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# **“PROTECTING THE PROTECTORS”: AN ANALYSIS OF FUNDAMENTAL RIGHTS VIS-À-VIS THE INDIAN ARMED FORCES UNDER ARTICLE 33 OF THE CONSTITUTION OF INDIA**

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## **Abstract:**

*“A nation's strength is rooted in the welfare of its soldiers,” is an often-heard adage. Being one of the most decorated and highly regarded professions, the dedication and services rendered by the military personnel is an art in itself. However, there has been much debate as to whether these citizens who perform duties that are fundamental for the safety and security of our country, are in fact given the benefit of fundamental rights which are the hallmark of our great nation. “Every rule has an exception,” is a common paradox which holds true as far as Article 33 of the Indian Constitution is concerned, constituting an exception to Fundamental Rights. The Parliament can curtail the Fundamental rights of the military personnels and certain categories of public servants. Given the rigorous nature of the armed forces, an imbalance often arises between the need to maintain discipline and order and the status of persons in the armed forces as citizens of the country who are equally entitled to enjoy rights at par with their countrymen.*

*The researcher herein, attempts to analyse the legislative intent and judicial interpretations in order to judge the rationale behind the present position of fundamental rights through the lens of Article 33. Issues such as drawing the line between fundamental rights and soldiership, whether these categories of individuals form a class apart from the rest of the citizens, extent of restrictions imposed by the Parliament, immunity of Acts from review of unconstitutionality and constitutional remedies, scope and effectiveness of available remedies are aspects that the researcher delves into in order to explore the contours of Article 33 with the objective of rendering workable suggestions to fill the major legal gaps that exist as on this day.*

**Keywords:** Article 33, Constitution of India, Fundamental Rights, Armed forces in India

The most potent instrument for the safety and security of the state against all forms of external aggressions would be the armed forces. Military discipline is of utmost importance when it comes to undertaking missions in a very organised fashion. It is human to err, however in the case of armed forces errors are met with stringent measures and speedy disposals. For this purpose, rights of the armed forces personnel are curtailed. However, the personnel are also the state citizen and thus enjoy all the rights that the citizenry enjoys.

In order to ensure that the members of the armed forces, the forces tasked with maintaining public order, the people working in any bureau or other organization established by the state for intelligence or counterintelligence purposes, or the individuals employed by or connected to the telecommunications networks established for the objectives of any force, bureau, or organization mentioned in Article 33 clauses (a), (b), and (c) are able to carry out their duties properly and maintain discipline among themselves, Article 33<sup>1</sup> gives the Parliament the authority to decide by law the extent to which any of the Fundamental Rights shall be restricted or revoked. Parliamentary legislation determines whether Article 33 is applicable; it does not, by itself, abolish any rights.<sup>2</sup> This provision may, therefore, be considered as an exception to the fundamental rights. A legislation enacted by the Parliament in the exercise of this power is immune to the challenge of unconstitutionality. The power is conferred to the Parliament and not on the state legislatures. The maintenance of law and order being a state subject the state law cannot abrogate a fundamental right of the members of such forces charged with the maintenance of public order.<sup>3</sup> The Parliament is entitled to lay down to what extent the fundamental rights can be modified by the state legislation applicable to the force charged with the maintenance of the public order. Article 33 applies both to the armed forces, that is, army, navy, and air force and also to forces charged with the maintenance of the public order such as the police. The term "members of armed forces" in the aforesaid article covers such civilian workers of the armed forces like barbers, carpenters, mechanics etc. Although these persons are non-combatants, nevertheless they are integral to the armed forces and therefore their fundamental rights can also be curtailed under Article 33.<sup>4</sup>

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<sup>1</sup>Article 33- Power of Parliament to modify the rights conferred by this Part in their application to Forces, etc. Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to, (a) the members of the Armed Forces; or (b) the members of the Forces charged with the maintenance of public order; or (c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or (d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

<sup>2</sup> M.P. Jain, Indian Constitutional Law, 8<sup>th</sup> Edn., Lexis Nexis

<sup>3</sup> Dalbir Singh v. State of Punjab, AIR 1962 SC 1106

<sup>4</sup> OKA Nair v. UOI, AIR 1976 SC 1179

In light of the aforesaid provision, a constitutional law student is often posed with the question as to whether the Constitution draftsmen kept the working of the armed forces above the pedestal of fundamental rights. In order to address the same, it becomes essential for one to begin at the constitutional assembly debates that took place during the enactment of present-day Article 33.

