
CONCURRENT JURISDICTION UNDER AIR FORCE ACT, 1950: PRIMACY OF MILITARY AUTHORITIES AND THE TEMPORAL WINDOW FOR DISCRETION – A COMPARATIVE ANALYSIS OF CONSTITUTIONAL BENCH JUDGMENT OF SUPREME COURT IN SOM DATT DATTA (1969), MADRAS HIGH COURT (2023), AND J&K HIGH COURT (2024)

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"In a constitutional Democracy, military justice must remain a sword of discipline, and not a shield from the Rule of Law"

ABSTRACT

This article analyzes three landmark judgments spanning 55 years to clarify one of Indian military law's most contentious issues: When can military authorities invoke their "primacy" or "first option" to assume jurisdiction over a crime allegedly committed by service personnel. The key finding is that Military authorities' substantive primacy (their right to choose court-martial over criminal court) is real and binding, but their temporal primacy (their ability to exercise this right at any time) is limited to a defined window: post-investigation (charge-sheet filed) but pre-cognizance (Magistrate's acceptance of the case). The three landmark judgments chart this evolution, *Som Datt Datta v. Union of India* (AIR 1969 SC 414, Constitution Bench), which affirms military priority, with the timing implicit. The second, *State Rep. by Inspector of Police v. Commandant AFAC* (Madras HC, 2023), mandates that the military can assume jurisdiction early (pre-charge-sheet) if a Court of Inquiry is initiated, and the third, *P.K. Sehrawat v. Union Territory of J&K* (J&K HC, 2024), rejects early assumption; mandates explicit written Section 124 decision post-charge-sheet only. Critical Incongruencies have been identified, Divergence between Madras HC (2023) and J&K HC (2024) on timing, Victim victimization through parallel inquiries (POSH Internal Committee Inquiry + police investigation + Court of Inquiry), Procedural disparities between court-martial and criminal trial

(bail, counsel, appeals). Primacy of Art 33 (Restrictions on Fundamental Rights for Military personnel) in comparison to rights envisaged under Article 21 & Article 22 of the Constitution of India.

Keywords: Concurrent Jurisdiction, Air Force Act Section 124, Som Datt Datta Doctrine, Police Investigation, Timing of Military Discretion, Victim Protection, Constitutional Safeguards.

1. Introduction

1.1 The Central Strain. India's armed forces operate under a dual-track justice system, comprising military courts-martial (governed by the Army Act 1950, Navy Act 1957, and Air Force Act 1950) and ordinary criminal courts (governed by the BNSS 2023/erstwhile CrPC 1973). When an active service member allegedly commits an offence triable under both regimes—such as murder, culpable homicide not amounting to murder, rape, theft, or criminal force — a ‘concurrent jurisdiction’ arises. As regards the offence of *murder, culpable homicide not amounting to murder, and rape*, the criminal courts have exclusive jurisdiction to try these three offences *unless the same is committed against a person subject to military law or the offence alleged to have been committed while in ‘active service’ or a ‘place outside India’*. Regarding all other offences, except the three mentioned, the Courts Martial have complete jurisdiction. The statutory scheme grants military authorities a "first option" (or primacy) to decide whether the accused will be tried by court-martial or a criminal court. However, the timing of this option—when military authorities can invoke it—has been a source of doctrinal evolution and practical confusion since the establishment of Independent India.

1.2 The "Primacy Paradox." The two competing principles clash, the ‘Military Substantive Primacy’- Military authorities have priority in choosing the forum (court-martial vs. criminal court) because ‘Military discipline’ and ‘operational efficiency’ require coherence of command. Article 33 permits Parliament to restrict fundamental rights (including procedural rights) for military personnel. Also, Speed and specialised expertise in military trials serve justice. Per Contra, ‘Police Investigative Primacy’- Police must conduct the initial investigation without military interference because Article 21 of the Constitution guarantees fair procedure to all persons, including service members. Investigative integrity requires impartiality; command pressure can skew the collection of evidence. Also, Service members are still constitutional citizens; absolute military control violates due process. *The Paradox: How can the military have "priority" in choosing the forum if the police must retain investigative autonomy until the*

military formally exercises its choice? The answer requires *temporal sequentiality*, which the High Courts have held differently, although the Constitutional Bench judgment of the Supreme Court in *Som Datt Datta's* case unequivocally grants primacy to the Military authorities.

