members. Voting on the finding of each charge and specification shall be by secret written ballot. All members present shall vote.

**Number of votes required to convict.**

A finding of guilty of an offence for which the death penalty is mandatory results only if all members present vote for a finding of guilty. As to any other offence, a finding of guilty results only if at least two-thirds members present vote for a finding of guilty. In computing the number of

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1. Also see Mil. R. Evid. 40, 405, 201, 201A & 304 (e).
2. Article 106
votes required to convict, any fraction of a vote is rounded up to the next whole number. For example, if there are five members, the concurrence of at least four would be required to convict.

Members shall not vote on a lesser included offence unless a finding of not guilty of the offence charged has been reached, the members shall vote on each included offence on which they have been instructed, in order of severity, beginning with the most severe. The members shall continue to vote on each included offence on which they have been instructed until a finding of guilty results or findings of not guilty have been reached as to each of such offence.

The procedure for voting shall be that each specification shall be voted on separately before the corresponding charge. The order of voting on several specifications under a charge or on several charges shall be determined by the president unless a majority of the members object. The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

Once the findings have been reached, they may be reconsidered only in accordance with Rule 924.

**Action after findings are reached.** After the members reached the findings on each charge and specification before them, the court-martial shall be reopened and the president shall inform the military judge that the findings have been reached. The military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the sentence and may assist the members in putting the findings in proper form. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the findings.  

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3 RCM, Rule 921.
Announcement of findings

Findings shall be announced by the president in the presence of all the parties after they have been determined. The military judge shall announce the findings when the trial is by military judge alone or when finding may be entered under Rule 910 (g) of the RCM.  

Impeachment of findings

Findings which are proper on their face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.

Deliberations of the members ordinarily are not subject to disclosure vide Mil. R. Evid. 606. Unsound reasoning by a member, misconception of the evidence or misapplication of law is not a proper basis for challenging the findings. However, when showing of a ground for impeaching the verdict has been made, members may be questioned about such a ground. The military judge determines, as an interlocutory matter, whether such an inquiry will be conducted and whether a finding has been impeached.  

Reconsideration of findings. Members may reconsider any finding reached by them before such finding is announced in open session. Any member may propose that a finding be reconsidered. If such a proposal is made in a timely manner, the question as to whether to reconsider shall be determined in a closed session by secret written ballot. Any finding of not guilty shall be reconsidered if a majority vote reaches for reconsideration. Any finding of guilty shall be reconsidered if more than one-third of the members vote for reconsideration. When the death penalty is mandatory, a request by any member for reconsideration of a guilty finding requires reconsideration. If a vote to reconsider a finding succeeds, the procedure as
given in Rule 921 shall apply. In a trial by the military judge alone, the military judge may reconsider any finding of guilty at any time before announcement of sentence.  

**Pre-Sentencing procedure**

After the findings of guilty have been announced, the prosecution and defence may present matter to aid court-martial in determining an appropriate sentence. Such matters shall ordinarily be presented in the following sequence: presentation by the trial counsel of the service date relating to the accused from the charge sheet; details of the accused as to his prior service as reflected in his personal record of service; evidence of prior convictions, if any; evidence of aggravation; and evidence of rehabilitative potential. The defence counsel shall present evidence in extenuation or mitigation or both. Thereafter, rebuttal by the trial counsel, argument by the trial counsel on sentence followed by argument of the defence counsel on sentence and lastly rebuttal arguments in the discretion of the military judge.

The military judge shall personally inform the accused of his right to present matters in extenuation and mitigation, including the right to make a sworn or unsworn statement or to remain silent and shall ask whether the accused chooses to exercise those rights.

**Matters to be presented by the defence.** Generally, the defence may present matters in rebuttal of any material presented by the prosecution and may present matters in extenuation and mitigate regardless of whether the defence offered evidence before the findings. Matters in extenuation of an offence serves to explain the circumstances surrounding the commission of any offence, including those reasons for committing the offence which do not constitute a legal justification or excuse. Matters in mitigation of an offence are introduced to lessen the punishment adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It would include the particulars acts of conduct or bravery, evidence of the reputation, record to show his efficiency level, fidelity subordination,

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6 RCM, Rule 924.
temperance, courage or any other trait desirable in a service member. The accused may make a sworn or unsworn statement in this regard. If he makes a sworn statement, he can be cross-examined by the trial counsel and the Court-Martial. The military judge may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers and such other writings of similar authenticity and reliability. There can be rebuttal to the above by the trial counsel and surrebuttal by the defence counsel.

**Sentence determination**

Subject to limitations in the Manual (RCM), the sentence to be judged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the Code, a court martial may adjudge any punishment authorized under the law in force. Subject to limitations in the Rules for Courts Martial-1984, a Court-Martial may adjudge the following punishments, that is to say Reprimand; forfeiture of pay and allowances; fine; loss of numbers, lineal position and seniority; reduction in pay grade; restriction to specified limits; hard labour without confinement; confinement, confinement on bread and water or diminished rations, punitive separation (Dismissal, dishonourable discharge or bad-conduct discharge); death and punishments under the laws of war.

While 'dismissal' applies to commissioned officers, commissioned warrant officers, cadets and midshipmen as may be adjudged by a general court martial, whereas 'Dishonourable discharge' and 'Bad-Conduct discharge' applies only enlisted personnel. A commissioned officer or Warrant Officer or a cadet or midshipman may not be reduced in grade by any court-martial. However, in time of war or national emergency, the Secretary concerned, or such under Secretary or Assistant Secretary as may be designated by the Secretary concerned, may commute a sentence of dismissal to reduction to any enlisted grade. Only a general court-martial may sentence a commissioned or warrant officer or a cadet or midshipman

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7 RCM, Rule 1001.
to confinement. A commissioned or warrant officer or a cadet or a midshipman may not be sentenced to hard labour without confinement. Only a general court-martial, upon conviction of any offence in violation of the code, may sentence a commissioned or warrant officer or a cadet or midshipman to be separated from the service with a punitive separation. In the case of commissioned officers, cadet or midshipman and commissioned warrant officers, the separation shall be by dismissal. In the case of all other warrant officers, the separation shall be by dishonourable discharge.⁸

__Announcement of Sentence__

The announcement of the sentence is made in open court as soon as it is determined. It must be made in the presence of the military judge, the accused and counsel for both the parties. A sentence is not itemized according to the offence set out by the charges and specifications. A single sentence is imposed based upon all the offences of which the accused has been found guilty. Though the announcement will not disclose the vote of any particular member, but the required percentage of members concurring in the sentence is included in the announcement. If there is any ambiguity observed in the sentence, the military judge brings that to the notice of the members so as to consider that observation and to carry out correction therein. When the court reconsiders the sentence, the result of such reconsideration is announced.

After a sentence has been announced, the court cannot reconsider the sentence with a view to increasing its severity unless the sentence prescribed for the offence of which the accused has been convicted is mandatory in nature.⁹

__Position of Military Judge vis-à-vis members of the court-martial__

The ‘law officer’ of the earlier Articles of War has been replaced by a military judge who is certified by the Judge Advocate General of each service to perform his duties as such. The ‘president’ of the Court, for all practical

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⁸ RCM, Rule 1002 & 1003.
⁹ UCMJ 62(b)(3). Also see Military Justice under the Uniform Code by Brig Gen (retd) James Snedekar, p.291.
purposes, is now the foreman of the jury. The accused may request trial before the military judge alone.10

Responsibilities of Military Judge

The military judge is the presiding officer in a court-martial. He is responsible for ensuring that the court-martial proceedings are conducted in a fair and orderly manner, without unnecessary delay or waste of time or resources. Unless otherwise specified, the president of a special court-martial without a military judge has the same authority and responsibility as a military judge.11 He shall determine the time and inform for each session of court-martial. He recesses or adjourns the court-martial as appropriate. Subject to Rule 504(d)(1), he may also determine the place of trial.12 He will ensure that the dignity and decorum of the proceedings are maintained. Subject to the Uniform Code and the Manual for Courts-Martial, 1984, he exercises reasonable control over the proceedings to promote the purposes of the said rules and the Uniform Code of Military Justice (Code). Vide RCM, Rule 102, he may within the framework established by the said Code and the Manual, prescribe the manner and order in which the proceedings may take place. Thus, he may determine: when, and what order, motions will be litigated; the manner in which voir dire (preliminary examination of a prospective juror by a judge to decide whether the member/prospect is qualified and suitable to serve on a jury) 13 will be conducted and challenges made; the order in which the witnesses may testify; the order in which the parties may argue on a motion or objection; and the time limits for argument. He should prevent unnecessary waste of time and promote the ascertainment of truth, but must avoid undue interference with the parties presentations or the appearance of partiality.

He rules on all interlocutory questions and all questions of law raised during the trial and instruct the members on questions of law and

11 RCM, Rules 502(b)(2) & 801(a).
12 RCM, Rule 906(b)(11).
procedure which may arise during the conduct of the case. He instructs the members concerning findings and sentence, and when otherwise appropriate.

(a) **Rules the Court.** The military judge may promulgate and enforce rules of the court. He may exercise contempt power.

(b) **Obtaining evidence.** The court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge. The members may request and the military judge may require that a witness be recalled, or that a new witness be summoned or other evidence produced. The members or the military judge may direct the trial counsel to make an inquiry along certain lines to discover and produce additional evidence.14

(c) **Interlocutory questions and questions of laws**

For the purpose of Rule 801(b), ‘Military Judge’ does not include the president of a special Court Martial without a military judge. Any ruling by the military judge upon a question of law, including a motion for a finding of ‘Not Guilty’ or upon any interlocutory question is final. A military judge may change a ruling made by that or another military judge in the case except a previously granted motion of a finding of not guilty, at any time during the trial. When required by the Manual or otherwise deemed appropriate by the Military Judge, interlocutory or questions of law shall be presented and decided at sessions held without members under Rule 803.

(d) **Rulings by the President of a Special Court-Martial without a Military Judge.**

Any ruling by the President without a military judge on any question of law other than a motion for a finding of guilty is final. Similarly, any ruling by him on any interlocutory question of fact, including a factual issue of mental capacity of the accused, or on a motion for a finding of guilty is final unless objected to by a member. He may change a ruling made by him

or by another President, except a previously granted motion for a finding of not guilty, at any time during the trial. Except as provided in Rules 505 and 912, all members will be present at all the sessions of a special Court-Martial without a military judge, including sessions at which questions of law or interlocutory questions are litigated. However, the President of a Special Court-martial may examine an offered item of real or documentary evidence before ruling on its admissibility without exposing it to other members.

(e) **Procedure for rulings by the President of a special court-martial without a military judge which are subject to objection by a member**

The President of a Court-Martial without a military judge shall determine whether a ruling is subject to objection. When a ruling by the President of a special court-martial without a military judge is subject to objection, the President shall so advise the members and shall give such instructions on the issue and the legal standards by which they will determine it if objection is made. When a member objects to a ruling by the President without a military judge which is subject to objection, the court-martial shall be closed, and the members shall vote orally, beginning with the junior in rank, and the question shall be decided by a majority vote. A tie vote on a motion for a finding of not guilty is a determination against the accused. A tie vote on any other question is a determination in favour of the accused. The president of a special court-martial without a military judge may close the court-martial and consult other members before ruling on a matter, when such ruling is subject to the objection of any member.

Questions of fact in an interlocutory question shall be determined by a preponderance of the evidence, unless otherwise stated in the Manual. In the absence of a rule in this manual assigning the burden of persuasion, the party making the motion or raising the objection shall bear the burden of persuasion.
A ruling on an interlocutory question should be preceded by any necessary inquiry into the pertinent facts and law. For example, the party making the objection, motion or request may be required to furnish evidence or legal authority in support of the contention. An interlocutory issue may have a different standard of proof. Most of the common motions have been discussed in specific rules in the Manual. The military judge or President of a court-martial may require a party to clarify a motion or request may be required to furnish evidence or legal authority in support of the contention. An interlocutory issue may have a different standard of proof. Most of the common motions have been discussed in specific rules in the Manual. The military judge or President of a Court-Martial may require a party to clarify a motion or objection or to make an offer of proof, regardless of the burden of persuasion, when it appears that the motion or objection is vague, inappropriate, irrelevant or spurious.

(f) **Effect of failure to raise defences or objections.**

Failure by a party to raise defences or objections or to make requests or motions which must be made at the time set by the Manual or by the Military Judge under the authority of the Manual, or prior to any extension thereof made by the military judge, shall constitute waiver thereof, but the military judge for good cause shown may grant relief from the waiver. 15

(g) **Court-Martial Sessions Without members under Article 39 (a)**

A military judge under Article 39(a), after service of charges, call the court-martial into session without the presence of the members. Such sessions may be held before and after assembly of the court-martial, and when authorized under the Manual, after adjournment and before action by the convening authority. All such sessions are a part of the trial and shall be conducted in the presence of the accused, defence counsel and the trial counsel in accordance with Rule 804 and 805 of the RCM and shall be made a part of the record.16

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15 RCM, Rule 801.
16 RCM, Rule 803.
(h) Presence of the accused at trial proceedings.

The accused shall be present at the arraignment, the time of the plea, every stage of the trial including session conducted under Article 39(a), voir dire and challenges of members, the return of the findings, sentencing proceedings and post trial sessions, if any, except as otherwise provided in this Rule (Rule 804).

The further progress of the trial to and including the return of the findings and, if necessary, determination of a sentence shall not be prevented and the accused shall be considered to have waived the right to be present whenever an accused, initially present; is voluntarily absent after arraignment; or after being waived by the military judge that disruptive conduct will cause the accused to be removed from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

The accused may expressly waive the right to be present at trial proceedings. There is no right to be absent, however, and the accused may be required to be present over objection. Thus, an accused cannot frustrate efforts to identify the accused at trial by waiving the right to be present. The right to be present is so fundamental, and the Government’s interest in the attendance of the accused so substantial, that the accused should be permitted to waive the right to be present only for good cause, and only after the military judge explains to the accused the right, and the consequences of foregoing it, and secures the accused’s personal consent to proceeding without the accused.

