

Introduction

The studies have shown that the 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, viz. the Mahabharat and the Arthashastra, the other accounts about the ancient history are skeletal. The primary reason for the lack of chronological records in the service administration emerges to be the innumerable invasions into 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. The records of the 'vedic 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.¹ The historical depth of the constitutional provisions is thus evident from their legal profoundness.

Constitutional Provisions

The elaborate provisions in part XIV of the Constitution indicate the great importance that the constitutional framers attached to the services. Titled as "Services under the Union and the States", the chapter lays down the guidelines for framing rules with regard to the conditions and the administration of the services.² The defence forces have, however, been excluded from Part XIV and subjected to special laws. Hence the rules of administration for the defence personnel are understood in the manner they appear in their respective legislations.

Before Independence, the rules of administrative and quasi judicial adjudication in the defence forces were seen in conformity to the Articles of War. Perusal of the Manual of Military Law, 1922 reveals that the foundation for the law of the defence forces lay in the East India Company Mutiny Act, 1754. Under the statutory sanction of enactments of 1754 and 1813, a military code was framed by each presidency. The Act of 1833 for the first time provided a common code for the native armies of India. This was later repealed by the Acts of 1845, 1861 and 1869. The amalgamation of the three native armies in 1895 necessitated amendments in the Indian Articles of War particularly with regard to the conditions of service. Hence a bill was drafted consolidating the existing law and passed into an Act as the "Indian Army Act, 1911."³

Post-Independence, the Act of 1911 was found to be unduly harsh and inadequate as it was prepared in a colonial setting though many of its provisions were borrowed from the statutes applicable to the British Forces. With the changed environment, the pleasure powers of the Governor General also were to be now replaced by that of the President. Hence with a view 'to consolidate and amend the law relating to the government of the regular Army', the Army Act, 1950 came into force for the new Indian Republic.⁴ Correspondingly, the Air Force Act, 1950 and later the Navy Act, 1957 were also enacted.⁵

Customs of Service

The customs of service intertwined with the Indian ethnicity had been a factor in the law of service in the defence forces. Due to the fascination of the British with military ethnography the defence service law nestled in tradition and then transited to the Statute. The Statutory law of services remained fixed to the English and the American law and procedures as the concept of the due process clause of the US discreetly found its way into the Indian administrative jurisprudence which had otherwise been so far dominated by the principles of common law. The evolutionary trends are noticed in the fields of justiciability of the Doctrine of Pleasure, recording of reasons, interpretation of restrictions on fundamental rights, scope of judicial review in trial proceedings under the defence services legislations, conditions of service and the scope of service privileges vis-à-vis the responsibilities of command. Though thousands of nautical miles apart, the underlying thought between India, the UK, and the US on this aspect was interestingly similar. The comparative study of the three systems reveals more similarities than differences.

Defence Forces - the Constitutional Status : Self Regulating Safeguards

The main factor which distinguishes the service in the defence forces from that of the civil organisations albeit the government, and makes a case for special law are their terms and conditions which encompass the rules of recruitment and commission. The most characteristic feature of these provisions governing the services is thus the provisions themselves. For instance, appearance of the words, "subject to the provisions of this Act and the rules and regulations made thereunder" suggest the manner in which the power under the provision is regulated by the provision itself. The hallmark of these provisions is thus the self-regulating safeguards contained in the provisions themselves. This in fact leaves no room for arbitrary exercise of power at any level. Coupled with this is the ever vigilant judiciary of India. The exercise of power under the law of services is in fact tested on the grounds of 'legality', 'rationality' and procedural 'propriety'. This is termed as the golden rule of the administrative law.

Impact of Constitutional Provisions on the Defence Forces

Employment in the defence forces is a public service. The personnel of the defence forces in India like their civilian counterparts enjoy the privilege of the continuous and uninterrupted service in the colours, governed not only by the legislations but also by customs and conventions of the services. For their overall allegiance to the Union, Article 52 of the Constitution of India declares, "There shall be a President of India". Article 53 vests the executive power of the Union and the resultant supreme command of the three forces in the President who thus holds a special status vis-à-vis their personnel, in as much as, the President enjoys the absolute power of appointment and removal in respect of all the three services which he exercises with the aid and advice of the Council of Ministers.

The Principal Doctrines Relating to the Services

The service in the defence forces is much influenced by the doctrines propounded by the Supreme Court. The constitutional doctrines relevant to the defence forces are three viz., the doctrine of Presidential pleasure, the doctrine of continuous officiation and the doctrine of principles of natural justice.

