LAW COMMISSION OF INDIA

One Hundred Sixty Ninth Report

ON

Amendment of Army, Navy and Air Force Acts

April 1999

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Dear Shri Kumarmangalam,

I am forwarding herewith the 169th report on "Amendment of Army, Navy and Air Force Acts."

2. The subject was taken up **suo motu** in view of the observations of the Hon'ble Supreme Court in **Lt. Col. Prithi Pal Singh** V. **Union of India,** 1982(3) SCC 140 underlining a glaring deficiency in the Army Act *viz* absence of the remedy of appeal against the orders of courts martial, and the desirability of recording reasons by courts martial in support of their conclusions and orders. The Court in this case has also reviewed the developments in other countries such as U.K. and U.S.A. while making its recommendations.

3. The idea underlying the report is that while maintaining the discipline in the Armed Forces, the dignity of the individual must be respected. It is necessary to ensure that Armed Forces are not deprived of the services of the bright and courageous young men of the society on account of inadequate machinery for getting justice in the Armed Forces, or for fear of being punished for no wrong done by them or for imposition of disproportionate punishment for an offence. Effective justice system needs to be evolved to safeguard interests of officers in the military with due regard to higher standards of conduct and discipline in the Armed Forces. Justice and discipline should go together.

4. In as much as no action has been taken by Parliament so far in pursuance of judgement of **Prithi Pal Singh's** case the Law Commission considered it appropriate to undertake review of the existing laws on the subject.

5. The Law Commission had extensive discussions with the retired as well as serving officers of the three Armed Forces before finalising its conclusions.

6. The recommendatiaons in this report seek to meet the deficiencies pointed out by the Hon'ble Supreme Court in its decisions on the subject by suggesting measures for expeditious disposal of appeals against the orders of courts martial. The report also recommends certain measures for prompt redressal of grievances relating to conditions of service of the mambers of the Armed Forces.

With regards,

Yours Sincerely,

(B.P. Jeevan Reddy)

Shri P. Kumarmangalam,
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Chapter I

INTRODUCTION

1.1 **The Objective**:—The idea underlying this report, taken up [illegible] is that while maintaing the discipline in the Armed Forces, the dignity of the individual must be respected. It is necessary to ensure that Armed Forces are not deprived of the services of the cream of the society and that the bright and courageous among them do not keep out on account of inadquate machinery for getting justice in the Armed Forces, or for fear of being punished for no wrong done by them. It is equally necessary to ensure that punishment is not disproportionate to the offence and also to make the military law more humane and dynamic to bring it in tune with the culture in the armed forces of the developed countries. It should be remembered that a soldier's life is not a comfortable one. Most of the time he is away from his family. It is the sense of pride and sacrifice in the cause of country's defence that sustains him. It would not be proper to deny him justice which is available to other citizens of the country. It must also be remembered that military discipline cannot be based only upon domination and implicit obedience to the orders of the superiors. The superiors must continuously demonstrate their competence and technical ability in order to command respect and loyalty of those under them. Keeping this in mind, many democratic nations have felt it necessary to rewrite their military laws to provide greater protection against arbitrary action. It is not correct to say that in as much as the number of persons affected by military law and the courts martial are small or because the members of the Armed Forces have voluntarily submitted themselves to the existing system with all its defects, no reform of the law is called for. It should not be forgotten that military justice system is evolved to enforce certain standards of behaviour, some of which are identical to standards enforced in civilian life. The higher standards of conduct and discipline in the Armed Forces are called for not only to keep in readiness an efficient fighting machine but also to command public respect for the Armed Forces. Justice and discipline should go together.

1.2 It should also be borne in mind that even today interference by High Court and Supreme Court with the decisions and findings of courts martial are not totally excluded. Instead of each High Court adopting its own approach in these matters. it would be desirable, and it would be conducive to better discipline, if a single appellate tribunal is created to hear the appeals against the findings, decisions and orders of the courts martial under all the three enactments. The Army Act and the Air Force Act were enacted in 1949-50 and are based mostly upon the British Acts. While the law in the United Kingdom has made several advances as indicated hereinbefore, the military law in India has remained more or less rooted in the past. This report is an attempt to rectify the situation in certain respects.

Chapter I

INDIAN MILITARY LAW—ITS ORIGIN AND EXTENT

(i) Introductory

2.1 **Origin of the Indian Army**:—The origin of Indian Military Law is succintly described in the Manual of Military Law 1. The Indian Army sprang from very small beginnings. Guards were enrolled for the protection of the factories or trading posts which were establihsed by the East India company at Surat, Masulipatam, Armagon, Madras, Hooghly and Balasore in the first half of the seventeenth century. These guards were at first intended to add to the dignity of the Chief Officials as much as for a defensive purpose, and in some cases special restrictions were even placed by treaty on their strength, so as to prevent their acquiring any military importance. Gradually, however, the organisation of these guards was improved and from them sprang the East Indian Company's European and Indian troops. Both these steadily increased in numbers, until in 1857, it numbered (including local forces and contigents, and a body of 38,000 military police) no less than 311038 officers and men (Imperial Gazetter of India, 1907, Vol. IV (Ch. XI).

