CHAPTER VI

CONSTITUTIONAL INTERPRETATION OF TENURE, TERMINATION AND PROCESSUAL JUSTICE IN DEFENCE FORCES

Prelude

Indian Constitutional history dates back to the 4th and 3rd centuries BC and but for the two major treatises in the field of polity and administration of services, viz., the Mahabharat and the Arthashastra, the other accounts are skeletal. The primary reason for the lack of chronological records in the service administration emerges to be the innumerable invasions on the country, during which most of the literary records were destroyed. But what eventually has remained after the invasions is, that, which was passed by the word of mouth, from generation to generation. This kind of destruction of the pristine records did not affect the southern parts of India as much as it did the northern and the central India.¹ The records of the ‘vedic

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¹ (a) This detestation for history still continues in some parts of the world. It became evident when the whole world witnessed with horror the destruction of the Bamiyan statues of Buddha- an apostle of peace the precursor to the path of liberation from misery. (b) Knowledge on the evolution of services and their tenure, termination and processual justice aspects in India in the preceding pages of the study and the ones that follow has been derived and inferred from the similar records after a very careful perusal of these documents. This entailed innumerable visits to the libraries and scrutiny of books chronicles and at times remnants of manuscripts. Reference in this case was made to the writings in the field of administrative law. Right from the Shanti Parva of the Mahabharata and the rock edicts of Ashoka to the judgements of the Supreme Court and the writings of the modern jurists some of whom though not very popular but have explored the fields of new thought. This has been done particularly in relation to the development of the concept of tenure, termination and processual justice in general and then in relation to the tenure, termination and processual justice of services in the defence Forces in particular. This was the only way to access
invasion of the southern India, the manuscripts of the works composed by the inimitable sage Agastya, recorded on palm leaves are still believed to be preserved in the temple of Palani, Tanjore and the National Museum, Chennai.

Service jurisprudence in India is known for its peculiar formation and consistency. It is intertwined with legislations, rules, directions, practices, judicial decisions and also with the principles of Administrative Law, Constitutional Law, Fundamental Rights and the principles of Natural Justice. Tenure and termination are those incidents of service which eventually flow into the judicial arena where the administrative actions culminating into termination of service are subjected to intense judicial scrutiny. The decisions of the administrative authorities are instrumental for such decisions tested on the anvil of good conscience and fair play as the Justice in such

the various aspects of the trends of exercise of power of tenure, termination and processual justice in services.

(c) Services in India have been of relevance from the beginning. Hence the south has preserved the knowledge of the past with ardour and respect. Posterity thus owes a lot to the southern scholars for the preservation and spread of knowledge where it was decimated. It is believed that the rich libraries of Nalanda and Taxila when set on fire by the invading Mahmud of Ghazna, kept on burning for more than six months at a stretch. From this small account, the irreparable loss caused to the literary treasures of India by the invaders can be measured. The care and circumspection with which the huge libraries were raised is evident from the fact that elaborate procedure was prescribed not only for the recording of the royal writs which was the principal source of law but also for the selection of the recorder of those writs so as to rule out any possibility of error. The Arthashastra laid down those qualifications as follows:-

“One who is possessed of ministerial qualifications, acquainted with all kinds of customs, smart in composition, good in legible writing, and sharp in reading shall be appointed as a writer (lekhaka). Such a writer, having attentively listened to the king's order and having well thought out the matter under consideration, shall reduce the order to writing.” (Kautilya's Arthashastra).


3. Palani is a small town ship in Tamilnadu, famous for the holy temple of Murugan swamy, Kartikeya, the elder son of Siva and Parvati, of Hindu mythology.

4. Supra note 2.
matters is considered as an essential and the first and the foremost virtue. John Rawls describes justice as the virtue of social institutions in the following words:—

“Justice is the first virtue of social institutions, as truth is of systems of thought”.5

In its salutary role, the judiciary on its part seeks to draw a balance between the twin needs of services viz., (1) the need to maintain discipline in the ranks of the Government servants; and (2) the need to ensure that the disciplinary authorities exercise their powers properly and fairly without losing sight of the fundamental principles of justice.

6.1 The general concept

Adverting to the Constitutional provisions, part XIV of the Constitution of India deals with the services under the Union and the States more or less in the same manner as inherited from the British model markedly different from the ‘spoils system’ prevalent in the United States of America where appointments are made as a reward for political service to a party. This, in India, among other things ensured political neutrality in the services. The Shah Commission Report highlighted this high point of neutrality in the services in the following passage:—

"Exhortations have in the past often been addressed by political leaders that public functionaries must be committed servants of the Govt. These have in no small measure been responsible for some of the serious consequences that had followed certain steps taken by the Govt. servant during the emergency. The commitment of a public functionary is, however, to the

duties of his office, their due performance with an accent on their ethical content and not to the ideologies, political or otherwise, of the politicians who administer the affairs of the state. Commitment by the public servants, therefore, means only and entirely, commitment to the policy and programmes of the Govt. in so far as the policy and programmes are in conformity with the fundamentals of the Constitution......... Unless the services work for and establish a reputation of political neutrality, the citizens will have no confidence in the impartiality and fairness of the services. It is expected of the services that they would tender frank, informed and well-considered advice without getting personally involved in their present position or their future advancement, however, unpalatable such advice may be to the political head of the ministry."

All laws passed by the Parliament are implemented by the Executive- in short, the services. The loyalty and integrity of services and an unfailing allegiance to the Constitution is a sine-qua-non for services in the National political and Executive setup. This rule applies to the Defence Forces of the Union in an equal measure. The importance which the framers of the Constitution have accorded to the services under the Union is evident from the fact that a whole chapter (Chapter XIV) under the Constitution is devoted to the services. The response which the National polity expected from the services, is revealed from the following address of Sardar Vallabhbhai Patel, the first Home Minister of Independent India, to the senior civil servants of the country at that time:-

"Have you read that history? (the history of safeguards for the Indian civil service) or you do not care for recent history after you began to make history. If you do that, than I tell you we have a dark future. Learn to stand on your pledged word; and, also, as a man of experience. I tell you do not quarrel with the instruments with which you want to work. Have morals no place in the new parliament?...... Today, my secretary can write a note opposed to my views. I have given that freedom to all my secretaries. I have told them if you do not give your honest opinion for fear that it will displease your minister please then you had better go. I will bring another secretary. I will never be displeased over a frank expression of opinion. That is what the Britishers were doing with the Britishers. We are now sharing the responsibility. You have agreed to share responsibility. Many of them with whom I have worked, I have no hesitation in saying that they are as patriotic, as loyal and as sincere as myself..."\(^7\)

The certainty in the rules and policy for the purpose of recruitment, service tenures and the various modes and causes for their cessation thus assumed importance for the obvious reasons. Desire to strike a balance between the State necessity and the individual liberty are found to have given room for judicial interpretation by way of extensive judicial review of Executive decisions of persons in authority and the judiciary through its various decisions dictated the manner in which the terms of tenure and termination of service in respect of the Government servants should be understood.

6.2 Civil Servant Distinguished from Defence Personnel

The term civil servant includes members of a civil service of the Centre or a State, or of an All - India service, or all those who held civil posts under the centre or a state. A civil post means an appointment or office on the civil side and includes all personnel employed in the civil administration of the Union or a State. What however, is necessary to make a civil post under the Government is the relation of master and servant between the State and the employee. Whether such a relationship exists is a question of fact to be decided in each case. A host of factors have to be taken into consideration to determine such relationship. None of these factors may be conclusive and no single factor may be considered absolutely essential. Some of these factors were outlined by the Supreme Court in the State of Uttar Pradesh v. Audh Narain Singh. These factors which were in the form of a questionnaire included certain pertinent aspects of service, in the following manner:-

(i) Who selects the employee?
(ii) Who appoints him?
(iii) Who pays him the remuneration or wages?
(iv) Who controls the method of his work?
(v) Who has the power to suspend or remove him from employment?
(vi) Who has a right to prescribe the conditions of service?
(vii) Who can issue directions to the employee?

If answer to all these questions is, ‘the Government’, then it is a civil post under the Government.\footnote{8}{AIR 1965 SC 360.} \footnote{9}{Ibid.}
The co-existence of all these indica as above is not predicated in every case to make the relationship as one of master and servant. In special classes of employment, a contract of service may exist even in the absence of one or more of these indica. Ordinarily, the right of an employer to control the method of doing work and the power of superintendence and control are strong indication of master and servant relationship. A civil post need not carry a definite rate of pay; he may be paid on commission basis, the post need not be whole time, it may be part time and its holder may even be free to engage himself in other activities. What is important, however, is the existence of the master-servant relationship. Applying the same analogy, the Panchayat service in Gujarat created by a state law was held to be state civil service and its members as servants of the state. The term civil servant does not include a member of a Defence service, or even a civilian employee in Defence service who is paid salary out of the estimates of the Ministry of Defence. These persons while falling under Article 309 and 310 do not enjoy the protection of Article 311. A member of the police force, however, is a civil servant.

6.3 The service tenures and their termination - the constitutional point of view

The Law and the Authority to the Defence services in India emanates, besides the Parliament, from the highest Executive of the country, the President of India. This is particularly so in view of their special relationship with the office of the President as enshrined in Article 53 of the Constitution which is as follows:

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10. Ibid.
11. Ibid.
13. Ibid.
“Without prejudice to the generality of the foregoing provision, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.”

The law of Defence services in India is seen as a comprehensive mixture of statute and customs of service and this mixture of law and custom affects all the aspects of service in the Forces. The tenures of service being the most important aspect of employment in any discipline and as much in the Defence Forces, naturally attract the maximum attention. When seen in the light of the powers which affect these tenures, the elements of right and duty are found meticulously dovetailed into each other.

