CHAPTER IV
CUSTOMS OF SERVICE AND THE PRINCIPLES
OF TENURE, TERMINATION AND PROCESSUAL
JUSTICE IN DEFENCE FORCES

Prelude

After having known a thing as to what it is, the other
curiosity that arises is how it came to be?\(^1\) This is true about the
law relating to the defence forces as well, as it cannot be
different from the other disciplines of study in the field of the
social sciences. 'The theologians say that law originates from
God.'\(^2\) Austin believed that law originated 'from the sovereign.'\(^3\)
Savigny found it (the law) in the volksgeist.\(^4\) Lord Denning went
to the extent, to say that, 'without religion there can be no
morality and without morality, there can be no law.'\(^5\) At the same
time, what is morally wrong cannot be theologically right.\(^6\) Thus,
the practices which were morally correct and theologically right
became the basis of law. These, in fact were, the customs
accepted by the society for the governance of their individual,
social and economic intercourse. It may therefore, not be wrong
to say that all history is based on customs. Defined as a rule of
conduct, obligatory on those within its scope established by long
usage\(^7\), customs were the most authentic source of law until the
Parliaments in the world started enacting legislations.

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1. BN Mani Tripathi, 'An Introduction to Jurisprudence (Legal
India 2008, p.181.
2. Ibid.
3. Ibid.
4. Ibid.
5. Lord Denning.
6. Sir Joseph Arnold of Privy Council in Mahraj Libel case, 1861, as
quoted by HM Seervai.
7. P.G. Osborn, 'A Concise law Dictionary', (Sweet and Maxwell Ltd.,
Appointments and removals were discretionary hence customs were formed around exercise of this prerogative. With no obligatory procedure for compliance, customs of war were given precedence. A reading of the historical texts relating to the defence forces reveals that all over the world, it is in the customs and conventions that the ground, air and the marine forces of the nations groomed and nurtured them. Whether it was their uniforms or their ranks and ratings or the rules of discipline, the usage decided what was right and what was wrong. While in some cases, the customs took the shape of statues, a majority of them remained unwritten. Since it was near impossible to memories and follow the usage in letter and spirit, the governments of nations thought it necessary to give them some written form. Hence, those customs which had not been adopted by the statute came in the form of orders and instructions of the respective heads of the services.

Among many rights conferred by the constitution of India on its citizens, one important right, with respect to its employees, is the right to serve peaceably and continuously, until superannuation. The contingencies which are allowed to prevail upon this right of continuous service with remuneration are retirement, release, discharge or termination of service by way of removal, dismissal or cashiering (applicable only in case of defence service officers). In ideal circumstances, cessation of service is an incidence of employment occurring in due course by way of release or retirement, relinquishment of an appointment or employment, or discharge on completion of terms of engagement, fulfillment or expiry of contract of service. The inviolable right of continuous service is available for every citizen under Article 16 of the Constitution of India. But when referred
to in terms of the defence forces of India, it finds itself regulated in the sense that the contracted liability is mandatory to be discharged in the manner specified in the contract of enrolment called the ‘enrolment form’ IAFK 1162, and the conditions in that form called as the enrolment conditions or the terms of engagement or in case of the officers, the terms of commission or the junior commission in the case of Junior commissioned officers as the case may be. Even though related to the service, unregulated freedom is alien to the defence Forces. The reason is simple; there is no concept of unregulated freedom under the State umbrella. In a democratic set up, political freedom is central to all freedoms, the rest are secondary. In the words of Hans Kelsen the ‘political freedom’ is essential to mankind. This kind of freedom means the ‘political freedom in the sense of democracy’.

This has been guaranteed by Article 19 of the constitution of India to its citizens irrespective of their status. Fundamental rights have been modified in respect of the defence personnel but not the freedom to be treated equally and to be dealt with equitably. This however, may not necessarily mean -hold tenures indefinitely, as that would, in any case be contrary to the rule of law and equity. This wisdom of enjoying a regulated liberty within the parameters set by the State is the essence of governance in the defence services in relation to their tenures and terminations. Probably this is the next landmark in the State administration after the Evolution of mankind from the extinct hominid. ‘This accomplishment of the Nature should, however, not be allowed to be squashed under the roller coaster of ambition that brooks no opposition nor should it be allowed to

carry the load of ignorance till eternity.' Prior to the discovery of new principles of tenure and termination based on the statutes, the old texts relied on intuition, providence and the judgement of the emperor. One such text is the Akbar - Nama by ABU-L-FAZAL, translated from original Arabic by H. Beveridge, I.C.S. on invitation from Asiatic Society of Bengal. The book reveals certain profound texts in the form of exhortations to the Mughal lineage and the system of administration including the defence forces and at certain places in the form of verses. These verses stress upon the principles of service, humility and adherence to the divine law. The popular sentiment of unqualified obedience to the royal edicts set the course of events of those times and became an important reference point on the administrative decisions and justified actions like the terminations from the

9. The researcher, in an article titled 'Human Rights: A Classical Approach' published in the Festschrift, A Tribute to Dr. (Ms.) Thirty D. Patel (2008). " .....The likes of Dr. Thirty Patel is the ones who make this difference as in their own humble way they serve and enrich the society and thus assist the Lord in his great act of bringing peace, awareness and solace to His beleaguered children."

10. Preface to the First Volume of the Akbar-Nama(1902). Discovering the principles of tenure, termination and processual justice is a journey into the origin of state and its subjects. Reading into the olden treatises of law and administration brought the researcher face to face with the rare writings of the thinkers of the olden times. And sometimes found entirely unexpected sources of historical information on the subject. One such source has been the Akbar - Nama of Abu-l-Fazal. The rich translation of the original text by H.Beveridge, I.C.S. on invitation from Asiatic Society of Bengal which came out after near impossible, unprecedented and unachievable hard labour of the translator who banked upon the British Museum, London; the India Office, London; the Royal Asiatic Society's Library, London for the original texts, introduces the reader to treasure of information on thinking and times of that era. Hence a reference to the recordings of Abu-l-Fazal became necessary not only to explain the enormity of this task but also to place on record profound gratitude to the scholar who wrote the Akbar-Nama and the one who made it possible for the researcher to read and understand it and its simple complexities. It has been indeed a great voyage into the ocean of history of administration of that era.
Royal service. A verse reproduced from the Akbar Nama\textsuperscript{11} is as follows:—

\textit{Wherever discourse deals with the knowledge of God, Our thoughts’ praise becomes dispraise. Behold rashness, how it boils over with daring! Can a drop embrace the ocean? Think not that it is even a single letter of the Book, for the letter is muslin and the Book moonlight. How long wilt thou be an embroiderer of speech? Stay thy foot here, with the acknowledgement of humility.}

\textbf{CUSTOMS}

\section{Customs in the Defence Forces}

The rules relating to the tenures and the terminations in the defence forces are generally referred to as the rules passed by the Parliament but it could not be so entirely since the concept of employment in the state is a far older concept. Hence the tenure and termination too had originated when the customs of the service alone constituted the rule of governance. Status of customs in the matters pertaining to tenure and termination today is that, due to long usage in the service law, the conventions which were found useful and could be given some semblance of policy were retained in the service as long as those conformed to the rule of law. Primarily they comprised of the conventional customs and the general customs. For instance, the custom of awarding censure of a superior Commander to a junior officer has to be strictly in accordance with the specified

There is in fact no part of the service in the forces which has not been influenced by the customs and usage. Thus, it can be said about those customs, which, having surpassed the status of being simply persuasive, the importance the customs of service in the defence forces have assumed is phenomenal acquiring a binding status of almost a legislation. Many customs of service have been reduced into writing and accorded a legal status. Breach of these customs is punishable as an offence in the court of law.

4.1.1 Customs in Relation to the Tenure and Termination

In the large edifice of State, the defence forces have occupied a place of utmost importance but in spite of their importance, the focus of every chronicle’s attention has been the campaigns, battles and their combatant might as a result the tenure and other related aspects of the service in the defence forces were pushed to the back seat. Consequently, the precedents on termination of service customarily done are few. But since the ‘termination of defence service’ which results into involuntary or forcible cessation of privilege, from the very beginning was within the prerogative of the sovereign authority who could be the King, the Sabha, the Sultan, the Emperor, the Governor General, the President, the Central Government or any of its functionaries duly authorized in this behalf. As far as the servants of the State were concerned, power of ‘termination of’ or ‘removal from’ service and the exercise of this power was deemed

12. Award of censure in the form of ‘displeasure’, ‘recordable’ of ‘non-recordable’ is nothing but an adoption of custom of service which empowers a superior commander to award his ‘displeasure’ of specific nature to his subordinate officer. This is also termed as ‘reproof’ customarily given.

13. Offences pertaining to ‘Good Order and Military Discipline’ u/s 63 of the Army Act, 1950 are purely Military offences many of which, in the civil, may not constitute even an offence but being repugnant to some custom of ‘Military Service’ will constitute an offence triable by a court martial assembled under the Act.
as only an expression of the "Sovereign Will". The exercise of this "Will" was in all other matters was governed either by the Charters, Statutes or by some laid down Usage. Perusal of the recordings of the past reveals somewhat arbitrary exercise of this power if seen through the prism of the modern judicial activism. The main reason for this appears to be the absence of an effective judicial review during those times. Credit today goes to the exponents of Justice like Blackstone, Marshall, Cardozo, Denning, Bhagwati and many others who through their various judgments expounded the principle of the 'Rule of Law' for the society and extended its benefits to the mankind. This concerted effort of the jurists and judges brought peace and order in the society. The noted Jurist and a historian Sripati Roy in one of his Tagore law Lectures in Calcutta, during Jan –Feb 1909 expressed the following views:

\[ Custom \text{ is of far earlier origin than Law. Law which is a product of a rather complicated machinery of Social and Political organisation was unknown, at any rate, in its present sense, in the primitive ages.}^{14}\]

4.1.2 The Customs on tenure of Service- an Imperial approach

A glimpse of Military history in India reveals that most of the customs and traditions of service which are prevalent in the Forces today, were either already prevalent in the British Army and came with them ashore or are those which were integral to the Indian society and the British Officers while serving in India with Indian troops found them appropriate to infuse valour for the protection of the crown interests and later became essential

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for the maintenance of discipline among the Native troops. An appreciable and acceptable mix of both became what is now known as the ‘Customs of Service’. For instance, the expression of pleasure in termination of service is the customary prerogative of the crown. There is no denying the fact that the customs of service play a major role in the administration of the services; in particular the Army and the Navy. The Air force, however, is of a much recent origin when compared with the Army and the Navy; hence it draws heavily from the customs of Army. Interestingly, keeping standing armies was a necessity as well as a custom. Hence, the acceptance of the customary law in the defence forces is but a natural concomitant of their process of rising. Much has been borrowed from the English tradition which along with the irrepressible ambition brought some healthy tradition for instance the rock hard discipline. In that vein, the mercantile spirit of the East India Company was generally abhorred by the British for obvious reasons as they had their sights set on much higher goals to achieve in India. At the same time the natives were also detested for being black or at least for not being white or for, what the majority of the English people thought about the native customs, were the ‘Heathen rites’\(^\text{15}\). This detestation on the basis of colour of skin carried on even in the past mid nineteenth century. In today's setting when the nation is conscious of its profound and glorious past, a deep rooted golden history, it is hard to imagine that Indian troops, serving their own land, inspite of chivalrous lineage as proud as the British themselves, were generally referred as the ‘sepoy armies’. ‘Pandy’ derived from Mangal Pandey was another derogatory expression which the British, after 1857 used profusely, for those Indians who were accused of freely expressing their National pride. The

\(^{15}\) William Dalrimple, p.50.
law of tenure and termination for these troops of Indian origin were not the same as were used for the English troops. Dismissals in respect of the Indians were generally accompanied by rigorous imprisonments which in fact gave to the British masters a work force to maintain their prisons through Indians without pay. Dismissals were summary and without appeal. This was in accordance with the primitive customs but not allowed by any law of the land. But in spite of all the difference in culture and thought traditionally inspired by an inflexible western mind set eminently reflected by Rudyard Kipling the “never the twain shall meet”, So deep was the impression of Indian customs on the British that some of them followed those customs even at the cost of their personal welfare. Reproducing the deep impressions of the British Officers in the early nineteenth century about the Indian profoundness, William Dalrimple wrote, “Vedas were written at that remote period in which our savage ancestors of the forest were perhaps unconscious of a God, and was, doubtless, strangers to the glorious doctrine of the immortality of the soul first revealed in Hindustan.”

This record of events though in the form of a travelogue gives a much needed insight into the functioning of the services during a particular regime, their tenures and the mode of their terminations. Whether done by the ruler himself or by any of his subordinates, the law applied was only the acceptable customs of the defence service. In a country where diversity is the essence of all disciplines; it is natural that different customs would invariably find their way into the legislations. This is both legal as well essential. The requirement in such cases is, that, a valid custom must be of immemorial antiquity, certain and reasonable, obligatory, not

repugnant to Statute law.\textsuperscript{17} Law relating to the defence forces of the Union in India rests on the wide pedestal of custom and tradition. The statutes which govern the defence forces of the Union, have the customs rolled into the provisions wherever the statute with its existing provisions, found itself unable to provide for a situation or a contingency.

4.1.3 The ‘Customs’ of service

The Army Act, 1950 is highly influenced by the customary law in its essential parts. Some of the provisions contain the customs as a part of the provision itself not separating the custom from the law. The first authority in the field of tenure and a termination of service in the defence forces is the Commanding Officer commanding a Unit, Ship, Squadron, Wing etc. The definition of such a Commanding Officer as contained in the statute is a clear indication of the extent of influence of custom in the service. Section 3(v) of the Army Act, 1950 defines a Commanding Officer who holds the power to dismiss from service any person below the rank of a junior commissioned officer\textsuperscript{18} or to discharge from service persons below the officers’ rank\textsuperscript{19} will discharge his functions as such Commanding officer in accordance with the customs of military service.\textsuperscript{20} The provision makes it clear that the Commanding officer while discharging his duties will give precedence to the statutory law but in the absence of any statutory provision shall take recourse to the customs of service.\textsuperscript{21} In other words, the commanding

\begin{itemize}
\item \textsuperscript{17} ‘Osborn’s Concise Law Dictionary’, p. 106.
\item \textsuperscript{18} See Appendix 1, Army Act Section 116 r/w Army Act Sections 120 &71.
\item \textsuperscript{19} See Appendix 1, Army Rule 13.
\item \textsuperscript{20} Sec 3(v), Army Act,1950.
\item \textsuperscript{21} Ibid., note 16.
\end{itemize}
officer, in the absence of a statutory provision shall, in all matters where the statute is silent, for all practical purposes, be guided by the ‘customs of service’

4.1.4 The ‘Customs’ of War

Another expression which finds its mention in the statutes relating to the defence forces of the Union is the custom of war. The provision appears in relation to the discharge of the duties of the commanders while administering ‘justice’ to its ranks. As it has been seen that exercise of administrative functions cannot be seen as different from the exercise of power of removal and termination, being integral to the maintenance of discipline in the forces, the power of administration of justice too is seen as an extension of the same administrative power under the respective Acts. Taking the example of the solemn oath provided under the statutes which is to be administered to the commanders as the court or to the each member of a court martial assembled under the respective Acts is another instance of custom adopted in the Statute. Bound by this solemn oath or affirmation as the case may be, the court when sitting singly as in the case of Summary Court martial under the Army or the Air Force Acts is saddled with the responsibility of administering justice to a soldier or an Airman as the case may be. This court which is empowered to pass a sentence of dismissal with or without imprisonment is guided by the customs of service in discharge of its duty as such court. Going further, a General or a Summary General Court – Martial has the power to award a sentence of cashiering or dismissal with or without rigorous

23. Ibid.
24. See Appendix 1.
25. See Appendix 1.
imprisonment as applicable to the Officers, Junior Commissioned Officers, Non Commissioned Officers and the Jawans in the Army or the Airmen in the Air Force or the Shipmen, mid shipmen etc., in the Navy. Bound by the oath or the affirmation as the case may be, these courts martial which exercise the highest judicial authority in the forces too are governed in the discharge of their functions by the customs of war and service. Another important legal functionary, the ‘judge advocate’ who assists the commanders sitting as the court to administer justice as provided in the statute too is guided by the customs of service in the discharge of his duties as such legal functionary. The expression used in all these cases is, “the custom of war in the like cases”. The expression ‘in the like cases’ justifies the application of customs and usage to the similar cases occurring in the defence services. It means the use of customary norms for administration of justice is an accepted practice in the forces. This also vindicates the belief that when tested on the anvil of judicial scrutiny, the customs of service applied for the administration of justice in the defence services shall pass the test of legality if challenged in the court of law.

