



The Role of a Judge Advocate in a Court Martial Concerning Administration of Justice: A Critical Overview of the Sri Lankan Law



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Introduction

Military law serves two broad purposes. One is to enhance command and control to make a band of fighters into a more effective force; the other is to reduce the exposure of civilian noncombatants to the harsh consequences of war.¹ Military law has evolved to govern a distinct society of warriors whose primary function is fighting or preparing to fight wars. War necessarily involves killing and destroying property, both activities that are legally privileged under international and domestic law. Finer argues that, in a democratic country, the primary function of the armed forces is to fight and win wars.² Since the environment in which armed forces work in is

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C. Shanor and L. Houge, *Military Law in a Nutshell* (4th Edn, West Law 2013)

2 S.E. Finer, *The Man on Horseback: The Role of Military in Politics* (1st

distinctively different from that of their civilian counterparts, even the administration of justice in relation to the armed forces must also be separate from the traditional methods of administering justice. However, that is not to say that, neither the standards nor the scales of justice should be lower to military personnel. People who are subject to military law should also enjoy justice as it is enjoyed by their respective civilian counterparts. Justice should embrace fairness and fairness must be for all whether military or not.

It is difficult to conceive of an effective armed force, particularly one which deploys in the furtherance of its government's policy, without a separate system of justice or at least a system which acknowledges the unique nature of military service. Appreciating and understanding the military context is essential to the administration of justice in the military in peace or armed conflict or at home or abroad.³ To understand military justice, you have to confront two threshold questions. Is the military a "separate society"? Should it be? The answers to these questions will determine the nature and scope of military justice in any particular country and will tell a good deal about that country's political values.⁴ In many democratic countries, the military organisation and its management have been the subject of wide-ranging reforms. Military courts are different. Unlike civilian criminal courts, which may be of general or limited jurisdiction but in any event have authority over everyone in the country, courts-martial are exceptional courts. Their jurisdiction over individuals is limited, basically because it has always been understood that military justice has as its central purpose the maintenance of order and discipline within the armed forces. Even from a Sri Lankan context, military trials and courts have been both recognized and established under a different legal regime.

The Military Justice System in Sri Lanka

The British military justice system, conceived with the aim of 'disciplining' a mercenary force after the 1857 Mutiny, is the progenitor of the military legal systems of the South Asian

Edn, Pall Mall Press 1962)

3 A. Duxbury and M. Groves, *Military Justice in the Modern Age* (1st Edn, Cambridge 2016)

4 E. Fidell, *Military Justice: A Very Short Introduction* (1st Edn, Oxford 2016)

countries including Sri Lanka.⁵ The military justice system in Sri Lanka is for the most part governed by three separate Acts which include, the Army Act No 17 of 1949 (as amended), the Navy Act No 34 of 1950 (as amended) and the Air Force Act No 41 of 1949 (as amended). The main objective of all these Acts are to provide for and the raising of their respective forces. It is to be mentioned that the respective armed forces Acts only apply to people who are subject to military law. According to section 34 of the Army Act No 17 of 1949, a person subject to military law includes, all officers and soldiers of the Regular Force and all such officers and soldiers of the Regular Reserve, Volunteer Force, or Volunteer Reserve, as are deemed to be officers and soldiers of the Regular Force.⁶ In the case of *Hulangamuwa and Others v Balthazar*,⁷ the Supreme Court opined that a civil court has restrictions upon itself in applying civilian law to persons who are subject to military law.

As mentioned above since military discipline is a *sine qua non* in the whole military system, it becomes a part of the military justice system as well. Unlike in a civilian context the justice system in the military has to be swift and it should also be fair. The success of the military justice system would therefore rest on the balancing of these twin pillars of swiftness and fairness. In the Sri Lankan context, the military justice system contains two main adjudication processes which includes a Summary Trial and a Court Martial. In addition to this, the court of inquiry⁸ and board of inquiry functions as fact finding missions where the reports of such bodies and the recommendations therein may be used in latter proceedings such as a Summary Trial or a Court Martial.

When one considers the procedure adopted at a summary trial in a military context, a commander plays a significant role in the proceedings from framing the charges to making the decision.

