



Judge-Advocate General in Military

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Abstract : -

"Discipline and justice cannot be treated as two different entities. They have to co-exist. It is our endless effort to ensure maintenance of the highest standard of discipline through the best quality of justice throughout the Army"¹.

Judge-Advocate General who is the legal and judicial Chief of the Army. The Judge Advocate General is assisted by a separate JAG branch, which consist of legally qualified Army Officer. He advises the Military personnel on their day to day matters his role is also related with Military Law, Military justice and with Court-Martial. The Motto(s) of it "Nyay EVA DHRMA" justice alone is the Supreme duty at any cost and under all circumstances.

The Judge Advocate General who is referred as "TJAG" (Pronounced as Tea JAG) and term of his tenure is four years.

Keywords :-

Maintenance important, grave, Bona-fide, exonerate, Prosecutor; impartial, appointment, subsequent, circumstances, residue, Amalgamated, Promulgation, Vitiate, crucial, humiliation, endorsement, dignity, implication, transaction, deliberate, ascertain, compilation, quadruplicate, disadvantage, consequence.

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Introduction :-

Judge Advocate is an important functionary in court-martial proceedings. Most of the members of court martial are laymen, and have hardly any experience of conducting trial by court martials. It is, therefore, necessary that on points of law or procedure which arise at the trial, the court should be guided by opinion of the Judge Advocate, and not disregard it except for very weighty reasons. The court is responsible for the legality of its decision, but it must consider the grave consequences which may result from its disregard to the advice of the Judge Advocate on any legal point. If a court-martial, acting without jurisdiction or in excess of jurisdiction, convicts a person subject to Army Act, the members of the court may be held liable in damages by a civil court and such liability-or at least the amount of the damages-may depend upon the question whether they exercised a bona fide judgment, and the fact that they accepted the advice of the Judge Advocate, even if such advice was held to be wrong, might practically exonerate the members from liability.

As the Judge Advocate has to perform a number of mixed duties, such as rendering advice to the prosecutor, the accused, the court and the convening officer. It is absolutely necessary that in fulfilling his duties, he maintains an entirely impartial position. He must not only be fair but also should appear to be so at all times. He must never share transport and accommodation with the prosecutor or the accused during the course of his employment as Judge Advocate.

An officer who is disqualified for sitting on a court-martial, shall be disqualified for acting as a judge advocate at the court-martial.



All the disqualifications specified in Army Act section 39(2), which applies to members of court-martial, also apply to the Judge Advocate. Although accused has no right to object to Judge Advocate, it is necessary that Judge Advocate is impartial and also appears to be so. He should be free of all suspicion of bias or prejudice. Where a Judge Advocate was found to be unduly friendly with the prosecutor, the proceedings of the court-martial were quashed on the ground that the Judge Advocate did not seem to be impartial².

A court-martial shall not be invalid merely by reasons of any invalidity in the appointment of the judge advocate officiating thereat, in whatever manner appointed, if a fit person has been appointed and the subsequent approval of the Judge Advocate General or Deputy Judge Advocate General obtained, but this rule shall not relieve from responsibility the person who made the invalid appointment.

If the judge advocate dies, or from illness or from any cause whatever is unable to attend, the court shall adjourn, and the presiding officer shall report the circumstances to the convening authority; and a fit person not qualified to be judge advocate may be appointed by that authority, who shall be sworn, or affirmed, and act as judge advocate for the residue of the trial, or until the judge advocate returns.

System of Administration of Justice in Army :-

1. Judiciary of the Army consists of :
 - (a) The Department of the Judge Advocates General.
 - (b) The Armed Forces Tribunal established by the Central Government under section 4 of the Armed Forces Tribunal Act, 2007.



The Department of the Judge Advocate General Army

2. The Dept. has a selected cadre of legally qualified officers who, carry out pre-trial scrutiny of the cases for the guidance of the convening authorities, act as Judge Advocates at trials by courts martial, where they advise the courts on legal aspects of the confirming authorities. They advise the formation commanders in cases of doubt of difficulty and assist the staff officers in progressing legal and disciplinary cases. They also facilitate defending civil court cases by assisting the Government Counsels and also representing th Government and the Chief of theArmy Staff, and other Army authorities, before such courts, when called upon to do so.
3. By this British Articles of War 1666, Charles II, designated the Judge Advocate General, hereinafter to be referred to as the JAG as the legal adviser in all matters to the Commander-in-Chief (C-in-C). The Articles of War also provided that a judge advocate was required to attend general courts martial, summon witnesses and administer oaths.
- 3A. In the Article of War of 1672, it was provided that in criminal cases affecting the Crown, the judge advocate had to inform and prosecute on behalf of the Crown. In Turner's Pallas Armata, written in 1671, it is said that it was the duty of the judge advocate, to inform the court-martial what the civil and municipal law provides, that the military might not infringe upon the jurisdiction of the civil courts.
4. Until 1893, the JAG was a Privy Councillor, member of the Government and was also a member of the parliament. In 1893, the



