
MILITARY JUSTICE AND DUE PROCESS OF LAW: A CRITICAL ANALYSIS OF THE INDIAN COURT MARTIAL SYSTEM UNDER INTERNATIONAL FAIR TRIAL STANDARDS

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ABSTRACT

Military justice systems occupy a very unique position within democracies as they are bound to have coexistence between the gruelling demands of military discipline as well as fundamental principles of fairness, accountability and the rule of law. While institutions under the **Army, Air Force & Navy Act of 1950 & 1957** respectively serve legitimate military objectives, over the years concerns have arisen regarding their compatibility with constitutional guarantees and fair trial standards.

This paper aims to critically examine the Indian court martial system through **Articles 14, 21 & 33** of the constitution along with **Article 14** of the **International Covenant on Civil & Political Rights**. The study analyses the historical evolution of the statutory framework and the justification provided by the constitution on the necessity to maintain a distinct adjudicatory system for the armed forces. Particular emphasis will be laid upon concerns regarding judicial independence, command influence, procedural safeguards, transparency, access to legal representation and mainly the **Summary Court Martial (SCM)** proceedings.

Through examinations of judicial precedents in *Ranjit Thakur v/s Union of India*, *Lt. Col. Prithi Pal Singh Bedi v/s Union of India*, *Union of India v/s Major A. Hussain*, *Major General Shri Kant Sharma v/s Union of India* we see the continuing tension between military discipline and constitutional fairness. We also see a comparative analysis between the systems from the US & UK and how their application regards the Indian military justice system since they demonstrate how military discipline can be preserved even with added procedural safeguards.

The study concludes that certain structural features of the present framework require reform to better align military adjudication with constitutional guarantees and international fair trial standards.

INTRODUCTION

Within the armed forces of India, the administration of justice is often referred to as being distinct yet controversial as compared to civilian judicial institutions. Military justice systems evolved as not just mechanisms to deal with violations but institutions that strengthen core values of the armed forces such as discipline, command authority and operational effectiveness. These measures are vital for the preservation of national security.

In India, the framework governing military justice is derived mainly from the **Army Act, 1950**¹, **Air Force Act, 1950**² and **Navy Act, 1957**³ which provides detailed adjudicatory mechanisms for the trial with respect to service personnel. The very existence of a separate justice system for the armed forces reflects the recognition of the armed forces functioning under different conditions compared to the civilian society and thus requiring distinct “disciplinary structures”. Yet the necessity of such a distinction does not eliminate the constitutional obligation of the armed forces to its personnel regarding fairness, accountability and adherence to procedure established under law.

Article 33⁴ of the Indian Constitution empowers parliament to restrict or modify certain application of fundamental rights in relation to the armed forces to ensure proper discharge of duties and maintenance of discipline. The constitutional challenge remains to determine the extent of procedural safeguard may be limits to pursue discipline within the armed forces while not undermining the essentials of due process and natural justice. The following concerns arise with respect to court martial proceedings. The questions raised delve within the concepts of impartiality of military tribunals with the influence of command upon the adjudicatory proceedings as well as transparency and access to legal representation along with adequacy of the appellate review mechanisms. These concerns are furthered as the legitimacy of institutions in democracy are derived not just from their effectiveness but from compliance with fundamental principles of fairness.

The dilemma extends beyond constitutional framework of the nation but also engages scrutiny from the international human rights watchdogs as India is a party to the **International**

¹ The Army Act, 1950, No. 46, Acts of Parliament, 1950 (India)

² The Air Force Act, 1950, No. 45, Acts of Parliament, 1950 (India)

³ The Navy Act, 1957, No. 62, Acts of Parliament, 1957 (India)

⁴ INDIA CONST. art. 33

Covenant on Civil and Political Rights (ICCPR)⁵. India is bound by the guarantee of fair trial by international standards as embodied in **Article 14**⁶ which emphasizes upon equality before the courts and tribunals as well as the right to an independent and impartial adjudicatory body and the broader requirements of procedural.

