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IJLRA

# **MILITARY JUSTICE IN SOUTH ASIA**

**Authored By: Sadhika**

## **TABLE OF CONTENTS**

<u>Serial Number</u>	<u>ChapterNumber</u>	<u>Title of the Topic</u>
1.		Cover Page
2.		Title Page
3.		Declaration by Student
4.		Certificate by Supervisor
5.		The Acknowledgment
6.		Table of Case Laws
7.		List of AbbreviationsUsed in Dissertation
8.	1	Introduction to Military Justice System in South Asian Countries
9.	2	Primary and Secondary DataFor the Topic in Concern
10.	3	Existing Military Laws inSuch Countries
11.	4	Drawbacks of These Existing Military Laws
12.	5	Suggestions to OvercomeThese Drawbacks
13.	6	Conclusion of theDissertation

**\*\* BIBLIOGRAPHY AT THE END \*\***

## **TABLE OF CASE LAWS MENTIONED IN DISSERTATION**

S. No	Case Law Name	Year
1.	Halima Khatun V Bangladesh	1972
2.	KH Eteshamudin V Bangladesh	1980
3.	Lieutenant Prithipal Singh Bedi V Union Of India	1990
4.	Union Of India V CS Gill	2000
5.	Union Of India V PS Gill	2013
6.	Ranjit Thakur V Union Of India	1987
7.	District Bar Association, Rawalpindi V The SC	2015
8.	Brigadier Retired FB Ali V The State	1975

## **LIST OF ABBREVIATIONS USED IN DISSERTATION**

<b>S. No.</b>	<b>Abbreviation</b>	<b>Full Form</b>
1.	JAG	Judge Advocate General
2.	CrPC	Criminal Procedure Code
3.	SC	Supreme Court
4.	AFT	Armed Forces Tribunal
5.	DGLD	Director General Law-fare Directorate
6.	NIO	National Investigation Officer
7.	OAG	Office of Attorney General
8.	HC	High Court
9.	IPC	Indian Penal Code

## **The Chapter I**

### **(Introduction To Military Justice System In South Asian Countries)**

The term 'Military Justice' refer to the set of laws which are made or are enacted or implemented so as to give a specific structure to laws concerned with the armed forces etc.

It is done so, so that they can easily be identified and get distinguished from the civilians.

Such forces play a crucial role as they protect their country from various external dangers.

For the purpose of dissertation; we shall be dealing such laws prevalent in the South Asia.

It comprises of the countries of Bangladesh, Bhutan, India, Pakistan, Nepal and Sri Lanka.

Recently it has been considered that Afghanistan and Maldives also form part of it.

### **TOP 25 MOST POWERFUL COUNTRIES IN THE ASIA-PACIFIC REGION, 2018**

**CEOWORLD Magazine**

#### **SUPER POWERS**

- 1. United States
- 2. China

#### **MAJOR POWERS**

- 3. Japan
- 4. India

#### **MIDDLE POWERS**

- 5. Russia
- 6. Australia
- 7. South Korea
- 8. Singapore

- 9. Malaysia
- 10. Indonesia

- 11. Thailand
- 12. New Zealand

- 13. Vietnam
- 14. Pakistan

- 15. Taiwan
- 16. Philippines
- 17. North Korea

#### **MINOR POWERS**

- 18. Bangladesh

- 19. Brunei

- 20. Myanmar
- 20. Sri Lanka

- 22. Cambodia
- 23. Mongolia
- 24. Laos
- 25. Nepal

Source: Sydney-based Lowy Institute

## Laws In India

It has three types of military laws- The Army Act 1950, the Air Force Act 1950 and the Navy Act 1957. These are the statutory provisions or laws for the army personnel.

\*\*Military- Collectively called Armed Forces\*\*

As per the Section 45 of the Code<sup>2</sup>; no member of the Armed forces can be arrested by the police of the civilians for doing anything or to be done during the performing of the official duties assigned, except in cases where there is a consent and approval by the Central Government.

A JAG n India is an executive for the military, appointed by the chief of staff in concern. It does not perform functions of any Advocate, nor of any Judge.

SC<sup>3</sup> has held that the military litigants have no vested right of appeal, against any Armed Forces Tribunal (AFT) in the country.

- Recently SC<sup>4</sup> has ruled that one can only approach SC after AFT, if aggrieved.

{AFT was established in 2009 under its 2007 Act- A judicial tribunal to provide justice to the military personnel, in lieu of the existing civil courts)

- Somewhere somewhat situation can be seen in the country of Nepal.

## Laws In Nepal

Here a General Court Martial can pronounce life imprisonment as well as confiscation of the ancestral property in concern to the offenders involved in enmity or say mutiny etc.

Also there is a Special Court Martial in the country of Nepal which comprises of a Judge /Chairperson + Secretary of Ministry of Defence + Chief Judge Advocate. It has the original jurisdiction to adjudicate the matters which come before it. It is appealable in nature and matters of appeal can be filed before the SC.

- Nepal Army Act 2006- Section 22 provides immunity to the acts done during the official duty time while Section 66 enlists offences.

<sup>2</sup> CrPC 1973

<sup>3</sup> In 2012

<sup>4</sup> In 2015

## **Laws In Pakistan**

Here a military offender can be sentenced to death.

Pakistan has its own Army Act<sup>5</sup>.

The JAG head is conventionally considered as the principal law officer of the legal wing of the army. It deals with litigation matters of the military.

Recently<sup>6</sup> the term 'Director General Law-fare Directorate (DGLD)' has been enforced. Its power and role, is considered to be superior to that of a JAG.

## **Laws In Bangladesh**

Its Army emerged during the Liberation War of Bangladesh<sup>7</sup>. Now this Army is considered to be third most powerful army in South Asia.<sup>8</sup>

In this country, Human Rights Commission has no mandate to take action against the Forces.

The country has its own Army Act 1952. Any offender under the Act; will be taken into the military custody. Concept of JAG is also given. Also the Act provides for 4 types of Martial Courts- General, District, Field General and Summary.

- This Act does not allow for second trial in the same matter.

## **Laws In Bhutan**

Here the Army is divided into 5 military branches- Royal Bhutan Army, Royal Bodyguard, National Militia, Royal Bhutan Police and the Forest Guards.

Under the Army Act 1971; there are 5 types of Court Martial- Summary, General, Disciplinary, Special General and Royal Bhutan Army.

<sup>5</sup> 1952 Year

<sup>6</sup> 2014 Year

<sup>7</sup> 1971 Year

<sup>8</sup> Global Fire Power 2019 Ranking

## **Laws In Sri Lanka**

The Army Act<sup>9</sup> states mainly that if a person, who is related to military law, commits some offence whether inside or outside Sri Lanka then it may be tried and punished by a Court Martial, present at any place that time- Jurisdiction not a hindrance.

## **Laws In Afghanistan**

Division or bifurcation of the Armed Forces here- Afghan Armed Forces + Afghan National Army + International Security Assistant Force + Afghan Air Force + Frontier Corps

There is even a Military Criminal Procedure Code. It is to regulate the procedure related to the crimes of the Afghan Armed Forces or its service members.

## **Laws In Maldives**

It recently came up with its own Armed Forces Act.<sup>10</sup>

It has its own National Defence Force- Coast Guard + Marine Corps + Special Forces + Service Corps + Special Protection Group + the Military Police.

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<sup>9</sup> Of 1949

<sup>10</sup> In 2008

## **Statement Of Problem**

There are many problems or issues that need to be analysed so as to find solutions for a better military justice system in the South Asia.

Some accused in the military, in some countries are not even entitled for a legal help during a summary trial. No right to appeal lie against punishments awarded in summary trial.

The laws of evidence hardly get applied to such forces and their proceedings are not even of public nature. In Sri Lanka, an accused may demand that evidence against him to be taken on an oath.

There is not much provision for review of punishments in the South Asian countries except in India and that too since 2009 only.

Also finding and sentencing may be once received by order of confirming authority. There is no right to appeal to it though now it is available in India and Nepal.

The Judge Advocate General has neither the functions of a judge nor of an advocate. It remains under functional control of the convening authority. This means it is not independent in nature which can lead to bias opinions or decisions. The powers of the convening authority are not appealable in nature.

One of the biggest issues is that the military justice system in South Asia lack concepts of the right to counsel, independent and impartial adjudicating authority, right to fair trial, reasoned judgment and the right to appeal.

Even these countries have been reporting cases enforced disappearances, illegal imposition of curfew, rape, molestation, sexual harassment, killing of protected persons, arbitrary detentions and torture.

There have been instances where it has been alleged that Rapid Action Battalion (RAB), a special police force with close links to army, has been responsible for these offences but still not much action has been taken yet since Human Right Commission does not have any mandate to take any action against the disciplined forces.

Some reports show that no military person has been prosecuted in Nepal for the abuse of human rights committed during conflicts, lasting for over ten years.

Nowadays the civilians have started doubting the fairness of a military trial.

Thus we observe that accountability of serious human rights violations is a key area of concern in South Asia.

## **Objectives Of Research**

**The upcoming thesis or dissertation aims to achieve some objectives as listed below-**

- ❖ Finding out the existing military laws and their actual level of implementation.
- ❖ Looking for reasons of grey areas or loopholes in such laws
- ❖ Analysing the laws both in the interests of the civilians and the armed forces
- ❖ Understanding the rationale of all the military laws that existed till date
- ❖ Check the extent of abuse of military laws with their grounds

The primary focus here being, looking for the solutions so as to overcome hindrances that come in between in process of making an ideal Military Justice System in the South Asian region.

## **Hypothesis**

- ❖ I assert that India has one of the top disciplined military in the world and that Pakistan has the least powerful military.
- ❖ I assert that there is no fair trial procedure for the armed forces and that Judge Advocate General (JAG) takes no right decisions.
- ❖ I assert that South Asian countries still don't have the ideal military justice system and also that there are no special laws for armed forces in Afghanistan.
- ❖ I assert that there are no laws to provide justice to the victims who are mentally or physically or sexually assaulted by the armed forces.
- ❖ I assert that there are no legal ways to provide justice to the military.

## **Research Questions**

**This thesis aims to examine and critically answer some research questions which are enlisted as below:**

- ❖ Are the military laws sufficient in the country?
- ❖ Do such laws provide blanket protection to the military?
- ❖ Is there a need of law to provide basic rights of civilians to the military as well?
- ❖ What changes can be done in military justice system to make it ideal?
- ❖ How can their adjudication system be more fair and transparent?

## **Research Methodology**

### **Primary Approach-**

- Making a questionnaire based on basics of prevailing military justice.
- Taking opinions of at least 30 people on the questionnaire, being from different fields like say doctors or lawyers or civilians or judges etc
- Doing a survey on the awareness of military laws prevailing in own country.
- Preparing pie charts or bar graphs for the purpose of study.
- Drawing conclusions from the observations made from primary data.

### **Secondary Approach-**

- Looking for authorised recent reports on the military justice system of South Asia
- Studying of such reports and recommendations or suggestions if any
- Creating a hypothesis of such study.
- Making list of observations and drawing conclusions on the same.

## **Survey Of Literature**

### **I. Atrocity and American Military Justice in Southeast Asia<sup>11</sup>**

It is a study of how the American military legal system handled the crimes against the civilians with various atrocities civilians usually face during the wars era.

### **II. Mapping Security in the Pacific<sup>12</sup>**

It focuses on the looking after the interests of the pacific island countries by emphasizing more on the roe of its organizational structure, power dynamics and gender play for the outcomes thereof.

### **III. Military Intervention and Secession in South Asia<sup>13</sup>**

It shows how South Asia was too into the secessionist movements within the military where areas like Bangladesh, Sri Lanka, Kashmir and Punjab provide for a right situation for the examination of such compelling issue.

#### **IV. Everyday Occupations: Experiencing Militarism in South Asia & Middle East<sup>14</sup>**

It depicts how even during the 21<sup>st</sup> century, political conflicts and militarization have come along to constitute a worldwide social condition instead of being an exception. It shows how the occupation of military now increasingly building relations even with sovereignty.

#### **V. Women and Politics of Peace: : South Asia Narratives on Militarization<sup>15</sup>**

It discusses the experiences of the females negotiating conflict and post-conflict situations to deliver some transformative peace.

It covers aspects like women participation, militarization, peace building, violence, justice and even the accountability therefore.

#### **I. Army Lawyers in Southeast Asia and Judge Advocates in Vietnam<sup>16</sup>**

It is about the history of the ones who served as soldier-lawyers within the Southeast Asia region in concern particularly in the period between 1959 and 1975.

It explains how Army Lawyers were good at handling more than legal missions and the way how they enhanced the success of military operations.

#### **II. The Courts, The Army and The Government<sup>17</sup>**

This research paper examines how with time, Pakistan has started becoming more interventionist which is impacting both the elected political authority and the military also. It also examines the implications of it.

#### **III. The Military and the Indian Democracy since Independence<sup>18</sup>**

It attempts to explore how India has succeeded to put the military out of the politics and why many other countries failed in doing so. It also explores on how India's democracy survived in middle of all this. It even draws a comparison of India with Pakistan on such matters and such military regimes in regard.

<sup>11</sup> Trial by Army by Louise Barnett

<sup>12</sup> By Sara N Amim

<sup>13</sup> By Anne Noronha Dos Santos

<sup>14</sup> By Kamala Viswesaran

<sup>15</sup> By Rita Manchanda

#### **IV. Military Justice in the Modern Age<sup>19</sup>**

It provides insights from both scholars and practitioners on reforms to military justice in individual countries including UK, Canada, Netherlands and Australia & in wider regions of South Asia and Latin America parts.

#### **V. Indian Military Modernization and Conventional Deterrence in South Asia<sup>20</sup>**

It raises concerns over the still ongoing continuous military modernization in India and how it can become or be a threat to the traditional military balance within the country.



