

CONSTITUTIONALITY OF SUMMARY COURT MARTIAL PROCEEDINGS WITH LESSER DUE PROCESS

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Abstract

Indian Military Law had its genesis from the Military law of England and took its shape after the Mutiny of 1857. Discipline being the basis, the justice system did not adhere to the tenets of fair trial and standards of due process. The Military justice was marred by command-dominance with too much of power being invested in the hands of the Commanding Officer/ Convening Authority. Summary Court- martial was introduced in 1869 with the purpose of prompt and swift award of punishment to indiscipline soldiers and after attaining independence, continues in the same position till date.

The Military Justice System may seem to appear separate from its civilian counterpart but is in fact very much similar to the criminal justice system. But the main drawback is that the adjudication of Military Justice System is in the hands of those personnel who have no legal background which is detrimental to the accused more so when these adjudicators try him under Summary Court-martial

proceedings, where they are empowered to decide on cases whose penalty range from dismissal of service, stigmatization of records, imprisonment, etc. Summary Court-martial is held only in the Indian Army only wherein a Commanding Officer takes on multifarious role; like being responsible for presiding over the trial, acting as a judge, deciding on the guilt or innocence of the accused, and imposing a sentence. It is time for Indian Military Justice System to transform from a self-run system of discipline by Commanders to a sophisticated legal system with the intent to achieve justice and thus order and discipline.

Key Words- Military Justice System, Discipline, Court-martial, Summary Court-martial, Convening Authority, Commanding Officer.

I. INTRODUCTION

In 1823, Sir William Blackstone described summary proceedings as ‘hearings where an accused may be convicted of diverse offence without any formal process or jury, at the discretion of the judge or judges appointed by act of parliament, or common law.’¹ The Summary Court-martial (SCM) proceeding has all the trappings of fair trial but in practice the legal Rights pertaining to fairness of Trial, which is fundamental as well as liberty of the service personnel, are not followed according to the exact established set of uniform legal procedures which in turn is a due process violation and against the Rule of Law.

¹ 4Sir William Blackstone, Commentaries on the laws of England: Book the Fourth, 280 (A Strahan & W. Woodfall, Law Printers to the King, 1791),available at <http://books.google.co.in/books?id=Q1ozAAAIAAJ&itp=280#v=onepage&q&f=false> (last visited on Aug. 23,2012); http://oll.libertyfund.org/index.php?option=com_content&task=view&id=1279&Itemid=284 also cited in Claire Newhouse, Summary Proceedings Within the Australian Military Justice System: How and Why Are They Inherently Unjust? (October 31, 2005) (Unpublished Honour thesis for Faculty of Law, The Australia National University), available at: www.scribd.com/doc/50489718/10/II-Summary-Proceedings-An-Exceptional’ -Proceedings (last visited on Feb. 29, 2012).

Arguments and reasoning by the authorities in favour of continuing such proceedings with lesser degree of due process protections are based on the premise that such proceedings are necessary for maintaining discipline. Even after the constitution of the Armed forces Tribunal (AFT), the soldiers being punished for under three months in custody, do not have the right to appeal.²

The SCM trial process is only used to try service personnel for offences under the Army Act. The nature of the Trial is that it is carried out in an expedited manner and does not follow procedures of a fair trial. Prevalence of Summary Trials are understood during war or when the soldiers are deployed in far off stations where Court of proper jurisdiction cannot be availed. In that case procedural fairness may be of less importance and not entirely feasible, but during times of peace Rule of Law and the principles of Fundamental Justice demands more for our soldiers.³

SCM procedures are very detrimental to the soldier as the penalty he has to suffer, include imprisonment as well as a red ink entry in his service records along with removal from service. Not only this, he is not even allowed legal representation which is a basic Fundamental Right of any citizen and especially when your Right to livelihood is at stake. The procedures adopted during Trial are so trivial that even the fact that the soldier has to be presumed to be innocent and his guilt has to be tried beyond reasonable doubt, is applied in letter and spirit of Fair Trial.

² Staff Reporter, *Bench of Armed Forces Tribunal Opened*, The Hindu, Dec. 7, 2009, available at <http://www.hindu.com/2009/12/07/stories/2009120759840300.htm> (last visited on Jan. 24, 2012).

³ Bill C- 41, Supporting the Troops: Fairness for Canada's Soldiers(BCCL, 2011) available at <http://bccla.org/wp-content/uploads/2012/03/20110311-BCCLA-Policy-Bill-C41.pdf> (posted on Mar.11, 2011) (last visited on Jun. 27, 2012).

This chapter of the thesis is based on the Claire Newhouse Thesis⁴ which in turn is based on the theoretical framework developed by socio- legal academic, Dr. Doreen McBarnet in 1979.⁵ Till date due attention has eluded this form of Court-martial since offences and punishments are trivial and the second being that this process does not involve much law or lawyers.

A. ORIGIN OF SUMMARY COURT MARTIAL

Summary Courts- Martial was introduced into the regular army after the mutiny in the Bengal Army in 1857.⁶ It was felt by the British that the mutiny of 1857 was mainly due to the fact that the Commanding Officers (CO) powers did not allow him to give the deviants punishments summarily which made it impossible to effectively nip any revolt or mutiny at its bud.⁷ But this was not the case of soldiers from Punjab irregular Force, wherein the CO of a regiment had almost absolute power and could himself deal promptly and effectively with all military offenders or reward his own men for a commendable deed.⁸

In the summary proceedings, the adjudicator took on the role of the deputy commissioner, political officer and military commandant, all rolled into one⁹ which gave the CO to convict and sentence a military offender, and thereafter execute the sentence in his capacity as a Magistrate and the same was respected by the civil and prison official.¹⁰ Thus to avoid any such uprising or mutiny the CO was invested with wide powers and SCM was introduced in

⁴ Newhouse, *supra* note 1.

⁵ DJ McBarnet, *Conviction, Law, the State and the Construction of Justice* (Macmillan, London, 1989), *cited in*, Newhouse, *supra* note 1.

