

Comparison of the minimum procedural guarantees enshrined in ICCPR with the relevant provisions of the Army Act, the courtmartial regulations and the discipline regulations of the Sri Lanka Army

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Article 14 of the International Covenant on Civil and Political Rights (ICCPR) contains minimum procedural guarantees for an individual undergoing a trial for a criminal charge. Article 14 of the International Covenant on Civil and Political Rights is quoted below.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the rights to be presumed innocent until proved guilty according to law.
3. 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.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the rights to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

This paper analyses the rights of an accused guaranteed at a trial before a Court Martial in the light of the provisions of the following sources.

1. International Convention on Civil and Political Rights 1966
2. The constitution of the Socialist Republic of Sri Lanka 1978
3. The Army Act No. 17 of 1949
4. The Court Martial Regulations 1950 (Gazette No. 10163 dated 10.10.1950)
5. The Army Discipline Regulations 1950 (Gazette No. 10754 dated 22.09.1950)

The International Convention on Civil and Political Rights came into being in 1966. The Army Act was passed in 1949 for the raising and maintenance of an Army and for matters connected therewith. The Court Martial Regulations and the Army Discipline Regulation came into operation in 1950. It is noted that minimum procedural guarantees enshrined in article 14 of the ICCPR had been guaranteed in Sri Lankan military justice system 16 years before the existence of the ICCPR. It is found all the basic legal principles have been codified in to the military legal system ensuring the accepted legal standards to safeguard the rights of an accused before a Court Martial.

1. **The right to a fair and public hearing.**

Article 12(1) of the Constitution of Sri Lanka guarantees equality before law and equal protection of the law.

Rules of natural justice are strictly adhered to at a Court Martial.

If an individual has any personal interest in the matter in issue such a person has been disqualified to sit on a Court Martial. In terms of Section 52(2) of the Army Act following persons are disqualified to sit on a Court Martial obviously respecting rules of natural justice.

- (a) the prosecutor.
- (b) any witness for the prosecution
- (c) the Commanding Officer of the accused
- (d) the officer who investigated the charge on which the accused is arraigned.

It is worth noting that to secure a fair trial for the accused the Judge Advocate of the Court Martial is vested with power to 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 and for that purpose with the permission of the Court Martial may question any witness on any relevant matter.¹

Further in terms of Regulation 4 of the Court Martial Regulations no officer shall be eligible for serving on a Court Martial if he is the officer who convened the Court or if he has a personal interest in the case. This is to safeguard principle of natural justice.

The President of the Court Martial has been apportioned responsibility for the trial being conducted in the proper order in accordance with the Army Act and in a manner befitting a court of justice.²

It shall be the duty of the President to see that justice is administered and that the accused has a fair trial and that he does not suffer any disadvantage in consequence of his position as a person under trial or of his ignorance or incapacity to examine or cross-examine witnesses.

All the proceedings of a Court Martial are held in open court and in the presence of the accused except when a Court Martial sits in closed court for any deliberations.³

To ensure a fair trial at a Court Martial the Judge Advocate has to be careful to maintain an entirely impartial position in fulfilling his duties.⁴

¹ Section 54 (e) of the Army Act

² Regulation 17(2) of the Court Martial (General & District) Regulation

³ Regulation 20 of the Court Martial (General & District) Regulation

⁴ Regulation 108 of the Court Martial (General & District) Regulation

It is mandatory to adhere to the following provisions which strengthen legal rights of fair hearing at a Court Martial.

