

# An Appellate Tribunal for the Armed Forces\*

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## Introduction

The Government has issued notification for the setting up of the Armed Forces Tribunal, first of its kind in any South Asian country, to deal exclusively on cases pertaining to armed forces personnel. The Armed Forces Tribunal Bill, 2007, passed by the Parliament, received the assent of the President on 25th December 2007. The Tribunal will start functioning with a Principal Bench in New Delhi. The Benches of the Tribunal are likely to be set up at Bangalore, Chandigarh, Cochin, Guwahati, Jodhpur, Kolkata, Lucknow and Mumbai. The Supreme Court of India, in 1982, while hearing the case of Lieutenant Colonel PP Singh Bedi had expressed the necessity for an independent appellate forum for the Armed Forces. As the Army Act, 1950, the Navy Act, 1957, and the Air Force Act, 1950 are generally identical; the term Army Act used in this paper represents all the three Acts.

## Composition

The Principal Bench of the Tribunal will be headed by the Chairperson, and will have judicial and administrative members. Only a former judge of the Supreme Court or a former Chief Justice of a High Court can be its chairperson. While judicial members will be serving or retired high court judges; the administrative members will be drawn from the Armed Forces, those who have served as a Judge Advocate General for at least a year, or other officers not below the rank of a Major General or equivalent. A Bench of the Tribunal shall consist of one judicial and one administrative Member. When a serving person is appointed as an Administrative Member, he shall have retired from service prior to assuming such appointment.

## Jurisdiction

**Original Jurisdiction.** The Armed Forces Tribunal will have original jurisdiction over service matters. The term 'service matters' as defined in section 3 of the Act, includes (i) remuneration allowances, pension and retirement benefits; (ii) tenure, including commission, appointment, enrolment, probation, confirmation, seniority, training, promotion, reversion, premature retirement, superannuation, termination of service and penal deductions; and (iii) summary disposal and trials where the punishment of dismissal is awarded. The punishment of dismissal in a summary trial can only be awarded by a Naval disciplinary court constituted during war or active service under the Navy Act.

A person aggrieved by an order pertaining to any service matter mentioned above, may make an application to the Tribunal accompanied by prescribed fee and necessary documents. The Tribunal shall not admit his application unless it is satisfied that the applicant had availed 'of the remedies available to him under the Army Act, Rules or Regulations.' In case where an individual has made an application and no final order has been made by the Central Government or other authority, or/and a period of six month has expired, his application will be admitted by the Tribunal. Retired Services personnel including their dependents and heirs will be authorised to approach the Tribunal in disputes relating to service matters.

**Appellate Jurisdiction.** The Tribunal has jurisdiction in relation to appeal against order, findings or sentence passed by a court-martial. The Tribunal shall allow an appeal against conviction by a court-martial where **(a)** the finding of the court-martial is legally not sustainable, or **(b)** the finding involves wrong decision on a question of law; or **(c)** there was a material irregularity in the trial resulting in miscarriage of justice. The Tribunal shall be empowered to dismiss the appeal where it considers that no miscarriage of justice is likely to be caused or has actually resulted to the applicant. While dismissing an appeal, the Tribunal shall give reasons in writing. The Tribunal shall not admit an appeal unless it is satisfied that the applicant had availed the remedies available under the Army Act.

## Powers of the Tribunal

The Tribunal, while disposing of an application relating to the service matter, may summon and enforce attendance of any person, require production of any document, and may receive evidence of affidavit. The tribunal shall be empowered to issue commission for the examination of witnesses or documents, or may requisition any public record or document from any office. However, this power shall be subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872. The Tribunal shall decide both questions of law and fact, and may dismiss an application, review its earlier decision or set aside any order of dismissal.

The Tribunal, while disposing an appeal against the decision of the court-martial, shall be deemed to be a criminal court. It shall be empowered to **(a)** substitute for the findings of the court-martial, a finding of guilty for any other offence for which the offender could have been lawfully found guilty by the court-martial and pass a fresh sentence; **(b)** if sentence is found to be excessive, illegal or unjust, the Tribunal may **(i)** remit the sentence, **(ii)** mitigate the punishment awarded, or **(iii)** commute such punishment to any lesser punishment mentioned in the Army Act; **(c)** enhance the sentence awarded by a court-martial; **(d)** release the appellant, if sentenced to imprisonment, on parole with or without conditions; **(e)** suspend a sentence of imprisonment; or **(f)** pass any other order as it may think appropriate.

