NOTES AND COMMENTS

FUNDAMENTAL RIGHTS OF INDIAN MILITARY PERSONNEL

MILITARY PERSONNEL occupy the most dignified position in the life of our nation as they preserve and protect its sovereignty, integrity and unity not only during war times but also during the days of peace. Their devotion and services to the country are fundamental in character. They are expected to command and posses virtues of the highest order known to human beings in the services of the state. It is sad to note that these great servants of the nation are not allowed to enjoy the fundamental rights which are the sweetest fruits of our sovereign, socialist, secular, democratic, republic in the manner in which these rights visit and inform all the citizens of India. It appears that the fundamental rights are not that fundamental to the military personnel. In the present article an attempt is made to judge the rationality of the existing position of the fundamental rights.

As discussed earlier, army life is highly challenging life with no dull movement in any sphere of their activities. Army institutions demand high degree of discipline. A soldier may, like a clergyman incur special obligations in his official character but the task which a soldier may be called upon to perform and the circumstances under which such task may have to be performed by a soldier call for a high degree of discipline and the maintenance of such discipline in turn requires a special code of law to define the duty and to prescribe punishment for its breach. The position of the members of the armed forces in a democracy is of significant constitutional importance. The constitutional position of the armed forces personnel is one of dual liability. A person subject to military law whether an officer or a soldier has a two fold relation, one his relation towards his fellow citizen outside the army and the other his relation towards the member of the army and especially towards his military superiors. In his military character a soldier occupies a position totally different from a civilian, he does not possess the same freedom in addition to his duties as a citizen. He is under the exclusive jurisdiction of the military law regarding the question relating to his military duty and discipline. Though the civil courts have jurisdiction to determine the persons subject to military law, the questions of military duty and discipline are within the sole cognizance of the military authorities prescribed by the military law and the aggrieved officer or soldier has no remedy under the ordinary law. Further, in the interest of military discipline and efficiency, military law inflicts more

severe punishment for the offences like desecration or disobedience to orders which are mere breach of contract under the ordinary law.

Owing to the need for different treatment article 33 of the Indian Constitution confers power on the Parliament to modify the rights conferred by part III in their application to men in the forces. Article 33 states that the 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 organization established by the state for the purpose of intelligence or counter intelligence; or

(d) Persons employed in, or in connection with, the telecommunication system set up for the purpose 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.

This provision may, therefore, be treated as an exception to the fundamental rights. A law enacted by the Parliament in the exercise of this power cannot be challenged on the ground that it infringes any fundamental rights. The power is conferred on the Parliament and not on the state legislatures. The maintenance of law and order being a state subject the state law cannot abrogate a fundamental right of the members of such forces charged with the maintenance of public order. This can only be done by the Parliament under article 33. The Parliament is entitled to lay down to what extent the fundamental rights can be modified by the state legislation applicable to the force charged with the maintenance of the public order. Article 33 applies to the armed forces, i.e., army, navy and air force and also the forces charged with the maintenance of the public order such as the police. Thus, the Army Act, 1950 provides that no female shall be eligible for enrolment or employment in the regular army. Similar restrictions were imposed under section 2 of the Naval Forces (Miscellaneous Provisions) Act, 1950 and section 12 of the Air Force Act, 1950.

Likewise, the Parliament has enacted the Public Force (Restrictions of Rights) Act, 1966 for restricting certain fundamental rights of the members of the police forces functioning under several institutions listed in the schedule to the Act. A member of the police force is thus prohibited without the consent of the central government, or of the prescribed authorities

from being a member of any trade union, labour union or political association or any organization which is not recognized as part of the force of which he is a member, or is not purely social, recreational or religious in nature. He cannot communicate with the press or publish any book, letter or any other document except where it is being published in the bonafide discharge of his duties or the communication is of purely literary, artistic or scientific character or of any other prescribed nature. No member of the police force is to participate in any meeting or demonstration, organized for any political purpose or any other purpose prohibited by the rules made under the Act. The breach of these rules is punishable with imprisonment and with fine. The Parliament has also enacted the Intelligence Organisation (Restrictions on Rights) Act, 1985 restricting certain fundamental rights in their application to the members of the central bureau and certain central intelligence agencies. This has been done with a view to curb the tendency of indiscipline in such intelligence agencies (such as Intelligence Bureau and the Research and Analysis Wing (RAW). The Act prohibited the staff of these agencies from participating in trade union activities or associating with political organizations or communicating with the press. It is a cognizable criminal offence to do so.