4.1.5 The Defence Services Regulations

As the defence forces were following customs and traditions in their day to day functions, it was essential to reduce them to writing and document them for reference. This task has been done effectively by compiling them systematically in the form of regulations of the respective services. The customs of service prevalent in the defence forces of the Union were thus enshrined in the ‘Defence Services Regulations’. The usage relating to the Military is contained in the Regulations for

26 All General Courts Martial shall and all District or Summary General courts martial may have a judge advocate as a part of the court martial (Army Act Section129)
the Army,\textsuperscript{27} and those pertaining to the Navy are found in the ‘Navy Regulations’.\textsuperscript{28} As mentioned earlier, among the three services, the Air force is a relatively new wing of the defence forces; nevertheless it has its own traditions and thus its own regulation\textsuperscript{29} These ‘Regulations’ too have been issued under the authority of the Government of India. The regulations relating to the Army cover the salient aspects of administration of the regular Army in India and were last revised in 1962, superseding the Regulations for the Army in India-reprint 1945 and ‘Instructions by His Excellency the Commander –in – Chief, Reprint 1945’. Though the regulations are non statutory in nature, due to their long usage, these have attained the force of law and their non compliance or willful breach constitutes a substantive offence under the Army Act and is punishable as provided therein. The issue of their binding status was raised before the Supreme Court in the case of Brigadier J.S. Sivia\textsuperscript{30} and the court laid down that the Regulations for the Army, being the repository of the customs of service were binding in nature.

4.1.6 Customs and the Departmental orders and Instructions

Next are the departmental orders and instructions. The departmental orders and instructions take their authority from the defence Services Regulations. Should any variance arise between such orders and instructions and those regulations, the latter shall prevail. In other words the Defence Services Regulations are the repository of the conventions relating to the three services. Taking the example of the Army which is the

\begin{itemize}
\item \textsuperscript{27} The Regulations for the Army, 1987 edition which is the revised edition of the Regulations of 1962.
\item \textsuperscript{28} Part of the Navy Regulations is statutory while a part of it is non statutory.
\item \textsuperscript{29} Air Force Regulations too are non statutory like the Regulations for the Army.
\item \textsuperscript{30} MLJ 1996 SC 3.
\end{itemize}
largest of the three, regulations for the Army enshrine the conventions relating to the Army service. Terms like regiments duty, graded staff appointment, corps staff appointment, technical staff officers, secondment, extra regiments employment, plural marriage, the procedure to deal with plural marriage of an Army person including a gorkha of Nepal origin in the employment of the Indian Army though do not find mention in the Army Act, 1950, are provided in the regulations.

4.1.7 Reproof

Reproof is an English term with the dictionary meaning as ‘rebuke’\(^{31}\) or ‘reprimand’\(^{32}\). The Regulations For the Army 1987, provide that it may be verbal or in writing and must not be administered in the presence of subordinates except for the purpose of making an example. The term reproof does not find mention in the Army Act or the Army Rules. The concept is purely customary and takes the form of ‘censure’\(^{33}\) awarded by the specified superior authority which includes the Central Government. Reproof is in fact the progeny of customs of service and has been duly recognized by the courts of law in India.\(^{34}\)

4.1.8 Tenure and Termination as per Customs and Usage in the Navy

Employment on the sea has been the main vocation in the west. Hence the rules of employment and termination in the Navy were specific but primarily guided by the customs of the sea. Later, the Navy as a defence force and a deterrent against the belligerent nations occupied an important place within the State structure. History is replete with the stories of battles at


\(^{32}\) Ibid.

\(^{33}\) Brigadier JS Sivia’s case (supra).

\(^{34}\) Ibid.
sea. England in particular, being proud of its Navy has with great care and circumspection preserved its heritage and glory in letter and spirit. Starting from naming the sides of the ship to the administration of its crew, its retention on duty at sea and their removal from duty, everything was based on the 'customs of the sea' which meant the usage which regulated the conduct of the ship men during the voyage on the high seas.

The 'English' believed that it is imperative in all respects to conform to the established customs and practices of His Majesty's Service at Sea. The customs and practices referred by them on the aspect of the service tenure at sea are the unwritten common law of Great Britain to which all British subjects are considered to be legally bound. A large part of these customs has not been transformed into the statutes but are still observed with austerity. For instance, with regard to the 'employment' on board a ship, the men were contracted only for the duration of the commission of the ship in which they had elected to serve and after the ship paid off, those who were retained in the service were the Captain, his lieutenants and warrant officers. Freedom of the workmen lay at the mercy of the captain of the ship and eventually with the marine company. This regulated their terms of service with a particular ship. Until the year 1825, even some pay was held back of shipmen as a guarantee against desertion. The practice was to pay the men off only at the end of a commission. This gave rise to the term, a ship paying off, which literally means 'dismiss (workers) with a final payment.'

4.1.9 Usage on Recruitment and Removal

The customs and conventions of service at the sea extended as far as the recruitment and conditions of service once employed. There was a custom of compulsory service in the sea. It was an Admiralty rule, founded upon an old tradition that every male British subject was eligible to be pressed into service at the sea and pressing for the naval service was legal. For this purpose, an organized group of people called as the press-gangs who were a body of men employed to enlist men forcibly into service in the Army or navy were authorised. They could hold people forcibly for service at sea provided the press-gangs held a warrant issued in the county and was accompanied by a commissioned officer. The Warrant used to be issued by the commissioners On behalf of the office of Lord High Admiral which generally read as follows:-

By the Commissioners for Executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, &c. and of all His Majesty's Plantations, &c.

IN Pursuance of His Majesty's Order in Council, dated the Sixteenth Day of November, 1776, We do hereby Impower and Direct you to impress, or cause to be impressed, so many Seamen, Seafaring Men and Persons whose Occupations and Callings are to work in Vessels and Boats upon Rivers, as shall be necessary either to Man His Majesty's Ship under your Command or any other of His Majesty's Ships, giving unto each Man so impressed One Shilling for Prest Money. And in the execution hereof, you are to take care that neither yourself nor any Officer authorised by you do demand or receive any Money, Gratuity, Reward or other Consideration whatsoever, for the sparing Exchanging or Discharging any Person or Persons impressed or to be impressed as you will answer to it at your Peril. You are not to intrust any Person with the execution of this Warrant, but a Commission Officer and to insert his Name and Office in the Deputation on the other side hereof, and set your Hand and Seal thereunto.---This Warrant to continue in Force till the Thirty First Day of December 1776, and in the due execution thereof, all Mayors, Sheriffs, Justices of the Peace, Bailiffs, Constables Headboroughs, and all other His Majesty's Officers and Subjects whom it may concern, are hereby required to be aiding and assisting unto you, and those employed by you, as they tender His Majesty's Service, and will answer the contrary at their Perils.

Given under our Hands and the Seal of the Office of Adm-  

istry, the

Captain
Commander of His Majesty's

By Command of their Lordships,

38. http://in.search.yahoo.com under the heading 'Royal Navy and Marine Customs & Traditions'.
The customs of service in England had a profound effect on the Edicts of the Emperors in England and their administration, is evident from, the orders and charters issued during that time. One such example is of a diktat issued, in the name of His Majesty the King of England, to a yard in the year 1776 which runs as follows:\footnote{39. \url{http://in.search.yahoo.com} under the heading ‘Royal Navy and Marine Customs & Traditions’}:

\begin{center}
\begin{minipage}{0.7\textwidth}
These are to certify all whom it may concern, That the Bearer hereof is employed in His Majesty's Yard at Deptford, you are therefore to let him pass quietly to and again between the said Yard and his own Habitation, during the Space of Four Days from the Date hereof, without being otherways imperfect. Dated this, \textit{\underline{22}}d\textit{\underline{8th}} of November 1776. He is about Twenty four Years of Age, five Feet Nine Inches high, with his own, Plain, Short, Hair, Compliment.

\textit{\underline{Signature}}
\end{minipage}
\end{center}

India was highly influenced by the customs of England as those were brought by the British as they came to India. The common law was tried and tested successfully in England and was thus preferred for adjudications in India over the Indian Customary law. But along with the British came their individual idiosyncrasies particularly of those who were at the helm for Indian affairs. It has been observed that the services in India owe much of their superciliousness to the Imperial approach of Lord Wellesley whose 'Imperial policies would effectively bring
into being the main superstructure of the Raj as it survived upto 1947.\textsuperscript{40} He also brought with him ‘the arrogant and disdainful British racial attitudes that buttressed and sustained it.’\textsuperscript{41}Inherited from the British, the defence forces of the Indian Union had their roots fixed deep in customs, but could not be set in a watertight mould distanced from the benefits accruing from the juristic ventures for long. Still the Customs in India have had a very deep and indelible impression on its varied citizenry. We see it day in and day out in every walk of our life. However, from the eyes of an outsider, this description is more striking and noticeable. With progressive times, the customs soon gave way to the more specific and intelligible laws of tenure and termination. The customs, good or bad, were needed to be seen in the perspective in which those were created and adopted. The society simultaneously moved on regardless changing and adapting many a tradition conforming it to the current times.

\textbf{4.1.10 Indelible Impressions of customs and Usage on the Defence services and their terminologies}

Very little is left to doubt that the customs and usage covered a major part of the government code as well. Whether it was the uniforms of the sailors or their ranks and ratings, the customs and usage of service have played an appreciable role. A few important customs are listed below:

1. A warship, before entering a foreign port, would signify her friendly intent by firing all her guns singly, thereby leaving the ship temporarily unarmed. The custom is maintained now by firing blank charges.

\textsuperscript{40} William Dalrimple, ‘\textit{White Mughals; Love and Betrayal in Eighteenth Century India‘}, (Penguin Books India, 2002), p.54.

\textsuperscript{41} \textit{Ibid}.
2. The pattern of salute in Navy with the palm facing inwards was to conceal the tar stained hands while saluting is nothing but a pure custom. Salute by number of ruffles on drums - three for an admiral, two for a vice-admiral, and one for a rear-admiral is again an old custom being followed till date.

Certain terms which owe their origin to custom and usage are such as the term vice which meant ‘in place of’\(^\text{42}\). When used in the context of Navy it is used as a prefix to the term admiral i.e., the one subordinate to an Admiral. Another term which received its coinage from custom is the rear-admiral. As it was considered necessary to simultaneously protect the front and the rear of a fleet of ships in a fixed formation, with the usual squadrons the vanguard and the rearguard which were commanded by two admiral’s viz., the admiral of the vanguard and the admiral of the rearguard. Hence the term rear admiral. Piping the side, Manning ship, Warming the bell etc., are the terms in vogue in the Navy which have their origin purely in customs. Similarly, many terms in the Army owe their origin to customs and usage.

For instance, the word Lieutenant also pronounced as Leftenant in the Army officer cadre, originates from the French lieutenant or an abbreviated Lieut\(^\text{43}\) meaning thereby holding a place or position for someone else, a substitute, Deputy\(^\text{44}\) or standby\(^\text{45}\). Some of these customs date back to the early 13\(^\text{th}\) century.

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43. Ibid., p.467.
44. Ibid.
45. Ibid.
4.1.11 Custom and Usage on Award of ‘Punishments’ in the Defence Forces.

The law relating to the Indian Navy is contained in the Navy Act, 1957. Though it is near impossible to document all customs and usage relating to a service, the customs and usage of Navy which relate to the most essential ceremonies, service welfare and the discipline, are contained in the Navy regulations, part of which have also been made statutory.\(^46\) Tracing the history of the service law, the Articles of War, were first written in 1661 in the reign of Charles II and considered as a purely naval code of discipline, occupy the centre stage in the treatises on discipline in the defence forces. Taking an example from the customs of Admiralty, \textit{sleeping on watch on ship}, was considered a very serious offence because it endangered the ship. The punishment increased with each repetition. For instance, for the first offence, a bucket of sea-water was poured over the head of the offender. A second time the offender’s hands were tied over his head and a bucket of water was poured down each sleeve. For a third offence the man was tied to the mast with heavy gun chambers secured to his arms, and the captain could order as much additional pain to be inflicted as he wished. The fourth offence was inevitably fatal; the offender was slung in a covered basket hung below the bowsprit. Within this prison he had a loaf of bread, a mug of ale and a sharp knife. An armed sentry ensured that he did not return aboard if he managed to escape from the basket. Two alternatives remained -- starve to death or cut him adrift to drown in the sea. Interestingly, the motto for such a law was, "For the good of all, and to prevent unrest and confusion."\(^47\) The most common type of punishment, inflicted for

\(^{46}\) Part I of the Navy Regulations which houses the ‘\textit{discipline procedure}’ is statutory.

\(^{47}\) \textit{Ibid.}
almost any crime at the discretion of the captain, was whipping. Mutinous sailors were whipped with *cat-o’-nine tails* or *keelhauled* i.e., dragged beneath a ship on the end of a rope. These were the accepted practices inherited from the customs of service at the sea and seen today would be termed as gruesome from all standards of justice. The discomfort of dismissal or termination would pale in significance in front of such punishments. This, however, leaves no doubt in the mind of the reader that the treatment meted out to the righteous soldiers of ‘Sepoy Mutiny’ of 1857 when they were tied to the canon mouths and ordered to be shred into smithereens was only an extension of an age old custom. Some remnants of such customary punishments were handed down by the British in the garb of tradition incorporated in the provisions of the Army Act 1911, later the Act of 1950, until removed (omitted) by the Army Amendment Act, 1992.  

4.1.12 Customs and Usage of the Air Force

The Air Force is of a relatively recent origin when compared with the other two forces, the Army and the navy. As the Air force is understandably linked to the innovation in the field of aviation, its recent origins are justified. The customs of service of the Air Force reveal a close similarity with the usage of the military. Nevertheless, as the customs and traditions have a bearing on the specific service as those are peculiar to a service, the customs of service in the Air Force are specific and replete with pride of the service. Considering the contribution of the Air Force in the formation of the world history, since the invention of the Aircraft, the usage of this service is an honoured treasure.

49. *Ibid*.
50. See Appendix 1, Field punishment which found its mention in section 80(j) of the Army Act, 1950, omitted vide Act 37 of 1992.
The Regulations which enshrine the customs of the Air Force Service called the Regulations for the Air Force, revised Edition, 1964 were issued under the authority of the Government of India. These regulations have superseded the Regulations for the Royal Indian Air Force–(Rules)- Reprint, 1942 and Regulations for the Indian Air Force – Instructions by his Excellency the Commander –in- Chief in India, Reprint 1944. The responsibility to ensure that these regulations are strictly observed is that of the Air and other Officers Commanding. These regulations deal with all those matters which are not specifically provided in the Statute.

PRINCIPLES

4.2 Principles of Tenure, Termination and Processual Justice

The General principle of tenure, termination and processual justice originates from the belief that the sovereignty is supreme and it lies either in the king, the President or the popularly elected body like the Parliament. The most essential part of this principle is the ‘legal authority’ attached to the exercise of the power of removal, dismissal or termination by the ‘Sovereign’ himself or by his ‘delegates’ in the discharge of their sovereign functions.

Tenures, in all cases, are set by the Statutes or the rules, the by-laws, or the administrative instructions issued under the authority of the statute or the rules which accord them the legal enforceability. This principle is applicable not only for the governance of the tenures but commences its influence right from the stage of recruitment. As the power of appointment and dismissal is integral to the exercise of sovereign functions by the competent authorities, the ‘Sovereignty’ as explained by
Oppenheim, is, “supreme authority which is independent of any other earthly authority.” Simplistically seen, this does not appear to anticipate any legal or administrative control of any kind in its exercise, but when applied to the incidents of employment and that of tenure and terminations, the control is found exercised either by the sections of the statute itself or subsequently, by some judicial verdicts from the courts of competent jurisdiction. Dismissal, removal and termination of the defence personnel from the government service, under the constitution, are in fact governed by their respective Statutes. This governance is, however, required to conform to the ‘rule of law’ provided in those statutes or interpreted by the courts of law as aforesaid. The service tenures of Officers, Junior Commissioned Officers, the Non Commissioned Officers, the enrolled persons, the Air-men or the Sailors in their respective “forces” are required to conform to the terms of engagement which are definite and specific in each case. An important factor which determines the principles of tenure and termination in the defence forces is the concept of the specified tenures which is as much applicable to defence personnel as to any other citizen of the country governed by the constitution of India and his own law of service. As long as the service in all disciplines of the defence forces is affected by the exercise of powers by their administrative authorities or the Commanders,

52. See Appendix- I, Section 3 (xviii), The Army Act, 1950 (46 of 1950).
53. See Appendix- I, Section 3 (viii), The Army Act, 1950 (46 of 1950).
54. See Appendix- I, Section 3 (viii), The Army Act, 1950 (46 of 1950).
55. See Appendix- I, Section 2(1)(b), The Army Act, 1950 (46 of 1950).
58. See Appendix- I, Section 3 (xi), The Army Act, 1950 (46 of 1950).
their governance is required to be based on firm principles, administrative and constitutional, in short the ‘rule of law’.  

Before the benefits of a statute could be acquired in the service, subjection to the said statute is the pre-requisite quality. For instance in case of the persons subject to the provisions of the Army Act, 1950, before the privileges of service are conferred on the defence personnel, the subjection under the Act is ensured.

