CHAPTER - VI

A. COMMAND INFLUENCE AND THE ROLE OF JUDGE ADVOCATE GENERAL'S DEPARTMENT IN INDIA

Introduction

"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 executive chain of command. Frequently, the members of the courts-martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings – in short, for their further progress in the service."

Justice Black in Reid V Covert

Justice Black went on further to state while conceding that the military personnel have 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 the things do not and cannot have the independence of jurors drawn from the general public or of civilian judges. The Supreme Court of India while dealing with the case of Lt Col Prithi Pal Singh V Union of India, AIR 1982, SC page 1438 observed that while great advances have been made in administration of military justice in other countries, especially the United States, where an accused has a right to a legally qualified counsel even before the Special Court-martial and a military judge, in certain circumstances, can conduct the trial alone. A ban has been imposed there on command interference with military justice system. Ours still is an antiquated system.

1 (1957) 1 Law ed 2d at page 1174.
Command structure and influence on administration of military justice.

We have various authorities dealing with many aspects of a disciplinary process. The disciplinary process commences with the hearing of the charge under Army Rule 22 by the Commanding Officer of unit, which is the lowest in the chain of command. After hearing of the charge(s), one of the options left with him is to refer the case to the convening authority, a Divisional Commander (a Major General) in the case trial by General Court Martial is being contemplated. Depending upon the gravity of offence(s), if the Commanding Officer is satisfied that the offences are fit to be tried by a District Court Martial, he, then refers the case to his Brigade Commander who is of the rank of Brigadier. While trials by General Courts Martial can be convened by Central Government, Chief of the Army Staff or any of the authorized who is A-1 warrant holder. Those authorities could be General Officer Commanding-in-Chief (GOC-in-C) of a command, General Officer Commanding (GOC) of a Corps (a Lieutenant General) or a Divisional Commander (a Major General), whereas District Courts Martial, as discussed in the preceding chapters, can be convened by a Brigade or Sub Area Commander, who are holders of the ‘B-1’ warrants who can confirm the proceedings of such courts martial as well.

Prior to a case coming up for trial by General Court Martial (GCM) or District Court Martial (DCM) or for that matter by Summary General Court Martial (SGCM), the documents for pre trial advice are sent to the representatives of the Judge Advocate General’s Department (JAG’s Deptt) who are located generally at the Command Head Quarters and the Corps Head Quarters. Though these officers represent the Judge Advocate General at a court martial, but they are basically responsible to the Commanders (whether GOC-in-C Command or GOC of a Corps) for all purposes so far as advice/opinion on legal cases are concerned. It is upto the commander whether or not to follow the advice/opinion rendered by his legal adviser, called the Dy Judge Advocate General. These officers are dependent on these commanders for their fitness, gradings, promotion and postings etc.
The position is same so far as the officers at the Army Head Quarters or the Officers in Charge Legal Cells are concerned. Normally, there is hardly an influence exercised by any of such commanders on the officer of the JAG's Deptt working at a particular Head Quarters but possibility in a selected case of exercising such influence cannot be ruled out.

**Purpose and role of the Judge Advocate Generals Department at various levels of Command.**

(a) **The Judge Advocate General.** The Judge Advocate General is the legal adviser to the Chief of the Army Staff in matters of military, martial and (in its fighting service aspect) international law. He also assists the Adjutant General in matters relating to discipline involving application of military law.\(^1\) However, under the Navy Act 1957, the office of the Judge Advocate General has been statutorily provided for and qualifications for his appointment have been laid down.\(^2\) Like his deputies at Command and Corps level, he also assists the convening authorities upon questions arising during the preparation of cases for trials by courts-martial. He, along with his officers at command and corps level, advises confirming authorities on confirmation or review or on pre-confirmation and post-confirmation petitions. His position is subordinate to the Chief of the Army Staff. The Judge Advocate General fulfils some of the highest judicial and advisory functions in the Army and suggestion has been made that in view of the responsibilities of the post and the need for complete independence, his qualifications, status and remuneration should be prescribed. Like the main functionaries, he too should be appointed by the President in consultation with the Chief Justice of India and should be responsible to the latter in the performance of his duties.\(^3\)

There is a criticism to the effect that there are conflicting nature of duties being performed by the officers of the JAG's Deptt. The officers of the JAG's Deptt advise the commander on pre-trial matters.

