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# The Technicalities Of Military Desertion In India: A Comparative Analysis Between Section 38 Of The Army Act, 1950 And Art. 85 Of The Uniform Code Of Military Justice

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## Abstract

Military Desertion is a crime that requires clear and detailed laws considering the grave nature of penalties laid down for it in the Army Act, 1950. Section 38 of the Act consists of laws regulating desertion in India, mainly prescribing the penalties for the same. However the section lacks clarity on what constitutes desertion, the essentials and the circumstances resulting in the deserter's punishment. An offence that results in serious penalties such as death requires more specificity in its laws and this paper addresses the logic and rationale behind this contention. Absence without leave or AWOL and Desertion both have similar implications but there exist certain essential differences that justify their severalty. The paper highlights the distinctness of the two crimes while simultaneously comparing the attention to detail given to both sections of the Act. The author in this paper, aims to identify and highlight the absence of the essential elements of desertion which are determined by understanding its causes, without which efficient and purposeful law-making is unachievable. The lack of clarity and detail in Section 38 is highlighted with reference and in comparison to the Uniform Code of Military Justice of the United States of America.

**Keywords:** Desertion, Penalties, Section 38, Army Act of 1950, UCM

## Introduction

The Indian Army soldier is imbued with a set of principles, mainly a strong sense of duty and love for their country that motivates them to willingly face a variety of obstacles and challenges and when called upon, to make the ultimate sacrifice in the service of the country. All soldiers are born with the Army's mentality instilled in them: a relentless drive to succeed, acceptance of their enormous responsibility, and an uninhibited willingness to risk their lives to save others, with the assurance that the country will care for them and their families in return. The spirit of brotherhood, regardless of caste, creed, religion, the motto - "One for all and all for one", the spirit of self sacrifice for the sake of 'Naam, Namak and Nishaan' which refer to the honour of the nation, loyalty towards the nation and the insignia of the nation respectively, fearlessness and valour in combat while fighting against all odds and even in the face of death, forthrightness, discipline, integrity and courage - the emotion of all these qualities flows within the soldier's being.<sup>1</sup> The Army, as an institution, prioritises honour and discipline through stringent regulation and is regulated by the Army Act, 1950. Section 38 of this Act speaks about desertion which in simple terms means unauthorised absence from military duties without an intention of returning. When a soldier deserts his duties, he is called a 'deserter' who will be tried by the Martial Tribunal (SCM)<sup>2</sup> and according to this Act, be granted imprisonment or a death penalty. The penalties prescribed in the military statutes are not the same for every nation and are formulated according to the ideals and beliefs of that nation. Nevertheless, desertion of military duties is considered a very serious offence across all borders due to their common objective of service to the nation. The Army Act of 1950 regulates the Indian Army wherein Section 38 lays down the laws regarding desertion. It is contended that there exists ambiguity in Section 38 with regard to the essential elements of desertion that may result in severe punishment. Since the objective of this paper is to analyse the letter of the law by addressing the ambiguity of this section, the research methodology incorporated in this paper is Doctrinal. The Author's claim in this paper shall be supported by case laws, journal articles and book chapters pertaining to punishment of desertion along with a comparative study between the Army Act, 1950 and the Uniform Code of Military Justice (USA).

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<sup>1</sup> Ideas and Ethos - The Official Home Page of the Indian Army, India, available at: <https://indianarmy.nic.in> (last visited on November 26, 2022)

<sup>2</sup> Wing Commander U C Jha, "Military Justice System In India", *The United Service Institution of India (USI) Journal* (2006)

## Causes for Desertion

In order to understand the causes of desertion, it is vital to understand the types of desertion. There are four main types of desertion - Desertion with the intent to remain away permanently, Desertion to avoid hazardous duties or evade important responsibilities, Attempted Desertion and Desertion before the acceptance of resignation<sup>3</sup>. These are regulated under Section 38 of the Army Act, 1950. Section 38(1) lays down penalties of death or imprisonment for someone who deserts or attempts to desert their military duties during times of active duty i.e. war and also when under orders for active duty.<sup>4</sup>

