P: ISSN NO.: 2394-0344 RNI No.UPBIL/2016/67980 VOL-3* ISSUE-9*(Part-1) December 2018
E: ISSN NO.: 2455-0817 Remarking An Analisation

Role and Salient features of Military Law in India

Abstract

Discipline and character closely connected with respect for rule of law are the bed rock for the Strength of an Army. The command of a Superior officer treated as a call for duty and obeyed even at the risk of self is the culture of every member of Armed forces, which makes the Army a class by itself and earns for it the respect of every one.

"Society is not static, nor is the laws which govern it At no time we can start from the Scratch. Therefore; change must be acknowledged and the law must strive to keep face. It should not lag behind the times"[1]

"The Penalty imposed must be commensurate with the gravity of the misconduct would be violative of Art 14 of the constitution"[2] The point to note and Emphasize is that all powers have legal limits.[3]

Keywords Salient features, Military Law, Citizens, Country.

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Introduction

For proper appreciation of the provisions of the Army Act 1950 and the Rules made there under, it is necessary to understand various provisions of the Constitution pertaining to the Armed Forces. The important provisions in this regard are contained in Articles 33, 136 (2) and 227 (4) of the Constitution. Although members of the Armed Forces, being the citizens of the country, are entitled to enjoy Fundamental Rights conferred by the Constitution, these rights, in their application to the members of the Armed Forces, have been curtailed by the Parliament. This has been done by virtue of provisions of Article 33 reproduced below -

33. Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to -

1. the members of the Armed Forces; or
2. the members of the Forces charged with the maintenance of public order; or
3. persons employed in any bureau or other organization established by the State for purposes of intelligence or counter intelligence ; or
4. persons employed in, or in connection with the telecommunication systems set up for the purposes of any Force, bureau or organization 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".

Under the above Article, Fundamental Rights of the members of the Armed Forces can be restricted or abrogated in full or part, as deemed necessary, by the Parliament. The purpose laid down for restriction or abrogation of Fundamental Rights is 'to ensure the proper discharge of duties' and 'maintenance of discipline' amongst the members of the Armed Forces. Any restriction or abrogation which does not further the aforesaid purpose, would thus be violative of the Fundamental Rights and liable to be struck down as ultra vires of the Constitution.

In accordance with the provisions of Article 33, restrictions on various Fundamental Rights have been imposed on the members of the Armed Forces. Section 21 of the Army Act and Rules 19 to 21 framed there under are relevant. Ordinarily, one would consider that the curtailment of Fundamental Rights of the Armed Forces personnel is confined to the Section and Rules mentioned ibid. But it is not so. The Supreme Court in the case of *Ram Swaroop* v *Union of India'* has laid down that restrictions on Fundamental Rights should not be thought to be limited to those set out in the ibid provisions of the Army Act and the Army Rules. According to the Supreme Court, the complete Army Act was passed by the Parliament in pursuance of the powers vested in it under Article 33 of the Constitution. The pertinent observation of the Supreme Court is as under :

"The learned Attorney General has thus argued that the entire Act has been enacted by Parliament and if any of the provisions of the Act is not consistent with the provisions of any of the Articles in Part III of the Constitution, it must be taken that to the extent of the inconsistency Parliament had modified the Fundamental Rights under those articles in their application to the persons subject to that Act. Any such provision in the Act is as much law as the entire Act. We agree that each and every provision of the Act is a law made by Parliament and that if any such provision tends to effect the Fundamental Rights under Part III of the Constitution, that provision does not, on that account, become void, as it must be taken that Parliament has thereby in the exercise of its power under Article 33 of the Constitution made the requisite modification to affect the respective Fundamental Rights"

In view of the above ruling of the. Supreme Court, restrictions on Fundamental Rights, seen in various provisions of the Army Act and the Rules made there under can only be examined on the basis of the criterion contained in Article 33. If the modifications do not serve the purpose for which it is permissible to impose restrictions, these would be violative of the Fundamental Rights. So far none of the provisions of the Army Act or the Army Rules has been held to be violative of the Fundamental Rights.

