COURT MARTIAL LAW IN INDIA: A COMPARATIVE ANALYSIS

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I. INTRODUCTION

The objective of military law is to maintain order and discipline among members of the armed forces and in some cases, among others who work in a military environment.[1] This is guaranteed by augmenting the Indian Penal law with a special code of discipline and a special legal framework for enforcing it. Such special provisions are essential to maintain the operational efficiency of an armed force in times of peace as well as in war. Keeping this in mind, the Standing Committee of the Parliament in its Tenth Report to the Parliament on 23 May 2006, highlighted the recommendations for making changes in the proposed Armed Forces Tribunal Bill. The Standing Committee was of the view that an 'expert committee' be constituted urgently to review thoroughly the Army Act, 1950, the Air Force Act, 1950, and the Navy Act, 1957, and bring them at par with the norms followed in other democratic countries. Consequently a committee of Experts was constituted to study these Acts. The Committee recommended the framing of a common disciplinary code for the three Services. The committee pointed out that all three services Acts were enacted soon after independence, reflected the mindset of a colonial regime and were modelled on the provisions of the Crown, and ironically while the master or parent laws progressed and moved with the times, the basic structure of Indian Military laws remained the same, except a few minor changes or amendments enforced through decisions of constitutional courts.[2] This paper is an attempt to critically analyze the domestic court-martial laws and bring them at par with the norms followed in developed democracies and UN Conventions.

Indian military law has its origin in the British military law. After Sepoy Mutiny of 1857, Britishers made many changes in the system of administration with the aim to exercise more control over the territory. Article of War (Act V of 1869) was one of the major steps by them to exercise unquestionable control and enforce unconditional discipline in the Armed Forces. That may be a reason, they had command dominated system of British military

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[1] The Army Act, 1950 (Act 46 of 1950), s.2(j); The Airforce Act, 1950 (Act 45 of 1950), s. 2(d); The Navy Act, 1957 (Act 62 of 1957), s. 2.

[2] Committee of Expert, Ministry of Defence, Govt. of India, "Report on Review of Service and Pension matters including potential disputes, minimizing litigation and strengthening institutional mechanisms related to redressal of grievances" 152 (2015).

justice in India. The system was improvised to ensure obedience to the commander and to serve at his will with the sole aim to fulfill the colonial interest of the imperialistic power. The independence of India from British rule and the resultant constitutional changes necessitated the revision of the Army Act, 1911 and the Regulations. The Army Act was enacted and came into effect from 22 July 1950.[3] The Government framed Army Rules, 1950 which were replaced by the Army Rules, 1954. After forty-three years, certain amendments were incorporated in the Act in 1993.[4] The Air Force Act came into effect on 22 July 1950.[5] Then the Air Force Rules, 1969, were made as per the requirements of section 189 of the Air Force Act, 1950.[6] Subsequently, the Navy Act, 1957, came into force from 1 January 1958[7] and subsequently, some meaningful amendments were made in the Navy Act in year 1974, 1982 and 2005[8] too.

II. MODERN MILITARY LAW JURISPRUDENCE: A SHIFT TOWARD CIVILIANIZATION

In the words of General Eisenhower, "Army was never set up to insure justice. It is set up as your servant, a servant, of the civilian population of this country to do a particular job, to perform a particular function; and that function, in its successful performance, demands within the Army somewhat, almost of a violation of the very concepts upon which our government is established …So this division of command responsibility and the responsibility for the adjudication of offences and of accused offenders cannot be as separate as it is in our own democratic government."[9] In the early nineteenth century, courts martial were done to set an example with the sole purpose to enforce the disciplinary policy and inculcate military values in the men under command. This was the era where court martial system was considered as an autonomous legal system with its own laws and distinct procedures detached from the civilians understanding of due process and criminal law jurisprudence. Even a civilian officer, Patterson, the Secretary of War had spoken the traditional argument that commander's control over court martial is required for maintaining efficiency of the fighting forces. He further expressed, "Army is organized to win victory in

[3] The Army Act, *supra* note 1.
[4] The Army (Amendment) Act, 1992 (Act 37 of 1992).
[5] The Airforce Act, *supra* note 1.
[6] The Air Force Rules, 1969 (Published with the notification of the Government of India in the Ministry of Defence notification No. S.R.O. 126, dated 22 July 1950)
[7] The Navy Act, *supra* note 1.
[8] The Navy (Amendment) Act (53 of 1974); The Navy (Amendment) Act (48 of 1982); The Navy (Amendment) Act, 2005 (23 of 2005).
[9] Quoted in letter from New York State Bar Association to Committee on Military Justice, Jan. 29, 1949.

war and the organization must be one that brings success in combat. That means singleness of command and the responsibility of the field commander for everything that goes on in the field. The Army has other functions such as feeding, medical care and dispensing justice, but they are subordinate".[10] In a similar statement made by General William T. Sherman before U.S congressional committee in year 1879 said, "it will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence."[11] In his opinion the object of civil law and military law are far apart and therefore, each one requires their own separate system of laws and statutes. He was not in favour of any change which may hit and pose challenge to the vast disciplinary power of military commanders. Until world war I, this understanding of military law was generally accepted and criticized rarely. Court-martial abuses and outrageously severe sentences during world war I, led to the first public movement for civilianization of military law.[12] It was General Samuel T. Ansell from U.S military who ushered the first movement of reform in the history of contemporary military law. He was the person who discovered the idea of providing independent military judges, a court chosen by the judge rather than by the commander. He only, coined the idea of giving right to accused to have a portion of the court chosen from his own rank and also advocated for *defining military crimes with definiteness.*[13] Ansell further asked for definite limits on sentences, a binding mandatory pretrial investigation, right to representation by a lawyer and civilian court for appeal against the decision of court martial.[14] Professor Morgan was in favour of similar steps and appreciated the British reforms in the law pertaining to court martial which placed certain court martial functions in an independent judge advocate's office which was removed from the military structure and civilianized.[15]

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[10] Quoted in statement of John Kenney, Under Secretary of the Navy, "Hearings on H.R. 2498 Before Subcomm. No. 1 of the House Comm. On Armed Services", 81st Cong., 1st Sess. 780 (1949) in *VI Papers of Professor Edmund Morgan on the Uniform Code of Military Justice*, on file in Treasure Room, Harvard Law School.

[11] Quoted in "Hearing on H.R. 2498 Before a spec. subcomm of the House Comm. On Armed Services", 81st Cong. 1st Sess. 780 (1949).

[12] Edward F. Sherman, "The Civilianisation of Military Law", *Maine Law Review*, Sherman (1970). Articles by Maurer Faculty, 2260, *available at*: https://www.repository.law.indiana.edu/facpub/2260 (last visited on Aug. Aug. 04, 2022).

[13] *Ibid.*

[14] *Id.* at 6.

[15] Professor Morgan's copy of Report of the Army and Air Force Courts- Martial Committee, Great Britain (Cmd. 7608, 1946). Paragraphs 105-113 of that Report recommended the transfer of all functions involving pretrial advice and prosecution (and apparently defense under a legal aid scheme) from the Judge Advocate

A. International Covenant and Rule of Law

India had ratified the International Covenant on Civil and Political Rights (ICCPR) on 10 April 1979 and therefore, it is binding on us to incorporate the provision of the covenant in our statutes. It provides for "*a fair and public hearing by a competent, independent and impartial tribunal established by law*".[16] It confers minimum guarantee to everyone in determination of criminal charges against him or her with full equality.[17] These rights are conferred to ensure fair, impartial trial with the right to representation to the accused by the counsel of his or her choice. It gives protection to the offender against *double jeopardy* too.[18] In addition to this, '*Basic Principles of the Role of Lawyers*, 1990'[19], '*Basic Principles on the Independence of Judiciary'*[20] and '*Guidelines on the Role of Prosecutors*, 1990'[21] were

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General of the Forces to new civilian Directorates of Legal Services in the War Office and Air Ministry. This was accomplished on Oct. 1, 1948. See Wiener, *Civilians Under Military Justice* 231 (1967). The Courts-Martial (Appeals) Act. 14 & 15 Geo. 6, c. 46 (1951) created a civilian Courts-Martial Appeal Court which would have direct review over courts-martial. Subsequent legislation involving further civilianization of military justice included: Administration of Justice Act, 8 & 9 Eliz. 2, c. 65 (1960) (permitting court-martial cases to be appealed to the House of Lords); Criminal Appeal Act 1964, c. 43 (authorizing retrials of criminal cases, including courts-martial, where there is fresh evidence); Criminal Appeals Act 1966, c. 31 (enlarging scope of appellate review of courts-martial).

[16] The International Covenant on Civil and Political Rights, art. 14(1).

[17] *Id.*, art. 14(3).

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt.

Art. 14(4) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

Art. 14(5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

Art. 14(6) When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Art. 14(7) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

[18] *Id.*, art. 14(7).

[19] Adopted by the Eighth United Nations Congress on *the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990, *available at*: https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx.