In any case, the accused may forfeit the right to be present by being voluntarily absent after arraignment.

Trial may proceed without the presence of an accused who has disrupted the proceedings, but only after at least one warning by the military judge that such behaviour may result in removal from the courtroom. In order to justify removal of the accused from courtroom, his
behaviour should be of such a nature as to materially interfere with the conduct of the proceedings. The military judge should consider alternatives to removal of a disruptive accused. Such alternatives include physical restraint (such as binding, shackling and gagging) of the accused or physically segregating the accused in the courtroom. Such alternatives need not be tried before removing a disruptive accused under Rule 804(b)(2). Removal may be preferable to such an alternative as binding and gagging, which can be an affront to the dignity and decorum of the proceedings. Disruptive behaviour of the accused may also constitute contempt.17

Presence of Military Judge, Members and Counsel.

No Court-Martial proceeding, except the deliberations of the members, may take place in the absence of the military judge, if detailed.

Unless trial is by the military judge alone pursuant to a request by the accused, no court-martial proceeding may take place in the absence of any detailed member except: Article 39(a) session under RCM, Rule 803; examination of members under RCM 911(d); when the member has been excused under RCM 505 or 911(f); or as otherwise provided in RCM 1102. No General Court-Martial proceeding requiring the presence of members may be conducted unless at least five members are present and, except as provided in RCM 911(h), no special court-martial proceeding requiring the presence of members may be conducted unless at least one-third of the members actually sitting on the court-martial are enlisted persons.

As long as at least one qualified counsel for each party is present, other counsel for each party may be absent from a court-martial session. An assistant counsel who lacks the qualifications necessary to serve as counsel for a party may not act at a session in the absence of such qualified counsel.

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17 RCM, Rule 809. Also see Rule 804.
PROCEDURE OF A SPECIAL COURTS-MARTIAL

In most respects, the procedure of a special court-martial is similar to that of a general court-martial. In the procedure for convening, organisation, preliminary matters relative to challenges, motions, pleas, opening statements, stipulations, introduction of evidence, power to punish for contempt, arguments, instructions to the court and the determination and announcement of findings and sentence, special courts martial closely follow the procedure of general courts-martial. There are some variations, which occur, however, due to smaller number of members necessary to constitute a quorum, the lack of a military judge, the different qualifications of counsels and the possible summarization of testimony and procedure in the record of proceedings.

- **Distinctions.**

  1. The number of members which constitutes a quorum is three as in the case of District Court Martial. This includes enlisted person if requested by the enlisted accused, which will be one-thirds of the members of the court. As we have seen earlier, the quorum in case of a general court martial is five members.

  2. No military judge is appointed for a special court-martial. The president of the Special Court-Martial makes the rulings on all interlocutory questions other than challenges. These rulings are, however, subject to objection by another member of the court. If a member objects to a ruling of the President upon a question, the court is closed and the question is voted upon. On interlocutory questions other than challenges the vote is taken orally and the question is decided by a majority vote. A tie vote on a motion for a finding of not guilty or on a motion relating the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favour of the accused. The voting is done in closed session but the President announces the decision in open

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18 RCM, Rules 912 (h); see generally Rule 901 to 1011.
Before the court closes to vote on the findings, the President of the court-martial instructs the court as to the elements of each offence charged, the presumption of innocence, reasonable doubt and the burden of proof.

(3) The qualifications required of counsel for special court-martial used to be different earlier prior to the Military Justice Act 1968, but now these are the same. Now the defence counsel is to possess similar qualifications as the trial counsel.

(4) The record of trial need not contain a verbatim transcript of all the testimony and proceedings in open court, if a bad-conduct discharge is not imposed. A summarized report of the testimony, objections and other proceedings is sufficient if no reporter was appointed.

After the amendments to the Code was carried out by Military Justice Act, 1968, a military judge also forms a part of the special court-martial, as in the general court-martial. Similarly, a military judge alone may constitute a court if a military judge is detailed and if requested and approved as such under Rule 903. Further, in addition to counsels, assistant trial and associate or assistant defence counsel may be detailed at a special court-martial.

**Procedure of a Summary Court Martial**

The purpose of a Summary Court Martial is to administer justice promptly for relatively minor offences under a simple form of procedure. At the trial, the Summary Court Martial represents the government as well as ensures the interest of the accused to see that the accused does not suffer any disadvantage. If plea of not guilty is offered by the accused, the officer constituting the court thoroughly and impartially investigates both sides of the matter and assures that the interests of the government and the accused are safeguarded. The procedure prescribed for a general court-martial, so far as is applicable, is used as a guide for a Summary Court-Martial. A Summary Court-Martial has the same power as the trial counsel.
of the general or special court-martial to complete the attendance of witnesses by subpoena and to take depositions in proper cases. To obtain attendance of witnesses, the Summary Court Martial takes action similar to that taken by the trial counsel of a general or special court-martial. It has also a power to punish for contempt.

(a) Preliminary Procedure. The court corrects and initials slight errors or obvious errors in the charge sheet, but if substantial changes are required, he refers the matter to the convening authority. Departmental regulations may require or restrict the appointment of reporters for summary courts-martial. The accused is informed of his rights. He is asked whether he consents or objects to such trial and the court will give the accused a reasonable time to consider the question and to prepare his response. If an accused objects to be tried by the Summary Court-Martial, the court notes the fact on the charge sheet and returns the charges and allied papers to the convening authority. If the accused consents to trial or if he objects to trial and it appears that he has been and has elected to refuse non-judicial punishment for all the offences alleged, the summary court-martial proceeds with the trial. In a case, an accused tried by SCM was not informed by the court of his right to object to such trial. The accused asserted his right to be represented by counsel and throughout the trial conducted himself in a manner clearly indicating that the trial confused with the trial by special court-martial. Inasmuch as by such conduct, the accused had manifested his objection to trial by summary court-martial, the purported trial was held to be a nullity and no bar to a subsequent trial by a special court-martial for the same offence. The accused is advised about the general nature of the charges, the fact that they have been referred to a summary court-martial for trial, the identity of the officer who appointed the court, the name of the accuser, the name of the witnesses who will probably be called, the right of the accused to cross examine them or to have the court ask any questions which the accused desires to be answered, the right of the accused to call any witnesses or to produce any evidence in his own behalf with the assurance that the court will assist him in every possible

way to do so, his rights to testify on the merits or to remain silent, his right to make, after any findings of guilty are announced, an unsworn statement in mitigation or extenuation of any offence of which he may be convicted, and the maximum punishment which the court can adjudge if the accused is found guilty of the offence or offences charged.  

(b) Arraignment and pleas. The procedure involved during the arraignment is more or less the same as under the Army Act 1950. It consists of reading or showing the charges to the accused, making any necessary explanation of them, and asking the accused how he pleads to each specification or charge. If the accused pleads guilty to any specification or charge, the court explains the elements of the offence to which he has pleaded guilty. If the accused desires to change his plea or if the court is in doubt as to his understanding and desire to plead guilty, or if at any time during the trial the accused makes a statement, sworn or otherwise, inconsistent with his plea guilty, the court enters a plea of not guilty. Even though a plea of guilty to all the specifications and charges is allowed to stand, the court has a choice to proceed at once to find the accused guilty or to hear and consider all the evidence, whether on merits or in mitigation or extenuation. In some cases, the latter course will be dictated by the interests of justice. If after hearing the evidence, the court believes the plea of guilty to have been improvidently entered, it enters a plea of not guilty and proceeds as though the accused had pleaded not guilty.

(c) Introduction of evidence

To start with, witnesses for the prosecution are called and examined under oath. The accused is extended the right of cross examination of such witnesses. The court aids the accused in cross examination, if the accused desires it, either by suggesting questions or by actually asking questions suggested by the accused. On behalf of the accused, the court calls defence witnesses and obtains such other evidence as may tend to disprove or negate the guilty of the accused as to the charges or to explain the acts or

24 MCM 79(d)(1). See also UCMJ 31.
25 MCM 79(d) and UCMJ 45.
omissions charged, or to show extenuating circumstances or to establish grounds for mitigation. The court explains to the accused his right to testify on the merits or to remain silent, and gives to the accused full opportunity to exercise his election. Unless the convening authority directs otherwise, the evidence is not summarized or attached to the record.

(d) **Findings and sentence.** After the evidence has been heard, the summary court martial applies the same principles as for the general court martial and special court martial in determining the findings. If the accused has been found guilty of any of the offences, the court advises him of his right to submit matter in extenuation or mitigation, including the making of an unsworn statement. Before determining the sentence, the court shows or reads to the accused admissible evidence of previous convictions and the personal data on the charge sheet and asks him whether they are correct. The sentence is determined as per the principles laid down. The record is authenticated by the signature of the court.

We observe that the procedure for trial by Summary Court Martial is akin to trial by Summary Court Martial under the Indian Army Act, 1950, except that the convening authority to convene the Summary Court Martial is designated by the Secretary concerned. It is the person who may convene a general or special court-martial; the commander of a detached company or other detachment of the Army; the Commander of detached squadron or other detachment of the Air Force; the commander or officer in charge of any other command when empowered by the Secretary concerned or a superior competent authority to any of the above. Secondly, we find if the accused objects to be tried by Summary Court Martial before arraignment, he may not be tried by Summary Court Martial. In such a case, the convening authority may dispose of the case in accordance with RCM, Rule 401. Under the said Rule, the commander may dispose of the charges by dismissing any or all of them, forwarding any or all of them to another commander for disposition or referring any or all of them to a court-martial which the commander is empowered to convene. The minimum rank/grade of the Summary Court Martial is a Lieutenant of the Navy or Coast Guard or Captain of the Army, Air Force and Marine Corps. With

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26 RCM, Rule 1302 (c).
regard to the award of punishment it cannot award death, dismissal, dishonourable or bad-conduct discharge, confinement for more than one month, hard labour without confinement for more than 45 days, restriction to specified limits for more than two months or forfeiture of more than two-thirds of one month's pay. The accused does not have a right to counsel at the summary court martial, however, the convening authority may, as a matter of discretion, detail or otherwise make available a military attorney to represent the accused at a summary court-martial.

JOINT AND COMMON TRIALS

A joint trial is one in which two or more accused who are jointly charged with the commission of an offence(s) are tried together, whereas a common trial is one in which two or more accused who are separately charged with the commission of an offence(s), which although not jointly committed, were committed at the same time and place and are so closely related as to susceptible of proof by the same evidence, are tried together. In joint trials and in common trials, each accused shall be accorded the rights and privileges as if tried separately. Each accused may be represented by a separate counsel, make challenges for cause, make preemptory challenges (Rule 912), cross examine witnesses, elect whether to testify, introduce evidence, request that the membership of the court include enlisted persons, if an enlisted accused, and, if a military judge has been detailed, request trial by military judge alone. When different elections are made (and, when necessary, approved) as to court-martial composition a severance is necessary. Thus, if one co-accused elects to be tried by court-martial composed of officers, and a second requests that the enlisted members be detailed to the court, and a third submits a request for trial by military judge alone, which request is approved, three separate trials must be conducted.

If a joint or common trial, evidence which is admissible against only one or some of the joint or several accused may be considered only against the accused concerned. For example, when a stipulation is accepted which was made by only one or some of the accused, the stipulation does not apply
to those accused who did not join it. In such instances, the members must be instructed that the stipulation or evidence may be considered only with respect to the accused with respect to whom it is accepted.

In a common trial, a motion to sever is liberally considered. Such a motion should be granted in any case, however, if good cause is shown.

**Procedure in Revision, Rehearing, or new Trial**

(a) **Procedure in revision.** (1) Any court-martial may, on its own motion or at the discretion of the convening authority, be reconvened for the purpose of revising its action or correcting its record, but only the members of the court who participated in the findings and sentence have power to engage in the revision proceedings.

(2) Revision proceedings are begun in open court in the presence of the accused, counsel for both sides, the military judge and at least a quorum of the members who participated in the findings and the sentence. It is not essential that the military judge and counsel be the same as those who occupied those positions at the trial of the case, but if the new ones appear at the session in revision, their qualifications must be inquired into, they must be sworn and opportunity to challenge a new military judge must be given.

(3) In a general court-martial, the military judge calls the court to order, and the trial counsel, after accounting for personnel present, announces the reason for the session in revision. Any pertinent communication from the convening authority is read aloud by the trial counsel. The court may then ask the military judge for additional instructions and advice which, are given in open court and recorded. No witnesses are called or evidence taken in revision proceedings, but the court

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27 Mil. R. Evid. 306.
28 RCM, Rule 812. As to the difference between joint trial and common trials, see 12 ETO 147; 16 ETO 136. See also Logan v United States 144 U.S. 263, 296, 12 Sup. Ct. 617, 627 (1891).
29 MCM 80(b).
may refer to the record of the trial proceedings in the case. The court is then closed and the members deliberate.

(4) The court in revision may adhere to its former findings or sentence or both, or it MAY make revoke either or both and substitute a new finding or sentence or both. Such action is taken by secret written ballot in the same manner as was applicable to the original determination of findings and sentence. The action taken is announced in the open court as soon as determined. The court then adjourns. A copy of the record in revision is given to the accused and the original is forwarded to the convening authority.

(b) **Rehearing and new trials**

(1) Both a rehearing and a new trial are judicial proceedings before a court-martial, no member of which participated in the original trial proceedings. A rehearing is technically a continuation of the former trial proceedings, and the term was adopted to distinguish such continuation from the completely new and separate proceeding of a new trial which might be granted to an accused under a serious court-martial sentence, upon his petition based upon grounds of newly discovered evidence or fraud on the court.

(2) Except in the Summary Court Martial, the members of the court are not permitted to examine any part of the record of the original proceedings in the case other than the charges in the charge sheet, except when received in evidence in the proceedings at hand. The military judge or President of a special court-martial may, however, examine that part of the record of any prior proceeding which relates to errors there committed when necessary to make rulings in the proceedings at hand.