1.3 Why This Matters: A Case Study of P.K. Sehrawat case (J&K HC, 2024). Flight Lieutenant (victim) alleges rape by Wing Commander at Air Force Station, Srinagar (31.12.2023 / 01.01.2024). The Air Force initiates a POSH Internal Committee inquiry on 25 January 2024. Victim files police complaint on 08.09.2024 (after POSH IC finds allegations "not proven"). The police register FIR (370/2024) and begin the investigation. Within 3 weeks (CJM order 10.10.2024), the Magistrate transfers custody to the Air Force (stopping police investigation). The High Court intervenes, quashing the transfer, holding that Section 124 cannot be invoked pre-charge-sheet.

1.4 The Stakes.

For the victim: Does she testify before a court-martial (military tribunal, potentially prejudicial) or a civilian court (open, neutral)?

For the accused: Does he face a swift court-martial (potential military discipline pressure) or a civilian trial (constitutional safeguards)?

For Justice system integrity: Does the military authorities get the first option - *primacy* (undermining the police investigation) or the second option (undermining the military justice system and colouring it as a command influence, as if all investigations by police have concluded in justice)?

2. Constitutional & Statutory Framework

2.1 Article 33: The Constitutional Basis. Article 33 *inter-alia* states that "*Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to members of the armed forces or the forces charged with the maintenance of public order, be restricted or modified.*"

2.2 Interpretation. In *Ram Sarup v. Union of India*, AIR 1965 SC 247 (Constitution Bench), it was held by the Supreme Court that Article 33 permits reasonable restrictions on Part III rights (fundamental rights) for military personnel and that the restrictions must be proportionate

to military exigencies (discipline, efficiency, national security). It was also held that such restrictions cannot be arbitrary or absolute; they remain subject to judicial review under Articles 14, 21, and 32 of the Constitution.

2.3. Application. Section 124 (Air Force Act) and Section 125 (Army Act)—the military discretion provisions—are valid under Article 33 as reasonable restrictions on the accused's right to choose the forum (implicit in Article 21's "fair procedure").

2.4 Concurrent Jurisdiction. Section 71 of the Air Force Act, 1950 provides that any civil offence (like IPC/BNS/POCSO/ POCA/NDPS, etc) committed by an AF personnel can be tried by a court-martial. Sec 72 of the Air Force Act, 1950 provides exception to Sec 71 of AF Act wherein Murder, Culpable Homicide, Rape are not triable by Court-Martial, if the victim is a person who is not subject to any Military Law (Army Act/Navy Act/AF Act), unless it was committed in active service, outside India, or frontier post. In this way, the scheme of concurrent Jurisdiction ensures protection for civilians, but intra-military crimes (e.g., AF vs. AF/Army/Navy) are exempt from this exception.

Section	Provision	Implication
Sec 71	Any IPC/BNS/POCSO/ POCA/NDPS offence committed by an AF personnel is triable by court-martial	Broad concurrent jurisdiction
Sec 72	Exception: Murder, Culpable Homicide, Rape are not triable by Court-Martial, if the victim is a person who is not subject to any Military Law (Army Act/Navy Act/AF Act), unless it was committed in active service, outside India, or frontier post.	Protection for civilians; but intra-military crimes (AF vs. AF vs. AF/Army/Navy) are exempt from this exception.

2.5 Critical Implication. Rape by an Air Force officer against a civilian is not triable by court-martial (civilian protection). But rape by an Air Force officer against a fellow Air Force officer is triable by court-martial (no exception applies). This creates a closed military ecosystem for intra-military crimes.

2.6 Air Force Act Sections 124-125: The Discretion Mechanism

Section	Function	Actor	Timing
Sec 124	Designated Officer's first option to choose a Court-Martial and detain the accused in Air Force custody	Chief of Air Staff or Commanding Officer	Implicitly, at any stage, including during investigation (per Som Datt Datta)
Sec 125	The criminal court's countervailing right to demand the delivery of the accused	Magistrate/ Criminal Court	Post-charge-sheet {as per CrPC/BNSS read with 'The Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1978'}

2.6.1 Interplay: If the Designated Officer (Section 124) invokes Court-Martial jurisdiction and places the accused in Air Force Custody, the criminal court (Section 125) cannot insist. If the Designated Officer does not invoke, the criminal court proceeds. If both claim jurisdiction, Section 125 (AF Act) and Section 518 of the Bhartiya Nagarik Suraksha Sanhita (BNSS) / Section 475 (CrPC) read with 'The Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1978' provide conflict-resolution (Central Government decides).