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<sup>16</sup> By Fredric L. Broch III

<sup>17</sup> The Tangled Triangle of Turmoil in Pakistan by I. A. Chowdhary

<sup>18</sup> By Steven I. Wikinson

<sup>19</sup> By Alison Duxbury

<sup>20</sup> By Walter C. Ladwig III

## The Chapter II

### (The Primary And Secondary Data)

#### **THE PRIMARY DATA:**

QUESTIONNAIRE ON THE BASICS OF MILITARY JUSTICE SYSTEM IN INDIA-

Questions   Responses 30

**MILITARY JUSTICE IN SOUTH ASIA- SPECIFICALLY INDIA**

TO CHECK AWARENESS OF BASIC CONCEPTS RELATED TO MILITARY IN INDIA

Name \*

Short answer text

Profession \*

Short answer text

Age \*

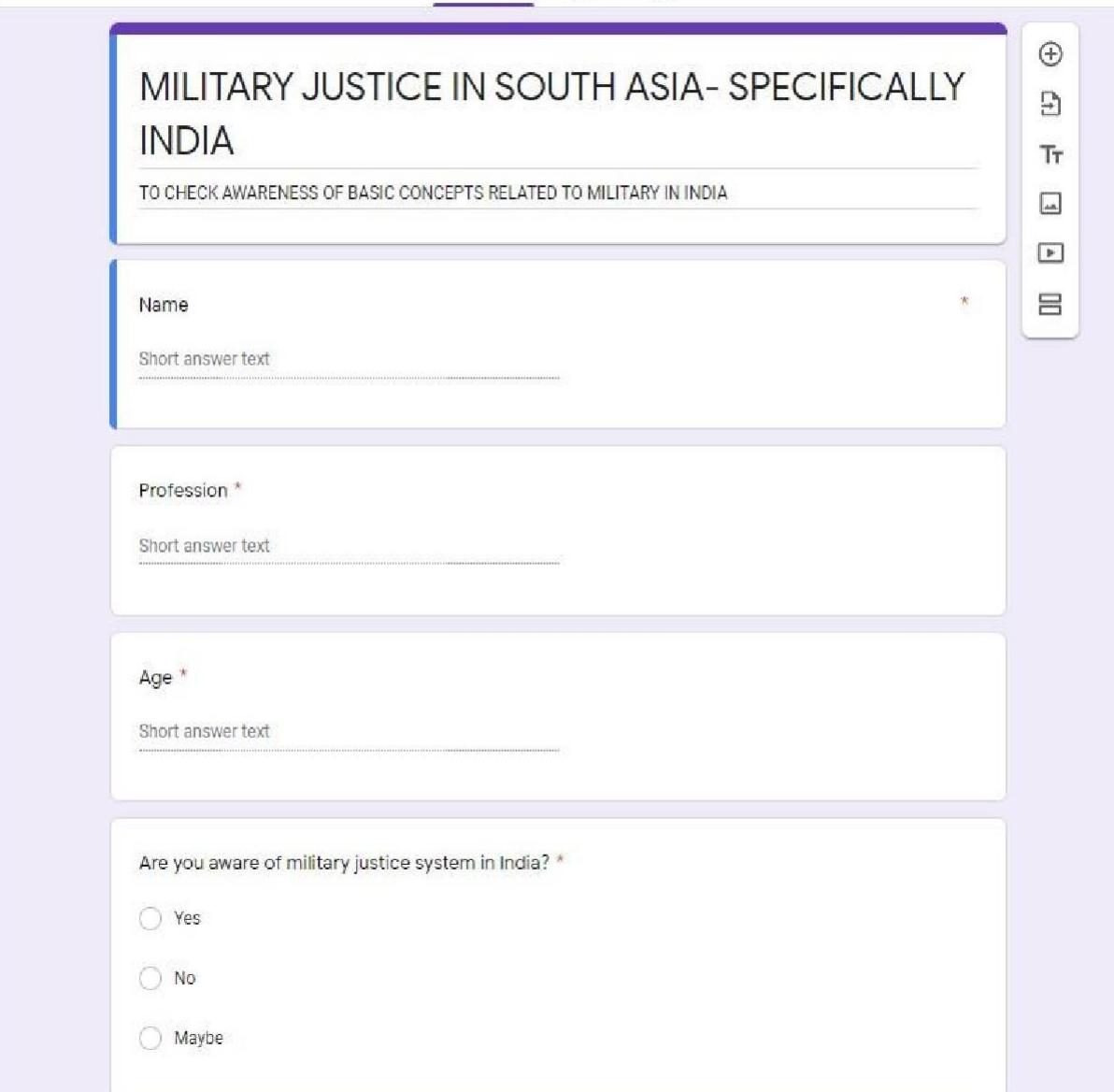
Short answer text

Are you aware of military justice system in India? \*

Yes

No

Maybe



Questions   Responses **30**

How many Acts are mainly there in our Military Law? \*

1  
 2  
 3  
 4

Does Military include only Armed Forces? \*

Yes  
 No

Are decisions of Armed Forces Tribunal appeal-able? \*

Yes  
 No  
 Do not know

Does Military enjoy the same Fundamental Rights as others? \*

Yes  
 No  
 No but with some exceptions  
 Yes but with restriction



Where is the Principal Bench of Armed Forces Tribunal? \*

- New Delhi
- Mumbai
- Kolkata
- Bangalore



How many Regional Benches are there in India of such Tribunal? \*

- 7
- 8
- 10
- 12

Indian Military has how many divisions? \*

- 2
- 3
- 4
- 5

Do you know Chief of Defense Staff in India? \*

Yes

No

Are you aware of the term 'JAG' in Indian Army? \*

Yes

No

Maybe

#### RESPONSES OF THE QUESTIONNAIRE IN CONCERN-

30 responses



Accepting responses

Summary

Question

Individual

Name

30 responses

Rajneesh

Punit

Preeti

Raj

Neeti

Priya

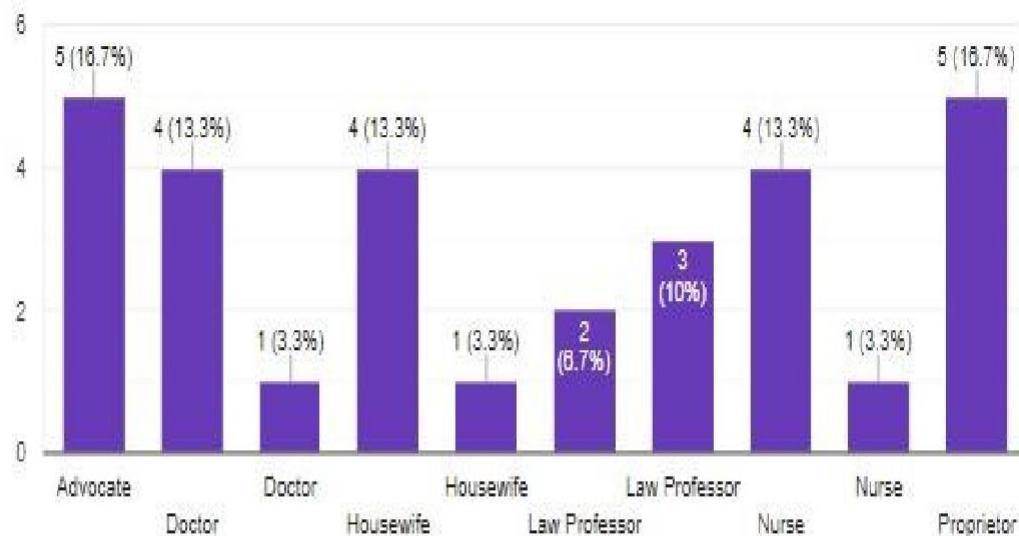
Rajesh

Taani

Pooja

## Profession

30 responses



## Age

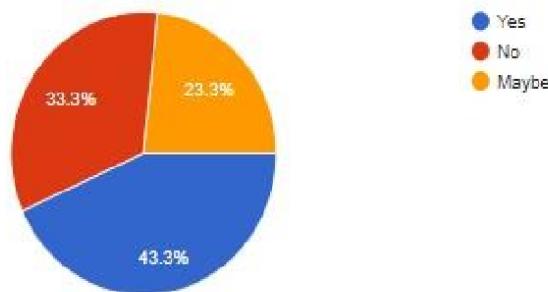
30 responses



## **Observations From The Responses Of The Questionnaire In Concern-**

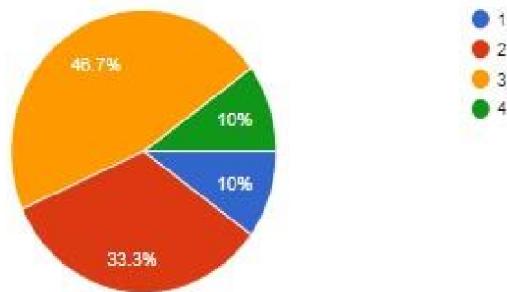
Are you aware of military justice system in India?

30 responses



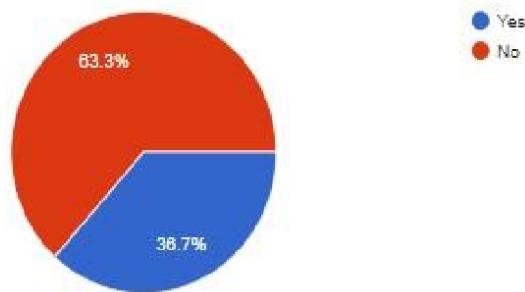
How many Acts are mainly there in our Military Law?

30 responses



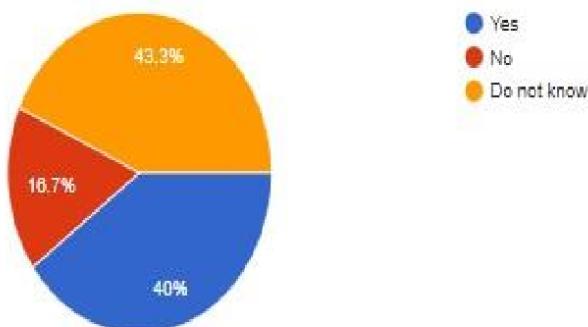
Does Military include only Armed Forces?

30 responses



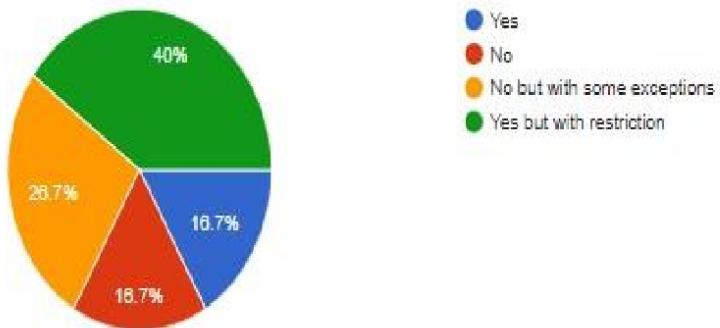
Are decisions of Armed Forces Tribunal appeal-able?

30 responses



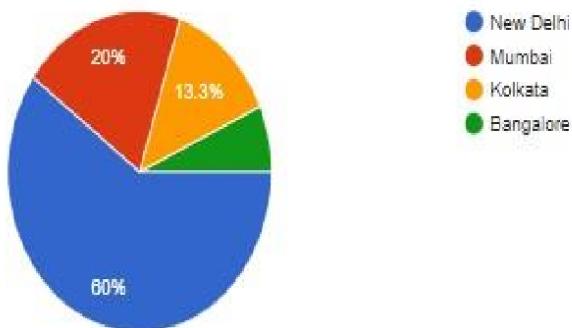
Does Military enjoy the same Fundamental Rights as others?

30 responses



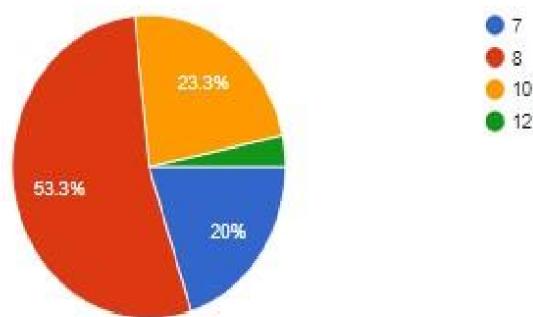
Where is the Principal Bench of Armed Forces Tribunal?

30 responses



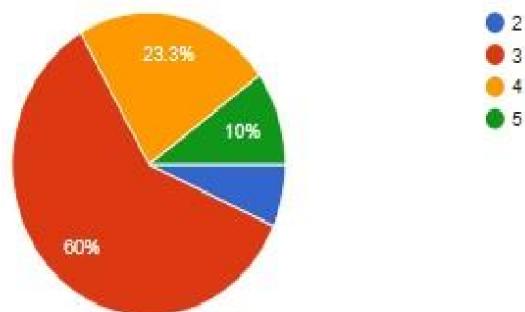
How many Regional Benches are there in India of such Tribunal?

30 responses



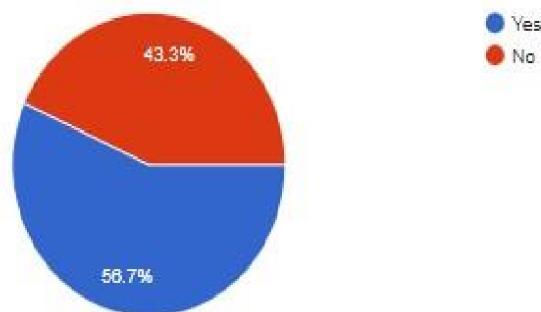
Indian Military has how many divisions?