[20] Adopted by the Seventh United Nations Congress on *the Prevention of Crime and the Treatment of Offenders* held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, *available at*: https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx.

adopted by the UN General Assembly. The United Nation's Guidelines on the Role of Prosecutors fixes the responsibility on the state for ensuring that the prosecutors appointed by it must have prescribed education, training and should be conscious of the ethical duties of their office which incorporates their professional approach for ensuring constitutional and statutory protections available to the suspect or the victim. United Nation, in its "*Policy on Defence Sector Reform*", directed to improve (including creating and removing) the functionality of present framework within the defence sector and it expresses its intention for ensuring that procedure for military detention must operate in harmony with international human rights norms and standards.[22]

B. Article 33 of the Constitution of India and Armed Forces

Article 33(a) of the Constitution of India states that Parliament may, by law, determine to what extent any of the rights conferred by this Part III shall in their application, to the members of the Armed Forces, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.[23] Article 51 (c) illustrated under Part IV (Directive Principles of State Policy) states that the State shall endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another.[24] Provisions of the International Covenant on Civil and Political Right also contain provisions akin to Article 37 of the principles contained in Part IV of the Constitution in the matter of framing state welfare provisions for the different sections of the society. It says that the provision contained in Directive Principles of State Policy shall not be enforceable in any court of law, but the principles laid down therein are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.[25] Article 39(A) illustrates about equal justice and free legal Aid.[26] Article 50 of the Directive Principles of State Policy emphasizes on

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[21] *Supra* note 19.
[22] Department of Peace Keeping and Department of Field Support, United Nation, *Policy on Defence Sector Reform*, Annex 4, para. 2, *available at*: https://issat.dcaf.ch/download/18534/216935/UN%20Defence_Sector_Reform_ Policy. pdf (last visited on March 22, 2022).
[23] The Constitution of India, art. 33(a).
[24] *Id.*, art. 51 (c).
[25] *Id.*, art. 37.
[26] *Id.*, Art. 39A.

separation of judiciary from executive and directs that the State shall take appropriate measures to separate the judiciary from the executive in the public services of the State.[27]

In *Ram Sarup* v. *Union of India,* the Supreme Court held that each and every provision of Army Act is a law made by Parliament and that if any such provision 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 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.[28] It is not disputed that the persons to whom the provisions of Army Act apply do form a distinct class.[29] They apply to all those persons who are subject to Act and such persons are specified in Section 2 of the Act.[30]

In another leading case, Supreme Court has held that while investigating and precisely ascertaining the limits of inroads or encroachments made by legislation enacted in exercise of power conferred by Article 33, on the guaranteed fundamental rights to all citizens of this country without distinction, in respect of armed personnel, the court should be vigilant to hold the balance between two conflicting public interests; namely necessity of discipline in armed personnel to preserve national security at any cost, because that itself would ensure enjoyment of fundamental rights by others, and the denial to those responsible for national security of these very fundamental rights which are inseparable adjuncts of civilised life.[31] In this case the court emphasized that deprivation of personal liberty must be preceded by an enquiry ensuring fair, just and reasonable procedure and trial by a judge of unquestioned integrity and who is wholly unbiased.[32] A marked difference in the procedure for trial of an offence by the criminal court and the court martial is apt to generate dissatisfaction arising out of this differential treatment.[33] Further the Supreme Court of India cites Justice William O'Douglas observation made in his article[34] where he says 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 of 'court martial' generally strike terror in the heart of the person to be tried by it. And somehow or the other

[27] *Id.*, art. 50.
[28] *Ram Sarup* v. *Union of India*, (1964) 5 SCR 931.
[29] *Ibid.*
[30] The Army Act, *supra* note 1, s. 2.
[31] *Lt. Col. Prithi Pal Singh* v. *Union of* India, AIR 1982 SC 1413; 1983 SCR (1) 393.
[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*

the trial is looked upon with disfavour."[35] Subsequently, Court in this case quoted few lines from *Reid* v. *Covert* in which Justice Black observed as under:[36]

> *Courts martial are typically adhoc 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 court martial must look to the appointing officer for promotions, advantageous assignments, and efficiency ratings, 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 things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges.*

The Court further agrees that unjust decision would be subversive of discipline.[37] In this historical judgment court admits that our Army Act is more or less modelled on the U.K. Act[38] which itself has gone through vast changes over the period.

C. Differences in the Three Service Acts

The provisions of the Service, three Acts are not the same. Under the Air Force Act, 1950, only three types of courts-martial, i.e., general court-martial, district court- martial and summary general court-martial have been provided.[39] Unlike provision of summary trial under Army Act, the Air Force Act confers power with certain conditions to the commanding officer to punish an offender other than officers and warrant officers without the intervention of court martial.[40] The Army Act, 1950 in addition to the above three types of courts-martial also has summary court-martial which can try personnel below the rank of Junior Commissioned Officer and can award punishments of dismissal and imprisonment upto one

[35] "The Law: Tough test for military justice" *Time Magazine*, October 03, 1969, *available at*: http://content.time.com/time/subscriber/article/0,33009,901524-1,00.htm
[36] 1 L Ed 2d 1148: 354 US 1 (1957), p.1174
[37] *Supra* note 33.
[38] *Ibid.*
[39] The Air Force Act, *supra* note 1, s. 109.
[40] *Id.*, s. 81.

year.[41] However, the Navy has only one type of court-martial during peace time[42] and a disciplinary court too during war or active service.[43] Unlike the Army and the Air Force, where the senior-most officer of the court-martial becomes the presiding officer, in the Navy the convening authority always nominates the president of the courts-martial.[44] In the Navy, the findings and sentence of courts-martial do not require confirmation of the convening authority or any superior authority and these become operative the moment they are pronounced, except in the case of a sentence of death which requires prior confirmation by the Central Government.[45] The verdict of acquittal is final in the case of the Navy and not subject to confirmation or revision[46] unlike in the Army[47] and the Air Force.[48]

In the Army Act[49] and the Air Force Act[50], every general court martial, every district or summary general court martial may be attended by a judge advocate of the respective services or the officer appointed by him. However, every court-martial in the Navy, is required to be attended by a judge advocate or any fit person appointed by the convening officer.[51] Under the provision of the Army Act, the judge advocate remains in attendance when the court deliberates on the findings,[52] whereas in the Navy the judge advocate does not sit with the court when the court is considering the findings.[53]

In Navy, the Commanding Officer of a ship may summarily try any person belonging to the ship, other than an officer, for an offence not being a capital offence and can award imprisonment or detention up to three months.[54] This power of summary trial is limited in the Air Force where punishment up to 28 days of imprisonment can be awarded to persons below the rank of NCO without the intervention of court martial.[55] However, under the provision of the Army Act, the Commanding Officer has power to award sentence up to one year.[56]

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[41] The Army Act, *supra* note 1, s. 120.
[42] The Navy Act, *supra* note 1, s. 97.
[43] *Id.*, s. 95.
[44] *Id.*, s. 97(12); The Airforce Act, *supra* note 1, s. 127; *supra* note 41.
[45] The Navy Act, *supra* note 1, s. 149(2).
[46] *Id.*, s. 161(2).
[47] The Army Act, *supra* note 1, s. 153.
[48] The Airforce Act, *supra* note 1, s. 152.
[49] The Army Act, *supra* note 1, s. 129.
[50] The Airforce Act, *supra* note 1, s. 128.
[51] The Navy Act, *supra* note 1, s. 99.
[52] The Army Rules, 1954, rule 61.
[53] The Navy Act, *supra* note 1, s. 116(2).
[54] *Id.*, s. 93(2).
[55] The Airforce Act, *supra* note 1, s. 82(a).
[56] The Army Act, *supra* note 1, s. 120(5).

The proceedings of a court-martial or disciplinary court are reviewed by the Judge Advocate General (JAG) of the Navy either on his own motion or on application made by an aggrieved person.[57] The JAG is to transmit the report of the review together with his recommendations to the Chief of the Naval Staff (CNS) for his consideration.[58] In the Army and Navy, the Judge Advocate General or any other officer of the same department, review the proceedings of courts-martial and may make recommendations before its confirmation by the competent authority[59] but under the provision of section 88 of the Airforce Act, power of review can be exercised by any superior Air Force authority as provided under section 89 of the same Act. These reviews under Army Act and Navy Act are advisory and not binding on the Chiefs of the respective Service.[60]

i) Who all are subject to the Army Act, the Navy Act and the Air force Act?

This is a crucial question for the purpose of exploring the applicability of these Acts on class of persons. It is general understanding that these Acts are applicable only to the person who are into military service or serving in any of the three forces of the union. Very first chapter of Army Act deals with the definition "Persons subject to this Act" because then only these provisions of the Act will find its applicability on the individual. It states: Officers, JCOs, WOs of regular Army, persons enrolled under this Act, persons belonging to the Indian Reserve Forces, persons belonging to the supplementary forces when called out for service or when carrying out the annual test, Officers and men of Territorial Army, person holding commission in the Army in India Reserve of Officers and officers appointed to the Indian Regular Reserve of Officers subject to the condition prescribed by this act under section 2, are the person subject to this Act.[61] The Navy Act and the Air force Act also defines "the person subject to this Act."[62] But the question arises whether a civilian not included as a subject to these Acts, can be tried for an offence committed under this Act? Subject to the restraint imposed under Army Act, this Act confers power to the Central Government/ disciplinary authority to notify a civilian in active service with military as "the person subject to the Army Act".[63] Similar provisions, regarding prosecution of civilian employed in active

[57] The Navy Act, *supra* note 1, s. 160.
[58] *Id.*, s. 161.
[59] The Army Rules, 1954, rule 69 and *supra* note 57.
[60] The Army Rules, *Id.*, rule 70; The Navy Act, *supra* note 1, s. 163.
[61] The Army Act, *supra* note 1, s. 2.
[62] The Air force Act, *supra* note 1, s.2; The Navy Act, *supra* note 1.
[63] The Army Act, *supra* note 1.

service are illustrated in Air force Act and Navy Act too.[64] But under the provision of Navy Act, a civilian who is not subject to any of the three Acts can be tried for the offence of espionage by a Naval Court;[65] this provision is unique and special to the Navy Act only. In other services, the act of espionage is triable under the provision of Official Secret Act, 1923 or the National Security Act. The National Security Act,1980 prescribes maximum period of detention for one year only.[66] Therefore, it can be said that effectively, the Official Secret Act, 1923 is India's anti-espionage Act held over from the British colonial period. Civilian, who are charged with the act of espionage in military establishment but not on active service or covered under the provision of section 2(i) of *t*he Army Act and Section 2(d) of the Air force Act, will be tried by the civil court under the provision of Official Secret Act, National Security Act or Indian Penal Code where pendency of cases are very high and such types of sensitive offence pertaining to national security needs special care with speedy trial.