In *Ram Swarup* v. *Union of India*,[1] the petitioner was tried and convicted by the general court-martial under the Army Act, 1950. The sentence was confirmed by the Central Government. The petitioner pleaded that his trial by court-martial violated his fundamental rights under article 14 of the Indian Constitution. Rejecting the plea of violation of the fundamental rights of the petitioner, the court observed that even if a fundamental right had been affected by any rule under the army Act, 1950 it could be taken that the Parliament had, by the requisite modification, affected a fundamental right in relation to the members of the armed forces, in exercise of the powers under article 33. It was further held by the court that the Parliament need not specify in detail as to which fundamental right and to what extent it was curtailed by a law relating to the forces mentioned under article 33. It may make a law with reference to article 33 which restricts the fundamental rights but without mentioning the specific fundamental right which such law restricts. Thus, the law providing for court-martial need not say that article 21 will not be applicable to the procedure before a court-martial.[2] Parliament may also authorize the executive to restrict the fundamental rights. So long as the restriction is in respect of the forces covered by article 33 and for the purpose specified in that article, i.e., the

1. AIR 1965 SC 247.
2. *Prithipal Singh* v. *Union of India*, AIR 1982 SC 1413.

proper discharge of their duties and maintenance of discipline among them the court cannot examine the propriety or suitability of the restrictions.[3] In the same case the general reserve engineering force has been held a "force" covered under article 33 and section 21 of the Army Act, 1950 authorising imposition of restriction on the right covered under article 19 (1) was upheld.

The expression "members of the armed forces" in article 33 covers such civilian employees of the armed forces as barber, carpenter, mechanics etc. Although these persons are non-combating, nevertheless, they are integral to the armed forces and, therefore, their fundamental rights can also be curtailed under article 33.[4] In *Kameshwar Prasad* v. *State of Bihar*,[5] it was held that article 33 selects only two services for special treatment, *viz.*, the armed forces and the forces charged with the maintenance of public order. The rules prescribing their conditions of service are saved against the challenge of violation of fundamental rights. Article 33 does not exclude other classes of government servants from the purview of the fundamental rights merely by reason of their being in government service.

In pursuance of the power conferred by the present article, the Parliament has enacted the Army Act, 1950 (SLV 6 of 1950), the Air Force Act, 1950 (XLV of 1950) and the Navy Act, 1957 (62 of 1957), providing that some of the fundamental rights included in part III of the Constitution shall not extend to the members of the armed forces. These restrictions or abrogations are as follows:

(a) The Army Act, 1950 provides that no female citizen of India shall be employed or enrolled in the regular army except in such department, branch etc as central government, may by notification, specify. These provisions, thus, exclude the armed forces from the operation of article 16 of the Constitution.

(b) The Army Act empowers the central government to make rules restricting in such manner and to such extent as may be specified in notification the following rights of the members of the armed forces:

  (i) the right guaranteed under article 19 (1) (c) to be a member of or to be associated in any way with, any trade union or labour union or any class of trade union and labour union or any society;

3. *R.V. Vishwan* v. *Union of India*, AIR 1983 SC 658.
4. *O.K.A. Naya*r v. *Union of India*, AIR 1976 SC 1179.
5. AIR 1962 SC 1166.

(ii) the right guaranteed under article 19 (1) (a) and (b) to attend or address any meeting or to take part in any demonstration organized by any body or person for political or for other purpose;

(iii) to communicate with the press to publish or cause to be published any book, letter or any other documents.

These provisions, thus, provide for the restrictions on the fundamental rights conferred by sub-clauses (a) to (c) of article 19 (1) in their application to the armed forces.

(c) Special provisions has been made in the Act as regards arrest and detention of a person subject to the Act and the corresponding provisions of article 22 of the Constitution will not, therefore, extend to such person.

(d) Subject to the Act, when any person has been acquitted or convicted of an offence by a court-martial or by criminal court or has been dealt with under sections 80, 83 and 84 of the Army Act, he shall not be liable to be tried again for the same offence by the court-martial or dealt with under the said section. The Act, however, provides that if the central government gives sanction, a person who has been tried by the court-martial again be tried by the criminal court for the same offence. The result is that the rule against double jeopardy contained in article 20 (2) of the Constitution does not apply to military personnel.