A soldier who carries strong values and passion towards their role and has vowed to uphold those values can cause a stir when they decide to desert their duties. Statutes and policies are formulated by the people, for the people and therefore, talking about what instigates such a decision is important. One of the main reasons is the element of fear which stems from the unimaginable danger and threat to life the troops face. Brigadier Sukhdev Singh in his chapter from an edited book called '*Military Musings: 150 years of Indian Military Thought from The Journal of The United Service Institution of India*', points out the ignorance that a soldier's mental health has been subjected to. He describes the way the soldier's duty-centric nature is taken for granted and how "fantastic" it is to suggest that any soldier can get used to exposing themselves to constant danger of life. Peace time indices of soldiers' reaction to battle conditions are taken into consideration which could not be further from the reality of the soldiers' actual battle experiences. Brigadier Singh emphasises the need for scientific studies and surveys to be conducted in order to explore the soldiers' reactions and find "remedial measures for adverse reactions." He further observed that all men suffer from an element of fear for personal safety and act on instincts of self-preservation. Consequently, they also worry about the effect on their families in the event of them getting injured or losing their lives. A natural fear like this obviously is quite different from cowardice and causes them to abandon duties.<sup>5</sup> The records of a General Courts Martial can show certain records and various other causes of desertion and absence without leave. Drug and alcohol addiction, mental deficiency or weakness,

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<sup>3</sup> By Admin, Court Martial law - The Four types of Military Desertion, available at: <https://courtmartiallaw.com/>

<sup>4</sup> Army Act, 1950, India, available at: <https://indianarmy.nic.in/writereaddata/documents/ARMYACTS190216.pdf>

<sup>5</sup> Brigadier Sukhdev Singh, "Reactions of Soldiers in Battle", Rana T. S. Chhina, *Military Musings: 150 years of Indian Military Thought from The Journal of The United Service Institution of India*, page 261 (Speaking Tiger, 2021)

fear of punishment, failure to understand the reasons for discipline, illness or physical strain, illness with an undetermined cause, weakness of character, dissatisfaction with the organisation, homesickness, poverty of dependents, desire to marry and many more. Each of these causes include cases of both, desertion as well as absence without leave (AWOL).<sup>6</sup>

## **Distinction between Desertion and Absence without Leave**

Section 38 of the Army Act, 1950 lays down the law for Desertion and Section 39 of the same Act lays down the law for Absence without leave. While the two are essentially similar, they are not exactly the same hence proving the need for a separate section for each.

Absence without leave or AWOL, according to the Oxford Dictionary, refers to “a situation wherein a soldier has left their group without permission.” Desertion refers to a situation wherein the soldier leaves without permission without an intention of returning. Armed services personnel are deemed AWOL if they skip a scheduled meeting, leave the location, or are otherwise absent from their unit or designated area of duty. A service member may be absent without authorization in the following circumstances, according to the Manual for Courts-Martial (PDF) which are included in the laws of the US Military (including the elements of each):

### **1. Failing to go to the designated time and location of duty**

The accused was assigned a certain shift and location for duty. He was aware of the time and location, but he did not arrive at the designated place of duty on time without permission.

### **2. Leaving the designated location of duty**

The accused was assigned to a specific location of duty; he was informed that it was against the rules for him to leave without permission, but he nonetheless did so after reporting for work.

### **3. Absence from the group, business, or place of work**

The accused excused themselves without permission from a place of employment, unit, or organisation, and their absence lasted for a specific amount of time or was terminated by apprehension.

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<sup>6</sup> E. N. Woodbury, “Causes of Military Desertion: A Study of Criminal Motives”, Vol. 12, Journal of Criminal Law and Criminology, 214 (1921)

#### **4. Failure to report to a unit, organisation, or place of service with the intention of avoiding field exercises** (same components as #3, but in addition to the following)

The accused intended to avoid all or some of the manoeuvres or field exercises since he knew his absence would happen during them.

#### **5. Giving up on a watch or guard**

The following circumstances apply: The accused was a member of a guard, watch, or duty; the accused absconded from this guard, watch, or duty; the absence was without permission; and the accused meant to quit their position.<sup>7</sup>

According to Section 39 of the Army Act of 1950 in India, any person subject to this Act who commits any of the following offences, that is - absents himself without leave; or without sufficient reason overstays leave granted to him; or being on leave of absence and having received information from proper authority that any corps, or portion of a corps, or any department, to which he belongs, has been ordered on active service, fails, without securing leave, shall be guilty of an offence under this section. When on parade or in the line of march, without good reason or without permission from his superior officer, he must leave. When in camp, garrison, or elsewhere, he must be found outside of any boundaries set by any general, local, or other order, without a pass or written permission from his superior officer. He must also attend school when duly ordered to do so without permission from his superior officer or without good reason.<sup>8</sup>

A serviceman of the Army is said to have deserted his duties if he permanently leaves his post without authorization. The following types of desertion, as mentioned before, are included in the Manual for Courts-Martial of the US Military, along with descriptions of each type:

#### **1. Desertion with the intention of staying away forever**

The accused abandoned his or her group, workplace, or place of responsibility; the absence lacked authorization. The accused intended to leave his or her unit, organisation, or place of duty at some point during the absence, and the accused either stayed gone until the stated date or was caught.