2.7 Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1978. Rule 3 of the said Rules mandates that the Magistrate cannot try/commit an accused for trial unless the competent military authority has moved or the Magistrate has issued a notice to the competent military authority, and there is no response from the said authority. Also, Rule 4 stipulates that the Magistrate must give a 15-day notice to the military authority before proceeding with the trial. Rule 5 provides that, if the military authority (post-notice) decides on a court-martial, the Magistrate must deliver the accused.

2.7.1 Implication: Rules 3 to 5 contemplate conflict resolution, implying both forums may claim jurisdiction; rules structure the process.

3. Som Datt Datta V. Union of India (1969): The Constitution Bench Doctrine

3.1 Facts & Issues

Som Datt Datta (Army personnel) was tried by General Court-Martial for IPC Sections 304, 149 (causing death by negligence; criminal intimidation). No Rule 5 notice was given by the Commanding Officer to the Magistrate; hence, the criminal court held that it alone had jurisdiction. The Constitution Bench of the Supreme Court (Justice V. Ramaswami) considered whether the court-martial had jurisdiction.

3.2 Holdings

A. Three Categories of Offences

Category 1: Military-specific offences (Sections 34-68 Army Act: mutiny, desertion, etc.) which are exclusively triable by court-martial and the Criminal Court does not have any jurisdiction.

Category 2: Civil offences (IPC offences) under Section 69 of the Army Act, 1950 (pari Materia to Sec 71 of Air Force Act, 1950) has Concurrent jurisdiction (ordinary criminal court OR court-martial, if charged under Section 69 of Army Act/Sec 71 of AF Act, 1950)

Category 3: Murder, culpable homicide, rape against non-military persons (Section 70 of Army Act/Sec 72 of AF Act) are exclusively triable by criminal court (except when committed in active service/outside India/frontier post)

Key Principle: Category 2 creates Concurrent Jurisdiction; the military's option arises only if it formally decides on a court-martial.

B. Primacy of Military authorities

It was held that ‘...*Section 125 of the Army Act (Sec 124 of the AF Act, 1950) presupposes that in respect of an offence, both a criminal court and a court-martial have concurrent jurisdiction. Such a situation can arise in a case of an act or omission punishable both under the Army Act*

as well as under any law in force in India. It may also arise in the case of an offence deemed to be an offence under the Army Act. Under the scheme of the two sections, in the first instance, it is left to the discretion of the officer mentioned in s. 125 to decide before which court the proceedings shall be instituted, and, if the officer decides that they should be instituted before a court-martial, the accused person is to be detained in military custody;

Interpretation. At any stage, including pending investigation by the Police, the Military authorities have the **primacy** in deciding as to which forum, i.e., Criminal Court or Court-Martial to try the accused. If such authority decides to try the accused by court-martial, the accused is to be detained in Military Custody. Detaining the accused in 'Air force / Military custody' and setting the Air force Law/Military law in motion by invoking Sec 124 of the Air force Act/Sec 125 of the Army Act are the two key elements to show intent of the concerned Air force/Military authority. If this is properly done, then the Criminal Court have to leave the case completely to the Military authorities, including handing over of any report/evidence to the said Military authority

C. Military Priority Grounded in Exigencies (Ram Sarup Principle, AIR 1965 SC 247)

While Som Datt Datta itself did not elaborate, the predecessor Constitution Bench in Ram Sarup held that *"There could be a variety of circumstances which may influence the decision as to whether the offender be tried by a Court Martial or by an ordinary criminal court... It becomes inevitable that the discretion to make the choice... be left to responsible military officers... guided by considerations of the exigencies of the service, maintenance of discipline in the army, speedier trial, the nature of the offence and the person against whom the offence is committed."*

Implication: Military priority is conditional, not absolute; grounded in exigencies, not per se superiority. There may be situations where Military authorities prefer not to try the accused by court-martial and instead hand them over to a criminal court. The accused, per se, cannot claim to be tried by court-martial only; it is on the subjective discretion of the concerned military authorities, who will be governed by the exigencies of the military service.

3.3 The Implicit Timing Problem

Som Datt Datta does not explicitly state when the Commanding Officer's option crystalizes. It

simply says that *it is left to the discretion of the officer mentioned in s. 125 to decide before which court the proceedings shall be instituted, giving primacy to the Military authorities*, although it indeed implies that the Commanding Officer can claim the accused at any stage, including during investigation. However, there is no explicit dictum which is visible from the said judgment. The judgment addresses a scenario where no criminal proceedings before a Magistrate had begun; thus, it sidesteps the question: If police arrest and bring the accused before a Magistrate, at what stage can the military claim jurisdiction? This ambiguity persisted for 42 years until S.K. Jha (2011).

