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# CONSTITUTIONALISM AND ITS RELATIONSHIP WITH MILITARY LAW

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## ABSTRACT

The paper investigates the relationship that military law, which collectively encompasses Army Act 1950, Navy Act 1957 and Air Force Act 1950, and their relationship with constitutional ideologies and jurisprudence. The paper will dwell into an in-depth analysis of these principles and statutes under these legislations how they exist parallel with constitutional articles. The paper would also look into interviews of currently employed jag officers for their opinions of these existing statutes. The paper aims to find a conclusion of whether the military law is ultra vires in nature or it abides by constitutional principles.

## 1. INTRODUCTION

Constitution, which is known as the Grund-norm of all other laws from which they are derived was completed on 26<sup>th</sup> November 1949, this day is also now celebrated as the constitution day in India.

The constitution was framed based on maintaining certain principles which are enshrined in the preamble of India, this preamble is also known as the basic structure of the Indian constitution. These principles are referred to as what is known to be the doctrine of basic structure, and the principle was reinforced in the case of *Kesavananda Bharti v. state of Kerala*<sup>2</sup>.

Over the years many laws have been derived from reading down these constitutional principles, many laws have also created exceptions which have in many judicial precedents also been questioned.

Military law is one such law that enjoys certain individuality and autonomy in its principles due to the rigid discipline and behavioral requirements that are required in military<sup>3</sup>. This autonomy of existence derives from the legal maxim “*generalia specialibus non derogant*”, it was further

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<sup>2</sup> *Kesavananda Bharati v. State of Kerala* (AIR 1973 SC 1641)

<sup>3</sup> Statement by JAG officer in interview

reiterated in the case of *Sachin patel v. darshanam group* <sup>4</sup> that specific laws governing a particular aspect will overrule general laws which are applicable in the ordinary course of law.

Additionally, the judgment in *mithu saha union of india* <sup>5</sup> (Calcutta High Court, 2023) emphasizes that when there are two provisions simultaneously in existence one being a special provision while the latter being a general provision, the special law will prevail in case of any repugnancy. This jurisprudence arises out of the same legal jurisprudence behind the doctrine of repugnancy which states that the central law will prevail over state law when they are both in conflict.

## 2. WHAT IS CONSTITUTIONALISM

The term "constitutionalism"<sup>6</sup> refers to a mechanism for providing legitimacy to a democratic government. The significance of constitutionalism and its ideologies surpasses the value of having a written and codified constitution.

Doctrines such as Separation of powers, judicial oversight, and accountable government are some of the essential concepts that have evolved and developed over time to reflect the concept of constitutionalism and adapt to the changing requirements of the society. It is the polar opposite of dictatorial principles such as of arbitrary power. Constitutionalism recognizes the need for a government with powers while also insisting that those powers be limited. To preserve the fundamental freedoms of the individual, as well as his dignity and personality, the Constitution should be permeated with 'Constitutionalism,' with some built-in constraints on the powers conferred by it on governmental organs.

It refers to the principle of governance in accordance with the Constitution, which includes the protection of fundamental rights, the rule of law, and the separation of powers. The principle of constitutionalism requires that governmental powers are exercised within the framework of the Constitution to ensure that they do not infringe upon the rights and freedoms guaranteed to individuals

In India, the Preamble of the Constitution is closely related to the idea of constitutionalism. Justice, liberty, equality, and fraternity are among the core ideals and ideas that form the foundation of the Constitution and are outlined in the Preamble. It highlights that the people themselves are the source of all governing authority, and both embodies and theorizes the goals of the Indian

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<sup>4</sup> Sachin patel v. darshanam group CMP/Vadodara/200101/000001

<sup>5</sup> mithu saha union of India CRR 1256 of 2010

<sup>6</sup> Fellman David, ( 2025 ) The touchstone of constitutionalism is the concept of limited government under a higher law., prepp(college dunia)

populace. Understanding the nation's democratic ethos requires an understanding of the link between constitutionalism and the Preamble. In India, the Preamble of the Constitution is closely related to the idea of constitutionalism. Justice, liberty, equality, and fraternity are among the core ideals and ideas that form the foundation of the Constitution and are outlined in the Preamble. It highlights that the people themselves are the source of all governing authority, and both embodies and theorizes the goals of the Indian populace. Understanding the nation's democratic ethos requires an understanding of the link between constitutionalism and the Preamble.