Against this backdrop, the paper examines whether the Indian court martial adequately satisfies constitutional guarantee as well as international trial standards. It analyses the structure and functioning of military courts within Indian and evaluates their compatibility with the principles in **Article 14** of the **ICCPR** and **Article 21**⁷ of the Indian Constitution. The main point of contention is while specialized military justice mechanisms and systems are needed in the context of national security, certain procedures and features challenge procedural fairness as well as tribunal independence. The paper also explores potential ideas for reforms which strengthen the safeguards surrounding due process while preserving the objectives of military justice.

EVOLUTION & LEGAL FRAMEWORK OF MILITARY JUSTICE IN INDIA

The system of military justice in India dates back to the colonial era where it was designed primarily to maintain discipline, operational efficiency and most importantly loyalty within the ranks rather than safeguard individual rights of the troops⁸. The preservation was essential to imperial governance following the Revolt of 1857. Although India attained independence in 1947 many features of the colonial military justice system was retained. The debate arises whether these aspects of the court martial system fully align with the modern standards of fairness and accountability as laid down under the constitution.

[A] Statutory Framework Governing Military Justice

The contemporary military justice system in India is primarily governed by; **The Army Act (1950)**, **The Air Force Act (1950)** and **The Navy Act (1957)**. Collectively they define military offences, disciplinary measures, regulate powers of the command and provide procedures for the functions of court martials. **The Army Act 1950** occupies particular significance as it governs a large footprint of the armed forces and a wide range of offences such as

⁵ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

⁶ International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171.

⁷ INDIA CONST. art. 21

⁸ A.K. Saxena, *Military Law and Military Justice in India*.

insubordination, desertion, operational negligence and criminal offences committed by service personnel.

[B] Structure and Jurisdiction of Court Martial

The military justice system establishes 4 forms of court martial namely; **General Court Martial (GCM)**, **District Court Martial (DCM)**, **Summary General Court Martial (SGCM)** and **Summary Court Martial (SCM)**.⁹

The **General Court Martial** can be considered as the military equivalent of a civilian sessions court due to its extensive jurisdiction. It has the authority to adjudicate severe punishments which may result in life imprisonment or capital punishment.

The **District Court Martial** has a limited jurisdiction as it's required to try offences of lesser gravity and has narrower sentencing powers as compared to the GCM.

The **Summary General Court Martial** is a relevant tribunal during active military operations or a situation where convening a GCM is not possible. SGCMs act as tribunals to necessitate prompt administration of military justice.

The **Summary Court Martial** is the most controversial of the bunch as it is conducted by a commanding officer in a scenario that necessitates the swift resolution of disciplinary matters. However, the concentration of the powers of investigation, adjudication and prosecution in the hands of a single individual has raised serious concerns regarding impartiality, independence and compliance with principles of due process as well as the risk of institutional bias and undermining the confidence within the military justice system.

[C] Constitutional Position of Military Justice

The military justice in India primarily derives its legitimacy from **Article 33** of the Indian Constitution which empowers the parliament to modify or restrict application of fundamental rights in relation to service members of the armed forces to ensure the maintenance of discipline as well as proper discharge of duties. Yet **Article 33** does not create a constitutional vacuum where military authorities are exempt from legal limitations. Any restrictions upon rights of

⁹ The Army Act, 1950, No. 46, Acts of Parliament, 1950 (India), § 108.

members of the armed forces as they too are citizens must be justified to be required under legitimate disciplinary objectives. The Supreme Court of India has emphasized that military institutions remain subject to broader framework of the constitution. With the evolution of **Article 21**, any procedure affecting life or personal liberty must be fair, just and reasonable. Hence military necessity cannot wholly extinguish the need for fundamental requirements of fairness and natural justice. Thus, the constitutional challenge lies between the preservation of military justice and protection of procedural fairness.

[D] Armed Forces Tribunal and Judicial Oversight

The establishment of the **Armed Forces Tribunal (AFT)** under the **Armed Forces Tribunal Act, 2007**¹⁰ marked a significant development in the evolution of military justice within India. Prior to this judicial review of court martial proceedings required recourse to constitutional courts which results in delays and procedural complexities. The **AFT** was established to enhance accountability within the military justice system and ensure greater access to legal remedies for service personnel. Questions still arise about the scope of review, institutional review and access to the Supreme Court.

