

Preface

Indian military law has its origin in the military law of England. It was conceived to discipline a ‘mercenary’ force after the Mutiny of 1857. Under the British system, military justice was command-dominated and its mechanism was out of step with social justice. After India attained independence in 1947, a need was felt to modernise the military legal system. However, the approach was perfunctory, and the existing British Indian Army Act 1911 was replicated to govern the armed forces of independent India. Since then, military law has remained almost stagnant. This prompted the Supreme Court to comment in 1982 that ‘the winds of change blowing over the country have not permeated the closed and sacrosanct precincts of the Army’.

Since the Second World War, a body of international human rights law has developed reaffirming the morally appealing idea of adherence to shared standards of justice to qualify for membership of the international community. The Constitution of India elaborates these rights in Part III and Part IV and mentions the dignity of the individual as a core value in its Preamble. Respect for human rights is the essence of the philosophy of the Constitution of India.

The obligation to follow the international standards of human rights led to significant changes in the Canadian military justice system. Canada was one of the first countries to change what has traditionally been one of the hallmarks of a military justice system—the role of the military commander in military justice. This followed the landmark *Genevoux* case in 1992, in which a soldier found guilty of narcotics offences and desertion was sentenced to 15 months’ imprisonment and awarded a dishonorable discharge from the service by a general court-martial. He appealed to the Supreme Court of Canada claiming that the military court-martial system had violated his rights to an independent and impartial tribunal guaranteed by the Canadian Charter of Rights and Freedoms. The Supreme Court invalidated the conviction because it felt that there was a lack of the necessary judicial independence in the court-martial system, and because there was insufficient institutional independence due to the structural involvement of the military commander in the system. In this respect, the Court determined that an actual lack of independence need not be established; rather, the test was whether an informed and reasonable person would ‘perceive’ the military tribunal as an independent forum.

During the same period, the UK made significant changes in its military justice system based on the treaty obligations under the European Convention on Human Rights and the opinion of the European Court of Human Rights in *Re Findlay v the United Kingdom*. Since then, a number of other countries have reexamined their systems and have either implemented modifications that would significantly alter and limit the role and influence of military commanders over the military justice system or are considering such modifications. Significant among these is the US, which has seen a number of high-profile criminal cases and investigations within the military justice system over the past few years.

The Indian military justice system, which bears resemblance to the pre-1996 British system, has faced thorough scrutiny by the Supreme Court. In *Re PPS Bedi* in 1982, the apex court called the military justice system 'archaic' and 'antiquated'. The court expected that the changes all over English-speaking democracies would awaken our parliament to change the system. It also pointed out that parliament should not deny the benefits of the liberal spirit of the Constitution to a class of citizens who were always on alert repelling external aggression and suppressing internal disorder. Unfortunately, the government did not take any serious action on the remarks of the Supreme Court, except making a few changes in the Army Act in 1993. Dissatisfaction with the system of governance and military justice mounted and led to the filing of a large number of cases by military personnel in the higher civil courts.

The Government has passed the Armed Forces Tribunal Act 2007 after a prolonged silence and the Armed Forces Tribunal and its Benches are likely to start functioning by April 2009. The tribunal is expected to adjudicate complaints and disputes regarding service matters and appeals arising out of the verdicts of the courts-martial of the three services. However, the Government has not made any change in the archaic military legal system.

'Justice is the first virtue of a social institution, as truth is of systems of thought' commented Rawls in *Justice as Fairness*. Justice must be an inherent quality of law. It imparts value to law, and both justice and law have expanding horizons. This expanding nature of law demands that we do not confine ourselves to national laws as it would provide a narrow and restricted view. In the present era of awakening of the notion of human rights, when retributive justice is being seen as a relic of uncivilized days, we must take proper steps to modernise our military justice system.

In India, the question of defence policy is, for most people, something abstract, remote and of very little concern. Therefore, the public is either not interested or not involved, and the Government enjoys considerable freedom of action based on a permissive consensus. Even our parliamentarians do not take active and decisive part in discussions relating to military matters unless it relates to allegations of corruption against a political party. Thus, the governmental actions of participating in international peace-keeping operations or the deployment of the armed forces for internal security duties, the terms and conditions of military service and military legislation generally do not interest our parliamentarians.