Among the employments with the State, the tenures may be abruptly terminated by Executive orders. The fundamental rule governing this aspect is that in spite of the fixed tenures and long treasure of experience, the services of the servants of the Government could be dispensed with by the will or what is termed as the pleasure of the Executive. Since the exercise of power by any Executive authority under the Constitution is regulated by Part III of the Constitution itself, exercise of Executive authority is not absolute in the sense of being unfettered. In the backdrop of the fundamental nature of our country being a welfare state, the exercise of administrative power has to cover all its distance with one foot tied to the concept of ‘rights’ guaranteed under the Constitution notwithstanding the modifications allowed by the Defence services statutes. In this context, unregulated exercise of power is kept out of purview. It has been provided that even the highest Executive in the country, the President exercises his powers with

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17. Constitution of India, Article 53 (2).
the aid and advice of the Council of Ministers as this is a rule that is enshrined in the Constitution.

Article 310 of the Constitution, lays down that the Defence personnel, which means a member of a Defence service or a person holding any post connected with the Defence, and the civil servants, includes members of a civil service of the centre or a state or of an All-India service, or all those who hold civil posts under the centre or a state (civil post here means an appointment or office on the civil side and includes all personnel employed is the civil administration of the union or a state, and the members of the all-India service), hold office during the 'pleasure of the President'. Similarly, a civil servant in a state holds office during the pleasure of the Governor. This is the general rule which operates as far as the terms of service of these personnel are concerned. A marked peculiarly of this provision is that it is subject to general Constitutional limitations i.e., when there is a specific provision in the Constitution giving to a public servant a tenure different from that provided in Article 310, the Constitution provides that the servant shall be excluded from the operation of this Doctrine viz., the Supreme Court judges (Act. 124), Auditor General (Art 148), High Court judges (Arts. 217 and 218) a member of the Public Service Commission (Article 317) and the Chief Election Commissioner (Article 324) have been expressly excluded by the

18. **Article- 310. Tenure of office of persons serving the Union or a State – (1)**
Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all India service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

(2) x x x x x x x x x x x
Constitution from the rule of pleasure.\textsuperscript{19} To understand this concept in its entirety, a reference to Article 311 is necessary.\textsuperscript{20}

The Constitution has kept the Defence Forces out of the purview of Articles 310 and 311 in Chapter XIV but has allowed the Parliament to pass legislations in respect of each force for its governance. For their overall allegiance to the Union, Article 52 of the Constitution of India declares, “There shall be a President of India” and Article 53 has vested the Executive power of the Union and the resultant supreme command of the three Forces in the President.\textsuperscript{21} There is thus no doubt that the highest

\begin{footnotesize}
\begin{enumerate}
\item \textit{Pradyat v. Chief Justice}, (1955) 2 SCR 1331.
\item \textbf{Article- 311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State-} (1)No person who is a member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.
(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. Provided that where it is proposed after such inquiry , to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:
Provided further that this clause shall not apply –
(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or
(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or
(c) where the President or the Governor as the case may be, is satisfied that in the interest of the security of the state it is not expedient to hold such inquiry.
(3) If, in respect of any person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.

\item \textit{Article- 53. Executive power of the Union.-} (1) The Executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.
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Executive authority under the Constitution as far as the Defence Forces of the Union are concerned is vested in the President. This authority is for all purposes i.e., for the appointment of the personnel into the service and also for their removal there from. Article 310 makes it clear that every member of the Defence Forces of the Union is subject to the pleasure of the President. As far as the civil servants are concerned, the Constitution provides an elaborate procedure for exercise of this pleasure by the President in accordance with Article 311 of the Constitution.

As regards the Defence Forces, no procedure is provided in the Constitution, which means the rules relating to the pleasure of the President with respect to the Defence Forces must be contained in the legislations framed under the authority of Article 309 of the Constitution. Article 309 can thus be considered as the mother of the legislations governing the Defence Forces in the country and all such legislations as its progeny. Supremacy of the Constitutional authorities is however,

(2) Without prejudice to the generality of the foregoing provision, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.
(3) Nothing in this Article shall –
(a) be deemed to transfer to the President any function conferred by any existing law of the Government of any State or other authority; or
(b) prevent Parliament from conferring by law functions on authorities other than the President.

22. **Article- 309. Recruitment and conditions of service of persons serving the Union or a State** – subject to the provisions of this Constitution, Acts of the appropriate legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State. Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed to such services and posts until provision in that behalf is made by or under an Act of the appropriate legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.
retained. Certain viewpoint expressed in an article published in the 'Law Quarterly Review',\textsuperscript{23} is relevant. The author has remarked that the English jurisprudence entertains two different conceptions of prerogative power viz., one, espoused by Blackstone and endorsed by Wade, wherein the authority to change people's rights, duties or status under the laws of England is vested solely in the Crown and the other principally espoused by Dicey wherein, every act which the Executive Government can lawfully do without the authority of an Act of Parliament, is done by virtue of the prerogative.\textsuperscript{24} One thing can be said with certainty that such a state as enumerated in the latter part will never visit the Indian set up; thanks to the ever alert legislature and a judiciary which has unto itself, ascribed the responsibility to guard against any infringement of the Constitution by any arbitrary exercise of power by the Executive.

**DOCTRINES**

6.4 Doctrines on the tenure, termination and processual justice in the Defence Forces

The concept of tenures and terminations and the processual justice in the Defence Forces under the Constitution is studied in the light of its relevant Doctrines. The two most important Doctrines in this field are, (a) The Doctrine of (the Presidential) pleasure' and (b) the Doctrine of 'continuous officiation' and (c) the Doctrine of Principles of Natural Justice i.e., (i) the Doctrine of "Audi Alteram Partem" and (ii) the Doctrine of "Nemo debet bis vexari" i.e., a man must not be put twice in peril for the same offence.

6.4.1 The doctrine of (the Presidential) pleasure - a legacy of common law

The concept of pleasure in holding office has been borrowed from Britain where a servant of the crown has always held the office during the pleasure of the 'crown'. This indeed being a common law Doctrine has its origin in the customs and conventions of the Great Britain. The tenure of office of a civil or a Defence personnel can be terminated at any time at will without assigning any reason, without notice. Under common law practice, the civil servant has no right to take recourse to courts, or claim damages for wrongful dismissal even he cannot file a case even for arrears of his salary when removed from service by the exercise of 'pleasure'. The crown is thus not bound by any contract between itself and its servants which means the power of the crown for tenure and termination is unfettered. This Doctrine is based on 'public policy' wherein; the continuation in service is dependent upon good conduct of the servant. The crown is not bound to retain in service any person whose conduct is not above board and satisfactory. There, however, is an exception to this rule, and the exception is the power of the Parliament. Operation of the Doctrine of pleasure can be modified by an Act of the Parliament of England. This is an endorsement of the rule of supremacy of the Parliament over the power of the crown. This can be considered as an important feature of a representative democracy in a country professing the ideals of equity justice and good conscience.

(a) Position in India

In India, Article 310 of the Constitution lays down that the defence personnel, which means a member of a Defence service or a person holding any post connected with the defence, and the civil servants, includes members of a civil service of the
centre or a state or of an All-India service, or all those who hold civil posts under the centre or a state (civil post here means an appointment or office on the civil side and includes all personnel employed is the civil administration of the union or a state, and the members of the all-India service), hold office during the ‘pleasure of the President’. Similarly, a civil servant in a state holds office during the pleasure of the Governor. This is the general rule which regulates the terms of service of the aforesaid personnel. A marked peculiarly of the provisions relating to the ‘Doctrine of Pleasure’ is its subjection to the general Constitutional limitations i.e., when there is a specific provision in the Constitution giving to a public servant a tenure different from that provided in Article 310, the Constitution provides that the servant shall be excluded from the operation of this Doctrine. For instance, the Supreme Court judges (Article 124), Auditor General (Article 148), High Court judges (Arts. 217 and 218) a member of the Public Service Commission (Article 317) and the Chief Election Commissioner (Article 324) are the State functionaries who have been expressly excluded by the Constitution from the rule of ‘pleasure’.

6.4.2 Doctrine of pleasure: President as the Supreme Commander of the Defence Forces - a perspective

Pleasure literally means the state of being happy or satisfied. It also suggests that a person’s continuance or discontinuance is contingent upon his acceptance in that state. In respect of the servants of the union, irrespective of their status whether in the civil employ or as a part of the defence/armed forces of the union, their continuance in the service of the union is subject to the pleasure of the President.

Similar power and authority is conferred on the Governor of a

State in respect of the servants employed in the respective state Governments. This power however does not extend to the person employed by private individuals or companies. The Doctrine which came to be developed through the study of this exercise of pleasure by the president in the Centre or by the Governor in the State under the Constitution is termed as the ‘Doctrine of pleasure’.

Pleasure of the President under the armed Forces Legislations is absolute and unfettered is apparent from the provisions contained in those Acts themselves. There is a clear distinction in the applicability of this Doctrine to the armed Forces personnel vis-à-vis their counterparts in the civil services. Consequently, the implications of the exercise of pleasure with respect to the defence personnel are also clear and unambiguous. The orders of termination of service passed by the President in exercise of his pleasure under the relevant sections of the Army, Navy and the Air Force Acts were unquestionable and irrevocable. The Executive powers of the President exercised in pursuance of the ‘pleasure’ in respect of the Armed Forces of the Union were considered absolutely non justiciable. This belief received further strength from the fact that the power of ‘removal’ is exercised by the President in the capacity of being not only the Supreme Executive of the Nation but also as the Supreme Commander of the Armed Forces. Besides, the code of strict discipline of the armed Forces found it near impossible to question the orders and authority of as high as the President himself. The belief was firm that the President who is responsible for the grant of commission as an officer into the Army, Navy or the Air Force, or appointment into these Forces as warrant officer or junior commissioned officer or enrollment as soldiers, airmen or naval seamen, too holds the authority to pass the order of removal in the same vein, and that the same ought
to be accepted in the same manner without a demur in the high tradition of the Forces.