- (i) It is the duty of the prosecutor to assist the Court Martial in the administration of justice to behave impartially, to bring the whole of the transaction before the Court Martial and not to take any unfair advantage of or suppress any evidence in favour of the accused.⁵
- (ii) The Court Martial is required to allow great latitude to the accused in making his defence.⁶
- (iii) The accused has a right to state the names of all the members of the Court Martial to whom he objects⁷ and the accused is allowed to call any person to make a statement to support his objection.⁸ When an objection to a member is allowed that member cannot take further part in the proceedings.⁹

If an objection of an accused to the president of a Court Martial is allowed the authority convening the Court Martial shall appoint another officer as president and such officer shall act as the president.¹⁰

If an objection of an accused to a member of a Court Martial is allowed the member objected to has to retire and authority convening the Court Martial should appoint a successor to the retiring member.¹¹

02. **The right to a competent independent and impartial tribunal established by law.**

It is mandatory for a Court Martial to satisfy itself that it is legally constituted. It is the first duty of the court to ascertain that,

- (a) the court has been convened in accordance with the Army Act and the Regulations
- (b) the court consists of required number of members
- (c) the each of the member is not disqualified from serving on the Court Martial

5 Regulation 34 of the Court Martial (General & District) Regulations

6 Regulation 36 of the Court Martial (General & District) Regulations

7 Regulation 39(1) of the Court Martial (General & District) Regulations

8 Regulation 39(2) of the Court Martial (General & District) Regulations

9 Regulation 39(4) of the Court Martial (General & District) Regulations

10 Section 60(5) of the Army Act

11 Section 60(6) of the Army Act

(d) the president and the members are of the required rank ¹²

The names of the members of a Court Martial are read in the hearing of the accused appearing before a Court Martial and the accused is asked whether he objects to any such member.¹³

An accused appearing before a Court Martial can, for any reasonable cause object to any member of the Court Martial, including the President. ¹⁴

If an accused appearing before a Court Martial believes that the tribunal is not competent, he before pleading guilty to a charge has a right to object to the general jurisdiction of the Court Martial. And if the Court Martial considers anything stated by the accused in support shows that it has no jurisdiction, it has to receive any evidence offered in support.¹⁵

To maintain independence of the members of the court it has been provided that every member of a Court Martial must give his opinion by word of mouth on every matter which the court has to decide including the sentence, notwithstanding that he may have given his opinion in favour of acquittal. ¹⁶

03. **The right to presumption of innocence until proved guilty according to law.**

Presumption of innocence is a fundamental right guaranteed by Article 13(5) of the Constitution of the Socialist Republic of Sri Lanka.

Article 13(5) - Every person shall be presumed innocent until he is proved guilty.

04. **The right to prompt notice of the nature and cause of criminal charges.**

Discipline Regulation of the Army provides for that in the case of an officer or soldier against whom a charge for the commission of a military or civil offence has been made a written and signed statement of the offence should be transmitted to him. ¹⁷

12 Regulation 18(2) of the Court Martial (General & District) Regulations

13 Regulation 60(1) of the Court Martial (General & District) Regulations

14 Regulation 60(2) of the Court Martial (General & District) Regulations

15 Regulation 57(1) of the Court Martial (General & District) Regulations

16 Regulation 29 of the Court Martial (General & District) Regulations

17 Regulation 25 of the Disciplinary Regulations

In terms of Regulation 15(1) of the Court Martial Regulations an accused, before his trial has to be informed of every charge on which he is to be tried. At the time of so informing, the accused should be given a copy of the charge sheet. ¹⁸

It is mandatory for the President of a Court Martial to ascertain that the accused understand the nature of the charge to which he has pleaded guilty and to inform him of the general effect of the plea and in particular, the meaning of the charge to which he has pleaded guilty, and of the difference in procedure, which will be made by the plea of guilty and should advise him to withdraw that plea if it appears from the Summary of Evidence that the accused ought to plead 'not guilty'. ¹⁹

05. **The right to adequate time and facility for the preparation of a defence to the dependants and to his counsel.**

An accused for whose trial a Court Martial has been ordered has to be afforded a proper opportunity for preparing his defence, and should be allowed free communication with his witnesses and with any friend, defending officer or legal advisor with whom he may wish to consult. ²⁰

In preparation for defence by the accused, his rights, including the right to be assisted or represented at the trial should be explained to him. An accused is asked to state in writing whether or not he wishes to have an officer assigned by the convening authority to represent him at the trial. ²¹

An accused should be given free of charge a copy of any Summary of Evidence or abstract of evidence, prepared previously, relating to his case, as soon as practicable after an accused has been remanded for trial by a Court Martial and, in any case not less than twenty four hours before his trial. ²²

The accused, before his trial is informed that, on his giving the names of any witnesses he may desire to call in his defence reasonable steps shall be taken for procuring their attendance. The interval between his being so informed and his trial should not be less than 24 hours.