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\(^{2}\) The Navy Act, 1957, Section 168.

such a examining the Court of Inquiry proceedings, Summary of Evidence, finalising the charges against the accused, advising the prosecutor and writing reports on applications for trial. One of such officers later acts as a Judge Advocate at the trial. The officers of the JAG's Deptt also later on advise the confirming authorities whether or not such proceedings of the court-martial should be confirmed. In other words, whether the finding(s) returned by the court-martial are sustainable legally or there is any variation required etc. Similarly, with regard to the sentence of the court-martial, whether the same is commensurate with the nature and gravity of the offence(s) or otherwise. No Judge Advocate, however, reviews the proceedings of any court-martial at which he had acted as a Judge Advocate.

(b) **Judge Advocate** A Judge Advocate is an important functionary at a court-martial. Most of the members are laymen and have hardly any experience of conducting trials by courts-martial. It is, therefore, necessary that on points of law or procedure or procedure which arises at the trial, the court should be guided by the opinion of the Judge Advocate, and not disregard it except for very weighty reasons. It has been experienced that there have been some instances where the members of the court-martial did not follow the opinion/advice rendered by the Judge Advocate on law points. This is a serious anomaly in our military judicial system unlike the United States, where the Military Judge (who is the counter part of Judge Advocate) rules on points of law and the jury members have no say and rightly so since they are laymen having no knowledge of the nitty-gritty of law and legal procedures. The court-martial is responsible for the legality of its opinion, but it must consider the grave consequences which may result from its disregard to the advice of the Judge Advocate on any legal point. If a court-martial, acting without jurisdiction or in excess of jurisdiction, convicts a person subject to the Army Act, the members of the court-martial may be held liable in damages by a civil court and such liability – or at least the amount of damages – may depend upon the question whether they exercised a bonafide judgement, 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.

As the Judge Advocate has to perform a number of mixed duties, such as rendering advice to the prosecutor, the accused, the court and the convening officer, it is absolutely necessary that in fulfilling his duties, he maintains an entirely impartial position. He must not only be fair but also should appear to be so at all times.

In the case of *Trilochan Joshi Vs Union of India*, the Delhi High Court was of the view that the Judge Advocate performs no functions either of an advocate or of a judge. He used to be a crown prosecutor but in course of time he ended up as an adviser. Judge Advocate is, thus, not a judge as the one in a trial by jury except in the sense that he has to maintain an entirely impartial position and his addresses cannot be styled as or as in the nature of directions. The court-martial deliberate on its findings 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 swaying the minds of the members of the court-martial and if his advice is patently contrary to law and may have affected the verdict of the court martial, High Court will be entitled to see whether or not to sustain the verdict.

The findings(s) of the court-martial cannot be quashed simply because advice had not dilated upon certain alleged alterations in the register or certain contradictions in the statement of some witnesses. The conduct of the Judge Advocate, after reading his advice in open court and sitting in the closed court is a course permissible under Rule 61(1). The presence of a Judge Advocate, who does not seem to be impartial, will vitiate the proceedings.

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2. 1983 Cri L J NOC 109 (Delhi).
3. Sansar Chand (Maj) V, UOI; 1980 (3) SLR (Himachal) 125.
Whether or not a Judge Advocate would be disqualified to sit at a court-martial on the ground of bias, the Rajasthan High Court (Jaipur Bench) had answered in the negative. As per them, a Judge Advocate is not a member of the court-martial. His presence at a court-martial is required by virtue of Army Act Section 129. The accused does not have a right to object to the Judge Advocate.

In the case of *Bhagat RS Lt Col vs Union of India*, the Delhi High Court was of the view that a misdirection by the Judge Advocate leading to the erroneous conclusions of law and fact by the court-martial is relevant and such failure on his part must be held to have caused serious prejudice to the accused.

As observed by Lord Goddard, “he has no authority over a court-martial that a Judge has in a court over which he is presiding.” For instance, unlike a judge, he cannot direct an acquittal merely because he is strongly of the opinion that that is the proper verdict. But, by and large, the functions of the Judge Advocate are very similar to the functions of a Judge summing up to a jury in a civil case, and because of this, one is concerned that his position is not as clearly independent as that of a judge. Stationed amongst members and others, he cannot be entirely free from the military ethos and he may well have discussion about a case on which he must later advise a court-martial.

