



1-7-1990

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Recommended Citation

Gorthi, Maj General AB (1990) "The relationship of military law with the civil judicial system," *National Law School Journal*: Vol. 2: Iss. 1, Article 11.

Available at: <https://repository.nls.ac.in/nlsj/vol2/iss1/11>

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The relationship of military law with the civil judicial system

MAJOR GENERAL A.B. GORTHI

Introduction

1. Discipline is indeed the bed-rock of an armed force. What marks the armed forces in India apart from the other organs of the Government is the exemplary standard of discipline amongst its members. For the effective maintenance of discipline, armed forces universally are governed by a special law, known as 'military law'. The term military law is sometimes confused with martial law which is "neither more nor less than the will of the General who commands the Army; in fact, martial law is no law at all."¹ Military law, on the other hand, is the set of enactments governing the members of the regular army.² Military law in India is laid down in the Army Act, 1950 and the rules made thereunder, namely, the Army Rules, 1954.

Constitutional aspects of military law

2. *Restrictions on Fundamental rights.*—Article 33 of the Constitution of India can be viewed as the Constitutional back-bone of military law in India. It empowers the Parliament to make laws prescribing the limits to which any of the fundamental rights may be abridged or even abrogated in respect of the members of the armed forces so as to ensure "the proper discharge of their duties and the maintenance of discipline among them." Although the Army Act, 1950 does not directly declare Article 33 as its source, the latter protects the VIRES of any such provision in the former enactment that tends to make an inroad into the hallowed precincts of Part III of the Constitution.³ Accordingly, certain aspects of the Fundamental Right to Freedom enshrined in Article 19 stand circumscribed in respect of persons, subject to the Army Act. In addition to the restrictions specifically imposed in the Army Act,⁴ it seems to be the view of the judiciary that any provision of the Army Act which infringes upon any fundamental right may be deemed to be an intended infraction of the related right and to that extent Constitutionally valid.

3. *Restrictions on the powers of the Civil Courts.*—Realising the desirability of keeping the management of the armed forces outside the country's judicial mainstream, the Founding Fathers have ousted the supervisory jurisdiction of the High Courts over 'any court or tribunal constituted by or under any law relating to the armed forces'.⁵ Even the extraordinary jurisdiction conferred upon the Supreme Court to grant special leave to

1. Statement by the Duke of Wellington in the House of Lords, referring to imposition of Martial Law in Ceylon in 1849.
2. The Preamble to the Army Act 1950 (46 of 1950) says that it is "An Act to consolidate with amendment to the law relating to the government of the regular army."
3. *Ram Sarup v Union of India*, AIR 1965 SC 247.
4. Army Act Section 21 should be read with Army Rules 19-21 which forbid military personnel from taking part in unauthorised organisations and political and non-military activities and from communicating with the Press.
5. Article 227 (4) of the Constitution of India.

appeal does not extend to "any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the armed forces."¹ Further, the safeguard specified in Articles 310(2) and 311 have been made inapplicable to members of the defence services in matters relating to dismissal, removal, etc.

Civil and military laws

4. There is an erroneous notion, both within and outside the armed forces, that when a soldier dons uniform, he gives up his liability under the civil laws. Contrarily, when a soldier becomes subject to the stringent code of military discipline, he does so in addition to his continued subjection to the civil laws.² This dichotomous system of justice in respect of military personnel needs to be understood with care. While the quality of justice available to a man in uniform should in no manner be inferior to that available to his civilian counterpart, it should not be so modelled as to defeat its very object, which is maintenance of discipline.