It's also noticeable that the provision of field punishment is peculiar to the Air force Act only.[67] The Navy Act keeps it vague under the provision of section 81(n), however, the provision under Army Act conferring power to award field punishment was repealed by section 2 of the Army (Amendment) Act 1992.

Another anomaly among these three Acts, is the provision of successive trial by criminal court and a court martial under the Air Force Act. Under the provision of Air Force Act, a person convicted or acquitted by a court martial may, with the previous sanction of the Central Government, be tried again by a Criminal Court for the same offence, or on the same facts.[68] However, similar provision under Army Act was repealed by the Army (Amendment) Act, 1992.

Now the question arises, do we have any trace of reasonable justification in support of above-mentioned difference within Army Act, Navy Act and Air Force Act in the history of Indian military law? Is it necessary in present context to have three different statutes for three services? Lastly, why other leading democracies like U.S.A, South Africa and U.K have amended their military law and opted for Unified Military Code and other additional reforms in their military justice system?

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[64] The Air force Act, *supra* note 1; The Navy Act, *supra* note 1, ss. 2(f), 2(2)(a).
[65] The Navy Act, *supra* note 1, s. 38.
[66] The National Security Act, 1980 (Act 65 of 1980), s. 13.
[67] The Air force Act, *supra* note 1, s. 77.
[68] The Air force Act, *supra* note 1, s. 126.

ii) Need for Unification

The Indian Army Act, the Air Force Act, and the Navy Act, enacted during post-independence era, are derived from the Indian Army Act, 1911. In the words of Wg Cdr UC Jha (Retd.), "Though these Acts have been amended, they are unable to answer the needs of the modern soldier and are at odds with the liberal interpretation of the Constitution."[69]

Following the creation of the Chief of Defence Staff and India's Tri-Service Strategic Forces Command in 2001 and requirement of operational integration of the three Services at various levels during joint military operations, there is a necessity for a uniform disciplinary code for all three services. Some of the military commanders and the expert of military law believes that a harmonized approach to military law would enhance operational effectiveness of our defence forces.[70]

The law is a dynamic instrument, and its goal is to ensure justice; therefore, it needs to be reviewed and amended at regular intervals to keep pace with the sociological changes and the international norms. A few amendments were brought in over the years, but they have not been proved very helpful in keeping service law in line as civilian law is. Over the period it is realized that the existence of separate Acts, makes interpretation and amendment of the Acts more complicated. It would be easier to modernize and amend a common code for the Services than to do so individually.[71]

Numbers of countries are following common code of disciple and justice for their armed forces. The United Kingdom has recently upgraded its military justice system and now, it's having a common code for the three Service known as the Armed Forces Act, 2006. U.S.A, U.K and South Africa are some of the few democracies which have successfully adopted a unified code for military justice.

III. CONTEMPORARY PRACTICES IN OTHER DEMOCRACIES

A. U.S.A.

[69] Wg Cdr UC Jha, "Unification of the Army, the Navy and the Air Force Act" *USIJ* (April- June 2007).
[70] Eugene Fidell and Navdeep Singh, "Why India must get rid of separate disciplinary codes for Army, Navy & Air Force" *The Print*, July 16, 2021, *available at*: https://theprint.in/opinion/why-india-must-get-rid-of-separate-disciplinary-codes-for-army-navy-air-force/696951/ (last visited on Jan. 20, 2022).
[71] *Supra* note 69.

The US Army operated under the Articles of War for about 175 years prior to adoption of Uniform Code of Military Justice (UCMJ). The Navy, during this period, operated under this code. Military justice was a command dominated system. Similar to Indian military law, their system was also designed to secure obedience to the commander, to serve the commander's will and Courts-Martial were not viewed as independent, but as tools to serve the commander.[72] Military justice had few of the procedures and protections of civilian criminal justice and protecting the rights of the individual was not a primary purpose of the system.[73] The federal courts of U.S.A was also reluctant to interfere with the court-martial system, as explained by the Supreme Court in 1953 in *Burns* v. *Wilson.*[74] In that era it was a common understanding across the nations that the military justice was a command function and court martial was interpreted as an executive action by most of the contemporary jurists.[75] Therefore, judicial feature was reduced in the court martial proceedings.

However, the Code had gone through two major changes in 1968 and 1983. The Military Justice Act, 1968 significantly augmented the autonomy of military court. It made provisions for military judges to preside in special and general courts-martial. Military judges were kept out of the command influence of the convening authority and were made part of judges pool placed under the command and control of Judge Advocate General.[76] This Act also provided for civilian Court of Military Appeals but made limited its review to questions of law in the belief that the court should not overrule a court martial's determination of factual questions or challenge convictions on the evidence.[77] The Military Justice Act,1983 had streamlined the pre-trial and post-trial processing and also ended the power of convening authority to detail judges and counsels to courts-martial. Pre-trial agreements, rights of a suspect and accused, independence of military judges, functioning of the JAG branch and the appellate court review are hallmarks of the US military justice system.[78] In reference to the judicial standard laid down by the United Nation Covenant on Civil and Political Rights,

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[72] *Ibid.*
[73] White, "The Background and the Problem" 35 ST. *John's Law Review* 197, 200 (1961); Letter from New York State Bar Association to Committee on Military Justice, Jan. 29, 1949, at p. 5, in VI Papers of Professor Edmund Morgan on "the Uniform Code of Military Justice", on file in Treasure Room, Harvard Law School Library.
[74] 346 U.S. 137 (1953).
[75] *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65 (1857).
[76] Edward F. Sherman, The Civilianization of Military Law 22 *Maine Law Review* 56 (1970).
[77] *Id. at* 49.
[78] The Uniform Code of Military Justice, 1983, Report No. 98.

UCMJ has made essential contribution on the subject of military justice, and to the efficiency of the US Armed Forces. Its main achievement was provision of permanent military courts having competent, qualified military judges away from Command influence.

B. The United Kingdom

Prior to 31 October 2009, the legislation for the services disciplinary and criminal justice system in United Kingdom were provided for in the three Service Discipline Acts i.e. the Army Act 1955, the Air Force Act 1955 and Naval Discipline Act 1957; these were collectively known as the Service Discipline Acts or SDA. Since then, SDA is being reviewed every five years and amended progressively to reflect changes in civil law and to accommodate the needs of the Services.[79] In year 1996 and year 2000, some substantial changes were made to incorporate the provisions of the European Convention on Human Rights.[80]

The Secretary of State for Defence had presented "the Strategic Defence Review, 1998". It stated, "there would be advantages from combining the three SDAs into a single Act. The SDR acknowledged the key principle that a system of service law is essential to operational effectiveness. But it concluded that there would be advantages to be gained from combining the three systems into a single Act, while recognizing that this would be a substantial and complex undertaking".[81]

Important features of modern military law of the United Kingdom are:[82]

i Unified code for Army, Navy and Air force, i.e., "the Armed Forces Act, 2006"

ii Appeal from summary court martial to Summary Appeal Court

iii Provision of appeal to Court Martial Appeal Court and to House of Lords.

iv Provision for Directorate of Prosecution with its well-defined role.

v Permanent Standing Court for the purpose of court martial.

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[79] https://www.judiciary.uk/about-the-judiciary/the-justice-system/jurisdictions/military-jurisdiction// (last visited on March 12, 2022).
[80] *Ibid.*
[81] *Supra* note 71.
[82] The Armed Forces Act, 2006; Also See Wg Cdr UC Jha (Retd.), "Military Justice System in India", *USI Journal* (April- June 2006), *available at*: https://usiofindia.org/publication/usi-journal/military-justice-system-in-india-2/ (last visited on Jan. 22, 2022).

vi An independent authority to decide whether to take a case to court martial.

vii An administrative officer selects the court martial panel members and reviewing officer justifies the decision.

viii Areas such as redressal of grievance procedures and the framework for holding Service Boards of Inquiry were given due importance

ix Provision of compensation to the person by secretary of State in case of miscarriage of justice.[83]

C. Canada

Some of the important feature of military justice system of Canada are :[84]

i Unified code for military justice known as "Comprehensive National Defence Act, 1950

ii Akin to British system

iii Commander has no authority to appoint judges

iv Director of military prosecution prefers charges and conducts prosecution at court martial.

v Right to appeal to the Supreme Court of Canada on question of law.