4. S.K. Jha Commodore V. State of Kerala (2011): Explicit Timing

4.1 Facts

Three naval officers were arrested on 10.01.2008 for IPC offences (unlawful assembly, rioting, attempted murder). The Commanding Officer (Commodore SK Jha) applied on 14 January 2008 (four days after the arrest) for a hand over for trial under the Navy Act. The Magistrate rejected, holding: "Investigation is at a preliminary stage; application is premature." The case reached Supreme Court.

4.2 Holdings (Justice Rajendra Babu & Justice Markandey Katju)

A. Explicit Timing Standard

"The Constitution Bench while construing Rule 3 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952 read with Section 549 CrPC, 1898 (now Section 475 CrPC, 1973) held that the option as to whether the accused be tried before the criminal court or by a Court Martial could be exercised only after the police had completed the investigation and submitted the charge-sheet and that the provisions of the Rule could not be invoked in a case where the police had merely started an investigation against a personnel subject to military, naval or air force law."

"The stage at which the option can be exercised by the Commanding Officer (as to whether the accused should be tried before a Court Martial or a criminal court) cannot be examined at this stage as the investigation has not been completed and a charge-sheet has yet to be submitted."

B. Application

The Accused were arrested on 11.01.2008. The Commanding Officer's request to hand over the case was on 14.01.2008 (investigation barely started). The Police investigation was ongoing. The court-martial option is premature at this stage. Hence, it was held that the Magistrate was correct in rejecting the Navy Authority's application.

4.3 Doctrinal Clarification

S.K. Jha does not overturn *Som Datt Datta*; it clarifies the timing. Military primacy (affirmed in *Som Datt Datta*) operates only after investigation (charge-sheet filed), not during investigation. In any case, it was not a situation where Section 124 of the Air Force Act / Sec 125 of the Army Act, 1950, was not invoked by the Naval authorities. Hence, the ambiguity continued.

5. Madras High Court (2023): The "Court of Inquiry as Indicator" Approach

5.1 State of Tamil Nadu (Rep. by Inspector of Police) v. Commandant, Air Force Administrative College, Coimbatore (Crl.O.P. No. 23403 of 2021, decided 20.07.2023, 2023 SCC Online Mad 4769 (Justice R.N. Manjula)

A. Facts

The accused Flight Lieutenant Amitesh Harmukh and Flight Lieutenant (victim), both IAF officers. The said incident took place in the intervening night of 09-10 September 2021, where the victim has alleged rape against her by the said fellow Air force Officer at AFAC Officers' Mess, Coimbatore. The Commandant of AFAC ordered a Court of Inquiry on pursuant to the written complaint of the victim. During the pendency of the ongoing Court of Inquiry, the victim filed an FIR with the Coimbatore Police under Section 376 (1) of the IPC and other relevant sections. The Civil Police arrested the accused officer, who was under investigation before the Air force Court of Inquiry. The Commandant AFAC approached the Magistrate for seeking the transfer of the custody of the accused officer to Air Force custody for trial before Court Martial under Air Force Act, 1950. The Ld Magistrate, by order dated 30 Sep 21, passed in C.M.P. No. 20197 of 2021, handed over the custody of the accused to the Air Force authorities. The said Order of the Ld Magistrate was challenged by the Tamil Nadu police before the Principal District and Sessions Court Coimbatore in Criminal Revision Petition No. 22 of 2021. The petition was partly allowed; however, the order of the Ld Magistrate to hand

over the custody of the accused to the Air Force authorities was not revised. Aggrieved, the Tamil Nadu Police had filed a Criminal Original Petition before Hon'ble High Court of Judicature at Madras, which was disposed vide its judgment dated 20 July 2023 in CrI. OP No. 23403 of 2021 and CrI. MP No. 13845 of 2021, holding that the handing over of custody by the Magistrate was proper and holding that subsequent police investigation was not required.

B. Justice R.N. Manjula's Key Holdings

1. Section 124 of AF Act, 1950 - Timing.

"Under Section 124 Air Force Act, competent authority has first option to decide whether accused tried by Court Martial or criminal court. If authority decides Court Martial, it can direct detention in Air Force custody. Priority justified by... Balbir Singh v. State of Punjab, (1995) 1 SCC 90."