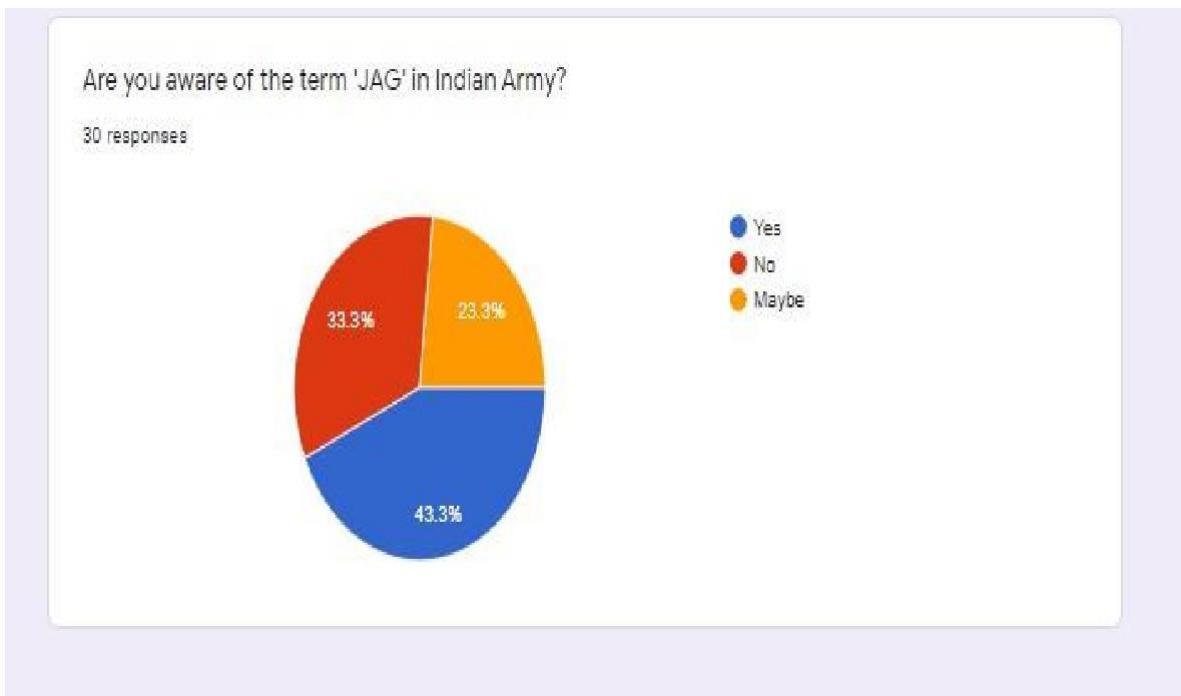
30 responses



Do you know Chief of Defense Staff in India?

30 responses





#### CONCLUSIONS FROM THE OBSERVATIONS FROM THE RESPONSES

- ❖ Only 43.3 % claim that they are aware of the military justice system in India.
- ❖ Hardly 40% know that there are actually 3 main laws for the military in India.
- ❖ About 36% know that Military and Armed Forces are same in a way.
- ❖ 40% are aware of the fact that AFT Orders are appealable in nature.
- ❖ Majority know that Armed Forces in India enjoy same fundamental rights as of the civilians but with some restrictions.
- ❖ 60% do know that AFT Principal Bench is in New Delhi, India.
- ❖ Barely 20% know that there are other 7 Regional Branches of AFT in India.
- ❖ Majority know the basic- The 3 divisions of Indian Military.
- ❖ 56% around think or believe that they know the Chief of Defence Staff in India (General Bipin Rawat being the concerned- Not Defence Minister, Rajnath Singh)
- ❖ Almost 43% state that they are of the concept of JAG in the Indian Army.

## The Secondary Data:

Few Recent Incidents Related To Military Justice System In The South Asian Region

# Probe in Army recruitment scam finds candidates in defence academy who paid 'bribes' to get in

CBI handed probe into Army recruitment scam, books 17 officers and personnel for alleged bribery & irregularities in admissions to National Defence Academy (NDA), Officers Training Academy (OTA).

SNEHESH ALEX PHILIP 16 March, 2021 6:13 pm IST

The screenshot shows a news article from a newspaper website. At the top, there's a navigation bar with links for MENU, HOME, NEWS, OPINION, BUSINESS, SPORT, ENTERTAINMENT, CROSSWORD+, SCIENCE, NEWS, NATIONAL, INTERNATIONAL, STATES, CITIES, and a link to NEWS > INTERNATIONAL. Below the navigation bar, the word 'INTERNATIONAL' is highlighted in blue. The main headline reads 'Bhutan general, 2 judges held for 'overthrow' plan'. Below the headline is a photo of a person with the caption 'AFP'. To the right of the photo are the publication details: THIMPU, FEBRUARY 18, 2021 21:29 IST and UPDATED: FEBRUARY 18, 2021 21:29 IST. Below the photo are sharing options for Facebook, Twitter, LinkedIn, WhatsApp, Email, and Print, along with font size controls (A, A, A). The article begins with the sub-headline 'Plot against Army chief, Chief Justice'. It then describes how police detained a top general and two judges over an alleged plot to overthrow the country's top military officer and Chief Justice. It mentions that former Royal bodyguard commandant Brigadier Thinley Tobgay, Supreme Court judge Kuenley Tshering, and top district court judge Yeshey Dorji appeared in court on Wednesday after being detained at their homes. The article also notes that the three were accused of plotting to overthrow Lieutenant General Batoos Tshering by implicating him in a corruption scandal. Finally, it states that all three were denied bail by the Thimphu district court and remanded in custody until a first formal hearing on February 27.



NEWS    ABOUT    THEMES

## Military “justice” system: a glaring surrender of human rights

JANUARY 16, 2019

The trial of civilians by military courts is a glaring surrender of human rights and fundamental freedoms, found the ICJ in its Briefing Paper *Military Injustice in Pakistan* released today.



The region still suffers from serious, systematic and ongoing violations of human rights and the rule of law:

- Armed conflict continues in several parts of the region (particularly Pakistan and India) with government forces, as well as insurgents, violating international humanitarian law and perpetrating human rights violations, notably unlawful killings and enforced disappearances;
-

## Some Observations From The Incidents Shown Above:

- ❖ Delayed system to provide justice to the concerned personnel
- ❖ Direct arrest on basis of some evidence
- ❖ Detention one of the common punishments
- ❖ Common offence- Act of sedition or waging war
- ❖ Gross violation of human rights
- ❖ No speedy trials for the military
- ❖ Assumed to be guilty at first instance
- ❖ Frequent unlawful killings of civilians
- ❖ Violation of fundamental rights
- ❖ Not all basic rights available to the military, as available for civilians
- ❖ Special / different military justice system
- ❖ Easily the armed personnel get accused of some offence / charge
- ❖ No validity of ‘innocent until proven guilty’
- ❖ Military system shows surrender of human rights
- ❖ Shows cases of the enforced disappearances

## Some Conclusions From The Observations Mentioned

### Above (Can Be Said As ‘Some Suggestions’):

- ❖ Need for a more efficient military justice system
- ❖ Need for speedy trials for the military
- ❖ Need of protocol for ‘grounds of arrest’ of the armed forces
- ❖ Punishment to be at par with the offence / crime
- ❖ Need a system to maintain the basic fundamental rights
- ❖ Not all offences / acts to be considered ‘against the country’
- ❖ More rights to be given and enforced for the military
- ❖ Requirement of some database to keep check on disappearances
- ❖ Some guidelines of ideal structure for military laws, needed
- ❖ Maybe need of some ‘disciplinary committee’ for the military
- ❖ More systematic ‘redressal mechanism’ for the military could help
- ❖ More opportunity of ‘being heard’
- ❖ More judicious use of principles of natural justice required

## THE CHAPTER III

### (Existing Military Laws In The Concerned Countries)

#### CASE IN BANGLADESH

On 20 August 1975; KM Ahmed, the then President, issued a proclamation stating in of the provisions that no court or supreme court or any tribunal etc would have any power or authority to question the validity or laws given in any martial law / regulation / rule passed.

Halima Khatun v Bangladesh<sup>21</sup>: Case of writ petition filed so as to challenge the government order regarding some abandoned property. But soon, Martial Law Order VII was enforced which led to the assumption of such property being of the government.

It was stated that this Martial Law Order cannot be questioned as it is out of the original jurisdiction of the SC. Also it was stated that

- This was the first case law regarding the interpretation of martial laws of the country

It was finally held that any martial law or proclamation or order etc subordinates the constitution of the nation.

(Period when the country was under the martial rule completely)

Later in 1976 under the seventh amendment; a new Article was inserted and thus an office for the Advocate General was created. In the same year third proclamation was passed leading to appointment of Ziaur Rahman as Chief Martial Law Administrator.

KH Eteshamudin v Bangladesh<sup>22</sup>:

- Case related to capital punishment in a special martial court.

It was held that the Chief Martial Law Administrator has the powers to transfer a case from the criminal Martial Law Court in concern to the Special Martial Law Court- As per Martial Law Regulation 3 (2). Also it was held that supremacy of the country's constitution in no way be competent to the Proclamation (s), headed by the Chief Martial Law Administration.

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<sup>21</sup> Case of 1978

<sup>22</sup> Case of 1980

Since then, for many years, the martial law has remained the supreme law of the land. Even though if constitution gets evaded, it has been subordinate to the martial law and is subjected to it. In no case the Supreme Court can come in conflict with the martial laws.

Thus we can say that the moment the country of Bangladesh is under martial law (in few circumstances); the constitution along with other existing laws lose their superiority.

We can observe that no government in this country for decades had no control over the armed forces of the nation.

Many leaders have tried to increase their power and have more roles in decision making for its people but till date, many times, it has not been possible without the military intervention.

In such cases; civilian control do not have their own decision making powers.

*It could be due to-*

- Institutionalized purgatives- Military having more power in governance
- Informal contestation in political sphere

So it can be said that civilians and military primacy in decision making can be under-

- Elite recruitment i.e. the political regime
- Public policy
- Internal security
- National defence
- Military organizations

Here the decisions of the military depends upon-

- Hardware of its organisation i.e. the overall structure
- Software of it i.e. basis of recruitment, etc

Hence we see that even after independence, Bangladesh failed to implement the parliamentary system that it had planned for many decades. It has been ruled many years either by military rule or with military involvement.

It was in the year that a free and fair general election was conducted. It led to the development of the ‘House of the Nations’

- *Leading to a Parliamentary Democracy & Independent Judiciary*

### THE ARMY ACT 1952-

- A comprehensive Act for the Bangladesh Army unit.

It has been in existence ever since it was passed. It has been followed by the military till date; irrespective of who has been in power to regulate the country.

#### Some Provisions-

- Death penalty can be given by the court martial in concern: hanging or shooting.
- Execution of detention in military custody or detention barrack
- 4 types of Court Martial- General, District, Field, Summary
- Prohibition of second trial for same offence
- Concept of JAG
- Requirement of judicial notice within the general military knowledge
- Warrant to be issued by the Chief of Army Staff
- Grounds for granting pardon or suspension
- Provision for withholding pay and allowances during the trial
- Even punishment for abetment or attempt of the offence in concern

Thus we see the role of Court Martial in providing the justice to the military in concern.

#### Role of National Investigation Officer-

It is concerned with looking after and sharing information related to the conduct and discipline of the military unit in concern whenever it goes for a mission.

#### Role of the Commanding Officer-

- It has the duty of framing charges related to sexual exploitation or say abuse by military accused.
- Also conducts prosecutions in cases of summary trials.

## **CASE IN BHUTAN**

The Royal Bhutan Army got organized as a proper military force in the early 1950s, time of China desire to take over Tibet.

With time, one standing army got well established by 1963 with required military training.

The Royal Bhutan Army protects the country not only from the external threats but also from internal issues related to it say counterinsurgency.

Thus in a way, it is responsible for both external and internal security of the nation.

It is answerable to the Ministry of Home and Cultural Affairs. On the other hand, the King is the Chief of the Royal Bhutan Army itself.

Some restrictions on rights available to this Army-

- Freedom of peaceful assembly or say association
- Freedom of movement

Here the government intervenes whenever there is any report of any kind of human abuse by this Army particularly.

The Royal Bhutan Army has a systematic well-established military justice system.

- Presence of a JAG
- System to redress legal issues in Armed Forces
- Establishment of Armed Forces Court of Justice- Both civil & criminal

As per their Army Act<sup>23</sup>; there are various types of Court Martial (Legal Proceedings)-

- Summary
- General
- Disciplinary
- Special

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<sup>23</sup> Act of 1971

### Role of the Commanding Officer-

- Investigation into administrative and disciplinary matters
- Head of all troops for discipline purpose
- Has the power to try the accused summarily
- Has reference matters by higher forum for grave offences
- Can order for investigation if required somewhere in the military
- Enhance the existing policies for better implementation
- Can appoint Officer for sexual exploitation cases and incidents similar to it

### Role of National Investigation Officer (NIO)-

- Has a legal officer for investigating the allegations in concern
- Can refer matters to Senior or Commanding Officer

### Role of the Royal Bhutan Army for Justice-

- Investigate or even prosecute by members of the concerned security forces
- Has power to further investigate an ongoing matter
- Can transfer case to Office of Attorney General (OAG) if required

### Establishment of Army Welfare Committee<sup>24</sup> -

- Provide housing, food and income for Royal Bhutan Army / Guards
- Has provisions for retirement benefits
- Has started with providing food for army units in Western Bhutan<sup>25</sup>
- Helps the disabled personnel with welfare benefits
- Provisions for pre retirement training
- Free medical care for the disabled and the retired

<sup>24</sup> Established in 1978

<sup>25</sup> A pilot project of 1979

## CASE IN INDIA

Considering what military justice is; it is nothing but a set of laws which is to govern the armed forces in the country so as to provide them with justice. The country in concern, might use special forces for its enforcement / implementation.

Sometimes it is different from martial law. Martial law is more of rule of military authority over the civilians in a country, say during times of war or emergency unrest etc. it totally depends on the circumstances at a given point of time.

Justice system in India has been one of the oldest in the world.. It started with British rule in the 18-19<sup>th</sup> century. It follows the common law system, the traditional and fundamental system have precedents, customs, usages etc.

The Courts in India have a hierarchy. There is the SC at the highest level and various HC<sup>26</sup> under it. District courts are seen at the lowest level.

For the Military Justice System in India; India has 3 main Acts (legislations)- Army Act<sup>27</sup>, the Air Force Act<sup>28</sup> and the Navy Act<sup>29</sup>. These are the set of laws that are applicable to the members of the military of the country. India does have laws for its para-military force too like it has Acts of Border Security Force Act, Coast Guard Act and so on; all being under Army Act.

### Concept of Summary Courts Martial-

It was first seen in India after the mutiny in Bengal Army Act 1857. It was realized that there were irregular forces especially in Punjab, having lack of discipline. Need had arisen for a regular disciplined force with set of punishments and rewards for the armed forces with the mentioning of extent of powers they hand and in what matters.

This led to the Commanding Officer getting the power of convicting and sentencing any offender in the military force. Later having the power to issue warrants and even for the execution of the sentences pronounced to the military offender; thus playing more or less a role of a Magistrate.