D. South Africa

In the early phase of 1990's, laws were amended in the South Africa and a new Constitution was promulgated, which affected all spheres of society including the Armed Forces. The Military Discipline Supplementary Measures Act, 1999 (MDSMA) was enacted by the Republic of South Africa on 23 April 1999 with the aim to provide better system of justice which can become helpful in maintaining improved standard of discipline essential for the Armed forces.[85] The MDSMA brought certain positive key changes in the military justice system of South Africa. Under its provision, Court of military judges, Court of Senior Military Judges and the Court of Military Appeal were established[86] which makes it similar to the hierarchy of civil court. The Act laid down the minimum qualification and criteria for

[83] The Armed Forces Act, 2006 (2006 Chapter 52) of U.K., s. 276.
[84] *Ibid.*
[85] The Military Discipline Supplementary Measures Act, 1999, South Africa, acknowledgement.
[86] The Military Discipline Supplementary Measures Act, 1999, s. 6.

becoming the judge of all the three courts. As it requires degree in law with certain years of experience as an advocate before being appointed as judge,[87] makes these forums more effective in the process of justice delivery and chances for error in judgments can be reduced through these measures. It is a more preferred system then the jury trial like in Indian military justice system, where presiding officer including members are not so qualified for delivering justice to the accused. The Court of Military Appeals empowered to hear full appeal and review[88]. Right to review is one of the important rights conferred to the accused under this Act.[89] The provision of ad hoc military tribunals for courts-martial were abolished after promulgation of the Military Discipline Supplementary Measures Act, 1999 from the military justice system of South Africa.

Countries like U.S.A, U.K, Canada and South Africa had adhered to the uniform code for their Army, Navy and Air force and they have carried out amendments to their respective military codes to bring them in line with prevailing international standards and the concept of the rule of law.

IV. DEFINING THE OFFENCE UNDER MILITARY LAW: A CRIMINAL LAW PERSPECTIVE AND UN CONVENTIONS

A. Actus non facit reum, nisi mens sit rea

The legal maxim "*actus non facit reum, nisi mens sit rea*" has remained the basic elements of an offence throughout the centuries up to the present day which foresees that no man should be convicted of a crime unless these two elements are satisfied. Criminal liability necessitates a concurrence of *actus reus* that entails an act which is done voluntary to inflict harm with *mens rea*, the guilty mind. The principle of *actus reus* and *mens rea* are regarded as distinct elements of crime, and these two are required to be present in order to establish a crime.

The underlying principle of the doctrine of *mens rea* is that an act does not make an individual guilty unless the mind is also guilty, which is expressed in the Latin maxim *'actus non facit reum nisi mens sit rea'*. The mere commission of a criminal act (or bringing about the situation that the law provides against) is not enough to constitute crime, at any rate in the case of more serious crimes. The element of wrongful intent is required to constitute criminal

[87] The Military Discipline Supplementary Measures Act, 1999, s. 13(2).
[88] *Id.,* s. 34.
[89] *Id.*, s. 25.

liability.[90] If we examine the offences illustrated under military Act, some of these brings out deviation from this fundamental principle of criminal law jurisprudence. Lord Goddand, C.J. in *Brend* v. *Wood* stated,[91] "It is of utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind." For example, an offence committed under section 13 (1) (e) of the Prevention of Corruption Act does not require *mens rea* or criminal intent to constitute a crime.[92] Applying the same principle on some of the military offences like "intoxication" when the personnel is not on duty, is another good example for strict liability offence where criminal intent is not required to be proved to charge a person under section 48(2) of Army Act. While criminalizing any act under military law, we need to see, whether it is contributing into achieving higher level of discipline and operational readiness of the armed forces and simultaneously, we must strive to balance individual's right who are subject to military law and even if requires some adjustment which requires compromising the individual's right then it must be done in dire need only but with bare minimum invasion to one's right. The principle of legality too asserts the similar idea. As per this principle only the law can define a crime and fix a penalty (*nullum crimen, nulla poena sine lege*). It also implies that the criminal law must not be extensively interpreted to an accused's detriment, for instance by analogy.[93]

B. Nullum crimen sine lege certa; nullum crimen sine lege stricta

This principle illustrates that an offence must be distinctly defined in the law, and this must be conceivable for any person. The requirement is satisfied where a person can comprehend the wordings of the applicable provision and, if need be, with the help of courts' interpretation of it, what omissive action will bring criminal liability for him. The classification of offences requires a clear definition of the criminalized act that establishes its elements and allows it to be distinguished from acts that are not penalized or illegal acts that may be punished by non-criminal measures.[94] In another case, the court held that the sphere of application of each offence must previously be delimited as clearly and precisely as

[90] Glanville Williams, *Textbook of Criminal Law* 30 (Stevens and Sons Ltd., 1983).
[91] *Brend* v. *Wood,* (1946) 62 TLR 462.
[92] *Runu Ghosh* v. *CBI,* CRL.A. 482/2002, Delhi High Court decided on Dec. 21, 2011.
[93] Grădinaru, Daniel, *The Principle of Legality* (November 20, 2018). RAIS Conference Proceedings - The 11th International RAIS Conference on Social Sciences, *available at*: https://ssrn.com/abstract=3303525.
[94] *Castillo Petruzzi et. al.* v. *Peru*, petition no. 11319 of 1994, IACHR, *available at*: https://www.corteidh.or.cr/docs/casos/articulos/seriec_52_ing.pdf.

possible in an explicit and precise manner.[95] The European Court too recalled that Article 7 of the Convention requires offences to be "clearly defined in law." That condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it, what acts, and omissions will make him liable.[96]

If we apply above mentioned principle to the offences illustrated under the Army Act, Navy Act and the Air Force Act, it will be found that some of the offences do not qualify the criteria. Like the offence of "unbecoming conduct", described under section 45 of Army Act and Air force Act, "offences against good order and discipline/ violation of good order or discipline" covered under section 74 of Navy Act, section 65 of Air Force Act and section 63 of Army Act are very broad category of offence which are not distinctly defined as the offence to be. Who will judge what is "unbecoming conduct"? Here the court or the prosecution have extensive power to interpret it to the detriment of the accused which is again contrary to the laid down principle of criminal law jurisprudence. Same condition is prevailing with the interpretation of section 63 of Army Act and corresponding section of other service Acts. It confers enormous power to the superior military authority to declare any objectionable act as criminal under section 45 and section 63 of the Army Act.

The Presiding Officer and members of the court martial are appointed by the convening authority through a convening order[97] and, therefore, the chances of influencing the court martial proceeding by the convening authority cannot be ruled out. Under the Navy Act, the President of a Court Martial is appointed by the Convening Officer or the officer empowered by him to appoint the President[98] and then, the President appoints the remaining members[99] from the pool of officers posted under his command. This provision facilitates convening officer to have the control over the entire proceeding.

V. REASONED DECISION AND JUDGMENT WRITING STANDARD IN COURT MARTIAL PROCEEDINGS

A. Judgment Writing

[95] *Fermin Ramirez* v. *Guatemala*, petition no. 12403 of 2000, IACHR, *available at*: https://www.corteidh.or.cr/docs/casos/articulos/seriec_126_ing.pdf.
[96] *Radio France and Others* v. *France*, No. 53984/00, ECHR 2004-II, *available at*: www.hudoc.echr.coe.int.
[97] The Army Rules, 1950, rules 37(3) and 151(2); The Air Force Rules, 1969, rule 43(3) and 130(2).
[98] The Navy Act, *supra* note 1, s. 97(12).
[99] *Id.*, s. 19.

There is a popular saying, "Justice must not only be done, but must also be seen to be done".[100] Illustrating reasons in support of findings and to determine sentences, is the core of any judgment writing. Well written reasoned judgment is helpful for the appellate court when it comes to appeal. It facilitates the judges of appellate court in following manners:

i To understand the facts and applicable law

ii To give clarity on standard of evidence applied

iii To evaluate arguments of both the parties

iv To assess the legality of procedure followed during trial

v To reach the absoluteness of findings

vi To validate the sentence passed by the lower court

vii Finally, it assists the judge to pass the suitable judgment at appellate or confirmation stage

The Army Act requires brief reasons in support of finding on each charge[101] but it is silent on the sentencing part. Even the confirming authority is not required to write reasons while exercising its power under section 154, section 155, section 157, and section 158 of Army Act which is apparent from the wordings of the statute itself. Army Rule 161 confers power to the court to deliberate in close court as to its sentences. In such a situation where deliberation about sentencing is taking place in close court, it is in the interest of justice to disclose the reasons on record to support the severity of sentence awarded with due consideration to mitigating factors. Secondly, it is required to understand the interpretation of word "*brief reasons"* illustrated under Army Rule 62(1). For that purpose, we need to understand the essential factors which is required to be illustrated and deliberated in a standard judgment writing. Brief reason cannot be taken as an excuse to compromise with the essentials of judgment writing. It should not seem as if the prosecutor himself or herself has written the judgment and the judgment must give confidence to its reader that there is no bias in judgment making. In criminal trial, it must show that the guilt is proved beyond reasonable doubt. Mere writing the sentence "in the light of evidence produced and evaluated, the offence is proved beyond reasonable doubt" will not be suffice. Court is required to write

[100] Lord Hewart, Former Chief Justice of England in the case of *Rex* v. *Sussex Justices*, [1924] 1 KB 256.
[101] The Army Rules, 1954, rule 62(1).