The aim behind following constitutionalism is in order to maintain the spirit of the law and is reflection of the legal framework of the nation.

## 2.1 IMPORTANCE OF CONSTITUTIONALISM

The importance of these principles is extremely relevant for the smooth functioning of society, these principles help maintain and uphold principles that help avoid centralization of powers or arbitrary actions of the people and the state. Constitutionalism helps maintain legal ethos while enforcing the law and while creating new laws or amendments as to not make changes that may not be in the best interest of society and justice. These principles help derive the ideology of rights and protection that are enshrined in part three of the Indian constitution which includes the fundamental rights of the citizens of India.

In the case of *IR Coelho v. State of Tamil Nadu*<sup>7</sup> The Court determined that constitutionalism is a legal principle that necessitates control over the exercise of governmental power in order to ensure that the democratic principles upon which the government is founded are not undermined.

The Preamble not only sets forth the objectives of the Constitution but also establishes the foundational values that guide the interpretation of constitutional provisions. It underscores the commitment to a sovereign, socialist, secular, and democratic republic, thereby framing the constitutional discourse around these ideals. Also, the judiciary plays a crucial role in interpreting the Constitution in light of the Preamble. The courts have often emphasized that the Preamble is a key to understanding the Constitution and its provisions. For instance, the Supreme Court has reiterated that the Preamble reflects the core values of the Constitution and must be considered when interpreting other constitutional provisions (as seen in the judgment of *Gujarat Ambuja Exports Limited and Another v. State of Uttarakhand And Others*<sup>8</sup>).

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<sup>7</sup> *IR Coelho v. State of Tamil Nadu* AIR 2007 SC 861

<sup>8</sup> *Gujarat Ambuja Exports Limited And Another v. State Of Uttarakhand And Others* MANU/SC/1417/2015

The Preamble also embodies the concept of transformative constitutionalism, which aims to change the socio-economic conditions of the country and promote equality and justice. The case of *Navej Singh Johar & Ors. v. Union of India*<sup>9</sup> is a case in which these ideologies are conceptualised and applied, where the court recognized the need for a dynamic interpretation of the Constitution to ensure that the ideals of the Preamble are realized in practice.

### 3. WHAT IS MILITARY LAW

The military and its establishment, organizations and operations are governed by a set of laws that were introduced to codify the military justice legal framework to regulate the enforcing order and discipline of the armed forces and its members. However, the term military law<sup>10</sup> generally refers to disciplinary rules that govern the behavioral requirements of the members of the armed forces. For several reasons, military and military-related offences have their unique system of adjudication.

For starters, rapid and immediate decisive action or punishment is required due to the nature and importance of the armed forces. For the nation's security and safety, put it another way, the military simply cannot afford to wait for the many adjournments and delays inherent in the civilian (general laymen) court system. For regularity and the incorporation of the discipline characteristic of the military, speedy trials and predictable outcomes are essential. This frees up the armed forces to concentrate on protecting the country

#### 3.1 TYPES OF MILITARY LAW

The laws that collectively are referred as military law in India are primarily the Army Act 1950<sup>11</sup>. Army Rules 1954<sup>12</sup>. Navy Act 1957<sup>13</sup> and Air Force Act 1950<sup>14</sup>. The armed Forces Tribunal Act, 2007 was passed in 2007 and was regarded as an important piece of legislation that permitted the foundation of the Armed Forces Tribunal (AFT).

The legislations were historic regulations that granted legal recognition to the separate and inhumane job requirements that exist in the military, and codified its nature of work in such a manner that it may be suitable for Indian culture, before the enactment of these laws, India relied upon British colonial laws to govern them.

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<sup>9</sup> Navej Singh Johar and Ors. vs. Union of India (UOI) and Ors. (06.09.2018 - SC) : MANU/SC/0947/2018

<sup>10</sup> Kiran. (2022). Military law vs civilian law in India: comparative study. Jus Corpus Law Journal, 3(2), 832-844.

<sup>11</sup> India code, Army Act 1950

<sup>12</sup> India code, Army Rules 1954

<sup>13</sup> India code, Navy Act 1957

<sup>14</sup> India code, Air Force Act 1950

## **4. DOES MILITARY LAW IGNORE CONSTITUTIONALISM?**

The judicial system of India grants access to an appeal system in accordance with following the hierarchy of courts.