The peculiarity of the general principles of tenure and termination in the defence forces is that the status of the employee has always been found integral to the tenures. Perusal of accounts vis-a-vis the status of individuals in employment reveals certain interesting facts about the principles governing employment relations. Beginning with what Megasthanese and Kautilya in their respective treatises, viz., the ‘Indica’ and the ‘Arthashastra’ respectively, recorded about the status and description of dasa or the slave and Doulas (Greek) which differed substantially, in its liability for service. Doulas(slave) for Megasthanese is a human being sold for ever with no ‘rights’ as a human being, master could dispose him off the way he willed. Dasa for Kautilya, however, had a specific relation with respect to the services, provided, his or her rights were only suppressed and not dissolved. Rights of dasa were redeemable and unlike the west were not extinguished forever. Since, the law of tenure and termination extended to the slave and his master, and also being subject to a laid down procedure, the concept of tenure,

59. ‘Ours is a system of rule of law, which does not entertain injustice.’ B.A. Khan(Justice), on the panel of discussion on ‘punishment to the perpetrators of heinous crime against a woman in New Delhi’, TV Channel, Aaj Tak, 2100 hours - 2130 hours, 02 January, 2013.
60. See Appendix- I.
61. Ibid.
63. Ibid.
termination and the processual justice had indeed taken root in India as early as 4th and 3rd century B.C. A rendering of Mahabharat too reveals similar accounts of master-servant relationship as explained in the Shanti Parva as it exhorts mutual respect between the two. Eulogies to the principle of mutual rights and duties in the performance of official functions are found even in cultural treatises.64

4.2.1 Principle of audi alteram partem – concept in India

The principle of audi alteram partem i.e., no one ought to be condemned unheard, is closely intertwined in the Indian defence jurisprudence as the basic principle of the tenures and termination. This fact is evident from the provisions relating to the conditions of services in the Army, Navy and the Air Forces of India.

The duties of the four varna and of the four orders of religious life could be considered as the first and the foremost to bring in a definite order in the ‘employment’. This would perhaps be the earliest that the rules of employment and governance, ever acquired a definite and crystallised shape and appearance. In other words, the rules of tenure and termination and the processual justice had their basis in the early segregation of duty and responsibility. The administrative setups were subject to the vagaries of time as those had to keep with the developments taking place in and around the system. The Maha-senapati and the Senapati which were the acronyms for the modern generals, the Chiefs of Army, Navy and the Air Force Staff, exercised the

64. The Srimad Bhagwat Purana has in it, the dialogue between Lord Krishna and his childhood friend, Uddhava “Panchatma Keshu Bhuteshu Smaneshu cha Vastutah”64 i.e., all beings are composed of five elements which are similar hence all differences are shallow. Sitting as a presiding judge in Family Court, Lord Denning gave to the world the famous principle of equality and equitability, “what is sauce for the goose is sauce for the gander” i.e., state cannot use different parameters for people similarly situated.
powers of appointment and dismissals besides leading the forces in battles. Arid was the chief military advisor to the sultan in the Gaznavi’s Army. The rules of appointment and tenures varied with the Royal prerogative. Though the regular forces had concrete rules of administration derived from the scriptures, but the mythology and the tribal customs too played an important role. The principle underlying the tenure and termination was in fact the necessity of war and campaign. This was contrary to what was being practiced in the ancient India where the society and its defence forces remained within the strict fold of Dharma which had no parallel anywhere in the world. In relation to the great and unique academic exercises undertaken in India during the pre historic age, William Dalriple wrote, “Vedas were written at that remote period in which our savage ancestors of the forest were perhaps unconscious of a God, and were, doubtless, strangers to the glorious doctrine of the immortality of the soul first revealed in Hindostan.”

The system of duty and obligation to perform ordained tasks which can be equated with the discharge of duty by a government servant, are amply illustrated by the duties imposed on the varna-ashrams and the strict adherence ingrained and accrued. Harmlessness, truthfulness, purity, freedom from spite, abstinence from cruelty, and forgiveness were duties common to all. The reflections of these duties are found in the statutes governing the defence forces. It was firmly believed that the observance of one’s own bounden duty leads one to heaven and infinite bliss. But when it is violated, the world will come to disaster owing to confusion of castes and duties. The prime responsibility of the king thus was never to allow people to swerve from their duties, for the world, when maintained in accordance with injunctions of

the triple Vedas, will surely progress, but never perish.\textsuperscript{66} With this high moral fibre of the service in the background, the rules of employment, tenure and termination are found to be influenced by the high principles of morality in governance which incidentally returned to India through the West.

4.2.2 Misconduct an offence under Defence Law - a ground for termination of service

The case under study is the decision of Madras High Court in a petition filed by Major F.K. Mistry in the year 1948.\textsuperscript{67} The petitioner was an Ordinance Officer prosecuted for misappropriation of government stores meant for the defence purposes. The petitioner waited till the charge was framed against him and later moved the Court on the ground of jurisdiction.

(a) **Issues Involved**

(a) Which statute governs the affairs of the defence personnel;

(b) What constitutes a civil offence;

(c) What is the relevance of the maxim *generalia specialibus non derogant*?

(d) Whether the criminal court has jurisdiction over military personnel accused of committing civil offences.

(b) **Petitioner’s argument**

As derived from the judgement and order of the Hon’ble High Court was contended by learned Mr. Jayarama Aiyar, on behalf of the petitioner that the Acts complained against him constitute an offence under Section 31 of the Indian Army Act, and such an offence is triable only by, a court-martial. Any

\textsuperscript{66.} Shamasstry, in *Kautilya’s Arthashastra*.

\textsuperscript{67.} *In Re: Major F.K. Mistry v. Unknown*, (1949) 2 MLJ 44.
offence other than that contemplated by Section 31 will come within the residuary Section 41 and may be tried either by a court-martial or by the ordinary criminal Court; but if the offence is one which comes directly within Section 31, the ordinary criminal Courts of the land have no jurisdiction. 68 Therefore, Mr. Jayarama Aiyar, the counsel of the petitioner, argued that the petitioner being a person to whom the Indian Army Act applies, could only be tried by a court-martial, and for this purpose, he had devoted much time and energy on intensive study of the history and development of the various Army Regulations which existed in India during the time of the East India Company. According to him, criminal breach of trust by a person in the employment of the Army of the East India Company, was made an offence punishable by a court-martial even prior to the enactment of the Indian Penal Code in 1861, previous to which year there existed no codified penal law in India, so that an Army Officer committing the offence of criminal breach of trust was liable to be dealt with only by a court-martial before the enactment of the Indian Penal Code. Section 3169 had its predecessors in the various Army Acts and Regulations from 1845 onwards; and a study of those Acts will reveal that from the early times to the enactment of Act VIII of 1911 by which many offences committed by Army personnel were made triable by the ordinary criminal Courts, such offences as criminal breach of trust were triable by a court-martial.

(c) **The maxim generalia specialibus nonderogant**

Relying upon the maxim *generalia specialibus nonderogant*, Mr. Jayarama Aiyar, the petitioner’s counsel contended that a

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68. The concept is known as the ‘Concurrent Jurisdiction’ under Section 125 of the Army Act, 1950. The principle was recognized in *Union of India v. Major SK Sharma*, AIR 1987 SC 1878.

69. The Indian Army Act, 1911 (Act VIII) of 1911.
special Act like the Army Regulations having provided for the trial of the offence of breach of trust of Army property by a court-martial as early as 1861, and having continued it in the subsequent Acts, unless a special provision is made for its trial by the ordinary criminal Courts, it should be presumed that the special jurisdiction is retained.

He also referred to Section 5 of the Indian Penal Code, 1860 which says that "Nothing in this Act is intended to repeal, vary, suspend or affect any of the provisions .... Or of any special or Local Law." He relied upon a passage at page 156 of Maxwell on the Interpretation of Statutes, eighth edition, by Sir Gilbert H.B. Jackson, which is in the following terms:

Having already given its attention to the particular subject and provided for it, the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention is manifested in explicit language.

(d) Respondents' arguments.

The learned Advocate-General appeared on behalf of the Crown and expressed the wish that the points raised should be considered and decided in view of the importance of the questions involved.

The respondent maintained this singular proposition, that, In dealing with a consolidating statute each enactment must be traced to its original source, and, when that is discovered, must be construed according to the state of circumstances which existed when it first became law. The proposition has neither reason nor authority to recommend it.
The very object of consolidation is to collect the statutory law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating Act was passed.

(e) Principle(s) Laid down by Madras High Court.

The court held that,-

it is undisputed that the petitioner who holds the rank of a Major in the Indian Army is governed by the provisions of the Indian Army Act, 1911 (Act VIII of 1911), which consolidated and amended the law relating to the Government of His Majesty's Indian forces, such as Indian Commissioned Officers, Viceroy's Commissioned Officers, soldiers and other persons in His Majesty's Indian forces.

(i) Applicability of the Army Act. The court further held that every person subject to Indian Army Act, 1911 (Act VIII of 1911), who, either Within British India or at any place beyond British India commits any civil offence shall be deemed to be guilty of an offence against military law, and, if charged therewith under this section (Section 31), shall, subject to the provisions of this Act, be liable to be tried for the same by court-martial, and on conviction to be punished as prescribed thereunder.

(ii) Civil offence. The term ‘civil offence’ is defined in Section 7, Sub-section (18) as meaning an offence which, if committed in British India, would be triable by a criminal Court, and this is followed by the definition of the word
‘offence’ as meaning any Act or omission punishable under this Act, and includes a ‘civil offence’ as hereinbefore defined.\textsuperscript{70}

Thus, every person subject to Military law who commits any of the following offences...........shall be tried by a court martial.

\textbf{4.2.3 Modified Fundamental rights for defence forces – breach a ground for removal}

Consequent to the provisions of Article 33 of the constitution, the laws governing the defence forces in India have to a certain extent modified the Fundamental rights in their application to the serving defence personnel, in pursuance of a public policy. Section 21 of Army Act, 1950 provides that subject to the provisions of any law for the time being in force relating to the regular Army or to any branch thereof, the Central Government may, by notification, make rules restricting to such extent and in such manner as may be necessary the right of any person subject to this Act—

(a) to be a member of, or to be associated in any way with, any trade union or labour union, or any class of trade or labour unions or any society, institution or association, or any class of societies, institutions or associations;

(b) to attend or address any meeting or to take part in any demonstration organized by anybody of persons for any political or other purposes;

(c) to communicate with the press or to publish or cause to be published any book, letter or other document. \textsuperscript{71}

\textsuperscript{70} See Appendix- I, Army Act, 1950 (XLVI of 1950).
\textsuperscript{71} See Appendix- I, Army Act, 1950 (XLVI of 1950).
After laying down the substantive law as above, the Rules on modification were framed. Army Rule 19 provides that no person subject to the Army Act shall, without the express sanction of the Central Government—

(i) take official cognizance of, or assist or take any active part in, any society, institution or organization, not recognized as part of the Armed Forces of the Union; unless it be of a recreational or religious nature in which case prior sanction of the superior officer shall be obtained;

(ii) be a member of, or be associated in any way with, any trade union or labour union, or any class of trade or labour unions. On the political and non military activities, the law was further amplified in Army Rules 20 and 21.

Though the above provisions are not omnibus, provision has been made in respect of the Air Force Act and the Navy in their respective legislations. A reference is thus made to the Air

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72. The Army Rules, 1954 have been notified by the Gazette Notification Extraordinary, vide the S.R.O. 484 dated 27th November, 1954.
73. The restrictions on the Fundamental rights are found in Rules 19, 20 and 21 of the Army Rules, 1954.
75. Section 21 of the Air Force Act, 1950 gives to the Central Government the power to modify certain Fundamental rights in their application to persons subject to the Air Force Act. The section provides that subject to the provisions of any law for the time being in force relating to the Air Force or to any branch thereof, the Central Government may, by notification, make rules restricting to such extent and in such manner as may be necessary the right of any person subject to this Act—
(a) to be a member of, or to be associated in any way with, any trade union or labour union, or any class of trade or labour unions or any society, institution or association, or any class of societies, institutions or associations;
(b) to attend or address any meeting or to take part in any demonstration organised by anybody of persons for any political or other purposes;
(c) to communicate with the press or to publish or cause to be published any book, letter or other document.
Force Rules, 1969 besides the Air Force Act, 1950.76 The Navy Act77 deals with this aspect under Sections 19.78

76. Rule 19 of the Air Force Rules, 1969 provides that no person subject to the Act shall, without the express sanction of the Central Government,—
   (a) be a member of, or associated in any way with, any society, institution, association or organisation that is not recognised as part of the armed forces of the union or is not of a purely social, recreational or religious or educational nature;
   Explanation.— If any question arises as to whether any society, institution or organisation, not recognised as part of the Armed Forces of the Union; unless it be of a recreational or religious nature in which case prior sanction of the superior officer shall be obtained;
   (b) be a member of, or be associated in any way with, any trade union or labour union, or any class of trade or labour unions.


78. Under the Navy Act of 1957, the modification of Fundamental rights in respect of the navy personnel is dealt with in the following manner:

19. Restriction respecting right to form associations, freedom of speech etc.—(1) No person subject to naval law shall, without the express sanction of the Central Government—
   (a) be a member of, or be associated in any way with, any trade union, labour union, political association or with any class of trade unions, labour unions or political associations, or
   (b) be a member of, or be associated in any way with, any other society, institution, association or organisation that is not recognised as part of the Armed Forces of the Union or is not of a purely social, recreational or religious nature.
   Explanation.— If any question arises as to whether any society, institution, association or organisation is of a purely social, recreational or religious nature, the decision of the Central Government thereon shall be final.
   (2) No person subject to naval law shall attend or address any meeting or take any part in any demonstration organised by any body of persons for any political purposes, or for such other purposes as may be specified in this behalf by the Central Government.
   (3) No person subject to naval law shall communicate with press or publish or cause to be published any book or letter or other document having bearing on any naval, army or air force subject or containing any fact or opinion calculated to embarrass the relations between the government and the people or any section thereof or between the government and any foreign country, except with the previous sanction of the Central Government.
   (4) No person subject to naval law shall whilst he is so subject practice any profession or carry on any occupation, trade or business without the previous sanction of the Chief of the Naval Staff.”

“20. Political and non-military activities.—(1) No person subject to the Act shall attend, address, or take part in, any meeting or demonstration held for a party or any political purposes, or belong to or join or subscribe in the aid of, any political association or movement.
   (2) No person subject to the Act shall issue an address to electors or in any other manner publicly announce himself or allow himself to be
This state of affairs attracted the attention of the Hon’ble Supreme Court of India in the case of Lt. Col. Prithipal Singh Bedi etc., which remains the undisputed law from the Apex court till date. The court observed that the foregoing modifications do not expressly inhibit the right of a defence personnel to serve peaceably i.e., enjoy a fixed and uninterrupted tenure of service under the Government, but do impose certain restrictions on the rights which are essential owing to the peculiar nature of the service in the defence forces.

(a) Brief facts of the case.

As derived from the judgement and order of the Hon’ble Supreme Court, Lt. Col. Prithipal Singh Bedi was commissioned into the Regiment of Artillery in 1958 and in course of his service he came to be promoted to the rank of Lt. Colonel and in

publicly announced as a candidate or as a prospective candidate for election to Parliament, the Legislature of a State or a local authority, or any public body or act as a member of a candidate’s election committee, or in any way actively promote or prosecute a candidate’s interests.

21. Communications to the Press, Lectures, etc.—No person subject to the Act shall—
(i) publish in any form whatever or communicate directly or indirectly to the Press any matter in relation to a political question or on a service subject or containing any service information, or publish or cause to be published any book or letter or article or other document on such question or matter or containing such information without the prior sanction of the Central Government, or any officer specified by the Central Government in this behalf; or.
(ii) deliver a lecture or wireless address, on a matter relating to a political question or on a service subject or containing any information or views on any service subject without the prior sanction of the Central Government or any officer specified by the Central Government in this behalf.

Explanation.—For the purposes of this rule, the expression “service information” and “service subject” include information or subject, as the case may be, concerning the forces, the defence or the external relation of the Union.


80. AIR 1982 SC1413. Also see Study and Practice of Military Law by Colonel GK Sharma and Colonel MS Jaswal; Deep And Deep Publication, New Delhi, 6th revised edn. (2006).

81. AIR 1982 SC 1413.
that capacity he was designated as Commanding officer. Based on an allegation of interpolation in a confidential report of another officer, he was called upon to face a trial by General Court Martial on a charge under section 45 of the Army Act, 1950 for breach of Army discipline. He questioned the legality and validity of the order convening the general court martial, more particularly its Composition. A petition was filed under Article 32 of the Constitution of India, alleging violation of mandatory procedures and Fundamental rights contained in part III of the constitution.

(b) Issues Involved

Firstly, What is the scope of Article 33 with regard to the modification of Fundamental rights with respect to the Army personnel?

Secondly, what is the scope of the word and expression “Corps” under the Army Act, 1950?

Thirdly, How far are the principles of natural justice applicable to the Army personnel.