(3) A court-martial upon rehearing does not try the accused for any offence of which he was found not guilty by the first court-martial, if it found him guilty of other offences originally charged, the court-martial upon rehearing cannot, by the general rule, impose a sentence in excess of or

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30 UCMJ 63(b).
31 House Hearings 1180; UCMJ 73.
more severe than the original sentence. Reconsideration of a finding of not guilty being prohibited, a lesser offence included in the original charge cannot be made the basis of a sentence in rehearing proceeding. To this rule, there are two general exceptions. First, if the prior sentence was based upon a finding of guilty of an offence not considered on the merits of the original trial, such prior sentence is not a limitation. Second, if a mandatory sentence is prescribed, by the code for an offence, that sentence must be imposed regardless of the actual sentence imposed in the original trial. The trial counsel reminds the court of its limitations upon its discretion in adjudging a new sentence before the court is closed for deliberations upon a sentence. If the accused had undergone any portion of the sentence awarded to him in the previous trial, he would get the credit (set off) in the administrative execution of the sentence.

(4) A court-martial upon a new trial does not try the accused for any offence of which he was found not guilty by the first court-martial or for any offence for which he was not tried by the first court-martial. If it finds him guilty of other offences originally charged, the court-martial upon a new trial cannot impose a sentence in excess of or more severe than the original sentence as approved or affirmed. The trial counsel reminds the court of the limitation upon its discretion in adjudging a new sentence, before the court is closed for deliberation upon a sentence. Subject to this limitation, the court then imposes an appropriate sentence without regard to any credit to which the accused may be entitled by virtue of the prior execution of any part of his former sentence. Such credit is automatically given to him with administrative execution of the sentence. The record of the proceedings is forwarded by the convening authorities though the reviewing authorities to the Judge Advocate General who granted the accused's petition for a new trial and the secretary concerned may act upon the findings and the sentence.

When a rehearing on sentence is combined with a trial on the merits of one or more specifications referred to the court-martial, whether or not such specifications are being tried for the first time or reheard, the trial will proceed first on the merits, without reference to the offences being reheard.

32 UCMJ 63(b); 2 Bull. JAG. Army 141 (1943); 33 ETO 286; 75 BRD 360; 63 BRD 313.
on sentence only. After findings on sentence are announced, the members, if any, shall be advised on which the rehearing on sentence has been directed. Additional challenges for cause may be permitted, and the sentencing procedure shall be the same as at the original trial, except as otherwise provided in this Rule (Rule 810 of RCM). A single sentence shall be adjudged for all offences.

The accused at a rehearing or new or other trial shall have the same right to request enlisted members or trial by military judge alone as the accused would have at the original trial.

No member may, upon a rehearing or upon a new or other trial, examine the record of any former proceedings in the same case except when permitted to do so by the military judge after such matters have been received in evidence; or that the President of a special court-martial without a military judge may examine that part of the record of the former proceedings which relates to error committed at the former proceedings when necessary to decide the admissibility of offered evidence or other questions of law, and such a part of the record may be read to the members when necessary for them to consider a matter subject to objection by any member.33

**SALIENT FEATURES INTRODUCED BY MILITARY JUSTICE ACT, 1968**

(a) **Introduction**

In general terms, the Military Justice Act, 1968 makes nine major changes in the Uniform Code of Military Justice. These are given in the succeeding paragraphs.

(b) **Legally qualified defence Counsel.** Perhaps the most important provisions of this Act are those that increase the availability of legally qualified counsel to represent defendants before special courts-martial.

Since most of the servicemen cannot afford to hire a civilian lawyer and since the services (with the exception of Air Force) have generally taken

33 RCM, Rule 810(a)(3), (b)(3) and (c).
the position that military lawyers are not available for assignment as defence counsel in special courts-martial, the overwhelming majority of servicemen tried by special courts-martial are represented by non-lawyer officers who know next to nothing about military law. Since the special court-martial is the most used of the three military courts, the absence of a requirement for lawyer defence counsel in these tribunals is particularly significant.

The special court-martial has evolved into a complicated legal proceedings, purporting to provide a full jury trial and to ensure due process and bound by legal statutes and precedents. Complex legal problems of admissibility of evidence, interpretation of laws and regulations, and instructions and charges arise frequently in these courts. Moreover, although the six months maximum confinement authority of such courts is not particularly great, they are empowered to adjudge a bad-conduct discharge which is a lifetime liability since it carries a stigma equivalent to that of a dishonourable discharge adjudged by a general court-martial. In addition, the right to counsel in civilian courts has greatly increased in eighteen years since enactment of Uniform Code. Under the decision in Gideon V Wainwright and related decisions, indigents in state and federal civilian courts are now entitled to free legal counsels in felony cases and some federal and state courts have extended the right to non-felony trials. The Army had taken the position that the Gideon rule does not apply to courts-martial and had made no move to provide a lawyer counsel in all special courts-martial, and the Army found itself lagging behind the civilian courts in respect of this vital constitutional guarantee. In fact, under a 1967 decision by the court of Military Appeals applying the Miranda principles to military interrogation procedures, the Army was now in the anomalous position of providing a serviceman a lawyer during interrogation but not during his trial, if trial was by special court-martial.

34 Joint hearing of the Congress at page 912. These hearings were to discuss the Bill to improve Administration of Justice in the Armed Services, before the Sub Committee on the Judiciary and a special sub committee of the committee on Armed Forces, U.S. Senate, 89th Congress, 2nd session (cited as Joint Hearings).
36 United States V Tempia, 16 USCMA 629, 37 CMR 249 (1967).
Although, the Armed Forces for many years resisted proposal for requiring lawyer defence counsel in special courts-martial, they finally agreed to support a proposal limited to special court-martial empowered to adjudge bad conduct discharges. The House bill contained such a provision.

Now the proposal which was enacted into law reads that a lawyer defence counsel be mandatorily required only in special courts-martial empowered to adjudge bad conduct discharges.37 In all other special courts-martial lawyer defence counsel must be provided, unless waived by the accused, except when such counsel “cannot be obtained on account of physical conditions of military exigencies” in which case the commander ordering the trial in the absence of a defence lawyer must make “a detailed written statement, to be appended to the record, stating why (lawyer defence Counsel) could not be obtained”.38 The Senate report on the bill made it clear that the requirement for lawyer defence counsel in special courts-martial not empowered to adjudge punitive discharges is intended to be mandatory except in the most unusual cases of genuine unavailability because of such things as geographical isolation or combat conditions.39 It is hoped that the manpower problems in provisioning lawyer defence counsels have been solved to a large extent with enough effort and imagination and they are further being dealt with by the expanding Judge Advocate General’s Corps and by using non-JAG military lawyers to serve as defence counsels in special courts-martial.40

--- **Military Judges**

Clearly, the next most important change made by the Act are those that increase the participation of law officers in courts-martial, enhance their prestige and further safeguard their independence from unlawful command influence. As brought out earlier, the old designation of “law

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37 Military Justice Act, 1968 (MJA), Section 2(5).
38 Ibid, Section 2(10)(B).
39 Senate report No 1601, 90th Congress, 2d Session. 8 (1968).
40 Each year there are more than ten times as many JAG applications by graduating law students as the services can accept. Most unsuccessful applicants go into the military in non-legal capacities. In the past, only the Navy had used non-JAG lawyers in courts-martial. Also see “The Military Justice Act of 1968” by Sam Ervin Jr, published in Military Law Review- Vol 45, pp.84-96.
“officer” was changed to “Military Judge”. They preside over the courts-martial to which they are assigned much as a federal district court judge does, with roughly equal powers and functions. They rule with finality on all questions of law, decide on requests for continuances, rule on challenges to members, instruct the members on the applicable law, and under the new provisions, conduct pre-trial sessions without the attendance of the members of the court for the purposes of ruling on preliminary matters and performing generally the functions performed in pre-trial session conducted by federal district court judges. He can try the accused serviceman by general or special court-martial much as a federal district court judge without a jury, provided he had been requested so by the accused and he, having approved such a request.

--- Improvements in Military Court procedures ---

The A reformed military trial procedures in a number of ways to streamline the heretofore cumbersome and unwieldy court-martial proceeding and brought it more nearly into line with criminal proceedings in federal district courts. They include that a requirement that a request by an enlisted defendants for non-officers members on the court must generally be made prior to convening of the members, a requirement that members be sworn in before the court convenes, elimination of the troublesome and litigation producing practice of permitting the military judge to confer in closed sessions with the members concerning the form of the findings, \(^{41}\) authorisation for the military judge or member-president of a court-martial to accept a plea of guilty and enter judgement thereon without a necessity of vote by members, \(^{42}\) changes in the method of record of some general courts-martial, \(^{43}\) and a provision for a summarized record of the some general courts-martial. \(^{44}\) However, by far the most important provision, besides the authorization of a single officer trial without members, is the provision amending the Uniform Code to authorize the convening by the military judge of a pretrial session without the attendance of members for the purpose of disposing interlocutory motions raising defences and objections, ruling upon

\(^{41}\) MJA, Section 2(9).
\(^{42}\) Ibid, Section 2(22).
\(^{43}\) Ibid, Section 2(23).
\(^{44}\) Ibid.
other matters that may legally be ruled upon by the military judge, holding the arraignment and receiving of the pleas of the accused and performing other procedural functions which do not require the attendance of the court members.

(c) **Trial by Military Judge alone.**

As mentioned earlier, perhaps the most innovative and potentially beneficial provision of the Act is the one amending the Uniform Code to permit the convening of a general or special court-martial consisting of a military judge sitting alone much as a federal district court judge may try a case without a jury. The armed services, which had vigorously supported this provision, anticipated that this new procedure would result in great reduction in both the time and manpower normally expended in trials by courts-martial.

This amendment provided that a case might be referred to single-officer court if the accused, before the court is assembled, so requested in writing, and the military judge approved it. This provision is modeled generally after rule 23(a) of the Federal Rules of Criminal Procedure. The command structure in the armed forces presents a possibility of undue prejudicial influence over the court by Commanding Officers that is not present in civilian administration of justice where the jury members are selected from a broad base of eligible persons pursuant to a detailed federal statute designed to ensure complete impartiality.

(d) **Protections against command influence.**

The uniform code presently contains provisions designed to reduce such command influence by prohibiting convening authorities and other commanding officers from attempting to improperly coerce or influence the action of a court-martial or any reviewing authority and prohibiting Commanding Officers from censuring or reprimanding the court or its members with respect to the actions of the courts.

(e) **Limitations on trial by Summary Court-Martial.** An additional provision added to the Act by the Senate Armed Services Committee amended the Uniform Code to assure that a serviceman may not
be tried over his objection by a Summary Court Martial, which, as noted above, consists of one commissioned officer and which affords literally no safeguards to the accused. Under the applicable provision of the Uniform Code as originally enacted, a serviceman initially offered trial by Summary Court-martial for an alleged offence could refuse such trial and demand trial by special or general court-martial. On the other hand, if his Commanding Officer initially offered him non-judicial punishment ("company punishment") for the offence and he elected to be court-martialled instead, he could not then refuse trial by a Summary Court-martial if his commander decided to refer his case to such a court. The Act amended the Uniform Code to provide that a serviceman offered trial by summary court-martial for an alleged offence may demand trial by a special or general court-martial instead (where his rights will be better protected) without regard to whether or not he has first been offered company punishment for the alleged infraction.

(f) Review and post conviction procedures.

In addition to the above changes in trials by courts-martial, the Act makes a number of changes in the post conviction remedies and protections afforded to servicemen and in the review structure. For example, it provided for the first time a form of release on bail after conviction pending appeal. The Uniform Code provides that a sentence to confinement begins to run from the date it is adjudged by the court, with the exception that periods during which it is suspended are to be excluded in computing the term of confinement. The Court of Military Appeals has held that a suspension of a sentence makes the accused a probationer as to the part suspended, and that the suspension may not thereafter be vacated except after a hearing to establish that the accused has violated his probation. Suspension of sentence cannot, therefore, be used effectively as a means of release pending appeal. In consequence, a convicted military prisoner must begin serving his sentence to confinement from the date it is adjudged, even though it may ultimately be reversed on appeal. It is reversed by the Court of Military

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45 UCMJ Art 20.
46 MJA, Section 2(6).
47 UCMJ, Art 57(b).
Appeals after undergoing full range of intermediate review, the prisoner probably will have served the entire sentence by the time a decision is rendered. If reversal comes earlier, at the court of military review level, he will at least have served several months of the sentence before reversal.

The Act amended the Uniform Code to correct this situation by permitting the convening authority or certain higher Commanding officers, upon application of the accused, to defer the service of a sentence to confinement pending appeal. The deferment would be terminated and the sentence would begin to run automatically when the sentence is approved upon review and ordered executed.

In addition, the Act also extended the time within which an accused may petition the Judge Advocate General for a new trial from one year to two years. It also amended the provision relating to the Boards of review by redesignating them as “Court of Military Review” and by directing the establishment of a Single Court of Military Review for each Armed Force to replace the several Boards of Review existing in each of the services. The amendment also provided that each court of Military Review shall be composed of one or more panels and that each panel shall be composed of not less than three appellate military judges.

We see, therefore, that the Military Justice Act, 1968 represented a big leap in the administration of military justice in the United States of America.

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2) MAJ, Section 2(24).
D. IN OTHER COUNTRIES

(i) RUSSIA

“In Russia, our regime is one of democratic dictatorship.”

Andrei Vishinsky

As brought out above, enough material is not available on Russian system of trial by courts martial. However, as gathered from some of the books available on Soviet/Russian military law, the Russian Court-martial system and the punishment awarded by them is given in the succeeding paragraphs.