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<sup>7</sup> Failure to report for Duty: AWOL, Desertion and Other Charges, available at: <https://www.findlaw.com/>

<sup>8</sup> Army Act, 1950, s. 39

## **2. Desertion with the aim of evading a dangerous task or an important service**

The defendant left their team, business, or place of employment. He did it with the intention of avoiding performing some task or service. The work needed to be done included danger or was of a particularly significant nature; the accused was aware that the work was needed but failed to show up until the alleged date.

## **3. Desertion before notice of acceptance of resignation**

The defendant had submitted his or her resignation and was a commissioned officer. The accused left their position prior to getting notification that their resignation had been accepted. They left with the intention of moving away permanently, and they stayed away up until the alleged date or until they were found.

If the effort goes further than simple planning, it can also be tried as a military crime. The harshest penalty for deserting is dishonourable discharge, loss of all pay, and five years in prison. But in times of war, the death sentence may be used for deserting (at the discretion of the court-martial)<sup>9</sup>.

Desertion laws according to the Army Act, 1950, however, lack the clarity, specificity and variety of circumstances and possibilities that can serve as grounds for penalisation of a deserter from the Indian Army unlike Section 39 of the same Act containing laws concerning absence without leave is very specific about what qualifies for punishment under the same. Essentially AWOL and Desertion are very similar. However, a statute requires every word, every detail to be present under a certain section in order to serve its purpose of regulation. No matter how similar two crimes may be, both crimes need to have their own definitions, laws and respective penalties clearly mentioned in the statute.

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<sup>9</sup> Failure to report for Duty: AWOL, Desertion and Other Charges, available at: <https://www.findlaw.com/>

## Examining the constituents of Section 38

### **In Section 38 of the Army Act, 1950,**

**38(1)** states that any person subject to this Act who deserts or attempts to desert the service shall be liable to death or such lesser punishment upon conviction by the court martial, if he commits the offence while on active duty or while under orders for active duty as are mentioned in this Act; if he commits the offence under any other circumstances, he shall be liable to imprisonment for a term that may extend to seven years or such lesser punishment as is mentioned in this Act.

**38(2)** states that on conviction by a court martial, anybody subject to this Act who knowingly harbours any such deserter is subject to imprisonment for a term that may not exceed seven years or such lesser punishment as specified in the Act. Lastly,

**38(3)** states that any person subject to this Act who possesses information of any desertion or attempt at desertion of a person subject to this Act and does not immediately notify his own or another superior officer or take any steps in his power to have the person apprehended is subject to imprisonment for a term that may go up to two years or such lesser punishment as is mentioned in this Act upon conviction by court-martial<sup>10</sup>.

Clauses (2) and (3) serve their purpose of being “sub clauses”. They are an extension of the first sub clause which is supposed to be the introduction clause to section 38. Ironically, this is where the question mark lies. Clause (1) of this section is missing a clear definition of the term, “Desertion”. A legal statute is meant to protect the people and is the guiding framework of laws meant to serve justice. The only takeaway from reading Section 38(1) of this bare act is the knowledge of the penalties of Desertion rather than what the crime itself, is. Desertion is a term that also exists in the Hindu Marriage Act. “It is the abandonment of one spouse by the other without any reasonable cause and without the consent of the other.” This term exists in both the Acts and it has been described only in the latter. Undoubtedly, both situations are different, the statutes are different as well and therefore, it is easy to decipher what the term means in its respective statute. If the term exists in the Army Act, it objectively implies desertion of military duties and not marital. However, this being a Doctrinal research paper, a legal research paper, the letter of the law is put into question. The purpose of a legal statute, the most tedious yet critical task of formulating laws, is to lay down clear cut laws without any gaps, loopholes or room for assumptions.

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<sup>10</sup> Army Act, 1950, S. 38

A definition, the essentials and grounds for penalty of Desertion are absent in Section 38(1), and hence this ambiguity perpetually extends to clauses (2) and (3) that lay down laws for accomplices who harbour a deserter and who fail to inform authorities when they receive information of desertion taking place, respectively. Without a clear understanding of what Military Desertion is and what it constitutes, it becomes difficult to justify the death penalty the Act prescribes to punish the accused and moreover, impossible to punish the accomplice.