5 U C Jha, 'Military Justice in Difficult Circumstances: The South Asian Countries' (2015) 54 Mil L & L War Rev 301

6 For similar provisions see, section 22 of the Navy Act No 34 of 1950 'persons subject to naval law' and section 34 of the Airforce Act No 17 of 1949 'persons subject to this Act'.

7 [1984] 2 Sri LR 29

8 For example, the 1952 Army Court of Inquiry Regulations governs the substance and the procedure to be adopted in an Army Court of Inquiry



This one-way traffic has been seen as a major obstacle in the administration of justice from a military context. Liivoja⁹ observes that summary proceedings entail a hearing before a more senior service member who not only decides what charges to bring but, acting as a trier of fact and law, determines whether a charge has been proven, and, if it has, awards punishment. This is in complete contrast to the principles of natural justice which requires a person not to be the judge of his own case. In fact, much of the historical development of military justice can be seen as the gradual narrowing of the commander's authority to impose punishment "summarily," that is to say, without a regular trial. According to Section 42 of the Army Act No 17 of 1949, a Summary Trial can be conducted against any person who is subject to military law who is an officer of a rank below that of lieutenant-colonel or is a warrant officer is charged with any offence and the case is referred under section 40 to be dealt with warrant officer, summarily by the authority mentioned in paragraph (b) (ii) of subsection (1) of that section.¹⁰ It is interesting to note that, officers who are in a rank above a lieutenant colonel has to be tried in a Court Martial irrespective of the offence that they have been charged with. In addition to this there are certain offences which a Court Martial alone has the jurisdiction to determine. For example, any offence that carries a death penalty can only be heard by a General Court Martial or a Field general Court Martial and it cannot be dealt with in a Summary Trial. It is also important to point out that, a person who is subject to be tried by a Summary Trial has the option of requesting the the commanding officer that he/she be tried in a Court martial under section 40(3) of the Army Act No 17 of 1949.¹¹ There are both advantages and disadvantages attached in deciding to go for a Court Martial. While an individual would be afforded a fair trial at a Court Martial, if found guilty the punishment that may be inflicted may also be higher than in a Summary Trial since the swiftness of military justice system is undermined by such endeavours of those who seek justice at a Court Martial.

Trial at a Court Martial

A Court Martial is the highest form of adjudicatory body within the military justice system. A Court Martial has the jurisdiction to try any person subject to military law who is charged with any military or civil offence.

According to the Sri Lankan military justice system, a Court Martial may be a General Court Martial, a Field General Court Martial or a District Court Martial.¹² A General Court Martial can be convened by His Excellence the President or such officer of a rank not below that of field officer according to section 46 of the Army Act No 17 of 1949.¹³ It is also important to note that a Court Martial is vested with the power of giving the death penalty. A General Court Martial can pronounce the death penalty with the concurrence of at least two-thirds of the members thereof and a Field General Court Martial can pronounce the death penalty with the concurrence of all its members.

A General Court Martial shall consist of at least five members when it is trying a person subject to military law on account of the offence of treason, murder or rape. In any other instances there shall be 03 members.¹⁴ An officer of a rank below that of captain shall not be a member of a general court martial for the trial of a field officer.¹⁵ The president of a General Court Martial shall be appointed by the authority convening such court martial, and shall not be that authority or an officer of a rank below that of field officer¹⁶. A Field General Court Martial can be convened by the commanding officer where only a part of the army is on active service or is in any country outside Sri Lanka, and it is impracticable, in the opinion of the commanding officer thereof, to convene a general court martial.¹⁷ A field general court martial shall consist of not less than three officers.¹⁸ A district court martial may be convened by any person empowered to convene a general court martial or by such officer of a rank not below that of captain as may be authorized by such person, and shall consist of not less than three officers.¹⁹ In the case of *Sarath Fonseka v Dammika Kithulegoda and Others*²⁰ that a Court Martial is a Court in terms of the definition given to a 'court' in the Constitution.