2.2 **E.I., Company's Mutiny Act**:—Statutory provision was first made for the discipline of the East India Company's troops by an Act (27 Geo II, Cap 9) passed in 1754 for "Punishing Mutiny and Desertion of officers and soliders in the service of the United Company of Merchants of England trading to the East Indies, and for the punishment of offences committed in the East-Indies, or at the Island of Saint Helena". Section 8 of this Act empowered the Crown to make Articles of War for the government of these troops, and such articles were accordingly made and published. The terms of the Act were wide enough to cover both European and Indian troops, but the language of the articles themselves showed that they were originally intended for Europeans only. In the absence of any other code, however, the Government of Bengal, Madras and Bombay seem to have applied these articles, with such modifications and omissions as appeared necessary, to the bodies of Indian troops maintained by them, of which the present Indian Army is the descendant. In 1813, owing to doubts having arisen as to the legal validity of the existing arrangements for the discipline of the Indian troops, provisions were inserted in the Act (53 Geo III, Cap 155 ss 96 and 97) which was passed in that year to extend the Company's privileges for a further term, which legalised the existing system and gave power to each of the Governments of Fort William, Fort Saint George and Bombay to make laws, regulations, and Articles of War for the government of all Indian officers and soldiers in their respective services. It was further provided in 1824 (4 Geo Iv, Cap 81, s 63), that such legislation should apply to the Indian troops of each presidency, wherever serving, and whether within or beyond His Majesty's dominions.

2.3 **Each Presidency Frames its own code** :—Under the statutory sanction of these two enactments a military code was framed by the government of each presidency and put in force as regards its own troops. These codes still followed to a great extent the Articles of War then applicable to the Company's Europeans, but the only punishments awardable to Indian officers seem to have been death, dismissal, suspension and reprimand and to Indian soliders, death and corporal punishment. Transportation and imprisonment were not awardable.

(ii) The Articles of War

2.4 **Government of India Act, 1833, and the "Articles of War"** :— By section 73 of the Government of India Act, 1833 (3 and 4 Will. IV, Cap 85) the power to legislate for the whole Indian Army was restricted to the Governor General of Council and laws so made were given general application to all Indian Officers and soldiers wherever serving. Under the powers conferred upon it by the Act of 1833 the Indian Legislature, for the first time, provided a common code for the Indian officers and soldiers in 1845, "Articles of War" being enacted for them by the Governor General in Council as Act XX of that year. This Act was shortly afater repealed and replaced by Act XIX of 1847 which, having been frequently amended (Acts of Governor General in Council VI of 1850, XXXVI of 1850, III of 1854, X of 1856, VIII of 1857, XXII of 1857, and VI of 1860 in the intervening period) was in turn repealed by Act XXXIX of 1861. This was repealed by Act V of 1869 ("The Indian Articles of War") which replaced it. The preamble to this Act indicates that for the first time recognition was granted to the existence of what are commonly known

as "followers" and Act V was equally made applicable to them.

2.5 **Amendment of "Articles" in 1894** :—The amalgamation of the three armies maintained by the Presidencies into one in 1895 necessitated considerable amendments in the "Indian Articles of War". These amendments were effected by Act XII of 1894 and the Indian Articles of War, as altered by this Act, and by various minor amendig Acts. (Acts of Governor-General in Council, XII of 1891, I of 1900, I of 1901, IX of 1901, XIII of 1904, and V of 1905) furnished the statutory basis of the Indian Military code until 1911. As time went on, however, and the Indian Army began to take its share in the imperial responsibilities of the British Army, it was found that an Act originally framed for three separate local forces, each serving as a rule in its own Presidency, failed to provide adequately for the discipline and administration of that army under modern conditions. Owing also to the mass of amendments super-imposed on the original articles, these were often difficult to understand and sometimes even self-contradictory.

2.6 **The Indian Army Act, 1911** :—The amendment of the Indian Articles of War was, therefore, again taken up in 1908, but the consideration then given to the subject showed that a new consolidating and amending Act would be necessary, any further amendment of the articles of 1869 being only likely to accentuate the existing confusion. Accordingly, Indian Army Act, consolidating the existing law as to the Indian Army into one simple and comprehensive enactment and adding such provisions as experience had shown to be necessary, was passed into law in March, 1911 and came into force on 1st January, 1912. All previous Acts dealing with the subject were repealed by section 127 of the said Act. Amendments were subsequently made to this Act by various amending Acts. (Acts of Governor-General in Council, XV of 1914, X of 1917, XI of 1918, XVIII of 1919, II of 1920, XXXVII of 1920, XXXIII of 1923, VIII of 1930, XXXIII of 1934 and VII of 1935).

2.7 **The Indian Army (Suspension of Sentences) Act, 1920** :—During the 1914-18 was temporary Acts (Acts of Governor General in Council IV of 1917 and XVII of 1918) were passed to provide for the suspension of sentences. These measures were found to be beneficial and on 23rd March, 1920 a permanent Act to provide for the suspension of sentences of imprisonment or transportation passed by courts martial on persons subject to the Indian Army Act, which repealed the temporary Acts, came into force. This Act which is known as the "Indian Army (Suspension of Sentences) Act" (Act of Governor General in Council XX of 1920) was to be read as one with the Indian Army Act.

2.8 **Army Act, 1950** :—The need for a general revision of the Indian Army Act, 1911 was felt for some time prior to 1947. Some of the provisions of the said Act had become out of date and insufficient for modern requirements; but after 15 August 1947, the need for revision became imperative for obvious reasons. A Bill to consolidate and amend the law relating to the government of the regular Army was, therefore, introduced in the Constituent Assembly of India on 21 December, 1949. This was passed into law by the Parliament on 20th May, 1950 as Army Act (Act XLVI of 1950) and came into force on 22nd July, 1950. Amendments subsequently made by the amending Acts are Acts XIX of 1955, XXXVI of 1957, adaapted by 3 ALO 1956.

2.9 **Rules and other "subordinate legislation"** :—The present military code of Army is thus contained in the Army Act, 1950 and certain rules and other matters which latter, being made in pursuance of the Army Act by authorities therein empowered to do so, have the force of law. Examples of this latter class of "subordinate legislation" are the Army Rules, 1954 framed by the Central Government under Section 191 of the Army Act, and those as to "Summary and Minor punishments" contained in para 443 of the Regulations for the Army, 1962 which derive their statutory force from orders issued by the COAS with the consent of the Central Government in pursuance of AA.s.82.

