

## A STUDY ON ARMED FORCES AND ARTICLE 33

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**Abstract:** The constitution of India has secured to all its citizens Right to justice, liberty, equality and fraternity. Ironically, Article 33 made this conflict to the article 13 as regards to the armed forces personnel. Article 33 empowers the parliament to determine by law to what extent any of fundamental rights conferred by part 3 will be applicable to members of the armed forces in India. Article 33 denies the accused the minimum degree of decency and fair play that must be guaranteed in any democratic society professing to follow the concept of rule of law and causational system the military justice system off other democracies. Judicial approach has not been uniform as regards grant of pension for the reason that pension regulations clearly stipulate forfeiture of pension, but the courts adopt a liberal approach and considering pension as socio-economic measure tends to grant pensionary benefits of the concerned person. Due to Article 33, the shortcomings present in justice system to armed forces are Right to bail, Trial in summary court martial, Members of court martial, Legal aid to accused, Double jeopardy, Denial of right to appeal.

**Keywords:** Armed Forces, Court Martial, Article 33, Fundamental Rights.

**Introduction:** India has one of the largest, most disciplined and most efficient Armed Forces in the world. The purpose of Armed Forces is to protect the nation's citizens and territory from threats and external aggression. The Armed Forces are not a deliberate body. They have an executive function. The Armed Forces has developed laws and traditions of its own. The Armed Forces constitutes a specialized community governed by its own laws that recognized unique military offences such as desertion, absence without leave, disobedience of orders and dereliction of duty. The British military justice system, conceived to 'discipline' a mercenary force after the 1857 revolt, is the progenitor of the Indian Army Act 1950, The Navy Act 1957 and The Air Force Act 1950. Indian Army is still following the system of military justice as it inherited from the British though the law in the United Kingdom has changed to deep pace with modern practices of justice.

**Article 33:** K.M. Munshi's draft on fundamental rights provided that Union legislature would by law be entitled to determine to what extent any of the fundamental rights should be restricted or abrogated for members of the Armed Forces or forces charged with the maintenance of public order to ensure the fulfillment of their duties and maintenance of discipline. The sub-committee on f.r. accepted Munshi formulation and the Advisory committee, Report of April 1947 included it as clause 23. The constituent Assembly adopted this clause without any discussion on 2 may, 1947.<sup>1</sup> The article was readily adopted by Assembly on 9 December 1948 with minor verbal modification.<sup>2</sup> At revision stage, It appears to be Article 33. The Constitution (Fiftieth Amendment) Act 1984 by its section 2 substituted Article 33 by the present text.

**Now, Article 33 states 33. Power of Parliament to Restrict Fundamental Rights:** Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to,— (a) the members of the Armed Forces; or (b) the members of the Forces charged with the maintenance of public order; or (c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or (d) person employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.<sup>3</sup>

Article 33 selects members of Armed Forces charged with maintenance of public order and saves the rules prescribing the conditions of service in regard to them from invalidity on the ground of violation of

any of fundamental rights guaranteed by part III and also defines the purpose for which such abrogation or restriction might take place, this being limited to ensure the proper discharge of duties and maintenance of discipline among them. As experience has revealed that the need for ensuring proper discharge of their duties and the maintenance of discipline among them is of paramount importance in the national interest. The article having thus selected the services members of which might be deprived of the benefit of the fundamental rights guaranteed to other persons and citizens and also having prescribed the limits within which such restrictions or abrogation's might take place.<sup>4</sup>The restrictions must be such as are necessary for ensuring the proper discharge of duties by the Armed Forces and of discipline among them.<sup>5</sup>

The constitution-makers were obviously anxious that no more restrictions should be placed than are absolutely necessary for ensuring proper discharge of duties and the maintenance of discipline amongst the Armed Force personnel and therefore Art. 33 empowered parliament to restrict or abridge within permissible extent, the rights conferred under part III of the constitution in so far as the armed personal are concerned.<sup>6</sup>