The Role of the Judge Advocate

According to section 53 of the Army Act No 17 of 1949, the authority convening a General Court Martial shall, and the authority convening a District Court Martial may, appoint a person, who has sufficient knowledge of the practice and procedure of Courts Martial and of the general principles of law and of the rules of

¹⁹ See, 50 (1) of the Air Force Act No 41 of 1949 and Army Act No 17 of 1949

evidence, to act as Judge-Advocate at the court martial. Being so appointed, the judge advocate, frequently referred to as "J. A.," becomes the most important part of the judicial machinery. No one else takes the initiative in anything, but all await the action of the judge advocate. He does everything for everybody and his duties range in increasing dignity from fixing the fire in the Sibley stove to swearing in the members of the court. If anything goes wrong, the president remarks, "The judge advocate will see that this does not occur again."²¹

The Court Martial is somewhat similar to what we find in a Jury Trial since the matters of law and matters of facts are determined by two different bodies of persons. In a Court Martial the Judge Advocate has to explain and apply the law while the members of the Court Martial will decide on the facts and the appropriate punishment if any and/or to acquit the accused. Since the Court Martial has the power to pronounce the death penalty, it can be argued that granting the accused a fair and just trial would be undeniable. Therefore, one must be vigilant about the Constitutional protections afforded to an accused under the Fundamental Rights Chapter.²² Article 13 of the Constitution is generally considered as the due process clause where it affords an accused with a bundle of rights before he/she is found guilty. Article 13 (3) declares that, 'any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court'. Since it has been established in the case of *Sarath Fonseka v Dammika Kithulegoda and Others*²³ that a Court Martial falls within the definition of a 'court' any person who is brought before a Court Martial shall be afforded with such right and the Judge Advocate has a duty to make sure that such right is both granted and protected. This is also evident from Section 73 (1) of the Army Act No 17 of 1949 where it states that, 'at all proceedings before a court martial the prosecution as well as the defence shall be entitled to be represented by counsel'.²⁴ Further Article 13(4) provides that, 'no person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law'. Therefore, the Judge Advocate has to make sure that the decisions taken at the Court Martial are in accordance with the existing law. Lastly Article 13(5) guarantees the right to be presumed innocent until proven

guilty. This is also an important consideration to be mindful in the deliberation of military justice. The above-mentioned rights granted under the Constitution in a nutshell makes it clear that the principles of natural justice must be adhered in a Court Martial of whatever type. The cardinal principles of natural justice are explained by the two Latin phrases of *audi alteram partem* meaning that both the parties must be heard before pronouncing any judgments and *nemo iudex in causa sua* meaning that one must not be the judge of his/her own case. In adhering with the first principle, the Judge Advocate is required to give an equal opportunity to both the prosecution and the defence to both present and establish their cases. With regard to the second principle, the Judge Advocate is required to act impartially without any bias. It is also to be noted that in appointing a Judge Advocate, it does not require the appointing authority to appoint an army personnel as the Judge Advocate, whereas the appointing authority can appoint any person with a sound knowledge of the substance and the procedure adopted at a Court martial to act as the Judge Advocate.

Section 54 of the Army Act No 17 of 1949 lists out the respective powers and duties of a judge Advocate.²⁵ While civilian justice system is mostly based on an adversarial type of adjudication where the Judge plays the role of an umpire without really getting actively involved in the truth finding mission, a Judge Advocate on the other hand is required to play much more of an active role in a Court Martial where the role of a Judge Advocate is somewhat achingly similar to a judge serving under an inquisitorial system of adjudication. Section 54(1) of the Army Act No 17 of 1949 requires the Judge Advocate to, give advice on questions of law or procedure relating to the charge or trial to the prosecutor and to the accused. However, once the trial has begun, the Judge Advocate can give such advice only upon the permission and the sanction of the members of the Court Martial. The giving of advice for both the prosecution and the defence is really helpful since the ultimate decision as to whether the accused is guilty or not has to be formed by the members of the Court Martial themselves and therefore, having the requisite understanding about the law and procedure becomes a must. Court Martial Regulations of 1950 under section 107 points out that the members of the Court Martial shall always abide by the directions of the Judge Advocate unless