- office of the Judge Advocate General ceased to be a political appointment and ever since, is held by experts in law.
5. In the year 1841, three Judge Advocates General were appointed, one each for the Armies of Bengal, Bombay and Madras. In the year 1895 the three 'native armies' were amalgamated into one and on 1 Jan 1912 the Indian Army Act, 1911 came into force which resulted into the designation of a Judge Advocate General in India for the entire Indian Army.
 6. After 15 Aug 1947, the Judge Advocate General in India was redesignated as the Judge Advocate General. The Department of Judge Advocate General was comprised of 27 officers during 1947, Brig9 DM Sen (now a retired High Court Judge) was appointed as the first Indian Judge Advocate General. The department underwent Indianisation under his leadership.
 7. The Judge Advocate General had a Deputy Judge Advocate General (DJAG) in each Command along with an Assistant Judge Advocate General (AJAG) and few Deputy Assistant Judge Advocates General (DAJAsG)
 8. These officers used to function in advisory capacity to various commanders and also act as Judge Advocates at the courts-martial trials. The DJAG also had the powers to issue commission for the examination of witnesses. The same position continues after the Army Act, 1950 came into force on 22 July 1950. During 1962, an AJAG was also authorised in each Corps HQ as legal adviser to the Corps Commander. Certain legal cells headed by officers of the JAG's Dept.



were established in the year 1984 at the formations located near the High Courts to assist the formations/units for progress of civil court cases. In the year 1984-85, the appointment of AJAG Corps was upgraded to DJAG. In addition, a DAJAG was also authorised to his office. The appointment of DAJAG has since been upgraded as AJAG, at Corps, Command and IHQ of MOD (Army).

ROLE OF THE JUDGE ADVOCATE GENERAL

9. The JAG is the legal adviser to the Chief of Army Staff in matters of military, martial and (in its fighting service aspect) international law. He also assists the Adjutant General in matters relating to discipline involving application of military law. The Judge Advocate General is the 'Nodal Legal Agency' for single point contact with the institutionalised judicial system as well as to advise on all legal matter pertaining to Army Act, Regulations for the Army, Special Powers Act, International laws and Conventions agreed by the Government of India for the Indian Army. Special Laws invoked by the Government for the Army also includes Charter of Trades and Tariff Laws formally agreed upon by the Government pertaining to Army. The legal advice will be within the framework of the Constitution of India and its amendments thereof, as on the date and day of promulgation³.
10. Army Act Section 129 provides that every general court-martial shall and every district or summary general court-martial may be attended by a Judge Advocate. The title Judge Advocate is curious and misleading since it suggests two completely opposite functions



performed by same individual. The explanation is found in the description given in 1864, by Lord Cranworth, of the duties of Judge Advocate. He calls him the “Judge-Advocatus” a Judge to assist the court through forming no constituent part of it. The term ‘advocate’ may thus be a corruption of ‘Advocatus’ used in Lord Cranworth’s sense.

11. In order to understand the term, its limitations, responsibilities importance and utility, the following case law may be referred:
 - a. “The Judge Advocate performs no functions either of an advocate or of a Judge. He used to be a crown prosecutor but in course of time he ended up as an adviser. Judge Advocate is thus not a judge as the one in a trial by jury except in the sense that he has to maintain an entirely impartial position and his addresses cannot be styled as or in the nature of directions. The court martial deliberates on its finding in the closed court in the presence of the Judge Advocate, vide Rule 61(1). Thus, the quality of his advice has very crucial role in the trial in swaying the minds of the members of the court-martial⁴.
 - b. A Court-Martial is constituted by its members A Judge Advocate under section 129, through he attends the Court-Martial does not become a member thereof. He is not an officer constituted the Court-Martial⁵.
 - c. “The presence of a Judge Advocate, who does not seem to be impartial, will vitiate the judgment”⁶.