Another serious criticism of the office of the Judge Advocate is the practice of the Judge Advocate retiring with the court when the court is considering its findings. This should cease forthwith because of two reasons. The first reason is that if the court-martial when considering its verdict, found itself in need of assistance from the Judge Advocate on some point of law, it is preferable and quite easy
for the court to be reopened, and for the advice to be given by the Judge Advocate in the hearing of the accused and the prosecution. The second argument against it is that inasmuch as the Judge Advocate in his Summing Up of the case may, in the proper discharge of his duty, have been compelled to make observations damaging to the defence, the spectacle of his retiring with the members of the court to consider the verdict could not fail to cause the gravest misgivings in the mind of the accused. Although, justice might be done, it would not appear to the accused to have certainly been done and is imperative that a change in the practice should be made without delay. It may be stated that a similar recommendation made by both the Oliver Committee and the Lewis Committee was adopted by the British Army in 1947.

Command Influence by the Convening Authority. The phrase “Command and Control” is vague and indefinite. A convening authority have, as commander of a formation, have vast judicial powers. Though these powers have been conferred on him to exercise a proper command and control, with a view to maintain good order and military discipline, but there are certain grey areas of his command through which he can exercise improper command and control. This can be discussed under the following heads:

(a) Court Appointment. Selection of members of the court-martial, prosecutor and the defending officer is the prerogative of the convening authority and it is all within his control. He may or may not select those officers whose orientation is well directed to crime detection/prevention and control. Accordingly, the only way to prevent the members of the court-martial from being improperly influenced by the commander is to discontinue the commander’s power to appoint the members and to remove him from any responsibility in the field of military justice as has been done under the Uniform Code of Military Justice in 1951. Under that both the

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12 Uniform Code of Military Justice, 1951, Articles 27(b) and 26(a).
counsel and the military judge are certified by the Judge Advocate General concerned, as competent to perform their duties before they can be appointed by the commander. Under the British law, these appointments are still being made by the convening authority except that the Judge Advocate is appointed by the Judge Advocate General. The plan proposed by the American Bar Association appears to be representative of all reform movements and is worth consideration:-

"The remedy suggested is a simple one: the power to convene the court, to appoint assigned defence counsel and to order the sentence executed would be taken away from the Commander and vested in the Army Judge Advocate General’s Department or its equivalent in the other services. Commanders who under existing law, convene the court could be required to make available to the Army or other Head Quarters a panel of officers available and qualified for court-martial service. From such panel, the judge Advocate General or his Deputy at Army or other Head Quarters would select the members of the court to adjudicate the cases in a particular division. That court could, of course, be composed of officers selected entirely from divisions other than the division in which they are assigned to preside."13

(b) Reference to Trial. The power to refer a case to trial involves a command function because of the military nature of the courts-martial. There is a room for improvement in the existing system. It is the duty of the Commander vide Army Rule 37(1) to personally satisfy himself that the specifications allege an offence under the Army Act and that there are ample evidence available to support the charges. The commander is not the person who can fully ensure compliance of the Rule ibid. These determinations involve legal principles and decision, as to whether such an evidence would support the charges, is better left to the staff judge advocate, so far as

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American military justice system is concerned. In our context, this duty devolves on the Deputy Judge Advocates General of a Corps or Command, who initiate Report on Application for Trial, after thoroughly scrutinizing the evidence contained in the Summary of Evidence and the Court of Inquiry proceedings. In United States, as a matter of practice, the decision is made by the Staff Judge Advocate in the form of advice to the Commander. Even so, the fact that the commander is enjoined to personally make these decisions is an open invitation to unlawful command. It is the course of least resistance for the staff judge advocate in advising his commander consciously or unconsciously to colour his legal opinion to reflect what he believes the commander will decide on his own. To overcome the above difficulty, as suggested by Major Donald W. Hausen, the Staff Judge Advocate should be charged with the responsibility of finally determining whether the charges are legally in order as also whether or not there is sufficient evidence to support the charges. It is only if the Staff Judge Advocate concludes that the charges are correct and that there is sufficient evidence to support the charges would the case be referred to the commander for his consideration. The experience of the Staff Judge Advocate should continue to be utilized by calling upon him to give his recommendations to the convening authority concerning the nature of the offence(s) and the level of the court-martial deemed appropriate.