The President, under the Indian Constitution, is the Supreme Executive, who exercises his functions with the aid and advice of the Council of Ministers. During the exercise of these functions, the President holds a special status vis-à-vis the servants of the Government. This makes the institution of the President as an omnipotent institution with power to dismiss or remove from the Government service any one under the umbrella of his authority. By virtue of being the Supreme Commander of the Defence Forces of the Union, the President, exercises his pleasure, in respect of all of them. Consequently, the ultimate power to dismiss, remove or reduce the Defence Forces personnel rests in the President and the exercise thereof is regulated by law. While the President in India is the Supreme Executive, our Constitution by Article 53(3)(b) prevents the parliament from conferring by law functions of the President on authorities other than the President himself.

While drafting the Constitution, an important issue for consideration was, what would make for the strongest Executive consistent with a democratic Constitutional structure? And what form of Executive would be suited to the conditions of this country. KM Munshi, expressed his profound views on this issue and said,

"The strongest Government and the most elastic Executive have been found to be in England and that is because the Executive powers vest in the cabinet supported by a majority in the Lower House which has financial powers under the Constitution. As a result, it is the rule of the majority in the legislature; for it supports its leaders in the cabinet, which advises the
head of state namely the King. The king is thus placed above party. He is made really the symbol of impartial dignity of the Constitution. The Government in England is found strong and elastic under all circumstances.....”27

The above thinking was basically the reflection of our deep appreciation of the glorious past which in the later twentieth century found itself reflected in some legal and historical writings. On this aspect, Professor VR Mehta, a renowned scholar in India, quoted from Brihaspati Sutra and wrote, “....In the beginning there was a golden age which was based on justice and right. There was no king and every man followed his or her own good sense. There was of course a social hierarchy in which there were masters and servants. But the whole system worked spontaneously.”28

The highest Executive, who from an authoritative monarch came to be reduced to a titular head in democracies, held the power of pleasure due to its royal origins. According to Brihaspati, a king, though elected by the people, was endowed with divine qualities. His justice was divine justice and against it, there was no appeal. This view was replaced by the Arthashastra of Kautilya who was well aware of the dangers of anarchy as well as the absolute necessity to transcend it by establishing order in the society. Accordingly, Kautilya encouraged the establishment of a strong kingdom with an equally strong king who would rule in accordance with the Dharma Shastras. The king in Kautilyas’s opinion should be a repository of absolute power with an unquestionable authority. As he was conscious of the dangers of absolute power in the hands of a single person, and the attrition it can cause to the...
State, he advised regulation of king’s authority through limitations. The Sabha, elected by the Pura Janapada, was composed of two houses. This Sabha exercised effective control over the king during Kautilya’s times. Probably it resembled the system in existence today. Kautilya advocated a strong king whose writ was supreme in his kingdom but he also observed that

“A wise king can make the poor and miserable elements of his society happy and prosperous, but a wicked king will surely destroy the most prosperous of loyal elements of his kingdom.”

This too was not acceptable view to the modern thinkers who were greatly influenced by the profundity of the thoughts circulated by Rousseau, Hobbes, Bentham and Austin. Major political developments took place in England. With an unwritten Constitution which is a bundle of well recognized customs and traditions, England indeed became the successful democracies in the world. In India we followed this model and with adaptations to suit our own political milieu, conferred the supreme Executive power in the President. Part III of our Constitution became the brightest gem in the Constitutional treasury. There is no denying the fact that the powers of the President enshrined in part XIV of the Constitution with their Constitutional safeguards also occupy a place of unparalleled importance in the Constitution.

It has been long recognized that services under the Constitution are an important and integral part of our Executive. They perform the solemn duty of giving shape to the lofty ideals and dreams of our legislators. The services are thus indispensable. But the servants of the Government, despite their fixed tenures and long treasure of experience, can still be

29. Foundation of Indian Political Thought’ by VR Mehta.
removed from the service of the State by what is termed as the ‘pleasure of the President’. Constitution provides that the President exercises his pleasure with the aid and advice of the Council of Ministers. Since the pleasure of the president is not exercised by him personally but by one of his Ministers, its exercise is amenable to bias and prejudice thereby affecting the exercise of pleasure. Considering the pleasure of the president in respect of the Defence personnel, a rare exercise and outside the judicial purview, the Supreme Court examined the ‘pleasure’ invoked in respect of an Air Force person, in the case of Hazara Singh v. Chief of Air staff. The court upheld the exercise of pleasure, however, settled the issue whether the person removed from service under the pleasure Doctrine was entitled to pension or not.

6.4.3 Legislative Power subject to the Doctrine of Pleasure

What emerges from chapter XIV of the Constitution, as the most predominant feature is the power of the President to ‘appoint’ and ‘remove’ the Government servants from the service of the Union - Duranto bene placito (during the pleasure). This includes the personnel belonging to the Defence Forces of the Union. The role of the Chief Executive vis-a-vis his servants, reveals a relationship of master and servant in which the major governing factor is ‘conduct’ of the servant. The contract of service can be terminated by the master unilaterally if the servant is guilty of misconduct, or conduct which is inconsistent with his duties as a servant. “The rule of conduct is transcendent law”, declared the Manusmriti.

30. (Delhi) 1982 (1) SLR 521.
31. Latin phrase which pithily expresses the rule of English Law; also see State of Bihar v. Abdul Majid, 1954 SCR 786.
Peculiarity of this pleasure in respect of the Defence personnel is its being beyond any subjection unlike the pleasure of the crown in England which is subject to the Parliamentary control. In Britain, the power of the Crown can be modified by the parliament by passing legislations regulating its exercise. Interestingly, the expression “subject to the provisions of the Act and the Rules made there under”, finds a mention in the Army, Navy and the Air Force Acts simultaneously where the power of termination by way of cashiering, dismissal, removal, discharge or compulsory retirement etc., is to be exercised by the Central Government or other authorities under the respective Acts. In other words, power of termination vested in the authorities other than the President is regulated by the Rules thereby confirming inherent check on the power of as mentioned aforesaid. It is another thing that the exercise of this power is subject to extensive judicial review by the courts. Grounds for exercise of this power however, vary in every case though misconduct of the Government servant is one major ground for termination. Termination of service follows various modes viz., by trial, where termination comes by way of punishment awardable by a court martial; termination of service by authorities other than the court martial viz., the Central Government, the Chiefs of Army, Navy and Air Force Staff or the Officers below the Chiefs of Army, Navy and Air Force Staff, upto the rank of Brigadier in the Army or equivalent in the other two Forces. Law on this issue has long ago crystallized. In Dharampal Kukreti v. union of India, the Supreme Court went to the extent to hold that termination is justified even in those cases where a court martial after trial has not awarded dismissal as a punishment. And also that such termination will not amount to double punishment and will thus not be affected by the Doctrine of double jeopardy.
6.4.4 Supremacy of the Doctrine

A careful perusal of article 309 and subsequent articles viz., Art 310 and Article 311 of the Constitution reveal that the legislative power conferred on the Parliament or State Legislature or the rule making power of the President or the Governor, by Article 309 is controlled by the Doctrine of pleasure as enshrined in Article 310 of the Constitution. This is evident from the opening words of Article 309 itself which reads, "Subject to the provisions of the Constitution." in other words the power of the legislature or that of the Executive to make rules laying down the conditions of service of, public servants is subject to the ‘tenure at pleasure’ under Article310.\(^{33}\) Art 309 is thus to be read subject to Article 310. A law or a rule cannot, thus, impinge upon the overriding power of the President or the Governor to put an end to the tenure of a civil servant at his pleasure.\(^{34}\)

Position with respect to the Defence personnel is however, different. In Union of India v. S.B. Mishra,\(^{35}\) the Supreme Court held that the rules made under Article 309 are not applicable to Defence personnel as they remain subject to the President’s pleasure. Hence the Defence Forces in their own respective legislations, have, independent provisions, with regard to the pleasure of the President, as a result, Article 310 too is not applicable in their case.\(^{36}\)

With respect to the inter-relationship between Articles 309 and 310, the views of Supreme Court are that rules made under the proviso to Article 309 or under Acts referable to that Article are subject to Article 310(1). As in Tulsiram Patel’s case the court observed as follows:

34. In union of India v. K.S. Subramanian, it has been held by the Supreme Court that AIR 1989 SC 662.
35. AIR 1996 SC 613.
“The opening words of Act 309 make that article expressly subject to the provisions of this Constitution, Rules made under the proviso to Article 309 or under Acts referable to that Article must, therefore, be made subject to the provisions of the Constitution if they are to be valid. Art 310(1) which embodies the pleasure Doctrine is a provision contained in the Constitution. Therefore, rules made under the proviso to Article 309 or under Acts referable to that Article are subject to Article 310(1). By the opening words of Article 310(1) the pleasure Doctrine contained therein operates "except as expressly provided by this Constitution." Article 311 is an express provisions of the Constitution. Therefore, rules made under the proviso to Article 309 or under Acts referable to Article 309 would be subject both to Arts. 310(1) and Article 311.”37

6.4.5 Doctrine of Pleasure - Its Implications

Does the Doctrine of pleasure make the crown in England or the President in India an autocratic ruler vis-à-vis those subject to exercise of the aforesaid pleasure? Answer to this question lies in the extent of checks and balances which a system of administration adheres to while dealing with cases involving such an exercise. Circulation of various ideas and propounding of corresponding theories and ideologies influence the socio political milieu of a country. It determines the manner in which a person understands the exercise of power by elected or nominated functionaries of a nation viz., the President and the Governor. This circulation of ideas which permeate the Indian system through judgments pronounced by the courts in India and opinions expressed by various jurists, determine the scope of these powers. As a political thinker, Andrew Heywood

37 AIR 1985 SC 1416.
has put it, “Ideas and ideologies influence political life in a number of ways. In the first place, they provide a perspective through which the world is understood and explained. People do not see the world as it is, but only as they expect it to be; in other words, they see it through a veil of ingrained beliefs, opinions and assumptions. Whether consciously or unconsciously everyone subscribes to a set of political beliefs and values that guide their behaviour and influence their conduct.”