DUE PROCESS AND FAIR TRIAL CONCERNS IN THE INDIAN COURT MARTIAL SYSTEM

[A] Judicial Independence & Command Influence

A persistent criticism of the armed forces justice system stems from the extent to which the court martial satisfies the need of institutional independence. Within the members are the court martial are serving officers who remain within the command hierarchy of the forces. Senior military authorities often play a significant role at various stages of disciplinary process even initiating the court martial as well as overall military administration. Although these arrangements are often justified as operational requirements they raise concerns of command influence over the process as adjudication.

The arising concerns regard structure, members of the court martial are serving military officers who all are subject to military discipline standards responsible for maintaining discipline across the forces. The members do not enjoy security of tenure, institutional independence or complete

¹⁰ The Armed Forces Tribunal Act, 2007, No. 55, Acts of Parliament, 2007 (India).

insulation from the executive authorities. All the members their; future postings, professional advancement and performance stats are still determined by the military chain of command and hence situations are created where the appearance of impartiality may result in the member being compromised even in the absence of bias. A good illustration of this is that the authority that convenes the court martial has substantial influence over composition of the tribunal and initiation of the proceedings which is very different from the civilian judicial system where such powers are distributed within different institutions to minimise the risk of bias and strengthen community trust in adjudication.

On the other hand, the Supreme Court has recognized the importance of impartiality within military proceedings. In cases such as *Ranjit Thakur v/s Union of India*¹¹, the court emphasized that principles of natural justice must be applied with equal to force to military tribunals as it is applied in the civilian sphere. Similarly, in *Lt. Col Prithi Pal Singh Bedi v/s Union of India*¹² the court rejected the idea that members of the armed forces are exempted from constitution safeguards. Internationally in the United Kingdom, in *Findlay v/s United Kingdom*¹³ the **European court of Human Rights** observed that the extensive involvement of the command hierarchy has undermined the independence required as per fair trial standards. The court also emphasized how significant influence leads to reasonable doubts about impartiality regarding the tribunal.

Those who defend the existing system state that armed forces personnel operate in circumstances that involve national security, operational secrecy and battlefield exigencies which require specialized disciplinary frameworks. The core argument lies concerning excessive judicialization of military discipline may undermine operational effectiveness. Yet, even post this argument the need for adequate procedural safeguards cannot be eliminated. Hence the challenge lies in finding coexistence between military discipline and judicial independence.

[B] Procedural Deficiencies and Natural Justice Concerns

The due process concerns arise not from the absence of such procedural safeguards but the manner in which they operate. One of the most significant concerns is the ability of the accused

¹¹ *Ranjit Thakur v. Union of India*, (1987) 4 S.C.C. 611 (India).

¹² *Lt. Col. Prithi Pal Singh Bedi v. Union of India*, (1982) 3 SCC 140.

¹³ *Findlay v. United Kingdom*, 24 Eur. Ct. H.R. 221 (1997).

personnel to effectively prepare and present a defence. This concern arises when military personnel are based in operational environments, remote postings where access to legal resources are restricted. Hence the issue over here is no whether legal representation is available, moreover is it whether the representation is adequate.

Another concern is the implementation of **Rule 180 of the Army Rules, 1954**¹⁴ allows individuals to be afforded an opportunity to be present, hear the evidence against them, cross examine witness and provide evidence in return in cases here an individual's character or reputation within the armed forces is likely to be affected by such an inquiry. The existence of such a provision is in alignment with principles of natural justice but repeated litigation surrounding use of **Rule 180** depends on the effective implementation of such a safeguard. In *Union of India v. Charanjit S. Gill*¹⁵, the Supreme Court emphasised the importance of procedural fairness in military proceedings and recognised that safeguards intended to protect affected personnel cannot be reduced to mere formalities.

Transparency presents a major concern to overcome. Within the civilian judicial system, decision is accessible to all for criticism and appellate review. Supporters of the military system may argue that requirements of confidentiality are justification for such less transparency but this makes it difficult to assess the consistency of military adjudication. Thus, the visibility of procedural deficiencies is lesser than compared to civilian systems.