Soviet Courts Martial system in the last eighty-five years

During the initial years of Soviet power, martial law in the form of revolutionary-military tribunals was imposed in the country. The emergency measures were justified. Subversive counter-revolutionary elements had infiltrated into the red army and were active on a large scale, and there were numerous cases of sabotage and desertion on the fronts. After the foreign interventionists were driven out of the country and the internal counter-revolution smashed, the revolutionary-military tribunals were reorganized into courts-martial and adapted to the peacetime Red Army structure. They were to tackle new problems aimed, as before, at strengthening Soviet authority and increasing the combat readiness and fighting capability of military units in the Army and Navy. The Great Patriotic War posed new problems. Courts-martial tried and punished enemy spies, covered and panic-mongers, protecting the inviolability of the oath of allegiance and Commanding Officer’s orders. After the war, courts-martial tried many people guilty of treason for having collaborated with the Nazis. On March 4, 1965, decree of the USSR Supreme Soviet Presidium ruled that the term of limitation does not apply to those who committed act of treason in the war, and courts-martial are still reopening such charges. In December 1986, for instance, the court-martial of Byelorussian Military District found guilty of a
man by the name of Vasyura who had sided with the Nazis in the war and sentenced him to death.\(^{50}\)

**Military Courts and Procedure**

In accordance with Article 102 of the Constitution of U.S.S.R., justice in the erstwhile U.S.S.R. shall be administered by the Supreme Court of the erstwhile U.S.S.R., the Supreme Court of the Constituent Republics, autonomous regions of the area, the special courts of the erstwhile U.S.S.R. and the people’s court.

**Military Tribunals**

Russian courts martial are the law courts of the erstwhile U.S.S.R. and as such constituted an integral part of the Russian legal system. Their activities were directed and supervised by the Military Judicial Board of the Supreme Court of the erstwhile U.S.S.R.\(^{51}\) On the basis of Article 102 of the constitution of the erstwhile U.S.S.R., the following of its special courts shall function:

- (a) Military tribunals;
- (b) Rail Transport line courts; and
- (c) Water transport line courts.

**(a) Composition**

Each of such court to compose of a Chairman and two people’s assessors. The military division of the Supreme Court of the erstwhile U.S.S.R. consisted of a chairman, deputy chairman, members of the Supreme Court and peoples assessors who could summon witnesses and took part in the hearing of the judicial cases.

**(b) Jurisdiction**

The military tribunal shall have jurisdiction to try the following cases:

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(a) All offences committed by servicemen, or reservists during training period;

(b) All offences committed by KGB officers, praporshchiks, michamans, sergeants, starshines, soldiers and seamen;

(c) All offences against the established rules of service as committed by officials of corrective-labour institutions;

(d) All charges of espionage;\(^{52}\)

(e) Crimes provided for in Article 17(2) of the Statute on state crimes which included counter-revolutionary crimes against administrative order which are especially dangerous for the State;

(f) Threatening the strength and power of the Worker-peasant Red Army who trial shall properly be entrusted to the military tribunals;

(g) Crimes in localities by virtue of exceptional circumstances where civil courts are not functioning;

(h) In case of involving complicity of several accused, one or more of whom is subject to the jurisdiction of a military tribunal and the other to that of a civil court. The case, in that event, cannot split, shall be examined by the military tribunal with respect to all the accused;

(i) A case in which there are several accused persons, some of which are amenable to the jurisdiction of the military tribunals and the other to that of the civil court and the case is interrelated by a unity of action and intention.\(^{53}\)

\(^{52}\) Ibid.

\(^{53}\) See "Documents on Soviet military law and administration", page 143.
**Trial Procedure**

Military tribunals shall act according to the rules of procedure established for provincial and corresponding courts by the Codes of Criminal Procedure of the erstwhile constituent republics. Military tribunals shall have the right to try cases within twenty-four hours after accusation is served on the prisoner. They shall try cases as a body of three permanent members.

**Courts Martial system under Stalin**

At that time, a number of acts aimed at making those guilty of criminal offences liable to more severe punishment and to limit the guarantee of justice were enacted. Charges of terrorist activities, sabotage and economic subversion were investigated within ten days, heard in absentia and the sentence carried out on the spot. The simplified legal procedure left the accused totally unprotected against the abuses by the investigating bodies. This opened the way to falsifying criminal cases by using unlawful methods of investigation, confession under duress and physical violence. The year 1934 saw the establishment of extra-court bodies empowered to enforce criminal penalties. The special board to the Commissariat of Home Affairs was established, as well as the notorious troikas (a group of three) with extraordinary powers at regional and district levels. These extra-court bodies were responsible for mass repression under Stalin. Unfortunately, the courts-martial served the same purpose. Of the 733 Red Army senior commanding officers and political workers, 579 were shot or sent to labour camps just before the outbreak of the war.

To be fair, many judges, communists of the true Leninist steeling, refused to accept the abuses of legal procedure. Some cases falsified by investigating bodies were sent back to be reinvestigated. Even in those dark years, acquittals were not impossible. But for such impartial decisions, the judges had to pay a serious, often tragic price.
Following the 20th Congress of the Communist Party, and above in the recent years, courts-martial have been contributing a great deal to the rehabilitation of Stalin’s victims. Many military leaders convicted unlawfully, including Mikhail Tukhachevsky, Iona Yakir, Ieronim Uborevich, August Kork and Vitaly Primakov had been exonerated. The process of rehabilitation of army victims is continuing.

**Forms of defences in legal procedure of the armed forces**

In the army, there are no special defences different from general legal ones. Any serviceman brought to trial is guaranteed the same defences as any other Soviet citizen in the court. He may defend himself, or he may apply for the services of a defending lawyer.

**Reformation of judicial bodies and law courts and the 27th Congress**

The issues of reforming the judicial bodies and law courts was raised at the 27th Congress and the 19th All-Union Conference of the Communist Party as the law courts in the country were losing much of their prestige and the military tribunals were to exception to it. The object of the legal system is now under way to restore and reinforce the prestige. One of the priorities is to improve the quality of criminal trials. For this reason, a major solution, which we see as a way of implementing the Party orientation towards improving the quality of justice, would be for courts-martial to strictly observe such principles of democratic legal procedure as equality of citizens before the law, glasnost and openness, avoiding any preconceived judgements or accusatory biases, implementing the principle of presumption of innocence. The object of all such efforts is to be guarantee the rights and interest of all Soviet citizen at large.

**Courts Martial and law courts and prevention of crimes.**

Whatever activity the courts-martial are carrying out — whether they are hearing a criminal case or lecturing troops on legal matters or making some other educational efforts — they do so to prevent crimes and offences and
promote legal order in military units and on naval vessels, coordinating their activities with the commanding officers, political bodies and military prosecutors.

They adopt many ways to impart legal education, such as, by way of open trials in army units, involvement of judges in legal propaganda and legal instruction. In addition, courts-martial supervise the ways that the causes of crimes and offences are being removed and give methodical advice to legal activists on methods of crime prevention. As other responsibilities, they help set-up comrades’ courts and supernumery legal advisory centres and officers law study courses with minimum curriculum of law.

It is one of the major objectives of military judges to make their preventive efforts in close contact with the life of military units and sub-units as successful as possible, promoting discipline and legal order in the country’s armed forces in real terms.54

**Military Crimes and Punishments in Russia**

Law in the erstwhile Soviet Union had two characteristics – persuasion and coercion. The erstwhile Soviet courts have been awarding severe sentences designed not only to punish the particular offender but even more severe as a deterrent. In their context, military law is a means. Its end is the maintenance of order, discipline and obedience, both in military or otherwise. Their system makes no distinctions of rank. High and low alike share its weight and fear its impact. Indeed, more senior is the officer, the more apprehensive he may be, for in many instances, even a minor transgression of law may mean the end of a career, regardless of prior distinctions and merits.

Until 1959, Soviet military courts, were being governed by a law adopted in 1927. Although this Code was incomparably more severe than similar codes in non-communist countries, it was considered insufficient

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and a new law on military courts and crimes was adopted by the Supreme Soviet on 25 December 1958. The Chief Military Procurator of the Soviet Armed Forces, Major General Gornyj gave this description of the 1958 Code:

"This law has fully preserved the standards of the law of 1927, which have been justified by experience, and it has strengthened the level of responsibility for acts presenting a significant danger."

The new law defined additional offences and sharply increased the measures of punishment available, especially for transgressions committed during war. These include any situation in which an individual or a unit is engaged in combat action, whether in wartime or peacetime and may extend to such activities as border incidents, for suppression of disorder or the repulsion of violations of airspace.55

Standard of Military Law

As brought out in the preceding pages, of the 33 Articles of the new code, 15 provide for application of death penalty. Under the code, the longest prison term to which a convict could be sentenced to is 15 years. The next most severe punishment is death.

The following offences may be punished by death penalty: any kind of evasion of duty, disobedience and resistance; forcing others to commit violations; misuse of authority, negligence or inactivity; refusal to use weapons and leaving the field of battle; damaging arms and military equipment in general or abandoning them to the enemy; and surrender. Any of the following offences if committed during war or in a combat situation is punishable with death. Desertion, Assaulting or willfully disobeying officer; Mutiny or Sedition; Misbehaviour before the enemy; compelling surrender; Disclosing parole or countersign; Forcing a safeguard; Aiding the enemy; Misbehaviour of sentinel; serious loss of equipment;

Disciplinary Battalion

Next to the threat of the death penalty, the most important punishment system is the Disciplinary Battalion. Enlisted offenders may be sent to this Battalion for periods from three months to two years, as the military court may direct.

In the Disciplinary Battalion, the working day includes both combat training and hard labour lasting from twelve to fourteen hours. Discipline is enforced in the extreme: even minor infractions are punished by solitary confinement at bread and water and without bedding. On the other hand, model prisoners may ‘graduate’ from a Disciplinary Battalion to a retraining unit with a less rigid regimen and eventually restoration to duty. A prisoner assigned to a Disciplinary Battalion is stripped of his rank and pay and deprived of all benefits accruing to servicemen and their families. After he has served his term of punishment, he returns to his unit. The time served in the Disciplinary Battalion does not count as part of his obligated term of service.

Once sentence has been pronounced, the prisoner must serve his full term. Only in exceptional cases, where the offence committed is actually rather insignificant, may the court put the prisoner on probation. The Soviet prison system observes, however, the practice of releasing a prisoner ahead of time as a reward for good behaviour. This relief, while it is never available to a convicted political offender, may cut as much as one-third off a prisoner’s term. In practice, it is used as a device for the enforcement of prison discipline and to increase the output of the convict labour products.

Use of Armed Force. The disciplinary regulations for the armed forces of the Soviet state that in the event of open insubordination or resistance of subordinates, the Commanding Officer concerned must adopt all coercive measures including in emergencies, the use of the armed force...
for the restoration of order. Marshal Malinovsky had told the 22nd Party Congress\textsuperscript{56} that 82% forces are communists and comsomol members that 90% of the officers are members of the party. If these figures are true, and if one assumes that members of the Party are dedicated to the aims of the Soviet State then why such a pattern of severity under the law?

\textbf{Discipline – a crucial factor.} Contemporary armed forces are supplied with the products of modern military technology, including the means of nuclear destruction. This places, as never before, a special significance on the reliability of the individual in whose hand these weapons are placed. Discipline, thus, becomes an absolutely crucial factor. Text of the oath which Soviet soldiers take reads:

\begin{quote}
I swear to be an honourable, brave, disciplined soldier, to safeguard all military and state secrets, to fulfil unquestioningly all military regulations and orders of commanders!

I swear to preserve in every possible way military and state property and to my last breath to be devoted to my socialist motherland and the Soviet Government!

I am always ready upon the order of the Soviet Government to defend my native land – the U.S.S.R., and I wear to defend my Native Land courageously, not sparing my blood nor my very life for the achievement of full victory of the enemy!

If I violate this, my solemn oath, then let the severe penalty of Soviet law, universal hatred and contempt befall on me!

The spirit as well as the letter of this oath are plainly reflected in the law on judicial responsibility for infringements of military regulations. From the point of view of the communist government, it is necessary to force the armed services to obey without question and to act at all times in interest
\end{quote}

\textsuperscript{56}Pravda dated 25 October 1961.
and for the advantage of the Communist State. Fear of the severity of Soviet military law is the instrument used to accomplish this end.57

Salient differences between the military law under the Uniform Code and the Soviet military law

Punishments provided for in the Soviet military law are for more severe in nature than under the Uniform Code. Many crimes bear the death penalty, absence from the appointed place of duty does not warrant a discharge as under the Uniform Code, but will place the convicted man in a Soviet Penal Battalion for three months to two years.58 To see more clearly, how periods of confinement under the Soviet military law compare with those under the Uniform Code, a brief comparison of perhaps the five most frequent offences will prove helpful.

<table>
<thead>
<tr>
<th>United States</th>
<th>Soviet Union</th>
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<tbody>
<tr>
<td><strong>1. Absence</strong></td>
<td></td>
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<tr>
<td>(a) Not more than three days: one month confinement</td>
<td>-Not more than one day: Discipline.</td>
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<tr>
<td>(b) From 3 days to 30 days: six months confinement</td>
<td>-From 1 to 2 days: Three months to two years in a penal Battalion.</td>
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<tr>
<td>(c) More than 30 days: Dishonourable discharge and one year confinement.59</td>
<td>-More than 2 days: Treated as desertion.60</td>
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<tr>
<td><strong>2. Disobedience</strong></td>
<td></td>
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<tr>
<td>-Bad Conduct discharge and six months confinement.61</td>
<td>-Three months to three years confinement.62</td>
</tr>
<tr>
<td><strong>3. Contempt to a petty officer</strong></td>
<td></td>
</tr>
<tr>
<td>-Three months confinement63</td>
<td>-Three to six months confinement.64</td>
</tr>
</tbody>
</table>

United States Soviet Union

58 Military Crimes, Article 9(a).
60 Military Crimes, article 9.
61 MCM (1951), Rule 127(c).
62 Military Crimes, Article 3.
63 MCM (1951), Rule 127(c).
64 Military Crimes, Article 7.
4. **Striking a petty officer**

| -Dishonourable discharge and one year confinement.\(^\text{65}\) | -Two to ten years confinement.\(^\text{66}\) |

5. **Derelict in Duties**

| -Three months confinement.\(^\text{67}\) | -Three to six months confinement.\(^\text{68}\) |

The Uniform Code clearly applies to all servicemen on active duty. There seems to be no reason as to why it should not apply to reservists on active duty. It is clear as well that the Uniform Code would apply in the traditional fields of occupied territories, areas of martial rule and prisoner of war.\(^\text{69}\) The Uniform Code extends military jurisdiction, however, to civilians accompanying the armed forces under treaties with other nations.\(^\text{70}\) Whether military jurisdiction over such civilians is constitutional has already been before the courts of the land. But another problem arises here. Even federal courts of general jurisdiction may not usually review court martial proceedings; military tribunals are subject to civil court jurisdiction only “for the purpose of ascertaining whether the military court had jurisdiction of the person and the subject-matter”,\(^\text{71}\) and for a determination whether the sentence was excessive in nature. In cases concerning the power of consular and similar courts overseas, the earlier decisions held that the guarantees in the constitution “can have no operation in another country.”\(^\text{72}\) Not until 1955, did the Supreme Court retreat from this position. In cases striking down the jurisdiction of courts-martial to try men released from active duty,\(^\text{73}\) or murderous widows accompanying their slain husbands in uniform,\(^\text{74}\) the court held that military jurisdiction was limited to those on active duty with the armed forces. The rule in American is clearly this; all civilians are guaranteed full constitutional rights from military jurisdiction both in America and overseas.

