

Oath by Judge Advocate at Courts Martial

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Judge Advocate General's Department (in short JAG Department) is the sole agency constituted and competent to render legal advice to the commanders and staff at all levels of the Indian Army. The Department is headed by the Judge Advocate General, an officer of the rank of Major General. As legal advisers, it charter forms part of JAG officers to undertake the role of Judge Advocate at courts martial.

JAG Department officers primarily belong to two streams. First is of those who are law graduates, men and women, who are commissioned directly in the JAG Department. Other category is of those officers, who are already serving in Army/ Services and are later, on their application and based on their performance, are approved for permanent secondment to the JAG Department. None of these officers are required to take an oath while joining the department or at the time of their induction. Notwithstanding the same, every officer of the department while nominated to serve as Judge Advocate at a trial by Court Martial is required every time to take an oath or affirmation. Oath in this context refers to 'oath of office' by a public official before assuming his position, declaring that he would faith fully perform his duties.

Provisions relating to swearing or affirming of Judge Advocate and other officers are contained in Army Rule 46. The same reads "After the members of the court are all sworn or have made affirmation, an oath or affirmation shall be administered to (them) in such of the following forms as shall be appropriate, or in such other form to the same purport as the court ascertains to be according

to the religion or otherwise binding on the conscience of the person to be sworn or affirmed.

The contents of the oath or affirmation are given below.

Form of Oath

“I,, swear by Almighty God that I will to the best of my ability carry out the duties of Judge Advocate in accordance with the Army Act¹ and the rules made thereunder and without partiality, favour or affection, and I do further swear that I will not on any account, at any time whatsoever, disclose or discover the vote or opinion on any matter of any particular member of the court-martial, unless required to give evidence thereof by a court of justice or, a court-martial in due course of law.”

Form of Affirmation

“I,....., do solemnly, sincerely and truly declare and affirm that I will to the best of my ability carry out the duties of Judge Advocate in accordance with the Army Act and the rules made thereunder and without partiality, favour or affection, and I do further solemnly, sincerely and truly declare and affirm that I will not on any account, at any time whatsoever disclose or discover the vote or opinion on any matter or any particular member of this court-martial, unless required to give evidence thereof by a court of justice or a court-martial in due course of law.”

After the members of the court are all sworn an oath or affirmation is administered to the Judge Advocate by the Presiding Officer or a member of the court martial. It is not necessary that the person administering oath or affirmation should be of the same religion. According to the existing practice, Hindus and Muslims are affirmed whereas Christians and Sikhs are sworn. Religious sacred or holy books viz. Bhagvat Gita, Koran, New Testament (or some book containing it) and Guru Granth Sahab are used by the Hindus, Muslims, Christians and Sikhs respectively. Jews are sworn on the Old Testament. The provision under Air Force Act² and the Navy Act³ are almost identical.

According to the usual practice, the person to be sworn or affirmed is asked to indicate his religion or faith. Thereafter, the appropriate religious book is named and he is asked whether he has due faith in it and would respect it having regard to the task at hand. Affirmations are repeated by the person making affirmation after the person administering.

The rule permits an oath or affirmation to be administered to the person

sworn or affirmed in such form to the same purport as the court ascertains to be according to his religion or otherwise, binding on his conscience. Thus, in an uncommon event where the person to be sworn claims to be an atheist, he may be called upon on to take oath/affirmation on what is binding on his conscience.

Rule 149 provides a shelter against the validity with regard to any irregularity in procedure by reason of a future to administer an oath or affirmation to an interpreter or shorthand writer which shall not affect the validity of the proceedings merely on that count. Non mention of Judge Advocate in this context could imply that an irregularity in his case would not give any such protection.

Army Act Section 59 (b) relates to the offence of refusal “to take an oath or make an affirmation legally required by a court martial to be taken or made” and carries, on conviction, the penalty of upto three years imprisonment. The security forces in India are composed of the Border Security Force⁴ Central Industrial Security Force⁵, Railway Protection Force⁶, National Security Guard⁷ and the Central Reserve Police Force⁸ etc. Each one of them is governed by their own Acts framed by the Indian Parliament. The Courts Martial held under such Acts provide for a mandatory attendance by a law officer, who is required to take oath in the like manner.

What is the purpose of an oath? It is a mere formality or ritual? The statutory law is silent in this regard. However, its utility is manifold. It adds dignity and solemnity to the proceedings. The accused and others present are duly impressed by the process. Secondly, it is meant to sensitize and remind the oath taker to bear in mind the text and to abide by its contents. Further, it gives him a requisite legal protection from any attempts to pressurize him to reveal the vote or opinion of any particular member of the court martial.

