CHAPTER VIII

EPILOGUE

We must scrutinise the administration of justice in our armed forces in the light of broadened perspective of discipline and command and rewrite it striking a fair balance between the pressures of a democratic society and the requirements of military discipline and efficiency.

The need for a general revision of the Indian Army Act 1911 was felt for sometime prior to 1947. Some of the provisions of the military law had become outmoded. Accordingly, the Army Act 1950 came into force on 22 July 1950. To implement the provisions of the said Act, the Rules 1954 came into being. Our military law, generally speaking, is fairly answering the requirements of time. But the time, it appears, is changing at a fast rate so far as provisions of law are concerned. Many big leaps have been taken in the field of military law by various countries to see that it is brought as close to the civil law as possible. There is an ever-growing need to update it in consonance with the liberty-oriented constitution and the concept of 'rule of law', that we all cherish very deeply.

As we are aware that certain Fundamental Rights in relation to the members of the armed forces have been abridged or modified so as to enable them to perform their duties proper as also to maintain proper discipline in the service. Shri VK Krishna Menon had mentioned in the Rajya Sabha in the debates on the Navy Bill 1957 that “We are an independent country where every one has got the political right of choosing the government of the country in the last analysis and therefore while it is necessary in the armed forces to make some inroads into fundamental rights by law, we should try and retain them as far as possible” However, the

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Supreme Court in the case of *Ram Swaroop Vs Union of India* with regard to restriction on fundamental rights had, inter alia, held that "------"

We agree that each and every provision of the Act is a law made by the Parliament and that if any such provision tends to effect the Fundamental Rights under Part III of the Constitution, that provision does not, on that account, become void, as it must be taken that Parliament has thereby in the exercise of its power under Article 33 of the Constitution made the requisite modification to affect the respective Fundamental Rights".

The Supreme Court had held in the case of *Lt Col Prithi Pal Singh Vs Union of India* that it is one of the cardinal features of our constitution that a person by enlisting in or entering the armed forces does not cease to be a citizen so as to wholly deprive him of his rights under the Constitution. The apex court had quoted Justice William O’ Douglas “that civil trial is held 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. Very expression ‘Court-Martial’ generally strikes terror in the heart of the person to be tried by it. And somehow or the other the trial is looked upon with disfavour”. Continuing further, the Hon’ble Court mentioned the observations of Justice Black in *Reid Vs Covert* that, “Courts-martial are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subjected 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 court-martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings – in short for their further progress in their service. Conceding to the 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.”

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1. AIR 1965, SC 247.
2. AIR 1982, SC 1437.
3. (1957) 1 Law Ed 2d 1148.
Feeling pained, the court further observed that absence of even one appeal with power to review evidence, legal formulation, conclusion and adequacy or otherwise of punishment is a glaring lacuna in a country where a counter-part civilian convict can prefer appeal after appeal to hierarchy of courts. They felt that review of finding and/sentence in confirmation of proceeding under section 153 is provided for is a poor solace. Judicial approach by people, well-versed in objective analysis of evidence trained by experience to look at facts and law objectively, fairplay and justice cannot always be sacrificed at the alter of military discipline. Unjust decisions would be subversive of discipline. There must be judicial ad-mixture of both.

More than five decades of its working with the winds of change blowing over the world necessitates a second look so as to bring it in conformity with the liberty-oriented constitution and rule of law which is the uniting and integrating force in our political society. Reluctance of the Apex Court, more concerned with the civil law, to interfere with the internal affairs of the Army is likely to create a distorted picture in the minds of the military personnel that the persons subject to the Army Act are not citizens of India.

Even the United Kingdom have brought in the aspect of judicial review of courts-martial decisions by having Court Martial Appeals Court for the services. In the United States, they too have Courts-Martial Appellate Court for the armed forces under the Uniform Code of Military Justice. In addition, they have brought in many procedural reforms and ‘due process’ safeguards not then granted in the civil courts.