Chapter III

OBSERVATIONS OF THE HON'BLE SUPREME COURT OF INDIA

3.1 **Lt. Col. Prithi Pal Singh's case** :—As far back as 1982, the Supreme Court had, in its decision in **Lt. Col. Prithi Pal Singh** v. **union of India**[1] pointed out a glaring deficiency in the Army Act 1/, absence of the remedy of appeal against the orders of courts martial. The court also pointed out the changes brought about in recent decades on this subject both in U.K. and U.S.A. and observed that Parliament should bring about similar legislation consistent with the changed value system. They also pointed out the desirability of recording reasons by the court martial in support of their conclusions and orders. it would be appropriate to notice the relevant observations of the Supreme Court in paragraphs 44 and 45 of the said judgment :—

"Reluctance of the apex court more concerned with civil law to interfere with the internal affairs of the Army is likely to create a distorted picture in the minds of the military personnel that persons subject to Army Act are not citizens of India. It is one of the cardinal feature of our Constitution that a person by enlisting in or entering Armed Forces does not cease to be a citizen so as to wholly deprive him of his rights under the Constitution. More so when this court held in **Sunil Batra** v. **Delhi Administration** (1979) 1SCR 392, 495 that even prisoners deprived of personal liberty are not wholly denuded of their fundamental rights. 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 Constitution. Persons subect to Army Act are citizens of this ancient land having a feeling of belonging to the civilised community governed by the liberty-oriented Constituion. 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. ...**Absence of even one appeal with power to review evidence, legal formulation, conclusion and adequacy or otherwise of punishment is a glaring lacuna** in a country where a counterpart civilian convict can prefer appeal after appeal to hierarcy of courts. **Submission that full review of finding and/or sentence in confirmation proceeding under section 153 is provided for is poor solace**. A hierarchy of courts with appellate powers each having its own power of judicial review has of course been found to be counter-productive but the converse is equally distressing in that there is not even a single judicial review. With the expanding horizons of fair play in action even in administrative decision, the universal declaration of human rights and retributive justice being relegated to the uncivilised days, **a time has come when a step is required to be taken for at least one review and it must truly be a judicial review as and by way of appeal to a body composed of non-military personnel or civil personnel.** Army is always on alert for repelling external aggression and suppressing internal disorder so that the peace-loving citizens enjoy a social order based on rule of law; the same cannot be denied to the protectors of this order. And it must be realised that an appeal from Ceaser to Ceaser's wife—confirmation proceeding under section 153—has been condemned as injudicious and merely a lip sympathy to form. **The core question is whether at least there should be one appeal to a body composed of non-military personnel and who would enjoy the right of judicial review both on law and facts** as also determine the adequacy of punishment being commensurate with the gravity of the offence charged. Judicial approach by people well-versed in objective analysis of evidence trained by experience to look at facts and law objectively, fair play and justice cannot always be sacrificed at the altar of military discipline. **Unjust decision would be subversive of discipline. There must be a judicious admixture of both.** And nothing revolutionary is being suggested. Our Army Act was more or less modelled on the U.K. Act. Three decades of its working with winds of change blowing over the world necessitates a second look so as to bring it in conformity with liberty-oriented constitution and rule of law which is the uniting and integrating force in our political society. Even U.K. has taken a step of far reaching importance for rehabilitating the confidence of the Royal Forces in respect of judicial review of decisions of court martial. **U.K. had enacted a Court Martial (Appeals) Act of 1951 and it has been extensively amended in Court Martial (Appeals) Act, 1968.** Merely providing an appeal by

itself may not be very reassuring but the personnel of the appellate court must inspire confidence. The court martial appellate court consists of the ex-officio and ordinary judges of the Court of Appeal, such of the judges of the Queen's Bench Division as the Lord Chief Justice may nominate after consultation with the Master of the Rolls, such of the Lords, commissioners of Justiciary in Scotland as the Lord Chief Justice generally may nominate, such Judges of the Supreme Court of the Northern Ireland as the Lord Chief Justice of the Northern Ireland may nominate and such of the persons of legal experience as the Lord Chancellor may appoint. The cour martial appellate court has power to determine any question necessary to be determined in order to do justice in the case before the court and may authorise a new trial where the conviction is quashed in the light of fresh evidence. The court also has power inter alia, to order production of documents of exhibits connected with the proceedings, order the attendance of witnesses, receive evidence, obtain reports and the like from the members of the court martial or the persons who acted as Judge-Advocate, order a reference of any question to a Special Commissioner for Enquiry and appoint a person with special expert knowledge to act as an assessor (Halasbury's Laws of England, 4th Edn., paras 954-55, pp 458-459). Frankly the appellate court has power of full judicial review unhampered by any procedural claptrap. **Turning towards the U.S.A.**, a reference to Uniform Code of Military Justice Act, 1950, would be instructive. A provision has been made for setting up of a court of militry appeals. The Act contained many procedural reforms and due process safeguards not then guaranteed in civil courts. To cite one example, the right to legally qualified counsel was made mandatory in general court martial cases 13 years before the decision of the Supreme Court in **Gideon** v. **Wainwright** (372 US 335 (1963). Between 1950 and 1968 when the Administration of Justice Act, 1968 was introduced, many advances were made in the administration of justice by civil courts but they were not reflected in military court proceedings. To correct these deficiencies the Congress enacted Military Justice Act, 1968, the salient features of which are: (1) a right to legally qualified counsel guaranteed to an accused before any special court martial; (2) a military judge can in certain circumstances conduct the trial alone and the accused in such a situation is given the option after learing the identity of the military judge of requesting for the trial by the judge alone. A ban has been imposed on command interference with military justice, etc. **Ours is still an antiquated system. The wind of change blowing over the county has not permeated the close and sacrosanct precincts of the Army.** If in civil courts the universally accepted dictum is that justice must not only be done but it must seem to be done, the same holds good with all the greater vigour in case of court martial where the judge and the accused done the same dress, have the same mental discipline, have a strong hierarchical subjugation and a feeling of bias in such circumstances is irremovable".