which all evidence was produced before the court, which all were admitted and considered by it. "What is the standard of evidence applied in finalizing the finding? What is the law pertaining to the issue in question? How did they deliberate on determining the sentence? What all are the mitigating circumstances if any? Does the accused have any previous conviction or bad discipline record?" these points can be included in the judgment while deliberating upon sentence to be awarded to the accused. Section 354 of Code of Criminal Procedure lays down the standard of judgment writing in criminal trial which can be taken as reference point for Presiding Officers and Members of military court. [102] The best judgments are those which clearly state the legal principles on which they are based. In the process of reaching decision precedents are very properly read and studied as evidence of the law, but they should be used for the purpose of extracting the law from them. It is undesirable to cumber a judgment with all the apparatus of research which Bench, and Bar have utilized in ascertaining the principle of law to be applied.[103] A well written judgment must reveal that there was application of judicial mind at every stage of trial and for ensuring this, following factors must be considered and reflected in the judgment by military court:[104]

i Nothing should be illustrated in the judgment/order, which may not be relevant to the facts of the case.

ii It should have a co-relation with the applicable law and facts. The ratio decidendi should be clearly spelt out from the judgment / order.

iii After preparing the draft, it is essential to go through the same to find out, if anything, essential has escaped discussion.

iv The ideal judgment/order should have continuous chronology; regard being had to the concept that it has readable, continued interest and one does not feel like parting or leaving it in the mid-way.

v To elaborate, it should have flow and perfect sequence of events, which would continue to generate interest in the reader's mind.

vi Appropriate care should be taken not to load it with all legal knowledge on the subject as citation of too many judgments creates more confusion rather than clarity.

[102] The Code of Criminal Procedure, 1973 (Act 2 of 1974), ss. 354(1)-(5).
[103] Hon'ble Justice R.V. Raveendran, "Rendering Judgments- Some Basics" 10 *SCC (J)* (2009).
[104] *Joint Commissioner of Income Tax Surat* v. *Saheli Leasing and Industries Ltd*. (2010) 6 SCC 384.

vii The foremost requirement is that leading judgments should be mentioned and the evolution that has taken place ever since the same were pronounced and thereafter, latest judgment, in which all previous judgments have been considered, should be mentioned. While writing judgment, psychology of the reader has also to be borne in mind, for the perception on that score is imperative.

viii Language should not be rhetoric and should not reflect a contrived effort on the part of the author.

ix After arguments are concluded, an endeavor should be made to pronounce the judgment at the earliest and in any case not beyond a period of three months. Keeping it pending for long time sends a wrong signal to the litigants and the society.

x It should be avoided to give instances, which are likely to cause public agitation or to a particular society. Nothing should be reflected in the same which may hurt the feelings or emotions of any individual or society.

B. *Judgment Writing in Court Martial Proceedings: A Critical Analysis*

It has been learnt that Presiding Officer or the members of court martial lacks formal training of judgment writing. Judgment writing is nowhere taught to general duty officers in any of the command courses or during basic training in National Defence Academy/ Indian Military Academy or at Staff College, but they are given the responsibility to Preside the military Court. In such a condition, judgment written by them is bound to get error which may facilitate as good defence to the offender during appeal.

On the requirement of reasoned decision by military court, the question under consideration can be divided into following parts:

i. Is there any widely applicable principle of law which assert the necessity over an administrative authority to record the reasons for its order or decision; and

ii. If the answer is affirmative, then, is this principle apply to the decision or order confirming the findings and sentence of a Court-Martial and also on the post-confirmation proceedings under the Act?

On the first part of the question there is divergence of opinion in the common law countries. In India, Army Rule 62(1) requires brief reasons by court in support of its findings. The legal position in the United States is similar to that in India. In the United States, the

courts have insisted upon recording of reasons for its decision by an administrative authority on the premise that the authority should give clear indication that it has exercised the discretion with which it has been empowered because 'administrative process will best be vindicated by clarity in its exercise'.[105] The said requirement of recording of reasons has also been justified on the basis that such a decision is subject to judicial review and 'the Courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review' and that 'the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.'[106] In *John T. Dunlop* v. *Waiter Bachowski*,[107] it has been observed that a statement of reasons serves purposes other than judicial review inasmuch as the reasons promotes thought by the authority and compels it to cover the relevant points and avoid irrelevancies and assures careful administrative consideration. The Federal Administrative Procedure Act, 1946 which prescribed the basic procedural principles which are to govern formal administrative procedures contained an express provision to the effect that all decisions shall indicate a statement of findings and conclusions as well as reasons or basis therefore, upon all the material issues of fact, law or discretion presented on the record and the appropriate rule, order, sanction, relief, or denial thereof.[108]

In *Alexander Machinery (Dudley) Ltd.* v. *Crabtree*, Sir John Donaldson, as President of the National Industrial Relations Court of England has observed that: "failure to give reasons amounts to a denial of justice."[109]

The Committee on Administrative Tribunals and Enquiries (Franks Committee) in its report submitted in 1957, recommended that "decisions of tribunals should be reasoned and as full as possible". The said Committee has observed:

> *"Almost all witnesses have advocated the giving of reasoned decisions by tribunals. We are convinced that if tribunal proceedings are to be fair to the citizen reasons should be given to the fullest practicable extent. A decision is apt to be better if the reasons for it have to be set out in writing because the reasons are*

[105] *Phelps Dodge Corporation* v. *National Labour Relations Board,* [1940] 85 Law Edn. 1271 at p. 1284.
[106] *Securities and Exchange Commission* v. *Chenery Corporation*, [1942] 87 Law Ed. 626 at p. 636.
[107] [1975] 44 Law Ed. 2 377).
[108] The Federal Administrative Procedure Act, 1946, s. 8(b), *available at*: https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/01/act-pl79-404.pdf last accessed on 05/09/2022.
[109] [1974] ICR 120.

then more likely to have been properly thought out. Further, a reasoned decision is essential in order that, where there is a right of appeal, the applicant can assess whether he has good grounds of appeal and know the case he will have to meet if he decides to appeal."[110]

The recommendations of the Donoughmore Committee and the Franks Committee paved the way to the enactment of 'the Tribunals and Enquiries Act, 1958' and later on, the Act was replaced by 'the Tribunals and Enquiries Act, 1971' in United Kingdom. The Act prescribed that it shall be the duty of the Tribunal or Minister to furnish a statement, either written or oral, of the reasons for the decision if requested, on or before the giving of notification of the decision to support the decision. [111]

In *Pure Spring Co. Ltd.* v. *Minister of National Revenue*,[112] Canadian court held that when a Minister makes a determination in his discretion, he is not required by law to give any reasons for such a determination. But in some recent decisions, however, the Courts in Canada have recognised that in certain situations there would be an implied duty to state the reasons or grounds for a decision.[113] In the Province of Ontario the Statutory Powers Procedure Act, 1971 was enacted which provided that "a tribunal shall give its final decision, if any, in any proceedings in writing and shall give reasons in writing if requested by a party."[114] This Act has now been replaced by 'the Statutory Powers and Procedure Act, 1980', which has a similar provision.

The Commonwealth Administrative Decisions (Judicial Review) Act of Australia enables a person who is entitled to apply for review the decision before the Federal Court to request the decision-maker to furnish him with a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision and on such a request being made the decision-maker has to prepare the statement and furnish it to the persons who made the

[110] The Committee on Administrative Tribunals and Enquiries (Franks Committee) Report published in July 1957, para 98.
[111] The Administrative Tribunals and Enquiries Act, 1971, s. 12
[112] [1947] 1 DLR 501 at p. 539.
[113] *Re R D.R. Construction Ltd. and Rent Review Commission*, [1983] 139 DLR (3d) 168) and *Re Yarmouth Housing Ltd. And Rent Review Commission*, [1983] 139 DLR (3d) 544.
[114] The Statutory Powers Procedure Act, 1971 (In the State of Ontario), s. 17.

request as soon as practicable and in any event within 28 days.[115] Yet, the provisions of this Act are not applicable to the cases pertaining to security, intelligence and other special statutes, mentioned in Schedule I to the Act as these organisations comprise a different class. A similar duty to give reasons has also been imposed by section 28 and section 37 of the commonwealth Administrative Appeals Tribunal Act, 1975.[116] In India the matter was considered by the Law Commission pertaining to Reform in Judicial Administration. The Law Commission recommended:[117]

> *"In the case of administrative decisions provision should be made that they should be accompanied by reasons. The reasons will make it possible to test the validity of these decisions by the machinery of appropriate writs."*

In *Travancore Rayon Ltd.* v. *Union of India,* the Court has observed: [118]

> *"The Court insists upon disclosure of reasons in support of the order on two grounds; one, that the party aggrieved in a proceeding before the High Court or this Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power."*

In *Mahabir Prasad Santosh Kumar* v. *State of U.P. and Others*,[119] the licence granted under the provision of 'U.P. Sugar Dealers' Licensing Order, 1962 was cancelled by the District Magistrate without giving any reason and subsequently, in appeal against the said order of the District Magistrate, the State Government had dismissed the representation without recording the reasons for the same. The Court has held: [120]

> *"The practice of the executive authority dismissing statutory appeal against orders which prima facie seriously prejudice the*

[115] The Administrative Decisions (Judicial Review) Act 1977, s. 13.
[116] The Commonwealth Administrative Appeals Tribunal Act. 1975 (Australia), Ss. 28, 37
[117] Law Commission of India, "14TH Report on Reform of Judicial Administration", vol. II, p. 694
[118] (1969) 3 SCC 183, 1971.
[119] (1970) 1 SCC 764
[120] *ibid*

rights of the aggrieved party without giving reasons is a negation of the rule of law. Recording of reasons in support of a decision on a disputed claim by a quasi-judicial authority ensures that the decision is reached according to law and is not the result of caprice, whim or fancy or reached on grounds of policy or expediency. A party to the dispute is ordinarily entitled to know the grounds on which the authority has rejected his claim. If the order is subject to appeal, the necessity to record reasons is greater, for without recorded reasons the appellate authority has no material on which it may determine whether the facts were properly ascertained, the relevant law was correctly applied, and the decision was just."