Article 33 makes it clear that the right of the individuals enshrined in the Indian constitution is not reflected in the laws that govern the personnel of the Armed Forces. The Army Act 1950 especially the provisions relating the summary courts martial are in essence a continuation of the then prevalent system with all its inherent defects. It denies the accused the minimum degree of decency and fair play that must be guaranteed in any democratic society, professing to follow the concept of rule of law and causational system the military justice system of other democracies, which are moving towards granting all the fundamental rights to the members of Armed Forces have led to a demand for reviewing the existing military justice system in India –a system conceived to keep the native army under strict control.<sup>7</sup>

**The Armed Forces Tribunal Act 2003:** This Act has introduced a tribunal as a form of redressal forum for cases involving Armed Forces personnel. The tribunal deals with the appeals from court martial's verdicts and grievances related to conditions of service, including promotions, confirmations and appointments. The tribunal has principal bench headed by chairperson in the capital and consist of judicial and administrative members. Former judge of Supreme Court and former chief justice of High Court can be its chairperson. Basically, The Armed Forces Tribunal is the military version of central Administrative Tribunal (CAT). One of the laws continuing since the revolt of 1857 is summary court martial (SCM) against the person below the rank of Junior commissioned officer. This still is beyond the purview of act.

**Deficiencies in Justice System Due to Article 33:** This is the admitted fact that To appreciate the change in justice system for Armed Forces, It is very important to mention the necessity of separate system of justice due to disciplinary reasons. As Armed forces functioning in modern war demands quick decisions that cannot be achieved by a debating society. The army act reflects some defects which are also prevalent for Armed forces due to Article 33.

**Summer Courts Martial:** A summary court martial may be held by the commanding officer of any corps, department or detachment of the regular army to which the accused belongs. The trial in SCM does not fulfill the recognized standard of justice as absence of prosecutor and defender counsel or officer. So SCM violates the safeguards given by the fundamental rights.

**Violation of Article 14-Unfair and Unjust Trial:** In the case of Ex. Hav. Harpal Singh V. Union of India,<sup>8</sup> The Jammu and Kashmir High Court was approached in appeal against SCM. The court observed from the perusal of record that there is nothing to conclude that the accused was advised not to plead guilty as is required under rule 115 of Army rules the court set aside the summary court martial proceedings and held that the dismissal of the petitioner from the service on the basis of proceedings which were concluded in a manner which were neither fair nor judicial The court held that a person bind by the army rules cannot be denied procedural safeguards on the plea that procedures are

summary in nature. They do not lose their rights under article 14 of the constitutions. Hence they cannot be denied equality before law and equal protection of law.

**Violation of Article 15- Biased and Unfair Trial:** As the discrimination in the proceeding of summary court martial was challenged in the case of Lance Naik Mirza Narza Ahmed V/s Union of India<sup>9</sup>. As the grounds are that the commanding officer was biased against the petitioner and summary of evidence was prepared by the commanding officer. Then the court set aside the proceeding due to the grounds of biased and unfairness.

**Violation of Article 20(2) of the Constitution – Retrial and Double Jeopardy:** As in SCM, the constitution protection against double jeopardy enshrined in Article 20(2) whilst available before a court martial is not available to prevent a second trial on the same offence before or civil court. In Duralbabu R.V. Union of India<sup>10</sup> after being tried by summary court martial on the charge of overstayed of leave. The petitioner was found guilty and awarded punishment and dismissal from service. Then the order was set aside due to non-compliance with provisions of Rule 22. Then the petitioner was brought back to the unit. Then the charge was re-heard and did the accused pleaded guilty before the summary court martial. He was dismissed from service. He challenged the order of dismissal as violative of Article 20(2) of the constitution and section 121 of the Army Act, as it was not the respondent to set aside the earlier order and order of enquiry and punish the petitioner against is the clear violation of Article 20(2) of the constitution Likewise in the case of Surinder Singh V/s Union of India<sup>11</sup> The main contention was that the petitioner had already been tried and punished for same offence by a summary court martial. The court accordingly quashed the general court-martial proceedings as being violative of Army Act section 121 and Article 20(2) of the constitution.