<sup>26</sup> High Court

<sup>27</sup> Year 1950

<sup>28</sup> Year 1950

<sup>29</sup> Year 1957

With time, the military in India got its structure and became more organized. This led to the establishment of Summary Court Martial. This got legal recognition by 1869.

Proceedings of a summary court martial are held by 2 persons who are junior level commission officers, who cannot be a part of the proceedings. Even they do not have any voting rights.

Thus a summary court martial can be called a court of offences done by the soldiers / army.

It can pass or order for any sentence, depending upon the gravity of the offence done by the armed personnel in concern. However it cannot pass a death sentence / penalty.

Also there is a restriction on this summary court martial. It cannot pronounce an imprisonment punishment exceeding 3 months to a Major ranked officer.

- An accused here cannot defend itself with a defending officer or counsel.
- Also the Commanding Officer aids in examination of the concerned witnesses.

The decisions of the Summary Court Martial are considered to be final in nature and binding. Appeals in some way can be done before the Officers, superior in rank, as per the provisions of the law prevalent; which usually get rejected though since usually an offender is assumed to be guilty, once declared by the Court martial.

- With time, recently the decisions of Summary Court Martial are now appealable before the HC & SC as valid for other legal proceedings

We thus observe that till date, Indian military justice system still has the base of what the British introduced in the country under their Rule.

All the laws that exist for the military in India, are with respect to the Indian Constitution framework for the armed personnel.

- Article 21- Foundation of Human Rights- Right to Life- For every person
- Article 33- Poses restrictions on military for the purpose of disciplined behaviour during the time of their official duties
- Articles 136 and 227 restricts jurisdiction of higher judiciary over the court martial decisions and findings in concern.

Case of Lieutenant Prithipal Singh Bedi v Union of India<sup>30</sup>:

First time ever it was realized there is a requirement of a separate forum, backed by some legislation, so as to address and resolve the issues and grievances of the Indian Military.

The Parliamentary Estimate Committee in its 19<sup>th</sup> Report<sup>31</sup> recommended for an independent tribunal or board for the armed forces but no step was taken for it.

In Union of India v CS Gill<sup>32</sup>; the loopholes got highlighted in the Parliament administration regarding military justice in India.

Finally in 2007; the Armed Forces Tribunal Act came up; so as to create separate tribunals for the military force in India.

This tribunal is quasi-judicial in nature, responsible to maintain discipline by enforcing law and order in the Indian Military Force whether it is Army or Navy or Air Force.

This tribunal hears and decides issues / complaints / grievances / disputes of the armed forces in concern as per the 3 main Acts, mentioned earlier- Appealable before the SC.

In Union of India v PS Gill<sup>33</sup>; it was held that any order passed by the court martial can be appealed or challenged before an Armed Forces Tribunal.

This tribunal even takes up the appeal matters from the orders or sentences passed by the court martial, as per relevant Act.

The Principal Bench of such Tribunals is in New Delhi, India. The rest regional branches are in Chandigarh, Lucknow, Kolkata, Guwahati, Kochi, Mumbai and Jaipur.

Each Bench of every Tribunal has a Judicial Member and one of Administration. The Judicial Members are the retired military members, having rank of a Major for more than 3 years.

- A member being JAG for more than a year can also be considered for the position of Administrative Member of these Tribunals.

Current Chairperson of the Principal Bench is Justice Rajendra Menon.

The 2007 Act is supported by the Armed Forces Tribunals Procedure Rules which came in 2008. It usually overall follows the procedure practiced by the HC & SC in India.

<sup>30</sup> SC in 1990

<sup>31</sup> In year 1992

<sup>32</sup> SC in 2000

<sup>33</sup> SC in 2013

The Armed Forces Tribunals also act as a criminal court as per relevant provisions of the CrPC and IPC<sup>34</sup> for the Military in India.

Usually the court martial acts like a criminal trial court for the military as per the 3 main Acts, mentioned earlier.

*There are 4 types of court martial (trial by a military court) in India-*

- General
- District
- Summary General
- Summary

Court Martial, in past, have been used for the trial of the prisoners of war in military form.

In Ranjit Thakur v Union of India<sup>35</sup>; it has been held that the type and period of punishment lies within the discretion of the concerned court martial. It should be within prescribed form and on basis of evidences along with be free from all kinds of biasness.

Some common elements of a general military trial, seen in India-

- Own defence
- Open facts and figures
- Limitation period for each kind
- Independence and impartiality
- Rights related to inspection
- Open trial, for public
- Rights for the appeal
- Provisions for grant of pardon (like President power- Article 72, Indian Constitution)
- Conversions into writs

Some common punishments given by Court Martial-

- Termination from the Forces
- Forfeiture of benefits like pension
- Giving up on the Rank of the concerned Force

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<sup>34</sup> Indian Penal Code 1860

<sup>35</sup> SC in 1987

Some Rights or Privileges present for the Indian Military-

- Under the Pension Act<sup>36</sup>

*Section 11*- Pensions being immune from the attachment related court decrees

- Under the Indian Stamp Act<sup>37</sup>

*Article 53, Schedule I*- No stamps for pay and allowances of Sepoys during official duty time

- Under the Civil Procedure Code<sup>38</sup>

*Rule 28 of Order V*- Process of sending summons to the accused armed member

*Rule 1 of Order XXVIII*- Rules for Military using its powers to defend its own matter

- Under the Army Act<sup>39</sup>

*Section 28*- Immunity from attaching arms or equipments etc, for the official duty purpose

*Section 29*- Immunity from arrest in cases of debt in any revenue matter

*Section 30*- Immunity from arrest for the people attending the concerned court martial

*Section 32*- Prioritizing the matters related to litigation matters of the armed personnel

*Section 33*- Rights and privileges being relevant as given in other Acts of Air Force & Navy

*Section 125*- Having a choice between a criminal court and a court martial

- Under the Air Force Act<sup>40</sup>

*Section 28*- Immunity from attaching arms or equipments etc, for the official duty purpose

*Section 29*- Immunity from arrest in cases of debt in any revenue matter

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<sup>36</sup> 1871

<sup>37</sup> 1899

<sup>38</sup> 1908

<sup>39</sup> 1950

<sup>40</sup> 1950

*Section 30*- Immunity from arrest for the people attending the concerned court martial

*Section 32*- Prioritizing the matters related to litigation matters of the air force

*Section 33*- Rights and privileges being relevant as given in other Acts of Army & Navy

*Section 124*- Having a choice between a criminal court and a court martial

- *Under the Navy Act*<sup>41</sup>

*Section 20*- Immunity from attaching arms or equipments etc, for the official duty purpose

*Section 21*- Immunity from arrest in cases of debt in any revenue matter

*Section 22*- Immunity from arrest for the people attending the concerned court martial

*Section 24*- Priority to hear and decide matters related to the personnel in naval service

*Section 26*- Rights and privileges being relevant as given in other Acts of Air Force & Army

- *Under the Arms Act*<sup>42</sup>

*Sections 3, 4*- License for the military for carrying an arm or say fire arm or any ammunition

*Section 45*- Permission for the military by the Government for using the arms & ammunitions

- *Under the CrPC*

*Section 45*- No member of the armed personnel can be arrested for act done during the duty

*Section 197 (2)* - No prosecution to be begun for the military doing its official duty

*Section 475*- Persons of the military to be tried only by the concerned Court Martial and in some cases even a HC can do so.

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<sup>41</sup> 1957

<sup>42</sup> 1959

## **CASE IN PAKISTAN-**

Recently<sup>43</sup> the Pakistan Government in its Lower House has passed a Bill which aims towards the criminalising the offender, whoever criticises the military of the country.

It would in a way be considered like defaming the nation's government and thus can lead up to Rs. 5 lakhs fine or 2 years imprisonment or both, as the case may be.

Usually the punishments for the military offenders are harsh in nature in Pakistan.

For example, in 2019, 2 Army Officers were directly given death penalty in a spying matter.

The concept of Military Courts in Pakistan came up in 2015.<sup>44</sup> It was essential to speed up the trials of the military offenders; for their better military justice system + with more expertise.

It aims at providing a type of tribunals which is impartial and independent in its decisions.

The main Acts for the Military in Pakistan are the Army Act, Air Force Act<sup>45</sup>, the Pakistan Navy Ordinance<sup>46</sup> and the Protection of Pakistan Act<sup>47</sup>: Headed by Ministry of Defence .

With time, in 2017, now there is even provision for punishing the terror suspects in military.

District Bar Association, Rawalpindi v the SC<sup>48</sup>:

Commonly known as the Military Courts case, it was held that the latest amendments for the military justice in the country is constitutional in nature and it meets the standards for performing a fair trial to the military personnel

Usually the court martial in Pakistan acts like a criminal trial court for the military as per the Army Act<sup>49</sup>

<sup>43</sup> In April 2021

<sup>44</sup> 21<sup>st</sup> Constitutional Amendment

<sup>45</sup> 1953

<sup>46</sup> 1961

<sup>47</sup> 2014

<sup>48</sup> SC in 2015

<sup>49</sup> 1952

There are 4 types of court martial (trial by a military court) in Pakistan-

- General
- District
- Field General
- Summary

Court Martial, in past, have been used for the trial of the prisoners of war in military form.

General Court Martial-

It is the highest trial court in the nation. Its convening officer may dissolve it, when it seems fit, for the purpose of maintaining law and order.

It requires a judge advocate or a substitute to commence the legal proceedings.

District Court Martial-

It is a trial court for relatively less serious offences or crimes and it mandatorily requires the presence of a judge advocate in its proceedings.

Field General Court Martial-

It has the powers to do trial and pass any sentence to the concerned military offender as per the provisions of the Army Act 1952.

Its proceedings consist of at least 3 officers.

Summary Court Martial-

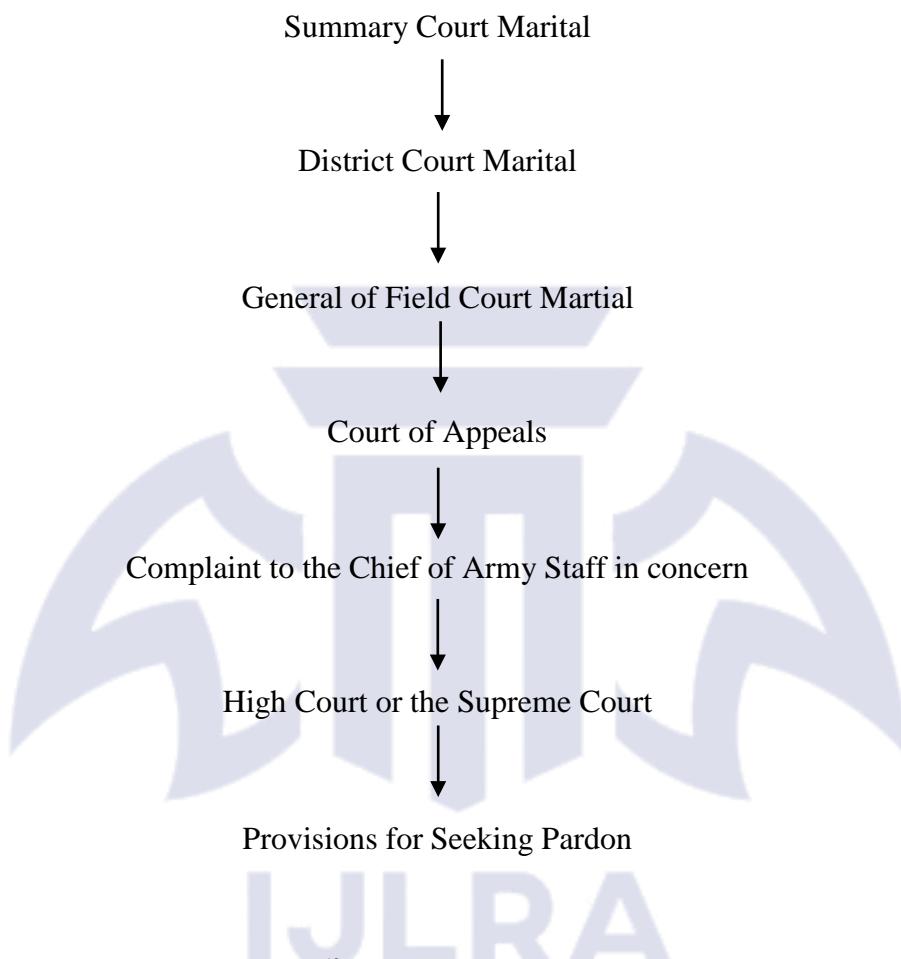
It is a trial court for the minor level serious offences like those offences having punishment of imprisonment for a term less than a year.

It can also not award a punishment exceeding 3 months to the one with Major rank.

All the matters in the court martial are appealable in nature whether it eb before the HC or the Sc, as the case may be.

First appeal is done to the Court of Appeals as per the concerned Acts.

Even the concept of ‘review’ is present for the tribunals or the court martial decisions.



Brigadier Retired FB Ali v the State<sup>50</sup> - Held the procedure used by above forums to be in consistency with the principles of criminal justice.

#### Role of a Judge Advocate in Pakistan-

- To give legal advice in matters of the prosecution of accused personnel
- Can conclude evidence and form an opinion in some matter
- Looks after the accused military offender so that trial is done in a fair way
- Needs to be present in matters to be taken up by the general court martial
- To determine fairness of trials, with no legal qualification

<sup>50</sup> SC in 1975

## **CASE IN NEPAL-**

Its structure is more or less same as of that of Indian Military Justice System.

### The Military Structure in Nepal-

- The Army
- The Air Wing of Army
- Armed Police Force
- The Naval Army
- The Marine Force

The Army Act 2006 of it, under Chapter V talks about some privileges available to them-

- No case to be filed against any act done during official duty
- Protection from arrest from the ones attending military legal proceedings
- No seizure or forfeiture of the arms, vehicles etc of the military
- No freezing of the salary and the allowances
- Nepal's military to be given priority while hearing the cases
- Provisions for the review or revisions of decisions
- Laws for military, not to be affected by other laws

Even for the welfare of the military in the country, Chapter VI of the Act talks about the creation of an Army Welfare Fund.

In the year 2008, the Directorate for Human Rights was established. It has a military personnel department as well.