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\(^{65}\) MCM (1951), Rule 127(c).

\(^{66}\) Military Crimes, Article 6.

\(^{67}\) MCM (1951), Rule 127(c).

\(^{68}\) Military Crimes, Article 22.

\(^{69}\) Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866).

\(^{70}\) UCMJ, Article 2(12).

\(^{71}\) Carter v Roberts, 177 U.S. 496, 498 (1900).

\(^{72}\) In re Ross, 140 U.S. 453, 464 (1891).

\(^{73}\) Toth v Ularles, 350 U.S. 11, 45 (1955).

\(^{74}\) Reid v Covert, 351 U.S. 487 (1956).
The scope of Soviet military jurisdiction is, however, far broader. All servicemen, of course, are subject to military law, as well as all reservists on active duty.75 There could be no doubt that the Soviet Union had extended military law into the traditional fields of occupied territories, areas of emergency and prisoners of war. But the jurisdiction of Soviet military law goes much further. Civilians living in unsettled areas, lacking courts, are subject to military law.76 Any civilian whose work is involved with the armed forces becomes subject to military law.77 Recent decisions by the Supreme Court of U.S.A. have struck down similar provisions in the Uniform Code.78

There are two other areas of military jurisdiction over Soviet civilians worthy of comment. Civilians relatives of a serviceman deserting across the borders were until 1958 legislation subject to military law and trial and liable to no less than six months deportation, usually to Siberia.79 The 1958 legislation eliminated this provision. In addition, the state crime of espionage brings under military jurisdiction any civilian so charged.80 Even though this special military jurisdiction is limited, it could encompass anyone, bringing trial upon only twenty-four notice of the charge, with no right of counsel to help in the defence. The trial may be held on any level of the Soviet system of courts, depending on the severity of the charge and the significance of the defendant, (accused) and may bring any civilian into military jurisdiction, whether as a Soviet or as an alien.

It may be stated, thus, that both these military judicial systems have similarity of purpose, that is, to maintain military effectiveness. Since the need of the armed forces is to obtain swift straight-forward justice is the factor that excepts military law from some aspects of procedural due process. There are many similarities in the procedures of both systems. Soviet military system seems to place more reliance on organisation, the

75 Military Crimes Article 1.
76 Statute on military tribunals, Article 10.
77 Military Crimes, Article 1.
78 Reid v Covert, 351 U.S. 487 (1956).
79 State Crimes, Article 58(1C) and 58(12). Article 58(12) is applicable to “non-servicemen” providing that failure to report a known “counter revolutionary crime” carries no less than six months deprivation of liberty.
80 Statute on Military Tribunals, Article 9(d).
command and the nation than the American system. This is evident from the stringent penal provisions on state crimes as also on government property. There is more discretion available with the Soviet officers dispensing the justice. It seems that the Soviet military law aims at moulding conduct of its troops more by force of law. It is harsher in form, though, in principle is the same as the American so a as punishment as a deterrence is concerned.

(ii) SWEDEN

Gustavus Adolphus' Articles of War

The military law system in Sweden can be traced back to the Gustavus Adolphus’ Articles of War, which are cited by the historians as “providing the rudiments of what would become a regular judicial process for the ascertainment of guilt and the assessment of punishment through tribunals denominated as courts or councils of war or courts martial”. Of course, the origins of courts-martial have roots deep in military history. The Romans had specific laws to govern their legions, the feudal system provided for military jurisdiction in the form of a Court of Chivalry, and various European sovereigns had written codes with forms of courts-martial. From 1625 to 1628, King Charles I of England sought to bring certain offences under military law and courts-martial otherwise, but was forced to retent under Parliament pressure. During this critical period of conflict between crown and Parliament, Gustavus Adolphus’ Articles of War were published in London in 1639. Gustavus’ Code was to serve as a model for future English military Codes, partly because so many British soldiers had served with Gustavus on the continent and were satisfied with the effects of the Articles of War of 1621.

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81 See Joseph W. Bishop, Jr’s “Justice under Fire” 5 (1974).
82 The Earl Marshal was one of the military officials who presided over the Court of Chivalry in England in 1521, it became known as the Marshal’s Court. Hence, the origin of the term ‘Court Martial’ according to one authority.
The Articles of War (1621) and the Indian Military Law

Gustavus Adolphus’ Articles of War of 1621 are considered as “a recognisable ancestor of the British Articles of War”. Since the Indian Military Law draws its source from the British military law, hence, it had a great impact of the Gustavus Adolphus’ articles of War of 1621 on it. Not only that, it also could be called the forerunner of the Uniform Code of Military Justice. Indian military law, amongst other provisions contains a general section (Section 63), wherein “all disorders and neglects to the prejudice of good order and discipline in the Armed Forces” are punishable by courts-martial. Such a broad general Article for punishing otherwise unspecified offences contrary to military discipline were an essential part of the British Articles of War. It was adopted in the American military codes, surviving constitutional attack on vagueness.

Court-Martial trial and punishments. Although Gustavus’ Code was harsher in term of punishment (a quarter of the offences were punishable by death) than our military law. Perhaps, it was the requirement of the day. The severe military punishments largely had their origin in the penalties devised by the free companies for their own protection against the vagaries of the more boisterous and unscrupulous of their members. Nevertheless, Gustavus’ Code was tailored to balance punishments against the offences committed. Thus, ordinary punishments included bread and water, confinement and shackles, but no flogging, while serious offences such as violence to women and plunder were punishable by death. The Indian military law or the Uniform Code of Military Justice is likewise restrictive as to punishments, flogging and other cruel and unusual punishments being prohibited.

85 Article I XIV, Articles of War, James II (1688) cited in William Winthrop, “Military Law and Precedents” 907 (2d ed. 1920), note 10 at p.920. See also Charles M Clode, “Administration of Justice under Military and Martial Law” 12 (2d ed. 1874). As per Clode, in British Codes of 1639 and 1642, the last clause in each Code was for punishing indefinite crimes for which no special order has been set down.

86 Parker V Levy 471 U.S. 733, 743 (1974). In this case, the Supreme Court recognized that “the military is, by necessity, a specialized society separate from civil society” in sustaining the provisions of the general Article, Article 134, Uniform Code of Military Justice.
Not only did Gustavus’ Code delineate specific offences and punishments, but it provided orderly procedures for the administration of military justice. The Articles of War established “a regimental court-martial, of which the regimental commander was present, and assessors elected by the regiment were members. A permanent general court-martial was also created with the Swedish royal marshal presiding and high ranking officers sitting as members. Finally, the system provided that an appeal could be had to the higher court if the lower court was suspected of being partial and the accused had the right to approach the monarch as a matter of final appeal.

The present military justice system is mainly based on the Gustavus’ Code which had a dual system of courts. A peculiar feature which was present in the Gustavus’ Code was that it also dealt with civil cases in addition to the criminal cases. While the regimental courts-martial tried cases of minor nature such as theft, insubordination and cowardice etc, whereas the standing courts-martial tried cases of treason and such other offences. Finally, Gustavus’ Code provided that every regimental commander read the Articles of War to his troops once a month\(^87\) as we do find that certain essential provisions of discipline being read and explained to our troops during roll-calls. In a similar manner, certain provisions of Uniform Code of Military Justice are a must to be explained to the American soldiers.\(^88\)

(iii) **FRANCE**

“*The military tribunals must be abolished, and will be. They are a survival of mediaeval prejudices. All citizens must be equal before the law. The danger of allowing one caste to consider itself separate from the rest of the nation and above common law was vividly exemplified in today’s monstrous decision*\(^89\).”

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\(^87\) R. Ernest Dupuy and Trevor Dupuy *The Encyclopaedia of Military History from 3500 B.C. to the present*, 529 (Rev.ed. 1977).


Jean Jauves' prophetic statement has, almost eighty years later on 01 January 1966 nearly became a reality, when a new French Code of Military Justice became effective creating broad, sweeping changes in military justice procedure and reflecting a significant step in the historical French trend towards uniting military justice and their civil law practices.90

__Trial Procedure under the New French Code._ After pre trial investigation or in the case of direct referrals to trial, the government contacts the appropriate military commander exercising jurisdiction for an order convening the court.91 The accused is, of course, free to communicate with his attorney and is provided, free of charge, copies of the allegations against him, the written statements of all adverse witnesses and the reports, if any, of expert witnesses.92 A summons (citation a comparaitre) must be served on the accused at least three days prior to trial in peacetime. The summons must again remind the accused regarding his right to counsel and further lists expected prosecution witnesses. The accused may, at this time, inform the prosecutor of the witnesses he desires to testify on behalf of the defence.93

With few exceptions, the conduct of the trial itself follows the procedures set forth in the Code of Penal Procedure. Generally, the trial are public and the progress of the trial is controlled under the rather broad discretionary powers of the President of the Court. The President may, in his discretion, direct the argument of the counsel, call witnesses, request the production of documents and take other steps necessary to discover the truth.94

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91 CJM, Article 184.
93 CJM, Art 257.
94 CJM, Art 209.
With respect to receiving testimony the accused is usually heard first and is interrogated by the court concerning the fait (the act constituting the alleged offence). Though the accused is not clothed with a constitutional guarantee against compulsory – incrimination, he may remain silent. However, his silence, in this regard may result in an inference against him. After questioning concerning the fait, an accused is asked whether or not he is guilty, whether there were aggravating circumstances, and whether extenuating or mitigating circumstances were present. Thereafter, other witnesses summoned by the prosecution and defence give their testimony without interruption except by the President. When the witnesses has finished testifying, he may be asked questions by the President, the government prosecutor and with the President’s approval, the other judges. Counsel for the accused may also request the President to ask certain question of the witness.

After the last witness is heard, the government prosecutor submits arguments. Then, the defence sums up, with both the accused and his counsel having the right to argue. If the prosecutor replies, the defence has another opportunity to speak – this right to have the last word always belongs to the defence.

The deliberations of the French military court are done in a secret manner; a majority of the judges must concur in any finding of guilty. In the event of a finding of guilty, the court then votes on whether there were extenuating or mitigating circumstances prior to adjudging a sentence by secret written ballot.

The responsibility of ordering into execution the adjudged sentence is vested in the government prosecutor under the new code. Except in death

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96 CPP, Arts 309-12, 331-32.
97 CPP, Art 346.
98 CJM, Arts 223, 225-26, 229.
cases, the execution of the judgement is carried out twenty-four hours after the period for appeal has expired or the order rejecting an appeal has been received from the Cour de Cassation. The punishment adjudged can, however, be suspended by the military commander who ordered the proceedings instituted.

**The New French Code**

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**The need for legislation in France**

The 474 articles now governing military justice for all French armed forces replace 274 articles previously relating to the French army, 276 articles heretofore applicable to the Navy, and the special legislation enacted in 1934 pertaining to their air forces. The prior Codes were long, complex, confusing and not set forth in a logical order. Moreover, it was only reasonable to assume the administration of military justice would not escape the extensive judicial reforms vigorously instituted by the De Gaulle regime since its accession to power in 1958.

The hostilities in Algeria led to increased jurisdiction on the part of French military courts.

Under the new theory of criminology and penology, existing punishments had become outmoded. The desire to keep pace with the times and to include more civilians-type procedures and safeguards, while increasing the speed of military justice were the primary goals sought in the revision. The reform-process was undertaken by the minister of the armed forces in close liaison with the minister of justice and most eminent members of the Military Justice Corps.

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99 CJM, Arts 325-28.
1 CJM, Art 340.
2 For some examples of recent French judicial reforms, see Herzog, "Proof of Facts in French Civil Procedure : The Reforms of 1958 and 1960."
Significant features of the New Code. (i) General. In order to effect the purposes of the new legislation, the emphasis was placed on incorporating to the maximum extent existing civil criminal procedures, interjecting more trained civilian judges into the stream of military jurisprudence and streamlining judicial bodies. The peace-time jurisdiction of the military courts have also been somewhat circumscribed.

(ii) Legal professionalism strengthened. In 1956, a law establishing a corps of military magistrates was enacted fusing together the trained judges of the army as well as naval services. These civilian jurists, familiar with the procedure under the military law, form the basis of the operation of present military justice at both the pre-trial and trial levels. Both the government prosecutor and the military examining magistrate are members of the military judicial corps. The powerful positions of President of permanent judicial district courts and principal assistant judge are now held by these magistrates. Even during war, a civilian judge remains a President of a military tribunal in contrast with the prior practice of replacing the military magistrate with a senior military officer.

The new and exceedingly important Chambre de Controle de l’Instruction is also dominated by magistrates of the Military Judicial Corps. In peacetime, the President of the Chamber and his principal assistant, both military magistrates, form two-thirds of this three member body. During wartime, the assistant is replaced by a military judge and the President may be a military magistrate of the mobilised reserve Military Judicial Corps. The entire military justice is now controlled and reviewed by the Cour de Cassation, composed of the most eminent civilian judges, it is apparent that the French military justice will gain respect. Military authorities voiced no objection to this new judicial independence during the parliamentary debates concerning the proposed code.