(emphasis supplied)

The Supreme Court concluded with the following observations :—

"We, therefore, hope and believe that the changes all over the English-speaking democracies will awaken our Parliament to the changed value system. In this behalf, we would like to draw pointed attention of the Government to the glazing anomaly that courts martial do not even write a brief reasoned order in support of their conclusion, even in cases in which they impose the death sentence. This must be remedied in order to ensure that a disciplined and dedicated Indian Army may not nurse a grievance that the substance of justice and fair play is denied to it."

(emphasis supplied)

3.2 **S.N. Mukherjee's case** :—In 1990, a Constitution Bench of the Supreme Court, in **S.N. Mukherjee** v. **Union of India**[2] while emphasising the undeniable desirability of the recording of reasons as a principle of natural justice, held that the same cannot be insisted upon in the proceedings taken under the Army Act. The court pointed out that the Army Act and the rules made thereunder provided for recording of reasons only in two situations and in no other situation. The two situations in which reasons are required to be recorded are—(a) where the court martial makes a recommendation of mercy and (b) where the proceedings of the **summary court martial** are set aside or the sentence imposed by it is reduced. The court held further that;

"reasons are not required to be recorded for an order passed by the confirming authority confirming the findings and sentence recorded by the court martial as well as for the order passed by the Central Government dismissing the post-confirmation petition".

Chapter IV

RELEVANT STATUTORY PROVISIONS

4.1 In the year 1992, Parliament enacted the Army (Amendment) Act, 1992, being Act No. 37 of 1992. Several provisions of the Army Act were amended but no provisions were made as recommended by the Supreme Court in **Prithi Pal Singh**. However, under SRO 17E dated December 6, 1993, sub-rule (1) or rule 62 of the Army Rules was amended obliging the tribunal to give brief reasons in support of its decision. The amendment reads :—

> "(1) The finding on every charge upon which the accused is arraigned shall be recorded and, except as provided in these rules, shall be recorded as finding as 'Guilty' or of 'Not Guilty'. After recording the finding on each charge, the court shall give brief reasons in support thereof. The judge advocate or, if there is none, the presiding officer shall record or cause to be recorded such brief reasons in the proceedings. The above record shall be signed and dated by the presiding officer and the judge advocate, if any."

4.2 Inexplicably, similar amendment has not been effected in respect of courts martial under the Navy and Air Force Acts.

4.3 **Need for taking up the subject suo motu** :—In as much as no action has been taken on Parliament so far as recommended by the Supreme Court in **Prithi Pal Singh**, where the developments in other countries such as in U.K. and U.S.A. had also been taken into consideration, the Law Commission has considered it *appropriate to undertake review of the existing laws on* the subject **suo motu.**

4.4 **Brief survey of the Army Act, 1950** :—The Army Act, enacted in the year 1950, contains as many as 16 chapters. Chapter VI sets out the various offences and chapter VII sets out the punishments. We are, however, concerned only with the provisions contained in chapters X, XI and XII which deal with courts martial, procedure of courts martial **and** confirmation and revision, respectively. Chapter X comprises sections 108 to 127. Section 108 provides for four kinds of courts-martial, namely, general courts-martial, districts courts-martial, summary general courts-martial and summary courts-martial. The other provisions in the chapter provide for convening of the various kinds of courts martial, their powers and other incidental matters.

4.4.1 Chapter XI comprises sections 128 to 152. As the title of the chapter itself indicates, these sections prescribe the procedure to be followed by court martial

4.4.2 Chapter XII comprising sections 153 to 165, provides for confirmation and revision of the orders of court martial. Section 153 says that no finding or sentence of a **general**, **district** or **summary general court-martial** shall be valid except so far as it may be confirmed as provided by Act. (The finding and sentence of a summary court martial, however, is not required to be confirmed and it can be carried out forthwith as provided in section 161. Of course, the very section provides an exception to the said rule *viz*, if the officer holding the trial is of less than five years service, he shall not, except on active service, carry into effect any sentence until it has received the approval of an officer commanding not less than a brigade.) Section 160 provides for revision of a finding or sentence recorded by the court-martial. It says " any finding or sentence of a court martial which requires confirmation may be once revised by order of the confirming authority and on such revisions, the Court if so directed by the confirming authority, may take additional evidence." Section 163 provides that even where the finding of guilty by a court martial has been confirmed or where such a finding does not require confirmation, is found for any reason to be invalied or not supported by evidence, the authority competent to commute the punishment under section 179 may substitute a new finding and pass a sentence for the offence specified or involved in such finding. Section 164 provides for confirmation and the remedy for the persons against whom a finding or sentence of the court martial has been confirmed. It would be appropriate to reproduce section 164 in its entirely :

> "164 . **Remedy, against order, finding or sentence of court-martial** :—(1) Any person subject to this Act who considers himself aggrieved by any order passed by any court-martial may present a petition to the officer or authority empowered to confirm any finding or sentence of such court-martial, and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order passed or as to the

regularity of any proceeding to which the order relates.

(2) Any person subject to this Act who considers himself aggrieved by a finding or sentence of any court-martial which has been confirmed, may present a petition to the Central Government, the Chief of the Army Staff or any prescribed officer superior in command to the one who confirmed such finding or sentence, and the Central Government, the Chief of the Army Staff or other officer, as the case may be, may pass such order thereon as it or he thinks fit."