Thus, it has been held that the refusal to confirm the sentence of court-martial does not constitute an acquittal within the meaning of section 121 of the Act and would not ordinarily bar a second trial.[6] The bar does not apply if one court-martial is dissolved before acquittal or conviction. As a result, the officer was to be deemed to have been acquitted of the charge. The court should not interfere with the administrative action by the army authority as the discipline in the armed forces is the paramount need of the hour.[7]

The Supreme Court held in *Sunil Batra* v. *Delhi Administration*,[8] that even prisoners deprived of personal liberty are not wholly denuded of their fundamental rights. In the larger interest of the national security and military discipline, the Parliament in its wisdom may restrict or abrogate such rights in their application to the armed forces; but this process should not be

6. *Sardar Singh* v. *Crown, Cr. Misc*. Case No. 1026 of 1945 Lahore.
7. *Lt. Col. P.P. S. Bedi* v. *Union of India,* 1982 (2) SLJ 582.
8. AIR 1978 SC 1675.

carried so far as to create a class of citizens not entitled to the benefits of the liberties of the Constitution. Personal liberty is cherished and is priceless. A marked difference in the procedure for trial of an offence by the criminal court and the court-martial is apt to generate dissatisfaction.

In *S.P.N. Sharma*,[9] the findings and sentence of the court martial were challenged on the ground of violation of fundamental rights. The case was decided by the Delhi High Court. The facts of the case were that the petitioner, an Indian air force pilot officer with headquarter at Kanpur, was arrested by the civil police on June 1, 1963 on the charges of passing the military secrets to a national of a foreign power and was found guilty in respect of three charges under sections 71 and 42-C of the Air Force Act, 1950 and was sentenced on November 28, 1963 to serve rigorous imprisonment for fourteen years by the general court-martial. The findings and sentence of the general court-martial was confirmed by the chief of the air staff on December 13, 1963 and on the following day this was communicated to him and he was committed to civil jail. The petitioner filed a petition before the Delhi High Court requesting for a writ of *habeas corpus*, challenging the findings and sentence of general court-martial, *inter alia*, on the following grounds:

(a) that rules 88, 89 and 112-A of the Air Force Rules are *ultravires* article 14 and clause (1) of article 22 of the Constitution.

(b) That the trial by general court-martial and findings and sentence of such court as also the confirmation of such sentence by the chief of the air staff are *ultravires* being violative of article 14, article 21 and clause (3) (a) of article 22 of the Constitution. He was not permitted to engage a lawyer before a court-martial and, therefore, he had been prejudiced in his defence.

The Delhi High Court rejected the second ground relying on the affidavit filed on behalf of the Union of India that the accused had no grievances on this score during the course of his trial and further held that in their view these circumstances by themselves would not vitiate the findings and the sentence of the court-martial in question. The other ground was based on the violation of the fundamental rights and was not considered by the Delhi High Court holding that in our Constitution article 19 guarantees to all citizens, *inter alia*, the right to move freely throughout the territory of India and article 21 specifically protects all persons against deprivation of their life and personal liberty except according to procedure established by law. Article 227 of the Constitution which confers the power of

9. *S.P.N. Sharma* v. *Union of India*, 1968 Cr. L.J. 1059 (SC).

superintendence over all courts on the high courts expressly excludes from the operation of the article the courts and tribunals constituted by or under any law relating to the armed forces. Having taken this view the high court did not consider the Supreme Court decision in *Ram Swarup* v. *Union of India*[10] or discuss the question of the applicability of fundamental rights to the members of armed forces.

In *Vishwan* v. *Union of India,*[11] an interesting question of law relating to the interpretation of article 33 of the Constitution was raised. The question was whether section 21 of the Army Act, 1950 read with chapter IV of the Army Rules, 1954 is within the scope and ambit of article 33 or not and if it is, whether central government notification making, *inter alia*, section 21 of the Army Act, 1950 and chapter IV of the Army Rules, 1954 applicable to the general reserve engineering force are *ultravires* and that the general reserve engineering force is neither an army force nor a Force charged with the maintenance of public order. General reserve engineering force is a force intended to support the army in its professional requirement. The personnel of general reserve engineering force are partly drawn from the army and partly by direct recruitment. The person recruited from the army are posted to general reserve engineering force according to deliberate and carefully planned manning policy. Directly recruited personnel are governed by the provisions of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 but for the purpose of discipline they are subject to certain provisions of the Army Act and the Army Rules as stipulated by notifications.

The facts of the above case in brief are that a group of general reserve engineering force personnel had assembled in front of the headquarter, chief engineer Project (VARTAK), shouted slogans and demanding the release of their colleagues placed under arrest, removed their belt participated in flag demonstration and failed to fall in line in spite of the order to do so, by the chief engineer and also associated themselves with an illegal association called "All India Border Road Association". They were tried by the court-martial under the Army Act, 1950 and the Army Rules, 1954 as applicable to general reserve engineering force personnel and convicted, and later on dismissed from the service. By the two notifications, the central government applied to general reserve engineering force all provisions of the Army Act, 1950 with certain exceptions and also the provisions of the Army Rules, 1954. Section 21 of the Army Act, 1950 and Rules 19, 20 and 21 of the Army Rules, 1954 are material as

10. *Supra* note 1.
11. *Supra* note 3.

they impose restrictions on the fundamental rights of the members of the general engineering force.