Fourthly, How is the legislative intent behind the provisions of the Army Act ascertained.

Fifthly, whether at least there should be one appeal to a body composed of non-military personnel and who would enjoy the right of judicial review both on law and facts as also determine the adequacy of punishment being commensurate with the gravity of the offence charged.

(c) Petitioner’s argument

Firstly, taking cue from Section 21 of Army Act and Rules 19, 20 and 21, of the Army Rules, it was submitted that while Art. 33 enables the Parliament by law to abrogate or restrict Fundamental rights in their application to Armed Forces,
Parliament exercised the same power limited to what is prescribed in section-21 and specified the restrictions in rules 19, 20 and 21 and, therefore, the remaining Fundamental rights in Part III are neither abrogated nor restricted in their application to the Armed Forces. Consequently, it was urged that the Act prescribing the procedure of court-martial must satisfy the requirement of Art. 21 of constitution of India.

Secondly, It was contended that the Apex Court must examine the validity of the Rules enacted in exercise of the power conferred by section 191 of the Army Act. It was urged that what Article 33 protects is an Act made by the parliament and not subordinate legislation such as the Rules and the regulations.

The main contention on behalf of the petitioner was that to satisfy the requirements of Article 33, the law must be a specific law enacted by Parliament in which a specific provision imposing restriction or even abrogation of Fundamental rights should be made; (2) that rule 40 of the rules should be so construed as to sub serve the mandate of Article 21 of constitution of India that the Army with its total commitment to national security against foreign invasion must be assured the prized liberty of individual members against unjust encroachment and the court should strike a just balance between military discipline and individual personal liberty; and (3) that principles of natural justice should be observed even in respect of persons tried by the Army Tribunals.

(d) The Respondent’s argument

The learned Attorney-General urged that the entire Act has been enacted by Parliament and if any of the provisions of the Act are 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.

(e) Principle(s) Laid Down By The Supreme Court

The court observed that to put the personnel of the general court-martial beyond reproach and to make it unbiased and objective, composition of the court-martial was so devised by statutory rules as to make it an ideal body having all the trappings of a court. Having observed as such, the court went on to define certain terms and expressions and also gave its opinion certain unexplained aspects of Military law and procedure.

(i) "Army Corps" defined.

People drawn from different corps, and avoiding officers of the same corps composing the General Court Martial, would ensure an objective unbiased body. This is achieved by giving the expression "corps" a restricted meaning so as not to make it synonymous with Army Corps at the top. If a battalion or a regiment is treated as a 'corps' then it is easy to provide composition of Court Martial in strict compliance with rule 40. Viewed from either angle the expression 'corps' in rule 40 is not used in the same sense in which the expression 'Army corps' is used. It is used in the sense in which it is defined and elaborated in Army Rule 187. It is, of course, true that the interpretation of rule 40 must be informed by the underlying intendment that officers composing the court martial must be independent of command influence or influence of superior officers. This depends on what meaning one must assign to a loose expression like 'command influence' and 'influence of superior officers'. These expressions have to be understood in the context of the vertical hierarchy in the composition of Army. Once it transpires that the expression 'corps' in rule 40 has the same meaning as has been set out in rule 187 and, therefore the
battalion would be a corps and an unattached company can be a corps by itself, it becomes easy and practicable to set up a court-martial in which officers outside the corps to which an accused belongs are enlisted and it could certainly be said to be free from command influence. The expression ‘corps’ in rule 40 is not synonymous with the expression ‘Army corps’. It must receive a restricted construction with narrow connotation as explained in rule 187 (3).\textsuperscript{82}

The golden words of the Hon’ble Supreme Court of India are contained in the following extract of the judgment:-

\textit{Army with its total commitment to national security against foreign invasion must be assured the prized liberty of individual members against unjust encroachment and the court should strike a just balance between military discipline and individual personal liberty; and that principles of natural justice should be observed even in respect of persons tried by the Army Tribunals.}\textsuperscript{83}

(ii) \textbf{Ascertainment of the legislative intent behind the provisions of the Army Act.}

The court dwelt upon this aspect in the following manner:-

\textit{One of the well recognized canons of construction is that the legislature speaks its mind by use of correct expression and unless there is any ambiguity in the language of the provision, the Court should adopt literal construction if it does not lead to an absurdity. To ascertain the literal meaning it is equally necessary first to ascertain the juxtaposition in which the rule is placed, the Purpose for}

\textsuperscript{82}Army Corps is otherwise defined in section 3 of the Army Act, 1950. However, the Supreme Court in their judgment has given it a legalistic and appropriate connotation with respect to Army Rule 40.

\textsuperscript{83}AIR 1982 SC 1413.
which it is enacted and the object which it is required to subserve and the authority by which the rule is framed.\textsuperscript{84}

(iii) On modification of Fundamental rights.

The distinguishing feature between the defence personnel and their civilian counterparts is the fact that the Fundamental rights available to the defence personnel have been modified to the extent desirable to the organizational necessity. The court crystallised its opinion in the following words:

\begin{quote}
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.\textsuperscript{85} The power to legislate in respect of any item must be preferable to any entry in the relevant legislative list. The law has to be enacted by Parliament subject to the requirement of Part III read with Art. 33 which itself forms part of Part III. Therefore if any provision of the Army Act is in conflict with Fundamental rights it shall have to be read subject to Article 33 as being enacted with a view to either restricting or abrogating the Fundamental rights to the extent of inconsistency or repugnancy between Part III and the Army Act.\textsuperscript{86}
\end{quote}

\textsuperscript{84} AIR 1982 SC 1413.
\textsuperscript{85} Ibid.
\textsuperscript{86} AIR 1982 SC 1413.
(iv) **The power of the Parliament explained**

Article 33 permits Parliament by law to not merely restrict but abrogate the Fundamental rights enacted in Part III in their application to the members of Armed Forces. The Act was enacted in 1950 and was brought into force on July, 1950. Thus, the Act was enacted after the Constitution came into force on January 26, 1950. When power to legislate is conferred by the Constitution, and Parliament enacts legislation, normal inference is that the legislation is enacted in exercise of legislative power and legislative craftsmanship does not necessitate specifying the powers. Since the Constitution came into force, Parliament presumably was aware that its power to legislate must be preferable to Constitution and therefore it would be subject to the limitation prescribed by the Constitution. Whenever legislation is being debated for being put on the statute book, Articles. 12 and 13 must be staring into the face of that body. Consequently when the Act was enacted not only Articles. 12 and 13 were hovering over the provisions but also Article 33 which to some extent carves out an exception to Articles. 12 and 13 must be present to the corporate mind of Parliament which would imply that Parliament by law can restrict or abrogate Fundamental rights set out in part III in their application to Armed Forces. But it was said that by contemporane - expositio Section 21 of the Act clearly sets out the limits of such restriction or abrogation and no more. Section 21 confers power on 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 Art. 19(1) (a) and (c) in their application to 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 & 21 have been framed by the Central Government.

Article 33 confers power on the Parliament to determine to what extent any of the rights conferred by part III shall, in their application to the members of the Armed Forces, be restricted or abrogated so as to ensure the proper discharge of duties and maintenance of discipline amongst them. Article 33 does not obligate that Parliament must specifically adumbrate each Fundamental right enshrined in part III 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 preferable 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 III 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.

(v) The duty of the court defined

While investigating and precisely ascertaining the limits of inroads or encroachments made by legislation enacted in the exercise of power conferred by Article 33, on the guaranteed Fundamental rights to all the citizens of this country without
distinction, in respect of armed personnel, the court should be vigilant to hold the balance between two conflicting public interests; namely necessity of discipline in armed personnel to preserve national security at any cost, because that itself would ensure enjoyment of Fundamental rights by others, and the denial to those responsible for national security of these very Fundamental rights which are inseparable adjuncts of civilized life.  

(vi) **Laid the Foundation for the Armed Forces Tribunal**

Absence of even one appeal with power to review evidence, legal formulation, conclusion and adequacy or otherwise of punishment is a glaring lacuna in a country where a counterpart civilian convict can prefer appeal after appeal to hierarchy of courts. Submission that full review of finding and/or sentence in confirmation proceedings under section 153 is provided for is poor solace. A hierarchy of courts with Appellate powers each having its own power of judicial review has of course been found to be counterproductive but the converse is equally distressing in that there is not even a single judicial review. With the expanding horizons of fair play in action even in administrative decision, the Universal Declaration of Human Rights and retributive justice being relegated to the uncivilized days, a time has come when a step is required to be taken for at least one review and it must truly be a judicial review as and by way of appeal to a body composed of non-military personnel or civil personnel.

_Army is always on alert for repelling external aggression and suppressing internal disorder so that the peace loving citizens enjoy a social order based on rule of law; the same cannot be denied to the protectors of this_

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87. See Appendix-I, section 191 of the Army Act, 1950.
order. And it must be realized that an appeal from Caesar to Caesar's wife...confirmation proceeding under section 153 has been condemned as injudicious and merely a lip sympathy to form.

The core question is whether at least there should be one appeal to a body composed of non-military personnel and who would enjoy the right of judicial review both on law and facts as also determine the adequacy of punishment being commensurate with the gravity of the offence charged. Judicial approach by people well-versed in objective analysis of evidence trained by experience to look at facts and law objectively, fair play and justice cannot always be sacrificed at the altar of military discipline. Unjust decision would be subversive of discipline. There must be a judicious admixture of both. And nothing revolutionary is being suggested.

(vii) Comparison with the West

Our Army Act was more or less modeled on the Army Act of the United Kingdom. Three decades of its working with winds of change blowing over the world necessitate a second look so as to bring it in conformity with liberty oriented constitution and rule of law which is the uniting and integrating force in our political society. Even U.K. has taken a step of far reaching importance for rehabilitating the confidence of the Royal Forces in respect of judicial review of decisions of court-martial. U.K. had enacted a Court Martial (Appeals) Act of 1951 and it has been extensively amended in Court Martial (Appeals) Act, 1968. Merely providing an appeal by itself may not be very re-assuring but the personnel of the appellate court must inspire confidence. The
court martial Appellate Court consists of the ex-officio and ordinary judges of the Court of Appeal, such of the judges of the Queen’s Bench. Division as the Lord Chief Justice may nominate after consultation with the Master of the Rolls, such of the Lords, Commissioners of Justiciary in Scotland as the Lord Chief Justice generally may nominate, such judges of the Supreme Court of the Northern Ireland as the Lord Chief Justice of Northern Ireland may nominate and such of the persons of legal experience as the Lord Chancellor may appoint. The court martial Appellate court has power to determine any question necessary to be determined in order to do justice in the case before the court and may authorize a new trial where the conviction is quashed in the light of fresh evidence. The court also has power inter alia, to order production of documents or exhibits connected with the proceedings, order the attendance of witnesses, receive evidence, obtain reports and the like from the members of the court martial or the person who acted a Judge-Advocate, order a reference of any question to a Special Commissioner for Inquiry and appoint a person with special expert knowledge to act as an assessor. Frankly the Appellate court has power of full judicial review unhampered by any procedural clap trap. Turning towards the U.S.A., a reference to Uniform Code of Military Justice Act, 1950 would be instructive. A provision has been made for setting up of a court of military Appeals. The Act contained many procedural reforms and due process safeguards not then guaranteed in civil courts. To cite one example, the right to legally qualified counsel was made mandatory in General court-martial cases 13 years before the decision of the Supreme Court in Grdeon v. Wainwriget. Between 1950 and 1968 when the Administration of Justice Act, 1968, was introduced, many advances were made in the
administration of justice by civil courts but they were not reflected in military court proceedings. To correct these deficiencies the Congress enacted Military Justice Act, 1968, the salient features of which are: (1) a right to legally qualified counsel guaranteed to an accused before any special court martial; (2) a military judge can in certain circumstances conduct the trial alone and the accused in such a situation is given the option after learning the identity of the military judge of requesting for the trial by the judge alone. A ban has been imposed on command interference with military justice, etc. 89

Ours is still an antiquated system the wind of change blowing over the country has not permeated the close and sacrosanct precincts of the Army. If in civil courts the universally accepted dictum is that justice must not only be done but it must seem to be done, the same holds good with all the greater vigour in case of court martial where the judge and the accused don have the same dress, have the same mental discipline, have a strong hierarchical subjugation and a feeling of bias in such circumstances is irremovable.90 We, therefore, hope and believe that the changes all over the English speaking democracies will awaken our Parliament to the changed value system. In this behalf, we would like to draw pointed attention of the Government to the glaring anomaly that Courts Martial does not even write a brief reasoned order in support of their conclusion, even in cases in which they impose the death sentence. This must be remedied in order to ensure that a disciplined and dedicated Indian Army may not nurse a

89. AIR 1982 SC 1413.
grievance that the substance of justice and fair play is denied to it. The freedom to form associations or unions available to the citizens of India under Article 19(1)(c) of the Constitution, is abrogated as far as the members of the defence forces are concerned. Requirement for such an abrogation can be well understood because of the nature of duties performed by the members of the defence forces and maintenance of discipline among them is the prime most necessity. But, the Fundamental right of a continuous tenure guaranteed under Article 16 of the constitution is available to the defence personnel. The principle of tenure and termination in India is that entitlement to the rule of law is Fundamental to the service administration as it is extendable by the judicial fiat to those who are governed by special laws and whose rights have been subjected to modification by statutes passed by the parliament. This protection is available under the constitution and is inviolable. It is right to contend that the principle of tenure, termination and processual justice rests on the pedestal of equality, equitability and justiciability i.e., the power of fixing tenures and passing orders of removals and termination are subject not only to adherence to a laid down process but also to judicial review by the courts where those may be queried and corrected if inequitably exercised. A landmark judgement on this issue is of Delhi High Court in an order of the full bench in the case of Major NR Ajwani.

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91. Army Rule 62 has already been amended Vide S.R.O. 17 E dated 06 December 993. Brief reasons in support of the findings are now recorded in the court martial proceedings. His is considered as a major step towards the development in the field of the processual justice in the defence forces of the Union. The amended Rule reads as under:

92. 55(1994) DLT 417; Judgement of the Full Bench headed by Justice Sunanda Bhandre.
A noted jurist H.K. Saharay succinctly brought out this principle in the preface to the 2nd edition of his book, “The constitution of India: An Analytical Approach”\(^93\) in the following words:

“While DOUGLAS in his Tagore Law Lectures (1955) \textit{From Marshall to Mukherjea} (Studies in American and Indian Constitutional law) said –

\textit{The Constitution of the United States is not a prolix document. Words are sparingly used; and a single phrase contains a vast arsenal of power}, IVOR JENNINGS commented – \textit{India’s constitution is long and prolix. But both the countries recognise that the people are the basis of all sovereignty. The Constitution of India, framed and written 50 years ago, can still claim to be the most modern Constitution of the age, reflecting the shine and glow of the influence of the Constitutions of different countries of the world. Rightly, therefore, AMBEDKAR had told the Constituent Assembly that the only new things in a constitution framed so late in the day are the variations made to remove faults and to accommodate it to the needs of the country. And this has enabled India, weathering all storms, to maintain a reasonably stable democracy which proved the people’s faith in the political philosophy of socialism, secularism and democracy.”}

He further said,

“Our constitution is rigid and supreme. Kesavananda’s case has settled its basic feature and so long as that decision stands, no amendment, and there have been several amendments so far, can whittle down or curtail or encroach

upon those basic features which include amongst others, the right to life, the rule of law, equality in the eye of law, the Fundamental rights balancing with the directive principles of the State policy and the supremacy of the Constitution itself.”

4.2.4 **Validity of termination proceedings in respect of those not directly subject to the Defence Law**

The constitutional validity of Section 21 of the Army Act, 1950 came up for consideration before the Supreme Court in the case of *R. Viswan & Others v. union of India & Ors.*

As derived from the judgement, the petitioners in this case belonged to the General Reserve Engineering Force (GREF). Charges were framed against them under section 63 of the Army Act, 1950 for acts prejudicial to good order and discipline. They were tried by Court Martial in accordance with the prescribed procedure and, on conviction, were dismissed from service. The petitioners challenged their convictions by Court Martial.

(a) **Issues Involved**

These writ petitions raised a short but interesting question of law relating to the interpretation of Article 33 of the Constitution. The question is 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 and if it is, whether Central Government Notifications Nos. SRO 329 and 330 dated 23rd September 1960 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 *ultra vires* that Article since the General Reserve Engineering Force is neither an Armed Force nor a Force charged with the maintenance of public order.