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4 CJM, Art 50.  
Authority of the examining magistrate and the government prosecutor increased. There is a tremendous increase in the power of the commissaire du government and the juge d’instruction, which will improve both the quality and speed of pre trial proceedings. The examining magistrate and the government prosecutor under civil procedures work in close cooperation with each other, and with their delegated authority form a most important link in the judicial chain. The elimination of the military commander’s authority on interjecting an appeal to the orders rendered by the Juge d’Instruction buttress the examining magistrate’s authority and hasten the process of military justice.

The government prosecutor is now the legal counselor to the military commander who exercises judicial powers. He may receive, by delegation from the competent military authority, the powers to direct the operations of the military judicial police during the investigation of an alleged offence. Further increases in his power include the ability to decide pre trial confinement matters, to determine whether the case will receive pre trial investigation or is to be transferred directly to a permanent judicial district court, and to ensure the execution of sentence. By statute, it is the government prosecutor and not the military commander, who is charged with the responsibility of the administration of military justice and discipline.

Jurisdictional matters. Military jurisdiction over offenders within the Republic of France during peacetime is limited. Without the territorial confines of France and in time of war, martial law or national emergency, the jurisdiction of the military is greatly expanded.

During peacetime, the permanent judicial district courts exercise jurisdiction over members of the armed forces pursuant to

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6 CJM, Arts 25, 117.
7 CJM, Arts 25, 84.
8 CJM, Art 25.
three jurisdictional bases. They only have jurisdiction over members of the armed forces who commit purely military offences⁹, and those military personnel who commit criminal offences within a military establishment or incident to military service. All cases involving other than the individuals or offences indicated above are subject to the jurisdiction of civilian tribunals.

Outside the territorial confines of France, military tribunals have peacetime jurisdiction of offences of every nature committed by servicemen, persons authorized to accompany the armed forces, civilian employees and dependents.

During wartime or a period of national emergency, all military courts, wherever located, exercise jurisdiction paralleling that of all military tribunals established overseas, supplemented by jurisdiction over any person committing treasonable acts or crimes against the security of the State. The determination of 'time of war' is apparently made by the President of the Republic of France pursuant to Article 16 of the constitution. Martial law may be declared by the Council of Ministers in accordance with Article 36 of the constitution and a state of emergency is instituted by decree of the Council of Ministers for a period not to exceed twelve days as specified by legislative enactment.¹⁰

(v) **War Crimes.** The new Code includes trial of the accused persons involved in war crimes. Another significant section deals with the military superior who either authorizes or tolerates the commission of war crimes by a subordinate.

A similar provision exists under the Uniform Code of Military Justice where such offences are triable by the GCsM and military

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⁹ Military offences have been listed in Title II, Book III of CJM.

¹⁰ DOLL 79-80.
commissions. French military courts have jurisdiction over war criminals when the following elements are present:

(a) The crime or infraction thereof was committed after the opening of hostilities;

(b) The crime was committed by a national enemy or an agent in the service thereof;

(c) The offence was committed on the territory of the republic, on territory submitted to the authority of France or in an operational war zone;

(d) The crime was directed against a French national or one protected by France, a member of the military serving or having served under the French flag or a stateless person or refugee of one of the territories listed above; and

(e) The infraction, whether or not under the pretext of war, is not justified by the laws and customs of war.

Because of some uncertainty in the past concerning evidentiary and procedural rules to be followed in war crimes trials, it was deemed advisable to include within the framework of the 1966 Code provisions relating to some purported legal defences to war crimes that were raised before the Nuremberg Tribunal. For these reasons, the new Code has specifically provided that the laws, decrees or regulations emanating from enemy authorities, or orders or authorizations given by the enemy or authorities dependent or having been dependent thereon, may not be invoked as a defence to the

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11 UCMJ, Arts 18, 21.
12 Compare in re yauashita 327 U.S. 1 (1964), with Geneva convention relative to the Treatment of Prisoners of War, Articles 85, 102, 12 Aug 1949, 6 U.S.T.3316 T.I.A.S. No 3364.
charge, but may be considered only as matters in extenuation and mitigation.\textsuperscript{13}

(vi) **Crimes Against the Security of the State.** In January 1963, the National assembly created the court of State Security (Cour de la surete de l' Etat) to deal with crimes and misdemeanours directed against State security in time of peace. The specific crimes of which the Court of State Security takes cognizance are listed in Article 698, Code of Penal Procedure (CPP). Its jurisdiction to both civilian and military personnel, without regard to whether the alleged offences were committed incidental to military service. During wartime, the jurisdiction to investigate and judge these crimes is vested in the military authorities.

(vii) **Appeal and Review.** It may be stated in brief that one of the most important changes in the new Code was the decision to place in the Court of Cassation the exclusive authority to review the decisions of both the permanent judicial district courts and the military tribunals in both peacetime and in the time of war.

(viii) **Other Changes.** Strict civilian procedural rules governing the conduct of the judicial police with respect to the length of time a suspect may be held for investigation and questioning before either release or formal charges are required. In order to protect the integrity of military justice, the drafters provided severe penalties directed at any military commander who establishes or maintains an illegal or repressive system of military courts or tribunals. Further, significant changes were effected in the field of punishments. The punishment of military degradation was abolished and dismissal substituted therefor. Trial in abstentia was abolished.

Thus, we see that the new legislation in France brought in some material new changes designed both to expedite military justice

\textsuperscript{13} CJM, Art 376.
proceedings and align military justice procedures more closely to those in the civilian courts. Underlying most of these provisions runs the trend towards greater professionalism and expertise in the administration of military justice in France. Under this Code, the number of military magistrates to military courts have increased and it subjected all military judicial proceedings to the review and control of the highest civilian appellate court of the land. Confidence in the military judicial corps has reflected in extending to the government prosecutor and the examining magistrate powerful judicial authority previously enjoyed only by their civilian equivalents. A speedy authoritative form for resolving pre-trial disputes is displayed in the creation of the Chambre de Controle de l'Instruction which is charged with overseeing the timely progress of military justice proceedings. As we have seen, although the jurisdiction of military tribunals in France has been somewhat more severely limited during peacetime, the new Code de Justice Militaire embodies provisions designed to guarantee the rapid enforcement of discipline overseas and in time of war.

(iv) CANADA

A “Court-Martial” under the National Defence Act of Canada (Hereinafter called as NDA) includes a General Court Martial, a Special General Court Martial, a Disciplinary Court Martial and a Standing Court Martial and the term “military” shall be construed as relating to all or any part of the Canadian Forces.

Disciplinary Jurisdiction of the Services. As to persons, the following persons are subject to the Code of Service discipline:-

(a) an officer or a man of the regular force;
(b) an officer or man of the special force:
(c) an officer or man of the reserve force when he is

(i) undergoing drill or training whether in uniform or not,
(ii) in uniform,
(iii) on duty,
(iv) called out under subsection 34(2) to render assistance in a disaster,
(v) called out in aid of civil power,
(vi) called out on service,
(vii) placed on active service,
(viii) in or on any vessel, vehicle or aircraft of Canadian forces or in or on any defence establishment or work for defence,
(ix) serving with any unit or other element of the regular force or the special force, or

d) a person who is attached or seconded as an officer or man to the Canadian Forces;

e) a person, not otherwise subject to the code of Service Discipline, who is serving in the position of an officer or man of any force raised and maintained outside Canada by Her Majesty in the right of Canada and commanded by an officer of the Canadian Forces.

f) a person, not otherwise subject to the Code of Service Discipline, who accompanies any unit or other element of the Canadian Forces that is on service or active service in any place;

g) an alleged spy for the enemy;

h) a person, not otherwise subject to Code of Service Discipline, who, in respect of any service offence committed or alleged to have been committed by him, is in civil custody or in service custody; and

i) a person, not otherwise subject to the Code of Service Discipline, while serving with the Canadian Forces under an engagement with the Minister whereby he agreed to be subject to that Code.
Continuing Liability. Every person subject to the Code of Service Discipline under sub-section (1) of Section 55 of the said Act, at the time of alleged commission by him of a service offence continues to be liable to be charged, dealt with and tried in respect of that offence under the Code of Service Discipline notwithstanding that he may have, since the commission of that offence, ceased to be a person in the above sub-section. Such a person as described hereinbefore, shall for the purpose of this Code be deemed, for the period during which under that Code, he is liable to be charged, dealt with and tried, to have the status and rank that he had held immediately prior to the time when he ceased to be a person mentioned above.

Persons accompanying Canadian Forces. A person accompanying a unit or other element of the Canadian Forces, that is on service or active service if such person participates with that unit or other element in the carrying out of any of its movements, maneuvers, duties in aid of civil power, duties in a disaster or warlike operations, or is accommodated or provided with rations at his own expense or otherwise by that unit or other element in any country or at any place designated by the Governor in Council, or is a dependent outside Canada of an officer or man serving beyond Canada with that unit or other element, or is embarked on a vessel or aircraft of that unit or other element, and if such a person is alleged to have committed a service offence, shall be treated as a man unless he has produces an authority from competent authority that his status is to be reckoned as an officer. Such person shall be deemed to be under the command of the Commanding Officer of the unit or other element of the Canadian Forces that such person accompanies. Every person who is alleged to have committed, during the currency of his imprisonment or detention, a service offence, shall be deemed to be under the command of the Commanding Officer of the service prison or detention barrack, in which he is imprisoned or detained.
Plea in bar of trial. Every person, in respect of whom a charge of having committed a service offence has been dismissed, or who has been found guilty either by a service tribunal or a civil court on a charge for having committed any such offence, shall not be tried or tried again by a service tribunal under this Act in respect of that offence or any other offence of which he might have been found guilty on that charge by a service tribunal as a Civil Court.

No limitation as to place. Subject to Section 60, every offence alleged to have committed a service offence may be charged, dealt with and tried under the Code of Service Discipline either in Canada or outside Canada.14

Period of liability under the Code of Service Discipline. No person is liable to be tried by a service tribunal unless his trial begins before the expiration of period of three years from the day upon which the service offence was alleged to have been committed. However, every person subject to such Code who is alleged to have committed a service offence of mutiny, desertion, absence without leave or a service offence for which the highest punishment that may be imposed is death, such person continues to be liable to be charged, dealt with and tried at any time under the said Code. In calculating the period of limitation, the period during which a person was a prisoner of war, any period of absence in respect of which a person has been found guilty by any service tribunal of desertion or absence without leave and any time during which a person was serving a sentence of incarceration imposed by any court other than a service tribunal shall not be included.

A service tribunal shall not try any person charged with an offence of murder, rape or manslaughter, committed in Canada.15

14 NDA, Section 58. Also see Revised Statutes of Canada (RSC), Sections 184 & 59.
15 NDA, Section 60.
Before enactment of the National Defence Act, persons who had been released from the armed forces remained liable to the Code for period from three to six months, those who remained with the forces continued to be liable to a service trial for three years after the offence was alleged to have been committed. In the United Kingdom, with certain exceptions, three months after a person has been released from the forces, he is free from trial under the military.\textsuperscript{16}

\textbf{Jurisdiction of Civil Courts.} Nothing in the Code of Service Discipline affects the jurisdiction of any civil court to try a person for any offence triable by that court. Where a person, sentenced by a service tribunal in respect of a conviction on a charge of having committed a service offence is afterwards tried by a civil court for the same offence or for any other offence for which he might have been found guilty on that charge, the civil court in awarding punishment take into account any punishment imposed by the service tribunal for the service offence. Where a civil court that tries a person either acquits a person of an offence, the imprisonment awarded, if any, by the service tribunal shall be deemed to be wholly remitted.

It has been pointed out that one who joins the Canadian Forces does not cease to be a citizen and that in general the law which applies to all citizens applies to the members of the forces. Yet, in many cases, a soldier who has been tried on the merits and convicted or acquitted by a competent service tribunal can be tried for the same offence by a civil court. Though National Defence Act Section 62(1) states, "\textbf{Nothing in the Code of Service Discipline affects the jurisdiction of any civil court to try a person for any offence triable by that court}". To date, there have been no cases where the civil courts in Canada have tried servicemen with whom service authorities have purported to deal. The first class comprises of those acts and omissions which are peculiar to the forces or which may be said to be purely military offences, for example offences relating to

\textsuperscript{16}Army Act 1955, 3 & 4 Eliz. 2, C-18, ss. 131(1) and 132(3). The exceptions are desertion, mutiny and civil offences committed outside the United Kingdom. S. 132 (1) provides that in the last case, the consent of the Attorney General of England must be obtained to hold the trial.
'desertion' or provisions "prohibiting conduct prejudicial to good order and military discipline" etc. These offences have no exact counterparts in the civil law and therefore do not give rise to the risk of double jeopardy. The second class of offences comprises of those offences punishable under the Criminal Code or any other act of the Parliament of Canada. Clearly persons convicted or acquitted of offences in this class are liable to subsequent prosecution for the same offence in the civil courts\textsuperscript{17}. This class also includes acts and omissions that are minor offences under the military law. For instance, for a man to strike another blow causing no bodily harm is in civil law, a common assault, but for a soldier to strike his superior officer or for an officer to strike his subordinate is, under military law, a serious offence involving a heavy punishment. The attitude of the service authorities towards this unfair situation is inconsistent. While defending it as necessary, they have attempted to meliorate the harsh consequences flowing from it. For instance, the National Defence Act requests the civil court to take military conviction into consideration in mitigation of sentence\textsuperscript{18}. But the possibility of double punishment for the same offence remains. It is a very long established principle of the common law that a person charged with a criminal offence may plead autrefois acquit or autrefois convict if he has been previously acquitted or convicted of the same offence by a court of competent jurisdiction\textsuperscript{19}. It is observed that in Canada it is perhaps considered vital to maintain the control of the civil authorities who may be prevented from trying a person who has been tried by a service tribunal on the same offence. In addition, the civil courts have exclusive control over servicemen charged with murder, rape or manslaughter when the offence is committed in Canada. It appears that they apprehend that a serviceman accused of any of those offences might, otherwise, be tried by the service tribunals hastily to acquit the individual, thereby

\textsuperscript{17} See Special Committee on Bill No 133. op. cit., footnote 22, p.125.
\textsuperscript{18} See Not ibid, pp. 127-128.
\textsuperscript{19} S. 516(1) of the Criminal Code provides, "An accused may plead the special pleas of (a) autrefois acquit, (b) autrefois convict. However, S.4 provides, "Nothing in this Act affects any law relating to the government of the Canadian Forces."
depriving the civil courts from exercising their jurisdiction from trying them. Such a view cannot be held to be a sound one in view of the fact that all over the places in various armed forces of the world, such offences are generally be tried by courts martial and there has not been any criticism of such dealing from any quarter so far.