The same author has again put it as, ‘power is seldom sought for its own sake’ but to achieve certain objectives, its exercise is best accomplished when it conforms to the rule of law.

In Union of India v. Tulsi Ram Patel, the Supreme Court upheld and justified the, pleasure Doctrine on the basis of public policy, ‘public interest’ and ‘public good’ in so far as inefficient, dishonest or corrupt persons, or those who have become a security risk, should not continue in service. Exercise of the pleasure in such cases is justified when the misconduct is apparent and continuance of such an individual in Government service is detrimental to the organization. Since the pleasure is exercised without issue of any show cause notice i.e., the victim is deprived of any opportunity to contest or respond, in first look it may appear to be contrary to the principles of natural justice and violative of the fundamental principle audi-alteram-partem i.e., no one should be condemned unheard. The truth is that Pleasure Doctrine is an exception to this rule.

6.4.6 Article 311 as a safeguard on Pleasure Doctrine

Bare reading of Article 310 would create an impression that President holding the Supreme Executive power, can,

38 Andrew Heywood, ‘Political Ideologies an Introduction’
39 Ibid.
40 AIR 1985 SC 1416.
remove a civil servant from service without assigning reasons. However, this power of pleasure has to be seen in the light of Article 311 which is responsible for changing the tenor of the pleasure in respect of the ‘Civil Government Servants’. Article 311 acts as a potent safeguard against any autocratic or *mala fide* exercise of the pleasure Doctrine. Constitution itself provides that the President shall exercise his powers with the aid and advice of his Council of Ministers, the element of bias finding its way into the aforesaid exercise cannot be ruled out. This aspect of pleasure was evident to the framers of the Constitution. The requisite safeguards are thus found incorporated in Article 310 itself followed by Article 311 which in fact acts as an effective regulator of power and prevents any malafide or hasty exercise of pleasure. The most outstanding quality of Article 311 is that the protection of the Article is available when dismissal, removal or reduction is by way of a punishment and not dismissal or removal simpliciter i.e., with no trappings attached. The Supreme Court laid down two tests to determine when shall the termination be considered as termination by way of punishment? (a) whether the servant had a right to hold the post or the rank; and (b) whether he has been visited with evil consequences.\(^4\)\(^1\) If a Government servant had right to hold the post or the rank under the terms of any contract of service, or under any rule, governing the service, then the termination of his service or reduction in rank amounts to a punishment and he will be entitled to protection under Article 311.\(^4\)\(^2\) Being omnibus provisions on law relating to the services under the Constitution, Articles 310 and 311 apply to all ‘civil’ Government servants, whether permanent, temporary, officiating or on probation.

\(^{41}\) *Parshottam Lal Dhingra case*, AIR 1958 SC 36.

\(^{42}\) *Ibid.*
6.4.7 Exceptions to Article 311

Article 311 (2) provides for certain circumstances in which the procedure envisaged in the substantive part of the clause need not be followed. These are:-

(i) Government servant is convicted on a criminal charge by a competent court;

(ii) For season to be recorded, it is impracticable to issue show cause; and

(iii) For reasons of security, retention of person in service is prejudicial and it is not expedient to issue show cause.

The three exceptions are explained in detail as follows:-

(i) **Conviction on a criminal charge** - One of the circumstances excepted by clause (a) of the proviso is, when a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge. The rationale behind this exception is that a formal inquiry is not necessary in a case in which a court of law has already given a verdict. However, if a conviction is set aside or quashed by a higher court on appeal, the Government servant will be deemed not to have been convicted at all. Then the Government servant will be treated as if he had not been convicted at all and as if the order of dismissal was never in existence. In such a case the Government servant will also be entitled to claim salary for the intervening period during which the dismissal order was in force. The claim for such arrears of salary will arise only on reinstatement and therefore, the period of limitation under clause 102 of the Limitation Act would apply only with reference to that date. The grounds of
conduct for which action could be taken under this proviso could relate to a conviction on a criminal charge before appointment to Government service of the person concerned. If the appointing authority were aware of the conviction before he was appointed, it might well be expected to refuse to appoint such a person but if for some reason the fact of conviction did not become known till after his appointment, the person concerned could be discharged from service on the basis of his conviction under clause (a) of the proviso without following the normal procedure envisaged in Article 311.

(ii) **Impracticability** - Clause (b) of the proviso provides that where the appropriate disciplinary authority is satisfied, for reasons to be recorded by that authority in writing that it does not consider it reasonably practicable to give to the person an opportunity of showing cause, no such opportunity need be given. The satisfaction under this clause has to be of the disciplinary authority who has the power to dismiss, remove or reduce the Government servant in rank. As a check against an arbitrary use of this exception, it has been provided that the reasons for which the competent authority decides to do away with the prescribed procedures must be recorded in writing setting out why it would not be practicable to give the accused an opportunity. The use of this exception could be made in case, where, for example a person concerned has absconded or where, for other reasons, it is impracticable to communicate with him.

(iii) **Reasons of security** - Under proviso (c) to Article 311 (2), where the President is satisfied that the retention of a person in public service is prejudicial to the security of the
State, his services can be terminated without recourse to the normal procedure prescribed in Article 311 (2). The satisfaction referred to in the to giving an opportunity to the employee concerned in the interest of the security of the State. This clause does not require that reasons for the satisfaction should be recorded in writing. That indicates that the power given to the President is unfettered and cannot be made a justifiable issue, as that would amount to substituting the satisfaction of the court in place of the satisfaction of the President which would be contrary to the spirit of the provision governing the Presidential pleasure.

6.4.8 Pleasure Doctrine in respect of Public Corporations

Executive power of the President encompasses all frontiers of service' but the expression 'service' here connotes the 'Government Service'. In its vast variety of services, Government and nongovernmental, the Doctrine of pleasure, extends to the services which are nongovernmental in nature or the services to a public corporation created under a statute. Law on this issue has been laid down by the Supreme Court in various judgments. The court has held that the statutory public corporations, or Government companies, registered under the Companies Act, although regarded as the instrumentalities of the state and thus 'authorities' for the purpose of Article 12 of the Constitution, yet have their own distinct personality separate from the Government. Accordingly, employees of such bodies are not regarded as employees of the Government and do not,
thus, fall within the term civil servants and do not, therefore, fall under the scope of Arts 310 and 311.\textsuperscript{45} With regard to the rights, the employees of these bodies do remain subject to the ‘Fundamental Rights’ and can also claim the benefits arising out of principles of Natural Justice in case of dismissal, reduction in rank etc. \textsuperscript{46} Similar is the state of the persons employed in service by the local bodies like the Vikas Nigam Ltd. In another judgment, the Supreme Court held that the officers and members of a High Court are civil servants.\textsuperscript{47}

\textbf{6.4.9 Position prior and subsequent to the year 1994 with respect to the defence personnel}

Position with regard to the Doctrine of Pleasure in the Defence Forces of the Union prior to the year 1994 was such that this was considered as the field for least interference. The courts were reluctant to tread into this so called unknown arena of Constitutional activity. While Article 310 which dealt with the civilian Government servants, was much in focus. It was probably thought that the nature of duties performed by the personnel belonging to the Defence Forces being peculiar was better left to themselves. But since the powers were conferred by the statutes, their judicial interpretation was essential so willy-nilly, some administrative decisions came up for judicial scrutiny. Consequently, the orders passed by the Courts-Martial conducted under the provisions of Army, Navy Air force or BSF Acts were viewed through the prism of propriety and judicial correctness. Among the powers of termination, the pleasure Doctrine still remained almost untouched and the removal in exercise of this power under the respective Acts of the Defence

:\textsuperscript{45} Ibid.
\textsuperscript{46} Kumaon Mandal Vikas Nigam Ltd v. Girija Shankar Pant AIR 2001 SC 24.
Forces, even though punitive, remained ‘camouflaged’. This, in fact was the term coined by the courts in the Company law but found its application in cases where power was exercised by a competent authority adversely. The Doctrine was literally interpreted as a camouflage as the courts entertained no judicial review. With no judicial interpretations at hand, this had some detrimental effect on the viability aspect of the system of administrative termination in existence in the armed Forces. The system of appeal in the Forces had already been termed as ineffective and archaic by the supreme court in *SN Mukherjee vs Union of India & Others*,48. The court even went to the extent of saying that appeal in the armed Forces was like an appeal from Caesar to Caesar’s wife as its fate would surely be ‘rejection’.49 Since the system of justice in the Defence Forces fulfills twin needs of the organisation i.e., the expeditiousness and certainty, it had definite advantages over the tardy disciplinary processes in vogue in the civil side. This required to be changed with so much time having passed since the promulgation of the Army, Navy and the Air Force Acts, and so many new vistas having visited the interpretative field, this Doctrine in respect of the Defence Forces too had to be seen in a new light. This task was made easy by the Delhi high Court in the year 1994, in a landmark case, *Ex. Major N.R. Ajwani & Ors. vs Union Of India & Ors.*50 A Division Bench comprising of Justice A B Saharya and Justice C N 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

49 Ibid.
army 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, services of some Defence personnel were terminated under Section 18 of the Army Act, 1950. 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. 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.