(c) Reviewing of Finding and Sentence. The development of the court-martial as an instrument of command discipline was accompanied by a requirement for review and confirmation by the convening authority before the sentence could be executed. The power to return the case to the court-martial for reconsideration together with the power of review operated to prevent a miscarriage of justice at a time when a few lawyers were involved in the judicial process. This inchoate nature of the finding and sentence led Winthrop to note:

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"While the function of the court-martial is regularly completed in its arriving at a sentence or an acquittal and reported its perfected proceedings, its judgement, so far as concerns the execution of the same, is incomplete and inconclusive, being in the nature of recommendation only. The record of the court is but the report and opinion of a body of officers, addressed to the superior who ordered them to make it and such opinion remains without effect or result till reviewed or concurred in or otherwise acted upon, by him."\textsuperscript{15}

The basic criticism of the commander’s power of review is not that the innocent are punished but that the sentences of the guilty are disproportionate to the crimes. There is a considerable weight in the above criticism. In a system operated entirely by military men, deference is naturally paid to the rank and position of the commander. Courts frequently endeavour to serve society’s interests, by balancing the needs of the government against those of the individual. In the military, the command is the society, therefore, there is a tendency to identify the Government’s interests with the society’s because the commander is deemed to speak for both. The point that is sought to be made can be illustrated by the case of \textit{Capt Harish Uppal Vs Union of India}\textsuperscript{16} where the officer was tried by Summary General Court Martial and sentenced to be cashiered from the service. The General Officer Commanding concerned feeling dissatisfied with the sentence ordered revision of the sentence by issuing the following order:-

"It would be appreciated that the charges of which the accused was convicted is of a very serious nature. The punishment of “Cashiering”, therefore, awarded for the offence appears to be palpably lenient. The maximum punishment provided for the offence under the IPC S.392 is ten years rigorous imprisonment. Even though the proper
amount of punishment to be inflicted is the least amount by which the discipline can be effectively maintained, it is nevertheless equally essential that the punishment awarded should be appropriate and commensurate with the nature and gravity of the offence and adequate for maintenance of high standard of discipline in the armed forces. ------

------------------------ The conduct of the accused by indulging in broad day-light bank robbery is despicable and his stooping so low as to deprive Shri Habibullah (PW-2) of paltry amount of Rs 6/- in Pak currency ------------------- is indeed highly reprehensible ----------------- It is, therefore, our imperative duty to ensure that such cases are dealt with firmly when a verdict of guilty has been returned by the court.”

In the face of such strong observations by the General Officer Commanding, the officers constituting the court could have felt compelled to enhance the sentence, and the enhanced sentence adding two years rigorous imprisonment could not be regarded as free act of the court-martial. What is further worrying is the usual practice, whereby the court imposes an excessively severe sentence upon the assumption that the commander who convened the court would reduce it to the extent he would consider just and conducive to the maintenance of discipline. There is no doubt that the commander is poorly equipped by training or judicial temperament to decide if the finding(s) and the sentence are correct in law. Sure, this duty should be entrusted to the Staff Judge Advocate whose opinion on legal matters should be final and not subject to review by the lay commander. At the same time, the commander should retain the final power to approve or disapprove the conviction and sentence based upon his view of the need for discipline and proper utilization of personnel in his command.17

Brig (Retd) RG Vidhu in his article on “Command Influence in Military Justice”18 quotes Hon’ble Birch Bayh, a U.S. Senator from Indiana in his introduction to “The Great Court Martial Cases” by Joseph Di Mona, says, “How overwhelming is the influence that Commanders holds over court-martial procedures -------. The commander determines whether to prosecute;

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18 Sainik Samachar dated 06 September 1992 at pp. 9 & 10.
controls the court-martial procedure and plays an integral role in the appellate process. He -------------- convenes the court-martial -----.

He chooses the men to serve as members of a court -------------- reviews the findings and the sentence and decides whether a sentence to confinement shall be deferred pending appeal. Military justice has not been above reproach. One reason for this is that the legal provisions relating to the administration of military justice are, perhaps as a matter necessity, so worded as to allow lot of discretion to superior authority.”

In the service, the Department of the Judge Advocate General symbolically represents the judiciary. The officers of this Department, like all other officers of the Army, at present look upon the concerned military authorities for their pay, posting, promotion and all other matters of service conditions. This naturally restricts, at least psychologically if not physically, their freedom of action. Then, even if they may be expected to rise above the consideration of their career interest-albeit a superhuman expectation – their advice can, within the existing rule position be rejected by the commander concerned with impunity. The officer had quoted in the article ibid that according to a Judge of a High Court at a Seminar in Delhi on 21 Jul 1991, the Judge Advocate General’s Department should not remain functionally placed under the Chief of the Army Staff, but should be responsible to the Central Government. While this may not materialize in the near future, yet the said Department may be made more autonomous, devising its governing mechanism. This will not only add respectability to the office but also to the confidence of a lay armyman. Perhaps, it will also inspire a greater sense of functional independence in the incumbents.