- d. “A misdirection by the Judge Advocate leading to the erroneous conclusions of law and fact reached by the court-martial. The argument of the respondent that mere misdirection is no ground for issuing writ of *certiorari* to a quasi-judicial tribunal, is not valid. The nature of misdirection is also relevant. Held, the failure on the part of the Judge Advocate must be held to have caused serious prejudice to the accused”⁷.
- e. “The various duties which are to be performed by the Judge Advocate are quite important. His advice has crucial role in the trial. As such if judge advocate is found to be biased or prejudiced, or even there is likelihood of bias and the Judge Advocate becomes hand-in-glove with the prosecution or becomes personally interested in the trial of the case to see that the accused are convicted, it can be assumed that the Judge Advocate is biased and such person would positively incur disqualification to be associated with the court in the trial by GCM”⁸.
- f. “The importance of the judge-advocate being of paramount nature requires that he should be such person who inspires confidence and does not subject the officer facing the trial to humiliation because the accused is also entitled to the opinion and services of the judge-advocate. It is true that Judge-Advocate theoretically performs no function as a judge but it is equally true that he is an effective officer of the court conducting the case against the accused under the Act. It is his



duty to inform the court of any defect or irregularity in the charge and, in the constitution of the court or in the proceedings. This quality of the advise tendered by the Judge Advocate is very crucial in a trial conducted under the Act. With the role assigned to him, a Judge-Advocate is in a position to sway the minds of the members of the court-martial as his advise or verdict cannot be taken lightly by the person composition the court who are admittedly not law knowing person”.

12.

- a. On being nominated as judge-advocate, he should read the charge, and peruse the summary of evidence to make himself conversant with the case. If he has any doubt relating to any legal aspect of the case, he should discuss the case with the DIAG or AJAG Command to clarify his doubt, before proceedings to the place of trial.
- b. He must reach place of trial at least one clear working day in advocate. After reaching the place of trial, he should call on the convening authority, and ‘A’ staff to make himself conversant with local situation. He should check the convening order and endorsement of order of trial on the charge sheet. In case he finds any mistake in the convening order, he should advise the convening authority to issue a fresh convening order. If any mistake is detected in the endorsement on the charge-sheet, he



should advise the convening authority to correct it before the assembly of the court.

- c. If he has been approached by the prosecutor or the accused or defending officer for clarification on any point of law, he should clarify the same without discussing the facts of the case in order to avoid prejudicing his mind, sec, AR 102 and note 3 thereto.
- d. He should visit the place of incident in order to have general idea of its layout and topography. He should inspect the courtroom and see whether it has been properly arranged. For layout of court-martial room, see Appendices 'B', 'C', 'F' and 'G'.
- e. After the assembly of the court, he should enquire along with the presiding officer and members as to the legal constitution of court vide AR 41 and as to amenability of the accused and validity of the charge vide AR 42. He should obtain certificate from each member of the court as he has been provided in para 460(e) of Regulations for the Army, 1987, Vol, 1 which should be attached to the proceedings.
- f. On each day before recording of evidence of witnesses and after the accused has been brought in, he should check the medical officer's certificate (specimen given on page 403 of the MML 1983, Vol II) that the accused has been found fit, he should obtain necessary information from the prosecutor about the expected period when the accused is likely to be fit to undergo the trial and accordingly advise adjournment of the court.



- g. He should strictly confirm himself to the duties laid down in AR 105 and maintain entirely impartial position at the trial. He should refrain from discussing the facts of the case or matters of evidence, except as provided in the Army Rules. He should conduct himself with dignity and be very polite to the members, prosecutor and the defence counsel and defending officer as well as other persons at the place of trial.
- h. In case of any administrative difficulty like accommodation, sahayak, transport, stationery, short-hand, writer, etc. He should approach the 'A' staff of the formation, if the unit is not able to meet the requirement; such matters need not be referred to DIAG of the command. However, if there is any doubt on any legal matter he should refer it to the DIAG of the command for clarification.
- i. If the accused pleads guilty to the charge, the judge advocate must impartially and faithfully explain the provisions of Army Rule 52(1) and 52(2) to the accused as well as the court-martial to ensure that the accused fully understands the implications of pleading guilty before the court proceeds with the trial on plea of guilty. If on perusal of summary of evidence, it appears that the accused ought not to plead guilty, or he has not pleaded intelligibly and voluntarily, the judge-advocate must advise the court to record plea of not guilty and proceed with the trial on plea of Not Guilty. It must be recollected that there is nothing untrue in a person pleading not guilty even though he



committed the offence, as the plea merely amounts to a claim, which he is entitled to make, that the charge against him shall be formally proved (Note 6 to AR 52).