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94. AIR 1983 SC 658.
(b) Petitioners’ argument

Petitioners contended that the GREF was a civilian construction agency and not a 'force' raised and maintained under the authority of the Central Government and consequently, the members of GREF were not members of Armed Forces or the Forces charged with the maintenance of public order within the meaning of Article 33 of the Constitution. Consequent to the above position, the application of the provisions of Section 21 of the Army Act read with Army Rules 19 to 21 to them was unconstitutional since it restricted their Fundamental rights in a manner not permitted by the Constitution since under that Article it was Parliament alone which was entrusted with the power to determine to what extent any of the Fundamental rights shall, in application to the members of the Armed Forces or Forces charged with the maintenance of public order, be restricted or abrogated and Parliament could not have left it to the Central Government to determine the extent of such restriction or abrogation as was sought to be done under section 21 of the Act. The petitioners were therefore, entitled to exercise their Fundamental rights available to them under clauses (a), (b) and (c) of Article 19 (1) without any of the restrictions imposed by Rules 19 to 21. Therefore, they could not be charged under Section 63 of the Army Act on the facts alleged against them. Their trial was not in accordance with law; and the application of the provisions of the Army Act and the Army Rules to the members of GREF for purposes of discipline was discriminatory and violative of Article 14 in as much as the members of the GREF were governed both by the Central Civil Services (Classification Control and Appeal) Rules, 1965 and the provisions of the Army Act and the Army Rules in matters of discipline.
(c) **Respondents’ argument**

The contention of the respondents was that the GREF has been raised and is being maintained for the construction of roads in the border areas and such other tasks as may be entrusted to it by the Border Roads Development Board. Being raised under the authority of the Government of India and placed under the overall command of the Director General, Border Roads who has always been an Army officer. The General Reserve Engineering Force (GREF) is an organised on Army pattern in units and sub units with distinctive badges of rank and a rank structure equivalent to that in the Army. Though GREF is undoubtedly a departmental construction agency, it is a force in the sense of a defence force of the Union.

(d) **Principle (s) laid down by the Supreme Court**

The Supreme Court observed that

(i) The members of the GREF answer the description of members of the Armed Forces within the meaning of Article 33 and consequently the application of section 21 of the Army Act to the members of GREF is protected by that Article and the Fundamental rights of the members of GREF must be held to be validly restricted by section 21 read with Army Rules 19 to 21.

(ii) The court next held that the power conferred on the Central Government to impose restrictions to these three categories of rights which are part of the Fundamental Rights under sub-clauses (a) and (b) and (c) of Article 19(1) is unanalyzed and unrestricted power permitting violation of the constitutional limitations.
In spite of the above observations of the Supreme Court, Section 21 of the Army Act or the corresponding provisions of the Navy and the Air Force Acts 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 members of the Armed forces and the forces charged with the maintenance of public order is concerned. It is elementary that a highly disciplined and efficient armed force is absolutely essential for the defense of the country. The constitution-makers therefore placed the need for discipline above the Fundamental rights so far as the members of the Armed forces and the Forces charged with the maintenance of public order are concerned and provided in Article 33 that Parliament may by law determine the extent to which any of the Fundamental Rights in their application to members of the Armed forces and the forces charged with the maintenance of public order, may be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them. Hence the Parliament itself can, of course, by enacting a law restrict or abrogate any of the Fundamental rights in rights in their application to the members of the armed forces and the forces charged with the maintenance of public order, as in, fact, it has done by enacting the Army Act, 1950 to such extent and in such manner as may be necessary.

The guideline for determining as to which restrictions should be considered necessary by the Central government within the permissible extent determined by Parliament is provided in Article 33 itself, namely, that the restrictions should be such as are necessary for ensuring the proper discharge of
their duties by the members of the Armed Forces and the maintenance of discipline among them. The Central government has to keep this guideline before it in exercising the power of imposing restrictions under Section 21 though, it may be pointed out that once the Central government has imposed restrictions in exercise of this power, 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 Parliament exclusively to the Central Government which is best in a position to know what the situation demands. Section 21 must, in the circumstances, be held to be constitutionally valid as being within the power conferred under Article 33.

While the power to modify Fundamental rights is termed as the uncanalised power of the Central Government, yet this power could not be extended so far as to deprive the delinquent officer or another rank from a right to show cause as available to him under the Army or Air Force Rules or the Naval Regulations before taking any action prejudicial to his service tenure. This in fact is the essence of the processual justice in the defence forces.

4.2.5 **Validity of termination where offence is time barred**

The later thinking on the modification of Fundamental rights was modelled on the basis of Prithipal Singh’s case which came to dominate the subsequent decisions on this aspect. One such case was the case of Captain Harjeet Singh Sandhu.\(^\text{95}\)

As quoted in the judgement, by the Hon’ble Supreme Court, Harjeet Singh Sandhu, the respondent was a captain in the Army. A General Court martial was convened under Section 109 of Army Act, 1950 which tried the respondent and awarded the sentence of forfeiture of three years service for purpose of

\(^{95}\text{ Union of India & Ors v. Harjeet Singh Sandhu, AIR 2001 SC 1772.} \)
promotion and severe reprimand to the respondent. The confirming authority formed an opinion that the sentence passed on the respondent was very lenient and therefore, in exercise of the powers conferred by Section 160 of the Army Act, sent the case back for revision. On revision, the punishment was enhanced. The Chief of the Army Staff in exercise of the power conferred by Section 165 annulled the court martial proceedings on the ground that the proceedings were unjust. Accordingly, a show cause notice was issued to the respondent under Section 19 of the Act read with Rule 14 of the Army Rules, 1954 calling upon the respondent to show cause why his services should not be terminated. Reply was filed by the respondent defending himself. Not convinced by his reply, two facts were recorded on behalf of the Chief of the Army Staff, viz., (i) a satisfaction that the retrial of the respondent by a court martial consequent to the annulment of the GCM proceedings was impracticable, and (ii) that the further retention of respondent in the service was undesirable. Ultimately an order dismissing the respondent from service was passed. The respondent challenged the order of termination in a civil writ petition before the High Court of Allahabad. The High Court of Allahabad in its impugned judgment relied upon Major Radha Krishan v. Union of India and therefore, held that the exercise of power under Section 19 was vitiated.

(a) Issues Involved

Firstly, what is the underlying legislative scheme with respect to the modification of Fundamental rights of the persons belonging to the defence forces.

96. AIR 2001 SC 1772.
Secondly, whether termination of service by the Central Government under Section 19 of the Army Act after the Court martial proceedings have become time barred under Section 122 of the Army Act, is still justified.

(b) Appellant’s argument

The learned ASG contended that the expiry of period of limitation under Section 122 of the Act does not ipso facto take away the exercise of power under Section 19 read with Rule 14.

(c) Respondent’s argument

The singular contention raised before the High Court was that the Court martial proceedings had become barred under Section 122 of the Army Act hence Section 19 of the Act was not available to be invoked. Action for terminating services under section 19 of the Act is violative of Article 14.

(d) Principle (s) laid down by the Supreme Court

The Supreme Court in this case in fact reiterated its observations in the famous Prithipal Singh Bedi’s case and held that-

(i) Army defends the country and its frontiers. It is entrusted with the task of protecting against foreign invasion and preserving the national independence. The arduous nature of duties, the task they have to perform in emergent situations and the unknown lands and unknown situations wherein they have to function demand an exceptionally high standard of behavior and discipline compared to their counterparts in the civil services. That is why the military people command the respect of the masses. Such factors taken together demand the military services being treated as a class apart and a different system of
justice i.e., the military justice being devised for them. Article 33 empowers the Parliament to restrict or abrogate Fundamental rights in their application to the members of the armed forces so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

(ii) The next point for consideration was the validity of action for termination of service under section 19 of the Army Act when trial by court martial was barred by time. On this issue, the court held that

Section 19 of the Act and Rule 14 of the Rules are to be read together and as integral parts of one whole scheme. However, the bar of limitation provided by Section 122 cannot be read into Section 19 of the Act in spite of a clear and deliberate legislative abstention. In other words, the exercise of power under Section 19 read with Rule 14 cannot be excluded where it is not possible to hold trial by court martial as the delinquent officer cannot be allowed to escape the consequences of his misconduct.

(iii) The maxim nullus commodum capere potest de injuria sua propria. The maxim nullus commodum capere potest de injuria sua propria i.e., no man can take advantage of his own wrong is applied in case where the provisions of law are given an extended meaning. For instance, in Union of India & Ors. Vs.

98. On the question whether after the Court martial proceedings having become time barred under Section 122 of the Army Act, can the provisions of Section 19 of the Army Act was still available to be invoked, the court observed that Section 19 empowers the Central Government to dismiss or remove from the service any person subject to this Act which power is subject to: (i) the (other) provisions of this Act, and (ii) the rules and regulations made under the Act and this power is in addition to the power to order trial by appropriate court martial.
Major General Madan Lal Yadav (Retd.)

the Supreme Court held that the delinquent officer having himself created a situation withholding commencement of trial, he would be estopped from pleading the bar of limitation and the trial commenced on vacating of the judicial order of restraint on court martial shall be a valid trial. The Parliament has by Act No.37 of 1992 amended sub-section (2) of Section 123 so as to exclude the time during which the institution of the proceedings in respect of the offence has been stayed by injunction or order.

In view of the foregoing observations, the High Court was not right in placing reliance on the decision in Major Radha Krishan’s case and holding that the exercise of power under Section 19 read with Rule 14 by the COAS was vitiated solely on account of the bar of limitation created by Section 122 of the Act.

4.2.6 Processual Justice in Defence forces a reality and not a myth

Inspired by the views of the jurists, it is normal to stay in line with what the Supreme Court laid down as a guideline in Prithipal Singh’s case on a rarely brought in focus, the subject of processual justice in the defence forces. If the procedure established by law prescribes compliance with principles of natural justice but makes it dependent upon a requisition by the person against whom an inquiry has to be held such procedure would not be violative of Art. 21.

99. (1996) 4 SCC 127. See Appendix 1, Also referred Section 122 and 123 of the Army Act, 1950.
102. AIR 1982 SC 1413.
103. Prithipal Singh’s case (supra)
The concept of rights and duties though integral to that of tenures and terminations, as derived from the careful study of the old treatises it may appear remote in context in relation to a subject as statutory as the tenures and terminations and little would be revealed on the processual justice in vogue in that era. But in reality it is not so. Administration is just a part of the State as the functions of a human being were to the leviathan. Defence has always been compared with the powerful mettle without which the State could be usurped by those who otherwise do not deserve it. The subject of tenure, termination and processual justice in the armed forces is generally covered under the head administrative action. The most common terms in use is Cashiering, dismissal, removal and compulsory retirement. Reasons could be varied. The act of termination is subject to judicial review and thus as a natural concomitant, required to conform to the basic principles of Natural Justice.

Besides the above, the opportunity to show cause available under Army Rule 14 in respect of action by the Central Government and AR 17 in respect of action by authorities other than central government except the President, and the corresponding provisions of the Navy and the Air force Acts, is a basic Fundamental Right (Audi Alteram Partem), entrenched in the principles of Natural Justice. A rendering of the relevant part of ARs 14 and 17 is thus essential. The relevant part of AR 14 reads thus, -

14. **Termination of service by the Central Government on account of misconduct.**— (1) When it is proposed to terminate the service of an officer under Section 19 on account of

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104. The mellow giant of the Greek philosophers who breathed and lived as a human being does. The Parliament is its heart and the defence forces of the state as its bones and muscles.
misconduct. he shall be given an opportunity to show cause in the manner specified in sub-rule (2) against such action:—

Provided that this sub-rule shall not apply:—

(a) where the service is terminated on the ground of conduct which has led to his conviction by a criminal court; or

(b) where the Central Government is satisfied that for reasons, to be recorded in writing, it is not expedient or reasonably practicable to give to the officer an opportunity of showing cause.

(2) When after considering the reports on an officer’s misconduct, the Central Government or the Chief of the Army Staff is satisfied that the trial of the officer by a court martial is inexpedient or impracticable, but is of the opinion, that the further retention of the said officer in the service is undesirable, the Chief of the Army Staff shall so inform the officer together with all reports adverse to him and he shall be called upon to submit, in writing, his explanation and defence.

Since rule 14 is mainly concerned with removals on the ground of misconduct in respect of officers, the provision in respect of other ranks is available in rule 17 which reads as under:

17. Dismissal or removal by Chief of the Army Staff and by other officers.—Save in the case where a person is dismissed or removed from service on the ground of conduct which has led to his conviction by a criminal court, or a court-martial, no person shall be dismissed or removed under sub-section (1) or sub-section (3), of section 20, unless he has been informed of the particulars of the cause of action against him and allowed reasonable time to
state in writing any reasons he may have to urge against his dismissal or removal from the service.

Undoubtedly the rules reproduced above are ample testimony of the fact that the opportunity under these rules is an objective and a legal opportunity and not a mere subjective or proverbial expositions since all the materials which become the basis of such an order of termination or removal are obligatorily provided to the delinquent. This obligation is mandatory and not permissive as mandated by the provision itself. This is by all means even without any support from any other provision of the Act or rules or regulations, enough guarantee against arbitrary exercise of power. Hence it is sufficiently asserted by the foregoing that the law on the issue of tenure and termination in defence forces is firmly rooted in a just and fair procedure.

4.2.8 Termination simpliciter or punitive dismissal

The underlying principle of processual justice rests in the constitutional guarantees available to the subject when under the administrative scanner. Reference is ordinarily made to the decisions of the courts on military matters. However, it is known that abstract questions concerning the nature of law have significance only against a background of concrete controversies\(^\text{105}\) and the general law in the civil has always served as a guide for studies in any special law. For instance, on service matters, the observations of the Supreme Court in civil cases have always laid down the law and principles of administrative contemplation. The Case of State of Bihar v. Abdul Majid\(^\text{106}\) is one such decision where the following observations of

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106. AIR 1954 SC 247.
the Supreme Court are of extreme importance and relevance on the issue of processual justice in general:

In a modern democratic State the efficiency and incorruptibility of public administration is of such importance that it is essential to afford to civil servants adequate protection against capricious action from their superior authority. If a permanent civil servant is guilty of misconduct, he should no doubt be proceeded against promptly under the relevant discipline rules, subject of course, to the safeguard prescribed by Article 311(2); but in regard to honest, straightforward and efficient permanent civil servants, it is of utmost importance even from the point of view of the State that they should enjoy a sense of security which alone can make them independent and truly efficient.107

Humanism-cum-equalism, as a way of life, is integral to our constitutional order and represents the essence of the processual justice in administrative actions. They are indeed the sure steps towards fusion, not fission in the various Departments of Public Service.

The process of dispensation of justice in the defence forces of the Union is laid down by their respective statutory rules viz., the Army rules, 1954 for the Army, Air Force Rules, 1969 for the Air Force and the Naval Regulations, for the Navy. Subject of tenure, termination and processual justice is not entirely left to the unwritten customs but is governed by the laid down provisions of the Acts and Rules, passed by the Parliament. The

107. Ibid.
rationale of Prithipal Singh Bedi’s case\textsuperscript{108} wherein the Supreme Court held the availability of Fundamental rights to the defence personnel as a sine qua non for their status as citizens of this country, threw a new light on the issue of the processual justice in the armed forces. By 1994 the court, in Ajwani’s case,\textsuperscript{109} had already ventured into a new field of the ‘exercise of the executive power of pleasure’ on removal and termination. In the Wing Commander Hazara Singh’s Case\textsuperscript{110} and Major Dharam pal kukrety’s case\textsuperscript{111} further strides were made in this direction. The principles of tenure and termination were fully determined and decided in these judicial verdicts. The parameters of the powers of the President, The chiefs of Army, Air and Naval Staff and subordinate defence authorities were also settled. Though it is almost apparent that the spirit of Article 311 controlling Article 310 of the constitution, cannot be imported into the provisions of termination under the Army, Air force and the Navy Acts, yet the justiciability of powers exercised in pursuance to these provisions is undisputed now. This drift in the interpretation can be illustrated by referring to certain cases pertaining to the civilian employees which have their ratio decidendi relevant to the defence forces. Ravindra Kumar Misra v. U.P. State Handloom Corporation Ltd. & Another\textsuperscript{112} is one such case where Rule 63 of the U.P. State Handloom Corporation Rules which stipulated termination of temporary service on one month's notice on either side came up for consideration before the Supreme Court. Rule 68 of the same Rules provided that if the punishment of discharge or dismissal is imposed, an enquiry commensurate

\textsuperscript{108} AIR 1982SC 1413.  
\textsuperscript{109} 55(1994)DLT417.  
\textsuperscript{110} AIR 1982 SC 1064.  
\textsuperscript{111} AIR 1985 SC 703.  
\textsuperscript{112} AIR 1987 SC2408.
with requirements of natural justice is a condition precedent.\textsuperscript{113} Whether 'motive' has become the foundation has to be decided by the Court with reference to the facts of a given case.

4.2.9 Removal administratively when specific offence and punishment provided under the Act.

In a case of \textit{Union of India v. S.K. Rao} decided by the Supreme Court, in the year 1972, an important principle of law of defence forces was expounded.