Col GK Sharma in his book titled, “Study and Practice of Military Law” observes at page 69, “In the course of perusing various proceedings of courts-martial, the author has observed that in certain cases the accused persons have been gravely prejudiced in their defence and the convening authorities have exercised command influence, during investigation as well as trial —— hampering their right of defence, fair investigation and fair trial, thereby causing failure of justice.”
The status of the Judge Advocate General and his staff under the British military judicial system seems to be better than India, though we had imbibed the British military judicial system when India became independent in 1947. It was probably convenient to do so since India was a Colony of the British prior to 1947. With regard to the appointment of the Judge Advocate General in the British Army, the Oliver Committee\(^\text{19}\) and the Lewis Committee\(^\text{20}\) had recommended that the Judge Advocate General should be appointed on the recommendations of and be responsible to some ministry other than the Secretary of State for War. This recommendation was primarily made in view of the importance of removing from the minds of the public any impression that the Judge Advocate General, whose duty it is, amongst other things, to review all convictions by Court-Martial and to advise on questions of law arising out of such review, is in any sense a subordinate official of the War Office Ministry. Based on these recommendations, the Judge Advocate General now is appointed by the Lord Chancellor and is responsible to him. His duties in relation to the Secretary of State for War, continue to be advisory. The Judge Advocate General hold his office under Letters Patent from the sovereign. The person appointed to the office shall be recommended to Her Majesty by the Lord Chancellor to whom the Judge Advocate General was made responsible in 1948, bringing his office into conformity with other judicial offices in this respect.

Like in India, a Judge Advocate in England is appointed to act at every court-martial either by the convening authority or an officer nominated by the convening authority or otherwise by the President of the court-martial. The duties of the Judge Advocate, as in our case, is to inform the convening authority before the trial, of any defect in the constitution of the court, to administer oath to the President and other members of the court-martial.

\(^{19}\) Report of the Army and Air Force Courts-Martial Committee 1938 (Cmd 6200). The Chairman was Mr Ronald Oliver, MC, KC.

and to any officer under instruction and to advise the court on question of evidence, law and procedure, as they arise and upon the rules and regulations of the service generally before the closing of the court for consideration of the finding(s). The Judge Advocate must advise the court on all legal issues arising in the case and, when necessary, on any issue relating to their power to convict on alternative offences.\textsuperscript{21} The Judge Advocate does not occupy the same place as the Judge and he has, unlike the American system, no authority over the court-martial that a judge has over a court he is presiding. His duty is to advise the court-martial on questions of law and to sum up the facts. If there is no evidence to support a conviction, he can say so.\textsuperscript{22}

J.A.G. Griffith writes in his article “Justice and the Army”\textsuperscript{23} that the Oliver Committee had recommended many things, but the principal recommendations out of those were three. First, that although that part of the J.A.G.’s office, which prepares cases for the prosecution and in serious cases supplies a judge advocate to sit with the court, is in practice separate from that part which reviews convictions and to that extent takes the place of a Court of Appeal, the former should be transferred to an independent Directorate with a separate head responsible to the Adjutant General; second, that as reviewing of cases in the J.A.G.’s office takes place of all final appeals on questions of law and procedure, the status of a J.A.G. should not be merely that of an official liable to be dismissed summarily; the status and salary of his staff should also be reconsidered on the same basis;\textsuperscript{24} third, all offences against the ordinary criminal law of the land when committed against the person or property of civilians should be tried by the civilian courts, as a general rule.\textsuperscript{25} This committee had also recommended, inter alia, that reasoned answers by the J.A.G.’s office to petitions should be in writing; that the J.A.G. should have power to hear arguments by the prosecution and defence on any question; that he should have power to obtain the opinion of the Court of Criminal Appeal on new or difficult points of law, and that where the Judge Advocate sits with a court-martial, he

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\item \textsuperscript{21} 33 Halsbury (3rd Edn) p. 1067.
\item \textsuperscript{22} R V Linzee (1956) 3. All ER 980.
\item \textsuperscript{24} Para 16 of the Oliver’s Committee report cited (Supra).
\item \textsuperscript{25} Para 20 & 21 of report ibid.
\end{thebibliography}
should not retire with the court when it is closed for any purpose other than the consideration of the sentence.

With regard to the command influence factor, it was stated by Lord Longhborough in 1792 as under:

"military court-martial are liable to the controlling authority, which the Courts of Westminster Hall have from time to time exercised for the purpose of preventing them from exceeding the jurisdiction given to them."