⁶ Divi Jain, *Summary Court Martial and the Indian Judiciary*, Legal Service India.com (Oct. 5, 2007), *available at* <http://www.legalserviceindia.com/article/130-Summary-Court-Marital-And-The-Indian-Judiciary.html> (last visited on Mar. 8, 2012).

⁷ Pragmatic, *Army Act-A Sad Remnant From 1857*, Pragmatic Euphony Blog (Jan. 26, 2008), *available at* <http://pragmatic.nationalinterest.nic.in> (last visited on Mar. 26, 2012).

⁸ Manual of Military Law, *available at* <http://indarmy.nic.in> (last visited on Mar. 26, 2012).

⁹ Jain, *supra* note 6.

¹⁰ *Id.*

1869.¹¹ Articles 93-97 and 107 of the Indian Articles of War of 1869 contain all the procedures and rules regarding SCM.¹² The British legislature continued with the provision of the SCM through the Indian Army Act and after attaining independence, when the Army Act (AA), 1950 came into force with effect from 22nd July 1950, the same position continues till date.¹³

B. PURPOSE AND NATURE

SCM is a speedy form of disposal of disciplinary cases. The purpose is to maintain discipline by means of prompt disposal and effective punishment to the offenders. The commanding officer who holds the trial of the accused by constituting the court is expected to exercise his powers of trial judiciously.

SCM is in a essence a tribunal dispensing justice in a simple, straight forward manner, unencumbered by complicated rules of procedure and serves the purpose set out above. The commanding officer holding the trial personally knows the accused as he is one of the men under his command. The procedure is neither too simple as in summary disposal nor is it so detailed as in District or General Court-martial.

C. JURISDICTION

Any person subject to the Army Act and under the command of the Officer holding the trial except an Officer, Junior Commissioned Officer(JCO) or Warrant Officer (WO), can be tried by a SCM.¹⁴ A Non Commissioned Officer (NCO) or a Sepoy will be attached to his own

¹¹ *Id.*

¹² Manual of Military Law, *supra* note 8.

¹³ G.K.Sharma & M.S.Jaswal, Study and Practice of Military Law, 607 (Deep & Deep Publications Pvt. Ltd., New Delhi, 2010).

¹⁴ Army Act 1950(AA 1950), § 120(3) & Regulations for the Army 1987 (RA 1987), ¶ 381.

unit to be tried by SCM, except in case of deserters, who can be tried in Regimental Centre's.¹⁵

D. OFFENCE AND SENTENCE

Any offence punishable under the Army Act can be tried by a SCM,¹⁶ but the C O shall not try offences provided under sections 34¹⁷, 37¹⁸ and 69¹⁹ or any offence against the Officer holding the trial except when there is a grave reason for immediate action and when it will be detrimental to discipline to refer the case to an Officer empowered to convene a District Court-martial (DCM) or an active service, a (Summary General Court-martial (SGCM). A certificate must be attached to the proceedings explaining why it was necessary to try any of the above offences without reference.²⁰

Any sentence can be passed under the Army Act except that of death or of imprisonment for a term exceeding one year. If the officer holding the SCM is below the rank of a Lieutenant Colonel, a sentence up-to three months imprisonment can only be given.²¹

II. SUMMARY COURT- MARTIAL PROCEDURE

Summary proceedings are conducted like a civilian criminal trial. The accused is arraigned asked whether they plead guilty or not guilty²² and thereafter plea of the accused is recorded²³. Before the plea the accused may offer plea to jurisdiction of Court.²⁴ While pleading guilty or not guilty, he may state in bar of trial that he has been previously convicted

¹⁵ RA 1987, ¶381; *see also*, Mahipal Singh v. Union of India and Ors, 55 (1994) DLT 176, *available at* <http://www.indiankanoon.org/doc/863242/> (last visited on Apr. 2, 2013).

¹⁶ AA 1950, §120(2).

¹⁷ AA 1950, § 34 (offences in relation to the enemy and punishable with death).

¹⁸ *Id.* § 37 (mutiny).

¹⁹ *Id.* § 69 (civil offences like murder, culpable homicide not amounting to murder and rape)

²⁰ *Id.* § 120 & notes.

²¹ *Id.* § 120(5).

²² *See* note 2 to AR 1954, r 111.

²³ AR 1954, r 115(1).

²⁴ *Id.* r 114.

or acquitted or dealt with summarily or that the charge has been dismissed or condoned or that it is time barred.²⁵ The findings thereon shall not require confirmation vide Army Rule 114.

If the accused pleads guilty and the authority is satisfied that the effect and implication of the plea is understood, his signature is thereupon obtained and the accused is convicted.²⁶ In a case where the Court may pass a special finding when the Court itself or the accused offers a qualified plea as to a less severe offence than what he was originally charged with,²⁷ may record a finding accordingly.²⁸ The accused gets the opportunity to address the Court regarding his charge or for the purpose of mitigation of punishment as well as call witnesses who can vouch for his character.²⁹ If the statement provided by the accused or evidence brought out in writing in the Summary Of Evidence (SOI) or otherwise, it seems that the accused did not understand effectively understand what his plea may entail, the Court will alter his plea to 'Not Guilty' and proceed with the trial accordingly.³⁰ If the accused states anything which if proved would mitigate the offence the Court should permit him to call witness in proof thereof.³¹

If they plead 'Not Guilty', the Commanding/ Presiding officer who is also a prosecutor takes evidence for the prosecution and at the close of the evidence for the prosecution the accused shall be asked if he has anything to say in his defense or if he wants to defer until he has called his own witness and no oath is administered to the accused³². The Court may in the

²⁵ *Id.* r 51 & 53 vide AR, r 114 (all such plea shall be treated in accordance to these sections).

²⁶ *Id.* r 115(2).

²⁷ AA 1950, § 139 or AR 1954, r 121(3).

²⁸ AR 1954, r 116(7) and in accordance with AR, r 115(2) & 115(2A).

²⁹ *Id.* r 116(3); *see also*, Union of India v. Dinesh Prasad, Civil Appeal No 1961 of 2010.