4.4.3 Section 165 empowers the Central Government, the Chief of the Army Staff or any prescribed officer to annual the proceedings of any court martial on the ground that they are illegal or unjust.

4.5 **No existing right of appeal against the order of the courts matial** :—It is thus evident that in the case of a final finding or sentence awarded by the ganeral courts martial, district courts martial and summary general courts martial, the only remedy provided to the accused persons is the one provided in sub-section (2) of section 164 as pointed out by the Supreme Court in **S.N. Mukherjee's** case. (The opportunity to make a representation to the confirming authority before confirmation is not a remedy but only an opportunity to make a representation before the final order is passed). The said remedy under section 164(2) can be invoked only **after** the finding of the sentence has been confirmed by the confirming authority and **not before** the confirmation of the same. The power or revision and the power to alter the finding or sentence in certain cases or for that matter the power to annual the proceedings provided by sections 160, 163 and 165 are not so much the remedies given to the accused persons but are really the powers of the various specified authorties. In sum, there is no right of appeal against the order of the court martial (*i.e.*, where it has been confirmed as required by law or where it does not require such confirmation, as the case may be), or against an orader passed under sub-section (2) of sectio 164, with which the accused is aggrieved.

4.6 **Differences in the procedures in the Navy Act and the Army Act** :—Pausing here, we may point out that the procedure provided by the Navy Act, 1957, in this behalf is different from that under the Army Act in certain respects. The differences between the two are :—

(a) The Navy Act does not require confirmation of the sentence or order recorded by the courts martial as is required by the Army Act. The only exception is where a sentence of imprisonment is awarded to an officer-in which case the sentence pronounced by the court martial cannot be implemented until the same has been communicated to the Chief of Naval Staff, who is entitled to pass such orders thereon as he may think fit. The sentence or order shall be implemented subject to such directions as he may make. It is the responsibility of the convening authority to take necessary steps to give effect to the sentence (Regulation 194 of the Regulations for the Navy Part-II).

(b) The Navy Act provides for judicial review of the proceddings of trials held by court martial. The power of judicial review is vested in the Judge Advocate General which power can be exercised either suo motu or on an application made by the aggrieved person. It is open to the Judge Advocate General to afford an opportunity of personal hearing to the convict if the circumstance of the case so call for. The convict can be heard either in persons or through an advocate or an officer of the Indian Navy. The Judge Advocate General then makes a report to the Chief of Naval Staff for such orders thereon as the latter may think fit. (Section 160). Section 161 of the Navy Act provides that in all cases of capital sentence and in all cases where the courts martial is ordered by the President, the Chief of Naval Staff shall send the matter with his recommendations to the Central Government. In other cases, the discretion lies with him to send such a report to the Central Government or not.

(c) According to sub-section (2) of section 161, an order of acquittal made by the courts martial cannot be interfered with or set aside either by the Judge Advocate General or the Chief of the Naval Staff.

(d) Section 162 provides that it is open to a person aggrieved with the finding or sentence of any court martial to present a petition to the Central Govemment or the Chief of Naval Staff. This remedy is in addition to the remedy of filing an application before the Judge Advocate General provided by section 160. Section 163 provides that on such petition being filled the Central Government or the Chief of Naval Staff may make any of the orders specified therein except on order to enhance the sentence.

Chapter V

HOW THE OBJECTIVES CAN BE ATTAINED

5.1 **Conclusions regarding appeals against the final orders passed by the courts martial** :—The Law Commission is of the opinion that in order to achieve the objectives discussed in the Chapter I :—

It is necessary to provide an appropriate appellate forum to enterin appeals **against the final orders** passed by the courts maratial. As explained hereinabove, while the Army and Air Force Acts provide for confirmation of the sentence or finding made by the courts martial (except the summary courts martial), the Navy Act does not provide for any such confirmation. In this connection, we are also of the opinion that it is not necessary to compel every aggrieved person to necessarily adopt the procedure prescribed by sub-section (2) of section 164 of the Army Act or for that matter corresponding provision of the Air Force Act, 1950. An appeal should be available against the final order (sentence or finding) of court martial. Indeed in view of the Tribunal proposed herein, sub-section (2) of the Section 164 and the corresponding provision in the Air Force Act may as well be deleted. Even the provisions relating to judicial review by Judge-Advocate General in the Navy Act can also be deleted.

5.1.1 The appellate tribunal, in our opinion, should not be a totally civilian appellate tribunal as has been provided in the United Kingdom since it may not be conducive to the discipline of the Armed Forces. We think it more appropriate to create a tribunal headed by a civilian judge whose other members shall be drawn from the retired members of the Armed Forces, and, from among those who have acted as or worked in the Judge Advocate General's department. To be precise, it shall be a three-member tribunal consisting of (1) a retired Judge of the Supreme Court or a retired Chief Justice of High Court who shall be the Chairman for a term of 4 years, (2) a retired officer of the Army of the rank of Major General or above, or a retired officer of the Air Force of the rank of Air Vice Marshal or a retired officer of the Navy of the rank of Rear Admiral, and (3) a retired Judge Advocate General of the Army/Air Force/ Navy.

The term of the President and members shall be four years. However, if an appeal is preferred by a person holding a rank higher than the rank held by the person appointed as member at the time of his retirement from category 2 above, the President of the Tribunal will write to the Central Government to nominate a retired officer for the case as a member of the Tribunal, who shall be of a rank not lower than that of the person who has preferred an appeal, in place of the member from category 2.

5.1.2 The quorum for the tribunal shall be two, but no decision shall be rendered by the tribunal except with the participation of the President.