The “second appeal” as it known, does not exist in military proceedings. There is no system in place for those who have been found guilty to file an appeal with a higher court. Section 164(2)<sup>15</sup> of the army act states that a person who is aggrieved by a military court finding or sentence may file a request with the central government, the head of the military, or any recommended superior official in charge of the one that confirmed the finding or sentence; the central government, the head of the military, or the other official may pass such requests because the case may likewise be appealed to a higher court. But this not exactly violate constitutional provisions as the court martial proceedings are subject to a review by the armed forces tribunal or the high court if a pertinent question of law is question, if the application of the law in the court martial proceedings was flawed only then Section 164(2) army act cannot be invoked.

Article 34<sup>16</sup> however gives the parliament the authority to pass laws that limit or abolish any of the basic rights of service members, with the goal of preserving order and ensuring that they can appropriately perform their tasks, it also severely limits and restrict the higher judiciary's authority to issue orders, conclusions, and punishments related to court-martial proceedings.

The court-martial proceeding may also be conducted as a summary trial which may be done in case of minor offences, these proceedings are also subject to the same laws and powers as conferred to a court martial proceeding and shall be treated as such.

### **4.1 IS MARTIAL LAW NEEDED AS IT EXISTS**

The powers of court-martial proceedings as quasi-judicial bodies have been questioned time and again, but the actual question should be whether the existence of these laws in equivalence to these abnormalities of changes in constitutional principles should such a law exist?

The life of a member of a military unit is not easy, it holds high responsibility and sense of duty. The laws were made in equivalent and proportional requirements of the job necessities that these military duties hold and value.

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<sup>15</sup> Supra 10

<sup>16</sup> India code, constitution of India

Furthermore, based on the provided legal judgments, the military does have the authority to amend military law, but such amendments must still comply with the overarching framework of the Constitution of India, particularly regarding fundamental rights.

In the case of *Chinta Subba Rao v. The Supreme Commander Of Defence Forces Of The Union Of India And Another*<sup>17</sup> (Andhra Pradesh High Court, 1979) it was discussed that the imposition of Martial Law and its emphasis on that the military may have certain powers, yet they are not permitted to or that they cannot infringe upon the fundamental rights guaranteed by the Constitution, especially the right to life and liberty under Articles 21.

Such principle of fundamental rights was also again upheld in the judgment *Ex. Major N.R Ajwani & Ors. v. Union of India & Others*<sup>18</sup> which clarifies that while the Army Act can impose restrictions on fundamental rights for members of the Armed Forces, such restrictions must be consistent with the Constitution. Article 33<sup>19</sup> allows Parliament to legislate regarding the Armed Forces, but it must do so while respecting fundamental rights.

The scope and nature of military law is wide and complex, however in the case of *Som Datt Datta v. Union Of India And Others*<sup>20</sup> the supreme court in 1968 provided insight into the scope of military law and its relationship with civil law, indicating that military laws can be amended but must operate within constitutional boundaries thus limiting it to follow the basic structure doctrine and mandating limits to minor violations of rights that would generally be considered as violation of both fundamental rights as conferred in part three of the constitution and human rights as enshrined in the magna carta<sup>21</sup>.

## 4.2 DIFFERENCES IN THE MILITARY JUSTICE SYSTEM AS COMPARED TO THE CIVILIAN JUSTICE SYSTEM

The military justice system while seeming perfect, does arguably have flaws in terms of retribution and reformative actions for the accused. Some examples are:

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<sup>17</sup>Chinta Subba Rao vs. The Supreme Commander of Defence Forces of the Union of India and Ors. (27.07.1979 - APHC) : MANU/AP/0081/1980

<sup>18</sup> Union of India and Ors. v. Ex. Major N.R. Ajwani and Ors. : (1996) 9 SCC 406

<sup>19</sup> India code constitution of India

<sup>20</sup> Som Datt Datta v. Union Of India And Others 1969 AIR SC 414

<sup>21</sup> National Archives and Records Administration, Vincent, N., & Sotheby's Inc. (n.d.). *Magna Carta Translation*. <https://www.archives.gov/files/press/press-kits/magna-carta/magna-carta-translation.pdf>

## RIGHT TO BAIL

Article 21<sup>22</sup> of the Indian constitution encompasses the right to bail for a convicted person, however, if a service member is arrested and facing charges, they will not be eligible for bail. It's up to the judgment of the Commanding officer, or the highest military official.