5. *Military and Civil Offences.*—Army Act declares certain acts and omissions as military misdemeanours punishable after trial by a court martial or summarily by a competent authority. These offences are called 'military offences', the most common of them being cowardice in war,³ desertion,⁴ absence without leave,⁵ mutiny,⁶ disobedience⁷ and insubordination.⁸ Though not punishable under the civil laws, these offences are viewed seriously and dealt with firmly under the military law. Besides the military offences, all the 'civil offences'⁹ which are punishable under such penal enactments as the Indian Penal Code, Official Secrets Act, Prevention of Corruption Act and so on, if committed by military personnel, are also triable by courts martial or otherwise under the Army Act, Serious crimes like murder, culpable homicide and rape when committed by soldiers on civilians are triable by courts martial if the said offence is committed while the offender is on active service or outside India or at any frontier post.¹⁰ The maximum punishment awardable under the Army Act is death, which may be inflicted either by hanging or shooting.¹¹

6. *Concurrent jurisdiction.*—With a view to resolve the concurrent jurisdiction of the civil and military tribunals, Rules have been framed under which, ordinarily, the accused is allowed to be tried by a court martial unless the competent military authority hands over the case to the Civil Court for trial.¹²

Basic structure of military justice system

7. For a proper appreciation of the military justice system, its salient features may briefly be enumerated. Every charge against an accused person is promptly investigated by the Commanding Officer. If the accused is placed under arrest on account of the alleged offence, the investigation must commence within 48 hours. During this preliminary

1. Article 136 (2) of the Constitution of India.

2. Vide Section 127, Army Act, a person subject to Army Act convicted or acquitted by a Court Martial may with the previous sanction of Central Government be tried again by criminal court for the same offence or on the same facts.

3. Army Act Section 34.

4. Army Act Section 38.

5. Army Act Section 39.

6. Army Act Section 37.

7. Army Act Section 41.

8. Army Act Section 42.

9. Army Act Section 3(ii) defines civil offences "an offence which is triable by a Criminal Court."

10. Please see Army Act Sections 69 and 70.

11. For the scale of punishments awardable by Courts Martial, see Army Act Section 71.

12. Criminal Court and Court Martial (Adjustment of jurisdiction) Rules, 1978, republished in para 418 of "The Regulations for the Army".

hearing, the accused is given an opportunity to cross examine witnesses, make a statement and to call witnesses in his defence. In complicated cases, a Summary of Evidence' is recorded. If a *prima facie* case is made out, the mode of trial is then determined depending upon the gravity of the offence.¹

8. *Military Tribunals.*—The tribunals which may be constituted under the Army Act and their powers are described below:²

<i>Tribunals</i>	<i>Persons triable</i>	<i>Maximum punishment awardable</i>
(a) General Court Martial and Summary General Court Martial	All persons subject to the Act	Death
(b) District Court Martial	Persons other than Officers and Junior Commissioned Officers	Imprisonment not exceeding two years.
(c) Summary Court Martial	NCOs and other ranks	Imprisonment for 3 months, and not exceeding one year if the officer holding the court is of the rank not below Lt Col

9. On active service, a Summary General Court Martial, which has the same powers as that of a General Court Martial, may be convened. Ordinarily a General Court Martial comprises five or more members who act as the jury. A district Court Martial is composed of not less than three officers. These courts martial are attended by a legally qualified, experienced Judge Advocate whose duties at the trial are somewhat similar to those of a Trial Judge in a Jury trial, except that the Judge Advocate under the Army Act leaves even questions of law for determination by the jury, which of course invariably decides after being duly advised by Judge Advocate in open court.

10. *Rights of the accused.*—In the preparation of his defence, the accused has almost all the rights which are due to him on the civil side and may even engage an advocate of his choice to defend him.³ Whether he has a counsel or not, the convening authority usually provides the accused with the services of a suitable military officer to act as the defending officer. In all cases where the maximum awardable punishment is death, the accused is provided with a civilian defence counsel at Government expense.⁴

Military and civil justice systems

11. The system of trial by court martial is nothing more or nothing less than the trial of a soldier by his own peers. It is so almost universally because of the requirements of military discipline and because the normal civil processes of law are generally not in harmony with the military ethos. The unique bonds of comradeship and implicit obedience to leaders' commands are vital components of military ethos. It is this military environment that spurs both an officer and a soldier in the battle field to fight and even fall hand in hand. Every Commander is charged with the duty to look after his men and win their trust and confidence to such a degree that they will follow him unquestioningly

1. Army Act Section 102 and Army Rules 22-24 refer.

2. Please see Army Act, sections 108-116 and 118-120.

3. Army Rule 95.

4. Regulations for the Army, Para 479.

through thick and thin. Commanders at every level do, therefore, display a deep sense of justice and fair play towards their subordinates. Superintendence by an outside agency, not conversant with the requirements of military discipline, could well shake the foundations on which the Armed Forces are constituted.