In *Woolcombers of India Ltd*. case the Court was dealing with an award of an Industrial Tribunal. It was found that the award stated only the conclusions and it did not give the supporting reasons. The Court has observed: [121]

"The giving of reasons in support of their conclusions by judicial and quasi-judicial authorities when exercising initial jurisdiction is essential for various reasons. First, it is calculated to prevent unconscious unfairness or arbitrariness in reaching the conclusions. The very search for reasons will put the authority on the alert and minimise the chances of unconscious infiltration of personal bias or unfairness in the conclusion. The authority will adduce reasons which will be regarded as fair and legitimate by a reasonable man and will discard irrelevant or extraneous considerations. Second, it is a well-known principle that justice should not only be done but should also appear to be done. Unreasoned conclusions may be just, but they may not appear to be just to those who read them. Reasoned conclusions, on the other hand, will also have the appearance of justice. Third, it should be remembered that an appeal generally lies from the decision of judicial and quasi- judicial authorities to this Court by special

[121] *Woolcombers of India Ltd*.v. *Woolcombers Workers Union and another* (1974) 3 SCC 318.

leave granted under Article 136. A judgment which does not disclose the reasons, will be of little assistance to the Court."

In *A.K. Kraipak and Others* v. *Union of India and Others*, it has been held:[122]

"The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely (i) no one shall be a Judge in his own cause (nemo dabet esse judex propria causa) and (ii) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably."

But over years many more subsidiary rules came to be added to the rules of natural justice.[123] A similar trend is discernible in the decisions of English Courts wherein it has been held that natural justice demands that the decision should be based on some evidence of probative value.[124]

The rules of natural justice are an implied rule. The scope of their application varies upon the statutory arrangement under which jurisdiction has been conferred pertaining to exercise of a particular power by an administrative authority along with exercise of judicial or quasi- judicial functions. However, the legislature, while conferring the said power to any administrative authority along with power to exercise of judicial or quasi-judicial functions by them, may feel that recording of reasons during passing the order would not be in the larger public interest then it may dispense with such a requirement. In U.S.A.[125] and Australia[126] also similar practices are seen where an express provisions in the Act itself is made. Such an exemption from giving reasoned decision can come up by necessary interpretation from nature of the subject-matter or from objectives and provisions of the Act. As per the administrative practices in U.S.A. and Australia, the public interest contained in such a provision would overshadow the purpose served by the requirement of recording the

[122] [1970] 1 SCR 457.
[123] *R.* v. *Deputy Industrial Injury Commissioner*, [1965] 1 Q.B. 456; *Mahon* v. *Air New Zealand Ltd*., [1984] A.C. 648.
[124] *Ibid.*
[125] The Administrative Procedure Act, 1946 (U.S.A).
[126] The Administrative Decisions (Judicial Review) Act, 1977 (Australia).

reasons. Therefore, in such cases, the said provision of recording the reason cannot be forced upon the Authority making the decision.

Now we will see whether the Army Act,1950 or the Army Rules, 1954 expressly or by necessary implication dispense with the obligation of recording reasons at confirmation and post confirmation stage?

This aspect will be considered in a broader perspective and examine whether reasons are required to be recorded at following stages:

i. recording of findings and sentence by the court-martial

ii. confirmation of the findings and sentence of the court-martial

iii. consideration of post-confirmation petition.

Before explaining the related provisions of the Act and the Rules, it is required to describe that the Constitution comprises of certain special provisions pertaining to the members of the Armed Forces. Article 33 confers power on Parliament to enact law for determining the extent to which any of the rights conferred by Part Ill of the Constitution shall, in their application to the members of the Armed Forces be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline amongst them.[127] Articles 136(2) and 227(4) impose certain restriction in the matter pertaining to appeal from judgment, determination, sentence or order passed by or made by military court or tribunals to the Supreme court and high court respectively.[128] However, Supreme Court under Article 32 and the High Courts under Article 226 have the power of judicial review in respect of proceedings of courts-martial and can grant suitable relief if the said proceedings have caused denial of the fundamental rights guaranteed under Part III of the Constitution, or if the proceedings suffer from a jurisdictional error or any other error of law apparent on record.[129] Since 2007, after the constitution of Armed Forces Tribunal, one can approach the Tribunal in appeal against any orders, decision, finding or sentence passed by a court-

[127] *Supra* note 23, art. 33.
[128] *Id.*, arts. 136(2) and art. 227(4).
[129] *S.N. Mukherjee* v. *Union of India,* 1990 (4) SCC 594.

martial.[130] For exercising power by tribunal, it requires to know following factual and legal issues:[131]

i Whether the findings of court-martial are legally sustainable due to any reason whatsoever; or

ii Whether the finding involves wrong decision on a question of law; or

iii Whether there was any material irregularity during the trial resulting in miscarriage of justice.

These issues can be understood clearly by the AFT judges in limited time frame if the judgment of lower court is well organised and covers all necessary details. Similarly, if the High Court or the Supreme Court want to properly address an issue pertaining to court-martial by exercising power under Article 226 or Article 32 respectively, well described reasoned judgment written by military court will be of good assistance and will save time of appellate court too.

It is also essential to analyse provisions of the Army Act and the Rules affecting the requirement of recording reasons for justifying the findings and sentence of the Military Court. The Act provides for four kinds of courts-martial, i.e., (a) general courts-martial (b) district courts-martial (c) summary general courts-martial and (d) summary courts-martial.[132] Chapter XI of the Act prescribes the procedure of Court Martial (Sections 128 to 152) of the Act.[133] It prescribes that every general court- martial shall, and every district or summary general court- martial, may be attended by a judge-advocate, who shall be either an officer belonging to the department of the Judge- Advocate General, or if no such officer is available, an officer approved of by the Judge-Advocate General or any of his deputies.[134] The Act provides that subject to the provisions of sub-sections (2) and (3) every decision of a court-martial shall be passed by an absolute majority of votes, and where there is an equality of votes on either the finding or the sentence, the decision shall be in favour of the accused.[135] It also lays down the minimum quorum required for passing the sentence in general court-

[130] The Armed Forces Tribunal Act, 2007, S. 15(1).
[131] *Id.*, s. 15(4).
[132] The Army Act, *supra* note 1, s. 108.
[133] *Id.*, ss. 128 to 152.
[134] *Id.*, s. 129.
[135] *Id.*, s. 132(1).

martial and summary general court-martial.[136] Rules 37 to 105 of the Army Rules specifically deals with the procedure at trial before the General or District courts-martial. Army Rule 60 provides that the judge-advocate (if any) shall sum up in open court the evidence and advise the court upon the law relating to the case[137] and that after the summing up of the judge-advocate no other address shall be allowed.[138] Rule 61 prescribes that the Court shall deliberate on its findings in closed court in the presence of the judge-advocate and the opinion of each member of the court as to the finding shall be given by *word of mouth* on each charge separately.[139] Army Rule 62 prescribes the form, record and announcement of finding and in sub-rule (1) it is provided that the finding on every charge upon which the accused is arraigned shall be recorded and, except as provided in these rules, shall be recorded simply as a finding of "Guilty" or of "Not guilty" with brief reasons in its support.[140] Sub-rule (10) of Rule 62 lays down that the finding on charge shall be announced forthwith in open court as subject to confirmation.[141] Rule 64 lays down that in cases where the finding on any charge is guilty, the court, before deliberating on its sentence, shall, whenever possible take evidence in the matters specified in sub-rule (1) and thereafter the accused has a right to address the court thereon and in mitigation of punishment.[142] Rule 65 makes provision for sentence and provides that the court shall award a single sentence in respect of all the offences of which the accused is found guilty, and such sentence shall be deemed to be awarded in respect of the offence in each charge and in respect of which it can be legally given, and not to be awarded in respect of any offence in a charge in respect of which it cannot be legally given.[143] Rule 66 makes provisions for recommendation to mercy and sub-rule (1) prescribes that if the court makes a recommendation to mercy, it shall give its reasons for its recommendation.[144] Sub-rule (1) of Rule 67 lays down that the sentence together with any recommendation to mercy and the reasons for any such recommendation will be announced forthwith in open court.[145] The powers and duties of judge-advocate are prescribed in Rule 105 which, among other things, lays down that at the conclusion of the case he shall sum up the evidence and give his opinion upon the legal bearing of the case

[136] *Ibid.*
[137] The Army Rules, 1954, rule 60(1).
[138] *Id.*, rule 60 (2).
[139] *Id.*, rule 61.
[140] *Id.*, rule 62(1).
[141] *Id.*, rule 62(10).
[142] *Id.*, rules 64(1) and 64(4).
[143] *Id.*, rule 65.
[144] *Id.*, rule 66.
[145] *Id.*, rule 67(1).