_Punishments._ The following punishments may be imposed in respect of the service offences: death; imprisonment for two years or more; dismissal with disgrace; imprisonment for less than two years; dismissed from service; detention; reduction in rank; forfeiture of seniority; severe reprimand; reprimand; fine; and minor punishments. A sentence that includes a punishment of imprisonment for two years or more imposed upon an office shall be deemed to include a punishment of dismissal with disgrace, whether or not the last mentioned punishment is specified in the sentence passed by the service tribunal.20

_Rules of Civil Courts applicable._ All rules and principles from time to time followed in the civil courts in proceedings under the Criminal Code that would render any circumstances a justification or excuse for any act or omission or a defence to any charge, are applicable to any defence to a charge under the Code of Service Discipline, except in so far as such rules or principles are altered by or are inconsistent with this Act.21

_Convening of Courts Martial._ The Minister, and such other authorities as he may prescribe, or appoint for that purpose, may convene General Courts Martial and Disciplinary Courts Martial.

A General Court Martial may try any person subject to the Code. It shall consist of not less than five officers. The President of the GCM shall be an officer of or above the rank of Colonel. Where the accused officer is of or above the rank of brigadier-general, the President of a GCM shall be an officer of or above the rank of the

20 NDA, Section 125.
21 NDA, Sec 129 & RSC 184 & S.125.
accused person, and other member of the courts-martial shall be of or above the rank Colonel. Where the accused person is of the rank of Colonel, all the members of the GCM, other than the President, shall be of or above the rank of Lieutenant-Colonel. Where the accused person is a Lieutenant Colonel, at least two of the members of a General Court Martial, exclusive of the President, shall be of or above the rank of the accused person.\textsuperscript{22}

\textbf{Judge Advocate.} Appointment of a Judge Advocate at a GCM is a legal necessity.\textsuperscript{23}

\textbf{Ineligibility to serve on Courts-martial}

An officer who convened the court-martial; the prosecutor; a witness for the prosecution; the Commanding Officer of the accused person; a provost officer; an officer who is under the age of twenty-one years; an officer below the rank of a Captain (for GCM only) or any person, who prior to the court-martial had participated in any investigation respecting the matters upon which a charge against the accused person is founded.\textsuperscript{24}

A Disciplinary Court-Martial may try any person subject to the Act but it shall not pass a sentence including a punishment higher in scale of punishment than dismissed with grace. It shall consist of not less than three officers. The President of this court shall be an officer of or above the rank of Major or of or above such higher rank as may be prescribed in the Regulations. A Judge Advocate may be appointed at this Court-martial.

With regard to Standing Courts Martial, each such court-martial shall consist of one officer, to be called the President, who is or has been a barrister or advocate of more than three years standing and who shall be appointed by or under the authority of the Minister. It can try an person who is liable to be charged of an offence but this court shall not pass a

\textsuperscript{22} NDA, Section 145 & RSC 184 & S.141.

\textsuperscript{23} NDA, Section 146.

\textsuperscript{24} NDA, Section 147 and RSC 184, S.142, 1966-67, C.96, S.40.
sentence any punishment higher in the scale of punishments than imprisonment for less than two years.25

Where a person other than an officer or man is to be tried by a court-martial, he may be tried by a special court-martial, consisting of a person, designated by the Minister, who is or has been a judge of a superior court in Canada, or a barrister or an advocate of at least ten years standing and subject to such modifications and additions as the Governor in Council may prescribe.26

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**Representation of Accused.** At any proceedings, the accused person has a right to be represented in such manner as shall be prescribed in regulations made by the Governor in Council.27

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**Admission to Courts martial.**

Courts-martial trial are generally public in nature, subject to availability of space, expediency and interest of public safety, defence or public morals.

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**Rules of evidence.** Subject to the provisions of this Act, the rules of evidence at a trial by court-martial shall be such as are established by regulations made by Governor in Council. No regulation made under S.158 shall be effective until it has been published in the Canada gazette and every such regulations shall be laid before the Parliament within fifteen days after it is made. If the Parliament is not in session, within fifteen days after commencement of the next ensuing session.

A court-martial may receive, as evidence of the facts stated therein, statutory declarations made in the manner prescribed by the Canada Evidence Act subject to the conditions that the party wishing to produce such document has to serve a copy of the same to the opposite party, at least seven days before the trial in case by the prosecutor and at least three

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25 NDA, Section 154, RSC 184, S.149 1966-67.
26 NDA, Section 155.
27 RSC 184, S.150.
days before the trial if the document is intended to be presented by the accused.

_Witnesses at the Courts-Martial._

The Commanding Officer of the accused person, the authority who convenes a court-martial or after the assembly of the court-martial, the President shall take all necessary action to procure the attendance of the witnesses whom the Prosecutor and the accused person request to be called and whose attendance can, having regard to the exigencies of the service, reasonably be procured, but nothing is this sub-section requires the procurement of the attendance of any witnesses, the request for whose attendance is deemed by any such Commanding Officer, authority who convenes a court-martial or President to be frivolous or vexatious.

However, where a request by the accused person for the attendance of a witness is deemed to be frivolous or vexatious, the attendance of that witness, if his attendance, having regard to the exigencies of the service, can reasonably be procured if the accused person pays in advance the fees and expenses of the witness at the rates prescribed in the regulations, and if at the trial the evidence of the witness proves to be relevant and material, the President of the court-martial or the authority who convened the court-martial shall order that the accused person be reimbursed in the amount of the fees and expenses of the witness so paid. Nothing in this Section (S.160) limits the right of the accused person to procure and produce at the trial at his own expense such witnesses as he may desire, if the exigencies of the service so permit.28

_Evidence on Commission_

Where it appears to the Judge Advocate General or to such other person as he may appoint for that purpose that the attendance of a witness at a trial is not obtainable because the witness is ill or is absent from the country in which the trial is held or the attendance of a witness for the

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28 RSC 184, S.154.
accused person is not readily obtainable for any reason or that there is no provision for compulsory attendance of that witness, the Judge Advocate General or such other person whom he may appoint such purpose may appoint any officer or other qualified person as "Commissioner" to take the evidence of the witness under oath, the document containing the evidence of the witness, duly certified by the commissioner, is admissible in evidence at the court-martial to the same extent and subject to same objections as if the witness had given that evidence in person at the trial. At any proceedings before a commissioner, the accused person and the prosecutor are entitled to be represented and the persons representing them have the right to examine and cross examine any witness.29

__Objection to members of Courts-Martial.__

The accused will have a right to object to the members of a court-martial. His objection will be decided and procedure for replacement of a member will be followed in accordance with the provisions30.

__Adjournment and Dissolution.__ A court-martial may be adjourned whenever so desired by the President. Where after the commencement of the court-martial, a court-martial due to death or otherwise, is reduced below the legal minimum, it shall deem to be dissolved. If, however, due to the absence of the President the legal minimum strength of the court-martial is maintained, the senior most member of the court-martial may be appointed as the President and the court-martial shall continue with the trial. But if the senior most member is not of sufficient rank, the court-martial shall be deemed to be dissolved. If due to the illness of the accused, it is impossible to continue the trial, it shall be dissolved.31

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29 RSC 184, S.155; RSC 310, S.2 (1956); NDA, Section 161.
30 NDA, Sec 163 & RSC 184, S.157.
31 NDA, Ss 165 & 166.
Amendment of Charges.

At any time during a trial by court-martial, it appears to the President that there is a technical defect in the charge that does not affect the substance of the charge, and the President is of the opinion that the accused person will not be prejudiced in the conduct of his defence by an amendment, he can make such an order.

Decisions by Courts Martial. The finding and the sentence of a court-martial and the decision in respect of any other matter or question arising after the commencement of the trial shall be determined by the vote of a majority of the members. In case of an equality of voting, the accused shall be found not guilty. However, in case of a sentence or on any other matter or question arising after commencement of the trial, except the finding, the President of the court-martial shall have a second or casting vote.

Questions of law. Where a Judge Advocate has been appointed at a court-martial, he shall determine questions of law or mixed questions of law and fact before or after commencement of the trial.

Unanimous finding where punishment of death is mandatory. Where the only punishment that a court-martial can impose for an offence is death, a finding of guilty shall not be made except with the concurrence of all the members. Where there is no such concurrence and no finding is made, the President of the court-martial shall so report to the convening authority and the court-martial shall thereupon be deemed to be dissolved and the accused may be tried again.

Pronouncement of Findings and sentence. The finding and the sentence of a court-martial shall, at the conclusion of the trial, be

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32 NDA, Sec 168(1) to (3).
33 NDA, Sec 168(4).
34 NDA, Sec 168(5).
pronounced to the offender in open court and he shall be under the sentence as of the date of such pronunciation.\textsuperscript{35}

\textbf{Punishment requiring approval.} A punishment of death imposed by a court-martial is subject to approval by the Governor in Council and shall not be carried out unless so approved. A punishment of dismissal with disgrace or dismissal from the service shall be deemed to be carried out from the date on which the release of the offender from the Canadian Forces is effected. An authority mentioned in Section 182 has the power to substitute a new punishment for a punishment of death that has not been approved; a punishment of dismissal with disgrace or otherwise that has not been approved; or a punishment imposed by a Commanding Officer at a summary trial that has not been approved.\textsuperscript{36}

\textbf{Quashing and Substitution of findings.} The Minister, and such other authorities as he may prescribe or appoint for that purpose, may quash any finding of guilty made by a service tribunal. Where findings have been partially quashed on merits, the authority set out in section 184, may substitute such new punishment or punishments as he considers appropriate.

The Minister, and such other authorities, as he may prescribe or appoint for that purpose, may substitute a new finding for any finding of guilty made by a service tribunal that is illegal or which cannot be supported by the evidence, if the new finding could validly have been made by the court-martial on the charge and if it appears that the service tribunal would have been satisfied of the facts establishing the offence specified or involved in the finding. On substitution of a new finding, the authority concerned shall substitute such new punishment or punishments as he considers appropriate.\textsuperscript{37}

\textbf{New Trial.} Where a service tribunal has found a person guilty of an offence and the Judge Advocate General certifies that in his opinion a

\textsuperscript{35} NDA, Sec 170 & RSC 184, S. 164.
\textsuperscript{36} NDA, Sec 178.
\textsuperscript{37} NDA, Sec 180.
new trial is advisable by reason of an irregularity in law in the proceedings of the court-martial, the Minister may set aside the finding(s) of guilty and direct a new trial in which case the person will be tried again on any appropriate charge as if no previous trial had been held. At a new trial, the new punishment shall not be higher in the scale of punishments than the punishment imposed by court-martial in the first instance.

Where a court-martial has passed a sentence in which is included an illegal punishment, the Minister, and such other authorities as he may prescribe or appoint for that purpose, substitute for the illegal punishment(s) as he considers appropriate. Such authority may, subject to the conditions set out in Section 184, mitigate, commute or remit any or all punishments included in a sentence.  

Suspension of Imprisonment or Detention

Where an offender has been sentenced to imprisonment for two years or more, or for imprisonment for less than two years or detention, the carrying into effect of the punishment may be suspended by the Minister or such other authorities as prescribed. Where a punishment is suspended before the offender has been committed to undergo the punishment, he shall, if in custody, be discharged from the custody and the terms of the punishment shall not commence until the offender has been ordered to be committed to undergo that punishment. The currency of the punishment shall be arrested from the day on which he is again ordered to be committed to undergo that punishment.

Australia

Introduction. To understand the effect of the court-martial tribunals decision, it is necessary to glance at how military law operated at the court-martial level in Australia before 1955. There have been a couple of difficulties/problems encountered during the courts-martial trial, which will be covered in the next chapter while dealing with reviews/appeals

38 NDA, Ss. 181-183.
against the court-martial verdict. Due to paucity of material on court-martial procedure, no serious effort has been made to evaluate/compare their procedures. It is also mainly because of the reason that a large number of cases are being disposed of in Austria by way of summary trials by the Commanding officers concerned. It is pertinent to point out that no appeal lies to the Appellate Court against the summary trial proceedings. The only protections in these cases are the service procedures of confirmation, review and consideration of accused's petition by superior officers and, perhaps, ultimately by the Judge Advocate General. The generalizations refer to Army and Air Force procedures. The naval procedures are often different.