The armed forces also follow procedural flexibility where certain adaptation is ensured to accommodate operational realities. Yet this requirement of flexibility becomes weaker outside such situations and the critical issue becomes whether the extent of these adaptations is proportionate to legitimate military objectives.

[C] Concerns Regarding Summary Court Martial (SCM)

One of the most controversial topics within the military justice system is the **Summary Court Martial**. A SCM is conducted by a commanding officer and is mainly to provide swift administration of justice on the field. Despite the practical advantages it offers, it is still criticised for having multiple functions under a single authority. This concentration of power raises concerns regarding impartiality and creates the risk of decision making to be influenced

¹⁴ The Army Rules, 1954, r. 180.

¹⁵ Union of India v. Charanjit S. Gill, (2000) 5 SCC 742

in order to fulfil disciplinary objectives. An SCM is also capable of imposing serious consequences including imprisonment, dismissal from service and reduction in rank.¹⁶

The Supreme Court has recognized the vital role that SCM's play through its judgement in *Union of India v/s Major A. Hussain*¹⁷ where the court stated that such procedure existed to ensure the effective maintenance of discipline within the armed forces. **Rule 22 of the Army Rules, 1954**¹⁸ seeks to ensure that allegations are properly heard before disciplinary action is initiated. Yet in the context of SCM, the opportunities for review and proper observance of **Rule 22 & Rule 180** are limited.

[D] Constitutional Limits of the Armed Forces under Article 14,21& 33

The main point of contention here is whether the procedural irregularities allowed to the armed forces remain consistent with the basic requirements of fairness as per constitution. The justification for a specialized military judicial system arises from **Article 33** which empowers the parliament to restrict fundamental rights of members of the armed forces to ensure discipline within the ranks and operational efficiency. As commented by **HM Seervai**, **Article 33** is a constitutional acknowledgement that certain freedoms guaranteed to the citizens may be limited to preserve the effectiveness of the armed forces¹⁹. Yet **Article 33** does not place military institutions out of reach of the constitutional principles.

When one views the issue through the lens of **Article 21**²⁰ of the Constitutions it becomes even more complex. With regards to the Supreme Court's decision in *Maneka Gandhi v/s Union of India*²¹ "procedure established by law" no longer refers to the existence of a statutory procedure but the procedure itself must be fair & reasonable. According to **OP Sharma** in **Military Law in India**²² military justice constantly hangs between the balance between disciplinary necessity and procedural fairness. With reference to **Article 14**²³, the constitutional guarantee against arbitrariness requires that distinctions created by law remain rationale and proportionate to their objective. The concern hence arises whether every

¹⁶ The Army Act, 1950, No. 46, Acts of Parliament, 1950 (India), §§ 71(c), (e), (f), 116–120.

¹⁷ *Union of India v. Major A. Hussain*, (1998) 1 SCC 537.

¹⁸ Army Rules, 1954, r. 22 (India).

¹⁹ H.M. Seervai, *Constitutional Law of India* (4th ed., Universal Law Publishing Co. 1996).

²⁰ INDIA CONST. art. 21.

²¹ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

²² O.P. Sharma, *Military Law in India* (N.M. Tripathi Pvt. Ltd. 1973).

²³ INDIA CONST. art. 14.

procedural departure from the civilian criminal justice system can be justified on the basis of **Article 14** alone? In *Lt. Col. Prithi Pal Singh Bedi v/s Union of India*, The Supreme Court emphasized that military justice must remain compatible with broader constitutional values.

[E] The Armed Forces Tribunal and Appellate Oversight

The AFT was conceived after repeated concerns regarding the approach to the constitutional courts through writ proceedings for appeals whose process was laden with delays, procedural complexities and inconsistent standards of review. The tribunal possesses jurisdiction over court martial proceedings. The AFT mainly serves as an institutional safeguard. Yet a principal criticism of the AFT is in regards to the independence of the institution. Other concerns regard the process of appointment, dependence on administration and the influence of the executive over the functioning of the tribunal. The geographical distribution of the tribunal benches, delays within adjudication as well as the limited accessibility to the remedies provided by the AFT.