C. COMMAND INFLUENCE AND THE ROLE OF THE JUDGE ADVOCATE GENERAL'S DEPARTMENT IN UNITED STATES OF AMERICA

A Military Judge (erstwhile Law officer) belongs to the Department of Judge Advocate General. Each service has its own Judge Advocate General's Department. In our text context as also in Britain, this officer is known by the appointment of "Judge Advocate" as mention above. He is a very important functionary at a court-martial trial. This officer has been styled by Mc Arthur as "the premium mobile". Adye described him as "the mainspring of a court-martial if he errs all may go wrong". It is, therefore, imperative that this officer should be professionally competent, fair and well versed in military law, general law of the land and orders and customs of service. He is the legal arbiter in proceedings before a court-martial, and, for many purposes, holds a position analogous to that of a judge in a federal district court which is trying a criminal case. In the absence of "military

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26 Oliver Committee report (Supra) para 26.
27 Grant V. Gould, 2 HB 1: 69 (1792); Also see “British Military Justice” by Peter J. Rowe, published in the Military Law Review, Vol 94 (1981) at p.106.
28 Ibid at 100. See also Lu re John Poe, 5B. & Ad 681 (1833)
29 "The original difficulty of putting the clergy on the same footing as laymen was at least as great as that of establishing the supremacy of the civil power in all matters regarding the Army." House Hearing 1153.
judge" the court-martial cannot receive evidence or act judicially; it can only adjourn until the military judge is present, because the "military judge" performs a judicial function.

**Unlawful command influence.** In American law, it has been provided that no convening authority or commander may censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the courts-martial or tribunal or such persons in the conduct of the proceedings. No person subject to the Uniform Code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority's judicial acts. However, it may be mentioned that general informations or instructions to implement the provisions of military justice, if such courses/informations are only designed to instruct the courts-martial personnel, are not included. Similarly, instructions given by the military judge in the open court are also not prohibited. Any action by the Judge Advocate General under the Rules of courts-martial, Rule 109 or appropriate action against a person for an offence committed while detailed as a military judge, counsel or member of a court-martial, is not prohibited. There are certain prohibitions provided for in relation to the functionaries of the courts-martial, so far as their evaluations/ratings are concerned, in order to ensure that such things do not exert any sort of command influence on any functionaries of the court-martial.30 In preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty, hence, it has been provided in the Code that no person may consider or evaluate the performance of duty of any such person as a member of the court-martial. Similarly, no person may give a less favourable rating or evaluation of any

30 RCM (1984), Rule 104 (b) (1) & (2).
defence counsel because of the zeal with which such counsel represented the accused. With regard to evaluation/performance of the military, similar prohibitions have been imposed, to ensure that there is no command influence in the rating or evaluation of the military judge’s judicial performance. There is a freer communication between the staff judge advocate of a formation Head Quarter and the Judge Advocate General.

- Professional Supervision of the military judges and counsels. Each Judge Advocate General may prescribe rules not inconsistent with the Rules of courts-martial (1984) to govern the professional supervision and discipline of military trial and appellate judge, judge advocates, and other lawyers who practice in proceedings governed by this Manual, i.e., (Rules of Courts-Martial-1984). After notice and the opportunity to be heard, counsel and military judges may be suspended for violations of such rules from practice in courts-martial and in the Courts of Military Review (CMR) only by the Judge Advocate General of the armed force of such court. The Judge Advocate General may upon good cause shown modify or revoke such suspensions. When a Judge Advocate General suspends a person from practice or the Court of Military Appeals (CMA) debars a person, any Judge Advocate General may suspend that person from practice upon notice and opportunity to respond in writing, but without further hearing.31

These improvements in the administration of military justice in the United States have come recently to eradicate the shortcomings which had been observed in the system for many years. For example, on the Command Influence, Justice Black had summed up the nature of courts-martial in the following words:-

"The members of courts-martial in nature of things, do not and cannot have the independence of jurors drawn from the general public of civilian judges."32

32 See Note 1 supra.
A charge invariably had been made by the critics of military justice in the United States about the prevalence of "Command influence", the domination and control of the court-martial by the Commanding Officer. As per Sherman on "Command Influence", "it is a most serious threat to justice in the military". Most of these assertions are to the effect that convening authority’s position in the command structure and his superiority in rank over other personnel involved in the process enables him to influence its operation. By its nature, the subject does not lend itself to documentation.