Court-Martial and its sources. Courts-Martial are an anomaly from a judicial point of view. They usually consist of five officers, one of whom acts as a President. There is also a judge advocate and prosecuting officer and the accused may be represented by a friend or a qualified counsel of his own choice. The procedure to be followed is contained in the respective Manuals of Military Law and Air Force Law for the Army and the Air Force and in the B.R. 11 in the Navy. These are the “bibles” of the military and the naval lawyers. The relevant Australian Statutes are the Defence Act 1903-1956 (Cth) the Air Force Act 1923-1956 (Cth) and the Naval Defence Act 1910-1952 (Cth). Regulations made thereunder also apply. Laws, statute and otherwise, of the United Kingdom are often made applicable by these statutes to the Australian servicemen. This has the result that repealed English laws are often applied to Australian serviceman but not applied to English servicemen on service in Australia. In the Manuals, there are statements of law to be applied but no authority is given and there is uncertainty whether they are the law or merely expressions of some unknown author's opinion on the law. There is no Uniform Code for the three services. Some service offences are common to the ordinary criminal law to which a serviceman is also subject. In a court-martial, a plea of autrefois acquit or autrefois convict in an ordinary criminal court will be a defence, but an acquittal or conviction by court-martial may not be pleaded.
as a defence in an ordinary criminal court.\textsuperscript{40} Theoretically, a serviceman can be tried twice for the same offence although visiting forces servicemen under visiting forces legislation can only be tried once, and if a serviceman successfully appeals against a court-martial conviction, he cannot be tried again by any other court.\textsuperscript{41}

The relevance of a non-compliance with the judges' rules, if it arose in a court-martial, is still uncertain. In an increasing number of matters, Australian law and particularly Australian Criminal Law is moving away from the English law,\textsuperscript{42} yet there seems little doubt, for example, that when an Australian serviceman is charged with an offence under "The general (Devil's) article", i.e., conduct prejudicial to good order and military discipline, he will be judged by English and not by Australian law. Many of these uncertain aspects of Australian military law will only be completely remedied by the enactment of a uniform code of military law as in the United States. In the meantime, the Tribunals deal with the problems that arise before it but is unable to introduce any major reforms. It does its best to determine the applicable law and insists that the minimum standards at courts-martial be no lower than those which courts of criminal appeal demand in trials at Quarter Sessions.

\textbf{Role of Judge Advocate.} It is here that the Judge Advocate's position has been spotlighted. Historically, his was a strange role. As his title suggests, he was not a judge and for many years, he was more advocate than a judge. He merely advised the court on questions of law and functions always included duties to assist the court, the prosecution and the accused. He is not in charge of the court as is a non military judge, unlike the "military judge" in the United States. The President, usually his senior, controls the court and is also a member of the jury. Some of the Judge Advocate's difficulties result from the service view that the courts-martial are not so much courts of law but courts of honour and true descendants of the court of Chivalry. The members are officers trained in service traditions of discipline and efficiency, and there is nothing strange to

\textsuperscript{40} R.V. Aughet, 13 Cr App R. 101 (1918); Army Act 44 & 45 vict, c 58 S. 162 (1881) (amended).
\textsuperscript{42} Cf Parker V The Queen, 37 Australian L. J. R 3 (1963).
them when one of their members, charged with an offence against those service conditions, comes before them to be tried. It is not surprising when justice miscarries through an excess of zeal on the part of the judge-advocate who forgets the impartial nature of his position and thinks of himself as a superior officer representing the service against which some offence has been committed.43

The court-martial is a jury, but a jury with a difference: it is judge of both facts and law, and that it also decides on sentence. It can discard the advice of the Judge Advocate on the law it should apply. Strange situations can arise on interlocutory matters. A submission of no case to answer at the close of the prosecution case not made to the Judge Advocate in the absence of the court- it is made to the court who are the jury, and they can disregard judge advocate’s advice. The advice of the judge advocate may be that there is no case to answer and yet the court (jury) may hold that there was and convict the accused.

Hence, we see that as the Tribunal’s judgements expose the uncertainties and anomalies, we can expect legislation to reform them. Service life is changing and the old concepts which seemed basic are also changing. It is in keeping with these changes that the Tribunal' (court-martial should 'Civilianise' the procedures at courts-martial. It must not be forgotten that the 1955 Act did not itself change any service law. It merely engrafted the system of appeals to the tribunal on the existing service system of confirmation, review and petition. The presentation of an unsuccessful petition was made pre-requisite to an application for leave to appeal.44

(vi) CHINA

A serviceman in China who is found to be violating regulations governing military criminal cases, provisional criminal code, police regulations or any other law is triable by court-martial. Military courts-

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43 See examples of cross examination by the Judge Advocate in the appeal of Schneider.
martial are organized under the orders of Ministry of War or the highest military authority concerned.45

__ Forms of Courts-Martial. __ There are many forms of Courts-martial, which are as under:-

(a) High military courts-martial;
(b) Military courts-martial;
(c) Provisional courts-martial.

High military court martial is established under the orders of the Ministry of War, whereas, Military court martial is established/convened under the orders of the Provincial military governor or by the authority in the office of the Military governor of a frontier area or garrison military governor or by the commander of the Army Corps, Division, Brigade or Provisional Army. Provisional military court-martial is convened by the commander of detached military forces.

__ Composition and Powers of Courts-martial. __ A military court-martial comprises of a Chief judge, associate judges, assistant judges and writers. It has power to try any officer of the rank of Colonel or below or their equivalents in other services, who is accused of an offence. A High Military Court-Martial shall have power to try any officer of the rank of General or his equivalent in other services, who is accused of an offence. A provisional court-martial shall have power to try any officer of the rank of Colonel or below or their equivalents in other services, who is accused of an offence committed in the district under military control.

__ Procedure for trials by court-martial. __ When a military serviceman has committed an offence before he joined the service, but the crime became known during his term of service, he shall be tried by a military court-martial, but if he had committed a crime during his term of service but the crime was detected after he had left the service, an ordinary law

45 Chinese military law regulations, Presidential order dated March 26, 1915, revised on April 17, 1918 and August 18, 1921, Article 1.
court will have jurisdiction over the case, except in a case where the offender is to be discharged and deprived of his military rank on account of the commission of the offence.

Appointment of Military Procurators. The following officers may be appointed as Military procurators: (1) Superior Officers and non-commissioned officers of the Military Police, (2) Military Aides-de-Camp (ADC) of an Army Corps, Division or Brigade. The military procurators of the Provincial Army shall be chosen and appointed by the highest authorities concerned. A military procurator, gendarme, judicial police officer, or policeman may arrest a military serviceman who commits an offence. The offender must, after the offender’s arrest by a gendarme, judicial police officer or policeman, be forthwith delivered to a military procurator or the higher authority of the proper rank in charge. The military procurator and the superior officer of the proper rank in charge after taking steps to procure evidence against an offender in a case shall submit such evidence whether in the form of a chattel or of other documents together with a report of investigation to the various authorities in accordance with the procedure given hereunder: 46 If the jurisdiction is recognized as a disputable and the offender be a military serviceman, he shall be sent to the military procurator, who has direct control over such offender. If the offender be a naval man, to the naval procurator who has direct control over such offender and if the offender be an ordinary person, then the procuratorate of the district. But a request shall be submitted to a higher authority for instruction regarding disposal of an ordinary person who is a joint offender with a military serviceman.

The Ministry of War and other High authorities shall send a case, after acceptance, to an assistant judge for trial. Before a trial takes place, the Assistant Judge shall issue a writ of summons and if necessary, a warrant, but a report must be submitted to the High authority in control for

46 Article 19 to 24 of the Chinese Military Law, quoted ibid. For composition of the courts martial and their power, see Articles 6 to 16.
information. An accused who appears in court by a writ of summons shall be tried within twenty-four hours, and one who appears in court by warrant, within forty-eight hours. If, the time limit for the trial of an accused referred to has been reached and it is considered necessary to detain such an accused, a writ of detention shall be issued. An accused who is not able to appear in the court on account of illness or any other justifiable and important cause, whether summoned by a writ of summons or by a warrant, may be examined by a military procurator in the place where he resides.47

Judgement can be in abstentia – in case of an escapee. Whenever an accused who should be given a term of imprisonment for a more serious offence, has escaped and is therefore unable to appear before the court, or if a person is to be fined a sum of money refuses to appear in the court, the judgement may be delivered in his absence.48 A judgement against the persons may be delivered who are present in the court, although they are concerned in a joint offence, where some of the co-offenders are not present in the court.49

A written judgement together with all the legal documents relevant to the case shall be prepared in accordance with the particulars specified in the following paragraphs, and signed and sealed by the chief judge, associate judges, assistant judges and writers for transmission to the Ministry of War, Commander-in-Chief for the army, or the high authority in control:-

(1) Grounds of the judgement.

(2) Written judgement for conviction shall clearly specify the evidence by which an accused is convicted and set forth the provisions of law for the violation of which an accused is condemned.

(3) Written judgement for acquittal shall clearly specify either that the accused has died, or that an error has been made in the case, or

47 Articles 25 and 26 of the military law ibid.
48 Article 34 of the law ibid.
49 Article 35 of the law ibid.
that the case is not actionable, or that the evidence is not sufficient for a conviction.

(4) Written judgement for dismissal shall clearly specify the time of limitation in a prosecution, or amnesty or pardon, or the fact that an accused should entirely be exonerated after definite conviction or by virtue of legal provisions.

(5) Written judgement of disputed jurisdiction shall clearly specify the fact why jurisdiction is in dispute.

(6) If there is a private action mentioned in a judgement, it must be thus clearly specified.

(7) Official title, number of the company, name, place of origin, age, address of an accused and the dates of conviction.

If the Ministry of War or the Highest Authority in Control considers that a judgement has been made contrary to the provisions of law, the Ministry of War or the Highest Authority in Control may order a reconsideration of the judgement of a High Military Court Martial or a Military Court Martial, or of the report submitted by a superior officer for pronouncement.\textsuperscript{50}

\textbf{New trial.} The Ministry of War, the Commander-in-Chief of the Army or the Highest Authority in Control may order a new trial, when a judgement of a military court-martial is considered to have been wrongly made and pronounced. After the pronouncement of a judgement, the accused or the relative of the deceased accused may apply for a new trial in case one of the following happens:-

(a) When in a case of homicide either the person alleged to have been killed is still alive after the accused has been sentenced, or that such person had actually died before the crime was committed.

\textsuperscript{50} Article 42 of the military law ibid.
(b) When some person has been sentenced for the same crime, in which case the accused was not an accomplice.

(c) When an alibi has been proved by producing proper written evidence showing that the accused was not present at the place where the crime was committed.

(d) When judgement has already been pronounced against a person who has maliciously and falsely prosecuted the accused.

(e) By producing proper written evidence showing that some of the legal documents relevant to the case have been forged or were in error.

An application for a new trial may be made by an accused who has been sentenced to imprisonment during his absence in court within the period after the pronouncement of the judgement has been made and before the terms of imprisonment expires; but a new trial must be held within ten days in case where an accused definitely knows that the pronouncement of the judgement has been rendered against him, or within ten days after his arrest or after his surrender in person. A new trial may be applied for by a person who has been fined a sum of money within ten days after the written pronouncement to that effect has been sent to his residence. When the accused has himself applied for a new trial, the new punishment to be inflicted shall not be severer than the original one. A military court-martial, when receiving an application for a new trial against a judgement rendered in the absence of the accused, may forthwith order the holding of a new trial without petitioning the Ministry of War, Commander-in-Chief of the Army and the Highest Authority in Control.51.

**Conclusion**

It may be brought out that there are many infirmities in the laws relating to our Armed Forces. There is a crying need to bring it in line with the provisions contained in certain developed military judicial systems of the

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51 Articles 45, 46, 49, 51, & 54 of the military ibid. Also see an article on “Chinese Military Law” published in C&MLJ, 1974, pp. 84 to 87.
world so as to answer the requirements of our liberty-oriented constitution and the rule of law. We need to extend the subjection to the military law with respect to cadets undergoing training at the respective academies prior to their commissioning into respective services. We also do not have any provision in relation to the reemployed officers. Their subjection to the Army Act through the Special Army Instruction 1/S/80 is infirm since the subjection to the statute would need to be created within the statute itself. There are many other areas such as civilians working with the defence forces (especially MES personnel etc), prisoners of war, spies and the violators of laws of war etc who have not been subjected to the military laws unlike the Uniform Code. The jurisdiction as to time (statute as to limitation of time) has to be seen in the light of the fact that such a provision has been created solely for the benefit of the accused, to be taken advantage of by him at his option by way of defence in the form of a special plea.

'Judge Advocate' plays a pivotal role during the trial. The value of his advise/opinion on legal issues cannot be brushed aside by the jury unless they are of the view that he is 'biased' which view is otherwise quite reflective from his conduct of the case. He is the only person who is well versed with laws, the members being hardly aware of the military laws, much less the laws as such. Therefore, he should have a power to rule on all interlocutory questions. He should preside over the sessions of the Courts-martial. However, at the time of deliberations on findings, he should not retire with the members, to exclude any possibility of the members being influenced by his presence or to allay any apprehension that the accused may have had about him. There should be no embargo of reemployed officers serving on the Courts martial after they have been subjected to the military law in a proper manner.

The standard of officers detailed to perform the job of a prosecutor or a defending officer at the trial is not upto the mark at the moment. There is a dire need to see that they are not only legally qualified but are also otherwise competent to perform such onerous duties. They need to be certified to be competent to perform such duties by the Judge Advocate General/Deputy Judge Advocate General concerned. This would require
induction of law qualified officers into the services who could not have made their grade to enter into the judiciary of the army (JAG's Department) or otherwise. Our troops generally hail from a poor family ground. There is, thus, a need to provide a counsel to the accused free cost not only at the trial but also prior to trial.

After the trial has begun, there should be a provision to replace a member subject to challenge by the accused, further subject to the provision that the evidence previously recorded has been read over to him. Like the members, there should be a provision to enable the accused to challenge the Judge Advocate also, if he so desires. The casting of Votes by the members should be by a secret written ballot to remove any fear which a junior member may entertain at that point of time. The right to have the last word (address), irrespective of whether the accused calls witnesses in his defence, should rest with the defence.

The powers of Summary Courts Martial need to be drastically curtailed so as to bring it in tune with the Uniform Code, obviously because of its inherent weaknesses, such as ineffective representation by accused's counsel (if he has one) and limitation as to challenge the officer holding the trial. Like in Army Act Section 84, there should be option given to the accused to be tried by a District Court Martial in preference to Summary Court Martial so as to enable him effectively organize his defence at such a forum. It is furthermore important in view of the vast powers that a Summary Court Martial has.

Before parting, it may be stated that there should be provisions like retrial, new trial and mistrial etc as in the Uniform Code to cater for particular circumstances of the case. Finally, in view of the fact that the nuances connected with life of armed forces personnel being generally the same, it highly calls for a Uniform Code, with some exceptions provided to cater for the peculiarities of a particular service.