(a) Brief Facts

As outlined in the judgment by the Hon'ble Supreme Court, the brief facts of the Case were that gross misconduct was alleged against the delinquent officer. An inquiry into the misconduct was made by a Court of Inquiry. The Chief of the Army Staff considered the conduct of the officer unbecoming of an officer. He also formed an opinion that the trial of the officer by a general court martial was inexpedient and, therefore, he

\textsuperscript{113} AIR 1987 SC2408. The case became a trendsetter. The case in brief was as follows:- The brief facts of the case were that the appellant in this case was employed in the U.P. Handloom Corporation on temporary basis. The order of appointment stated that his services were liable for termination with one month's notice or one month's pay in lieu of notice on either side. He was placed under suspension in November 1982 on charges of misconduct, dereliction of duty, mismanagement and showing fictitious production entries. That order, however, was revoked in November 1983 and his services were terminated forthwith by notice entitling him to one month's salary. The High Court held that the termination was not punitive and the question of breach of principles of natural justice did not arise. However, in the appeal by special leave it was contended that the appellant was entitled to the protection of Articles 14 and 16 of the Constitution, that though his order of termination was innocuous, the setting in which it had been made clearly made it an order of dismissal, punitive in character which entitled the appellant to a hearing commensurate with rules of natural justice and in the absence of such an opportunity being granted, the order of termination is liable to be quashed. Laying down the principle of termination, carried out administratively, of an employee, Misra Ragnath J., HELD that As long as the adverse feature of the employee remains the motive and does not become transferred as the foundation of the order of termination, it is unexceptionable.
ordered an administrative action to be taken under Army Rule 14\textsuperscript{114} by removing the officer from service.

(b) **Issues Involved**

**Firstly,** When the Army Act contained specific provision, viz. Section 45, for punishment for unbecoming conduct and as Section 19 itself suggests that power being subject to the provisions of this Act, Section 19 would be subject to Section 45 and therefore the Central Government would have no power to remove a person from the service in derogation of the provision of Section 44.

**Secondly,** the term *impracticable* has been used in Army Rule 14 in contradistinction with *impossible or impermissible* and therefore if a trial by court martial *though practicable* but has been rendered *impermissible* because of a bar created by the rule of limitation or rendered impossible because of a fact situation then resort cannot be had to Section 19 read with sub-rule (2) of Rule 14 by treating the impossibility or impermissibility as impracticability. The learned counsel for the respondents went on to submit that even Dharam Pal Kukrety’s case required reconsideration as in their submission it does not lay down the correct law. It was urged that to the extent Dharam Pal Kukrety’s case treats *impermissibility* as *impracticability* it is a mistaken view.

(c) **Appellants’ argument.** The power under Section 19 is an independent power. Though Section 45 provides that on conviction by court martial an officer is liable to be cashiered or to suffer such less punishment as mentioned in the Act, for removal from service under Section 19 read with Rule 14, a court martial is not necessary.

\textsuperscript{114} See Appendix-I, Army Rules 1954; *Union of India v. S.K. Rao*, AIR 1972 SC 1137, (1972) 2 SCJ 645
The power under Section 19 is an independent power. Though Section 45 provides that on conviction by court martial an officer is liable to be cashiered or to suffer such less punishment as mentioned in the Act, for removal from service under Section 19 read with Rule 14, a court martial is not necessary.

(d) **Respondents’ argument**

An inquiry into the grave misconduct was made by Court of Inquiry. The Chief of the Army Staff considered the conduct of the officer unbecoming of an officer. He also formed an opinion that trial of the officer by a general court martial was inexpedient and, therefore, he ordered an administrative action to be taken under Rule 14 by removing the officer from service. Army Act contained specific provision, viz. Section 45, for punishment for unbecoming conduct and as Section 19 itself suggests that power being subject to the provisions of this Act, Section 19 would be subject to Section 45 and therefore the Central Government would have no power to remove a person from the service in derogation of the provision of Section 44.

(e) **Principle (s) laid down by the Supreme Court.**

The court held that

(a) The power under Section 19 is an independent power and the two Sections 19 and 45 of the Act are mutually exclusive. The power conferred by Section 19 on the Central Government and the power conferred on court martial by Section 71 are clearly distinguishable from each other. They are not alternatives to each other in the sense that the exercise of one necessarily excludes the exercise of the other.
(b) The distinction was set out by the court in a tabular form:

<table>
<thead>
<tr>
<th>Serial Number</th>
<th>Points of distinction</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Termination (dismissal or removal) by Central Government under Section 19 read with Rule 14.</td>
</tr>
<tr>
<td>2.</td>
<td>Is condition of service falling within the realm of service jurisprudence; penalty maybe dismissal/removal or compulsory retirement.</td>
</tr>
<tr>
<td>3.</td>
<td>No enquiry is contemplated except affording opportunity to show cause as provided by Rule 14.</td>
</tr>
<tr>
<td>4.</td>
<td>Any person subject to Army Act dismissed or removed from the service by Central Government is not previous convict.</td>
</tr>
<tr>
<td>6.</td>
<td>Any person proceeded against under Section 19 does not suffer any incarceration.</td>
</tr>
<tr>
<td>7.</td>
<td>Satisfaction and formation of opinion in Rule 14 may be based on a single report of misconduct or more than one or series of such reports taken together. Punishment can be inflicted only on the misconduct forming subject matter of charge.</td>
</tr>
</tbody>
</table>
4.2.10 *Justiciability of the Doctrine of Pleasure – principles enunciated*

A landmark judgment of a **full bench** of Delhi High Court in *Ex. Major N.R. Ajwani & Ors. v Union Of India & Ors*\(^{115}\) discussed and settled the law on the justiciability of Doctrine of Pleasure with respect to the defence personnel.

**(a) Brief Facts.**

As derived from the judgment and order of the Delhi High Court, in the year 1977 the appellant’s services were terminated under Section 18 of the Army Act. These Letters Patent Appeals were filed by those persons whose services were terminated under Section 18 of the Army Act. A Division Bench comprising of Justice A B Saharya and Justice Sunanda Bhandare of Delhi High Court took upon themselves the onerous responsibility of examining the exercise of Presidential pleasure in respect of certain officers of the Indian Army whose services had been terminated under Section 18 of the Army Act, 1950 without assigning any reasons. Unable to decide on the scope of judicial review on pleasure doctrine in the armed forces, the Division Bench referred the matter to a larger bench of the high court. The court carefully examined the provisions relating to the pleasure doctrine, and, guided by their profound wisdom, the court opened in this field an altogether new vista. The facts of this case as written in the judgement and published in Vol. 55 of Delhi Law Times, 1994 reported at page 217, are that services of some defence personnel were terminated under Section 18 of the Army Act.\(^ {116}\) The Letters Patent Appeals were filed by those persons whose services were terminated under Section 18 of the


Army Act against the orders of single judge dismissing their writ petitions challenging the order of termination by the President.

A reference was also made to another judgment of Delhi High Court in LPA No. 116 of 1985 where Para 22 of the said judgment read as follows:

> Now turning to the question as to whether the termination is valid because Section 18 was not applicable, we are of the view that there are two possibilities. Either the termination order has to be set aside on the ground that it was passed without an enquiry on account of misconduct or some other way must be found to reconcile the provisions of Sections 18 and 19 of the Army Act. The appellant who appeared in person submitted with a great deal of eloquence that he had served during two campaigns on the Front Line in the service of the country, but no one had said that his service was unsatisfactory. He submits that the termination orders were passed as a result of certain statements, which have later been found to be incorrect and we would be justified in setting aside the termination because it was passed on the ground of alleged misconduct which was never inquired into. We see a great deal of force in this submission but we are reluctant to accept this point of view because it is against the discipline of an Armed Force. The fact that the President has used his pleasure to terminate the services of the appellant is a disincentive to hold that we can interfere with that pleasure in a writ petition. We are, therefore, inclined to take the opposite point of view to hold that the Presidential order terminating the services of the
appellant was not passed on the ground that the service was unsatisfactory. The provisions of Regulation 3 referred to earlier, would show that a positive reason must exist for holding the services to be unsatisfactory. The mere fact that the services were terminated under the pleasure doctrine is no reason for holding that the services were not satisfactory. We have taken this easier way out, as otherwise we would be compelled to hold that the termination was void and invalid.  

(b) Issues Involved

Firstly, in the Letters’ Patent Appeal, the appellants contended that the order of termination though purported to have been passed under Section 18 of the Army Act by and in the name of the President by exercising his presidential prerogative; in fact, the order was one of dismissal on the ground of misconduct. It was submitted that the order of termination was a ‘camouflage’ and on lifting the veil it would be apparent that the dismissal was by way of punishment. It was submitted that when it was found that adequate evidence was not available to convict the appellant before the court martial, the impugned order was passed by using the presidential prerogative. As such, the order was mala fide.

Secondly, it was contended that even though the order was passed under Article 310 of the Constitution of India read with Section 18 of the Army Act since it violates the Fundamental right guaranteed to the appellant, the same could not be sustained.

Thirdly, it was also contended that though Article 311(2) of the Constitution of India is not applicable to Defence Services,

117. Ibid.
rules of natural justice must be complied with because the defence personnel enjoy the protection guaranteed under Article 14 of the Constitution of India. The Division Bench, therefore, referred the following question of law for consideration by a larger Bench:

**Whether the order of termination passed by and in the name of the President under Section 18 of the Army Act read with Article 310 of the Constitution invoking the doctrine of pleasure of President be challenged on the ground that it is a camouflage and as such is violative of principles of natural justice and Fundamental right guaranteed under Article 14 of the Constitution?**

(c) **Appellants’ arguments**

Mr. Arun Jaitley, learned counsel for the Appellant contended that though the impugned order is passed by the respondent under Section 18 of the Army Act, it is in fact an order passed under Section 19 of the Act and it was a fraud on power because the power under Section 18 of the Army Act was used for collateral purpose. It was submitted that the order was arbitrary and lacked in fairness and thus violated the Appellant's Fundamental right under Article 14 of the Constitution. It was submitted that on the basis of antecedent and surrounding facts it is necessary for this Court to lift the veil in order to see the real content of the order. It is necessary for the Court to pierce the veil to see the real nature of the action. It was submitted that an order passed under Section 18 of the Army Act is subject to judicial review particularly because the said action is in fact in exercise of the executive power of the State. Large number of cases was cited by the learned counsel in

support of these contentions and it was submitted that the court should give construction which advances the constitutional spirit. National security cannot be used as an excuse for elimination of judicial review and exclusion of natural justice. It cannot give a license to the executive to act *mala fide* or without any material or act on the basis non-existent and irrelevant material. It was submitted that unless the respondents claim privilege against production of record which is a matter to be decided by the Court, the respondents were duty bound to produce the record as and when the Court summoned the same.\(^{119}\)

(d) **Respondents’ arguments**

Shri K.T.S. Tulsi, learned Additional Solicitor General appearing on behalf of the Union of India, submitted that while the pleasure of the President in respect of civilian employees under Article 310 of the Constitution of India is restricted and controlled by Articles 309 and 311 of the Constitution there is no such restriction on the pleasure of the President in the case of defense personnel. Article 311 of the Constitution is not specifically applicable to defense personnel and thus the pleasure of the President in cutting short of tenure of a defense Personnel is not controlled or governed by any restriction. It was submitted that the theory of lifting of veil is derivative of the restriction imposed on the pleasure of the President by Article 311 and since Article 311 itself is not applicable, the theory of lifting the veil by questioning the validity of an order passed under Section 18 of the Army Act read with Article 310 of the Constitution cannot be challenged. Section 18 of the Army Act confers an over-riding power of termination on the President who is the Supreme Commander of the Armed Forces since defense

\(^{119}\) *Ibid.*
personnel cannot have a right to a fixed tenure. Section 18 of the Army Act confers a much wider discretion on the President than Article 310 which is controlled by Article 311 and regulated by rules under Article 309 of the Constitution.\(^\text{120}\)

The learned Additional Solicitor General further submitted that in view of Article 33 of the Constitution, the Fundamental rights of defense personnel are restricted or abrogated. If the Army Act or Army Rules do not provide for natural justice, no one can claim that rules of natural justice should be complied with and since Section 18 does not so stipulate, the appellant cannot make a grievance that rules of natural justice have not been complied with. It was submitted that the Army Personnel are required to give up their Fundamental right to protect the Fundamental rights of other citizens and thus in view of Article 33 of the Constitution, the defence personnel are not entitled to protection guaranteed under Articles 14 and 16 of the Constitution of India. As such, judicial review is totally barred and services of an Army Personnel can be terminated without assigning any reason under the pleasure doctrine and there is no compliance to adhere to the rules of natural justice.

As regards the submission of the appellant that the action has been actually taken against the appellant under Section 19 in the grab of Section 18 of the Army Act it was submitted that it was open to the respondents to either terminate the services of the appellant under Section 18 of the Army Act or under Section 19 of the Army Act on the ground of misconduct after holding an inquiry as contemplated under Rule 14 or by way of summary trial under Section 83 of the Army Act and finally by way of court martial proceedings under section 109 of the Army Act. It was submitted that it was always open to the respondent to

\(^{120}\) Ibid.
resort to Section 18 of the Army Act even if initially the action was initiated under sections 19, 83 or 109 of the Army Act. Learned counsel relied on *Chief of Army Staff & Others v. Major Dharampal Kukrety*, in support of this contention. It was submitted that merely because court martial proceedings were initiated against the appellant at the initial stage it did not preclude the respondents from passing an order under Section 18 of the Army Act. Learned Additional Solicitor General submitted that in the case of Army Personnel, the extent of judicial review available to the High Court under Article 226 of the Constitution is far more restricted than in the case of civilian employees. This is so because under Clause 4 of Article 227 of the Constitution of India, the superintendence of the High Court over the defense force is excluded. As such, the order under Section 18 of the Army Act would not be subject to judicial review.

(e) **Principle (s) laid down by the Delhi High Court (Full Bench).**

The full bench of the High Court observed that

(i) **Pleasure of the President.** Section 18 of the Army Act manifests the pleasure of the President in its over-riding and unrestricted ambit and form postulated under Article 310 of the Constitution. In other words, any Act or Rules made for regulating the conditions of service of persons in civil service shall delineate machinery and procedure for enquiry of the particular kind postulated under Article 311 of the Constitution. *However, the position in relation to the defence personnel is different. The provisions made in Article 311 are not applicable to defence personnel.* Undoubtedly, the constitutional protection given to civil
servants under Article 311 of the Constitution is also not available to defence personnel.

The court further held that it is difficult to accept the extreme contention that since Article 311 is not applicable to defence personnel, it follows that pleasure of the President, so far as the defence personnel is concerned, is not controlled or governed by any restriction at all. In fact, the exercise of this power cannot be arbitrary or illegal. The effect of non-applicability of Article 311 to defence personnel does not, in any way, prevent the exercise of pleasure of the president from being ‘regulated by law’ under Article 53 or under Article 309 of the Constitution. Since Article 311 is not applicable to defense personnel, the restrictions contained therein do not inhibit the making of a law prescribing the procedure by which and the authority by whom they said pleasure can be exercised.

(ii) Judicial review. On the availability of judicial review, the court observed that the judicial review is a basic feature of the Constitution. This Court/High Courts have constitutional duty and responsibility to exercise judicial review as centinal quevive. Judicial review is not concerned with the merits of the decision, but with the manner in which the decision was taken.

(iii) Absence of procedure under section 18. Section 18 of the Army Act provides that every person subject to the Act shall hold office during the pleasure of the President. Undoubtedly, the section does not provide for procedure to be followed while passing an order under the said section. However, it does not permit passing of an order which is arbitrary, mala fide or illegal. Thus, order under Section 18 of the Army Act is subject to judicial review. The Government is bound to disclose the materials upon
which the pleasure of the President was exercised. If the decision arrived at is found to be mala fide or based on wholly extraneous and irrelevant facts the exercise if the pleasure becomes patently illegal.

(iv) Camouflage and lifting the veil. The term camouflage was discussed in the judgment. According to Oxford English Dictionary, means ‘guise’, ‘deceive’, disguising of any object raised in war, by means of paints, smoke screen etc., in such a way as to conceal it from the enemy. This term has been frequently used in the field of service law in cases where action by way of punishment it taken without enquiry, under the guise of an order made in innocuous form so as to pass muster under the cloak of simple termination of the tenure of service. In such cases, it is well settled that the innocuous form of the order is not conclusive and the Court can always pierce the veil and determine the real nature of the action.

In the opinion of the court, the concept of ‘camouflage’ is a facet of judicial review and the Court would lift the veil in all cases where it appears that power is used for a collateral purpose under the cloak or garb of innocuous form of an order and determine the true character of the order under challenge. Under the circumstances, for the aforementioned reasons the court the answered the full bench reference in the following words :-

An order under Section 18 of the Army Act read with Article 310 of the Constitution of India invoking the doctrine of pleasure of President is subject to judicial review to ascertain whether the same is exercised lawfully and not vitiated for mala fides or based on
extraneous grounds and that the order can be challenged on the ground that it is a camouflage.