2. Court of Inquiry as Jurisdiction Indicator.

"Court of Inquiry = Jurisdiction Indicator: AFAC initiated CoI pre-FIR. This signaled Air Force's jurisdiction assumption under Section 124. (Som Datt Datta principle: military assumption of jurisdiction is valid exercise)."

Critical Implication: If military initiates a formal Court of Inquiry pre-FIR, this constitutes an implicit exercise of Section 124 discretion, validating custody handover even before police charge-sheet.

3. Rape Jurisdiction (If Both Parties Service Members):

"Rape NOT triable by Court Martial under Section 72 exception when victim is service subject. Rape by Air Force officer against Air Force officer = Section 71 offence (triable by Court Martial)."

4. Outcome: Petition dismissed; court-martial trial proceeded.

C. Victim Protection Directives

Justice Manjula criticised AFAC's mishandling. The High Court held that the victim was pressured to withdraw the complaint (twice). The evidence (biological specimen, bedsheet)

was delayed for forensic examination. The accused was permitted to move freely on the campus.

Directive: Central Govt. must implement POSH Act committees, victim protection protocols, gender sensitization training.

5.2 Doctrinal Significance

Madras HC's Innovation: Suggests that the military can assume jurisdiction early (pre-charge-sheet) if it has initiated a formal Court of Inquiry. This represents a divergence from S.K. Jha's strict post-investigation requirement.

Reasoning: The Court of Inquiry (CoI) pre-FIR signals the military's jurisdictional claim. Military commitment to inquiry shows institutional interest and that the military is exercising Section 124 discretion early. The judgment categorically highlights the application of Som Datt Datta's case in the Supreme Court.

6. J&K High Court (2024): Corrective Clarification

6.1 P.K. Sehrawat v. Union Territory of J&K & Ors { CRM(M) 562/2024 c/w Bail App 105/2024 & CRM(M) 643/2024, decided 27.11.2024 (Justice Javed Iqbal Wani) }

A. Facts

Wing Commander P.K. Sehrawat (accused, 43 years) and Flight Lieutenant (victim), both IAF officers. The alleged incident of Rape took place on 31.12.2023 / 01.01.2024 at Air Force Station, Srinagar. POSH Internal Committee Inquiry concluded that the allegation by the victim "Cannot be confirmed" (not proven). Not satisfied with the findings of the Internal Committee, the victim filed a Police Complaint and an FIR was registered on 08.09.2024 (FIR 370/2024). The accused AF officer filed a petition before the J&K High Court for quashing the FIR based on the findings of the POSH IC and contended that the allegations were malicious. In the meantime, the Indian Air Force sought the transfer of the case from the Magistrate's court to the Court-Martial in terms of Section 124 of the Air Force Act, 1950. The Magistrate ordered the police to stop the investigation and handed the case over to the Air Force. The J&K High Court {CRM(M) 643/2024} had reversed the order of the Magistrate and ordered the Police to continue the investigation.

B. Justice Javed Iqbal Wani's Holdings (27.11.2024)**1. Section 124 Timing – RIGID POST-CHARGE-SHEET REQUIREMENT**

"Section 124 Air Force Act's discretionary power to choose between court-martial and criminal court must be exercised ONLY AFTER police investigation is complete and charge-sheet filed, but BEFORE the Magistrate takes cognizance—not during investigation."

2. Explicit Rejection of Madras HC's "Court of Inquiry as Indicator" Approach

"Unlike Madras HC case:

(1) Court of Inquiry was initiated pre-FIR and cancelled after 2 days (not an indicator of sustained jurisdiction assumption);

(2) Internal Committee finding is inconclusive, not a trial;

(3) No formal written Designated Officer decision for court-martial issued;

(4) Section 124 requires explicit, formal decision by Designated Officer, not mere reference to IC."

3. Formal Written Decision Requirement

"Air Force has NOT formally invoked Section 124 (no written Designated Officer order for court-martial). Formal decision is mandatory. Magistrate's pre-charge-sheet handover orders quashed as premature."

4. Police Investigation Primacy

"During the investigation phase, police operate with primacy and unfettered discretion under Chapter XII BNSS to conduct probe without Air Force interference. Only post-charge-sheet does the Air Force's Section 124 option crystallize."