³⁰ *Id.* r 116 (4).

³¹ *Id.* r 116 (6).

³² *Id.* r 118.

interest of justice, call witness, in reply to the defence.³³ If, after hearing the evidence, the summary authority forms the opinion that there is insufficient evidence to support any of the charge, the Court will acquit the accused of that charge.³⁴ If the finding regarding each of the charge is found not guilty, the accused shall be acquitted.³⁵ If the accused is found guilty, the authority then hears evidence relevant to sentencing like the accused record is consulted; his character evidence, gallantry or distinguished conduct and matters in mitigation are heard before imposing a sentence.³⁶ The sentence awarded shall be promulgated and carried out as soon as is feasible.³⁷ But in an event when the officer holding the trial has less than five years of service, then except on active service, sentence given by such an officer cannot be carried out until approved by superior authority.³⁸

The accused is also informed of his right to be put up a petition against the SCM award to the Central Government, Chief of Army Staff or any officer superior in command to the officer who held the trial, having powers not less than a Brigade Commander.³⁹ If the reviewing authority finds the award held in order it will countersign the proceedings or set aside the proceedings or reduce the sentence of the accused as it deems fit after due deliberation⁴⁰ and forward the proceedings to the CO who will do the needful and who shall then forward the proceedings to the Record officer concerned for preservation.⁴¹

³³ *Id.* r 119.

³⁴ *Id.* r 121(2); *see also*, Newhouse, *supra* note 2.

³⁵ *Id.* r 122.

³⁶ *Id.* r 1954 & r 123.

³⁷ *Id.* r 131.

³⁸ *Id.* r 132.

³⁹ AA 1950, § 164(2).

⁴⁰ *Id.* § 162 & notes.

⁴¹ AR 1954, r 146.

III. ARE THE PROVISIONS OF SUMMARY COURT MARTIAL APPLIED IN LETTER AND SPIRIT?

Though the provisions in the Army Act and Rule pertaining to SCM as mentioned above, on paper seem to be mostly in accordance with the spirit of fair trial and presents an outline of the responsibilities of Summary Authorities to duly administer justice according to law without any undue influence, pressure, with integrity and to deal with cases neutrally so that it is ensured that the accused rights are not encroached and a fair trial is accorded to him. In reality the procedure through which SCM's are carried out, raises serious concerns.

Justice Vikramjit Sen who was a judge of Delhi High Court in the year 2008, on 25th Jan, 2008 said in a case; 'It should also be noted that paragraph 448(c) of the defence Services Regulations, Regulations for the Army⁴² prescribes valuable safeguards against abuse of SCMs, but the spirit of all these provisions is far too often ignored so much so that the vice has become the norm - SCMs invariably pass orders of dismissal from service.'⁴³ He further opined that '...Summary Court- martial should be an exception and not a Rule, only to be applied where there is grave and compelling cause for taking immediate action. In such instances this immediate need for holding SCM has to be articulated and reasoned out in the writing in the order convening the SCM. Failure to do so would create good reasons to quash the SCM itself.'⁴⁴ It was further observed by the Court that '...routinely, and certainly far too

⁴² RA 1987, ¶ 448 (it deals with Scale of Punishments Awardable by Summary Courts-martial.--The following general instructions are issued for the guidance of officers holding summary courts-martial in passing sentence, but nothing contained in them will be construed as limiting the discretion of the court to pass any legal sentence, whether in accordance with these instructions or not, if in its opinion, there is good reason for doing so:...(c) The award of imprisonment in a civil jail coupled with dismissal from the service must never be used merely as a mean of getting rid of a man from the service but should be imposed only when the offence by itself, or the offence and the man's previous record taken together, actually merits such a punishment. In other cases in which removal is considered desirable in the interest of the service, the discharge of the individual under the appropriate item of Army Rule 13 should be applied for by the CO and authorised by the brigade or superior commander).

⁴³ Ex LN Vishav Priya Singh v. Union of India and others, 147 (2008) DLT 202 (DB).

⁴⁴ *Id.*

frequently, the sentence passed by SCMs violates the spirit of Regulation 448(c) thereby taking away the sepoy's livelihood without affording them the normal procedural protections of law.⁴⁵

The trials are brief and superficial in nature, favouring expediency at the expense of procedural protections for the accused.⁴⁶ Though the accused is granted right to question witnesses and present evidence, most of the time the CO under whom the trial commences tries to put undue pressure on the accused and sometimes dispenses with the need of examining or cross-examination of witnesses and tries to complete the trial in the shortest time possible and hence we see that the military rules of evidence, which apply in Courts-martial, do not apply in SCM. But such rules do serve an important purpose, ensuring that an accused person receives a fair trial and preventing false convictions. 'The lack of such rules and procedural safeguards in the Summary Trial procedure severely limits the quality of the justice provided under the process and increases the likelihood of false convictions.'⁴⁷

SCM as brought out above are conducted by the accused CO or someone delegated to act on his behalf, who alone constitutes the Court. He takes on multifarious role like being responsible for presiding over the trial, acting as a judge, deciding on the guilt or innocence of the accused, and imposing a sentence. Bias may creep up in the decision rendered by the Presiding Officer as he is also the CO of the accused and being in close contact may have formulated some opinion about the accused even before the trial would have commenced. Besides this the CO also lacks any judicial training and experience which further poses questions as to their use of legal concepts effectively(like for example to assess the guilt beyond reasonable doubt) and their presiding over trials in a fair manner. This unbridled use

⁴⁵ *Id.*

⁴⁶ *See* Bill C- 41, *supra* note 3.

⁴⁷ *Id.*

of discretionary power in the hands of the commanding officer may thus lean towards arbitrariness or discrimination, which violates Article 14 of the Indian Constitution.

The proceedings throughout is attended by two other persons who shall be officers or Junior Commissioned Officers or one of either but who shall not as such be sworn or affirmed,⁴⁸ and who have no right to vote in determining either the findings or the sentence. The officer holding the trial may consult them if he so desires⁴⁹ but their opinion is not binding upon the Court. Thus their presence is merely a cosmetic procedural safeguard afforded to the accused.