Based on its recommendations; Nepalese Army has enforced many guidelines, instructions, directives etc for the welfare of the military in the country.

### Some examples-

- Provisions for conducting inquiry before trial
- Role of the JAG to look for other evidences
- Appointment of board of court martial, if required
- Publishing of the court orders in the military cases
- Awareness of the laws among the military
- Proper training and aid for the personnel in need
- Creation of women friendly environment
- Setting up committee for check on human rights

(Refer to the Chapter VIII of the Army Act) Usually the court martial acts like a criminal trial court for the military

There are 4 types of court martial (trial by a military court) in Nepal-

- General- 5 or more members with more than 3 years of service
- District- 3 or more members with more than 3 years of service
- Summary General- 3 or more members
- Summary- Presided by officer having rank of commander or above

The District Court Martial has no power to impose death penalty to the military offender.

Some common civil punishments seen in the military justice system here-

- 30 days confinement
- Extra duty hours
- Fine up to 14 days pay
- Compensation of losses
- Temporary suspension from duty

Military offenders in Nepal cannot be tried twice by any forum for the same offence.

Some role of the JAG in the Army-

- Considered to be a judicial officer
- Can give advice on the legal matters of the military
- Supervises the military in concern
- Creation of more law and order in the military

## **CASE IN SRI LANKA**

The main legislation for the military justice in Sri Lanka is the Army Act 1949.

Here the Army consists of-

- A regular force
- A regular reserve
- Volunteer force
- Volunteer reserve

The Commander of the Army has to be appointed by the President of the country.

The Part VI of the Army Act deals with the Grievances of the Personnel.

- First complaint to be done before the Commander of the Army
- All decisions of the forums are appealable
- Even a written appeal can be done to the President of Sri Lanka

The trials under the Army Act are more of summary nature, for speedy justice of the personnel. Even there is a trial for cases of misconduct by the personnel.

Types of Court Martial under the Army Act-

- General- Requires 5 Officers if grave offence else 3 Officers
- Field General- Minimum 3 Officers
- District

Some special provisions for the Military under the Army Act-

- No trial if once acquitted from the offence
- No re trial if once done summarily
- No prosecution if once all charges removed on same matter
- Cases can be sent for reference or revision
- Provisions for reduction of the penalty awarded
- Entitlement of a counsel for the accused military personnel

The other essential legislation s for the military in Sri Lanka-

- Sri Lanka Navy Act with Regulations 1950
- Sri Lanka Air Force Act 1949

Even different writs like mandamus, certiorari and prohibition can also be filed against the military personnel who are accused of some offence.

- Mandamus is order from higher court to lower court so as to get some performance done which is public in nature
- Certiorari is more of higher court reviewing the orders of lower court
- Prohibition is restraining some order of lower court.

Any offender from the military, once assumed to be accused, will be taken into military custody from immediate effect.

- 24 hours rule applicable i.e. to be present before some legal forum
- Proper written statement to be made stating charges of the offences
- Can be released from custody if no next step taken within 7 days
- Reasons for need to be in custody to be stated before the concerned court martial
- No delay in investigation to be permitted
- Trial to be done summarily

Only in selected offences, military offender can be arrested without a warrant.

Some common punishments for the military offenders-

- Demotion to the lower rank
- Reprimand from the official authority of the personnel
- Deduction of the pay
- Penalizing in form of fines
- Temporary suspension
- Imprisonment
- Change in troop

## **Case In Afghanistan**

The systematic organized military force of Afghanistan was formed in the year 2002.

- It is now more balanced, ethical and disciplined in its functioning.

The Afghanistan military is divided into-

- Afghan Armed Forces
- Afghan National Army
- International Security Assistant Force
- Afghan Air Force
- Frontier Corps

Overall it is headed by the Ministry of Defence and General Staff, located in Kabul (capital).

Afghanistan has its own Military Criminal Procedure Code.<sup>51</sup>

It is meant to regulate the process of the trials of the accused in the military force so as to give a uniform procedure of investigation, evidence collection and fairness in the trials.

- The decisions of the courts are appealable in nature: Court of Appeals
- No specific jurisdiction in courts to be followed.
- A military offender can also be tried under the Constitution of the nation.
- There are now military courts to provide more speedy justice to the military.
- Is applicable to all types of military forces in the country.
- With time, even creation of military tribunals is coming up.
- Statement of accused by use of force is not acceptable by court of law.
- Accused has to be informed of every step of trial.
- Accused has the right to remain silent.
- Investigation to be done only by the concerned military prosecutor.
- Accused has the right to hire a counsel for its defence.
- Minimum 3 military judges to hear every matter.
- Supreme Court decision to be considered of the highest value in cases of appeals.

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<sup>51</sup> 2005

## **CASE IN MALDIVES**

Recently in 2018 year, the Maldives government passed a law and ordered its military force to resist from any directions passed by the SC of the country.

The same applies for the process of impeachment of President by civilians and military.

### The Armed Forces Act<sup>52</sup>-

It was enforced so as to lay down a set of duties, rules, regulations, principles, norms and principles related to the military force in the country.

It even aims towards a fairer and speedier justice system for the military.

- The Act provides for a National Security Council so as to advice or say guide the Commander in Chief in the legal matters.
- Act allows for creation of Reserved Forces, if required in some situation.
- Act prohibits the military from being associated to any political person.
- Act allows military working with police in cases of emergencies.

It also enlists various powers / immunities / privileges that the armed forces have, whether it be Navy or Army or the Armed Forces in the country. Some being-

- No charges to be made to the military if act done during official duty
- Only compensation for loss to be given by military for minor offences.
- Provisions for using specially created welfare funds for the armed forces.
- Having license to use arms and ammunitions
- Registration of all military vehicles

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<sup>52</sup> Bill of 2006 passed in 2008 as Act

## **THE CHAPTER IV**

### **(Drawbacks Of The Military Laws Discussed)**

#### **IN BANGLADESH-**

It was in the year 1986 that martial law finally came to an end in Bangladesh.

It was more like independence for the nation. The laws for military and for the ci villains thus had some distinction and separation.

Though there have been so many developments till date, somewhere still, the head of the Army there holds s more dominant position during the country's governance.

We can observe that the true colours of democracy do not reflect as in ideology.

One of the flaws we clearly observe in Bangladesh is that the country was under martial law for many years which means civilians had no say in its own laws.

The civilians had to blindly follow what the military used to say but this is not right.

Civilians should have the right to express what they actually want or desire from the nation.

Also one cannot impose same penalty or punishment like the military does. Rights of both the civilians and the military should be apart from each other.

Military is for the security of the country. If they do any wrong then there has to be different judicial system for them and different punishments. And they have no authority to impose all these on the civilians of the nation.

Also the basic or fundamental rights of the military should be different from civilians.

Military can use arms or ammunitions for the security purpose but if civilians also tart carrying every time and misuse the power of it then it can cause more unrest and disturbance.

Civilians should have more freedom to express their views or opinions but military cannot say everything in public since some facts are crucial to maintain law, order and peace.

In initial years of Bangladesh, there was no separation of powers in fact only military rule was there and that too for years.

A country needs military for protection and not for ruling purpose. There has to be ideally a parliamentary system so that only unit is focussed on law making.

This would make Judiciary separate from the Parliament, thus being independent and impartial in its decisions leading to a fairer trial.

Also if the military is responsible for both the governance of the nation and protecting the nation from threats then it won't be able to focus on one thing.

All the focus and mindset of the military should only be on security of the country and not anything else so as to maintain law and order.

Thus we observe that everyone has some basic implied functions so being stick to it shows better performance of the same.

The existing Army Act of the country made for military, has flaws too-

- No second appeal is allowed.
- Based on some facts, there is direct arrest or detention.
- No prior notice or warrant provision before arrest is there
- Many times the accused is not aware of the actual circumstances
- Family of the accused suffers since pay and allowances get withheld once accused
- Commander Officer can easily frame charges on the accused
- No proper system of appeal for the accused is given
- Not all fundamental rights are there for the military
- Sometimes 'innocent till proven guilty' also not followed here.

*We need to realize that even military is human but here their human rights are being violated and even the principles of natural justice too.*

By principles of natural justice we mean mainly are concerned with the right of being heard and the decision of the justice to be free from any biasness.

## **IN BHUTAN**

As per some findings; it is considered to be a flaw that the military of the country is responsible for even the internal threats apart from the external ones.

This means that for smallest disturbances within the country and military taking any harsh step for it, can lead to extreme level political unrest.

This also means that military will be accused even for minute offences and for the offences that they have even not committed, which means lack of justice for the military.

One of the drawbacks could be the King being the Chief of the Army.

This shows that the King can even misuse its powers and can command any punishment for any offence for the military, accused in concern.

King should be responsible for the welfare of the people and not the military.

There needs to be separate and independent justice system for the military since sometimes even the extreme steps taken by them, are in the interests of the security of the country.

One of the law provisions state that the government has full freedom to intervene in the matters whenever there is any case of human rights violation by the military.

The role of the government is primarily to make laws and promote welfare of the citizens. Their role is not to look after the judicial matters. That is the work of Judiciary.

There is a need of a proper systematic military justice system which is impartial, independent and rationale in its decision making.

Even the military, like the civilians, have the basic human rights for themselves.

The Commanding Officer has too many powers including investigation of the military cases.

There needs to be some authority to which appeals can be done for the actions done by the Commanding Officer. Here we again observe that an authority can be misusing the powers apart from what allotted to it easily, which will be detrimental to the interests of the military.

## IN INDIA-

In a way we can say that military personal choice is never given importance.

This shows how much impartiality and lack of choice is given to the military in India. We can say that this is against the justice system of them.

Many times their point of view is not considered before taking up a mission and many times the most experienced military does not get an opportunity to take up more than one mission at a time even if there is a need of it.

Even many times the opinions of military do not matter and their Chief takes a decision without consulting its team force.

The Military in India thus has very less opportunity, less incentives and less recognition than what they actual deserve for their work done for the security of the nation.

There are very less laws and provisions for the education of the military.

This means many of them not being fully aware of their rights whenever any legal matter against them comes up. This also means they are not even aware of the basic rights, that is, they can easily be exploited and no legal redressal could be given to them.

Lack of education also means that the Chief cannot help much its force whenever any crisis arises since they are not also aware of the solutions available for them.

The Military in India have full powers and license to use arms and ammunitions.

This means that they can be easily charged of any crime even during time of official duties and with no sufficient proof. This is against the basics of providing justice.

The Military accused of any offence, is taken into custody with no warrant or any kind of legal notice- Their basic fundamental human rights being violated.

One of the flaws seen in Military Justice System in India is the Commanding Officer sometimes having the role of Magistrate which is unfair and unjust for the accused.

Many times the decisions of the orders or the judgments passed by Summary Court Martial are considered final and binding.

This is against the rules of justices. If an accused is aggrieved by some decision of any legal forum then at least once it should get the right of appeal.

Sometimes it could be the case that some witnesses could not be presented or some fact was mentioned or some legal error was done so for such cases, there has to be some check system in form of say appeal or review or anything.

The Indian Military Justice system still has laws or its basis of the British Rule Era.

This shows that somewhere the old laws are being used in the current legal system. Laws need to be dynamic, change with time, need and circumstances. It is not necessary that the offences that existed earlier, exist today as well.

Also the type of punishments and value of fines also change with time. Obsolete laws cannot help us now much.

The Armed Forces Tribunal Act<sup>53</sup> was enforced after so many decades of independence.

This means that till the time there was no such Act, the military of India was provided justice in the same manner as that of civilians.

This means more delayed justice grant system, more paper related work, more work load on same courts and no expertise for dealing with the cases of the military.

Around 15 Main Benches of Armed Forces Tribunal are there in India.

- This is so less in comparison to the number of matters pending.

*Also these Tribunals more or less follow the principles of natural justice, which are not much binding in nature.*

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<sup>53</sup> Act of 2007

There is no provision for the legal aid in the laws for India for the Military.

There are many military personnel who are not that financially stable so as to afford the cost of litigation or say Advocate to defend its legal case where it has been accused of some offence. Right to defend is a basic right which is not provided here.

The Summary Court Martial usually gives imprisonment of less than 3 months.

Sometimes the offence is more grave or serious than expected, seen after conducting various stages of trial. But the law bars this Martial for granting imprisonment more than 3 months, which is unjust and unfair for the interests of the public at large.

Sometimes the matters of civil contempt are death with Government instead of Armed Forces Tribunal or any concerned Court Martial.

This is arbitrary and against the law since in India, only Judiciary can take up legal matters and decide on it after recording statements, evaluating evidences etc.

The current Laws for Military in India does not have any provision or the expertise level of the Members of the Judiciary dealing with the offences of the armed forces.

This can result in arbitrary or unfair or irrational or illogical decision of any legal matter dealing with some offence committed by some armed forces.

There is a need for proper education for them to reach that expertise level which can actually help the military getting the right justice. Not only education but there is also need for some type of formal training needs to be there, for the practical right training.

There should also be a uniform system for their appointment, disqualification, promotion / demotion, suspension and aspects related to it.

The 3 main Acts have very similar laws but for different types of military.

This causes chaos and confusion. There needs to be advanced legal uniform code which helps in administering the military justice in right and definite way.

A law degree should become mandate for all types of court martial or members of tribunal or for JAG so that justice could be granted in right directions

There is no right of bail in any legal provision of the military laws in India.

Bail is one of the basic human rights of the person detained but ironically there is not even a single rule or provision for the military in India particularly.

No provision for right to hire a prosecutor in Summary Court Martial.

Every accused in any part of the world has the basic right of hiring an Advocate to defend its case. It is the basic arrest related right. Everyone has the basic principle of justice to be heard once, its side of version of the case. This shows a gross human right violation.

No law for the military specifically prohibits the second trial for same offence.

Indian Constitution does prohibit double jeopardy.<sup>54</sup> It states that no person to be charged or tried or arrested for the same offence twice. But no law in India states the same for the armed forces, which is a big flaw in the military justice system.

There is no provision for fast track courts for the military in India.

Armed forces are responsible for the safety and security of the country. If the accused is not guilty then it should be held as speedily as possible. It should not wait for years to be declared innocent. Armed forces are the vitals for the country.

The concept of JAG is vague in nature.