before the court proceeds to deliberate upon its finding and the court, in following the opinion of the judge- advocate on a legal point may record that it has decided in consequences of that opinion.[146] The said rule also prescribes that the judge-advocate has, equally with the presiding officer, the duty of taking care that the accused does not suffer any disadvantage in consequences 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.[147] It is further laid down that in fulfilling his duties, the judge-advocate must be careful to maintain an entirely impartial position.[148] From the provisions referred to above it is evident that the judge-advocate plays an important role during the courts of trial at a general court-martial and theoretically, he is enjoined to maintain an impartial position. The court-martial records its findings after the judge-advocate has summed up the evidence and gives his opinion upon the law relating to the case.[149] The members of the court have to express their opinion as to the finding by word of mouth on each charge separately and the finding on each charge is to be recorded simply as a finding of "guilty" or of "not guilty".[150] It is also required that the sentence should be announced forthwith in open court.[151]

Looking at the provisions of the Act and practices, like the method of appointment of Presiding Officer, members and the Officer from JAG branch, effect of Command influence over the entire proceeding cannot be ruled out. Who appoints the Presiding Officer or the Members? From where Judge Advocates are detailed for the Court Martial? Who writes their Annual Confidential Report? Who is the Convening Officer? What all powers and influence, he had over the Military Court facilitated under the provision of Army Act? If we evaluate all the questions in the light of answers illustrated in previous paragraphs, the possibility of Command influence cannot be denied over the entire proceedings of any Court-Martial. Command influence is contrary to the concept of Rule of Law. And in such a scenario there are so much of control being exercised by the Convening Authority from appointment of Presiding Officers/ Members for court of enquiry, recording of summary of evidence and court-martial. Convening authority has power to suspend the rules on the ground of military

[146] *Id.*, rules 105(5) and 105(6).
[147] *Id.*, rule 105(7).
[148] *Id.*, rule 105(8).
[149] *Id.*, rule 60(1).
[150] *Id.*, rule 61(2).
[151] *Id.*, rule 67(1).

exigencies or the necessities of discipline[152] where the word "necessities of discipline", due to its vagueness leaves wide scope for exercising discretion by the convening authority. Here writing reasons, while exercising discretionary power particularly when suspending the rules in view of exigencies of service or necessities of discipline, must be made mandatory by the legislature under the provision of the Act.

Another crucial topic of discourse is 'right to representation of accused by a counsel of his/her choice' depends on the discretion of the convening officer or the court.[153] Defending Officer in a court martial having the same right and duties as appertain to counsel under the provision of Army Rule,[154] he is known as friend of the accused; however, the appointment of defending officer is done solely by the Convening Officer. Most of the time it is observed that the defending officer is a non-law qualified officer who barely has any experience as defence counsel. But the accused has no say in it. Even the proceeding can carry on if the convening Officer certifies that due to exigencies of service or for any other reason, there is no officer available for such duty. 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.[155] More so over, most of the courts martial are conducted in very inhospitable terrain in remote locality away from the mainland. In such a scenario, where law is framed as to inculcate command influence at every stage of trial, and also in an unfamiliar, inhospitable terrain, where searching for a qualified lawyer or getting legal aid by the accused under custody creates unfavourable situation for a fair trial. After above analysis of the discretionary power of the Convening Authority, it is recommended that every order passed by convening authority while exercising discretion in court-martial, must compulsorily be supported by valid reasoning.

The Act lays down that no finding or sentence of a General, District or summary General, Court-Martial shall be valid except so far as it may be confirmed by the competent authority.[156] It lays down that the confirming authority may while confirming the sentence of a court-martial mitigate or remit the punishment thereby awarded, or commute that punishment to any punishment lower in the scale laid down in Section 71 of the Act[157]. The

[152] *Id.*, rule 36.
[153] *Id.*, rules 96 and 97(1).
[154] *Id.*, rule 95 (3).
[155] *Id.*, rule 95(2).
[156] The Army Act, *supra* note 1, s.153.
[157] *Id.*, s. 158(1).

confirming authority is empowered to revise the finding or sentence of the court-martial and for this purpose, it may take additional evidences on record.[158] The confirmation of the finding and sentence is not required in respect of summary court-martial[159] and it is provided that the proceedings of every summary court-martial shall without delay be forwarded to the officer commanding the division or brigade within which the trial was held or to the prescribed officer; and such officer or the Chief of the Army Staff or any officer empowered in this behalf may, for reasons based on the merits of the case, but not on mere technical grounds, set aside the proceedings or reduce the sentence to any other sentence which the court might have passed.[160] In Rule 69 it is provided that the proceedings of a general court-martial shall be submitted by the judge-advocate at the trial for review to the deputy or assistant judge-advocate general of the command who shall then forward it to the confirming officer and in case of district court- martial it is provided that the proceedings should be sent by the presiding officer, who must, in all cases where the sentence is dismissal or above, seek advice of the deputy or assistant judge-advocate general of the command before confirmation.[161] The confirming authority may confirm or refuse confirmation or reserve confirmation for superior authority, and the confirmation, non-confirmation, or reservation shall be entered in and form part of the proceedings.[162] Rule 71 lays down that the charge, finding and sentence, and any recommendation to mercy shall, together with the confirmation or non-confirmation of the proceedings, be promulgated in such manner as the confirming authority may direct, and if no direction is given, according to custom of the service and until promulgation has been effected, confirmation is not complete and the finding and sentence shall not be held to have been confirmed until they have been promulgated.[163]

The provisions mentioned above express that confirmation of the findings and sentence in a court-martial is obligatory before the said finding or sentence become effective. The confirmation of the findings and sentence is an essential part of the proceedings of a court-martial and before the findings and sentence of a court-martial are confirmed the same are examined by the deputy or assistant judge-advocate general of the command.[164] The process is defined as a review of court martial for the purpose of checking the legality and

[158] The Army Act, *supra* note 1, s. 160(1).
[159] *Id.*, s. 161(1).
[160] The Army Act, *supra* note 1, s. 162.
[161] The Army Rules, 1954, rule 69.
[162] *Id.*, rule 70.
[163] *Id.*, rule 71.
[164] *Supra* note 161.

propriety of the proceedings as well as its findings and sentence. An express provision is made in section 162 for recording of reasons based on merits of the case regarding the proceedings of the summary court martial in cases where it is set aside, or the sentence is reduced.[165] No other requirement for recording of reasons is laid down either in the Act or in the Rules in respect of proceedings for confirmation. Therefore, the only inference which can be drawn from Section 162 of the Army Act is that it is mandatory to record the reason only in cases where the proceedings of a summary court-martial are set aside or the sentence is reduced and it also implies that recording of reason is not required when the findings and sentence are confirmed by the confirming authority.[166] During Confirmation, reasons are not required to be recorded for an order passed by the confirming authority confirming the findings and sentence by the court-martial as well as the order passed by the Central Government dismissing the post- confirmation petition.[167] However, there is similar procedural requirement of confirmation by High Court in case of death reference by Session Court and it is required to be heard minimum by division bench.[168] Significantly, the proceeding before the High Court in a death reference is not merely a mechanical exercise. On the contrary, it is trite law[169] that in a reference for confirmation of death sentence, High Court is required to examine the entire evidence for itself, independent of the Sessions Court's findings/views. In this regard, the Supreme Court in *Jumman* v. *State of Punjab*[170], while considering the scope of High Court's duty and power under such scenarios, held:

> *"10. … it is the duty of the High Court to consider the proceedings in all their aspects and come to an independent conclusion on the materials, apart from the view expressed by the Sessions Judge. In so doing, the High Court will be assisted by the opinion expressed by the Sessions Judge, but under the provisions of the law abovementioned it is for the High Court to come to an independent conclusion of its own."*

Extract of relevant portion of above illustrated judgment reveals that confirmation is a judicial process which requires application of mind by the Judges and therefore, application

[165] The Army Act, *supra* note, s. 162.
[166] *Supra* note 129.
[167] *Ibid.*
[168] *Supra* note 102, s. 369.
[169] *Balak Ram* v. *State of U.P.* (1975) 3 SCC 219.
[170] *Jumman* v. *State of Punjab* AIR 1957 SC 469.

of judicial mind must reflect through the text written by the judges while confirming the judgment of lower court or passing a new sentence. But in Army, the practice and procedure adopted for confirmation of all sentences including death penalty are different from mainstream criminal law practice which needs to be addressed by the law makers in the interest of justice.