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, 1950 since it violates the fundamental right guaranteed to the appellant, the same could not be sustained. It was also contended that though Article 311(2) of the Constitution of India is not applicable to Defence Services, rules of natural justice must be complied with because the Defence

51 Ibid.
personnel enjoy the protection guaranteed under Article 14 of
the Constitution of India.

6.4.10 Position with respect to the defence personnel as
finally settled by the judiciary

The law relating to the Defence Forces came to be seen in
a completely new light after the case of *Lt. Col. Prithi pal Singh
Bedi etc.* case,\(^52\) The Supreme Court in this case ruled that Army
is always on the alert for repelling external aggression or
suppressing internal disorder so that peace loving citizens enjoy
a social order based on rule of law; the same cannot be denied to
the protectors of this order.\(^53\) In Ajwani’s case the Full Bench of
the Delhi High Court posed a questioned before itself as probably
this was the only plausible method to find an answer to the
unattended riddle. The court while appreciating the dictum
duranto bene placito (during the pleasure) ruled, “......can we
apply this analogy in respect of the Defence Forces of the
union?” And then found its reply in its own appreciation as “The
answer is no!” Pleasure of the President under Section 18 of the
Army Act\(^54\), Section 15 of the Navy Act\(^55\) and Section 18 of the

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53. AIR 1982 SC1413. Also see Study and Practice of Military Law by
Colonel GK Sharma and Colonel MS Jaswal; Deep And Deep Pbn,
New Delhi, 6th revised edn (2006).
54. **Section- 18, Army Act,1950- Tenure of service under the Act.**
Every person subject to this Act shall hold office during the pleasure
of the president.
55. **Section- 15. Tenure of service of officers and sailors.** (1) Every officer and
sailor shall hold office during the pleasure of the President.
(2) Subject to the provisions of this Act and the regulations made there
under,-
(a) the central Government may dismiss or discharge or retire from
Naval service any officer or sailor” clause (b) of section 15 sub
section (2) further provides, “the chief of Naval staff or any
prescribed officer may dismiss or discharge from the Naval service
any sailor.
Air Force Act\textsuperscript{56} by its languages appears to be “unfettered”.\textsuperscript{57} Unlike Article 310 which is controlled by Article 311, provisions of the Army, Navy and the Air Force Acts wherein the pleasure is enshrined, do not control or regulate the exercise of pleasure of the President with respect to their personnel. However with respect to the civil servants subject to the pleasure of the State, the Supreme Court reconsidered its previous judgments\textsuperscript{58} and in subsequent judgements of Babu Ram Upadhaya and Moti Ram Deka, defined the status of the President and the Governor in relation to the State servants.\textsuperscript{59} The relevant observations of the court were as follows:-

“The President as well as the Governor is the Constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by our provisions under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise by the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the Constitutional sense in the Cabinet System of

\begin{itemize}
\item \textsuperscript{56} Section- 18. Tenure of service under the Act. Every person subject to the Act shall hold office during the pleasure of the president.
\item \textsuperscript{57} 55(1994) DLT 417.
\item \textsuperscript{59} AIR 1961 SC 751.
\end{itemize}
Government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. The decision of any Minister or officer under rules of business made under any of these two Articles 77(3) and 166(3) is the decision of the President or the Governor respectively. These Articles did not provide for any delegation. Therefore, the decision of Minister or officer under the rules of business is the decision of the President or the Governor........................

Whenever the term pleasure is used, it is used in reference to an entity which is capable of exercising it. In other words, a reference is generally made to human being occupying an office of authority. Those who refer to the State as a leviathan too believe it (the State) to be a living entity performing all functions attributable to a living person. In this situation it is but natural to presume that exercise of pleasure by the President or the Governor is done personally, which is otherwise not the case.

Hence it emerges from the foregoing discussion that while passing an order of termination of service, wherever there is adherence to the procedure established by law, unless the order is vitiated by mala fides apparent on record, the order of termination is valid and legally sustainable. In a case of the termination of service of an Industrial labourer at Naval Base, Cochin, where the procedure under Article 311 was followed, the termination was held to be valid. 60

Article 310 speaks of the pleasure simpliciter and thus itself does not prescribe the manner in which the pleasure of the President should be exercised. Position in relation to members of

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60. Union of India v. KS Subramanian AIR 1989 SC 662.
Defence services is that they are placed on an entirely different pedestal as far as the law on tenures and termination is concerned. Provisions made in Article 311 of the Constitution are not applicable to the Defence Forces personnel. This is in a way supporting the argument that the Constitutional protection available to the civil servants under Article 311 of the Constitution is not extended to the Defence personnel. The prohibition against *dismissal* or *removal* i.e., termination of service of a person in uniform by an authority subordinate to that by which he was appointed as stipulated in respect of a member of a civil service in Clause (1) of Article 311 is not available in the case of a person who is a member of a Defence service. Likewise, the protection of enquiry and opportunity of the kind and in the form stipulated in Clause (2) of Article 311 is also not available to Defence personnel.

The High Court of Delhi in the Case of *Major NR Ajwani & Others Vs Union Of India*\(^6\) while considering the validity of the exercise of presidential pleasure in respect of persons belonging to the Indian Army, found it difficult to accept the extreme contention of Sh K.T.S. Tulsi, the Additional Solicitor General that since Article 311 is not applicable to Defence personnel, it follows that pleasure of the President, so far as the Defence personnel are concerned, is not controlled or governed by any restriction at all.

In fact, the view of the Supreme Court in the cases referred to by the High Court clearly indicated that the President when he or his subordinate officer exercises Executive function, which includes the exercise of his pleasure under Article 310, must act in conformity with the provisions of the Constitution. The exercise of this power cannot be arbitrary or illegal.

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A somewhat similar argument was rejected by the Supreme Court in Moti Ram Deka’s case (supra). The Supreme Court referring to the case of *State of Bihar v. Abdul Majid*,62 observed that rule of English law in the Latin Phrase *duranto bene placito* (during the pleasure) has not been adopted fully in Article 310(1).

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 which they said pleasure can be exercised. Any provision made in this behalf shall not be vitiated on the ground that it does not conform to the provisions made either under clause (1) regarding the authority to take action or under Clause (2) regarding the manner in which the action shall be taken in the case of Defence personnel.

After section 19 of the Army Act, 1950 Section 20 of the Act lays down the law authorising dismissal or removal of a person in certain cases by an authority subordinate to that by which he may have been appointed. The procedure and the form of inquiry and trial prescribed for taking such action under the Army Act, rules and regulations is also different. Thus it is obvious that breach or contravention of any of the express provisions made in the Army Act, rules and regulations would vitiate the action taken against a person employed in the Army. In *Lekh Raj Khurana v. Union of India*,63 the appellant, who was a Surveyor in the Army Ordnance depot was found to be holding a

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63. AIR 1971 SC 2111.
post connected with Defence and it was held that such a person could not claim the protection of Article 311(2) of the Constitution, yet, it was further held that the breach of a statutory rule in relation to the conditions of service would entitle the aggrieved Government servant to have recourse to a Court for redressal. In other words, even in the absence of the Constitutional protection\textsuperscript{64} under Article 311, a person in the Army is still entitled to the statutory protection\textsuperscript{65} of the procedural safeguards, including the principles of natural justice, embodied in suitably modified form, for the purposes of fair enquiry and trial of cases by a peculiar kind of procedure in Courts of Inquiry and Courts Martial, specially provided under the Army Act.\textsuperscript{66}

6.4.11 Restrictions on pleasure

A notable point on this subject is that the pleasure embodied in article 310 of the Constitution, though not subject to the power of legislature of the country, is, however, not unlimited in its scope. On its exercise, the Constitution itself imposes several limitations which are:

(a) The pleasure under article 310 cannot be exercised arbitrarily in a discriminatory manner as it is controlled by Articles 14,15 and 16 of the Constitution. Article 15 comes into play whenever services are terminated on the grounds of religious bigotry, racial prejudice, casteism, provincialism or gender. Similarly article 16 imposes equable treatment and bars discrimination.

\textsuperscript{64} 55(1994) DLT 217.
\textsuperscript{65} Ibid.
\textsuperscript{66} Ibid.
(b) Article 320 (3) (c) of the Constitution provides that Union or State public service commission has to be consulted on all disciplinary matters affecting a person serving in a civil capacity under the central or the state Government.

(c) When a person not being a member of a Defence service or an All-India service is appointed to a civil post on contract for a fixed term, the contract may, if the President or the Governor as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment of compensation to him if, before the agreed period, that post is abolished, or that person is required to vacate that post for reasons not connected with misconduct on his part.

(d) An important limitation is imposed on the Doctrine of pleasure by article 311(1). According to this provision of the Constitution, no civil servant is to be dismissed or removed from service by an authority subordinate to the one which had appointed him. Dismissal or removal of a civil servant by an authority subordinate to the appointing authority is invalid.67

The purpose underlying article 311 (1) is to ensure a certain amount of security to a civil servant. It may, however be remembered that this kind of security is not available to the Defence personnel.

(e) Another important limitation imposed upon the pleasure Doctrine is by Article 311(2) of the

Constitution. According to this provision, no civil servant can be dismissed, removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given an opportunity of being heard in respect those charges.