## Re-trial

The Tribunal shall also have power to quash a conviction and order a re-trial by court-martial. The appellant shall not be retried for an offence other than the offence for which he was convicted by the original court-martial and in respect of which his appeal is allowed. He can also be retried for any offence charged in the alternative in respect of which the court-martial recorded no finding in consequence of convicting him of the first-mentioned offence.

The Tribunal shall be a court of record and shall have power to punish for contempt. The Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, but shall be guided by the principles of natural justice. The tribunal is empowered to grant bail to a military accused. However, an accused shall not be released if he has been charged with an offence punishable with death or imprisonment for life. A person making an application or appeal to the Tribunal may either appear in person or take the assistance of a legal practitioner of his choice to present his case before the Tribunal.

The Armed Forces Tribunal Act does not provide any fixed time frame for deciding an application of appeal. Section 23 of the Tribunal Act provides that every application shall be decided “as expeditiously as possible”. The Act also provides for the transfer of pending cases. Every suit or other proceeding pending before any court including a High Court before the date of establishment of the Tribunal would stand transferred to the Tribunal.

### **Appeal to the Supreme Court**

With the leave of the Tribunal, an appeal against the final decision or order of the Tribunal may be filed in the Supreme Court within 90 days of the decision of the Tribunal. However, such leave shall not be granted unless it is certified by the Tribunal that a point of law of general public importance is involved in the decision, or it appears to the Supreme Court that the point is one which ought to be considered by that Court.

### **Tribunal - Critical Appraisal**

The Armed Forces Tribunal Bill was introduced in the Rajya Sabha/Lok Sabha on 20th December 2005 and was subsequently examined by the Parliamentary Standing Committee on Defence. The Standing Committee had made extensive analysis of the Bill and had recommended 15 amendments in the Bill. The Committee was of the view that military laws should be strict enough to deal with military offences firmly and effectively to enforce discipline, but at the same time the law should not be oppressive to the extent of having a demoralising affect on the defence personnel. The government, however, has not accepted most of the recommendations of the Standing Committee. Some of the important issues which may cause hardship to military personnel are as under.

**Service Matters.** The Tribunal will not have any jurisdiction in matters relating to (i) transfers and postings; (ii) leave; and (iii) summary court-martial except where the punishment is of dismissal or imprisonment for more than three months. This is a serious lacuna in Tribunal's original jurisdiction. The term 'leave' was included in the jurisdiction of the Bill. However, the Ministry of Defence approached the Committee with apprehension that military units may be burdened with excessive litigation arising out of leave, which may affect their operational preparedness and discipline, and recommended for the exclusion of leave from the jurisdiction of the Tribunal. The Ministry's view that units may be burdened with excessive litigations arising out of leave is baseless and not supported by any empirical study.

Transfers and postings is another important issue pertaining to the Armed Forces personnel, which is kept out of the purview of the Tribunal. The Committee was also of the view that transfer and posting should not be kept in the purview of the tribunal as it would affect the 'operational requirements and discipline' of the forces. However, the Committee has desired that a clear-cut transfer policy should be formulated by the Services. It appears that the Standing Committee erred in its conclusion on this issue. Available data reveal that out of 9365 pending cases of the Armed Forces personnel in various High Courts, only 74 cases (0.79 per cent) relate to postings/transfers. An apprehension that Armed Forces personnel would rush to tribunal for remedy against 'transfers and postings' is not true because they have to make use of the existing remedy.

The military commanders at various levels are empowered to award minor punishments summarily to the officers and personnel below the officer rank (PBOs). The Tribunal is not empowered to entertain any petition against the award of minor punishments like forfeiture of seniority or severe reprimand awarded to the officers or detention/imprisonment up to 42 days to the PBO. The 'Summary Disposals and Trials' were kept within the purview of the Tribunal in the Bill. The Ministry, however, subsequently proposed that summary disposals and trials be kept outside the purview of the Tribunal since the punishments awarded under this process are minor in nature. As punishments awarded under summary disposals and trials by the commanding officers have invariably and deeply affected the career prospects of the serving personnel, the Committee, recommended that summary disposals and trials must be in the purview of the Tribunal in order to ensure justice to the Armed Forces personnel. The apprehension of the Ministry that inclusion of matters relating to postings and transfers, leave and summary disposal/trial would lead to large number of personnel approaching the Tribunal, leads to the belief that the system of governance within the Services in matters of postings and transfers, leave and summary trials is not just and fair. This apprehension in the minds of military hierarchy as well as the Ministry needs expunction. The denial of the right to appeal to the tribunal in these matters, when viewed from a different perspective, mean empowering the military chain of command with the power and perception that their decisions relating to postings and transfers, leave and minor punishments, even if arbitrary could not be questioned. The aggrieved person would then be forced to seek remedy through the writ jurisdiction of the high courts or the Supreme Court. This would be in contrary to the aims and objectives of the Tribunal.