The right to adequate time for the preparation of a defence is of so paramount importance after the plea of "Not guilty" is recorded burden is cast upon the Court Martial to ask the accused whether he wishes to apply for an adjournment on the ground that any of the procedures before his

18 Regulation 15(2) of the Court Martial (General & District) Regulations

19 Regulation 59 of the Court Martial (General & District) Regulations

20 Regulation 13 of the Court Martial (General & District) Regulations

21 Regulation 14(2) of the Court Martial (General & District) Regulations

22 Regulation 14(1) of the Court Martial (General & District) Regulations

trial have not been complied with and that he has not had sufficient opportunity for preparing his defence and if it appears to the Court Martial that the accused has not had sufficient opportunity of preparing his defence court may grant such adjournment.²³

The responsibility is cast upon the Commanding Officer, the Convening Officer, or after the assembly of the Court Martial the President of the Court Martial to take proper steps to procure the attendance of the witnesses whom the accused desires to call.²⁴

06. **The right to a trial without undue delay.**

Court Martial Regulations stipulate that when a Court Martial is assembled and the accused has been charged the Court Martial has to continue the trial from day to day and sit for a reasonable period on every day unless it appears to the Court that an adjournment is necessary for the purpose of justice or that such continuance is impracticable.²⁵

It has been further stipulated that a Court Martial may sit at such times for such period between Seven in the morning and Seven in the evening as may be fixed by the Commander of the Army²⁶ and if the Court Martial considers it necessary to continue a trial after 7 pm it may do so. But if it does so, it shall record in the proceedings its reason for so doing.²⁷

And also in the interest of the service, trials may be held at any hour if the Commander of the Army certifies under his hand.²⁸

07. **The right to defend oneself in person or through legal counsel of one's own choice and to free legal assistance.**

Army Act provides for that all proceedings before a Court Martial the Prosecution as well as the defence shall be entitled to be represented by a counsel.²⁹

23 Regulation 67 of the Court Martial (General & District) Regulations

24 Regulation 82(1) of the Court Martial (General & District) Regulations

25 Regulation 22 of the Court Martial (General & District) Regulations

26 Regulation 21(1) of the Court Martial (General & District) Regulations

27 Regulation 21(2) of the Court Martial (General & District) Regulations

28 Regulation 21(3) of the Court Martial (General & District) Regulations

29 Section 73 of the Army Act

Court Martial Regulations further ensure that counsel shall be allowed to appear on behalf of the prosecutor and the accused at Courts Martial.³⁰

An accused is asked to state in writing whether or not he wishes to have an officer by the convening officer to represent him at the trial.³¹

There is a mandatory duty of the convening officer to ascertain whether an accused not otherwise represented desires to have a defending officer assigned to represent him at his trial. If he does so desire, the convening officer shall use his best endeavours to ensure that the accused shall be represented by a suitable officer.³²

It has been stipulated in the Court Martial Regulations that if an accused is not represented at his trial by a counsel he may be represented by any officer subject to military law who shall be called 'the defending officer' or assisted by any person whose services he may be able to procure and who shall be called 'the friend of the accused'.³³

Neither the prosecution nor the accused has any right to object to counsel, if properly qualified.³⁴

08. The right to examine witnesses.

It is observed that an accused is afforded opportunity of this right even at the pre trial stage, of taking a written summary of evidence.

Regulation 48(2)(b) of the Discipline Regulations provides that at the time a Summary of Evidence is recorded an accused may put questions in cross-examination to any witness and the questions with the answers are added in writing.