Not unlike the Army Act, 1950, separate laws exist for Desertion and Absence without leave in the Uniform Code of Military Justice which is the Military statute for the USA. Article 85 of the UCMJ also has three sub clauses that are considerably different from Section 38 of the Army Act, 1950

### **In Article 85 of the Uniform Code of Military Justice,**

a) Any service member who,

1. without authorization, leaves his unit, organisation, or place of duty with the intention of staying away from it permanently;
2. with the intention of avoiding dangerous duty or avoiding important service; or
3. joins or accepts a position in the same or another one of the armed forces without fully disclosing the fact that he has been regularly separated or enrolls into any foreign Armed force without authorisation of the United States is guilty of desertion.

b) Any commissioned officer of the armed services who leaves his position or proper duties without permission and with the intention of staying away from them permanently after tendering his resignation and before receiving notice that it has been accepted is guilty of desertion.

c) If the offence was committed during a time of war, the punishment for desertion or an attempt to desert shall be death or such other punishment as a court-martial may order; however, if the offence occurred at any other time, the punishment shall be such other punishment, other than death, as a court-martial may order.<sup>11</sup>

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<sup>11</sup> Uniform Code of Military Justice, Appendix 2, 2019, art. 85

Clause a) is the main clause of Article 85 which very clearly lays down the essentials that constitute desertion with the first two clauses ending with the words, "...is guilty of desertion." There are clear cut clauses in the UCMJ that very well sum up what desertion is and its repercussions. Clause b) and c) are comprehensive extensions of the main clause and it is evident on comparison, which statute can facilitate uncomplicated trial proceedings and deliver informed judgements. This proves that the Army Act requires more specificity in Section 38 and needs to contain the definition and essentials of Desertion.

## Judicial Decisions

The following case laws regarding desertion from the Indian Army. These cases were decided by High Courts. The binding force of a High Court extends to the States under its jurisdiction including subordinate courts, authorities and tribunals situated within its jurisdictional territory.

1) Brahm Dutt Sharma v. State of UP, 1991

Allahabad High Court

Bench : Justice P. Gupta

The majority opinion on this case was that a person is guilty of being absent without leave when he is voluntarily absent from the place his duty requires him to be. If he did absent himself, the intention would either be to quit the service altogether or to avoid a particular duty or task for which qualify as desertion. The distinction between 'desertion' and 'absence without leave' was vital in this case. It was proved from the examination of prosecution evidence that the accused left his camp after leaving an application for earned leave in the office but left without obtaining the prior permission for leave, neither orally nor in writing. The Appellant who was declared guilty of desertion in the 1981 Sessions Court judgement, appealed to the Allahabad High Court in 1983 and after careful examination of the facts and evidence of the case, Brahm Dutt Sharma was declared not guilty of desertion.

2) Captain Virendra Kumar, through his wife v. Chief of the Army Staff, New Delhi AIR1986 SC 1060

Delhi High Court

Bench : Justice O. C. Reddy, Justice V. Khalid

The Prosecution stated that Virendra Kumar, having been posted at Ambala Cantonment by the

Army Headquarters, failed to report to his unit until he was apprehended by the civil police at Delhi. The appellant Smt Raksha Virendra Kumar who, on behalf of her husband, alleged that he had been forcibly removed from his house and taken away first to the police station and then to an unknown location and that his whereabouts were unknown and not of his own accord. He was absent without leave and did not desert his post. The Delhi High Court thus decided that his services in the Army be terminated and he start practising as an advocate under the Bar Council post his discharge.

3) Tapan Kumar Dalai v. Union of India & Ors, 2002 Orissa

High Court

Bench : Justices R. Patra and P. Mohanty

The petitioner was sanctioned 12 days of leave which he wanted to extend but applied for the same only after the expiry of the period of application for extension. Assuming his leave was sanctioned, which was, in reality, rejected, he failed to report back to service. The petitioner also chose not to go back to his battalion due to his intention to resign, the application for which was filed but that too, was rejected since he failed to comply with the rule of depositing three months' salary and allowances in lieu of three months notice for its acceptance. Since he remained absent for more than sixty days, an arrest warrant was filed against him for crimes committed under the Central Reserve Police Force (C.R.P.F) Act and was hence declared a deserter. The petitioner only later agreed to pay the deposit of three months pay and allowances and intended to follow through with his resignation and the Court pointed out that had the deposit been paid on time, the opposite party would not have had the occasion to declare him a deserter. In compliance with the court orders, the opposite parties accepted the deposit and approved the resignation.<sup>12</sup>

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<sup>12</sup> Summary Judgements, available at: <https://indiankanoon.org/> and <https://www.casemine.com/>

## **Conclusion**

The contention of the existing ambiguity in Section 38 of the Army Act is justified and supported by the research material incorporated in this research paper. The comparative study of Section 38(Army Act) and Article 85(UCMJ) shows that desertion is a grave crime in any nation as is the necessity for clear, airtight statutes to govern the nation. The aim of this paper was to provide a fair idea of the existing gap and unaddressed technicalities in the statute with regards to desertion in India owing to the ignorance and normalised indifference towards the causes of desertion and to point out the necessity for amendments to be made in this Act; furthermore, emphasise the general principle of law-making which is efficient regulation consequent to clear and irrefutable legal frameworks.



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