5.1.3 The tribunal shall be common to Army, Navy and Air Force. The seat of the tribunal shall be Delhi, but it shall be open to the tribunal to hold its sittings at such other places as it may decide in the interest of convenience of all concerned.

5.1.4 From the decision of the tribunal, a direct statutory appeal shall lie to the Supreme Court. This is not something new since such direct appeals are already provided by certain other enactments. For example, section 130-E of the Customs Act, and section 35-L of the Central Excises and Salt Act, 1944, or for that matter section 23 of the Consumer Protection Act, 1986. In view of proposed statutory appeal to the Supreme Court, it is expected that no High Court will entertain a writ petition under Article 226 of the Constitution of India against the orders of the appellate tribunal. If such an appeal is provided, it would be appropriate to delete clause (2) of Article 136 of the Constitution which provides that the power to grant special leave to appeal conferred upon the Supreme Court by clause (1) of the said article shall not apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

Chapter VI

OTHER CONCLUSIONS

6.1 **Examination of Views of the Armed Forces Personnel** :—Before finalising this report, the Law Commission had extensive discussions with the retired as well as serving officers of the three armed forces. They not only supported the proposals contained in Chapter-V, but also requested that that the tribunal so created should not be confined to the orders passed by courts martial but should also have jurisdiction in respect of disputes relating to conditions of service of the members of these armed forces. They brought to our notice that every year hundreds of writ petitions were being filed by members of the armed forces in several High Courts in India concerning their service matters including questions of seniority, promotion, pension and other conditions of service. They submitted that in many High Courts such matters were entertained and disposed of by a single judge, against whose orders a writ appeal/special appeal lies to the division bench of that High Court and against the orders of the division bench the appeals are being filed in the Supreme Court with the leave of the court under article 136(1) of the Constitution. They submitted that in the interest of discipline of the Armed Forces and for the prompt redressal of any grievances concerning their conditions of service, there ought to be a special tribunal against whose orders an appeal should directly lie to the Supreme Court. The present position, they submitted, was not satisfactory, apart from the fact that the remedy of writ was a restricted remedy where the courts interfered only on certain limited grounds. They pointed out that even while adjudicating the disputes relating to service conditions, the adjudicating authority should be aware of the discipline and working culture of the Armed Forces to arrive at an appropriate decision.

6.2.1 It would be seen at once that the aforesaid request practically amounts to a request for creation of a service tribunal for Armed Forces more of less on the pattern of administrative tribunals created under the Administrative Tribunals Act, 1985 **except** for the fact that the proposal contemplates a direct statutory appeal to Supreme Court. If so, one must, in this connection, take note of the fact that such a tribunal may fall within the four corners of article 323-A of the Constitution. We must also take notice of the decision of the seven-Judge Bench of the Supreme Court in **L. Chandra Kumar** v. **Union of India**[1] and the background and development leading up to the said decision. One must also take note of the mechanism created by the said decision whereunder all service disputes are directed to be raised in the first instance before the administrative tribunal against whose decision, remedy of judicial review under article 226 is made available, subject to the condition that such a petition for judicial review should be heard by a division bench. One of the considerations underlying this decision was to stop the unmanageable flow of appeals filed in Supreme Court **under article 136** against the decisions of the Administrative Tribunals—indeed even against the decisions rendered by administrative members sitting singly. The Administrative Tribunals Act, however, did not provide for a statutory appeal as is provided by the Central Excise Act/Customs Act (in certain matters) and the Consumer Protection Act and, therefore, the appeals against the orders of the Administrative Tribunal had to be and were being filed under article 136. Yet the reluctance of the Supreme Court to entertain appeals in service matters has to be taken into consideration. Of course, had the Administrative Tribunals Act provided a statutory appeal to Supreme Court against the orders of Administrative Tribunals, the decision in **L. Chandra Kumar** could not have created the alternative mechanism aforesaid. Keeping all the above considerations, we have objectively examined the request of these retired and serving members of the Armed Forces to create a forum for adjudication of their service disputes.

6.2.2 In **Bonkya Alias Bharat Shivaji Mane and others** v. **State of Maharashtra**[2], the Supreme Court held regarding exclusion of the jurisdiction of the High Court under Section 19 of TADA as follows :—

> "20.... Learned counsel submitted that the appellants should not be denied the opportunity to get the first hearing in the High Court because in the event of their failure in the High Court, they still have a chance to approach this Court under article 136 of the Constitution of India. The argument is fallacious and runs in the teeth of the express provisions of Section 19 of TADA. Section 19 (1) and (2) of TADA read as follows :—
>
> "19. Appeal—(1) Notwithstanding anything contained in the Code, an appeal shall lie as a matter of right from any judgement, sentence or order, not being an

interlocutory order, of a Designated Court to the Supreme Court both on facts and on law.

(2) Except as aforesaid, no appeal or revision shall lie to any Court from any judgement, sentence or order including an interlocutory order of a Designated Court."

21. A bare perusal of the above Section shows that an appeal against the judgement, sentence or order, of the Designated Court (except an interlocutory order) shall lie on facts and on law to the Supreme Court and that no appeal or revisio shall life to any other Court. In the face of this express provision, there is no scope to urge that the appeal may be transferred to the High Court because of the acquittal of the appellants for the offence punishable under Section 3 TADA by us. In a case where the Designated Court finds that no offence under TADA is made out, it is open to the said Court to transfer the case to the regular Criminal Court under Section 18 TADA but once the charge is framed and the case is tried by the Designated Court, an appeal against conviction, sentence or acquittal lies only to the Supreme Court and to no other Court."

6.2.3 In **S.S. Jain Samiti** vs. **Management Committee, R.J.I. College, Agra**[3], it was observed :—

"8.... The writ jurisdiction is meant for doing justice between the parties where it cannot be done in any other forum."