The key actors and contributors can be summarised as follows, Dr. B.R. Ambedkar in his opinion, as chairman of the Drafting Committee, was arguing in the Defence of Article 33 on the premise that, that it is necessarily needed to maintain discipline in the armed forces. Military service requires a degree of control and obedience which the full implementation of fundamental rights may weaken. They thus balance rights and the needs of the state, K. T. Shah was opposed to this view and apprehended that it might bring undue restraint in the rights of individuals. He was afraid that such a provision was likely to be misused and, therefore, modification in rights needed limitation and protection so as not to be misused arbitrarily. H.V. Kamath on the other hand supported the application of Article 33. He justified this on the grounds that, security men were different and could not be given equal status to that of civilians. He agreed that such restraints were required for smooth functioning. Sardar Vallabhbhai Patel stated that, there was enormous value in the integrity of a disciplined force, but he went on to say at the same time that such provisions must not scuttle the very basic rights of the individual. The views were reflective with a deep balance towards authority vis-à-vis individual freedoms.

While other members proposed examples from other countries showing similar provisions in military forces around the world. They said India, too, must ensure the armed forces effective enough but within the protective garb of democratic values.<sup>5</sup>

While the constitutional fathers had voiced their opinion on Article 33, the judiciary was time and again caught up with the dispute around same. Unfortunately, however, it is with respect that it is opined that the courts failed to take appreciate the opportunity before them to set out the scope of Article 33. The Hon'ble Supreme Court ruled in *Ram Swarup v. Union of India*,<sup>6</sup> that "it could be construed that the parliament had exercised its power under Article 33, even if a fundamental right had been affected by any rule under the Army Act, 1950." According to

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<sup>5</sup>Constitutional Assembly Debates-[https://eparlib.nic.in/bitstream/123456789/762996/1/cad\\_04-11-1948.pdf](https://eparlib.nic.in/bitstream/123456789/762996/1/cad_04-11-1948.pdf)-Parliament Digital Library

<sup>6</sup> 1965 SC 247: (1964) 5 SCR 931



Article 33, basic rights must be limited "so as to ensure proper discharge of duties and maintenance of discipline." This makes such an approach incorrect. According to Article 33, basic rights must be only be limited "so as to ensure proper discharge of duties and maintenance of discipline." This makes this strategy incorrect. This judicial failure explained such cases that, in breach of Article 33, violated fundamental rights.

The Hon'ble Supreme Court ruled in *R.V. Vishwan v. Union of India*,<sup>7</sup> that the Parliament had "unrestricted power permitting the violation of the constitutional limitations," which is another example of a constitutional misconception involving Article 33. In the overall context, Article 33 is significant in its own right. Although the parliament has the authority to control national security and order, there must be a limit beyond which members of the armed forces and other government workers (police, IB, RAW, etc.) cannot have their fundamental rights restricted. initially the judiciary failed to adhere to this. The ban placed on a member of a police force from becoming a member of any trade union or labour union has been upheld by the supreme court.<sup>8</sup>

In *S.P.N. Sharma v. Union of India*<sup>9</sup>, an Armed Forces member was prohibited from engaging a lawyer of his preference, contravening Article 22 of the Indian Constitution, while the defence was confined to the service authorities on the pretext of Article 33. It was in no way a matter related to the competency of the accused person to perform his duties satisfactorily and maintain the discipline as contemplated under Article 33. In such a scenario, if the courts had relied on the affidavit submitted by the service authorities indicating that the accused did not express any objections, this alone would not invalidate the findings and sentence of the Court-Martial in issue. The judicial system, in this particular instance, offered the service authorities entire protection from any constitutional challenge that may be brought against them under Article 33. The judiciary could have closely examined the matter alongside the appropriate implementation of Article 33. Considering that, the argument used by the service authorities is no ground since there is a clear violation of fundamental rights, which goes beyond the ambit of Article 33. According to the researcher, this would have been a thorough examination of the matter that complied with the standards of Article 33.