The matter also came up for consideration before the Supreme Court in the case of *Lt Col Prithipal Singh Bedi* v *Union of India*.[5]' It was contended before the Supreme Court that in order to satisfy the requirement of Article 33, Parliament was required to enact a specific law specifying therein the modification of the rights by Part III and that restriction or abrogation of fundamental rights could not be left to be deduced or determined by implication. To put it differently, the submission was that the law to satisfy the requirement of Article 33 must be a specific law enacted by Parliament, in which a specific provision imposing restrictions or even abrogation of the fundamental rights should be made; and; when such provisions are debated by the Parliament, it would be clear as to; now far restriction is imposed by Parliament on the fundamental rights enacted in Part III in their application to the members of the Armed Forces. In other words, a conscious and deliberate Act of Parliament alone could merit erosion of Fundamental Rights in their application to the Armed Forces. It was contended that by temporan expositio section 21 of the Army Act clearly set out the limits of such restrictions for abrogation and no more. Further, section 21 conferred power in the Central Government to make rules restricting to such extent and in such manner as may be necessary to modify the Fundamental freedom conferred by Article 19(1)(a) and (c) in their application to the Armed Forces; and none other, meaning that Armed Forces would enjoy other fundamental freedoms set out in Part III. Armed with this power, Rules 19, 20 and 21 have been framed by the Central Government. It was submitted that Parliament exercised the power limited to what is prescribed in the Section and the Rules mentioned ibid, and therefore, the remaining Fundamental rights in Part III were neither abrogated nor restricted. Negating the contention of the petitioners, the Supreme Court not only quoted with approval their observation in the case of *Ram Swaroop* v *Union of India*[6] but also observed-

"Article 33 does not obligate that Parliament must specifically adumbrate each fundamental right enshrined in Part Ill and to specify in the law enacted in exercise of the power conferred by Article 33 the degree of restriction or total abrogation of each right. That would be reading into Article 33 a requirement which it does not enjoin. In fact, after the Constitution came into force, the power to legislate in respect of any item must be referable to an entry in the relevant list. Entry 2 in List I : Naval, Military and Air Force and any other Armed Forces of the Union, would enable Parliament to enact the Army Act and armed with this power the Act was enacted in July, 1950. It has to be enacted by the Parliament subject to the requirements of Part Ill of the Constitution read with Article 33 which itself forms part of Part III. Therefore, every provision of the Army Act enacted by the Parliament, if in conflict with the fundamental rights conferred by Part III, shall have to be read subject to Article 33 as being enacted with a view to either restricting or abrogating other fundamental rights to the extent of inconsistency or repugnancy between Part III of the Constitution and the Army Act. This is no more res integra in view of the decision of the Constitution Bench of this *Court in Ram Swaroop v Union of India,*[7] which repelled the contention that the restriction or abrogation of the fundamental rights in exercise of the power conferred by Article 33 is limited to one set out in section 21 of the Act" With regard to the relation between courts-martial and civil courts, the Constitution, while providing that the High Court shall have superintendence over all courts and tribunals throughout the territories, in relation to which it exercised its jurisdiction, provide that nothing shall be deemed to confer on a High Court, powers of superintendence, over any court or tribunal, constituted by or under any law, relating to the armed forces.. Resultantly, the High Courts cannot exercise any superintendence over the court-martial. Similarly, the provisions regarding special leave to appeal to the Supreme Court shall not apply to any judgment, determination, decree or sentence or order passed or made by any court or any tribunal constituted by or under any law, relating to the Armed Forces. It is thus deducible that no appeal lies to the High Courts or the Supreme Court from 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. These provisions, however, do not affect the powers of the Supreme Court and the High Courts to grant writs.

(2) Every person subject to this/Act shall remain so subject until duly retired, discharged, released, removed, dismissed or cashiered from the service)

Object of Military Law

The object of military law is two-fold. First-It is to provide for the maintenance of good order and discipline among members of the Armed forces and

in certain circumstances among other's who live or work in a military environment. This it does by supplementing the ordinary criminal law of India and the ordinary judicial system with a special code of discipline and a special system for enforcing it. Such special provision is necessary in order to maintain in time of peace as well as war, and overseas as well as at home; the operational efficiency of an armed force.

It is for this reason that acts or commissions which in civil life may amount to no more than breaches of contract (like failing to attend work) or indeed more incivility (like being offensive to a superior) become in the context of army punishable offences. The second object of military law is to regulate various aspects of Armed forces administration, mainly in those fields which affects individual rights.

Thus there are provisions relating to enrolment, discharge, conditions of service, Penal deductions etc. Often in practice, however the term "military law" is used with regard to its disciplinary provisions rather than its administration in brief object of military Law as follows in nutshell.

Aim of the Study

Maintenance of good law and order and to regulate various aspects of Army discipline among soldiers administration.

Historical Development

The object of the disciplinary code is to ensure that the will of the commander is put into effect. Military law therefore traces its origins to the prerogative power of the rulers. In Rome just as a sector of civil law developed from the imperium of the Magistrates. So did military law derive from the imperium of those same Magistrates in their capabilities as commanders of the military forces. The Roman historian Tactius indicate the military justice in the Ist contury was some what rough-and ready and heavy handed and varied much with the individual commander. But it became more formalized 400 years later in the digest and code of the emperor Justinian with the rise of the Kingdome of the middle ages.