In any SCM though an accused according to laid down criteria of Fair Trial, is allowed a person or a legal advisor to assist him in his trial but he shall neither address the Court nor cross-examine the witnesses.⁵⁰ It is also not obligatory for the Court to provide the accused with a 'Friend' but only that propriety demands that a person of his choice be provided to the accused. Also by not doing so there is no violation of Army Rule 129, vitiating the whole trial.⁵¹ It is this discretion in the hands of the CO of allowing a lawyer or a defending officer of one's choice, which is usually given a go by. Summary proceeding with its seemingly fair provisions of allowing a fellow defence member to assist with the defense of the accused is not all that fair. Jean Crowder, New Democratic Party, Member of Parliament from Nanaimo, Cowichan, debating⁵² on Bill C-15 and especially on Summary Trials, opposed it on the grounds that it reproduces the contents of the former Bill C-41 but the recommendations given therein were not found incorporated in Bill C-15. She put forth in her debate portions from Bill C-41 that 'assisting Officers are not required to have any legal training, or any previous experience with the summary trial process. They are generally other Officers in the accused unit, who only undertake this role sporadically in addition to their normal duties and

⁴⁸ AA 1950, § 116.

⁴⁹ MML, chapter IV, ¶ 105.

⁵⁰ AR 1954, r129.

⁵¹ Union of India and others v. Ex Havildar Clerk Prithi Pal Singh, 1992 (2) SLJ 177.

⁵² Available at <http://openparliament.ca/politicians/jean-crowder/?page=5> (last visited on Apr. 4, 2013).

are appointed for the role under the authority of the presiding officer at a summary trial, which in itself presents a conflict of interest'.⁵³ Many assisting Officers therefore lack sufficient training and experience to provide an accused with effective representation.

Another aspect is that a defendant and their defending officer or 'friend' may not present the story clearly, but a good lawyer with an eye for legal relevance will be able to turn a defendant's account into a case by asking the right questions, raising legal objections to evidence and making submissions on point of law, 'something that a layman might simply lack the knowledge to achieve.'⁵⁴ The mere fact that a lawyer is prohibited to represent the accused in SCM proceedings is by in itself an inherent injustice. Article 14(3) of the International Covenant on Civil and Political Rights (ICCPR) sets out 'minimum guarantees' for an accused facing criminal charges which stipulates the provision to defend oneself in person or through legal assistance of own choosing.⁵⁵ India being signatory to ICCPR, Summary authorities hearing offences would therefore be required by international law to allow defendants legal representation.

Thus the SCM proceedings casts a doubt in the minds of reasonably informed people as to the accused being afforded a Fair Trial since although there exists all the procedural protections

⁵³ Newhouse, *supra* note 1; *See also* Bill C- 41, *supra* note 3.

⁵⁴ Newhouse, *supra* note 1.

⁵⁵ The International Covenant on Civil and Political Rights (hereinafter ICCPR) art. 14, 1966 (of which India is a signatory and is bound by its provisions) cl. 3 (it states that "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (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).

in the Indian Military Justice System, the same is not accorded in actual practice. The fair assessment of the guilt of the accused cannot be judged by officers without any legal knowledge and with application of lesser evidentiary value there is increased likelihood that the accused individuals will be found guilty.

IV. SUMMARY COURT MARTIAL AND DUE PROCESS

‘Institutional and procedural’⁵⁶ fairness wherein the Tribunals/ Courts are independent and impartial and where the rights of the parties are respected following the tenets of Natural Justice, forms the basis in which proper administration of justice can be done.⁵⁷ The SCM procedures comply with lesser application of due process protection but the penalties to the accused are very serious. It is thus pertinent that if SCM remains a part of the Military Justice System, steps be taken to provide procedural protection in order to be found constitutionally valid.

Eminent lawyer and orator, Daniel Webster undertook to summarize due process of law in 1819 in his argument in the Dartmouth College case, where he spoke of due process as "the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial, the meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society.....".⁵⁸

Army Act and Rules in India outlines the responsibilities of summary authorities, which embodies a procedural version of due process wherein for instance the accused has the right

⁵⁶ Icelandic Human Rights Centre, The Right to Due Process, *available at* <http://www.humanrights.is/the-human-rightsproject/humanrightscasesandmaterials/comparativeanalysis/therighttodueprocess/process/> (last visited on Mar. 4, 2012).

⁵⁷ *Id.*

⁵⁸ Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 4 L. Ed. 629 (1819), *available at* http://www.constitution.org/dwebster/dartmouth_oral.htm (last visited on Mar. 14, 2012).

to have his verdict reviewed. However, because these reviews are conducted within the Chain of Command where the reviewers may not be sufficiently independent and also their aim being to instil discipline. There is also the fact that punishment begin right after promulgation and as such there are even chances that by the time orders of a higher authority are obtained to mitigate or remit a sentence, full punishment would have been served by the accused and his career would have a permanent blot leading to future hardships in being employed in future. The accused is not only deprived of his liberty but his right to livelihood also becomes a daily struggle.

Due Process entails fair trial. It means that every person accused of an offence has the right to procedural fairness and it is the bounden duty of the Court to see that due process has been a part and parcel of a Trial. It is evident that when people have the protection of Due Process in a justice system which is not only armed with all the provisions of Fair Trial and procedural justice in the Statutes, but the very same are applied in all fairness to the those affected, they will accept and follow any outcome even when it is detrimental to their interest

While a defendant under the Army Act, is entitled to cross examine witnesses, one must bear in mind that the accused come from that strata of population who at the most have passed the senior secondary examinations and thus he may lack the skills or confidence to cross-examine and therefore decline the opportunity. Arguments can be placed that the accused having been offered the opportunity to cross-examine, has been afforded with fair trial according to law, but in the light of the above it would be seen that such a Right is unfair in substance. The mere fact that effective cross- examination can be done through a lawyer, their absence in the SCM proceedings, whereby the liberty and livelihood of a service personnel is at stake, is utterly unjustified. Again an accused who wants to plead not guilty is induced by the circumstances wherein his own lack of knowledge or misleading advice from

the defending officer or the friend of the accused makes him to plead guilty or not to contest his guilt.