It however needs to be understood that the protection of Article 311 is available only when dismissal, removal or reduction in rank is by way of punishment. It is, therefore, difficult to determine as to when an order of termination of service or reduction in rank amounts to punishment. The two tests to determine when termination is by way of punishment are given in the case of Parshottam Lal Dhingra v. Union of India\(^6\)\(^8\).

6.4.12 Suggestions on the doctrine of pleasure with respect of the defence forces.

In the present scenario, the exercise of the ‘pleasure’ may be considered on the following grounds:-

(i) **Greater transparency.** The crux of any liberty lies in the guarantee of transparency in the actions of those who have the power to infringe this liberty. The Doctrine of pleasure is based on the philosophy that any Government servant of the union or the state could be removed without assigning any reasons particularly so with regard to the Armed Forces. There is ample scope for manipulation in such cases. Hence there is a need to accord greater transparency while processing cases advising action under the pleasure Doctrine.

(ii) **Removal of disparity in respect of the Armed Forces.** A plea is always taken by the Government while invoking the presidential pleasure against an armed Forces person that

\(^{68}\) AIR 1958 SC 36.
he has forfeited his fundamental rights under Article 33 of the Constitution. But that is not so. No person under the Constitution can be deprived of his basic human rights. Keeping this in view, the Armed Forces personnel should also be placed on an even plank as their civil counterparts with regard to the provisions relating to the presidential pleasure. This would call for an amendment in the legislations pertaining to the Armed Forces.

(iii) **No forfeiture of pension.** All terminations under the presidential pleasure should be with pension and not without pension.

(iv) **Pleasure to be subject to the Act of Parliament.** It has been left to the courts to interpret the limitations on the pleasure of the President. It is now high time that India also adopts similar model as that of the Britain and subjects the exercise of the pleasure of the President to the Acts of the Parliament. This shall put to rest all speculation and references to wide range of interpretations on the subject.

### 6.5 Constitutional provisions and the exercise of disciplinary powers

Though a law made under Article 309 cannot restrict the pleasure of president or the Governor, yet a law or a rule can prescribe the procedure by which, and the authority by which the disciplinary powers can be exercised over the civil servants. Whatever that authority then does, it does so by virtue of the express power conferred on it by the law (or the rules), and not under the pleasure of the President or the Governor. The statutory power of the authority to take disciplinary action cannot be equated with the pleasure of the Governor or the President. The disciplinary authority has to act within the
compass of its statutory power, and any infringement of this may result in the order being quashed by the court. In a case where the power to take disciplinary action was vested in the Inspector General of Police subject to the approval of the State Government, dismissal of a sub-inspector of police by the Inspector General without the approval of the State Government would be invalid. 69

It clearly indicates that conferment of disciplinary powers by statute or rules on a designated authority does not in any way over ride the pleasure of the Governor or the President, as the case may be. This 'pleasure' remains intact. The Governor or the President can still dismiss, remove or reduce in rank a Government servant even though such power has also been conferred on any other authority. But so far as this authority is concerned, the validity of its action is to be tested with reference to the law under which it functions, and the Doctrine of pleasure cannot be invoked to justify a wrongful order made by such an authority. The Doctrine of pleasure can be invoked only when an order of termination of service has been made in the name of the Governor or the President.

The Constitution conclusively contemplates a 'Constitutional President' acting with the aid and advice of the Council of Ministers. Accordingly, the pleasure of the President or the Governor is not required to be exercised by either of them personally. 70 The power of appointment, dismissal or removal of civil servants is not a 'personal' but an 'Executive' function of the President or the Governor. 71 Wherever the Constitution requires the satisfaction of the President or the Governor for the

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exercise by him of any power, it is not his personal satisfaction which is required but satisfaction in the Constitutional sense.\textsuperscript{72} Thus an officer authorized under the rules of business can take the desired action in the name of the President or the Governor as the case may be.\textsuperscript{73}

A landmark case which often finds mention on the Doctrine of pleasure is \textit{Union of India v. Tulsi Ram Patel}.\textsuperscript{74} The Supreme Court in this case held,

“... the pleasure of the President or the Governor is not required to be exercised by either of them personally.”

\textbf{6.6 Termination Simpliciter, camouflage and Lifting the Veil}

While the propriety of presidential pleasure in respect of the personnel, whose cases were under consideration with the High Court, was an issue, another judgment of Delhi High Court was brought in focus.\textsuperscript{75} 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

\begin{tabular}{ll}
\textit{72.} & \textit{Ibid.} \\
\textit{73.} & \textit{Ibid.} \\
\textit{74.} & \textit{AIR1985 SC 1416.} \\
\textit{75.} & \textit{LPA No. 116 of 1985.}
\end{tabular}
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."

The above point of view of the Hon’ble Delhi High Court was undoubtedly bold and inspiring. It also showed how concerned was the court about ensuring that the exercise of Executive powers in relation to the armed personnel is not arbitrary. However, not coming to any conclusion, the Division Bench 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?"76

Mr. Arun Jaitley, who appeared on behalf of the Appellants, forwarded an argument which under the Military Law was rather new but required intense judicial consideration. This was perhaps that ideal opportunity through which the court and its pleaders wanted to extend the benefits of judicial contemplation to the Defence Forces. Mr. Jaitley contended as follows:-

“.....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. 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. Besides, 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. Eventually it was submitted that the court should give construction

which advances the Constitutional spirit as the 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 of non-existent and irrelevant material.”

This was a proposition forwarded for the first time with respect to the exercise of the Executive powers in relation to the personnel of the Defence Forces and this was the first ever attempt made by the jurists in India to bring the pleasure of the President in respect of the defence personnel within the purview of the courts. At first, it appeared as an attempt to break away from the tradition. But on a deeper contemplation, it was exhorted by the scholars of military law as a major step by the jurists and the judiciary put together, to extend to the special laws, dealing with the Defence Forces of the Union, the benefits of the Constitutional provisions contained in “Part XIV”. With this new thought visiting the provisions of Military Law, opened a new corridor for introspection.

Shri K. T. S. Tulsi, the then Additional Solicitor General who appeared on behalf of the Government and was representing the Respondents submitted as follows:-

“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 Defence personnel. Article 311 of the Constitution is not specifically applicable to Defence personnel and thus the pleasure of the President in cutting short of tenure of a Defence Personnel is not
controlled or governed by any restriction. It was also contended that the ‘theory of lifting of veil’\textsuperscript{77} is a 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.”

It was actually meant that with respect to the persons subject to the Army Act, 1950, Section 18 of the Act confers an over-riding power of termination on the President who is under the Constitution, the Supreme Commander of the Armed Forces. Since Defence personnel cannot have a right to a fixed tenure in the sense as their civilian counter parts do, Section 18 of the Army Act confers a much wider discretion on the President vis-a-vis the \textit{tenures and terminations} when compared with Article 310 which is controlled by Article 311 and regulated by rules under Article 309 of the Constitution.

6.7 Law on tenures in Defence Forces and scope of judicial review

It is no gain saying that the power of judicial review vested in the courts in India has made them the temples of justice in real sense. Whether it is \textit{MC Mehta v. Union of India} or the \textit{Asiad case}, the \textit{Bhalgalpur Blindings Case}, the \textit{Shah Bano case}, \textit{SR Bommai’s Case} or the \textit{Kesavananda Bharti case}, the country saw its highest judiciary at its best. Import of decisions on issues of tenures and terminations relating to the Defence Forces is far reaching. It is a field less known even to the courts hence the judicial contemplation is beneficial to the scholars and

\textsuperscript{77} Ibid.
the administrators alike. The requirement is to view these judgments dispassionately.

Performance of Executive functions sometimes results into infringement of rights guaranteed to the citizens by the Constitution. The courts by their extraordinary powers accord to the victims, the redressal of the wrongs suffered at the hands of those functionaries. This power of the courts is the power of judicial review. Pleasure of the President is one such power which is though exercised by the President through aid and advice of the Council of Ministers, may still require scrutiny from the courts. There has been variety of views on this aspect. With respect to the Defence Forces, some parties have gone to the extent of suggesting that the same is not available to them since their Fundamental Rights stand modified in accordance with their respective special laws. In the case of Major Ajwani, a similar contention was raised on behalf of the respondents. The Additional solicitor General who was representing the Government view in this case, contended that in view of Article 33 of the Constitution, Defence personnel do not enjoy fundamental rights guaranteed under Articles 14 and 16 unless the Army Act and the Rules expressly or impliedly confer the right of natural justice did not appear to find favour with the court. It was also submitted that the pleasure of the President under Article 310 being unfettered judicial review of an order passed under Article 310 of the Constitution read with Section 18 of the Army Act was not permissible. This approach was right in the light of the circumstances in which the provisions of military law were enacted. But law is believed to evolve with time. The courts did not want the Defence Forces to be deprived of the benefits of this evolution of thought. On three grounds an administrative action is subjected to judicial review; (i) illegality,
(ii) irrationality and (iii) procedural impropriety. The scope has further widened with the passage of time.

6.8 Doctrine of Continuous Officiation

The term ‘tenure’, has fixity of ‘time’ or ‘term’. The derivatives of ‘tenure’ such as terminable, terminal and terminally variously connote something, ‘that may be terminated’, something, ‘coming to an end after some time’ or an activity ‘in the last stage’, or of an event, ‘an extremity’. With its origin in the Latin word terminalis, the word term has been mentioned in the Dictionaries as a ‘noun’ which means, ‘an expression that forms part of a fraction or proportion or of a series or sequence’. As a verb the word ‘term’ signifies an overt activity for instance ‘I term it as simple or difficult’ etc. The other derivatives of term such as terminable, terminal etc., are similar as explained earlier. This helps us to understand the term ‘termination’, which in fact means cessation of service.