5. FIR Quashing Petition – DISMISSED

"FIR discloses cognizable offence; allegations detailed; Internal Committee (IC) "inconclusive" findings are not of exoneration. IC is preliminary, not a trial. Mala fides

secondary at the investigation stage (as per SC in Golconda Lingaswamy v. State of A.P.: 'material collected during investigation and evidence led in court which decides the fate of the accused')."

6. Transfer Petition – PARTLY ALLOWED (with Clarification):

"Quashed: CJM pre-charge-sheet transfer orders (10.10.2024, 16.10.2024).

Continued: Police investigation unfettered.

Post-Charge-Sheet: Air Force's Designated Officer at liberty to formally invoke Section 124 (written decision required); Magistrate shall comply with custody handover (no discretion to refuse if properly made).

Timing: Decision must come after charge-sheet filing but before Magistrate's cognizance."

C. Outcome

1. CRM(M) 562/2024 (Quashing by accused): DISMISSED (FIR valid; investigation continues)
2. CRM(M) 643/2024 (Transfer by Air Force): PARTLY ALLOWED (post-charge-sheet option preserved; pre-charge-sheet transfers quashed)
3. Bail App 105/2024: DEFERRED to 10.12.2024

6.2 Doctrinal Significance

Explicitly rejects Madras HC's flexible approach.

It Mandates:

1. Post-charge-sheet timing (explicit)
2. Formal written decision (mandatory)
3. Police investigation primacy (until charge-sheet)

Reconciliation with Som Datt Datta:

It affirms military primacy in principle. However, it limits temporal application to the post-

investigation window. It preserves investigative integrity during a police probe.

6.3 Present Status of the Case. Both the Union of India and the accused officer have approached the Supreme Court. The orders of the J&K High Court, together with the FIR and the Police investigation, have been **stayed** by the Hon'ble Supreme Court vide its order dated 10 Jan 2025 & 06 Jun 2025. Both petitions have been tagged together under the title 'PK Sherawat Vs UT of J&K & Ors (SLP (Crl) No. 95/2025)' and are pending adjudication on their merits. The UOI has made a specific request to determine the temporal inconsistency which is being applied differently by various High Courts without taking into account the law laid down by the SC in the Som Dat Datta case. As on date, the matter is *subjudice* before the SC.

7. COMPARATIVE ANALYSIS: THE THREE APPROACHES

7.1 Key Differences

Issue	Som Datt Datta (1969)	Madras HC (2023)	J&K HC (2024)
Timing	Implicit (post-Magistrate)	Flexible (pre-charge-sheet if CoI)	Rigid (post-charge-sheet)
CoI Role	Not addressed	Jurisdiction indicator	No jurisdictional effect
Written Decision	Implicit (Rule 5 notice)	Not applicable (since Sec 124 of the AF Act presupposes Section 125 of the AF Act as per the Som Dat Datta case)	MANDATORY
Police Autonomy	Implicit	Overridable if CoI initiated	Paramount until the charge-sheet
Magistrate Duty	Hand over if the military moves	Presume military assumption if CoI	Hand over only if a formal decision + charge-sheet

Issue	Som Datt Datta (1969)	Madras HC (2023)	J&K HC (2024)
Philosophy	Military-centric	Hybrid	Police-centric (investigation) + Military-centric (post-charge-sheet)

8. CRITICAL INCONGRUENCIES

8.1 Incongruency #1: Temporal Ambiguity (Madras HC vs. J&K HC)

Problem: Two High Courts (2023, 2024) have offered conflicting interpretations of Section 124 of the AF Act, 1950, regarding the timing. Madras HC permits early assumption (CoI as indicator); J&K HC mandates rigid post-charge-sheet requirement.

Impact: There is a legal uncertainty for military authorities, police, and magistrates. It creates a risk of forum shopping (pick a favourable HC judgment). It also creates inconsistent victim treatment across jurisdictions.

Reform: The Supreme Court may wish to establish a binding doctrine clarifying the timing, taking into account all permutations/combinations in cases of concurrent jurisdiction.

8.2 Incongruency #2: Parallel Inquiries & Victim Victimization

Problem: A Single incident of rape may trigger three parallel processes, namely, POSH Internal Committee (administrative, non-penal in nature), Police Investigation (criminal, evidence-gathering), and the Court of Inquiry (military fact-finding body akin to Police investigations under BNSS, and collection of evidence to make a prima facie case against the accused).