The Doctrine of Presidential Pleasure. Chapter XIV of the Constitution is the repository of this doctrine. Studied under the adage, duranto bene placito (during the pleasure).⁶ This encompasses all government servants as well as the personnel of the defence forces of the Union and provides that every person subject to the Act holds office during the pleasure of the President. Study of the role of the Chief Executive vis-à-vis his servants, reveals a relationship of master and servant in which the major decisive factor is 'conduct'. 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.⁷ The peculiarity of pleasure in respect of the Defence personnel is in its exercise as it remains beyond any subjection unlike the pleasure of the Crown in England which is subject to the Parliamentary control.

Doctrine of Continuous Officiation. The expression 'services' is generally associated with the defence forces. Though rarely occurring, 'officiation' in a specific appointment is an incidence of service which affects the tenure aspect of service intimately. This part of the service jurisprudence draws its legal authority from the provisions of the Part III of the Constitution principally from Article 16 thereof which guarantees an equality of opportunity in matters of employment. The courts developed this new doctrine therefrom known as the Doctrine of Continuous Officiation in a case in the year 1967.⁸ The words and expressions 'ad-hoc' and 'fortuitous' appear alongside. The service under the government thus presupposes a continuous, elongated officiation for a specified term determined by the rules on recruitment creating a vested right in the favour of the holder of office which is specific and gender neutral. Chanda Kochhar termed this state of affairs as the "gender neutral meritocracy", applicable to appointees and promotes alike in temporary and permanent posts.⁹

The Doctrine of the 'Principles of Natural Justice'. Adherence to the principles of 'Natural Justice' is fundamental to all adjudications. This is another Constitutional guarantee against arbitrary exercise of power. Two doctrines are generally found to influence administrative decisions viz., the doctrine of "Audi Alteram Partem" i.e., no one ought to be condemned unheard¹⁰ and the doctrine of "Nemo debet bis vexari" i.e., a man must not be put twice in peril for the same offence.¹¹ The corollary deduced from the above two rules and particularly the audi alteram partem rule was that "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 recognised in many civilizations over many centuries.

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. The Supreme Court in a case 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 Forces so as to ensure proper discharge of duties and maintenance of discipline amongst them."¹²

The Right to Equality under Article 14

Article 14 of the Constitution 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 as the Final Arbiter

For the evolution of the defence services jurisprudence and the reformatory trend in service administration, the juridical litany owes it to the Supreme Court of India which held that, "This Court is the final arbiter in interpreting the Constitution, declares what the law is."¹³ No aspect of the defence justice has been left untouched by the Apex Court. Whether it has been the necessity to record reasons¹⁴ or it was the justiciability of the Presidential pleasure¹⁵ or the system of appeal in the armed forces.¹⁶ The court gave to the jurists some interesting expressions like appeal from 'Caesar to the Caesar's wife'¹⁷ and at the same time upheld the military pride when it said, "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."¹⁸

Procedural Justice and the Responsibility of Command

It is a fact that a soldier spends major part of his life away from the public glare, many times in highly isolated locations. As a result, he is not exposed to the uncertainties of the outside world in the same measure as his civilian counterpart. When seen from the high point of equitability, it imposes an onerous duty on the commanders to ensure that while dispensing justice, the best interest of the soldier is kept in mind. Though the Statutory provisions have been designed to take care of this aspect, yet his lack of knowledge of it should not cause any prejudice during the course of justice.

Maintenance of Discipline is the Prime Concern of the Forces. Discipline has always been of prime importance to the defence forces. This is evident from the ethos which runs through them. For instance, the Chetwode oath or the Simonidean compositions are integral to the service in whatever state. Adherence to law is viewed as natural and its violation an exception. Compliance of law and procedure is generally seen as a natural concomitant of defence administration. Its violation too is rare, incidental and usually inadvertent.

Conclusion

Justice as Per the Rule of Law. Justice is the be all and end all of all systems. Due process which literally means a constitutional guarantee of fair procedure is found integral to the defence system of justice and administration. The perusal of the legal provisions generally covering these aspects reveal the following:-

- (a) Provision for hearing of charge, recording of evidence, cross examination, defence and opportunity for rebuttal etc;
- (b) Provision for the show cause notice, including an adequate formulation of the subject and issues involved in the case;
- (c) Application of mind by the competent military, naval or the air force authority to the facts of each case separately before the issue of show cause;
- (d) Provisions for opportunity to submit reply in defence to the show cause;
- (e) Application of mind by the army, naval or the air force authority to the reply of the delinquent; and finally,
- (f) The decision based only upon the evidence tested on the anvil of cross-examination.

As the above are essential for justice as per the rule of law, the principles of natural justice, due process and fair play are a part and parcel of system of judicial administration in the defence forces and thus in tune with the constitution.

Author's Note : The views expressed and suggestions made in the article are that of the author in his personal capacity and do not have any official endorsement.

End Notes

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17. Ibid.
18. Ibid.

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