they have weighty reasons to disregard such directions. If the members of a Court Martial disregards the directions given by a Judge Advocate, they must bear the responsibility for the legality of their decision. In the said regulations, section 108 makes it plain that the Judge Advocate is responsible for conducting a fair and impartial trial at a Court Martial. This requirement impartiality or non-bias is a *sine qua non* of any legal proceeding which has implications on the rights and privileges of an individual. Since a Court Martial is capable of handing out a death sentence, impartiality has to be maintained. This fact is also epitomised by the fact that, in the case of *Sarath Fonseka v. Dhammika Kithulegoda, Secretary General of Parliament & Others*²⁶ the Supreme Court held that, 'competent court' under Article 13(4) of the Constitution included a court martial, as military tribunals were already conferred jurisdiction to impose sentences of death or imprisonment. Therefore, if a Court Martial is a Court of law according to the Constitution, it has to adhere with all the procedures that are used by ordinary Courts to maintain the impartiality of its own proceedings. This further reiterates that the Judge Advocate has to take every step which is possible to have been taken by him in order to maintain the impartiality of the proceedings. One cardinal principle that has to be done in this regard has to do with affording sufficient and fair opportunity for both the prosecution and the defense to be heard. Therefore, the Judge Advocate must make sure that both the parties are given a fair hearing at the Court Martial to present their respective cases.

In the case of *Jayanetti v Martinus*²⁷ the Court stated that, a Court Martial, although it has the power to try and punish offences, which if committed by civilians would be tried by the ordinary Courts, is not ordinarily composed of officers with legal knowledge or judicial experience. Therefore, the Judge-Advocate has a duty imposed upon him by law to advise the Court Martial on the points of law and failing which a Judge Advocate would be failing his duty. The Court further stated that, a Judge Advocate's functions are comparable to those of a Judge of Assize in cases tried by Jury where he is required to advise the Court on the points of law. Further, in the case of *Chandra Kumara and Others v*

*Captain Samarawickrama and Others*²⁸ the Court held that, the primary object of recording a summary of evidence being to consider whether there is a prima facie case against the accused and the direction given by the Judge-advocate to the Court Martial that the evidence given by an individual at the stage of recording the summary of evidence was irrelevant and inadmissible under s. 33 Evidence Ordinance, is patently wrong and any conviction that has been handed out under such circumstances has to be quashed.

Section 54(b)²⁹ of the Army Act No 17 of 1949 stipulates that, it shall be the duty of the Judge Advocate to invite the attention of the court martial to any irregularity in the proceedings. Further, the section states that, 'whether or not he is consulted, he shall inform the court martial and the authority convening the court martial of any defect in the charge or in the constitution of the court martial, and shall give his advice on any matter before the court martial'.³⁰ This is another important duty that has to be discharged by the Judge Advocate in a Court Martial proceeding. A Judge Advocate in order to discharge his/her duty aforementioned must be vigilant about the incidents both prior to and during the proceedings of the Court Martial. A Judge Advocate should therefore be mindful with regard to the composition of the Court Martial and to give his opinion as to whether the composition is prejudicial to the interest of the accused. Section 05 of the Court Martial Regulations also makes it clear that the members of the Court Martial shall as much as possible should not consist of officers belonging to the same corps as the accused. In abiding by the classic principle enunciated in the case of *R v Sussex Justices, ex parte McCarthy*³¹ where the Court held that, 'justice must not only be done but must be seen to be done', the Judge Advocate by using appropriate means should make sure that there is not even any instance of any apparent bias. It is also important to mention that, according to section 38 of the Court Martial Regulations of 1950 the accused has no right to object to the prosecutor or the Judge Advocate. Therefore, it becomes incumbent on the part of the Judge Advocate to be as impartial as impartial

28 [2002] 2 Sri LR 153

29 For similar provisions see, section 39 of the Navy Act No 34 of 1950 and section 54 of the Air Force Act No 41 of 1949

30 *Vide* Section 54(b) of the Army Act No 17 of 1949

31 [1924] 1 KB 256

26 S.C. Ref. No. 1/2010

27 71 NLR 49

can be since the accused cannot object to a Judge Advocate even if he/she is not impartial.