The main contention before the Supreme Court was the constitutional validity of section 21 of Army Act which empowers the central government, by notification to make rules restricting to such extent and in such manner as may be necessary, three categories of rights enumerated therein. The petitioner contended that:

(1) Section 21 of the Army Act, 1950 was not justified by the terms of article 33 of the Constitution;

(2) Under article 33 it was the Parliament alone which was entrusted with the power to determine to what extent any of the fundamental rights shall, in their application to the members of the armed forces or the forces charged with the maintenance of public order be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them;

(3) Parliament could not leave it to the central government to determine the extent of restrictions or abrogations which were sought to be done under section 21.

(4) The petitioners further contended that they were entitled to exercise their fundamental rights under sub-clauses (a), (b) and (c) of clause (1) of article 19 of the Constitution without any of the restriction imposed by rules 19, 20 and 21 of the Army Rules, 1954. Thus, they could not be tried for these charges under section 63 of the Army Act and their conviction by the court-martial was void and illegal.

The Supreme Court after examining the provisions of the Army Act held that section 21 does not itself impose any restrictions on the three categories of rights specified therein but leaves it to the central government to impose restrictions without laying down the guidelines or indicating any limitations which would ensure that the restrictions imposed by the central government are in conformity with clauses (2), (3) or (4) of article 19, which ever be applicable. Thus, the central government is the sole judge of what restrictions are necessary and the central government may in terms of the power conferred upon it, impose restrictions it considers necessary even though they may not be permissible under clauses (2), (3) and (4) of article 19. The power is thus, a broad uncanalised and unrestricted power permitting the violation of its constitutional limitations. But, even though section 21 cannot be condemned as invalid on this ground as it is saved by article 33, which permits the enactment of such a provision. Article 33 carves out an exception in so far as the applicability of fundamental rights

to the members of the armed forces and the forces charged with the maintenance of public order is concerned. The Constitution makers, therefore, placed the need for discipline above the fundamental rights in the case of armed forces and article 33 does not require that Parliament may itself by law restrict or abrogate any of the fundamental rights in order to attract the applicability of that article. Parliament itself can, of course, enact a law restricting or abrogating any of the fundamental rights in their application to such force as in fact, it has done by enacting the Army Act, 1950 the provisions of which according to the decisions of the constitutional bench in this court in *Ram Swarup* case,[12] are protected by article 33 even if found to affect one or more of the fundamental rights. Having regard to the varying requirements of army discipline and the needs for flexibility in this sensitive area, it would be expedient to insist that the Parliament should determine what particular restrictions should be imposed and on which fundamental right in the interest of proper discharge of their duties and maintenance of discipline amongst them. The extent of restrictions would depend necessarily upon the prevailing situation at a given point of time and it would be inadvisable to enact it in a statutory formula. The Constitution makers were obviously clear that no more restrictions should be placed on the fundamental rights of the armed forces and forces charged with the maintenance of public order than what is required to ensure the proper discharge of duties and the maintenance of discipline. The central government has to keep this guideline before it in exercising a power of imposing restrictions under sections 21 though, it may be pointed out that once the central government has imposed the restrictions, the court will not ordinarily interfere with the decision of the central government that such restrictions are necessary because that is a matter left by the Parliament exclusively to the central government which is in a best position to know what the situation demands. Section 21 must, in these circumstances, be held to be constitutionally valid as being within the power conferred under article 33 of the Constitution.

After upholding the validity of section 21, the Supreme Court added that the question whether the members of the general reserve engineering force can be said to be the members of the armed forces for the purpose of attracting the applicability of article 33 must depend essentially on the character of the general reserve engineering force, its organisational set up, functions, the role it is called upon to play in relation to the armed forces etc. and if judged by these criteria they are found to be the members of the armed forces, the mere fact that they are non combatant civilians governed by the Central Civil Services (Classification, Control & Appeal)

12. *Supra* note 1.