There is no doubt that the Fundamental rights can be restricted only to the extent provided for in the Army Act and not otherwise. What is not specifically or impliedly taken away by the Army Act inheres in the Army personnel. The procedure prescribed for the tenure of service of an Army personnel governed by the Army Act even if it violates the Fundamental rights the same cannot be challenged in view of Article 33 of the Constitution of India on the ground that it violates Fundamental rights guaranteed under Part III of the Constitution of India. Undoubtedly, the power under Section 18 cannot be ordinarily invoked for dealing with cases of misconduct and the other provisions in the Army Act dealing with the various kinds of misconduct have to be invoked for dealing with such cases. This power under Section 18 must be used sparingly only when it is expedient to deal with such cases under the other provisions of the Army Act. Therefore, even if an order under Section 18 for removing defence personnel for misconduct is passed if it is found that there were sufficient reasons for resorting to Section 18, the same would not be open to challenge on merits.

The case also affirmed that judicial review is the exercise of the Courts’ inherent power to determine legality of an action and award suitable relief and thereby uphold the rule of law. Since section 18 of the Army Act does not contemplate the disclosure of material to the delinquent per-se, the court, however, laid down the following principle:-

Disclosure of material and documents would depend upon whether the documents in question fall within the class of privileged documents and whether in respect of them privilege has been properly claimed or not.
In all the above discussions we find that the spirit of Army Rules 14 and 17\textsuperscript{121} and the corresponding rules and regulations relating to the Air force and Navy are integral to the concept of processual justice involved in the provisions relating to the continuity and cessation of service in the defence forces. This indeed is the \textit{grundnorm} of \textbf{processual justice} in the forces which would not let the executive to ignore the essential processes culminating into removal or termination.

\textbf{4.2.10 Promotion to substantive rank and processual justice}

The fallout of administrative actions undertaken while following the “\textit{process}” which involves invoking of legal provisions and extending of the equitable rights to a person against whom an action is contemplated, as stipulated in the statute, is generally uniform in all the three defence services. However, the \textit{tenure to serve}, to get promotion, in his respective arm\textsuperscript{122} or service\textsuperscript{123}, is governed by different rules and the policy on tenures and promotion to the substantive rank etc.\textsuperscript{124} This aspect was examined by the Himachal Pradesh High Court in Brigadier JS Sivia’s case.\textsuperscript{125} The petitioner, in this case was an Army officer who was denied the substantive rank of Brigadier on account of award of ‘Severe Displeasure (recordable)\textsuperscript{126} as a result of Court of Enquiry\textsuperscript{127} held for dereliction of duty.

\begin{footnotesize}
\begin{enumerate}
\item[121.] See Appendix –I, Army Rules 1954.
\item[122.] Wing or corps which is peculiar to the various wings of the Army, Navy and Air Force and have even different tenures of service in that arm or ‘service’.
\item[123.] Service signifies the type of wing of the force e.g., Army Service Corps or the Remount and Veterinary Corps, the Army Medical Corps etc.
\item[124.] The expression is peculiar only to the promotions of the officers in the defence forces. A parallel in the civil is ‘Confirmation’ or the ‘confirmed promotion’.
\item[125.] (1994) ILLJ 906 HP.
\item[126.] (1994) ILLJ 906 HP; Award of ‘Severe Displeasure (recordable) is a form of censure or reproof awarded by certain competent authorities in the Army as per the customs of service.
\item[127.] (1994) ILLJ 906 HP ; Army Rule 177.
\end{enumerate}
\end{footnotesize}
The issue involved actually was the alleged denial of substantive promotion in the rank of Brigadier to the petitioner though he was holding the rank of Brigadier but it was in acting capacity and needed to be confirmed which is infact mandatory for further promotions to the Major General’s rank and beyond. Since the censure is awarded in accordance with the customs of service, in the same case, the Supreme Court held that the award of such nature, when in conformity with the customs of service, is in order in the Army.

4.2.11 Termination of service “administratively” despite “not guilty” verdict by court martial

Termination of service by resorting to the provisions of the Statutes governing the defence forces is a rare occurrence generally termed as a rare ‘incidence of service’. Though an important power, it is rarely used. The point was discussed in the case of Chief of the Army Staff and Others v. Major Dharam Pal Kukrety. The respondent in this case was a permanent commissioned officer of the Indian Army holding the substantive rank of Captain and the acting rank of Major. The officer was tried by a general court-martial comprising of five Officers, convened under the provisions of the Army Act, 1950. The court martial recorded the findings of ‘not guilty’ on all the charges in the manner as laid down in Army Rule 62. The findings were announced subject to confirmation by the

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128. (1994) ILLJ 906 HP.
130. AIR 1985 SC 703.
132. See Appendix –I, AA Section 109- Power to convene a general court-martial.
133. See Appendix –I, Army Rule 62. Form, record and announcement of finding.
134. See Appendix –I,AA Section 153. Finding and sentence not valid, unless confirmed.
competent authority. The confirming authority, while exercising its power under the A-2 warrant, denied to confirm the verdict and by an order, sent back the findings of the court martial for revision. The same general court-martial, therefore, re-assembled consequent to the revision order issued under Sec 160 of the Army Act, 1950. The revision was carried out as per procedure given at AR 68 but the court martial adhered to its earlier findings. Though the verdict of the court-martial was promulgated as required by Rule 71 of the Army Rules, the competent military authority, the Chief of the Army Staff, being not satisfied with the verdict given by the court martial, under Rule 14 of the Army Rules, issued a show cause notice calling upon the officer that a fresh trial by a court-martial was inexpedient and the respondent’s misconduct as disclosed in the proceedings rendered his further retention in the service undesirable. Hence he may show cause as to why his service from the Army be not terminated by the Central Government under Army Act Section 19 in accordance with the procedure provided in rule 14 of the Army Rules, 1954. The respondent officer, instead challenged, the Show cause notice before the Allahabad High Court. The court allowed the writ petition and concurred with the contention of the Respondent in his writ petition that under the Army Act, 1950 (Act No. 46 of 1950), and the Army rules there was an initial option either to have the

135. See Appendix –I, AA Section 154- Power to confirm finding and sentence of general court-martial.
136. A-2 warrant is at present issued by the Central Government to the COAS; and A-3 warrants are issued by the said Central Govt. to GOC-in-C commands, GOCs corps, division/area and Commanders Independent brigade/sub-area and to officers exercising such powers under AA.s. 8. The forms of warrant are provided in the Appendix to the Manual of Military Law.
138. See Appendix –I, Confirmation and Revision.
139. See Appendix –I, Army Rule 71 Promulgation.
140. See Appendix –I,
141. Kukrety’s case(supra) (AIR 1985SC 703).
concerned officer tried by a court-martial or to take action against him under Rule 14 and that in his case the option having been exercised to try him by a court-martial, it was not possible to resort to termination of service administratively as it would suffer from the bias of double jeopardy. Hence the impugned notice under Rule 14 was issued without any jurisdiction, as he had already been found not guilty by the court-martial on revision. The order of the High court came up for challenge before the Supreme Court.

(a) **Issues Involved**

**Firstly,** the question was whether the Government or the Chief of the Army Staff could take recourse to Rule 14 of the Army Rules on the ground that trial by Court Martial was 'inexpedient' or 'impracticable'.

**Secondly,** Whether once the decision to have the officer tried by court martial was taken, was action under Rule 14 permissible in case of finding of acquittal being rendered by the court martial?  

(b) **Principle (s) laid down by the Supreme Court**

The Court held, -

(i) **Meaning of the expression ‘inexpedient’**. Referring to the meaning of the expression ‘inexpedient’, the Court held that if the Chief of the Army Staff was of the opinion that further retention of the Officer in service was undesirable, recourse could be taken to Rule 14.

(ii) **Section 19 of the Army Act,1950 and Rule 14** of the Army Rules,1954 are to be read together and as integral parts of one whole scheme. Section 191 of the Army Act empowers the
Central Government generally to make rules for the purpose of carrying into effect the provisions of the Act and without prejudice to the generality of such power, specifically to make rules providing for inter alia the *removal, retirement, release* or *discharge* from the service of persons subject to the Army Act. Section 19 empowers the Central Government to *dismiss* or *remove* from the service any person subject to this Act which power is subject to: (i) the (other) provisions of the Act, and (ii) the rules and regulations made under the Act. Under Section 193, all rules made under the Act shall be published in the official gazette and on such publication shall have effect as if enacted in the Act. Under Section 193-A, such rules shall be laid before each House of Parliament.\(^{145}\)

Section 19 and Rule 14 so read together and analyzed, the following legal situation emerges:-

1. The Central Government may dismiss, or remove from the service, any person subject to the Army Act, 1950, on the ground of misconduct.\(^ {146}\)

2. To initiate an action under Section 19, the Central Government or the Chief of the Army Staff after considering the reports on an officer's misconduct;\(^ {147}\)

\(^{145}\) In *State of U.P. Vs Babu Ram* - AIR 1961 SC 751 the Constitution Bench has held, quoting from Maxwell on Interpretation of Statutes, that rules made under a Statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act, and are to be judicially noticed for all purposes of construction and obligation; an action taken under the Act or the rules made thereunder must conform to the provisions of the Act and the Rules which have conferred upon the appropriate authority the power to take an action. The Constitution Bench decision has been followed by the Supreme Court in State of Tamil Nadu v. M/s Hind Stone, AIR 1981 SC 711 holding that a statutory rule, while ever subordinate to the parent statute, is, otherwise, to be treated as part of the statute and as effective. Also referred, *Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India*, AIR 1992 SC 1033.

\(^{146}\) AIR 1985 SC 703; also referred Army Rule 14.

must be satisfied that the trial of the officer by a Court martial is *inexpedient or impracticable*,\(^ {148}\)

(b) must be of the opinion that the further retention of the said officer in the service is undesirable.\(^ {149}\)

3. Such satisfaction having been arrived at and such opinion having been formed, as aforesaid, the officer proceeded against shall be given an opportunity to show cause against the proposed action which opportunity shall include the officer being informed together with all reports adverse to him to submit in writing his explanation and defence. Any report on an officer's misconduct or portion thereof may be withheld from being disclosed to the officer concerned if the Chief of the Army Staff is of the opinion that such disclosure is not in the interest of the security of the State.\(^ {150}\)

4. Opportunity to show cause in the manner as aforesaid need not be given to an officer in the following cases: -

(a) Where the misconduct forming the ground for termination of service is one which has led to the officers conviction by a criminal court;\(^ {151}\)

(b) Where the Central Government is satisfied that for reasons, to be recorded in writing, it is not expedient or reasonably practicable to give to the officer an opportunity of showing cause.\(^ {152}\)

5. The explanation of the officer shall be considered by the Chief of the Army Staff. If the explanation is found satisfactory, further proceedings need not be pursued. The

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explanation, if considered unsatisfactory by the Chief of the Army Staff or when so directed by the Central Government, in either case, shall be submitted to the Central Government with the officer’s defence and the recommendations of the Chief of Army Staff as to the termination of the officers service i.e. whether the officer should be (a) dismissed, or (b) removed, or (c) compulsorily retired, from the service.

(6) The Central Government shall after taking into consideration the reports (on the officers misconduct) the officer’s defence, if any, and the recommendations of the Chief of Army Staff, shall take a decision which if unfavourable to the officer may be (a) to dismiss or remove the officer with or without pension or gratuity; or (b) to compulsorily retire him from service with pension and gratuity, if any, admissible to him.

(iii) ‘Misconduct’ explained. In the context in which the term misconduct has been used in Rule 14, it is to be given a wider meaning and any wrongful act or any act of delinquency which may or may not involve moral turpitude, would be misconduct, and certainly so, if it is subversive of Army discipline or high traditions of Army and/or if it renders the person unworthy of being retained in service. The language of sub-rule (2) of Rule 14 employing the expression the reports on an officer’s misconduct uses reports in plural and misconduct in singular. Here plural would include singular and singular would include plural. A single report on an officers misconduct may invite an action under Section 19 read with Rule 14 and there may be cases where there may be more reports than one on a singular misconduct or more misconducts than one in which case it will be the cumulative effect of such reports on misconduct or
misconducts, which may lead to the formation of requisite satisfaction and opinion within the meaning of sub-rule (2) of Rule 14.153

Section 19, with which we are concerned, is found in Chapter IV of the Act entitled Conditions of Service. Exercise of power under Section 19 is regulated by the procedure provided under Army Rule 14. Besides, the orders passed under section 19 pursuant to the procedure followed under Army Rule 14 is further open to judicial review on well settled parameters of administrative law governing judicial review of administrative action such as when the exercise of power is shown to have been vitiated by malafides or is found to be based wholly on extraneous and/or irrelevant grounds or is found to be a clear case of colourable exercise of/or abuse of power154 or what is sometimes called fraud on power,155 i.e. where the power is exercised for achieving an oblique end.

Misconduct as a ground for terminating the service by way of dismissal or removal, is not to be found mentioned in Section 19 of the Act; it is to be read therein by virtue of Rule 14. Misconduct is not defined either in the Act or in the Rules. It is not necessary to make a search for the meaning, for it would suffice to refer to State of Punjab & Ors. v. Ram Singh, Ex-Constable156 wherein the term misconduct as used in Punjab Police Manual came up for the consideration.

The case of an officer whose service is proposed to be terminated on the ground of misconduct which has led to his conviction by a criminal court is to be treated differently. He

154. The expression is found used in Chief of the Army Staff and Others v. Major Dharam Pal Kukrety, AIR 1985 SC 703.
155. Ibid.
156. (1992) 4 SCC 54.
need not be given an opportunity to show cause against the proposed termination. A decision as to termination in one of the modes provided by sub-rule (4) of Rule 14 can be taken by the Central Government on its own or on the recommendations of the Chief of the Army Staff if he considers that the conduct of the officer leading to his conviction renders his further retention in service undesirable in which case his recommendation accompanied by a certified copy of the judgment of the criminal court convicting him shall be submitted to the Central Government which will take the decision in accordance with sub-rule (5) of Army Rule 14.  

4.2.12 Other principles

The rule of tenure and termination empowers every employer to assess the service of the servant, in order to ascertain, as to whether he should be confirmed in his appointment or his services should be terminated. This in fact is the Fundamental rule of all employments. In a case where an employee is a temporary servant and has no right to the post on the lines of a permanent Government servant which here includes a defence personnel, under the contract of service or the Service Rules governing him, the employer will have the right

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157. Having referred to the meaning of ‘misconduct’ and ‘misconduct in office’ as defined in Black’s Law Dictionary and Iyers Law Lexicon, the Supreme court held as follows:-

the word misconduct though not capable of precise definition, on reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, wilful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order, (1992) 4 SCC 54.
to terminate his services by giving him requisite notice. The order of termination in such cases is innocuous as it would not cast any stigma on him nor will it visit him with any evil consequences. The cases relied were, *Parshottam Lal Dhingra v. Union of India*[^158], *Champakkal Chimanlal Shah v. The Union of India*[^159], *Shamsher Singh & Anr. v. State of Punjab*, *Regional Manager & Anr. v. Pawan Kumar Dubey*, *State of U.P. v. Ram Chandra Trivedi*[^163], and *State of Orissa & Anr. v. Ram Narayan Dass*[^164].

(a) In *Parshottam Lal Dhingra v. Union of India*,[^165] the Constitution Bench of the Supreme Court held that the use of the expression ‘terminate’ or ‘discharge’ is not conclusive. In spite of the use of such innocuous expressions, the Court has to apply the two tests namely, (1) whether the servant had a right to the post or the rank or (2) whether he has been visited with evil consequences. If the case satisfied either of the two tests then it must be held that the servant has been punished and the termination of his service must be taken as a dismissal or removal from service or the reversion to his substantive rank must be regarded as a reduction in rank and if the requirements of the rules and Article 311, which give protection to Government servant have not been complied with, the *termination of the service* or the reduction in rank must be held to be *wrongful* and in violation of the constitutional right of the servant. This view was also

[^158]: Ibid per Ranganath Misra, J.
[^159]: AIR 1958 SC 36.
[^160]: AIR 1964 SC 1854.
[^161]: (1975)1 SCR 814.
[^162]: (1976) 3 SCR 540.
[^163]: (1977) 1 SCR 452.
[^164]: 1961)1 I SCR 606.
[^165]: AIR 1958 SC36.
approved by another Constitution Bench of the Supreme Court in Champaklal Chimanlal Shah v. Union of India,\textsuperscript{166} Where the expression employment was to be read \textit{ejusdem generis} with the word appointment. Wanchoo, J. as he then was, spoke for the Constitution Bench,-

\begin{quote}
“It is well known that Government does not terminate the services of a public servant, be he even a temporary servant without reason; nor is it usual for Government to reduce a public servant in rank without reason even though he may be holding the higher rank only temporarily……. It may decide to dispense with the services of the servant or revert him to his substantive post without any action being taken to punish him for his bad work and/or conduct. Or the Government may decide to punish such a servant for his bad work or misconduct, in which case even though the servant may be temporary, he will have the protection of Article 311(2).”\textsuperscript{167}
\end{quote}

The compliance of such provisions for terminating service is for the sake of fairness.\textsuperscript{168}

(b) This ratio which emanated from Parshottam Lal Dhingra’s case (supra) and Champaklal’s case (supra) was reiterated by a 7-Judge Bench, in \textit{Shamsher Singh & Anr. v. State of Punjab}.\textsuperscript{169} The crux of the basic principle of tenure and termination lies in the necessity of prior enquiry into the conduct or the related circumstances leading to the warranting of termination. The rule which applied to the civilian employees, based on

\textsuperscript{166} AIR 1964 SC1854.
\textsuperscript{167} AIR 1964 SC 1854.
\textsuperscript{168} Ibid.
\textsuperscript{169} [1975] 1 SCR 814.
“misconduct”,\textsuperscript{170} is in a slightly different manner but in a same measure applicable to the personnel of the defence services. This interpretation of the rule of \textit{tenure, termination and processual justice} may also give rise to some misapprehension with regard to the procedure necessary to be followed in these cases. There is a possibility that the application of the same law to the cases with differing circumstances and facts could indeed create an impression that there is some conflict between decisions of the Supreme Court particularly when seen with regard to their applicability to the matters pertaining to the defence personnel. But the apprehension howmuchevers strong and apparently deep and profound, would vanish when the \textit{ratio decidendi} of each case is correctly understood in the light of the peculiar facts and circumstances of the case and the set of rules applicable thereto.