‘People care about the decision-making process. They consider evidence about representation, neutrality, bias, honesty, quality of decision, and consistency.’⁵⁹ Tom R Tyler in his paper brought out a link between the final outcome of the decision making process and perceptions of procedural justice. In doing so he found that expectations of the general public is that they perceive that fair outcomes are the resultant effect from fair procedures while ‘a procedure which consistently produces unfair outcomes will be viewed as unfair itself.’⁶⁰ Even Claire Newhouse writes that ‘Tyler found that people who experience what they considered unfair procedures had a reduced view of the legitimacy of the authority involved.’⁶¹

V. REASONS FOR REDUCTION OF DUE PROCESS IN SUMMARY COURT MARTIAL

Claire Newhouse in her master thesis⁶² finds out in the background of McBarnet’s theory, which states that due to trivial nature of the offence lesser due process is applied in lower Courts, whether the same could be applied to summary proceedings conducted under the Australian Defence Force Discipline Act, 1982 and whether it was justified. In her thesis she quoted McBarnet, according to whom there are two tiers of justice within the criminal justice system one, an ideology of justice in the higher courts and an ideology of triviality in the

⁵⁹ Tom R Tyler, *What is Procedural Justice?: Criteria Used By Citizens to Assess the Fairness of Legal Procedures*, 22, no 1, *Law and Society Review*, 103, 136 (1988); also cited in Newhouse, *supra* note 1.

⁶⁰ *Id.*

⁶¹ Newhouse, *supra* note 1.

⁶² *Id.* (The process of summary justice is considered using the theoretical framework developed by socio-legal academic, Dr Doreen McBarnet in 1979. Her research, mainly involving observational study in Scotland’s lower courts, resulted in seminal sociological study focused on the structure, substance and procedure of the law. In particular her ideology of triviality in the lower level of the legal system is applied to summary justice under the Australian Army. It is argued that summary proceedings are inherently unjust by comparison with the standards applied in higher courts in the way they are administered with a reduction of due process).

lower courts and this triviality is the reason for lesser due process application. McBarnet concluded from her research that the lower Courts which dealt with petty offences cannot make a show of following due procedure to its fullest as their main aim is to provide summary justice.⁶³ But the SCM proceedings followed in the India army any offence punishable under the Army Act can be tried apart from the few excepted sections.⁶⁴ Any sentence can be passed under the Army Act except that of death or of imprisonment for a term exceeding one year. Hence few offenses which may seem trivial, like overstaying of leave or prejudicial conduct, entails deprivation of liberty by way of incarceration which in turn leaves a permanent blot on the service personnel's character making it difficult to earn his livelihood in future. Thus the accused under such proceedings should under fair trial principles, avail due process application.

Due Process protection are applied to a lesser degree in SCM in the Indian Army even though the Statutes hold otherwise, may be due to the fact that such proceeding are conducted in a closed Court, without the presence of lawyers or legally qualified personnel and such hearings and their transcripts are not accessible to the public for scrutiny. Most of the times the personnel affected by an SCM verdict cannot go to Courts of Civil jurisdiction for vindication of their rights due to financial constraints and thus the Courts are unable to give precedence on SCM matters. Even there is a lack of academic writings on this subject reasons for which may be due to misguided perceptions that the offences and penalties are trivial, and that the crimes dealt with in SCM do not involve significant legal issues and that these proceedings are justified as a paramount question of maintaining discipline in the Army is involved.⁶⁵

⁶³ McBarnet, *supra* note 5.

⁶⁴ AA 1950, §§34, 37 & 69 .

⁶⁵ Newhouse, *supra* note 1.

During war or active combat the need for speedy Trial cannot be denied as it helps to maintain discipline in the Indian Army and during such times, allowance for less stringent procedural protections, may hold water, but during times of peace the requirements of procedural fairness protections accorded to individuals tried under the military justice system should be equivalent to the civilian justice system. The Indian Navy and Indian Air Force do not have provisions of SCM and it defies logic that when these two branches can continue to maintain discipline and order among lower ranks then why does the Indian Army requires to infringe the liberty of its personnel to such a greater degree than is really justified in the military context? Arguments can be placed that the strength of the Indian Army is far greater than that of the other two limbs of the Forces and thus such procedures are required. Even in the light of this argument SCM procedure has to draw distinction between exigent and non-exigent circumstances and accordingly grant protection of procedural fairness.

VI. SUMMARY COURT–MARTIAL PROCEEDINGS VIOLATE ARTICLE’S 14 AND 21 OF THE INDIAN CONSTITUTION

During the framing of our Constitution its framers had removed the Due Process clause with an intention to preclude judicial supremacy over the legislature but according to Abhinav Chandrachud, in reality by giving the Constitutional Court’s powers of ‘substantive review under Articles 14 and 19, and of procedural review under Article 22’⁶⁶, a doctrine akin to due process was always in existence in our Constitutional jurisprudence even if the clause was missing.

Article 21 of the Indian Constitution and its interpretation has brought about a richer meaning to the Rule of Law and has over the years gone beyond the concept of Due process (originally an American doctrine) by incorporating ‘ Substantive Due Process’ along with ‘Procedural

⁶⁶ Abhinav Chandrachud, Due Process of Law, (Eastern Book Company, New Delhi, 2011).

Due Process' . In the forward of the book penned by Abhinav Chandrachud,⁶⁷ Ex Justice R.V. Raveendran, of the Supreme Court, says that the Supreme Court in their judgments have brought about a semblance of parity between procedure established by law and due process of law, thus impliedly importing and incorporating fairness in trial, right to be heard before being condemned, judgment only after trial and deprivation of life and liberty only after due process, as part of Article 21. Its ambit has further been enlarged with the right to counsel, the right to legal aid, and the right to privacy, among others, as parts of substantive due process.