The tenure by virtue of its continuous nature gets affected by certain other events or incidents of service. As termination of service is nothing but an incidence of service though rarely occurring. Officiation in a specific appointment is another incidence of service which affects the tenure aspect intimately. This part of the service jurisprudence is related to the ‘promotion’ of a State employee which too draws its legal authority from the provisions of the part III of the Constitution.

82. Ibid.
83. Ibid.
principally from Article 16 thereof which guarantees an equality of opportunity in matters of employment. The courts have developed a new Doctrine therefrom which came to be known as the **Doctrine of Continuous Officiation**. In the year 1967, a Constitution Bench of the Supreme Court of India invented this principle\(^\text{84}\) which found itself repeated in a later case of *Narendra v. Union of India*\(^\text{85}\) followed in a host of other judgments by the Apex Court.\(^\text{86}\) In *Patwardhan v. State of Maharashtra*, it was held that ‘continuous officiation’ in a non fortuitous vacancy ought to receive due recognition. The words ‘tenure’ and term thus became responsible for the determination of the functions and responsibilities of the holders of an office and a specific mode of their discharge (official functions brought in by virtue of the continuous officiation in service).\(^\text{87}\) The other terms which are generally read alongside ‘tenure’ are ‘deemed’, ‘same’ and ‘similar’. Similarly, the other words and expressions which invariably appear along with the words and expressions ‘Continuous Officiation’ are ‘ad-hoc’ and ‘fortuitous’. The tenure of office under the Government thus presupposes a continuous, elongated officiation for a specified term and the term is determined by the rules on recruitment, the terms of engagement and the necessities of the State organisation which are sometimes affected by the vagaries of time but not before creating a vested right in the favour of the holder of office against his termination. The vested right so created is specific and gender neutral. Chanda Kochhar has termed this state of

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\(^{84}\) Nim v. Union of India AIR 1967 SC 1301.

\(^{85}\) (1986)2 SCC 157.


affairs as the “gender neutral meritocracy.”\(^{88}\) Expanding the scope of the term continuous officiation, which is seen as an essential incidence of tenure of service, this dictum is also applied to the transfers in almost an equal measure.\(^{89}\) This rule is in fact applicable to appointees and promotees\(^ {90}\) alike in temporary and permanent posts.\(^ {91}\)

The Defence Forces are governed by special laws and the provisions of tenures, termination and the processual justice in respect of Officers, Junior Commissioned Officers, the Non Commissioned Officers, the Jawans, the Seamen and the Airmen are uniform only in a particular rank. Rule 16A of the Army Rules, 1954 lays down the ages of retirement for various ranks in the Army which are different for each rank.\(^ {92}\) This Rule was added in its amended form by statutory Rules and orders 17 (E) dated 6\(^{th}\) December, 1993 replacing the earlier provision which had been incorporated by SRO 188, dated 4\(^{th}\) June 1979.\(^ {93}\) The Rule lays down the respective ages of retirement in various ranks in the Army in normal course. Similarly Section 190 of Air Force Act and Section 184 of Navy Act empower the central Government to lay down the provisions with regard to tenures of services for their respective officers and men. The orders with regard to the tenure of service in respect of persons other than officers are given in the Defence service Regulations. Authorities empowered to authorize discharge under the Army Act are provided in Rule 13 of the Army Rules which will be dealt with separately in the subsequent chapter. The Rule with regard to

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88. Chanda Kochhar, MD & CEO ICICI Bank, in her interview to the CNN on 17 Aug 2012.
89. Madhavan v. Union of India, AIR1987SC 2291.
93. Ibid.
the continuous officiation or what is referred to as the subjection to the Act is contained in Section 2 of the Army Act. Sub section (2) of the section provides, “(2) Every person subject to this Act under clauses (a) to (g), sub-section (1) shall remain so subject until duly retired, discharged, released, removed, dismissed or cashiered from the service.\(^94\)

The principle of continuous officiation has, however, found a discreet acceptance in the Defence Forces owing to their peculiar nature of service which is essentially command and tenure oriented. There is thus no denying the fact that this Doctrine has been judicially invented to widen the scope of right to continue is an appointment/post, once the same has been duly conferred and the recruitment has been done in accordance with the Rules framed under the authority of Article 309 of the

\(^94\). Section 2 of the Act deals with the subjection of persons to the Act and reads, “2. Persons subject to this Act.—(1) The following persons shall be subject to this Act wherever they may be, namely:—
(a) officers, junior commissioned officers and warrant officers of the regular Army;
(b) persons enrolled under this Act;
(c) persons belonging to the Indian Reserve Forces;
d) persons belonging to the Indian Supplementary Reserve Forces when called out for service or when carrying out the annual test;
e) officers of the Territorial Army, when doing duty as such officers and enrolled persons of the said Army when called out or embodied or attached to any regular Forces, subject to such adaptations and modifications as may be made in the application of this Act to such persons under sub-section (1) of section 9 of the Territorial Army Act, 1948 (LVI of 1948);
f) Persons holding commissions in the Army in India Reserve of Officers, when ordered on any duty or service for which they are liable as members of such reserve Forces;
g) officers appointed to the Indian Regular Reserve of Officers, when ordered on any duty or service for which they are liable as members of such Reserve Forces;
h) (Omitted).
i) persons not otherwise subject to military law, who, on active service, in camp, on the march or at any frontier post specified by the Central Government by notification in this behalf, are employed by, or are in the service of, or are followers of, or accompany any portion of, the regular Army. (2) Every person subject to this Act under clauses (a) to (g), sub-section (1) shall remain so subject until duly retired, discharged, released, removed, dismissed or cashiered from the service.”
Constitution. No administrative instructions can override, enlarge or reduce the scope of a rule duly framed under Article 309 though administrative instruction may be regarded as a guide for the exercise of jurisdiction.\(^\text{95}\)

Terms of statutory rules may provide for conferment of a title to an office and also for the mode of protecting it. If under such rules, a person acquires title to an office, whatever mode of termination is prescribed and whatever phraseology is used to describe it, the termination is neither more nor less than a dismissal or removal from service.\(^\text{96}\)

The right against termination is found enshrined in Article 16 of the Constitution which laid down that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state.\(^\text{97}\)


\(^{96}\) Moti Ram Deka v. General Manager North East Frontier Railways AIR 1964 SC 600.


(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this Article shall prevent Parliament from making any law prescribing, in regard to a classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion of any class or classes of posts in the services under the State of Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(5) Nothing in this Article shall affect the operation of any law in which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.”
real import of this Article with respect to the Defence Force is seen in the light of some historical decisions on this aspect. In *Prithipal Singh Bedi’s Case* the Hon’ble Supreme Court examined the aspect of availability/applicability of Fundamental Rights to the Defence personnel. The Court held,

“Parliament has the power to restrict or abrogate any of the rights conferred by Part III in their application to members of the Armed Force so as to ensure proper discharge of duties and maintenance of discipline amongst them.”

Interestingly, the court in *Prabhat Kiron’s Case* held that a discrimination which involves the invocation of Article 14 is not necessarily covered by Article 16. In other words, the discriminations allowed by Article 14 are sacred and to be honoured at all costs as those are not considered as violative of the part III of the Constitution. In another case, the court held that Article 16 cannot be invoked against a discrimination made by Constitutional provisions. The answer whether delay affects it, is also in the negative.

### 6.9 The Doctrine of the ‘Principles of Natural Justice’

Adherence to the principles of ‘Natural Justice’ is fundamental for all administrative adjudications. From the perusal of various judgements arising out of orders of termination by administrative authorities in the Defence Forces, the researcher finds that the two Doctrines which are generally found to influence administrative decisions are, the Doctrine of

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“Audi Alteram Partem” i.e., no one ought to be condemned unheard and the Doctrine of "Nemo debet bis vexari" i.e., a man must not be put twice in peril for the same offence. The principles of natural justice consist primarily of two main rules, namely, nemo judex in cause sua (no man shall be a judge in his own cause) and audi alteram partem (hear the other side). The corollary deduced from the above two rules and particularly the audi alteram partem rule was qui aliquid statuerit parte inaudita altera, adquum licet dixerit, haud aequum fecerit (he who shall decide anything without the other side having been heard, although he may have said what is right will not have done what is right" or as is now expressed "justice should not only be done but should manifestly be seen to be done". These two rules and their corollary are neither new nor were they the discovery of English judges but were recognized in many civilizations and over many centuries.

The principles of natural justice apply both to quasi judicial as well as administrative inquiries and adjudications entailing civil consequences.

It is well established both in England and in India that the principles of natural justice yield to and change with the exigencies of different situations which are not alike. They are neither cast in a rigid mould nor can they be put in a legal strait-jacket. They are not immutable but flexible and can be adapted, modified or excluded by statute and statutory rules as also by the Constitution of the tribunal which has to decide a


particular matter and the rules by which such tribunal is governed

Seeing it in the light of the provisions of our own Constitution, Article 14 applies not only to discriminatory class legislation but also to arbitrary or discriminatory State action. Violation of a rule of natural justice results in arbitrariness which is the same as discrimination, and where discrimination is the result of a State action, it is a violation of Article 14. Therefore, a violation of a principle of natural justice by a State action is a violation of Article 14 for which the courts are empowered to issue appropriate writs and rectify the anomalies so created.

Courts have in certain situations allowed the rule of principles of Natural Justice to be excluded. If legislation and the necessities of a situation can exclude the principles of natural justice including the audi alteram partem rule, a fortiori so can a provision of the Constitution such as the second proviso to Article 311(2). The audi alteram partem rule having been excluded by a Constitutional provision, namely, the second proviso to Article 311(2), there is no scope for reintroducing it by a side-door to provide once again the same inquiry which the Constitutional provision has expressly prohibited.