Rules, 1965 cannot make any difference. Accordingly, the Supreme Court dismissed the petition. After critical examination of the above cases, following conclusions may be drawn:

(a) In *Ram Swamp* case,[13] the Supreme Court has in its judgment nowhere made any reference to the two qualifications expressaly provided in article 33 of the Constitution. The Constitution permits the encroachment on fundamental rights in their application to the members of the armed forces only in so far as such restriction or abrogation is necessary for the maintenance of discipline or the proper discharge of duties by them.

(b) The proposition laid down by the Supreme Court that each and every provision of the Act is a "law" made by the Parliament under article 33 and that if any such provision tends to affect the fundamental rights, it must be taken that Parliament has restricted or abrogated the respective fundamental rights, it is respectfully submitted is too broad. It was further stated in *Vishwan*[14] that the power of the central government to restrict or abrogate the fundamental rights is uncanalised and unrestricted, permitting violation of the constitutional limitations. The constitution makers placed the needs for discipline above the fundamental rights in the case of armed forces. This virtually makes the provisions of the three service Acts immune from attack on the ground of their unconstitutionality. This could not have been the intention of the Parliament.

(c) In *Ram Swarup* case[15] and *S.P.N. Sharma* case[16] the accused persons had been arrainged on serious charges and both were not defended at their respective trial by court-martial by a lawyer, yet the Supreme Court and the Delhi High Court were quite satisfied with the affidavit filed by the service authority that the accused person had made no grievances on their account. This can be compared with the attitude of the Delhi High Court in *S.P.N. Sharma* case[17] where the high court in reference to the contention of the petitioner that he was not permitted to engage a lawyer before the court-martial and had consequently been prejudiced, said that this circumstance by itself, would not vitiate the findings and sentence of the court-martial in question.

13. *Ibid.*
14. *Supra* note 3.
15. *Supra* note 1.
16. *S.P.N. Sharma* v. *Union of India*, AIR 1965 SC 247.
17. *Ibid.*

It is submitted that the Supreme Court in *Ram Swarup*[18] and *Vishwan* cases[19] lost a very good opportunity of delineating the limits of judicial review of legislation restricting the fundamental rights in their application to the members of armed forces. It is admitted that the civil courts may be ill-equipped to determine certain questions relating to the enforcement of discipline and the exigencies of its operations in the armed forces. Placing a total blanket ban on the judicial review of the proceedings of the court-martial or action of military authorities would, however, tantamount to allowing absolute and arbitrary power to the government in so far as the members of the armed forces are concerned. The law passed by the Parliament under article 33 would be "law" within the meaning of article 13 (2). An excessive curtailment of the fundamental rights of the members of the armed forces may be struck down by the courts. In other words, the power under article 33 is not unqualified.

The Supreme Court in *Ram Swarup* case[20] and Delhi High Court in *S.P.N. Sharma* case[21] should have gone into the question of the accused having had effective legal assistance by a counsel of their choice. This scrutiny would have been well within the powers of the court by virtue of two qualifications explicit in article 33 of the Constitution which authorized restrictions or abrogations of the fundamental rights.

Thus, it would appear that provisions of three service Acts are immune from the challenge of unconstitutionality. This could not have been the intention of the framers of the Constitution. The rationale for expanding the scope of applicability of the fundamental rights to the members of the armed forces personnel, as envisaged in USA is equally applicable in India. There is no justification in law to deprive the armed forces personnel of their salutary protections.

The extension of the scope of the fundamental rights of the armed forces will depend upon the wisdom and ingenuity of our superior civil courts. The Constitution should be so interpreted as to afford all fundamental rights to the members of the armed forces except those which by their nature are inapplicable. This can be achieved by scrutinizing each allegation of the infringement of fundamental rights before the court-martial with reference to the two qualifications explicit in article 33 of the Constitution and only those restrictions should be permitted which are absolutely essential in the interest of the maintenance of discipline or the proper discharge of duties by the members of the armed forces.

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18. *Supra* note 1.
19. *Supra* note 3.
20. *Supra* note 1.
21. *Supra* note 9.

The Government of India is studying the issue of having an appellate court to review the verdict of courts-martial. However, if this proposal matures the Army Act, 1950 and Army Rules, 1954 will have to be amended accordingly. Such a court may be known and described as court of military appeal. There is no gainsaying the fact that establishment of such a court will give an elevated stature to the court-martial system as well as to the administration of judicial justice to the military personnel. Such a court should be manned by a 'flag officer' well versed in military laws along with judicial officer/s. Such a court will, thus, be the first judicial court of appeal who intern should be made to work under the superintendence of the apex court of the country. The Indian military will feel highly solaced since it will save them from exploitation and an expert knowledge of law instilling a new faith and trust in the judicial system of the nation.

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