The Maintenance of discipline was in forced by ordinance or articles of war issued by the sovereign or by a commander authorise by him at the beginning of each campaign.

The earliest new extant are those of the English king Richard-I in charter of 1189 for the government of those going to the Holy land with Mercenary armies drawn from many nations in the wars of the 16th and 17' Centuries each national contigent conded to apply the articles of the supreme commander according to its oun rules of procedure the articles of war of Maurice of Nassau Prince of orage, and Gutav II Adolf had a considerable influence on the National commanders who serve under them; who they came to command elsewhere. In the English civil wars, the ordinances of the royalist and parliamentary commanders were thus in the most part literally the same and in the next reign formed the basis of prince Rupert's code of 1672 which framed discipline of Cromwell's army was due not to any improved code but the fact that the articles were rigorously enforced; on the continent of Europe. The Article of Gustavo Adolf continued to be followed until supplanted by the codification of the 19th Century which established through out those countries a generally similar system that with revision and amendment continues to this day.

With the Introduction of a standing army in England in 1689. Parliament aimed to prevent this force coming under complete control of the Severing by a series of the mutiny acts. Normally passed annually to which the prerogative articles were subordinate. By a statute of 1717 the power to make articles was embodied in the Act. In the United States in 1775 and again 1806, articles of war were adopted the mutiny acts and Articles then in force in great Britain in British Army. The articles of war were replaced in 1881 by an annually renewed Army Act reformed in 1955 although they continued in the royal Navy until 1957.

Evolution of Military Law in India

The Process of Evolution of military law may be divided into four periods.

1. Ancient Period 1500 BL-1192 AD
2. Medieval Period 1192 AD- 1764 AD
3. East India company and British Period 1764 AD-15 Aug 1947
4. Post independence Period 15 Aug 1947 to Till date.

Military law in India can be traced from vedic period from 1500 BC to 1000 BC war were fought frequently for two reasons.

1. To defend the kingdom's from aggression of the other king or kings.
2. When an ambitious King declared war to annex the territory of others or to impose supremacy over other kingdoms or to attain the titles like chakravarti Maharaja Dhiraji Samrat etc.

The Commanders were known as Senapti, Baladhikrat Maha Baladhikrat; Danda Nayak etc.

Distinction between 'Martial Law' and 'Military Law

In any event martial law must be sharply distinguished from military law, the latter being the law governing the armed forces whether in war or peace. Military law is that system of law by which the military establishment of a State or nation is governed while orders and rules during martial law are applicable to combatants, non-combatants and civilians. This means that military law applies to military persons only, and not to those in civil capacity) Martial law supersedes and suspends civil law, but military law is superadded and subordinated to civil law?' It has been observed, that martial law cannot be enacted, except on extraordinary emergencies. But military law operates at all times, either in peace or war[8]

Is 'Martial Law' a Law? The martial law with which we are concerned is not law at all, but stems from the necessity of putting down a rebellion or a state of war within the realm. The Duke of Wellington was speaking of this kind of martial law in House of Lords, "Martial law is neither more nor less than the will of the general who commands the army. In fact, martial law means no law at all. Therefore, the

general who declared martial law, and commanded that it should be carried into execution, was bound to lay down distinctly the rules, regulations and limits according to which his will be carried out?' Civil laws in various countries do not recognize the exercise of force which is generally understood by the term martial law. Due to its 'nature of necessity' it does not derive authority from the people nor it is a written law and there is no practice under martial law laid down in any book.'[9]

Conclusion

"No one is above the law and no one is below it nor do we ask any man's permission when we ask him to obey it"[10] "Discipline and justice cannot be treated as two different entites. They have to co-exit. It is our endless effect to ensure maintenance of the highest standard of discipline through the best quality of justice throughout the Army.[11]

Reason is the heart beat of Every conclusion on, without the same it become lifeless.[12] In the Armed forces, law should be Similarly applied to all rank without discrimination, partiality, favour or affection.

References

1. *Bhagat Ram v/s State of Himanchal Pradesh AIR 1983 SL HRD at R. 460*
2. *Ranjit Thakur V/s Uo/ & ors AIR 1987 SL 2387*
3. *Hon;ble Justice R.C. Lohati Former Chief J. William Zeleryer of India.*
4. *AIR 1965 SC 247.*
5. *AIR 1965 SC 247.*
6. *AIR 1965 SC 247.*
7. *(1964) 5 SCR 931: AIR 1965 SC 247.*
8. *Issac Maltly; A treaty on Court martial and Military Law Thomas B. wait & Co-Boston 1813*
9. *Ibid.*
10. *Rajkuniar v. State Bihar AIR 2003 SC 4664*
11. *Major General Ag Goorthi P.V. sing AVSM*
12. *Theodore Roopevelt*