\textbf{(c) 'Motive' and 'foundation' in orders for termination}

For the ease of understanding the effect of the order of termination of service, the concept of 'motive' and 'foundation' has been brought in by the courts.\textsuperscript{171} In a case where the services are terminated on the ground of misconduct, the delinquency of the officer is taken as the 'operative motive',\textsuperscript{172} in terminating the service. In this case, if the motive becomes the sole basis of termination, the termination of service so affected is punitive as the termination which ensues from such motive cannot be innocuous. The other expression which finds mention in such situation is, 'foundation'.\textsuperscript{173} As long as the adverse feature of the employee remains the motive and does not become transformed as the foundation of the order of termination it is unexceptionable. No straight jacket test can be laid down to

\begin{itemize}
  \item [\textsuperscript{170}] \textit{Regional Manager \& Anr. v. Pawan Kumar Dubey}, [1976] 3SCR 540.
  \item [\textsuperscript{171}] \textit{U.P. v. Ram Chandra Trivedi}, [1977] 1 SCR 46.
  \item [\textsuperscript{172}] \textit{Ibid}.
  \item [\textsuperscript{173}] \textit{H.l. Trehan and ors. Etc.vs.Union of India and ors. etc.}, AIR1989 SC 568.
\end{itemize}
distinguish the two and whether 'motive' has become the 'foundation' has to be decided by the court with reference to the facts of a given case. The two are certainly two points of one line-ordinarily apart but when they come together 'motive' does get transformed and merges into foundation.\textsuperscript{174}

(d) **Commencement of disciplinary proceedings and their culmination into ‘cashiering’ or ‘dismissal’**.

Disciplinary proceedings are, however, considered to commence with the preparation of a tentative charge sheet and the hearing of charge by the commanding officer\textsuperscript{175} in the presence and hearing of the accused in the manner prescribed under Army Rule 22.\textsuperscript{176} The above proceedings are conducted in the presence of two independent witnesses to ensure that the proceedings do not suffer from any bias or prejudice. The procedure in all the three services Viz., Army, Navy and Air Force is identical and mandatory. All the subsequent proceedings will be rendered as *void- ab - initio* and without jurisdiction if the provisions of this rule are not complied with.\textsuperscript{177}

The provisions of Army rule 22 reveal that the commanding officer has the four following options after hearing the charge which he is free to exercise depending upon the facts of the case:–

(a) dispose of the case under section 80 in accordance with the manner and form in Appendix III; or

(b) refer the case to the proper superior military authority; or

(c) adjourn the case for the purpose of having the evidence reduced to writing; or

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\textsuperscript{174} U.P. v. Ram Chandra Trivedi, [1977] 1 SCR 462.

\textsuperscript{175} See Appendix –I.

\textsuperscript{176} Ibid.

\textsuperscript{177} I J Kumar v. Union of India, AIR 1997 SC 2085.
(d) if the accused is below the rank of warrant officer, order his trial by a summary court-martial;

Provided that the commanding officer shall not order trial by a summary court-martial without a reference to the officer empowered to convene a district court-martial or on active service a summary general court-martial for the trial of the alleged offender unless -

(a) the offence is one which he can try by a summary court-martial without any reference to that officer; or

(b) he considers that there is grave reason for immediate action and such reference cannot be made without detriment to discipline.

The commanding officer at this stage has the option to dismiss the charge. This exercise of power by the commanding officer creates an edifice so legal and strong that it acts as a bar to trial by court martial later. Hence the law arms the commanding officer with an absolute authority to impart justice (processual) at the very initial stage of the disciplinary proceedings.

(e) The Summary of Evidence as an essential part of processual justice.

One of the options which set the ball rolling for the disciplinary proceedings under the Act is the third option under Army Rule 22. Option (c) provides that the Commanding officer after hearing the charge in accordance with Rule 22 can adjourn the case for the purpose of having the evidence reduced

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178. See Appendix –I Army Rule 53.
179. The Army Act, 1950. Similar provisions are available in the Statutes relating to the other two forces as well. However, to avoid repetition, those are not being reproduced here.
to writing in the manner prescribed under Army Rule 23.\textsuperscript{180} This process is strictly in conformity with the principles of natural justice. The provision has certain marked features. The most important among those is the opportunity available to the accused to cross examine witnesses. Another sterling feature of this rule the liberty to make an unsworn statement under sub rule (3).\textsuperscript{181}

The unique feature of this process is that notwithstanding the possibility of the case being dealt with by a court martial at a later stage, the option to proceed administratively under Sections 18,19 or 20 of the ‘Act’ still remains with the competent military authority or the central Government or the President as the case may be. If the process of disciplinary channel is further pursued, the action under Army rule 24\textsuperscript{182} is taken and an application for trial, by court martial, on the form IAFD 937\textsuperscript{183} is

\textsuperscript{180} See Appendix –I.
\textsuperscript{181} See Appendix –I.
\textsuperscript{182} See Appendix –I.
\textsuperscript{183} IAFD-937(Revised)
FORM OF APPLICATION FOR A COURT-MARTIAL
Place……………………………….dated
……………………………….20………………
Application for a Court-Martial
Sir,
1 have the honour to submit……………….charge(s)………………against
No…………………
Rank………………… Name……………………of the…………………(unit),
under my command, and request
you to obtain sanction, of …………. that a………………., court-martial
may be assembled for his
trial at………………………….. (place).
The case was investigated by (a) ………………..
A court of inquiry (b) was held on…………….. (date)
………………at……………….. (Station).
Presiding Officer……………..Ranks ………………Names and
Corps; Members ……………….
The accused is now at……………..(place).
His general character is (c) ……………….
Enclose the following documents (d):
1. Tentative Charge-Sheet along with record of hearing of charge
proceedings. (in
duplicate).
submitted by the commanding officer to an officer holding the necessary warrant to convene a suitable court martial. The procedure of courts martial is contained in Chapter XI of the Army Act, 1950 and the corresponding chapters of the Navy and the Air force Acts. The whole process is legal and conforms to the rule of law. This in short puts the whole process of administrative justice in the defence forces on a valid legal and equitable platform. This is also a testimony to a comprehensive process of administration of justice in the defence forces in India. This objective is attained through statutes coupled with the rich conventions of the defence forces. The processual justice in the defence forces is thus based on the statutory law, rules made under the statutes and conventions which due to a prolonged use have attained the sanctity of a statute.

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2. Summary of Evidence, original and copy/copies.
3. Original exhibits.
4. List of witnesses for the prosecution and defence (with their present station and addresses).
5. List of exhibits.
6. Correspondence.
7. Statement as to character (IAFD-905) and the conduct-sheet of the accused (e).
8. Statement by the accused as to whether or not he desires to have an officer assigned by the convening officer to represent him at the trial [AR 33(7)].

Yours faithfully,
Signature of Officer Commanding

(a) Here insert the name of—
(i) Officer who investigated the charges.
(ii) Company, etc., Commander who made preliminary enquiry into the case. or
(iii) Officer who took down the Summary of Evidence [AR 39(2) (c)].
(b) To be filled in if there has been a Court of Inquiry respecting any matter connected with the charge(s); otherwise to be struck out [AR 39(2) (c)].
(c) To be filled in by the Commanding Officer personally in accordance with Regs Army para 171.
(d) Any item not applicable to be struck out.
(e) 3, 4, 5, 6, 7 and 8 to be returned to the Officer Commanding the unit of the accused with the notice of trial. (As derived from Universal’s The Army Act and Rules)
Implementation of the procedural safeguards is the responsibility of those who are in command of troops. To ensure that the powers are exercised within the parameters provided in the relevant sections and rules, the defence services of the Union are provided with the legal expertise in the form of the Judge Advocate General.\textsuperscript{184} He (the Judge Advocate General) being a statutory functionary, in all the three forces, his assistance and guidance to the commanders who are the repositories of power of justice, in the field of administration of justice is mandatory. The powers and functions of the representatives of the Judge Advocate General area also specifically laid down.\textsuperscript{185}

(f) **Show Cause mandatory where termination, removal, discharge etc., contemplated**

The Fundamentals of processual justice rest on the opportunities available to a delinquent to defend himself in adverse situations. Perusal of the provisions relating to removal and termination administratively done, reveal that each provision whether it is section 19 and 20 of the Army and Air force Acts or Sections 15 and 16 of the Navy Act, the provisions of the statute are required to conform to the procedure laid down in the corresponding rules or regulations as the case may be. It is a principle of natural justice that no one should be condemned unheard or no one should be removed from service without affording to him the opportunity to show cause. As the statute itself mandates that the power of removal is subject to the rules and regulations made under the authority of the Act itself, the Central Government or the Army, Navy or the Air force authority shall not proceed further in any manner other than provided in those rules and regulations. In this context the exercise of power by the Central Government or any other

\textsuperscript{184} See Appendix –I, **Section 129, Army Act, 1950.**  
\textsuperscript{185} See Appendix –I, **Army rule 104.**
prescribed authority would be rendered null and void if the procedure laid down in the respective rules or regulations is not adhered to. The show cause in these provisions would mean not only the opportunity to explain the conduct of the employee (the defence person in this case) but also obligate the prescribed authority to provide to the employee all material adverse to him and being used as a basis for decision to terminate or remove. This in fact is the essence of the rule of *audi alteram partem* applied in the cases of administrative terminations under the defence law, giving thereby to the administrative jurisprudence in the defence forces a pedestal of propriety, constitutionality and legal validity to stand upon.

***(g) ‘Processual justice’ as derived from provisions relating to Inquiry and investigation.***

‘Processual justice’ for the defence forces could not be principally different from what is available and applicable to the employee subject to the civil law. The process on justice in either case has to comply with the basic tenets governing its *dispensation*. While defining the term ‘*processual*’ and ‘*processual justice*’ in the first chapter reference has been made to the mandatory sections and rules in the statutes relating to the defence forces. That has been done not only to define the intended term but to explain it in a legalistic manner. When process is defined as a series of actions or steps towards achieving a particular end\(^ {186} \) and ‘processual’ as ‘relating to or involving the study of processes’, the attempt has been made to understand the term in its wider perspective. While referred to with respect to the defence forces and the system of justice prevalent therein, it would entail a reference to the processes adopted while dispensing justice in the defence forces. Normally,

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the process of investigation is considered to commence with the ordering of a Court of Inquiry under chapter VI of the Army Rules\textsuperscript{187} in the manner prescribed therein and the corresponding provisions of the Navy and the Air Force Acts. Evidence collected through the court of inquiry can become a basis for initiating administrative action against a delinquent even in the nature of termination of service.

An appraisal of the foregoing customs and the usage would reveal a gradual development of usage and its eventual acceptance in the Statutes and Rules relating to the service which came in the form of ‘Rules’, ‘Orders’ and ‘Instructions’ pertaining to the service. The customs have bound the forces together is a known and admitted fact. The Indian ethnicity had a major role to play in the determination of a particular custom in relation to a portion of the force. British fascination with military ethnography became even more evident in the 1830s when articles began to appear in the military press detailing the various communities in India and their suitability for military service.\textsuperscript{188} Customs in Indian scene played a very important role which was to be seen in the years to come. The defence forces being an inseparable portion of the State machinery could not remain unaffected by this transitional transformation from time to time. The subject of tenures, terminations and the processual justice grew up from tradition to Statute. With passage of time, customary law of services has been replaced by the statutory law passed by the Parliament which brought with it, the requirements of adhering to the laid down procedures. In the famous words of Douglas M. Peers, “India...was a living museum

\textsuperscript{187} See Appendix I.
of Europe’s distant past, of great repository of verifiable phenomenon of ancient usage and ancient judicial thought.”

**Appraisal**

In spite of elaborate laws and procedures, which have been provided for the governance of the defence forces, the customs cannot be relegated to a state of insignificance, as in the words of a Battalion commander having served in operational environment, it is the customs which bind a soldier to his unit and its great traditions of valour and sacrifice. “One word of command, thousands turns right. One battle cry thousands charges the enemy.” The customs of service thus have appeal and utility beyond the regimental sentiment and have largely influenced even the procedures involved in the administration of justice to the personnel serving in the ‘Defence Forces’. This not only justifies the peculiarity of the defence services, their Kaleidoscopic constitution, but also the antiquity of their customs and the unwavering faith of the soldier in the correctness and propriety of those customs.

A soldier is not considered as worldly in his approach as his counterpart in the civil. This is the popular belief and this belief is true to a large extent. As a result of his deployment in purely military establishments for major part of his service, his exposure to the outside world is relatively limited. Though this system of service is beneficial to the organization, it imposes an onerous duty on those under whom he serves, to see that no prejudice is caused to him owing to his position as such. The duty of commanders at all times is thus to ascertain that the best interest of the soldier is kept in mind while dispensing justice, and, no prejudice whatsoever is caused to him. The

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provisions in the statutes too have been designed to take care of this aspect. While the maintenance of discipline is the prime most requirements of the forces, welfare of those who constitute these forces is not allowed to get eclipsed in whatever circumstances. The defence forces use their battle mottos to keep their combatant men in high morale. The Chetwode oath and the writings of Simonides are thus integral to the service ethos. Adherence to law is viewed as natural and its violation an exception. Hence the processual justice in the defence forces is seen through the prism of objectivity and not through a utopian subjectiveness. Compliance of law and procedure is generally seen as a natural concomitant of defence administration. Its violation too is rare, incidental and usually inadvertent. This is what is revealed from the study of cases placed for scrutiny before the courts. The advantages or the disadvantages of any system are known to those who remain a part of the system and still view it as a dispassionate observer. Hence the approach as well as the derivations of a military scholar would be more pragmatic and less illusory. While the whole world is grappling with the consequences of over awareness and banality of overexposures, lack of street smartness thus in a way acts to his (defence personnel’s) advantage.

It is now settled that the rules made under Article 309 were not applicable to the defence personnel as they remain subject to the President’s pleasure. It was further held in Inder sain v. Union of India, AIR 1969 SC 220 the Supreme Court held that the term civil servant does not include a member of the defence force, or even an employee in defence service, hence the protection available to the civil servants under Article 311 is also not deemed to be extended to the persons belonging to the defence forces. In such a background, testing the principles of good conscience and fairplay in the defence services falls within
the purview of the courts to whom eventually every jurist adverts with hope and seeks assurance as so eloquently said by the Apex court, “Notwithstanding the limitations of the legislations and the compulsions of the organizations, the judiciary in our country has always stood out as a great champion of liberty irrespective of the fact whether the citizen belonged to the civil service or to the disciplined Armed Forces of the Union. It exhorts the immortal words engraved on the arch of the southern face of the North Block on the Raisina Hill, New Delhi

\[\textit{Liberty must not descend to a people,}\]

\[\textit{A people must raise themselves to liberty;}\]

\[\textit{It is a blessing that must be earned before it can be enjoyed.}\]

The rule of law in the country is maintained by the presence of a strong defence force protecting the borders of the country. Hence their tenures of service are adequately protected under their respective statutes. The power to terminate from service is vested in the authorities specified in those statutes but those too are governed by the rules framed under the Acts. Thereby, restrictions have been placed not on the Fundamental rights of the defence personnel but also on those who exercise the powers of command and have the power of termination.

In view of the foregoing, the basic principle of the \textit{processual justice} in relation to the \textit{tenure and termination of service} in the defence forces thus came to be that the defence personnel are entitled as a matter of right, to continuous uninterrupted tenures of service under their respective statutes. These tenures could be altered or varied only in the manner provided in the Army, Navy and the Air Force Acts. For instance, contravention of any of the Army Rules 19 to 21 which deal with the modification of Fundamental rights in respect of the defence
personnel, would be punishable as an offence under Army Act as an act or an omission prejudicial to good order and military discipline as provided in Section 63 of the Army Act, 1950. The underlying principle for an omission is that an omission to be punishable under this section must amount to neglect which is wilful or culpable. If wilful, i.e., deliberate it is clearly blameworthy.