Article 14 of Indian Constitution enunciates equality before law and equal protection of law which is fundamental to the Rule of Law. Legitimacy of a legal system is determined when each and every person is subject to the same laws. This requirement is also central to Article 14(1) of the ICCPR which states that, 'All persons shall be equal before the courts and tribunals'.

SCM seen in the light of Article's 14 and 21 of our Constitution may seem to go against the true spirit and object of the Article. India is a signatory to the ICCPR Convention and hence obligated to follow its provisions. In light of the international requirements of equality it could be argued that members of the Armed Forces are subject to Article 33 of our Constitution by way of which Parliament is empowered to abrogate certain rights of the service personnel, but nowhere is it mentioned that under Article 33 Parliament has the right to discriminate among members of the Armed Forces. This is exactly what has happened as SCM proceedings depends on the service the personnel belong to and the rank they wear, that is to say SCM is only meant for non commissioned officers and soldiers below them and that too only in the Indian Army. Even if we take the personnel of the Armed Forces to be a separate class, still soldiers of Air Force and Navy do not undergo this procedure in order to maintain discipline. Thus one can see that there is an inherent discrimination towards the

⁶⁷ *Id.*

soldiers in the Army who have to undergo such procedures with application of less due process and more so when their liberty and right to livelihood is at stake. The Supreme Court of India has held⁶⁸;

‘.....In the larger interest of national security and military discipline Parliament in its wisdom may restrict or abrogate such rights in their application to the Armed Forces but this process should not be carried so far as to create a class of citizens not entitled to the benefits of the liberal spirit of the Constitution. Persons subject to Army Act are citizens of this ancient land having a feeling of belonging to the civilised community governed by the liberty-oriented constitution. Personal liberty makes for the worth of human being and is a cherished and prized right. Deprivation thereof must be preceded by an enquiry ensuring fair, just and reasonable procedure and trial by a judge of unquestioned integrity and wholly unbiased’.

The CO, who plays the role of an investigator, prosecutor and a judge, all rolled into one in an SCM proceedings, has the power to punish an accused with less than ninety days confinement in Military custody and up to one year imprisonment in the civil jail along with dismissal from service. The accused is denied the right to legal assistance even when his right to liberty and livelihood is at stake and which is totally against the basic requirements and protection granted by Article 21 of Indian Constitution. Clair Newhouse in her thesis writes that ‘according to McBarnet, the ideology of democratic justice required due process of law before permitting inferences with a person’s liberty’.⁶⁹

⁶⁸Lt. Col. PPS Bedi v Union of India, AIR 1982 SC 1413.

⁶⁹ Newhouse, *supra* note 1.

In a latest judgement⁷⁰ of Delhi High Court Double Bench, Justice Vikramjit Sen observed

‘Mindful of the fact that Article 33 of the Constitution of India confers unbridled powers on Parliament to bring into place a situation which severely abridges the Fundamental Rights of a citizen it becomes the bounden duty of the Courts to ensure that the equality doctrine is not needlessly nullified. It also becomes essential that the Courts should interpret the law in a manner which will reduce to the minimum the inroads into the intangible rights contained in Chapter III of the Constitution.’

VII. THE JUDICIARY IN RELATION TO SUMMARY COURT – MARTIAL

SCM proceedings in the statute books contain various safeguards for the accused but its implementation, in most cases are flawed due to various reasons as mentioned above. Before the Armed Forces Tribunal Act, 2007, decisions of the Summary Court Martial’s were considered final. Even after the constitution of the Armed forces Tribunal, there is no right of appeal against the decisions given in summary court martial (SCM) proceedings, unless the punishment exceeds imprisonment for a period of three months.

In the Indian Army Summary proceedings are the most common means of formally disciplining its members. The SCM has been used extensively by the Indian Army. According to an article by U.C. Jha, ‘during a period of six years, from 1999 to 2004, an average of 995 SCM were held every year. Thus many army personnel have been deprived of their livelihood, freedom and pension by their own officers on the pretext of discipline.’⁷¹

⁷⁰ Ex LN Vishav Priya Singh, *supra* note 43.

⁷¹ U.C. Jha, *Summary Court Martial : A Colonial Legacy in Army*, The Hindu Open Page, Feb.17, 2008, available at <http://www.hindu.com/op/2008/02/17/stories/2008021750011600.htm> (last visited on Mar. 11, 2012).

U.C. Jha stresses on the point that ‘the unbridled discretionary power of a commanding officer to hold an SCM may degenerate into arbitrariness or discrimination and is, therefore, violative of Article 14.’⁷²

The hon’ble Supreme Court of India and the various High Courts as well as AFT, have frowned upon the practice of adopting SCM proceedings which is only detrimental to army personnel belonging to lower rank. According to the Apex Court, there were no proper guidelines to prevent its abuse and have set aside judgments given in many of these proceedings being biased, unjust, unfair and have declared the punishment disproportionate to the offence and have also opined that such proceedings should be taken resort to only in exceptional circumstances. Some of these cases are enumerated below:

A. Infraction Of Procedural Requirements

Clause 2 of Army Rule 1954, Rule 115 being a mandatory provision, the duty of the Court is to prudently find out before it records plea of Guilty of the accused, as to whether the accused understands what he has been charged with to which he has pleaded guilty. Also the Court can advise the accused to withdraw the plea of Guilty if after the Summary of Evidence it becomes clear that the accused is in fact not guilty. The mere fact that the plea of Guilty was not found signed and formally recorded on the original proceedings would point to the fact that the accused was not informed of the general effect of the plea of Guilty and therefore findings based on alleged plea of Guilty have no meaning at all.⁷³ How to follow the right procedure is the main crux of the question involved. Army Rule 1954, Rule 125 provides that

⁷² *Id.*

⁷³ Ex. Havildar Clerk Prithipal Singh, *supra* note 52; See also Lachman (Ex Rect) v. Union of India and Others 2003 II AD (Delhi) 183.