**Violation of Article 21- Denial to Right to Bail:** The Supreme Court has laid down categorically the principles on which bail ought to be granted but these are not applicable to Armed Forces personnel held in military custody as it is the matter of discretion of the commanding officer or the superior military authority. The right to bail depending on discretion is arbitrary and violates the right of Article 21.

**Violation of Article 22- Absence of legal aid to Accused:** Violation of Article 22 of the constitution as to the accused is not entitled to defend himself with the help of counsel. The absence of the services of an experienced legal officer as counsel for the accused also violates the right of against arrest and detention given by Article 22 of the constitution. The infrastructure required to meet the obligation of legal aid and fair proceedings has not been developed in Armed Forces. The organization does not provide any incentive to the defending officers So as a result court martial cases are not adequately defended, which is in clear violation of Article 22 of the constitution.

**Quantum of Punishment:** In the case of Chaudhry M.R. Ex. Sepoy. V/s Union of India.<sup>12</sup> The Himachal Pradesh High Court set aside the punishment of dismissal and six months of rigorous imprisonment awarded by the summary court martial. The accused while serving with IPKF in Sri Lanka had used criminal force against JCO of his unit by giving him a push. The court held that the punishment awarded was not commensurate with the offence.

**Members of Court Martial and Judge Advocate General:** The members are neither legally qualified nor trained in the administration of justice whereas the judge advocate performs no functions either as an advocate or as a judge.

**Denial of Appeal:** By clause (2) of Article 136 of the constitution, the appellate jurisdiction of supreme court has been excluded in relation to any judgment, determination, sentence or order passed or made by any court or Tribunal constituted by or under any law relating to the Armed forces. Similarly clause (4) of Article 227 denies to the High Courts the power of superintendence over any court or Tribunal constituted by or under any law relating to Armed Forces. As from the Summary court martial, it is sad

to say that in independent India, those who have pledged their lives for defending the honor of the nation have no protection against arbitrary action in the home of 'discipline'.

**Judicial Review by Indian Judiciary:** The power of judicial review in respect of proceeding of courts Martial can grant appropriate relief if it is said proceedings have resulted in denial of fundamental rights guaranteed under part III of the constitution or if the said proceedings suffer from a jurisdictional errors or any error of law apparent on the face of record. Generally speaking in the context of court martial, judicial review is not directed against a decision but is directed against the "decision making process". As in the case of Union of India V/s A. Hussain<sup>13</sup> the Supreme Court directed that A court martial has also the same responsibility as any court to protect the rights of the accused charged before it and to follow the procedural safeguards.

Grant and forfeiture of pension is governed by pension regulations for the Army 1961, (Para 1) which are non-statutory. Army Act lays down that a person other than an officer who is dismissed under the provisions of the Army Act, is ineligible for pension in respect of all previous services, though in exceptional cases, President may grant service pension, gratuity. Perusals of cases reveal that judicial approach in this regard has not been uniform. Considering the relevance of pension at old age, Persons cashiered or dismissed from their service have approached courts for relief in pension matters In the case of Maj G.S. Sodhi V/s Union of India and others<sup>14</sup> the approach of the court has been to pass directions for grant of pension considering facts of the case rather examining the rules in detail. The govt. vide its letter no 12(6)/951D (Pens/Sers) dated 9 June, 99 has decided that all Indian Army personal including commissioned officers who are cashiered/ dismissed under the provisions of Army Act 1950 or removed under Army rule 14 i-e. as a measure of penalty, will be ineligible for pension or gratuity in respect of all persons service. Considering above, This disparity for Army personnel should be removed as pension has a broader significance as it is a welfare measure of socioeconomic justice to those who had worked for the nation. As to ageing process, one is required to fall back in savings.