Notwithstanding its importance, the subject of military law has remained outside the syllabus of most law institutions. Even the newly created National Law Schools do not have military law in their curriculum. As far as the media is concerned, it has been active only in discussing cases of sexual harassment and corruption, and has not concerned itself with the needs of the armed forces.

The Indian armed forces are facing serious crises, such as a shortage of officers, allegations of gender discrimination and human rights violations, corruption and increased instances of suicides and fratricidal killings. A justice system strongly grounded in human rights norms and the rule of law could provide an answer to some of these problems. The military and

political leaderships appear reluctant to bring any substantial changes in the system. Cohen commented in *The Indian Army: Its Contribution to the Development of a Nation* that modernisation will come to South Asia, but only at the pace tolerated by the military. Hopefully, the Armed Forces Tribunal will usher in the era of modernisation when it starts functioning in the near future.

The military justice system is an expression of the nation's collective will over how much authority a society is willing to give to its military leadership. It is based on the notion that the military derives its authority from civilians and in so doing helps to minimise the risk of a military coup and helps protect civilian supremacy over the military. However, in India, there is hardly any interest in military legal matters. Occasionally, issues relating to military justice gain the public's attention and interest and there is a corresponding interest in the legal communities. At other times, interest in military justice tends to be limited to a fairly small group of practitioners and the subject attracts little attention outside of this small circle. Even within the armed forces, only a handful of officers of the Judge Advocate General (JAG) branch of the three services are concerned about the subject, but they do not have any legal responsibility of suggesting improvements to the system. There are a few former military officers of the JAG branch and other lawyers practising in the higher courts who have an opinion on the matter, but they too are shy of suggesting any normative change in the system. Since the Indian armed forces are one of the most secretive forces in the world, anyone approaching them with suggestions is seen as an intruder. Also, a natural tendency exists within the military establishment to defend the status quo.

Some senior members of the armed forces with whom I discussed the topic were of the view that the idea of human rights would be dangerous in our context, as it would undermine discipline among the troops. I hope this work will dispel this apprehension and show that implementing human rights norms would only enhance military discipline. If recruitment and retention of all types of skill is to be maintained, it is essential to develop and maintain the perception that the disciplinary system is fair to all personnel. For a democracy to succeed, a strong defence force is indispensable. And such a strong defence force is made of people—people who deserve to be treated with dignity.

This book has been organised into nine chapters. The first chapter, besides introducing the subject, reviews the literature on military justice and gives an historical account of the Indian military justice system. Chapter II traces the position of the armed forces in the Constitution of India. Chapter III provides a brief account of the systems and procedures followed in courts-martial in India. The British military justice system and its historical evolution and modernisation have been discussed in Chapter IV. In Chapter V, the American military justice system and the reforms made to it have been discussed to bring out the antiquations of the Indian system. Chapter VI seeks to examine critically certain aspects of the Indian military justice system in the light of the systems followed in various other democracies. It puts forth the deficiencies of the existing Indian system, especially in matters relating to the role of the convening authority and the issue of command influence. Chapter VII critically analyses the Armed

Forces Tribunal Act 2007. The need for a common code for the armed forces in India has been discussed in Chapter VIII. In the concluding Chapter IX, certain recommendations have been made for immediate reform in the administration of justice in the Indian armed forces. This work will, it is hoped, prove of interest to those who direct the policy of the armed forces; to researchers in the field who seek to understand the military justice system; and satisfy the need to incorporate changes in the system in the light of the expanding horizon of human rights.

I am grateful to the Parliamentary Standing Committee on Defence for giving me an opportunity to explain my point of view on the Armed Forces Tribunal Bill and make suggestions related to issues concerning the military justice system. These suggestions related to the review of the Army, Navy and Air Force Acts in the light of the changes made in other democracies and prevailing international law; incorporation of the right to a fair trial; applicability of constitutional rights in the military justice system; availability of free legal aid to military personnel in a trial by court-martial; separation of the judicial arm of the armed forces from the military chain of command; and a common code for the armed forces.

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