The military justice system in the United States has become the most enviable in the world. Some of the features brought in through the Military Justice Act 1968 may be recapitulated here. It provides that legally qualified counsel must represent an accused before any court-martial empowered to adjudge a bad-conduct discharge; in other special courts-martial, a legally qualified counsel must be detailed to represent the accused unless not available because of military conditions.
In addition, a military judge must preside over a special court-martial empowered to adjudge a bad conduct discharge unless not available because of exigencies of service. (2) It creates an independent judiciary for the armed forces, composed of military judges who are insulated from control from the commanders and who will now preside over military trials with functions and powers roughly equivalent to those exercised by federal district court judges. (3) It modernized the outmoded and cumbersome trial procedures to conform more closely with the practices on the civil side. (4) It permitted the accused to waive trial by the jury (or full court) and opt to elect to be tried by the military judge sitting alone, same as it is on the civil side where a defendant can waive a jury trial and be tried by the judge alone. (5) It prohibits ‘Command influence’ factor to a great extent. (6) It barred trials by Summary Court-martial – where there is no right given to the accused to have services of defence counsel, or no independent judge, and no jury – provided the accused objects to the trial. (7) The designation of the “Boards of Review” was transformed into “Courts of Military Review”, with independent judges. (8) It authorized the release of the convicted personnel from confinement (bail) pending appeal and lastly, it extended the time limit to petition for a new trial from one year to two years and strengthened other post-conviction remedies available to servicemen.

On 06 December 1983, further amendments were effected into their Military Justice Act. The salient of those being that the convening authority is not required to examine case for legal sufficiency before or after the trial. A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed. Trial Counsel and the Defence Counsel shall be detailed for each general and special court-martial. Assistant trial counsel and assistant and associate defence counsel may be detailed for each general and special court-martial. A proceeding in revision may be ordered if there is an apparent error or omission in the record or if the record shows improper or inconsistent action by a court-martial with respect to the findings or sentence that can
be rectified without prejudice to the accused. In no case, however, may a proceeding, in revision, reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty; or reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under the charge, which sufficiently alleges a violation of some article. The findings or sentence, or both, in a court-martial case not reviewed under sub-section (a) of 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 part of court, lack of jurisdiction over the accused or offence, error prejudicial to the substantial rights of the accused or the appropriateness of the sentence. Thus, we see that in addition to ensuring a fair trial of an accused with all the constitutional safeguards available, the stature and independence of the Judge Advocate General’s Department has been ensured. This Department, as we are aware works directly under the Defence ministry. More or less, an “independent field judiciary” has been created for the armed forces. Thus, we observe that the American military judicial system, duly backed up by the Military Justice Act 1968, further amended by the Military Justice Act, 1983 represents unquestionably the most significant advance in military justice. It is essential that we too imbibe some, if not all, of there disjunction features into our system.

Fortunately, for society for most of us the past is only a prologue to the present, and the present is the creative forerunner to a rewarding future. Courts-martial procedures under the Code have irreversibly moved from the drumhead. To a large degree, they correspond to those in the regular federal courts, and, as we have seen, in some areas, they accord the military accused broader protections than the civilian accused. The military system is not faultless and unimprovable. Indeed, there are defects, but these are defects of inefficiency and inconvenience, not vices that tend to destroy or diminish the fundamentals of a fair trial.

Footnote: Section 860, Article 60.
Detailment of Judge Advocate at a SGCM or DCM is not a legal necessity. Although this is left to the unfettered discretion of convening authorities, I believe the use of Judge Advocates in all such 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 Presiding Officer to handle, especially where the prosecution and/or the defence are being conducted by a Counsel. Moreover, there has hardly been a trial by SGCM or DCM in our country where Judge Advocate has not been appointed. Hence, the provision should be made mandatory for appointment of Judge Advocates at such trials as well.

It may be worth looking into the improvements brought in by the new French Code so far as administration of military justice is concerned. It is seen that legal professionalism has been strengthened by fusing together the trained judges of both the army and naval services. These civilian jurists are familiar with the procedure under the military law, or the basis of the operation of the 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 assist judge are now held by these magistrates. The new and exceedingly important Chambre de Controle de l' Instruction is also dominated by magistrates of the Military Judicial Corps. We may also ponder over having the above distinct feature of the French code into our military judicial system.

Besides, there are good provisions regarding 'rehearing' and 'new trial' under the U.S. Uniform Code of Military Justice. We may need to incorporate them in our military judicial system. In view of substantial powers available to the Commanding Officer conducting Summary Court Martial, there is a need to give an option to the accused whether he wishes to be tried by him. In addition, he also needs to be given a legally qualified defence counsel to defend him at the trial. Everyone who is being deprived of his liberty is entitled to supervision of lawfulness by a court, hence, such
an option is necessary. This will be in conformity with law in the U.K and the U.S.A.