Procedural defects such as command influence, inadequate defence preparation or any questions regarding impartiality may not always be corrected by a subsequent appeal. By the time the review has occurred, the accused may have faced imprisonment, dismissal from service or even reputational damage and hence the mere existence of an appellate may not substitute the absence of fairness during the proceedings.

Unlike the general system, access from AFT to the Supreme Court is subject to statutory limitations as per **Section 31**²⁴ ; which requires the aggrieved party to request the tribunal for leave prior to approaching the Supreme Court and if such leave is rejected, the party is left with no remedy. In the case *Major General Shri Kant Sharma v/s Union of India*²⁵ the Supreme Court clarified aspects of the relationship between AFT & constitutional courts.

Still the tribunal should be viewed as a corrective mechanism rather than a complete solution. The effectiveness of the justice system does not depend upon the presence of a review system rather it is up to the maintenance of fairness throughout the process of convictions.

²⁴ The Armed Forces Tribunal Act, 2007, No. 55, Acts of Parliament, 2007 (India), § 31.

²⁵ *Union of India v. Major General Shri Kant Sharma*, (2015) 6 SCC 773.

INTERNATIONAL FAIR TRIAL STANDARDS AND COMPARATIVE PERSPECTIVES

[A] International Fair Trial Standards under the ICCPR

Legitimacy in the modern justice system is assessed and compared to the international fair trial standards. A significant benchmark in this space is **Article 14 of the International Covenant on Civil and Political Rights (ICCPR)**²⁶, which guarantees equality before courts & tribunals, right to an independent adjudicator, adequate facilities for preparing a defence, legal representations as well as review by a higher authority. The **United Nations Human Rights Committee** has repeatedly emphasized that military tribunals must comply with the fundamental requirements of impartiality and fairness²⁷. An example of such violation of international fair standards is the concentration of power within the adjudicator in terms of the Summary Court Martial as it raises questions regarding independence. The limitations to preparation of a legal defence as well as the appellate review system also invite concerns with regards to international standards.

[B] The United States & The United Kingdom

The experiences from the following nations listed above provide a glimpse into how national systems are strengthening procedural safeguards within the military justice system and being able to not compromise discipline within the armed forces. In the case of the United Kingdom, following the judgement in *Findlay v/s United Kingdom*, it prompted substantial reforms that included independent Judge Advocate Generals as well as a greater separation between the disciplinary as well as adjudicatory functions of the forces. While in the United States, the armed forces operate under the **Uniform Code of Military Justice (UCMJ)**²⁸ which has progressively incorporated procedural protections that include legally trained judges, guaranteed access to defence counsel, codified procedural safeguards as well as a comprehensive appellate structure. Despite the issues both these nations face, reforms are focused on reducing institutional features that create doubts regarding impartiality while also preserving the core value of military discipline.

²⁶ International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171.

²⁷ U.N. Human Rights Committee, General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32 (2007).

²⁸ Uniform Code of Military Justice, 10 U.S.C. §§ 801–946a.

[C] Lessons for India

Firstly, both jurisdictions have acknowledged and worked to reduce the excessive command influence in the process of adjudication. India on the other hand continues its reliance on command influence particularly within the aspect of Summary Court Martials.

Secondly increasing the role of legally qualified officers and institutionally independent adjudicators will help in strengthening the perception and reality of decision making. Thirdly these jurisdictions have demonstrated that procedural safeguards can be emphasized without affecting operational effectiveness or discipline within the forces. Finally, we have to highlight the importance of transparency and accountability. Greater publication of military decisions, clearer procedural safeguards and enhanced review mechanisms would reinforce the legitimacy of the military justice system.

REFORM PROPOSALS

[A] Restricting the Scope of Summary Court Martial Proceedings

The SCM remains one of the most controversial aspects of the military justice system due to the severity of the consequences it hands out at the level of adjudication it operates in. A solution to this would be to limit the adjudicatory powers to minor offences which involve limited punishments. Any instance of an offence which are of a more serious manner or which results in stricter punishments may be referred to the **General Court Martial (GCM)**. This would assist in preserving the discipline provided by the SCM at the same time allowing for greater safeguard within the GCM to be applicable to more serious offences.