Consequent to the observations of the Supreme court, in cases like PPS Bedi, SN Mukherjea, Major GS Sodhi, etc.

104 Ibid.
105 Tulsi Ram Patel's case, AIR 1985 SC 1461[238 B].
106 Ibid., [238 D].
107 AIR 1982 SC 1413.
109 Major GS Sodhi v. Union of India & Ors, AIR 1991 SC 1617.
Captain Harish Uppal,110 and host of other cases, the Parliament passed the Armed Forces Tribunal Act, 2007 and established an Appellate Tribunal called the Armed Forces Tribunal in the month of August 2010 with its Principal Bench at New Delhi and its first Chairman Hon’ble Mr. Justice AK Mathur, a retired Judge of the Supreme court. This was an important step in the field of administration of justice for the Defence Forces by their own tribunals. By creating an apex tribunal, the Supreme Court brought the national judicial system a step closer towards realization of the road map which the framers of Constitution had charted to ensure justice to all - social, political and economic. The most appropriate observations of the Hon’ble courts are found in Prithi Pal singh’s, case, which are as follows:-

“Courts-martial are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of "command influence". In essence, these tribunals are simply Executive tribunals whose personnel are in the Executive chain of command. Frequently, the members of the court-martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings-in short, for their future progress in the service. Conceding to military personnel that high degree of honesty and sense justice which nearly all of them undoubtedly have, the members of a court-martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges.”111

110 Captain Harish Uppal v. Union of India & ors, AIR 1973 SC 258.
111 AIR 1982 SC 1413.
The court highlighted the denial of Appeal against orders of Army Tribunals\textsuperscript{112} under the statutes relating to the Defence Forces, as a major lacuna in the Defence judicial setup which required to be rectified. With this in the background the court observed as follows:-

"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 proceeding 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 uncivilised 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.\textsuperscript{113}

\textsuperscript{112} Army, with its total commitment to national independence against foreign invasion must equally be assured the prized liberty of individual member against unjust encroachment ... the court should strike a just balance between military discipline and individual personal liberty. And door must not be bolted against principles of Natural justice.

\textsuperscript{113} AIR 1982 SC 1413.
6.10 Appeal from Caesar to Caesar’s wife

Denial of an appeal is considered as denial of the benefits of principles of Natural Justice. The decisions of the courts martial which are reviewable only by superior military, Naval or the Air Force authorities as the case may be under their respective statutory laws, in the opinion of the court, did not offer much in the form of relief when compared to the country’s judiciary. No appeal in the Higher Courts is in fact admissible except for a writ under Article 226 in the High Court or Article 32 in the Supreme Court. The scope of judicial review being so limited, it was generally considered as an archaic system of justice. Eventually, giving in to the constant prodding from the Apex Court, the Armed Forces Tribunal has now been established on the lines of the Central Administrative tribunal as an Appellate body.

The system of Appeal under the Defence Forces statutes was considered as in-house and ineffective. The Supreme Court used an expression for this system of appeal as an appeal from ‘Caesar to the Caesar’s wife’ i.e., the appeal was considered as the worst alternative as no relief was anticipated in a closed door system. In other words, the administrative authority which is always a higher Military, Naval or Air Force commander and also served simultaneously as the appellate authority for administrative and quasi-judicial proceedings and decisions, arrived thereat, would in all probability view the act of the accused, these proceedings as well the decisions brought in appeal before him, more from the point of view of a commander than a judicial authority, reposed in a judicial body like a higher
“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 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. Our Army Act was more or less modeled on the U.K. Act. 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”.

114. AIR 1982 SC 1413.
6.11 Courts as the final arbiter

The Supreme Court in the SR Bommai case observed, “This Court is the final arbiter in interpreting the Constitution, declares what the law is. Higher judiciary has been assigned a delicate task to determine what powers the Constitution has conferred on each branch of the Government and whether the actions of that branch transgress such limitations, it is the duty and responsibility of this Court/High Court to lay down the law. It is the Constitutional duty to uphold the Constitutional values and to enforce the Constitutional limitations as the ultimate interpreter of the Constitution. The judicial review, therefore, extends to examine the Constitutionality of the proclamation issued by the President under Article 356. It is a delicate task, though loaded with political over-tones to be exercised with circumspection and great care. In deciding finally the validity of the proclamation, there cannot be any hard and fast rule or fixed set of rules or principles as to when the President’s satisfaction is justiciable and valid.”

In the same case the court observed that even the Proclamation under Article 356(1) made by the President is not immune from judicial review. The Supreme Court or the High Courts can strike down the proclamation if it is found to be mala fide or based on wholly irrelevant or extraneous grounds. Similarly, the pleasure of the president which was erstwhile inaccessible till the courts started examining it under their writ jurisdiction, is now subject to judicial review. The relevant observations of the court are as follows:-

“….. 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."

Yet in another case *Rajinder Singh v. Union Of India And Ors,*116 wherein the writ petition was filed by the petitioner for declaration of the order of termination of petitioner from service without issuing show cause as *void -ab -initio*, reinstatement of the petitioner with consequential benefits and direction of payment of pro-rata pensionary benefits to the petitioner. It was contended on behalf of the petitioner that insofar as the grant of pensionary benefit is concerned, the petitioner cannot be non-suited on the grounds of delay and cannot be deprived of these pensionary benefits. Reliance was placed on the judgement in the case of *Hazara Singh v. Chief of Air Staff* 117 to contend that if the power is exercised under Section 18 of the Army act by the President of India, then exercise of such power cannot deny pensionary benefits to the petitioner. The order read as under:

"The President, in exercise of the powers conferred by Section 18 of the Army Act, 1950 and all other enabling provisions in this behalf, is pleased to order that the services of IC-3066L Maj. Rajinder Singh of 252 (I) AD Missile But shall be terminated without terminal benefits with effect from the date on which he is relieved of his duties."

117. (Delhi) 1982 (1) SLR 521.
The impugned order forfeiting pension was considered to be without authority of law and was eventually quashed. Similar position was held in the case of Hazara Singh (Supra). In view thereof the latter portion of the order denying the termination benefits to the petitioner could not be sustained.

**Appraisal**

For all the good reasons, Britain has been termed as the mother of all democracies. The superiority of democratically elected Government over other forms of Governments all over the world is undisputed. Autocracies, dictatorships, Military Rulers, all had to eventually bow before the invincible will of the people. Abraham Lincoln in his Gettysburg address had rightly announced it to the world that Democracy is the Government of the people, for the people, by the people. But the will of the people in the democracies is expressed by their elected representatives who are required to conform to the laws made in the country for its governance. In a Parliamentary Democracy like India, the Executive power under the Constitution is exercised by the President with the aid and advice of the Council of Ministers. The repository of the supreme power is thus the public who has given unto themselves the Constitution. As has been in Britain that every civil servant in the Government holds office during the pleasure of the Crown, in India, every person, a civil or a Defence personnel holds office during the pleasure of the President. The concept of dealing with this aspect of the power of the President of India under the Constitution is termed as the ‘Doctrine of Presidential Pleasure’.

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118. (Delhi) 1982 (1) SLR 521
119. 96 (2002) DLT 432
In the foregoing study we examined the various dimensions of the Doctrine. Its applicability to the Armed Forces of the union, the effect of exercise of Presidential Pleasure on the Forces and also whether the pleasure of the President under the Indian Constitution is unqualified and unfettered or is controlled and governed by any other provisions of the Constitution or any other law of the land. While deliberating on this facet it has very clearly emerged that though with regard to the civil servants, the pleasure of the President is effectively controlled by Article 311, no such control is available either in the Constitution or in the Acts relating to the Defence Forces on this issue. Consequently, the Pleasure of the President with respect to the Defence Forces is unfettered and unqualified. The only safeguard if any is available by way of power of judicial review by the Supreme Court and the High Courts of India in their writ jurisdiction. Which too, as has been observed during the study, has been vehemently contested by the representatives of the Government? Notwithstanding the foregoing, Articles 310 itself and Article 311 of the Constitution are indeed very effective safeguards against any arbitrary exercise of the pleasure of the President in the exercise of his Executive functions. The most effective limitation imposed on the Doctrine of pleasure is by Article 311 of the Constitution. According to this provision, no civil servant can be dismissed, removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and giving him a reasonable opportunity of being heard in respect of those charges preferred against him as basis for termination of service or any other proposed action.

As is seen that Article 311 exercises control over article 310 and thus acts as a potent safeguard against any arbitrary
action of the Executive, no such control is exercised by any of the sections of the Army, Navy or Air force Acts on the provisions relating to the Pleasure of the President. It has also been observed that the term ‘civil servant’ does not include a member of the Defence force, or even an employee in Defence service. Hence, the rules made under Article 309 are not applicable to the Defence personnel as they remain subject to the President’s pleasure (Union of India v. SB Mishra, AIR 1996 SC 613).

The protection available to the civil servants under Article 311 is not extended to the persons belonging to the Defence Forces (Inder sain v Union of India, AIR 1969 Del 220).

The important provisions of Military Law had eluded interpretation so far since it was widely believed that the scope of judicial review in respect of the matters in relation to the Defence personnel was very limited. This point was repeatedly emphasized by the courts themselves in various judgements. Notwithstanding the foregoing, any and all fields of study have to be sooner or later visited by the new thought. This would, however, not obligate on the Parliament to provide everything in its minutest detail. The courts would do the rest. This became evident from the observations of the Supreme court in Bedi’s case as it held that 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. It was also
observed that 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. In this manner the provisions of Article 33 have been interpreted in favour of the Army Act. This analogy is applicable mutatis mutandis to the other two services as well i.e., the Navy and the Air Force.

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