**Contradictory To Preamble:** Article 33 of the constitution of India is against the basic structure of the constitution. As in the case of Keshwanand Bharati V/s Union of India.<sup>15</sup> The Supreme court held that preamble is considered in the basic structure of the constitution. As regards Preamble<sup>16</sup> "we the people of India" do not create any classification among ourselves so far as the protection of the right to life and liberty is concerned. As the Preamble to the constitution of India secures to all its citizens rights to justice, liberty, equality and fraternity. It is ironical that under Article 33 the fundamental rights which were to be inherent and natural of every individual sovereign member, were made to look as a toy given at the pleasure by Parliament.

**Conclusion:** To conclude it can be said that the officer's right to command and the soldier's duty to obey cannot be questioned. But the right to fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary deprivation of their basic rights and freedoms which in Indian constitution, are called as fundamental rights. The system of court martial came into existence to serve the needs of the mutiny days when certain rough and ready system of punishment had to be resorted. There is hardly any justification to keep this system going in its present form under the constitution of India, which has the true spirit of rule of law. The rule of law is the basis of any liberal political system that recognizes fundamental rights of an individual which are protected by independent judiciary. It may be stated that Article 33 is one such provision of the constitution which is in direct conflict with Article 13<sup>17</sup> which held that where a conflict between any constitutional and statutory provisions on one hand and the fundamental rights on the other, arise, those constitutional or statutory provisions must give way to the fundamental rights. So, It is very important for the parliament to take into account the needs of changing time as Austin (1999)<sup>18</sup> points out that whenever there is a conflict between integrity, democracy and social revolution, which are the three strands of unity, there is a need for a delicate balance among the three. In India there are glaring deficiencies in the safeguards provided to the accused and in the attitude of those administering the military justice system, despite the fact that the constitution of India makes a declaration that justice should be secured for every citizen. It makes it clear that either the members of the Armed forces are degraded by the application of Article 33 having no fundamental rights and all laws made there under depriving the valiant soldiers,

defenders and protectors of our sovereignty and integrity of their fundamental rights. are unconstitutional . As William Blackstone<sup>19</sup>stated. "How much therefore is it to be regretted that a set of men, whose bravery has so often preserved the liberties of their country should be reduced to a state of servitude in the midst of a nation of freeman!" In the landmark case Lt col. Prithi Pal Singh Bedi V/s Union of India<sup>20</sup>We may conclude with the words of the honorable Supreme Court. "The dominant purpose in construing or statute is to ascertain the intention of the Parliament .... Article 33 of the constitution which confers power on parliament to determine to what extent any of the rights conferred by part III shall in their application to the members of armed forces be restricted or abrogated does not obligate that parliament must specifically adumbrate each fundamental right and specify in the law the degree of restriction or total abrogation of each right. That would be reading into Article 33 a requirement which it does not enjoin.

### References:

1. C.A. Deb., Vol III. P 522
2. C.A. Deb., Vol VII, P. 955
3. Substituted by constitutional (Fiftieth amendment) Act, 1984, sec 2, for Article 33. (w.e.f. 11-9-1984)
4. Kameshwar Prasad V. State of Bihar AIR 1962 SC 1166.
5. Viswan, R.V. Union of India AIR 1983 SC 658 (Paras 7,9,10)
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8. AIR 1985 SC 264
9. WP No. 317 of 1981
10. Madras High Court WP No. 11525 of 1990 and WA. No. 794 of 1992.
11. 1992 Criminal Law Journal 1312.
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13. AIR 1998 SC 577
14. AIR 1991 SC 1617
15. (1973) 4 SCC 225
16. WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a 1 [SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC] and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the 2 [unity and integrity of the Nation]; IN OUR CONSTITUENT ASSEMBLY this twenty sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.
17. Article 13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void. (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void. (3) In this article, unless the context otherwise requires,— (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law; (b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas. 1 [(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.
18. Granville Austin working of democratic constitution: A history of the Indian experience, 651 (Oxford University Press, New Delhi, 1999)
19. William Blackstone, commentaries on Laws of England : A facsimile of The first edition of 1765-1769 (Chicago, University of Chicago press, 1979), available at. <http://presspubs.uchicago.edu/founders/documents/al81682.html>.
20. AIR 1982 SC 14/13.