- j. While questioning the accused under Army Rule 58, the judge advocate must ensure that he is questioned with a view to explain such points which if left unexplained may lead to his conviction. The accused should never be questioned to admit any incrimination fact or to supplement the case of the prosecution, since this would be contrary to the oath taken by the court as well as judge advocate in the form given in Army Rule 46(e).
- k. The judge advocate must record proceedings in accordance with Army Rule 92. In case the prosecutor or defence desires that a particular transaction or part of evidence to be recorded in question-answer form, the same be done. Submissions of the prosecutor, defence counsel or defending officer and accused be recorded in first person, to convey the meaning intended by the person making submission. This is essential with a view to make control of the proceedings faithfully and to ensure fair trial.
- l. The court-martial being an open court, under Army Act Section 80-A members of the public, press reporters and other military personnel be allowed to witness the proceedings of court-martial without any formal permission of the court unless, the court decided to exclude any person in public interest or interest



of justice. This will help in projecting the fair image of court-martial amongst service personnel and general public.

- m. During the trial, the proceedings are held in the custody of the judge advocate, who is duty bound to ensure safe custody of the same. He must liberally allow inspection of the proceedings to the members, prosecutor and the defence (Army Rule 93).
- n. During all the deliberations he should be present in close court but should not give any impression of his being pro-prosecution or pro-defence. He must always maintain entirely impartial position [AR 105(8)]. He should not disclose or discover vote or opinion of any member of court-martial and abide by the sanctity of his oath [AR 46(e)]
- o. After recording finding of the court on each charge, the judge-advocate must record brief reasons for arriving at such finding, after ascertaining the reasons from the members⁹.
- p. Before conclusion of the court-martial, the judge-advocate should explain provisions of Army Act Section 150. To the court regarding custody and disposal of the property pending trial (material exhibits) to enable the court to pass appropriate order for proper custody or disposal of the material exhibits.

The order passed by the court in this regard may be recorded in the proceedings or attached thereto, as an exhibits. A copy thereof may be handed over to the prosecutor or an officer of the unit together with the exhibit (if in the custody of the Court)



to give effect to such order, see JAG Army HQ letter No. 61967/JAG/90, dated 06 Nov, 90.

- q. On conclusion of trial, the judge advocate should compile proceedings in the following order:-
- i. Days of assembly of the court;
 - ii. Certificate of commissioned service;
 - iii. List of exhibits;
 - iv. List of witnesses;
 - v. Record of proceedings on Form JAFD-916 as given on page 403 to 420 of MML, and departmental instructions issued from time to time,
 - vi. Exhibits, and
 - vii. Summary of evidence.
- r. After compilation of the proceedings, on written request of the accused, a copy of the proceedings be delivered to him free of charge except in the cases provided in AR 147-A. A receipt should be obtained from him in quadruplicate and the same be attached to each copy of the proceedings, see ARs 147 and 147-A.

Powers and duties of judge advocate-

The powers and duties of a judge advocate are as follows:-

- (1) The prosecutor and the accused, respectively, are at all times after the judge advocates is named to act on the court, entitled to his opinion on any question of law relative to the charge or trial, whether he is in or out of court, subject, when he is in court, to the permission of the court.



- (2) At a court-martial, he represents the Judge Advocate General.
- (3) He is responsible for informing the court of any informality or irregularity in the proceedings. Whether consulted or not, he shall inform the convening officer and the court of any informality or defect in the charge, or in the constitution of the court, and shall give his advice on any matter before the court.
- (4) Any information or advice given to the court, on any matter before the court shall, if he or the court desires it, be entitled in the proceedings.
- (5) At the conclusion of the case, he shall sum up the evidence and give his opinion upon the legal bearing of the case, before the court proceeds to deliberate upon its findings.
- (6) The court, in following the opinion of the judge advocate on a legal point, may record that it has decided in consequence of that opinion.
- (7) The judge advocate has equally with the presiding officer, the duty of taking care that the accused does not suffer any disadvantage in consequence of his position is such, or of his ignorance or incapacity to examine or cross-examine witnesses or otherwise, and may, for that purpose, with the permission of the court, call witnesses and put questions to witnesses, which appear to him necessary or desirable to elicit the truth.
- (8) In fulfilling his duties, the judge-advocate must be careful to maintain an entirely impartial position.



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