The powers given to a Summary Court-Martial need to be curtailed drastically so as to be brought down to a maximum of three months rigorous imprisonment without dismissal. The system, which had been introduced to serve the needs of the mutiny days when certain rough and ready system of punishments had to be resorted to, does not recognize the recognized standards of justice and its continuance under the present circumstances is not desirable. Serious cases, if any, can always be dealt with by other forums of courts-martial.

Additional Suggestions

(a) **Common Code for three services.** We find that there are separate enactments governing the conditions of service, administrative and disciplinary aspect of the armed forces personnel. Perusal of these enactments viz Army Act 1950, Air Force Act 1950 and Navy Act 1957 reveals that the provisions of these enactments generally resemble each other, except at a few places where suitable provisions have been laid down to suit the requirements of a particular service. It is felt that though the purpose of these enactments is generally the same yet, they do, sometimes, pose difficulty while ascertaining rights, duties and liabilities. A single reference to a unified statute, like in the United Kingdom, the United States of America and Canada etc, would have been an ideal proposition, which unfortunately has not materialised though such an exercise had been undertaken in Sixties/Seventies\(^{37}\). It appears that the personal whims and fancies of certain functionaries did not allow the processing of the document for a Uniform Code. It is hoped that this kind of idea would see the light of the day, one day. A Uniform Code for the three services, on the lines of Uniform Code of Military Justice would not only be a handy reference for their organisations but also for their personnel to know rights, duties and liabilities of their fellows in uniform in other services.

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(b) **Strengthening the JAG's Department.** In addition to what has been stated in the foregoing paragraphs, it may be stated that there is an acute need to strengthen the JAG's Department as a whole. The JAG and his staff should be accorded a higher status commensurate to their role and functions. It would be in the fitness of things that the JAG is appointed by the Defence Minister and he should be accountable to him alone as is the case in the U.K. The JAG/Board of review (if empowered/constituted) should have power to hear arguments by prosecution and defence on any question. He should have power to obtain the opinion of the Appellate Court for the armed forces (when constituted) or the Supreme Court on new or difficult points of law. The JAG's Department needs to kept away from the 'chain of command' and it should be the JAG who should be responsible for supervision of work and efficiency rating of his officers so as to exclude the Department from any undue command influence, ensuring further fairness in the military justice system on the lines of U.S.A. The 'salary' of their staff would need to be looked into, including special allowance, if any. Their ages of retirement would also need to be increased in line with the medical services. There should be an increase of strength in the Department to cater for Departmental Officers at the Courts of Inquiry and 'A' Staff appointments at various levels of command structure and for provisioning of counsels for the prosecution and defence at the trials or during review/appeal before the JAG and/or the Appellate Court for the armed forces as and when the latter are legislated upon. This will also ensure proper monitoring of disciplinary and administrative cases for their expeditious disposal.

(c) **Judge Advocate's Status.** The Judge Advocate is the mainspring in the court-martial – if he errs, all may go wrong, as described by Adye. He cannot merely be termed as advisor, especially on matters involving law. He should be permitted to rule on all interlocutory matters, give finality on all questions of law and decide on continuances of the court-martial as under the Uniform Code. He should, however, not retire with the
members, whenever they are to consider their finding(s) and the sentence in closed court.

(d) **Induction of law graduates into the army.** It is observed that generally the 'prosecutor' and the 'defending officer' are persons without any legal qualification, even when, sometimes, they have to deal with some complicated legal cases. In the absence of qualified officers, the prosecution and defence of the cases are not being conducted with the quality of work that it deserves. To answer the problem, therefore, if some law graduates are commissioned into the Army for the purpose of their employment on such jobs like Courts of Inquiry and Courts martial, in addition to their own work, it will be a right step in improving the quality of the court-martial work. Further, only such persons should be appointed as prosecutors and defending officers, who, in addition to their legal qualifications, have been certified to be fit to discharge such duties by the JAG or his deputies at the Command HQs concerned.