We note that all the military judges of the General Court-martial assigned to the military judiciary, a command separated both geographically and structurally from the convening authority and responsible to the Judge Advocate General. When a command convenes a court-martial, a military judge is provided for it by the head of the judiciary. The name of the judge is listed in the convening order, formally known as "appointing order", which the convening authority signs. In this manner, the convening authority appoints the military judge. Moreover, the efficiency and fitness reports of these judges are prepared not by the convening authority but by the head of the centrally located independent judiciary activity. This activity is completely divorced from the convening authority’s chain of command and the military judge may even be superior in rank to the convening authority. With regard to counsel’s selection, the convening authority is similarly removed. Using the Navy’s in the United States as an example, the increased demand for counsels are being met through the ‘law centres’, under the Military Justice Act, 1968. Under this programme, commands, within a given district, obtain necessary counsels, by requesting them from the law centres, which is essentially a regional legal office at which many Judge Advocates, formally stationed at individual commands, are now assigned. For trial, the convening authority requests the necessary number of attorneys, who are, in turn, furnished by the law centre.

Prior to the Military Justice Act 1968 and Military Justice Act, 1983, it appears that the aspect of "Command influence" was too buoyant. In the
case of United States Vs Hedges, it was observed by the court of Military Appeals that the command and control aspect by the convening authority was not dead. A convening authority could appoint only those officers who share his opinions and attitudes. He could remove an officer from court-martial duty, who, in his opinion, improperly acquitted the accused or showed undue leniency. The members of the courts-martial were being subtly intimidated by their superiors. It was held in the case of United States V Dean that wherever improper influence upon the court by the commander or his representative is detected, the finding(s) required reversal.

In yet another case, i.e., United States V. Littrice, in which, at the commencement of trial and prior to plea, defence counsel interposed a motion which, in effect, was a challenge to all the members of the court. In support of this motion, Lt Col Lutz, a representative of the convening authority was placed on the stand to testify as to the instructions he had given to the members of the court-martial prior to trial.

Appellate defence counsel contended that instructions of the acting Commanding Officer constituted an exercise of improper influence over the court-martial, and, thus, deprived the accused of a fair trial. Appellant government counsel, on the other hand, argued that the instructions given to the court by the Commanding Officer were proper and expressly authorized by the Code and Manual provisions.

Thus, confronted with the necessity of maintaining a delicate balance between justice and discipline, congress liberalized the military judicial system but also permitted the commanding officer to retain many of the powers held by them under the prior laws. While it struck a compromise, Congress expressed an intent to free the court-martial members from any improper and undue influence by commanders which might affect an honest and conscientious consideration of the guilt or innocence of the accused.

33 11, USCMA 642 (1960).
34 5, USCMA 44; 17 CMR 44.
35 3 USCMA 487, 13 CMR 43 (1953); see also “Military Justice under the Uniform Code” by Brig Gen (Retd) James Snedekker, p.38.
It was observed that had Col Lutz been content to rely on the instructions set forth in the Seventy Army Circular, he would have stayed well within bounds. However, he went much further as he told the members that they should not usurp the prerogatives of the convening authority. In addition, he informed them that from his own experience as a member of the GCM, he had found that cases were thoroughly reviewed by the reviewing authority of the Seventh Army. It was observed that those statements more closely approached interference. As an abstract proposition, there is some value in explaining to the prospective members of a court that a record, after completion of trial, would receive a through review. Cast in a proper background, such a statement might be of assistance in helping court-martial members to understand trial and appellate procedures.

It was held that this was a concrete example of how a combination of events and statements can deny an accused a fair and just trial contemplated under the Uniform Code. The conviction and the sentence in this case was found to be product of a trial not founded upon those fundamental rights and privileges granted to one tried in the military system. The accused was tried and convicted by a court-martial which was not free from external influences tending to disturb the exercise of a deliberate and unbiased judgement. The attempt to enlighten the court-members might have been prompted by high ideals but the method of presentation was steeped in prejudice.

The decision of the Board of Review was reversed, findings and the sentence were set aside and a rehearing was ordered.