While the Supreme Court in the landmark judgement of *Bachan Singh v Union of India*<sup>23</sup> has established the grounds on which bail should be granted, this has been denied under section 164(2) Army Act 1950,<sup>24</sup> such powers can also lead to arbitrary decisions as it could be influenced by internal politics as the decision of the senior officer in a manner is a unspoken veto power over court martial proceedings and procedure established by law.

## DOUBLE JEOPARDY

While the constitutional protection against double jeopardy that is written in Article 20(2)<sup>25</sup> is accessible before a court-martial, it is not available to prevent a second trial on the same offence before a civil court. This is because a court-martial is a military court, and the military member is still subjected to civil law.

## ABSENCE OF RIGHT TO APPEAL

The army act 1950<sup>26</sup> does not have a provision that allows one for appealing a court martial findings and punishment. Sections 153 to 165 of Chapter XII of the Act allow for the verification and amendment of the military court order. A court martial verdict or sentence may be adjusted by an affirming authority order in accordance with Section 160. Confirmation and the remedies available to those who have had a judgment or sentence upheld against them are covered in Section 164. Section 164 (2) states that "Any person. who considers himself aggrieved by a finding or sentence of a court-martial may present a petition to the central government, the Chief of the Army Staff, or any pre-defined officer superior in control to the one who confirmed such finding or sentence, and the central government, the Chief of the Army Staff, or any predefined officer superior in authority to the one who confirmed such finding or sentence, and the central government, the Chief of the Army Staff, or any prescribed officer superior in command .Only after the punishment has been decided is this remedy possible. Therefore, until the sentence is confirmed, the accused has no right to seek redress. Additionally, this remedy consists of a paper exercise conducted in

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<sup>22</sup> India code constitution of India

<sup>23</sup> *Bachan Singh v Union of India* AIR 1980 SC 898, 1980

<sup>24</sup> Supra 10

<sup>25</sup> Supra 15

<sup>26</sup> Supra 10

private rooms without the accused having access to legal representation. Consequently, there is no way to contest the court martial ruling.

## **5. OPINION OF J.A.G OFFICER**

I interviewed a currently employed J.A.G (judge advocate general) officer on his opinion on the supposed rigid and hierarchical (rank of officer ) based laws that may seem arbitrary and ultra vires, and which are also allegedly claimed to be against human rights by many human rights activists.

The response I received was rather unforeseen and unexpected, the officer accepted that these laws may seem arbitrary and that on a personal note he dislikes certain aspects of them, however he further explained that his feelings were immaterial because he is thinking solely as a lawyer and with a positivist ideology of jurisprudence.

He pointed out to me that these thoughts of them being arbitrary only arise for the lack of respect for the procedures and culture or military teachings. The rigid teachings on behavioral values also include following orders from superiors. The officer stated that looking at the laws not as a lawyer but as a senior ranked officer in the military would rather better explain its core principles, he stated “while it may seem arbitrary, it is the most efficient and organized way, it is the way of the military to be absolutely disciplined and to have maximum efficiency”. This statement after further detailed discussion came to a conclusion that since military officers have higher duties than their own individual comforts and are duty bound to the nation and its protection; their rights are relatively less important than the safety of the citizens of this country.

The officer also explained that the situation is contextually similar to a state of national emergency which can be invoked under article 352<sup>27</sup>, where the rights of individuals may be partially restricted or suspended in the light of national interest.

He concluded by explaining that the job of a military officer involves higher duty than self to the protection of the nation and thus these procedures and laws are required to maintain the requirements of the job and that no one is ever forced to be in the military , they chose this life of selflessness and this duty to the nation.

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<sup>27</sup> Supra 10

## 6. CONCLUSION

Reading the above data and information it can be concluded that the power of the military to govern its laws separately is neither arbitrary nor is it ultra vires, it also follows constitutional principles that help it to align in basic principles to other laws of the nation. Since the nature of the applicants in the military is voluntary in nature, it cannot be said that the government is violating any rights of the citizens by putting them through harsh training steps. The military is an extended version of the government and must focus solely on protecting the nation and maintaining harmony; to maintain them the state allows such borderline practices that align with both the job requirements and constitutional principles which helps maintain maximum efficiency and discipline. Due to the national responsibilities of the military members, the laws revolving around their job are proportionally rigid and disciplinary in nature to maintain decorum and order in their workplace.

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