The right to examine witnesses has been guaranteed in Court Martial Regulations. The Regulation clarifies that a witness may be examined by the person calling him and may be cross-examined by the opposite party to the proceedings, and on the conclusion of the cross-examination may be re-examined by the person calling him on matter raised in the cross-examination.³⁵

30 Regulation 94 of the Court Martial (General & District) Regulations

31 Regulation 14(2) of the Court Martial (General & District) Regulations

32 Regulation 94(2) of the Court Martial (General & District) Regulations

33 Regulation 93(1) of the Court Martial (General & District) Regulations

34 Regulation 106(1) of the Court Martial (General & District) Regulations

35 Regulation 89 of the Court Martial (General & District) Regulations

The Regulation further stipulates that the counsel who appears before a Court Martial on behalf of the prosecutor or accused shall have the right to orally examine, cross-examine and re-examine witnesses.³⁶

09. **Prohibition of self-incrimination.**³⁷

The accused when giving evidence may be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to the offence charged, but shall not be asked, and if asked, shall not be required to answer any question tending to show that he has committed or been convicted of or been charged with any offence other than that with which he is then charged.

10. **Prohibition of double jeopardy**

A man must not be punished twice for the same offence is a well established principle of law.

Section 58 of the Army Act debars a person from being tried twice. Section 58 stipulates that, a person should not be tried for any offence if he has been already acquitted or convicted of that offence by a Court Martial or by a competent Civil Court, or the charge against him in respect of that offence has been dismissed by his Commanding Officer or he has been dealt with summarily for that offence by his Commanding Officer.

Though persons subject to military law commits a military offence he could be tried before a Court Martial it does not affect the jurisdiction of a Civil Court to try or to punish him for any civil offence.³⁸

But if a person subject to military law is convicted of an offence and sentenced to punishment by a Court Martial, and is afterwards tried for and convicted of the same offence by a civil court, then in awarding punishment it is mandatory for the civil court to have due regard to such punishment imposed by the Court Martial as that person may have already undergone.³⁹

Having given the consideration to prohibition of double jeopardy procedural mechanism is in place in Court Martial Regulations which stipulates that the accused at the time offers his plea of "guilty" or "not guilty" to a charge for an offence may offer a plea in bar of trial on the ground that he has been previously convicted or acquitted of the offence by a competent civil court or by a Court

36 Regulation 96 of the Court Martial (General & District) Regulations

37 Regulation 84(4) of the Court Martial (General & District) Regulations

38 Section 77(1) of the Army Act

39 Section 77(2) of the Army Act

Martial or has been dealt with summarily for the offence by his Commanding Officer.⁴⁰

11. **The right to appeal against conviction and sentence to a higher tribunal established according to law.**

The ICCPR ensures that every person convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

Section 79(1) of the Army Act stipulates that grant and issue of writ of mandamus, certiorari and prohibition applies in respect of any Court Martial or any military authority exercising judicial functions.

Further it is worth noting that in house mechanism is in place for an officer or soldier who considers himself aggrieved by the finding or sentence of a Court Martial to forward a petition to the confirming authority through his Commanding Officer.

Gallery



Audience at the Inaugural Session



Giving a Memento to the Commander of the Sri Lanka Air Force



Giving a Memento to the Secretary to the Ministry of Defence



Prof Rohan Gunaratne at Plenary Session on Defence



Giving a Memento to the Chief of Defence Staff



Prof Karunarathne Hangawatte of University of Las Vegas at Plenary Session on Law



Dr. Sunil Nawarathna, Secretary to the Ministry of Higher Education at Plenary Session on Management Social Sciences, Humanities and Education



Prof Rajiva Wijesinghe MP at Plenary Session on Management , Social Sciences, Humanities and Education



Hon Steve Maharey, Vice Chancellor of Massey University at Plenary Session on Defence



Prof AC Norris of Massey University at Plenary Session on Engineering



End of the Inaugural Session - Audience in Attention to the National Anthem



Invited Guests at the Conclusion of the Inaugural Session