12. Recognising the special needs of the Armed Force, the Founding Fathers curtailed the appeal jurisdiction of the High Courts and the Supreme Court over the verdicts of court martial. However, the writ jurisdiction of the Supreme Court and the High Courts, laid down under Articles 32 and 226 respectively, is unaffected. Invoking this jurisdiction, more and more service personnel are contesting not only verdicts of courts martial, but also various decisions of superior authorities on such administrative matters as promotion, seniority, retirement and so on. The courts, while admitting writ petitions on these matters, often pass *ex parte* interim stay orders causing serious administrative problems in the maintenance of discipline. This new development which, from a military point of view, is certainly unhealthy, raises two fundamental issues. Firstly, is there a requirement to streamline the existing military justice system so as to improve the level of satisfaction amongst the members of the Armed Forces and thus prevent them from approaching civil courts? Secondly, should there be legislative changes so as to restrict the jurisdiction of at least the High Courts in entertaining petitions under Article 226 from members of the Armed Forces?

13. While it can be said that military justice system ensures not only maintenance of discipline but also speedy dispensation of justice, the core question is whether there should at least be one appeal to a body composed of non-military personnel to review court martial proceedings and also determine the adequacy of punishment. As has been observed by the Supreme Court: "The wind of change blowing over the country has not permeated the close and sacrosanct precincts of the army. If in civil courts, the universally accepted dictum is that justice must not only be done but it must be seen to be done, the same holds good with all the greater vigour in case of court martial, where the judge and the accused don the same dress, have the same mental discipline, have a strong hierarchical subjugation and a feeling of bias in such circumstances is irremovable. We, therefore, hope and believe that the changes all over the English speaking democracies will awaken our Parliament to the changed value system.¹ The question of establishing a Court Martial Appellate Court on the pattern of the one obtaining in the United Kingdom has been under serious consideration by the Government for quite sometime.

14. The second problem that needs to be considered is that even after the establishment of a Court Martial Appellate Court, there will be nothing stopping the High Courts and the Supreme Court from continuing to entertain writ petitions from members of the Armed Forces. Even the proceedings of the Court Martial Appellate Court may themselves become the subject matter of such petitions. In this context, we may note that, with the advent of the Central Administrative Tribunal, the jurisdiction of the High Courts, including the writ jurisdiction, has been ousted in respect of such matters and persons coming within the purview of the Central Administrative Tribunal. This could be done because Article 323A itself permits exclusion of the jurisdiction of all courts, except the jurisdiction of the Supreme Court, under Article 136 with respect to disputes or complaints for which the Administrative Tribunal is set up. Unless Article 226 is made inapplicable, through a constitutional amendment to military personnel, the present unhealthy trend of military personnel seeking High Courts' intervention will continue. To meet this contingency, an alternate proposal has recently been made for the establishment of a separate tribunal, similar to the Administrative Tribunal exclusively

1. *Lt. Col PPS Bedi and others v Union of India* AIR 1982 SC 1413.

for the Armed Forces. This proposal too may take some time to materialise.

Conclusion

15. There can be no doubt that, while the Armed Forces must ensure that the military justice system is streamlined to such a degree that, justice is not only done to every member of the Armed Forces, is but it is also seen to be done by everyone, including those outside the Armed Forces, the civil judicial system must also recognise the importance of maintenance of discipline amongst the members of the Armed Forces. It is so because nothing can save our country from external aggression except a well disciplined, war efficient body of Armed Forces.