**The Summary Court-Martial (SCM).** The most extensively used military procedure against personnel below

the rank of junior commissioned officers has been excluded from the jurisdiction of the Tribunal, unless it awards imprisonment for more than three months, or dismissal. The SCM is peculiar to the Indian Army. During a period of six years, from 1999 to 2004, an average of 995 SCM were held every year. Trials held under the SCM have been criticised by the high courts and Supreme Court for awarding excessive and harsh punishments, denying procedural rights guaranteed under Article 14 of the Constitution, lack of evidence, arbitrariness, lack of justice, and non-compliance with the Army Rules. Such an arbitrary system of justice is not followed in any other democratic country. There is an urgent need to abolish this arbitrary system of trial carried over from the era of colonial rule.

**Enhancing the Punishment.** Section 15 (6) of the Act, giving power to the Tribunal to enhance the punishment awarded by a court-martial, is against the fundamental principles of natural justice. Such ‘coercive’ power to ‘enhance the punishment’ is not exercised by the military appellate courts in other democracies. The UK Court-Martial (Appeals) Act, 1968, provides that the sentence awarded during the disposal of an appeal shall not be a sentence of greater severity. The Defence Minister’s claim in the Rajya Sabha during the discussions that “the Bill is almost at par with the existing redressal machinery of the advanced countries such as UK, France, Canada, Australia and other countries”, may not be correct.

**Bail.** The tribunal is empowered to grant bail to a military accused. However, an accused shall not be released if he has been charged with an offence punishable with death or imprisonment for life. The power of the Tribunal in this regard is lower than that bestowed on the High Courts in India. The Committee’s recommendation that the Tribunal may have discretion to grant bail to personnel charged with offences punishable with death or imprisonment for life, as is being provided by the High Courts to accused person under section 437 of Cr.Pc, has been ignored by the Government. The Tribunal’s power in this regard should not be against the guidelines of the Supreme Court.

**Legal Aid.** The Armed Forces Tribunal Act does not make any provision for the legal aid. Insufficiency of legal aid would pose a serious handicap for the Armed Forces personnel approaching the Tribunal. The question of legal aid becomes more pertinent in the context of the armed Forces because the fundamental rights of those serving in the Forces have been abrogated by the constitution. The democratic provision of equality before law strongly warrants the provision of legal aid for the Armed Forces personnel, especially below the officer rank.

**Time Frame.** The Act does not provide any time frame within which the Tribunal should decide a petition. It makes a vague commitment in Section 23 (2) that every application shall be decided “as expeditiously as possible”. The Standing Committee’s recommendations that Tribunal should decide every case within six months have not been accepted by the Government. Since all the documentary evidence would be available with the Services HQs and appellant/witnesses could be summoned without undue delay, the Tribunal must have a fixed time frame to decide an appeal.

**Judicial Delay.** The Act also provides for the transfer of pending cases. Every suit or other proceeding pending before any court including a High Court before the date of establishment of the Tribunal would stand transferred to the Tribunal. The pending cases relating to the Armed Forces in various courts are over 100,000. The Tribunal will inherit this backlog and may take about 10 years to clear them. Besides, it will also cause inconvenience to litigants who may have to travel great distances for attending their cases. An Alternate Dispute Settlement mechanism must be worked out by the Tribunal to finalise the pending cases.

## Future Reforms

The Parliamentary Standing Committee, which examined the Bill had recommend that an expert committee be constituted to thoroughly review the three ‘Services’ Acts and make recommendations to bring them in tune with the norms being followed in other democratic countries. The Committee also desired that review of the above Acts be taken up urgently so that the revised Acts are in place before the establishment of the Tribunal. Since the Tribunal would deal with cases of all the three Services, the Committee desired that the common disciplinary code be created so as to bring uniformity in dispensation of justice to the Armed Forces personnel. The military justice system being followed in the UK, the USA, Australia and South Africa should also be examined.

During the discussion on the Bill in the Rajya Sabha on 3rd December 2007, the Defence Minister had stated: “.....I sincerely feel we are, actually, not fair to the Armed Forces. They need better care from the Nation, from the Government, and from all of us.” The Government, therefore, must appoint an expert committee to re-examine the Armed Forces Tribunal Act and also bring out systematic reforms in the three ‘Services’ Acts. A modern justice system based on the rule of law will be a moral assurance to the Armed Forces personnel that their constitutional rights would be protected.

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.\*Based on the text of a talk delivered at the USI on 02 Apr 2008.

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