Victim Impact: The victim may have to undergo the rigours of rendering multiple depositions before various statutory forums. These three statutory procedures may conflict with each other and, at times, may be repetitive, creating a significant toll on the victim. Justice is likely to be delayed due to the multiplicity of statutory forums/procedures, which are inconsistent with each other. It may trigger Secondary victimisation (re-traumatisation).

Reform: Enact the "Military-Criminal Justice Coordination Act" mandating that the POSH IC

proceedings must be '*stayed*' if a criminal investigation (under BNSS) / Court of Inquiry (Military law) is initiated stemming from the same incident. POSH IC must resume only if the accused is acquitted by a criminal court / military Court-Martial, and that too at the instance of the victim.

9. RECOMMENDATIONS FOR REFORM

9.1 Statutory Clarification: Amend Section 124 (Air Force Act, 1950)

Proposed Section 124-A:

"Timing of Discretion:

(1) The Designated Officer's discretion to institute proceedings before a court-martial under Section 124 shall be exercised at all convenient speed as soon as the offence/misconduct of the person(s) subject to the Air Force Act is brought to the notice of the said officer.

(2) Court of Inquiry or Formal Investigation shall be deemed as an exercise of Section 124 discretion. The formal discretion requires a written order by the Designated Officer specifying the offence/misconduct, decision to try by court-martial, date, and authority.

(3) The Central Govt may make rules to standardise such an order of the Designated Officer and a list of addressees to be informed, which may include the jurisdictional magistrate where the alleged offence has been committed, in addition to other authorities, which may include the concerned Officer in-charge of the jurisdictional Police station.

(4) The Designated Officer may also hand over the accused with a statement of offence/misconduct to the jurisdictional magistrate, in case he decides that the accused ought not to be tried by a Court-Martial and that he be tried by a criminal Court, for reasons to be recorded in writing. Such written orders shall also be communicated to all relevant addressees, in addition to the concerned Officer in-charge of the jurisdictional Police station.

(5) Once the powers of the designated officer are exercised for trying an accused in terms of the Act by a court-martial, all subsequent actions by the Police/Judicial Magistrate, including investigations/inquiry/trial, if any, pending under the criminal law of the land, on the same cause of action, would be non-est in law.

(5) *The powers excisable by the designated Officer under this section would be in addition to any other powers exercisable by him by any other law for the time being in force”.*

Benefit: Eliminates ambiguity; ensures primacy of military authorities in both investigations and trials. This will meet the objectives of enactments of special statutes, such as the Army/Navy/Air Force Acts, for specialised military-criminal law procedures, which are in harmony with Article 33 of the Constitution and enhance operational efficiency/Strict military Discipline.

9.2 Victim Safeguards: Coordination Protocol

Proposed "Military-POSH IC Justice Coordination Act":

Part A: POSH IC & Military Investigation Alignment

(1) *If a complaint is filed to both the POSH IC and the Military authorities, IC proceedings must stay pending the completion of the Military investigation, either through a court of Inquiry or a formal Investigation.*

(2) *If the charge-sheet alleges rape/sexual assault (triable offence), the POSH IC does not resume unless the accused is acquitted by a criminal/military court.*

Benefit: Reduces victimisation; coordinates parallel processes.

9.3 Doctrine Clarification: Supreme Court Pronouncement

Recommendation: The Supreme Court may like to pronounce a binding doctrine in the pending concurrent jurisdiction case:

"Doctrine of Substantive & Temporal Primacy":

Military authorities have both substantive and temporal primacy (first option) to choose court-martial over the Criminal court. However, this primacy is subject to the expediency of military service. The principle prevails at all stages of criminal law, whether during inquiry, investigation, trial, or otherwise.

Benefit: Binds all High Courts; eliminates divergence (Madras vs. J&K); ensures nationwide

consistency.

10. CONCLUSION

10.1 Synthesis

The concurrent jurisdiction doctrine governing military and civilian trials has evolved over 55 years:

1. Som Datt Datta (1969) established military substantive priority but left timing implicit.
2. S.K. Jha (2011) clarified that timing is post-investigation (post-charge-sheet).
3. Madras HC (2023) mandated it as an early assumption if the Court of Inquiry is initiated pre-FIR.
4. J&K HC (2024) deviated, affirming it as post-charge-sheet timing and mandating a formal written decision.

Central Finding: The "primacy paradox"—military substantive priority vs. temporal sequentiality can be resolved through clear statutory amendments and judicial pronouncements giving primacy to military authorities in the discretion considering military expediency and strict disciplinary requirements of the Armed Forces whose primary function is to uphold the sovereignty of the nation.