Section 54 (c)³² of the Army Act No 17 of 1949 provides that, 'the Judge Advocate shall take all such action as may be necessary to ensure that the accused does not suffer any disadvantage in consequence of any incapacity to examine or cross-examine witnesses or to give evidence clearly, and may for that purpose, with the permission of the court martial, question any witness on any relevant matter'. The importance of this aspect is also visible when one considers the section 47 of the Army Disciplinary Regulations of 1950 makes it clear that every person subject to military law who has been charged has a right to cross-examine any witness and to summon any witness to testify on his/her behalf including his/her spouse. In such circumstances, the Judge Advocate has to play both an active and assertive role in the administration of military justice by balancing out any disadvantage or lack of resources that an accused person may have. This duty casted upon the Judge Advocate also takes the proceedings of the Court Martial from an adversarial system of adjudication towards a more inquisitorial system of adjudication since the Judge Advocate is required to play a more active role in the administration of military justice as he/she is required to help the accused in cross-examining of witnesses and making clarifications regarding other evidences.

Section 54(d)³³ of the Army Act provides that, at the conclusion of the case he shall, unless both he and the court martial consider it unnecessary, sum up the evidence and advise the court martial upon the law relating to the case before the court martial proceeds to deliberate upon its finding. The summing up of evidence is a crucial part in the proceedings of a Court Martial since the decision would be deliberated upon both the facts and evidence that has been furnished to the Court Martial. In the case of *Kumaresan v Pannanwela and Others*³⁴ the Court Martial on a ruling by the Judge advocate relating to records of a preliminary hearing stated that the objections raised against the records of the preliminary would be ruled upon at the conclusion but this was not done. The Court of Appeal in considering the above circumstances held that, since the Judge advocate failed to caution the Court Martial that this record could not be used as substantive or corroborative evidence and since no ruling was

given on the preliminary objection, that the impinged decision of the Court Martial was void of any legal consequences. The Court further observed that the Judge Advocate in summing up the facts and law to the lay members of the court Martial has failed to direct them on a vital matter which amounts to a misdirection in law.

In addition to the main duties and responsibilities mentioned above, a Judge Advocate is also required to should inquire in to any objections that may be taken up against the composition of the Court Martial, concern himself/herself with the summoning of the witnesses and put questions to those witnesses upon the sanction of the members of the Court Martial, work intandem with the counsels of both the prosecution and the accused and where the accused is not represented by a counsel to make sure that it is not prejudicial to the rights and interests of the accused. The Judge Advocate must also make sure that the accused is furnished with the proceedings of the Court Martial and that the records of the proceedings are preserved for future reference especially since the decision of a Court Martial is subjected to the writ jurisdiction of the Court of Appeal by virtue of the section 79 of the Army Act No 17 of 1949.³⁵

Conclusion

From the above analysis of the role of a Judge Advocate in a Court Martial, it seems clear that the role assigned to a Judge Advocate is no ordinary role. This can be equated to the fact that unlike in a civilian context the military context requires a level of discipline which is unparalleled to its civilian counterpart. Everything within the military system is based on this idea of discipline and it also includes the administration of justice. In a military context justice has to be swift and it should set an example to deter military personnel from breaking the military law. However, if the military justice system is to get the following of its members, justice must not just be swift but it must also be fair from the eyes of those who are subjected to it. While it is agreeable that most of the liberties afforded to civilian people can not be granted to those who are subjected to military law, the basic premises

³⁵ For similar provisions see, section 132 of the Navy Act No 34 of 1950 and section 79 of the Air Force Act No 41 of 1949



of the due process should be strictly adhered even with regard to administration of military justice. The cardinal principles of natural justice which includes fair hearing and impartiality shall be maintained at any cost while giving due respect to the individual rights and freedoms of those who are subject to military law according to the rule of law from a military context which requires those who are subject to military law to follow and obey lawful orders and directions of their superiors.

The Judge Advocate presiding in a Court Martial has a great duty in upholding both the swiftness and the fairness of the of the trial. In doing so he is required to play a more active role that you find in an inquisitorial system of adjudication. He is required to assist both the prosecution and the accused in finding the truth by asserting himself in the proceedings of the trial. He is required to assist the accused where it is found that both presenting of witnesses and cross-examining them could not be done by the accused upon his own initiation. The role played by the Judge Advocate is similar to a role of a Judge in a trial by Jury. The Judge Advocate becomes a beacon of military justice in the administration of the military justice system which is based on discipline by playing a role that requires and herculean effort in not getting things done swiftly but getting them done fairly as well.

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5 Va L Reg ns 37

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