[B] Strengthening the role of the Judge Advocate General (JAG) Branch

A concern that the system faces is not the absence of a legal branch within the forces but whether its expertise influences the adjudicatory process. A possible reform is the increased participation of JAG officers in the adjudicatory process by allowing them to review procedural violations, identify violations regarding natural justice and formally investigate and record objections when proceedings fail to follow international fair trial standards. Also, the written reports and opinions of the JAG officers can be made part of the record during the appellate review under the Armed Forces Tribunal. This would reduce procedural irregularities during trial and improve accountability and transparency within the proceeding. Rather than

establishing new institutions, these approaches allow for the efficient usage of the existing institutions.

[C] Strengthening Rule 22 and Rule 180 Safeguards

Rule 22 ensures said allegations go through a thorough investigation prior to disciplinary proceeding being initiated whereas **Rule 180** seeks to protect individuals whose reputation may be affected by the proceedings by allowing them to hear evidence, cross examine witnesses and present their own defence. In most cases the concerns arise from the application of these rules in favour of those accused. To address this concern, the compliance with such provisions under the **Army Act, 1950** must be formally documented through written reports signed both by the accused and the adjudicating authority. These reports should contain all the procedures and steps taken by the concerned authority to ensure the application of these provisions and should subsequently be a part of the official proceedings under review of the **Armed Forces Tribunal**. Also, when an appellate authority finds a violation of either **Rule 22** or **Rule 180**, such violation should create a rebuttable presumption of procedural unfairness which would automatically encourage stricter compliance and reduce the uncertainty regarding the consequences of procedural irregularities.

[D] Strengthening Accountability through Review and Transparency

A concern that recurs is the limited ability to scrutinize court martial proceedings. All the concerns listed above stem from the absence of comprehensive records and transparent review mechanisms. A practical solution would be mandatory audio / visual recordings of the proceedings which would create an objective record of witness testimony, evidentiary proceedings, procedural compliance and judicial directions. This would also greatly support the appellate review and significantly improve the **Armed Forces Tribunal** ability to identify and correct procedural irregularities and cases of unfairness within the proceedings.

Another key input would be to have an automatic review mechanism under the **Armed Forces Tribunal** for cases that result in imprisonment, dismissal from service or reduction in rank. This additional layer of scrutiny by an independent authority would provide an important safeguard to the service personnel. Transparency should also form an integral part of the military justice system. Some proceedings may require confidentiality due to the nature revolving around concerns regarding national or operational security. Subject to appropriate

redactions significant court martial and AFT decisions can be published through an official system. This access would allow for academic analysis as well as promote consistency within the military justice system.

CONCLUSION

The very existence of a separate / special justice system for the armed forces is not inherently incompatible with a constitutional democracy. The armed forces operate under conditions which are in every manner fundamentally different from that of civil society and hence the need for a specialized justice system arises. The legitimacy of such a system does not depend on its efforts to mirror the civilian justice system but the limits to which its departures from the ordinary justice system can be justified and consistent with the rule of law.

Through the paper, it can be observed that the Indian court martial system serves an important disciplinary function but certain structural implementations raise concerns with relation to standards of procedural fairness. The concentration of authority under the SCM, continuous influence of the command structure over the adjudicating process as well as the disputes regarding procedural safeguards and issue relating to transparency and appellate review have plagued the military justice system for decades.

Yet at the same time judicial intervention and development of Article 21 as well as the establishment of the Armed Forces Tribunal has contributed to strengthening the accountability and legal oversight but still the existing reforms have not fully resolved concerns regarding institutional independence. Comparative developments in the US & UK demonstrate that military objectives such as discipline and due process can coexist.

Ultimately the core constitutional challenge is where the limits of departure from regular law must be drawn? A constitutional democracy cannot demand the military justice system as well as the civilian systems to complement each other yet at the same time it cannot permit military necessity to override core constitutional values and international standards of fair trials. The long term goal must therefore depend upon the ability to enforce the changes, understand the requirements of discipline and operational effectiveness and at the same time adhere to the constitutional commitment of fairness, accountability and rule of law.

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