‘the Court shall put the date and sign the sentence and such signature shall authenticate the same.’⁷⁴

Regarding the SCM proceedings which are held in an expedite manner and most often the accused is given charge- sheet on the very day his trial begins, in clear violations of Army Rules 1954, Rules 34 (1)⁷⁵ and 33 (7)⁷⁶; it was observed by Justice Saran of the Allahabad High Court,

‘Even otherwise, the Summary Court Martial, as the words suggest, is in fact a summary procedure of trial meant to be adopted in cases of extreme urgency, to meet out instant justice, which may be necessary for discipline and security in the Armed Force. In the present case, it is not understood as to what was the grave urgency after more than six months of the incident which is alleged to have taken place on 4.1.1992, that the entire proceedings were to be initiated and concluded on the same date i.e., 6.7.1992.’⁷⁷

B. Violation of Principles of Natural Justice

⁷⁴ Ex. Naik Mast Ram v. Union of India, T.A. 204 of 2010, W.P (C) No. 12289 of 2005 *available at* www.aftdelhi.nic.in/benches/...2/.../Nayak%20Mast%20Ram.pdf (last visited on Mar. 30, 2012)

⁷⁵ AR 1954, r 34 (1) (it states that the accused before he is arraigned shall be informed by an officer of every charge for which he is to be tried and also that on his giving the names of witnesses or whom he desires to call in his defence, reasonable steps will be taken for procuring their attendance, and those steps shall be taken accordingly. The interval between his being informed and his arrangement shall not be less than ninety six hours or where the accused is on active service less than twenty-four hours).

⁷⁶ *Id.* r 33 (7) (the Rule states that As soon as practicable after an accused has been remanded for trial by a General or District Court Martial, and in any case not less than ninety-six hours or an active service twenty-four hours before his trial, an officer shall be given to him free of charge a copy of the summary of evidence, an abstract of the evidence, and explain to him his rights under these Rules as to preparing his defense and being assisted or represented at the trial, and shall ask him to state in writing whether or not he wishes to have an officer assigned by the convening officer to represent him at the trial, if a suitable officer should be available. The convening officer shall be informed whether or not the accused so elects).

⁷⁷ Ex Naik Natwarlal v. Union of India and Others (2004)1 UPLBEC 266.

The double bench of Delhi High Court comprising of Justices A. Sikri and J.Malik while giving their judgment in a case pertaining to summary court martial⁷⁸ came down heavily on the Army Authorities and quashed the proceedings where in the Petitioner was put in civil jail after being brutally beaten on false and concocted charges with no procedure having been followed. The false averments of the authorities that they had followed due process of law was negated by the certificates given by the police and the doctors certificates, thus the Court held such proceedings as cooked up, malicious and violative of the principles of natural justice and a total absence of fair play. They even went on to say that the actions and conduct of the officer conducting trial was such that they would have directed the official respondents even to take action against him. However, they were unable to do so as the services of the officer and respondent No 4 in the said case had been terminated in the meantime and he could not be served in these proceedings.

C. Friend of the Accused

The defence is conducted by the accused himself even if he is illiterate. He is not represented by a counsel or a defending officer. He may be assisted by a 'friend' who may or may not be subject to the Army Act, and may or may not be legally qualified. He may only advise the accused and not address the Court or examine or cross examine witnesses. It was ruled in a case⁷⁹ that trial is vitiated if proper friend is not made available to the accused. Friend should be of choice of the accused if possible, which should be asked for before detailing any one as such. But the mere fact that he could not be of his choice will not vitiate the whole trial.⁸⁰ However, any particular friend imposed on accused against his wishes will amount to denial

⁷⁸ LNK Gurdev Singh v. Union of India, W.P (C) 776 of 1995 dt 01.02.08 (Delhi H.C), available at <http://www.indiankanoon.org/doc/1769443> (last visited on Mar.30, 2012)

⁷⁹ Joga Singh v. Union of India, 1996 Lab IC 677 (Delhi); also cited in Major JL Obheroi, *Military Law and Writs*, 346(SAAR Printers, Chandigarh, 2007).

⁸⁰ Union of India and others v. Ex Havildar Clerk Prithi Pal Singh, 1992 (2) SLJ 177..

of his right of assistance under Army Rule 129.⁸¹ In another case⁸² trial was held valid even though ‘ friend of the accused’ was not provided on the ground that the accused having pleaded Guilty, there was no necessity to examine or cross- examine any witnesses. A comment by Major J.L Obheroi who cited this case in his book, reads, “Ruling in case of Hav. Akbar Singh must not be regarded as a precedent. Friend if provided to Hav. Akbar Singh might have advised accused to plead not guilty; also any points in mitigation of punishment including his antecedents, social and economic background, effect on family, could have been forcefully urged.”⁸³

D. Biased and Unfair Trial and Judicial Review Thereof

In *Ranjit Thakurs* case⁸⁴ Honourable Supreme Court quoted with approval the observations of Lord Denning in the matter of *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*,⁸⁵

‘ .. in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be never- the-less if right minded persons would think that in the circumstances there was a real likelihood of bias on his part, then he should not sit ”.

⁸¹ COAS v. Sep Dvr MZ H Khan, MIL LJ 2006 All 152 , also cited in Major JL Obheroi, *Military Law and Writs*, 346(SAAR Printers, Chandigarh, 2007).

⁸² Hav Akbar Singh v. Union of India, Mil LJ, 2005 All 102, available at <http://indiankanoon.org/doc/941425/> (last visited on mar. 31, 2012)

⁸³ Major J.L.Obheroi, *Military Law and Writs*, 346 (SAAR Printers, Chandigarh, 2007).

⁸⁴ *Ranjit Thakur v Union of India*, AIR 1987, SC 238.

⁸⁵ [1969] 1 Q.B. 577, at 599 (cited in *Ranjit Thakur’s* case).