We find that in order to reduce the command influence upon the members, military judge and the counsels, and to enhance the powers of the Military Judge and the Judge Advocate General, many improvements have been brought in through the Military Justice Act 1983, for instance the requirement for the convening authority to personally select and detail military judge and counsels have been taken away. Military Judge can now excuse the members for good cause after assembly of the court. Convening
authority is not required to examine case for legal sufficiency before or after the trial. In addition to detailment of a Military Judge at a General Court Martial, a military judge may be detailed at any special court-martial. Section 826 (Article 26) has been amended. Now a military judge can preside over each open session of the court-martial to which he has been detailed. Section 827(a) (Article 27(a)) has been amended to provide for a trial counsel and defence counsel at each General and Special Court-martial, whereas, assistant trial counsel and assistant and associate defence counsel may be detailed at General and Special Court-martial. Through amendment of Section 869 (Article 69), the finding or sentence, or both in a court-martial case not reviewed under sub section (a) or under Section 866 (article 66) may be modified or set aside, in whole or in part, by the Judge Advocate General on ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offence, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. If such a case is considered upon application of the accused, the application must be filed in the office of the Judge Advocate General by the accused on or before the last day of the two-year period beginning on the date of the sentence is approved, unless the accused establishes good cause for failure to file within that time. If the Judge Advocate General sets aside the findings or sentence, he may, except when the setting aside is based on the lack of sufficient evidence in the record to support the findings, order a rehearing. If he sets aside the findings and sentence and does not order a rehearing, he shall order that the charges be dismissed.

D. COMMAND INFLUENCE AND THE JUDICIAL SET-UP IN SOME OTHER COUNTRIES

(i) RUSSIA

The Russian lawyers have always taken great pains to separate the legal proceedings from the military commander. Military procedures are integrated with the general law of criminal procedures. The courts-martials are the division of the general court system, supervised not by the

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36 Code of Criminal Procedure, art 27.
military commanders, but only by the military Collegiums of the U.S.S.R. Supreme Court. Trials are conducted by military procurators, who form a section of the procuracy, under the control of the Procurator-General. Procedures are same, in general, as in civilian criminal cases, trials taking place at a level commensurate to the importance of the case, sometimes even before the Supreme Court. Thus, at least in theory, Soviet military law has separated the court-martial from the control of the accused's commander.

As mentioned earlier, politics too, has made an impact on Russian military procedures. The military commissars, who shared authority with Commanding officers, were alternately abolished and restored four times during World War II. Now when eighty-six percent of the army officers are members of the communist party themselves, the role of the present Political Deputy has been reduced to that of a morale officer or party liaison. It is well to remember, however, that the Russian system places great discretion in the court trying any criminal case; just how much weight, then, politics exerts in the scales of Russian military justice is difficult to determine.

(ii) FRANCE

The judicial set-up for the armed forces has been strengthened to a great extent by the new French Code of December 1966. The military justice system has been, more or less, completely separately from the control and influence of military command, whom they serve. As we have seen in the preceding pages, in 1956, a law establishing a Corps of Military Magistrates was enacted fusing together the trained judges of both the army and naval services. These civilian jurists, familiar with the procedures under military law, from the basis of the operation of present military justice at both the pre trial and trial levels. Both the government prosecutor and the military

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37 Constitution of U.S.S.R. art 102, Also see Statue on Military Tribunals, art 1.  
40 DoLL 29.  
examining magistrates are members of Military Judicial Corps. The powerful positions of President of the permanent judicial district courts and principal assistant judge are now held by these magistrates. Even in time of war, a civilian judge remains as President of a military tribunal in contrast with the prior practice of replacing the military magistrate with a senior military officer.

Thus, we observe that the entire course of military justice is now controlled and reviewed by the Cour de Cassation, composed of the most eminent civilian judges, it is apparent that French military justice will gain respect.

**Conclusion**

The quotation of Justice Black in *Reid v Covert* cited above in the Chapter is quite valid in our context. There is a need to remove the factor of “Command Influence”, on the court-martial, whether during the stage of its composition or trial. It is not only desirable from the point of view of a common man but, more importantly, from accused’s viewpoint. As they say that justice should not only be done but seen to have been done. A lot is needed to be done in this regard. All this is possible only if the role and responsibilities of the officers of the Judge Advocate General’s Department is revamped on the lines of the American military judicial system, as discussed above. The status and functions of the Judge Advocate General need to redrafted so that it attains status that it rightly deserves. The role and status of the ‘Judge Advocate’ needs to be modelled on the lines of the ‘Military Judge’ under the Uniform Code. In addition, the appointment of the members to serve on the Courts-martial would need greater scrutiny prior to such appointments. Besides, the detailment of prosecution and Defence Counsels would need to be done after ascertaining their legal qualification and certification as to their fitness by the respective Judge Advocate General. A combination of all these factors together would help in excluding/minimising the command influence to a great extent.