It has no essential role in providing justice to the military. It neither has a role of a judge nor of an advocate. Its opinions are not completely binding. Rather its view might bias the decisions of the judicial authorities in concern for the military legal matters.

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<sup>54</sup> Article 20 (2)

## IN PAKISTAN-

It has been a good initiative for penalizing the ones who criticize the military but it has some issue too. If one is not told about the deficiencies in the services they perform then they will not improve. It is about the military of country who is responsible for the security. If they actually do something wrong then citizens should have the right to express it.

The types of punishments for the military offenders are too harsh in nature.

Even for spying for small matters, penalty is given as capital punishment. Agreed that doing anything against the country and that too by military is not right but straight away pronouncing death penalty for the military is somewhere wrong. It is violation of human rights and punishment too cruel for the offence committed.

The concept of Military Courts came up in 2015.

It is surprising to know that the government took decades to establish separate military justice system, the ones who are so important for the working of the country.

This not only delayed their justice period but also increase the workload of the existing courts in the country.

The concept of JAG is vague in nature.

It has no essential role in providing justice to the military. It neither has a role of a judge nor of an advocate. Its opinions are not completely binding. Rather its view might bias the decisions of the judicial authorities in concern for the military legal matters.

It has a long procedure for getting appeal.

This increases the time period to get justice. Military personnel cannot work during this period. Their basic rights also get infringed. Sometimes they are even not given basic pay and allowances during such period.

## **IN NEPAL-**

The Military accused of any offence, is taken into custody with no warrant or any kind of legal notice- Their basic fundamental human rights being violated.

Many times the decisions of the orders or the judgments passed by Summary Court Martial are considered final and binding.

- *This is against the rules of justices.*

If an accused is aggrieved by some decision of any legal forum then at least once it should get the right of appeal.

Sometimes it could be the case that some witnesses could not be presented or some fact was mentioned or some legal error was done so for such cases, there has to be some check system in form of say appeal or review or anything.

There is no provision for the legal aid in the laws for Nepal for the Military.

There are many military personnel who are not that financially stable so as to afford the cost of litigation or say Advocate to defend its legal case where it has been accused of some offence.

*Right to defend is a basic right which is not provided here.*

There is no right of bail in any legal provision of the military laws in Nepal.

Bail is one of the basic human rights of the person detained but ironically there is not even a single rule or provision for the military in India particularly.

There is no provision for fast track courts for the military.

Armed forces are responsible for the safety and security of the country. If the accused is not guilty then it should be held as speedily as possible. It should not wait for years to be declared innocent. Armed forces are the vitals for the country.

## IN SRI LANKA-

The Military accused of any offence, is taken into custody with no warrant or any kind of legal notice- Their basic fundamental human rights being violated.

There is no provision for the legal aid in the laws for the Military.

There are many military personnel who are not that financially stable so as to afford the cost of litigation or say Advocate to defend its legal case where it has been accused of some offence. Right to defend is a basic right which is not provided here.

There is no right of bail in any legal provision of the military laws.

Bail is one of the basic human rights of the person detained but ironically there is not even a single rule or provision for the military particularly.

The existing Army Act of the country made for military, has flaws too-

- No second appeal is allowed.
- Based on some facts, there is direct arrest or detention.
- No prior notice or warrant provision before arrest is there
- Family of the accused suffers since pay and allowances get withheld once accused
- No proper system of appeal for the accused is given
- Not all fundamental rights are there for the military
- Sometimes ‘innocent till proven guilty’ also not followed here.

Many times the decisions of the orders or the judgments passed by Summary Court Martial are considered final and binding.

This is against the rules of justices. If an accused is aggrieved by some decision of any legal forum then at least once it should get the right of appeal.

Sometimes it could be the case that some witnesses could not be presented or some fact was mentioned or some legal error was done so for such cases, there has to be some check system in form of say appeal or review or anything.

## IN AFGHANISTAN-

Afghanistan has no Civil Procedure Code for its Military but has one for Criminal cases.

This means there is no uniform system to deal with the civil cases or offences done by the military. They usually follow what the civilians usually follow or justice in such cases.

The basic or fundamental rights of the military should be different from civilians.

Military can use arms or ammunitions for the security purpose but if civilians also start carrying every time and misuse the power of it then it can cause more unrest and disturbance.

Civilians should have more freedom to express their views or opinions but military cannot say everything in public since some facts are crucial to maintain law, order and peace.

The concerned Criminal Procedure Code has no provisions regarding the jurisdiction.

This can easily lead to wrong punishments or penalties being given to the military. This can even cause confusion of where to actually file the required complaint.

This can also result in multiplicity of the proceedings, causing more time to get justice and more pressure on judicial forums to deliver the verdict.

The concept of Military Courts recently got added.

Here we see that the government took decades to establish separate military justice system, the ones who are so important for the working of the country.

This not only delayed their justice period but also increase the workload of the existing courts in the country which had to handle cases of both the civilians and the military.

There is no right of bail in any legal provision of the military laws.

Bail is one of the basic human rights of the person detained but still there is not even a single rule or provision for the bail of the military particularly.

## IN MALDIVES-

The Military has full powers and license to use arms and ammunitions.

This means that they can be easily charged of any crime even during time of official duties and with no sufficient proof. This is against the basics of providing justice.

The Military accused of any offence, is taken into custody with no warrant or any kind of legal notice- Their basic fundamental human rights being violated.

The Armed Forces was enforced after so many decades of independence.

This means that till the time there was no such Act, the military of Maldives was provided justice in the same manner as that of civilians.

This means more delayed justice grant system, more paper related work, more work load on same courts and no expertise for dealing with the cases of the military.

There is no provision for the legal aid in the laws for the Military.

There are many military personnel who are not that financially stable so as to afford the cost of litigation or say Advocate to defend its legal case where it has been accused of some offence. Right to defend is a basic right which is not provided here.

There is no right of bail in any legal provision of the military laws.

Bail is one of the basic human rights of the person detained but ironically there is not even a single rule or provision for the military particularly.

There is no provision for fast track courts for the military.

Armed forces are responsible for the safety and security of the country. If the accused is not guilty then it should be held as speedily as possible.

It should not wait for years to be declared innocent. Armed forces are the vitals for the country.

## **THE CHAPTER V**

### **(Suggestions To Overcome The Drawbacks Of The Military Laws Discussed)**

#### **IN BANGLADESH-**

There is a need for proper judicial intervention and system to keep a continuous check on the human rights violation within the military.

There should be some authority which keeps an eye to see if the accused military is being tortured or forced to own up the offence which actually not done.

There should also be a uniform and independent investigation team for military legal cases so that justice is actually served.

There should full respect of international human rights.

No accused should be treated badly, irrespective of actually offence done or not. Every accused is a human, whether in military or not, so deserves the basic dignity and respect in the society. It should have all the basic fundamental rights except for few since he is accused like restrictions on movement or travel, etc

One of the recommendations could be providing security to the witnesses involved.

This will ensure more fair trial and justice to the accused. Many times the witnesses are caused harm and truth never comes out thus the accused military gets suffered.

One suggestion could be imposing time limit to decide every matter related to military since it is rightly said that 'justice delayed is justice denied'.

One can even take the view of the public for pronouncing judgement as public is also concerned for its safety and security in the country.

The advocates and judges dealing with the military cases, should be more independent in nature. They can take views or opinions of others but should take one right decision based on actual facts and evidences.

There can be human rights activists groups exclusively dealing with the military.

More interaction with them and more aid from them can boost up the accused military confidence and can actually help in reaching the ultimatum goal of justice.

The military should have access to all relevant documents and that too of the government.

No fact or figure related to the legal proceedings of accused military should be hidden. The accused military should be fully aware of every small and big thing related to its case.

There can also be some expert committee who remains updated with military laws time to time so that military law regime never gets obsolete or useless.

Family of the accused military should not suffer.

They should not be deprived of their basic rights of claiming the pay or allowances or benefits associated with the accused military. They should not be openly defamed in public. Their fundamental rights should be respected every time.

No second appeal is allowed for the military.

They should at least get three to four levels of appeal since two appeals is till their Commanding Officer or related member only who is not judicial in nature and has no knowledge of the exact laws to be applied.

Policy of 'innocent until proven guilty' should always be applicable.

No military accused should be detained or arrested or defamed or suspended just because it is accused. It should be treated guilty only if pronounced by judicial form in last appeal.

## **IN BHUTAN-**

The military should not be responsible for the internal threats of the country.

This is very much needed because if not done then it means that for smallest disturbances within the country, military taking any harsh step for it, leading to extreme level political unrest in the nation.

This also means that military will be accused even for minute offences and for the offences that they have even not committed, which means lack of justice for the military.

The King should not be the Chief of the Army.

King can even misuse its powers and can command any punishment for any offence for the military, accused in concern.

King should only be responsible for the welfare of the people and not the military.

There needs to be separate and independent justice system for the military since sometimes even the extreme steps taken by them, are in the interests of the security of the country.

There should be a law which prohibits the government having full freedom to intervene in the matters whenever there is any case of human rights violation by the military.

The role of the government is primarily to make laws and promote welfare of the citizens. Their role is not to look after the judicial matters. That is the work of Judiciary.

There is a need of a proper systematic military justice system which is impartial, independent and rationale in its decision making.

Even the military, like the civilians, have the basic human rights for themselves.

The Commanding Officer should have limited powers .

There needs to be some authority to which appeals can be done for the actions done by the Commanding Officer. Here we again observe that an authority can be misusing the powers apart from what allotted to it easily, which will be detrimental to the interests of the military.

## IN INDIA-

There has to be a provision for creation of fast track courts for the military in India.

Armed forces are responsible for the safety and security of the country. If the accused is not guilty then it should be held free as speedily as possible. It should not wait for years to be declared innocent. Armed forces are the vitals for the country.

The Military in India thus has very less opportunity, less incentives and less recognition than what they actual deserve for their work done for the security of the nation.

There needs to be more provisions for the education of the military.

This means many of them being fully aware of their rights whenever any legal matter against them comes up. This also means they will be more even aware of the basic rights, that is, they cannot easily be exploited and a legal redressal could be given to them.

More education also means that the Chief can help much its force whenever any crisis arises since they will also be aware of the solutions available for them.

The Military accused of any offence, should be taken into custody with a warrant or any kind of legal notice- Their basic fundamental human right.

One of the recommendations could be limiting the powers of the Commanding Officer so that it does not play the role of a Magistrate.

The decisions of the orders or the judgments passed by Summary Court Martial could be made appealable in nature.

If an accused is aggrieved by some decision of any legal forum then at least once it should get the right of appeal.

Sometimes it could be the case that some witnesses could not be presented or some fact was mentioned or some legal error was done so for such cases, there has to be some check system in form of say appeal or review or anything.

The Indian Military Justice system should imbibe more laws with recent developments.

This is required since somewhere the old laws are being used in the current legal system. Laws need to be dynamic, change with time, need and circumstances.

It is not necessary that the offences that existed earlier, exist today as well.

Also the type of punishments and value of fines also change with time.

Obsolete laws cannot help us now much.

There should be more main Benches of Armed Forces Tribunal in India.

Current existing ones are so less in comparison to the number of matters pending.

A new provision should be added for the legal aid in the laws for India for the Military.

There are many military personnel who are not financially stable so as to afford the cost of litigation or say Advocate to defend its legal case where it has been accused of some offence. Right to defend is a basic right which is not provided here.

The Summary Court Martial should increase its imprisonment period.

Sometimes the offence is more grave or serious than expected, seen after conducting various stages of trial. But the law bars this Martial for granting imprisonment more than 3 months, which is unjust and unfair for the interests of the public at large.

The matters of civil contempt should not be dealt with Government, instead to be under Armed Forces Tribunal or any concerned Court Martial.

It will reduce the extent of arbitrariness which is against the law since in India. Only the Judiciary should ideally take up legal matters and decide on it after recording statements, evaluating evidences etc.

There needs to be more expertise level of the Members of the Judiciary dealing with the offences of the armed forces.

This can result in reduction of arbitrary or unfair or irrational or illogical decision of any legal matter dealing with some offence committed by some armed forces.

There is a need for proper education for them to reach that expertise level which can actually help the military getting the right justice.

Not only education but there is also need for some type of formal training needs to be there, for the practical right training.

There should also be a uniform system for their appointment, disqualification, promotion / demotion, suspension and aspects related to it.

There needs to be advanced legal uniform code which helps in administering the military justice in right and definite way.

The 3 main Acts have very similar laws but for different types of military. This causes chaos and confusion for every concerned party/

A law degree should become mandate for all types of court martial or members of tribunal or for JAG so that justice could be granted in right directions

There has to be a clear law of right of bail in the military laws in India.

Bail is one of the basic human rights of the person detained but ironically there is not even a single rule or provision for the military in India particularly.

Requirement of a provision for right to hire a prosecutor in Summary Court Martial

Every accused in any part of the world has the basic right of hiring an Advocate to defend its case. It is the basic arrest related right. Everyone has the basic principle of justice to be heard once, its side of version of the case.

Need of a law for the military specifically prohibits the second trial for same offence.

Indian Constitution does prohibit double jeopardy.<sup>55</sup> It states that no person to be charged or tried or arrested for the same offence twice. But no law in India states the same for the armed forces, which is a big flaw in the military justice system.

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<sup>55</sup> Article 20 (2)

## IN PAKISTAN-

There is a need for extend the term of the military courts.

This will lead to increase in the expertise level of the concerned courts and better decision making, in interest of the military.

There should be more reforms in the military courts like having more choice in using the right to defence own case, some cases to be of public hearing, less forced confessions and provisions for protection against torture in custody.

Not all punishments for the guilty military to be rigorous in nature.

The punishments or sentences pronounced should be at par with actual offence done and the punishments should also lower a bit in cases of minor, if any.

There can be special tribunals to hear the trials of the military offenders in such a way that it is not only fair but also transparent in nature.

One of the recommendations could be providing security to the witnesses involved.

This will ensure more fair trial and justice to the accused. Many times the witnesses are caused harm and truth never comes out thus the accused military gets suffered.

There is no proper procedure to take the military offender to military court so there has to be a clear and transparent method for it for better justice.

There should be appeal provisions for civil cases as it is the basic fundamental right of them.