(e) **Subjection - as to persons and time.** Subjection to the Military Law as provided is rather too restricted. It may also include cadets undergoing military training at various establishments, prisoners of war, violators of Humanitarian laws, spies, Military Engineering Service (at least on active service) and re-employed officers etc. Besides, the accused should have an option to waive the limitation as to time, notwithstanding the judgements of the Hon'ble Delhi High Court in the case of HC Dhingra (CWP No 639/88), which, it is humbly submitted, does not represent the correct legal position of the statute.

(f) **Hearing of the charge.** The provisions should be held to be 'directory' in nature rather than mandatory, unless there has been a flagrant violation of the provisions. Hence, the word 'shall' used in Army Rule 22 (1) may need to be substituted with 'will'.

(g) **Summary of Evidence.** It would be better if the Summary of Evidence is recorded on oath/affirmation to lend it further sanctity as also
to use such statement in the event of non-availability of a witness subsequently due to any reason such as death, impracticability to call witness due to time factor or distance etc involved.

(h) **Replacement of Judge Advocate/member during the trial.** Under the present military statute, Judge Advocate or a member cannot be replaced once the court has commenced recording evidence as to the merits of the case. A provision needs to be created to have replacement of such a person possible during the trial, provided the evidence previously recorded is read over to him, before resuming further with the case.

(i) **Suspension of sentence.** During the time the sentence, where imprisonment has been awarded, remains suspended, parole or furlough, the sentence should be excluded from the reckoning during such periods.

(j) **Limitation of time for submission of Statutory Complaints and petitions against court-martial verdict.** So far, there is no time stipulation within which a statutory complaint or a petition may be submitted under Army Act Section 26, 27 or 164(1) or 164(2), as the case may be. With the result, we do observe cases where petitions against court-martial awards are being filed after decades of delay. Such limitation, say within two years from the date the cause of action arose, needs to be provided for. This will not only ensure prompt disposal of such cases but also not encourage the delinquent to derive undue mileage in absence of relevant records, which are preserved for certain periods of time only.

(k) **Transparency in the screening system for promotion.** Presently, there is hardly any transparency in the screening system for promotion to a higher rank. The affected officer must know what all his dossier contains so that he can point out the inaccuracies, wherever noticed, before the promotion board is held. In the event of an officer getting superseded for promotion, there should be a statutory board of review and a judicial review provided for, so that the aggrieved person may represent his case either by himself or through his duly appointed attorney.
Moreover, where it is noticed by his Commanding Officer or next superior officer that the result of the promotion board is not in consonance with the performance of the officer, he may have a 'say' to take up case with the Military Secretary's Branch for their consideration of review of the case.

(I) **Revamping of CAB system** Lastly, the CAB system existing in the Office of the Chief of the Army Staff cannot said to be adequate. It is beyond thinking that an officer, who is not a legally qualified officer, would be able to do justice to a case, especially where intricate matters of law, such as 'bias', 'malice' etc are involved. Therefore, the CAB must be fully equipped to have an experienced officer from the JAG's Department, preferably a Brigadier/Col, who must be consulted on matters which are beyond the comprehension of lay officers.

(m) **Advisory Committee** It would be unwarranted to conclude that there is no room for change or improvement in the military system of justice. Some of the criticisms definitely merit careful consideration and consequent remedial action. There needs to be a Committee formed of the Judge Advocates General and some suitable officers from the Administrative Branch for the express purpose of seeing that there is a continuing improvement in the military justice system. Needless to say, their interaction with their Counterparts of other armed forces (especially the U.S.A and the U.K) would yield a greater positive results.

It is earnestly hoped that if the aforesaid steps are taken, the military judicial system will not only become vibrant but also answer most of the requirements of justice, equity and fairplay. Therefore, there is an urgent need to adopt the good features, as mentioned above, or in the preceding chapters without any further delay. Any delay in this regard will be counter-productive, notwithstanding any reason, whether administrative, financial or otherwise.

The effectiveness of an army as a disciplined body must be weighed against the scrupulous preservation of the rights of those who serve in it.
Military discipline must be preserved at all costs. But it is also important, that the powers conferred on the Commanding officers and other superior military officers are not arbitrarily or incorrectly exercised and that the possibilities of judicial intervention should not be closed. In the end, it would be apt to conclude with what Benjamin Cardozo said:

"The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow. It must have a principle of growth." \(^6\)

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