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<sup>7</sup> 1983 SCR (3) 60

<sup>8</sup> Delhi Police Non-Gazetted Karmchari Sangh v. UOI AIR 1987 SC 379

<sup>9</sup> AIR1968DELHI158

A lot has changed recently, though, the Hon'ble High Court of Delhi decided in the *Babita Puniya Case*<sup>10</sup> in 2010 that the Court would not interfere in an Armed Forces policy decision. However, the Court later firmly held that once a policy decision is made, it cannot be applied arbitrarily. After completing training and other criteria, female IAF officers were guaranteed a permanent commission (PC) in the aforementioned case. Female police were denied permanent commission even though their performance was on par with that of men officers. The Indian Constitution's Articles 14, 16, and 21 were violated, and it was held that this matter would be apt for judicial examination. In this instance, the judiciary's improved strategy was a move in the right direction. Even though Article 33 was not mentioned, the Court had held, or rather left implicitly, an impression that Article 33 could not be applied obdurately, which created a context for the demarcation of Article 33. This has created a golden opportunity for the judiciary to correct its position on Article 33.

It is noteworthy to mention that, the Supreme court has also insisted that there is a need to have a "proper balancing of interests of an individual as a citizen and the right of the State to frame a code of conduct for its employees in the interest of proper functioning of the State."<sup>11</sup> A number of cases however have risen questioning the restraints imposed on armed force personnels.<sup>12</sup>

In *Sunil Batra v. Delhi Administration*,<sup>13</sup> the Supreme Court ruled that inmates who are denied personal freedom do not completely lose their basic rights. The Parliament may, in its wisdom, limit or abolish such rights in their application to the armed forces in the greater interest of military discipline and national security, but this process should not be carried out to the point where it creates a class of citizens who might not be eligible to enjoy the benefits of the Constitution's liberties. Individual freedom is valued and precious. The procedure in trial of an offence by the criminal court and that of the court-martial distinctly differs and may likely result in dissatisfaction.<sup>14</sup>

Having traversed the evolution of judicial approaches to Article 33, it is needless to say that

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<sup>10</sup> [Babita Puniya v. The Secretary](#), AIR 2020 SC 1000

<sup>11</sup> *M H Devendrappa vs Karnataka Small Industries Development Corporation*, AIR 1998 SC 1064

<sup>12</sup> *P Balakotiah v Union of India*, AIR 1958 SC 232

<sup>13</sup> (1978) 4 SCC 409.

<sup>14</sup> FUNDAMENTAL RIGHTS OF INDIAN MILITARY PERSONNEL Author(s): A.K. Keshot Source: Journal of the Indian Law Institute, JANUARY-MARCH 2009, Vol. 51, No. 1 (JANUARY-MARCH 2009), pp. 67-78 Published by: Indian Law Institute

much needs to be done in laying down clear interpretations in the Article 33 jurisprudence. The researcher opines that, the courts are slowly and steadily moving in the right direction however the interpretation given to the Article at present is extremely broad vesting almost unbridled powers in the hands of the Parliament. The researcher in this context is reminded of the saying that “power corrupts and absolute power corrupts absolutely”. Measures towards creating a system of checks and balances is the need of the hour. Through the aforesaid analysis the researcher finds it safe to conclude that though the Constitutional framers placed discipline and order above the fundamental rights it could not have been their intention to deprive these groups of individuals of their natural rights. Furthermore, by virtue of Article 33, any laws so enacted by the Parliament escape the clutches of challenge on the ground of unconstitutionality, this however does not seem to be in tune with what the constitutional fathers had in mind. Both the judiciary and the parliament have almost turned a deaf ear to the tussle in interpreting Article 33 and much need guidelines for the same. Consequentially, resulting in a bane for the armed forces. The creation of an Armed Forces Tribunal, limited in its powers, would change the process but not the outcome which needs to be looked into as first priority.

From the analysis above the researcher would conclude that, the contours of Article 33 with respect to armed forces is quite and unexplored one having scope for amendments and growth in the coming days. Though Article 33 is crucial any rational individual would from a simple reading decipher that, the intent of the founding fathers was to curtail the rights of the forces to classify them as a separate group. The basic rights cannot be revoked capriciously. The judiciary in the past did not seem to have applied this dictum. However, the judiciary was able to change the track for the better. The recent judgments by the courts on Article 33 are a ray of hope for the armed forces.

Furthermore, the judiciary has moved steps in the right direction to harmonize Article 33 and the fundamental rights of the military personnels. Article 33 jurisprudence has a long way to go in procuring to the soldiers a sense of protection under the Constitutional provisions. A balanced approach between the two is a welcome step. It remains to be whether the approach of the Court will progress in the future towards protecting our protectors in both letter and spirit.

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