6.2.4 An aggrieved party will not have a right of recourse to the writ jurisdiction under article 226 against the decision of the proposed Tribunal since it is setteled law that where adequate remedy of appeal is there, one cannot have recourse to the writ jurisdiction of the High Court under article 226 of the Constitution of India. Thus when an aggrieved person is conferred right to appeal to the Supreme Court directly against the final judgement or order of the proposed Tribunal, then he will not have a right of recourse to the writ jurisdiction under article 226 against the decision of the proposed Tribunal.

6.2.5 In the backdrop of the above legal position, we proceed to give our conclusions.

6.3 **Conclusions regarding adjudication of service disputes** :—Hereinbelow, we recommend the following :—

6.3.1 The Army, Navy and Air Force Acts should be amended providing for creation of a Tribunal to adjudicate the disputes and complaints with respect to conditions of service of persons appointed to Army, Navy and Air Force. The Amendment should further provide for a statutory appeal to the Supreme Court against the final decisions and orders of such a Tribunal. An appeal against the interlocutory orders should be expressely barred. It is hoped that the High Courts would give due regard to the legislative intention behind such a provision, concerned in the public interest of discipline in the Armed Forces. In this behalf, the observations of the Supreme Court in para 108 (x) of the decision in **Mafatlal Industries Ltd.** v. **Union of India**[4] may be referred to :—.

",,,So far as the jurisdiction of the High Courts under article 226 of the Constitution—or of this Court under article 32—is concerned, it remains unaffected by the provisions of the Act. Even so, the Court would, while exercising the jurisdiction under the said articles, have due regard to the legislative intent manifested by the provisions of the Act... This is for the reason that the power under article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it override it. The power under article 226 is conceived to serve the ends of law and not to transgress them."

6.3.2 It would be appropriate to provide further that every service matter should necessarily be decided by a Bench of two members, one of whom shall be a Judicial Member. In case of difference of opinion between the Members of the Bench, the matter shall be referred to the Bench of three members, one of whom shall be a Judicial Member.

In such a situation, it would be easier to convince the Supreme Court of the desirability of such a direct appeal mainly on the ground that the necessity of prompt disposal of service disputes in the Armed Forces and in the interest of the discipline therein justify such a course. While indiscipline in any public service is not desirable and every service dispute should be adjudicated promptly, their need is much more so in the case of Armed Forces. In this context, it must be remembered that the Armed Forces are treated as a separate class even by the Constitution; article 33 provides that Parliament may, by law, determine to what extent any of the Fundamental Rights (in Part III) shall apply to Armed Forces. Article 311 including clause (2) thereof which contains very important protections to members of service-is made inapplicable to defence forces; the artaicle applies only to civil services.

The Service Tribunal so created shall be common to all three services. There shall be four Benches of the

Tribunal, *viz* at Delhi, Mumbai, Chennai and Calcutta, with the Delhi Bench being treated as the Principal Bench. (The machinery provisions of the Administrative Tribunals Act, 1985 can be imported to the extent necesary, for giving shape to this idea). Such a course will undoubtedly contribute towards a more satisfactory and prompt adjudication of such disputes. But this has to be an independent service tribunal apart from and in addition to the Appellate Tribunal recommended in Chapter V of this Report.

6.3.3 In case such a Tribunal is created, the Parliament may also consider to bring other para-military services too under the jurisdiction of this Tribunal.

6.4 Pending the amendment of Army, Navy and Air Force Acts on above lines, the proper thing to do so expedite disposal of petitions in High Courts would be for the Central Government to make a request to all the Chief Justicies of various High Courts in the country to amend the respective High Court rules and to provide that all service disputes concerning the Army, Navy and Air Force shall be entertained and adjudicated only by a division bench of the High Court and that such disputes should be given priority over other matters as far as possible. In such a case, the High Court would mean only one stage of litigation whereafter an appeal may lie to Supreme Court by special leave under article 136 of the Constitution. This recommendation can be adopted straight away.

Chapter VII

RECOMMENDATIONS

7.1 To sum up, the Law Commission makes the following recommendations :—

(a) The Army Act, 1950 be amended providing for the creation of an Armed Forces Appellate Tribunal which shall entertain appeals against the sentence/finding/order of the courts martial under the Army Act. The appeals can be preferred against the final orders of the courts martial. It shall be open to the person concerned either to file an appeal before the tribunal directly against the final order, finding or sentence of the courts martial or to adopt the remedy under sub-section (2) of section 164 in the first instance and then approach the appellate tribunal. The choice should be left to the aggrieved person. Indeed, it would be more appropriate to delete sub-section (2) of section 164 of the Army Act and the corresponding provision in the Air Force Act. Similarly, the provisions in the Navy Act relating to judicial review by the Judge Advocate General too may be deleted.

(Paragraph 5.1, Chapter V, supra)

(b) Such appellate tribunal shall consist of (1) a retired Judge of the Supreme Court or a retired Chief Justice of the High Court who shall preside over the tribunal (President), (2) a retired officer of the Army of the rank of Major General or above, or a retired officer of the Air Force of the rank of Air Vice Marshal or a retired officer of the Navy of the rank of Rear Admiral, and (3) a retired Judge Advocate General of the Army/Air Force/Navy. The term of the President and members shall be four years. However, if an appeal is preferred by a person holding a rank higher than the rank held by the person appointed as member at the time of his retirement from category 2 above, the President of the Tribunal will write to the Central Government to nominate a retired officer for the case as a member of the Tribunal, who shall be of a rank not lower than that of the person who has preferred an appeal, in place of the member from category 2.

The terms and conditions of members shall be as may be prescribed by the Central Government.