With regard to post-confirmation proceedings it is found that subsection (2) of Section 164 of the Act provides that any person subject to the Act who considers himself aggrieved by a finding or sentence of any court-martial which has been confirmed, may present a petition to the Central Government, the Chief of the Army Staff or any prescribed officer superior in command to the one who confirmed such finding or sentence and the Central Government, the Chief of the Army Staff or other officer, as the case may be, may pass such orders thereon as it or he thinks fit.[171] Prior to 1993, before inclusion of Army Rule 62(1), the scheme of the Act and the Rules were such that it was not obligatory to record reasons to support findings and sentence of any court-martial and, so for the proceedings for its confirmation. There is nothing in the language of Section 164(2) which may support such an intention of writing reasons while confirming the finding or sentence. Post confirmation proceedings do not require recording of reasons for an order passed on the post-confirmation petition even though reasons are not required to be recorded at the stage of recording of findings and sentence by a court-martial and at the stage of confirmation of the findings and sentence of the court- martial by the confirming authority.[172] In *SN Mukherjee* case, court held that since reasons are not required to be recorded at the first two stages [i.e. (i) recording of finding and sentence (ii) at the time of confirming the finding and sentences], the said requirement cannot be insisted upon at the stage of consideration of post-confirmation petition under Section 164(2) of the Act.[173] But after 1993, due to amendment in Army rule 62 (1), military court is required to give brief reasons in support of its findings. Due to this amendment, the logic given in *S.N. Mukherjee*[174] case will not be tenable and hence reconsideration on this issue of giving reasons while confirming the findings/sentence and while rejecting the post confirmation representation made by or on behalf of the accused in the light of Army Rule 62(1) is recommended. However, in this case court held that even though there is no requirement to record reasons by the confirming authority while passing

[171] The Army Act, *supra* note 1, s. 164(2).
[172] *Supra* note 166.
[173] *Ibid.*
[174] *Ibid.*

the order confirming the findings and sentence of the court-martial or by the Central Government while passing its order on the post-confirmation petition, it is open to the person aggrieved by such an order to challenge the validity of the same before this Court under Article 32 of the Constitution or before the High Court under Article 226 of the Constitution and he can obtain appropriate relief in those proceedings on above described grounds.[175] But while deciding the case, court forgot that the reasons illustrated in the judgment in support of sentence awarded and confirmation of finding and sentence will be facilitating in assessing its correctness at subsequent stage particularly when the accused is awarded with death sentence or life imprisonment.

For the reasons aforesaid, it was concluded by the court that except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions is required to record the reasons for its decision. This issue was addressed in the judgment passed by constitution bench in *S.N. Mukherjee* v. *Union of India*[176] and they agreed to the requirement of reasoned decision by judicial or quasi-judicial or administrative authority while exercising their power in making decisions. But on the matter of court martial, they touched it with extra care taking plea of public interest and made a flat escape from illustrating it as mandatory requirement of judgment writing by military court. However, after the amendment of Army Rules in 1993, rule 62(1) requires brief reasons in support of findings to be illustrated in judgment by the military court; but in view of law of natural justice and mainstream practice of judgment writing, military court must give reason for ascertaining the sentence to be awarded to the accused particularly, when the sentence is life imprisonment or death penalty. Same principle is applicable for the confirming authority too, they need to incorporate reasoning while confirming the findings and sentence of military court. Same approach by the court while rejecting the post confirmation petition is expected as the basis of not giving reason earlier as illustrated in *S.N. Mukherjee* case was based on non-necessity of reasoned decision by trial court at that time when it was decided prior to the amendment. But now, the amendment in army rule 62(1) provides good ground for writ to enforce reasoned decision at the confirmation and post confirmation stage too.

[175] *Ibid.*
[176] *Ibid.*

VI. CONCLUSION

Writing reasoned decision is one of the main ingredients of judicial transparency and no good law should permit an escape from it at any stage of trial or at any level of confirmation/appeal. It is recommended that giving confirming authority, a total exemption from writing reasoned decision is like giving silent consent to do injustice to the soldiers undertrial. It is recommended that a law should be enacted to impose a general duty to record the reasons for its decision by all administrative/ quasi-judicial/ judicial authority at all stages of trial. They must apply their mind while passing any orders or judgments and the same must be made reflected through their written text of orders/ judgments. This is required to drive away the doubt from the mind of senior public servants performing such duties and making them accountable for their decisions.

The classification of offences requires a clear definition of the criminalized act that establishes its elements and allows it to be distinguished from acts that are not penal or illegal acts that may be punished by non-criminal measures.[177] It's also a settled law that the sphere of application of each offence must previously be delimited as clearly and precisely as possible in an explicit and precis manner. Section 74 of Navy Act, section 65 of Air Force Act and section 63 of Army Act are vague and creates very broad category of offence which are not distinctly defined as the offence to be. Its vagueness gives power to interpret the section to the person filing the chargesheet. The question is 'Who will judge what is "unbecoming conduct" under section 63 of Army Act?' Here the court or the prosecution too have extensive power to interpret it to the detriment of the accused which is again contrary to the laid down 'principle of legality'. Same condition is prevailing with the interpretation of section 63 of Army Act and corresponding section of other service Acts. It confers enormous power to the superior military authority to declare any objectionable act as criminal under section 45 and section 63 of the Army Act. Unbecoming conduct, and violation of good order and discipline are the two offences which are illustrated vaguely and any person subject to this Act can be framed easily under these sections of Army Act and it gives wide powers to the officer commanding the unit to punish a black ship. Hence, this can be a good subject for judicial review by the court.

[177] *Supra* note 94.

The analyses of the provision of article 14 of ICCPR, *Basic Principles on the Independence of Judiciary'*[178] and '*Guidelines on the Role of Prosecutors*, 1990'[179] adopted by the UN General Assembly, article 50 of the Constitution, Supreme Court's reformative approach in series of judgments including *Prithpal Singh Bedi* case and Expert Committee Report, restructuring of JAG branch equipped with additional role is a crucial task need to be taken up on priority. It can be further divided into four branches on the line of United Kingdom and U.S.A. It is as under: (i) Branch, which can continue with its traditional role (ii) Another branch can maintain Pool of Judges for permanent military courts (iii) Directorate of prosecution (iv) Legal aid Authority and defence counsel. Permanent military courts having competent, qualified military judges away from Command influence is the need for fair administration of military justice. Provision of law qualified officers having prescribed experience as an advocate can be thought off for appointment of permanent military judges for court martial akin to South African system of military justice. Those judges can be kept away from command influence by keeping them under separate directorate. Prosecution counsel and defence counsel should have similar criteria for appointment. Provision of *Defending Officer* as prescribed under Indian military law should be exercised as an exception where exigency of duty demands speedy disposal and obtaining legal support of such counsel within limited time frame is not possible.

There is requirement of common code of military justice like in U.S.A, U.K, Canada, and South Africa as the creation of the post of Combined Defence Staff for the purpose of better coordination in case of joint operations demands it. An exception to the specific provisions can be accommodated within that Act for accommodating the unique requirement of all three services. Provision of double jeopardy under Air force Act is against the provision of Article 14(7) of ICCPR and against Article 20(2) of the Constitution. It has been repealed from the Army and Navy Act too. Under Navy Act no confirmation of finding by the

[178] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 available on https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx (last visited on March 12, 2021).

[179] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 available at https://www.ohchr.org/en/professionalinterest/pages/roleofprosecutors.aspx.

Convening Authority or Superior Authority is required except in case of death sentence[180] which is different from the practice of Army[181] and Air force[182].

Uniformity in the power of summary court is another issue which can be taken up for amendment. In Navy, the commanding officer of a ship may summarily try any person belonging to the ship, other than an officer, for an offence not being a capital offence and can award imprisonment or detention up to three months.[183] This power of summary trial is limited in the Air Force where punishment up to 28 days of imprisonment can be awarded to persons below the rank of NCO without the intervention of court martial.[184] However, under the provision of the Army Act, the Commanding officer has power to award sentence up to one year.[185] Under the provision of Navy Act, a civilian who is not subject to any of the three Acts can be tried for the offence of espionage by a Naval Court;[186] this provision is unique and special to the Navy Act only which can be incorporated to other two Acts as pendency of cases in civil courts is very high and such types of sensitive offence pertaining to national security needs special care with speedy trial. Addressing these anomalies with a Common Military Code is better than amending all three service Acts.

Compensation to the accused for miscarriage of justice done by the military court can be implemented so that the government official must take due care while evaluating the necessary factors prior to passing order for conviction. Article 14(6) of International Covenant on Civil and Political Rights talks about compensation to the wrongly convicted person. U.K has also implemented similar scheme for compensation to the person victim of miscarriage of justice.[187]

Under civil law practice we have experienced the rehabilitation effort of our government to rehabilitate the surrendered terrorists and criminals too. Therefore, ignoring the rehabilitation of convicted soldiers in civil life is irrational and an initiative for the same can be thought out.

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[180] *Supra* note 45.
[181] The Army Act, *supra* note 1, s. 153.
[182] The Air Force Act, *supra* note 1, s. 152.
[183] The Navy Act, *supra* note 1, s. 93(2).
[184] The Air Force Act, *supra* note 1, s. 82 (a).
[185] The Army Act, *supra* note 1, s. 120(5).
[186] The Navy Act, *supra* note 1, s. 38.
[187] *Supra.*note 17 and 83.

There is requirement of imparting basic training for judgment writing to the officers going to preside the court in future and any guideline or legal provisions can be made like chapter XXVII of the Code of Criminal Procedure as the same is no where included in the training module of the officers going to preside the military court.

Civilianisation of Indian Armed Forces is not only required based on changing international practices and covenants, but it is the need of the hour. As a military commander, one may feel apprehensive about the proposed changes, but if we analyse the performance of paramilitary forces and firemen, demonstrate that men can function effectively in activities posing risk to life and limb under a normal civilian superior- subordinate relationship where senior lacks criminal law sanction and complete power over the men under his or her command unlike military.

Provision of an independent court administered by impartial officers is more likely to win the acceptance of the troop under command than the menace of a powerful military commander whose control makes a farce out of court martial.

To counter psychological operation from enemy nation, we need to have a strong and cohesive armed forces free from any prejudice. The soldier risking their life, must have unconditional faith in the justice delivery system of the military they serve; and for inculcating such a high level of faith in the system, it must have the element of fairness and unbiases into it. This is the most compelling reason for reform we need.