Military judges and other judicial bodies should mandatorily have a law degree to work.

## IN NEPAL-

The Military accused of any offence, should be taken into custody with a warrant or any kind of legal notice- Their basic fundamental human right.

The decisions of the orders or the judgments passed by Summary Court Martial could be made appealable in nature.

If an accused is aggrieved by some decision of any legal forum then at least once it should get the right of appeal.

Sometimes it could be the case that some witnesses could not be presented or some fact was mentioned or some legal error was done so for such cases, there has to be some check system in form of say appeal or review or anything.

A new provision should be added for the legal aid in the laws for the Military.

There are many military personnel who are not that financially stable so as to afford the cost of litigation or say Advocate to defend its legal case where it has been accused of some offence. Right to defend is a basic right which is not provided here.

There has to be a clear law of right of bail in the military laws.

Bail is one of the basic human rights of the person detained but ironically there is not even a single rule or provision for the military particularly.

There has to be a provision for creation of fast track courts for the military.

Armed forces are responsible for the safety and security of the country.

If the accused is not guilty then it should be held free as speedily as possible. It should not wait for years to be declared innocent. Armed forces are the vitals for the country.

## IN SRI LANKA-

The Military accused of any offence, should be taken into custody with a warrant or any kind of legal notice- Their basic fundamental human right.

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There are many military personnel who are not that financially stable so as to afford the cost of litigation or say Advocate to defend its legal case where it has been accused of some offence. Right to defend is a basic right which is not provided here.

There has to be a clear law of right of bail in the military laws.

Bail is one of the basic human rights of the person detained but ironically there is not even a single rule or provision for the military particularly.

Family of the accused military should not suffer.

They should not be deprived of their basic rights of claiming the pay or allowances or benefits associated with the accused military. They should not be openly defamed in public. Their fundamental rights should be respected every time.

Policy of 'innocent until proven guilty' should always be applicable.

No military accused should be detained or arrested or defamed or suspended just because it is accused. It should be treated guilty only if pronounced by judicial form in last appeal.

The decisions of the orders or the judgments passed by Summary Court Martial could be made appealable in nature.

If an accused is aggrieved by some decision of any legal forum then at least once it should get the right of appeal.

Sometimes it could be the case that some witnesses could not be presented or some fact was mentioned or some legal error was done so for such cases, there has to be some check system in form of say appeal or review or anything.

## IN AFGHANISTAN-

Afghanistan should also have a Civil Procedure Code for its Military like it has one for its Criminal cases.

This means there will be uniform system to deal with the civil cases or offences done by the military since they usually follow what the civilians usually follow or justice in such cases.

The basic or fundamental rights of the military should be different from civilians.

Military can use arms or ammunitions for the security purpose but if civilians also start carrying every time and misuse the power of it then it can cause more unrest and disturbance.

Civilians should have more freedom to express their views or opinions but military cannot say everything in public since some facts are crucial to maintain law, order and peace.

The concerned Criminal Procedure Code should have provisions regarding the jurisdiction.

This is needed else it can easily lead to wrong punishments or penalties being given to the military. This can even cause confusion of where to actually file the required complaint.

This can also result in multiplicity of the proceedings, causing more time to get justice and more pressure on judicial forums to deliver the verdict.

A new provision should be added for the legal aid in the laws for the Military.

There are many military personnel who are not financially stable so as to afford the cost of litigation or say Advocate to defend its legal case where it has been accused of some offence. Right to defend is a basic right which is not provided here.

There has to be a clear law of right of bail in the military laws.

Bail is one of the basic human rights of the person detained but ironically there is not even a single rule or provision for the military particularly.

## IN MALDIVES-

The Military accused of any offence, should be taken into custody with a warrant or any kind of legal notice- Their basic fundamental human right.

The Armed Forces was enforced after so many decades of independence so there is a need for proper maintenance of it.

This means that till the time there was no such Act, the military of Maldives was provided justice in the same manner as that of civilians.

This means more delayed justice grant system, more paper related work, more work load on same courts and no expertise for dealing with the cases of the military.

A new provision should be added for the legal aid in the laws for the Military.

There are many military personnel who are not that financially stable so as to afford the cost of litigation or say Advocate to defend its legal case where it has been accused of some offence. Right to defend is a basic right which is not provided here.

There has to be a clear law of right of bail in the military laws.

Bail is one of the basic human rights of the person detained but ironically there is not even a single rule or provision for the military particularly.

There has to be a provision for creation of fast track courts for the military.

Armed forces are responsible for the safety and security of the country.

If the accused is not guilty then it should be held free as speedily as possible. It should not wait for years to be declared innocent.

Armed forces are the vitals for the country.

## **THE CHAPTER VI**

### **(CONCLUSION OF THE DISSERTATION)**

The term '**Military Justice**' refer to the set of laws which are made or are enacted or implemented so as to give a specific structure to laws concerned with the armed forces etc.

Such forces play a crucial role as they protect their country from various external dangers.

**For the purpose of dissertation; we dealt with such laws prevalent in the South Asia.**

- Bangladesh, Bhutan, India, Pakistan, Nepal and Sri Lanka.
- Afghanistan and Maldives also form part of it.

**There are many problems or issues that were to be analysed so as to find solutions for a better military justice system in the South Asia.**

Some accused in the military, in some countries are not even entitled for a legal help during a summary trial.

No right to appeal lie against punishments awarded in summary trial.

The laws of evidence hardly get applied to such forces and their proceedings are not even of public nature.

In Sri Lanka, an accused may demand that evidence against him to be taken on an oath.

The Judge Advocate General has neither the functions of a judge nor of an advocate. It remains under functional control of the convening authority. This means it is not independent in nature which can lead to bias opinions or decisions. The powers of the convening authority are not appealable in nature.

One of the biggest issues is that the military justice system in South Asia lack concepts of the right to counsel, independent and impartial adjudicating authority, right to fair trial, reasoned judgment and the right to appeal.

Even these countries have been reporting cases enforced disappearances, illegal imposition of curfew, rape, molestation, sexual harassment, killing of protected persons, arbitrary detentions and torture.

Some reports show that no military person has been prosecuted in Nepal for the abuse of human rights committed during conflicts, lasting for over ten years.

## **Nowadays The Civilians Have Started Doubting The Fairness Of A Military Trial.**

**The primary focus for the dissertation was to look for the solutions so as to overcome hindrances that come in between in process of making an ideal Military Justice System in the South Asian region.**

**For the purpose of this dissertation; my primary date was preparing a questionnaire so as to survey about the basics of the military justice system in India.**

**Some conclusive findings on it-**

- ❖ Only 43.3 % claim that they are aware of the military justice system in India.
- ❖ Hardly 40% know that there are actually 3 main laws for the military in India.
- ❖ About 36% know that Military and Armed Forces are same in a way.
- ❖ 40% are aware of the fact that AFT Orders are appealable in nature.
- ❖ Majority know that Armed Forces in India enjoy same fundamental rights as of the civilians but with some restrictions.
- ❖ 60% do know that AFT Principal Bench is in New Delhi, India.
- ❖ Barely 20% know that there are other 7 Regional Branches of AFT in India.
- ❖ Majority know the basic- The 3 divisions of Indian Military.
- ❖ 56% around think or believe that they know the Chief of Defence Staff in India  
Almost 43% state that they are of the concept of JAG in the Indian Army.

### **Scenario in Bangladesh:**

**We observe that no government in this country for decades had any control over the armed forces of the nation.**

Many leaders have tried to increase their power and have more roles in decision making for its people but till date, many times, it has not been possible without the military intervention.

**It was in the year 1986 that martial law finally came to an end in Bangladesh.**

So it can be said that civilians and military primacy in decision making can be under-

- Elite recruitment i.e. the political regime
- Public policy
- Internal security
- National defence
- Military organizations

Here the decisions of the military depends upon-

- Hardware of its organisation i.e. the overall structure
- Software of it i.e. basis of recruitment, etc

Hence we see that even after independence, Bangladesh failed to implement the parliamentary system that it had planned for many decades. It has been ruled many years either by military rule or with military involvement.

It was in the year that a free and fair general election was conducted. It led to the development of the ‘House of the Nations’

- *Leading to a Parliamentary Democracy & Independent Judiciary*

We also see the role of Court Martial is providing the justice to the military in concern.

National Investigation Officer-

It is concerned with looking after and sharing information related to the conduct and discipline of the military unit in concern whenever it goes for a mission.

Commanding Officer-

- It has the duty of framing charges related to sexual exploitation or say abuse by military accused.
- Also conducts prosecutions in cases of summary trials.

One of the flaws we clearly observe in Bangladesh is that the country was under martial law for many years which means civilians had no say in its own laws.

In initial years of Bangladesh, there was no separation of powers in fact only military rule was there and that too for years.

So it has been suggested that there is a need for proper judicial intervention and system to keep a continuous check on the human rights violation within the military.

One of the recommendations could be providing security to the witnesses involved.

Also one of the key suggestions is that the Family of the accused military should not suffer.

They should not be deprived of their basic rights of claiming the pay or allowances or benefits associated with the accused military. They should not be openly defamed in public. Their fundamental rights should be respected every time.

Even The military should have access to all relevant documents and that too of the government.

No fact or figure related to the legal proceedings of accused military should be hidden. The accused military should be fully aware of every small and big thing related to its case.

Also the policy of ‘innocent until proven guilty’ should always be applicable.

No military accused should be detained or arrested or defamed or suspended just because it is accused. It should be treated guilty only if pronounced by judicial form in last appeal.

## **Scenario in Bhutan:**

The Royal Bhutan Army got organized as a proper military force in the early 1950s, time of China desire to take over Tibet.

With time, one standing army got well established by 1963 with required military training.

The Royal Bhutan Army protects the country not only from the external threats but also from internal issues related to it say counterinsurgency.

Thus in a way, it is responsible for both external and internal security of the nation.

It is answerable to the Ministry of Home and Cultural Affairs. On the other hand, the King is the Chief of the Royal Bhutan Army itself.

### Some restrictions on rights available to this Army-

- Freedom of peaceful assembly or say association
- Freedom of movement

As per their Army Act<sup>56</sup>; there are various types of Court Martial (Legal Proceedings)-

- Summary
- General
- Disciplinary
- Special

### Some functions of the Commanding Officer-

- Investigation into administrative and disciplinary matters
- Head of all troops for discipline purpose
- Has the power to try the accused summarily
- Has reference matters by higher forum for grave offences
- Can order for investigation if required somewhere in the military
- Enhance the existing policies for better implementation
- Can appoint Officer for sexual exploitation cases and incidents similar to it

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<sup>56</sup> Act of 1971

National Investigation Officer (NIO)-

- Has a legal officer for investigating the allegations in concern
- Can refer matters to Senior or Commanding Officer

Establishment of Army Welfare Committee<sup>57</sup>-

- Provide housing, food and income for Royal Bhutan Army / Guards
- Has provisions for retirement benefits
- Has started with providing food for army units in Western Bhutan<sup>58</sup>
- Helps the disabled personnel with welfare benefits
- Provisions for pre retirement training
- Free medical care for the disabled and the retired

As per some findings; it is considered to be a flaw that the military of the country is responsible for even the internal threats apart from the external ones.

This means that for smallest disturbances within the country and military taking any harsh step for it, can lead to extreme level political unrest.

This also means that military will be accused even for minute offences and for the offences that they have even not committed, which means lack of justice for the military.

One of the drawbacks could be the King being the Chief of the Army.

This shows that the King can even misuse its powers and can command any punishment for any offence for the military, accused in concern.

King should be responsible for the welfare of the people and not the military.

There needs to be separate and independent justice system for the military since sometimes even the extreme steps taken by them, are in the interests of the security of the country.

It has been seen that the military should not be responsible for the internal threats of the country.

This is very much needed because if not done then it means that for smallest disturbances within the country, military taking any harsh step for it, leading to extreme level political unrest in the nation.

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<sup>57</sup> Established in 1978

<sup>58</sup> A pilot project of 1979

This also means that military will be accused even for minute offences and for the offences that they have even not committed, which means lack of justice for the military.

There needs to be separate and independent justice system for the military since sometimes even the extreme steps taken by them, are in the interests of the security of the country.

There should be a law which prohibits the government having full freedom to intervene in the matters whenever there is any case of human rights violation by the military.

The role of the government is primarily to make laws and promote welfare of the citizens. Their role is not to look after the judicial matters. That is the work of Judiciary.

There is a need of a proper systematic military justice system which is impartial, independent and rationale in its decision making.

Even the military, like the civilians, have the basic human rights for themselves.

### **Scenario in India:**

Justice system in India has been one of the oldest in the world.. It started with British rule in the 18-19<sup>th</sup> century. It follows the common law system, the traditional and fundamental system have precedents, customs, usages etc.

For the Military Justice System in India; India has 3 main Acts (legislations)- Army Act<sup>59</sup>, the Air Force Act<sup>60</sup> and the Navy Act<sup>61</sup>. These are the set of laws that are applicable to the members of the military of the country. India does have laws for its para-military force too like it has Acts of Border Security Force Act, Coast Guard Act and so on; all being under Army Act.

<sup>59</sup> Year 1950

<sup>60</sup> Year 1950

<sup>61</sup> Year 1957

### Concept of Summary Courts Martial-

It was first seen in India after the mutiny in Bengal Army Act 1857. It was realized that there were irregular forces especially in Punjab, having lack of discipline. Need had arisen for a regular disciplined force with set of punishments and rewards for the armed forces with the mentioning of extent of powers they hand and in what matters.

This led to the Commanding Officer getting the power of convicting and sentencing any offender in the military force. Later having the power to issue warrants and even for the execution of the sentences pronounced to the military offender; thus playing more or less a role of a Magistrate.

With time, the military in India got its structure and became more organized. This led to the establishment of Summary Court Martial. This got legal recognition by 1869.

The decisions of the Summary Court Martial are considered to be final in nature and binding. Appeals in some way can be done before the Officers, superior in rank, as per the provisions of the law prevalent; which usually get rejected though since usually an offender is assumed to be guilty, once declared by the Court martial.

- With time, recently the decisions of Summary Court Martial are now appealable before the HC & SC as valid for other legal proceedings

We thus observe that till date, Indian military justice system still has the base of what the British introduced in the country under their Rule.