(Paragraph 5.1.1, Chapter V, supra)

(c) The quorum for the tribunal shall be two, but no decision shall be rendered by the tribunal except with the participation of the President.

(Paragraph 5.1.2, Chapter V, supra)

(d) Against the orders of the tribunal, an appeal shall lie to the Supreme Court and subject to such appeal, if any, and the orders passed therein, the decision of the tribunal shall be final.

(Paragrah 5.1.4, Chapter V, supra)

(e) The Navy and Air Force Acts may be so amended as to adopt the appellate tribunal created by the Army Act for their purposes as well, with all the above features.

(Paragraph 5.1.3, Chapter V, supra)

7.2 (a) It would contribute to greater discipline and prompt disposal of service disputes pertaining to the three Armed Forces if a separate Service Tribunal is created. The Army, Navy and Air Force Acts should be amended providing for creation of a Tribunal to adjudicate the disputes and complaints with respect to conditions of service of persons appointed to Army, Navy and Air Force. The Amendment should further provide for a statutory appeal to the Supreme Court against the final decisions and orders of such a Tribunal. An appeal against the interlocutory orders should be expressely barred. It is hoped that the High Courts would give due regard to the legislative intention behind such a provision, concerned in the public interest of discipline in the Armed Forces. In this behalf, the observations of the Supreme Court in para 108 (x) of the decision in **Mafatlal Industries Ltd.** v. **Union of India**[1] may be referred to :—

> "... So far as the jurisdiction of the High Courts under article 226 of the Constitution of this Court under article 32-is concerned, it remains unaffected by the provisions of the Act. Even so, the Court would, while exercising the jurisdiction under the said articles, have due regard to the legislative intent manifested by the provisions of the Act.... This is for the reason that the power under artaicle 226 has to be exercised to effectuate the regime of law and not for abrogating

it. Even while acting in exercise of the said constitutional power, the High Court cannot ingnore the law nor can it override it. The power under article 226 is conceived to serve the ends of law and not to transgress them."

It would be appropriate to provide further that every service matter should necessarily be decided by a Bench of two members, one of whom shall be a Judicial Member. In case of difference of opinion between the Members of the Bench, the matter shall be referred to the Bench of three members, one of whom shall be a Judicial Member.

In such a situation, it would be easier to convince the Supreme Court of the desirability of such a direct appeal mainly on the ground that the necessity of prompt disposal of service disputes in the Armed Forces and in the interest of the discipline therein justify such a course While indiscipline in any public service is not desirable and every service dispute should be adjudicated promptly, their need is much more so in the case of Armed Forces. In this context, it must be remembered that the Armed Forces are treated as a separate class even by the Constitution; article 33 provides that Parliament may, by law, determine to what extent any of the Fundamental Rights (in Part III) shall apply to Armed Forces. Article 311 including clause (2) thereof which contains very important protections to members of service-is made inapplicable to defence forces; the article applies only to civil services.

The Service Tribunal so created shall be common to all three services. There shall be four Benches of the Tribunal, viz. at Delhi, Mumbai, Chennai and Calcuta, with the Delhi Bench being treated as the Principal Bench. (The machinery provisions of the Administrative Tribunals Act, 1985 can be imported, to the extent necessary, for giving shape to this idea). Such a course will undoubtedly contribute towards a more satisfactory and prompt adjudication of such disputes. But this has to be an independent service tribunal apart from and in addition to the Appellate Tribunal recommended in Chpater V of this Report.

(Paragraph 6.3.1 and 6.3.2, Chapter VI, supra)

In case such a Tribunal is created, the Parliament may also consider to bring other para-military services too under the jurisdiction of this Tribunal.

(Paragraph 6.3.3, Chapter VI, supra)

An aggrieved party will not have a right of recourse to the writ jurisdiction under article 226 against the decision of the proposed Tribunal since it is settled law that where adequate remedy of appeal is there, one cannot have recourse to the writ jurisdiction of the High Court under article 226 of the Constitution of India. Thus when an aggrieved person is conferred right to appeal to the Supreme Court directly against the final judgement or order of the proposed Tribunal, then he will not have a right of recourse to the writ jurisdiction under article 226 against the decision of the proposed Tribunal.

(Paragraph 6.3.4, Chapter VI, supra)

(b) Pending the amendments of the Army, Navy and Air Force Acts as proposed in paragraph 7.2 (a), the Central Government may request the Hon'ble Chief Justices of various High Courts to amend their respective High Court rules to provide that all service disputes concerning the said three Armed Forces should be heard only by a division bench and that such disputes should be disposed of as promptly as possible in the circumstances but not later than six months.

(Paragraph 6.4, Chapter VI, supra)

Sd/-
(Mr. Justice B.P. Jeevan Reedy) (Retd.)
Chairman

Sd/-
(Ms. Justice Leila Seth) (Retd.)
Member

Sd/-
(Dr. N.M. Ghatate)
Member

Sd/-
(Dr. Subhash C. Jain)
Member Secretary

Delhi, dated the 29th April, 1999

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Chapter III

1. Lt. Col. Prithi Pal Singh vs Union of India, 1982 (3) SSC 140.

2. S.N. Mukherjee vs Union of India, 1990 (4) SSC 594.

Chapter IV

1. L. Chandra Kumar vs Union of India, 1997 (8) SCC 261.

2. Bonkya Alias Bharat Shivaji Mane and Others vs State of Maharashtra, AIR 1996 SC 257.

3. S.S. Jain Samiti vs Management Committee, R.J.I. College, Agra, AIR 1996 SC 1211.

4. Mafatlal Industries Ltd. vs Union of India, (1997) 5 SCC 536 at p. 635.

Chapter VII

1. Mafatlal Industries Ltd. vs Union of India, (1997) 5 SCC 536 at p. 635.