Consequently, it ought not to be disclosed whether the decision was unanimous or by a majority. The decision is the verdict of the court as a whole, and the fact of its being unanimous or not is usually immaterial. The qualification at the end of the oath “unless required to give evidence thereof by a court of justice, or a court martial in due course of law” only apply to such cases as those where members of the court are charged individually with partiality or bribery, and thus in a court of justice it would, or might be, necessary to make a disclosure regarding individual votes to the court trying. What is the purpose of an oath? It is a mere formality or ritual? The statutory law is silent in this regard. However, its utility is manifold. It adds dignity and solemnity to the proceedings.

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What is the reason for a Judge Advocate being required to take oath or affirmation every time at the commencement of a trial? It is not mentioned in the statutory provisions. However, it appears to remind him about the duties and role assigned to him and his obligations thereat. These are quite distinct and different from the charter of his duties otherwise. When he is serving in the Department but not performing the role as a Judge Advocate.

The Armed Forces Tribunal was set up by virtue of Act No. 55 of 2007. The Tribunal exercises original jurisdiction with regard to service matters and acts as appellate authority over the verdicts and sentences of courts martial. The tribunal has wide powers to grant bail, overturn the decision of courts martial, entrance the punishments and even order a retrial of an offender. Each bench of the Tribunal is to consist of at least two members viz. one judicial and the other administrative. The latter may not necessarily be an officer belonging to the Judge Advocate General's Department. In that view of the matter, an administrative member with no legal qualifications or experience to deal with judicial matters, may form part of the Bench called upon to decide appeal against a court martial verdict (which would usually have an officer of the JAG Department and having legal education and background) even though such a member has not taken any oath.

It is interesting to note that the Constitution of India has laid down that every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the third schedule⁹. Similarly, a person appointed to be a judge of a High Court is required to take an oath or affirmation before the Governor of the State, or some person appointed in that behalf by him¹⁰ The word ‘subscribed’ means that the oath taken orally should be reduced to writing and be signed by the person taking it in token of

his adhesion to what is written¹¹. It may be noted that while the statutory law expects a Judge Advocate at a court martial to take an oath or affirmation and so is the case for a judge of the judiciary, no such provisions exist in the case of members of the Armed Forces Tribunal.

The omission to provide for the Chairperson and members of the Tribunal assume their office without taking an oath or affirmation appears significant when compared with the provisions of the Central Vigilance Commission Act, 2008¹² under which the Central Vigilance Commissioner or a Vigilance Commissioner is required to make and subscribe an oath before the President of India, or some other person appointed in that behalf by them.

The Supreme Court had held that when a judge permits his judgment in a case to be influenced by their relevant consideration of cast and creed, of relationship and friendship, of hostility or enmity, he commits a breach of his oath¹³. Applying this logic, proven exhibition of partiality or favour at a court martial by a Judge Advocate may amount to misdirection vitiating the trial.

In *Union of India V Maj Gen ML Yadav*¹⁴, a question arose as to when a trial by General Court Martial can be said to have begun. The broader view was that the trial commences the moment GCM assembles for proceeding with the trial, consideration of the charge and arraignment of the accused to proceed further with the trial including all preliminaries like the objections to the inclusion of the members of the court martial, reading out the charge/charges, amendment thereof etc. The narrow view was that the trial commences with the actual administration of oath to the members etc. and the prosecution to examine the witnesses when the accused pleads not guilty. The Supreme Court held that the occasion to take oath as per the procedure for GCM and the right of the members of the GCM arises with their empanelment as GCM and they get the power to try the accused the moment they assemble and commence examination of the case i.e. charge sheet and the record. The trial, therefore, must be deemed to have commenced the moment GCM assembled and examination of the charge was undertaken. There is no case law to indicate the consequences of any omission or irregularity in connection with the provisions relating to oath. Nor is there any concrete basis to show advantages or benefits from adherence to the rules in this regard. Nevertheless, oath by a Judge Advocate is viewed as a mandatory step connected to the court martial process.

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Notes

1. The Army Act, 1960 (No. 46 of 1950)
2. The Air Act, 1950 (No. 45 of 1950)
3. The Navy Act, 1957 (No. 62 of 1957)
4. The Border Security Forces Act, 1968 (No.47 of 1968)
5. The Central Industrial Security Forces Act, 1968 (No 50 of 1968)
6. The Railway Protection Force Act, 1957 (No. 23 of 1957)
7. The National Security Guard Act, 1986 (No. 47 of 1986)
8. The Central Reserve Police Force Act, 1949 (No. 66 of 1949)
9. Article 124 (6)
10. Article 219
11. Shabbir V State, AIR 1965, Allahabad 97
12. Act No. 45 of 2003
13. S P Gupta V Union of India, 1981 Supp SCC 87
14. (1996) 4 SCC 127