The Parliamentary Estimate Committee in its 19<sup>th</sup> Report<sup>62</sup> recommended for an independent tribunal or board for the armed forces but no step was taken for it.

Finally in 2007; the Armed Forces Tribunal Act came up; so as to create separate tribunals for the military force in India.

This tribunal is quasi-judicial in nature, responsible to maintain discipline by enforcing law and order in the Indian Military Force whether it is Army or Navy or Air Force.

This tribunal hears and decides issues / complaints / grievances / disputes of the armed forces in concern as per the 3 main Acts, mentioned earlier- Appealable before the SC.

<sup>62</sup> In year 1992

The Principal Bench of such Tribunals is in New Delhi, India. The rest regional branches are in Chandigarh, Lucknow, Kolkata, Guwahati, Kochi, Mumbai and Jaipur.

The 2007 Act is supported by the Armed Forces Tribunals Procedure Rules which came in 2008. It usually overall follows the procedure practiced by the HC & SC in India.

The Armed Forces Tribunals also act as a criminal court as per relevant provisions of the CrPC and IPC<sup>63</sup> for the Military in India.

Usually the court martial acts like a criminal trial court for the military as per the 3 main Acts, mentioned earlier.

There are 4 types of court martial (trial by a military court) in India-

- General
- District
- Summary General
- Summary

Court Martial, in past, have been used for the trial of the prisoners of war in military form.

Some common punishments given by Court Martial-

- Termination from the Forces
- Forfeiture of benefits like pension
- Giving up on the Rank of the concerned Force

In a way we can say that military personal choice is never given importance in India.

This shows how much impartiality and lack of choice is given to the military in India. We can say that this is against the justice system of them.

Many times their point of view is not considered before taking up a mission and many times the most experienced military does not get an opportunity to take up more than one mission at a time even if there is a need of it.

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<sup>63</sup> Indian Penal Code 1860

The Military in India thus has very less opportunity, less incentives and less recognition than what they actual deserve for their work done for the security of the nation.

There are very less laws and provisions for the education of the military.

The Military accused of any offence, is taken into custody with no warrant or any kind of legal notice- Their basic fundamental human rights being violated.

One of the flaws seen in Military Justice System in India is the Commanding Officer sometimes having the role of Magistrate which is unfair and unjust for the accused.

Many times the decisions of the orders or the judgments passed by Summary Court Martial are considered final and binding.

This is against the rules of justices. If an accused is aggrieved by some decision of any legal forum then at least once it should get the right of appeal.

Sometimes it could be the case that some witnesses could not be presented or some fact was mentioned or some legal error was done so for such cases, there has to be some check system in form of say appeal or review or anything.

The Indian Military Justice system still has laws or its basis of the British Rule Era.

This shows that somewhere the old laws are being used in the current legal system. Laws need to be dynamic, change with time, need and circumstances. It is not necessary that the offences that existed earlier, exist today as well.

Also the type of punishments and value of fines also change with time. Obsolete laws cannot help us now much.

One of the biggest flaws is that the Armed Forces Tribunal Act<sup>64</sup> was enforced after so many decades of independence.

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<sup>64</sup> Act of 2007

There is no provision for the legal aid in the laws for India for the Military.

There are many military personnel who are not that financially stable so as to afford the cost of litigation or say Advocate to defend its legal case where it has been accused of some offence. Right to defend is a basic right which is not provided here.

The current Laws for Military in India does not have any provision or the expertise level of the Members of the Judiciary dealing with the offences of the armed forces.

This can result in arbitrary or unfair or irrational or illogical decision of any legal matter dealing with some offence committed by some armed forces.

There is a need for proper education for them to reach that expertise level which can actually help the military getting the right justice. Not only education but there is also need for some type of formal training needs to be there, for the practical right training.

There should also be a uniform system for their appointment, disqualification, promotion / demotion, suspension and aspects related to it.

It has been recommended that a law degree should become mandate for all types of court martial or members of tribunal or for JAG so that justice could be granted in right directions

There is no right of bail in any legal provision of the military laws in India.

Bail is one of the basic human rights of the person detained but ironically there is not even a single rule or provision for the military in India particularly.

No law for the military specifically prohibits the second trial for same offence in India.

Indian Constitution does prohibit double jeopardy.<sup>65</sup> It states that no person to be charged or tried or arrested for the same offence twice. But no law in India states the same for the armed forces, which is a big flaw in the military justice system.

There is no provision for fast track courts for the military in India.

Armed forces are responsible for the safety and security of the country. If the accused is not guilty then it should be held as speedily as possible. It should not wait for years to be declared innocent. Armed forces are the vitals for the country.

<sup>65</sup> Article 20 (2)

The concept of JAG is vague in nature.

It has no essential role in providing justice to the military. It neither has a role of a judge nor of an advocate. Its opinions are not completely binding. Rather its view might bias the decisions of the judicial authorities in concern for the military legal matters.

**Scenario in Pakistan:**

Recently<sup>66</sup> the Pakistan Government in its Lower House has passed a Bill which aims towards the criminalising the offender, whoever criticises the military of the country.

Usually the punishments for the military offenders are harsh in nature in Pakistan.

For example, in 2019, 2 Army Officers were directly given death penalty in a spying matter.

The concept of Military Courts in Pakistan came up in 2015.<sup>67</sup> It was essential to speed up the trials of the military offenders; for their better military justice system + with more expertise.

It aims at providing a type of tribunals which is impartial and independent in its decisions.

The main Acts for the Military in Pakistan are the Army Act, Air Force Act<sup>68</sup>, the Pakistan Navy Ordinance<sup>69</sup> and the Protection of Pakistan Act<sup>70</sup>: Headed by Ministry of Defence .

With time, in 2017, now there is even provision for punishing the terror suspects in military.

Usually the court martial in Pakistan acts like a criminal trial court for the military as per the Army Act<sup>71</sup>

All the matters in the court martial are appealable in nature whether it eb before the HC or the Sc, as the case may be. First appeal is done to the Court of Appeals as per the concerned Acts.

<sup>66</sup> In April 2021

<sup>67</sup> 21<sup>st</sup> Constitutional Amendment

<sup>68</sup> 1953

<sup>69</sup> 1961

<sup>70</sup> 2014

<sup>71</sup> 1952

It has a long procedure for getting appeal.

This increases the time period to get justice. Military personnel cannot work during this period. Their basic rights also get infringed. Sometimes they are even not given basic pay and allowances during such period.

#### Role of a Judge Advocate in Pakistan-

- To give legal advice in matters of the prosecution of accused personnel
- Can conclude evidence and form an opinion in some matter
- Looks after the accused military offender so that trial is done in a fair way
- Needs to be present in matters to be taken up by the general court martial
- To determine fairness of trials, with no legal qualification

The concept of JAG is vague in nature.

It has no essential role in providing justice to the military. It neither has a role of a judge nor of an advocate. Its opinions are not completely binding. Rather its view might bias the decisions of the judicial authorities in concern for the military legal matters.

There should be more reforms in the military courts like having more choice in using the right to defence own case, some cases to be of public hearing, less forced confessions and provisions for protection against torture in custody.

There can be special tribunals to hear the trials of the military offenders in such a way that it is not only fair but also transparent in nature.

One of the recommendations could be providing security to the witnesses involved.

This will ensure more fair trial and justice to the accused. Many times the witnesses are caused harm and truth never comes out thus the accused military gets suffered.

There is no proper procedure to take the military offender to military court so there has to be a clear and transparent method for it for better justice.

There should be appeal provisions for civil cases as it is the basic fundamental right of them.

## **Scenario in Nepal:**

Its structure is more or less same as of that of Indian Military Justice System.

### The Military Structure in Nepal-

- The Army
- The Air Wing of Army
- Armed Police Force
- The Naval Army
- The Marine Force

For the welfare of the military in the country, Chapter VI of the Act talks about the creation of an Army Welfare Fund.

In the year 2008, the Directorate for Human Rights was established. It has a military personnel department as well.

Based on its recommendations; Nepalese Army has enforced many guidelines, instructions, directives etc for the welfare of the military in the country.

### Some examples-

- Provisions for conducting inquiry before trial
- Role of the JAG to look for other evidences
- Appointment of board of court martial, if required
- Publishing of the court orders in the military cases
- Awareness of the laws among the military
- Proper training and aid for the personnel in need
- Creation of women friendly environment
- Setting up committee for check on human rights

Usually the court martial acts like a criminal trial court for the military

There are 4 types of court martial (trial by a military court) in Nepal

Some common civil punishments seen in the military justice system here-

- 30 days confinement
- Extra duty hours
- Fine up to 14 days pay
- Compensation of losses
- Temporary suspension from duty

Military offenders in Nepal cannot be tried twice by any forum for the same offence.

Some role of the JAG in the Army-

- Considered to be a judicial officer
- Can give advice on the legal matters of the military
- Supervises the military in concern
- Creation of more law and order in the military

The Military accused of any offence, should be taken into custody with a warrant or any kind of legal notice- Their basic fundamental human right.

One of the suggestions is that the decisions of the orders or the judgments passed by Summary Court Martial could be made appealable in nature.

If an accused is aggrieved by some decision of any legal forum then at least once it should get the right of appeal.

Sometimes it could be the case that some witnesses could not be presented or some fact was mentioned or some legal error was done so for such cases, there has to be some check system in form of say appeal or review or anything.

A new provision should be added for the legal aid in the laws for the Military.

There has to be a clear law of right of bail in the military laws.

Bail is one of the basic human rights of the person detained but ironically there is not even a single rule or provision for the military particularly.

## **Scenario in Sri Lanka:**

The main legislation for the military justice in Sri Lanka is the Army Act 1949.

Here the Army consists of-

- A regular force
- A regular reserve
- Volunteer force
- Volunteer reserve

The Commander of the Army has to be appointed by the President of the country.

The Part VI of the Army Act deals with the Grievances of the Personnel.

- First complaint to be done before the Commander of the Army
- All decisions of the forums are appealable
- Even a written appeal can be done to the President of Sri Lanka

The trials under the Army Act are more of summary nature, for speedy justice of the personnel. Even there is a trial for cases of misconduct by the personnel.

The other essential legislation s for the military in Sri Lanka-

- Sri Lanka Navy Act with Regulations 1950
- Sri Lanka Air Force Act 1949

Even different writs like mandamus, certiorari and prohibition can also be filed against the military personnel who are accused of some offence.

Any offender from the military, once assumed to be accused, will be taken into military custody from immediate effect.

Only in selected offences, military offender can be arrested without a warrant.

The Military accused of any offence, is taken into custody with no warrant or any kind of legal notice- Their basic fundamental human rights being violated.

There is no provision for the legal aid in the laws for the Military.

There is no right of bail in any legal provision of the military laws.

Many times the decisions of the orders or the judgments passed by Summary Court Martial are considered final and binding.

This is against the rules of justices. If an accused is aggrieved by some decision of any legal forum then at least once it should get the right of appeal.

Sometimes it could be the case that some witnesses could not be presented or some fact was mentioned or some legal error was done so for such cases, there has to be some check system in form of say appeal or review or anything.

Policy of ‘innocent until proven guilty’ should always be applicable.

No military accused should be detained or arrested or defamed or suspended just because it is accused. It should be treated guilty only if pronounced by judicial form in last appeal.

### **Scenario in Afghanistan:**

The systematic organized military force of Afghanistan was formed in the year 2002.

- It is now more balanced, ethical and disciplined in its functioning.

The Afghanistan military is divided into-

- Afghan Armed Forces
- Afghan National Army
- International Security Assistant Force
- Afghan Air Force
- Frontier Corps

Overall it is headed by the Ministry of Defence and General Staff, located in Kabul (capital).

The concerned Criminal Procedure Code has no provisions regarding the jurisdiction.

This can easily lead to wrong punishments or penalties being given to the military. This can even cause confusion of where to actual file the required complaint.

This can also result in multiplicity of the proceedings, causing more time to get justice and more pressure on judicial forums to deliver the verdict.

There is no right of bail in any legal provision of the military laws.

Bail is one of the basic human rights of the person detained but still there is not even a single rule or provision for the bail of the military particularly.

Afghanistan should also have a Civil Procedure Code for its Military like it has one for its Criminal cases.

This means there will be uniform system to deal with the civil cases or offences done by the military since they usually follow what the civilians usually follow or justice in such cases.

The basic or fundamental rights of the military should be different from civilians in this country or nation.

Military can use arms or ammunitions for the security purpose but if civilians also start carrying every time and misuse the power of it then it can cause more unrest and disturbance.

Civilians should have more freedom to express their views or opinions but military cannot say everything in public since some facts are crucial to maintain law, order and peace.

### **Scenario in Maldives:**

Recently in 2018 year, the Maldives government passed a law and ordered its military force to resist from any directions passed by the SC of the country. The same applies for the process of impeachment of President by civilians and military.

The Armed Forces Act<sup>72</sup> was enforced so as to lay down a set of duties, rules, regulations, principles, norms and principles related to the military force in the country. It even aims towards a fairer and speedier justice system for the military.

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<sup>72</sup> Bill of 2006 passed in 2008 as Act

*It also enlists various powers / immunities / privileges that the armed forces have, whether it be Navy or Army or the Armed Forces in the country.*

One of the suggestions here is that the Military accused of any offence, should be taken into custody with a warrant or any kind of legal notice- Their basic fundamental human right.

The Armed Forces was enforced after so many decades of independence so there is a need for proper maintenance of it.

This means that till the time there was no such Act, the military of Maldives was provided justice in the same manner as that of civilians.

This means more delayed justice grant system, more paper related work, more work load on same courts and no expertise for dealing with the cases of the military.

A new provision should be added for the legal aid in the laws for the Military.

There are many military personnel who are not that financially stable so as to afford the cost of litigation or say Advocate to defend its legal case where it has been accused of some offence. Right to defend is a basic right which is not provided here.

There has to be a clear law of right of bail in the military laws.

Bail is one of the basic human rights of the person detained but ironically there is not even a single rule or provision for the military particularly.

There has to be a provision for creation of fast track courts for the military.

Armed forces are responsible for the safety and security of the country.

If the accused is not guilty then it should be held free as speedily as possible. It should not wait for years to be declared innocent.

Armed forces are the vitals for the country.

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