10.2 Remaining Incongruency

Parallel Inquiries: POSH IC + police investigation + CoI can victimise complainants; no coordination protocol.

10.3 Path Forward

Recommended Reforms:

1. Statutory Clarification (Section 124-A): Fix temporal window; mandate formal written decision.
2. Victim Safeguards (Coordination Act): Stay POSH IC during criminal investigation.

3. Doctrine Clarification (SC Pronouncement): Bind all courts on the "***Substantive & Temporal Primacy***" doctrine.

These reforms will reconcile the dual demands of military law—discipline and due process—and ensure that accused service members enjoy constitutional fairness while respecting military exigencies.

11. REFERENCES

Constitutional Bench Judgments

- Som Datt Datta v. Union of India, AIR 1969 SC 414; (1969) 2 SCR 177
- Ram Sarup v. Union of India, AIR 1965 SC 247; (1964) 4 SCR 931

Supreme Court Judgments (Post-1969)

- Balbir Singh v. State of Punjab, (1995) 1 SCC 90
- S.K. Jha Commodore v. State of Kerala, (2011) 15 SCC 492
- Army Headquarters v. CBI, (2012) 6 SCC 228
- State of Sikkim v. Jasbir Singh, Criminal Appeal No. 85 of 2022 (01.02.2022)

High Court Judgments (2023-2024)

- State Rep. by Inspector of Police v. Commandant AFAC, Madras HC CrI.O.P. 23403/2021 (20.07.2023), 2023 SCC Online Mad 4769
- P.K. Sehrawat v. UT J&K, J&K HC CRM(M) 562/2024 (27.11.2024)

Statutes

- Constitution of India (Articles 14, 20-22, 33)
- Air Force Act, 1950
- Army Act, 1950
- Navy Act, 1957
- Bharatiya Nagarik Suraksha Sanhita, 2023
- Prevention of Sexual Harassment Act, 2013
- Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1978

Chart 1: Timeline evolution (1969-2024) showing doctrinal shift from implicit to explicit timing requirements



Chart 2: Comparative matrix across eight dimensions (timing, CoI role, police autonomy, victim protection, etc.)

Military vs Civil Jurisdiction in Section 124 Cases (1969-2024)

Evolution from military-centric to procedurally rigorous framework

Dimension	Som Datt Datta v. UoI (1969)	Madras HC (2023)	J&K HC (2024)
Timing of Section 124 Exercise	Implicit post-Magistrate stage (not pre-charge-sheet explicit)	Flexible: Pre-charge-sheet if Col initiated (jurisdiction indicator)	Rigid: Post-charge-sheet only, before cognizance (formal decision required)
Role of Court of Inquiry (Col)	Not expressly addressed	Col pre-FIR = presumptive Section 124 exercise; validates early jurisdiction claim	Col cancelled after 2 days; mere Col initiation insufficient; no jurisdictional effect without formal Section 124 decision
Police Investigation Primacy	Implicit (assumes military can act first)	Acknowledged but overridable if military has initiated Col	PARAMOUNT during investigation phase; unfettered until charge-sheet filed
Rape Jurisdiction (Both Victim & Accused Service Members)	Not addressed (pre-POSH era)	Section 72 exception NOT applicable if victim is service subject; triable by court-martial	Agrees with Madras HC but emphasizes formal military decision requirement
Victim Protection Focus	Not addressed	Explicit focus; noted AFAC's victim-insensitive handling; directed POSH implementation	Explicit focus; rejected parallel inquiries; IC findings irrelevant to FIR; victim voice in forum choice
Magistrate's Discretion (in handling Section 124 request)	Limited (once military moves, Magistrate delivers)	Limited (if Col exists, Magistrate should presume jurisdiction assumption)	MANDATORY compliance only if: (a) written Section 124 decision received post-charge-sheet; (b) before cognizance. No discretion to refuse properly made requests.
Formal Written Decision Requirement	Implicit (Rule 5 notice contemplated)	Not explicitly required; Col initiation suffices	MANDATORY: Explicit written Designated Officer order specifying offence, decision to try by court-martial, date, authority
Overall Approach & Philosophy	Military-Centric (priority; efficiency; early jurisdiction assumption)	Hybrid (military priority + early assumption if formal inquiry initiated)	Police-Centric during investigation; Military-Centric post-charge-sheet (primacy with temporal sequentiality)