The Supreme Court while adjudicating the second limb of the contention as to the effect of the alleged bias held that,

‘... the test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and is whether respondent 4 was likely to be disposed to decide the matter only in a particular way. It is the essence of a judgment that it is made after due observance of the judicial process; that the Court or Tribunal passing it observes, at least the minimal requirements of natural justice, is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial "coram non-judice". As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the judge is not to look at his own mind and ask himself, however, honestly. "Am I biased?" but to look at the mind of the party before him.’⁸⁶

On the question of the choice and quantum of punishment it was held that the very same ‘was within the jurisdiction and discretion of the Court-Martial, but the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias.’⁸⁷

E. Punishment Disproportionate to the Offence- Doctrine of Proportionality

Though there are various considerations in the Army Act, Army Rule and Regulations for the Army that the Court should consider while awarding sentence, in most of the cases they are

⁸⁶Ranjit Thakur, *supra* note 84

⁸⁷ *Id.*

not followed. Though dismissal is lower in scale of the punishments⁸⁸, in effect it is harsher than rigorous imprisonment for three months. The Himachal Pradesh High Court⁸⁹ after due deliberation set aside the punishment of dismissal and six months of rigorous imprisonment awarded by the SCM to the accused who was charged of using criminal force on his senior officer while serving in Indian Peace Keeping Force, Sri Lanka, stating it to be disproportionate to the offence.

In the case of Sardar Singh⁹⁰ on the doctrine proportionality the Hon'ble Court had therein cited Lord Diplock's observation in *Council of Civil Service Unions V. Minister for the Civil Service*⁹¹:

“Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call ‘Illegality’, the second ‘irrationality’ and the third ‘procedural impropriety! This is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of ‘proportionality’ which is recognised in the administrative law of several of our fellow members of the European Economic community...”

The Hon'ble Court further observed that such an approach was also taken in the case of *Ranjit Thakur* .⁹² Thus any kind of power invested in any authority has legal limits. ‘The

⁸⁸ AA 1950, §71.

⁸⁹ Chaudhry M.R Ex Sepoy v. Union of India, CWP No 563 of 1990.

⁹⁰Ex Naik Sardar Singh v Union of India, (1991) 3 SCC 213.

⁹¹ (1984) 3 All ER 935, 950.

⁹² Ranjit Thakur *supra* note 84; BhagatRam v. State of Himachal Pradesh, A.I.R. 1983 SC, 454 (Court held: ‘It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution).’

wider the power, the greater the need for the restraint in its exercise and correspondingly, more liberal the construction of the procedural safeguards envisaged by the Statute'.⁹³

F. SCM Proceedings Should be an Exception and Not a Rule

In a judgement passed on 25th January 2008,⁹⁴ by the double bench of Delhi High Court it was held that SCM proceedings should be an exception and not a Rule only to be applied where there is grave and compelling cause for taking immediate action. In such instances this immediate need for holding SCM has to be articulated and reasoned out in the writing in the order convening the SCM. Failure to do so would create good reasons to quash the SCM itself. According to the facts of the case where the petitioners were tried not by their Commanding Officer, the Court gave three points and observed;

‘As per our analysis above, the exception to this Rule is restricted to the case of Deserters and that too where the CO of the Unit to which they belong is not readily and easily available. Secondly, an SCM must be the exception and not the Rule. It can only be convened where the exigencies demand an immediate and swift decision without which the situation will indubitably be exacerbated with widespread ramifications. Obviously, where the delinquent or the indisciplined action partakes of an individual character or has civil law dimensions, an SCM should not be resorted to. Delay would thus become fatal to an SCM. Thirdly, the decision to convene an SCM must be preceded by a reasoned order which itself will be amenable to Judicial Review. We are certain that once this formality is complied with, the inevitable disregard of the accused rights for a fair trial shall automatically be restricted to those rare cases where the interests of maintaining a

⁹³ *Id.*

⁹⁴ Ex LN Vishav Priya Singh, *supra* note 43 .

disciplined military force far outweigh the protection of the minor civil rights of a citizen of India.’⁹⁵

VIII. CONCLUSION

Summary Court- martial was the result of mutiny in the Bengal Army in 1857 and a necessity to instil god order and Military discipline among the awry Armed Forces personnel who were viewed with great mistrust. Protection of any kind of rights was unthinkable then. But in the present when world over and especially in England, on whom our Military Justice System is structures, there is a change in the thought process and in actual practice regarding rights of the individual including Military personnel rights in Summary Trials, such Rules/ provisions which were made for that era, having no validity now, should efface from the statute books.

The procedure followed in SCM wherein members of the Indian Army are tried, imprisoned, face penal consequences and are stigmatized for life, that too without a right to counsel or the benefit of many aspects of due process or for that matter sentence of imprisonment for less than 3 months has no provision for appeal, should be revamped to suit the changing times. It is also a fact when such provisions are not prevalent in other branches of the Armed Forces, why should it still be used in the Indian Army alone. All this is against the provisions of Article’s 14 and 21 of the Indian Constitution. The accused is tried by his Commanding Officer, who does not have a legal background and may be biased by his previous contact with the accused. Conducting a Fair Trial is a cry in such circumstances although Due Process protection and provisions of Fair Trial are provided for in the statutes.

Even if SCM were to be continued, a balance has to be brought between the need to maintain discipline and respecting citizen servicemen individual rights. The CO should by all means be invested with power to punish his troops and promptly resolve minor misconduct with lesser

⁹⁵ *Id.*

punishment in order to discipline them. But where grave nature of misconduct is involved with true penal consequences, the right to elect the forum for Trial should be accorded to the accused.

There is no doubt that SCM proceedings from an operational point of view, is a necessity but it lacks structural independence and impartiality. There is an urgent need to weigh the fact that whether SCM should be done away with or if it were to continue, then should our soldiers be allowed to undergo consequences which go beyond the service punishments and result in civilian criminal record as a result of which their future livelihood is jeopardised.

A Justice System which considers individual rights, guarantees Due Process protection, is fair and impartial, also boosts the morale of its service personnel, and when such basic guarantees lack, it would be detrimental to the goal of achieving and maintaining discipline.

