CHAPTER II
EVOLUTION OF LAW AND CONCEPT OF
TENURE AND TERMINATION IN DEFENCE
FORCES
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Prelude

Anthropological studies have revealed that ‘man appeared on the face of earth about 5.6 million years ago’.\(^1\) With the evolution of human species, the need for peaceful co-existence overtook everything else. The family, the village the communion and later the State were formed. Need for a king and law in the society was felt by the mankind to maintain the order. Justice occupied the central place and King was anointed with the authority to adjudicate all matters. Slowly and steadily, the judicial function was vested on an independent body, the courts. Hence, the third organ of the government, the judiciary was born. This strong edifice of the State was adequately protected by a regular defence force administered by the Fiat of the King and later by the Parliament. As the forces were composed of different elements, so the different rules of employment were promulgated for them, by the royal fiat, by laying down different conditions for tenure and termination for each one of them. It was indeed a long journey from where it began.

Referred to as ‘Jambudvipa’ during the prehistoric times, India, a union of twenty nine states and seven Union territories has been a unique blend of cultures, beliefs, traditions,

\(^1\) A.L. Basham, The Wonder that was India: A Survey of the culture of the Indian sub-continent before the coming of the Muslims (Sidgwick and Jackson, London, 1954, p. 3. (From about 400,000 to 200,000 B.C., man first left surviving traces in Punjab).
religions, languages, and topography - a marvellous blend of variety. The country has risen from the rich and lustrous Indus, the Harappan and the Mohenjo Daro civilizations. The system of Military justice was not alien to the early settlers. The emphasis was on following what Manu had ordained in his Institutes? The seers at individual level were discovering new philosophies. Study of the prehistoric literature reveals that simultaneously, the defence forces and the different trends in their service conditions in India have evolved with the evolution of the other fields. The land, air and the marine forces of India today comprise of men chosen from the greatly diverse cultures and upbringings, traditions of gallantry, chivalry and compassion. Hence, the consequent diversity and the richness of tradition which has come to dominate the defence forces of India and also the defence history which had its typical high and low points. For instance, the rise and fall of the great Magadha Empire, the Guptas, the Cholas, and the Chalukyas imperatively contributed to the evolution of its service conditions one way or the other. For the ease of understanding, we generally divide the Indian evolution into three periods viz., (i) ancient, (ii) medieval, and (iii) modern. The modern period is further studied under two heads viz., (a) pre-independence and (b) the post independence modern periods. Evolution of the concept of tenure in the defence forces and their termination, by various authorities, has to be therefore, seen in the same order and in the light of the factors responsible for evolution of the Military system of administration in India.
2.1 Ancient Period

The period of the ancient age is taken to be between the earliest times to the 7th Century A.D. The study of the evolution of the subject of tenure, termination and processual justice thus starts with the Vedic age. Viewed legalistically, the essence of all relationships in the society ever since its inception has been the obligation between the master and servant. Even before the word rajya or the state came into being, the individual human interactions were governed by the issue of necessity. The Arya (Anglicised as Aryans), as the males in the society were usually addressed, set for themselves and for those who were with them, a code of conduct, whose violation was met with reprisal from karta- the executive head of the family. The legendary episode of the famous Vasishtha and the Vishwamitra who came from vedic age of the Brahmarishi and the Rajrishi cults respectively, reveals the development of two distinct ideological schools in Aryavarta. Vasishtha was known to have attained immortality as he had the realisation of the ultimate reality while Vishwamitra came from the ruling class of the Aryavarta. Sage Vishwamitra was later credited with the creation of the inimitable Gayatri which is considered as his sole and singular accomplishment. Discovery catapulted him to the lofty position of a Brahmarishi, settling all disputes between him and Vasishtha. Gayatri is considered as the brightest jewel in the universe of knowledge as the Sun is in the solar system. The land of Aryans, the area between the three rivers viz., the Ganges, the Yamuna and the mythological Saraswati, initially inhabited by the early settlers as they are believed to have descended from the Central Asia and

3. *Supra note.1*, p.3& 28.
4. *Ibid*.p.3. The continent was earlier called as the Jambudvipa(The continent of Jambu tree).
propounded the philosophy of objective karma, which set the foundation of new social order. Service which was on variable terms was meant either to the Arya i.e., an individual or to a school of thought. The sole authority of retention and removal was thus reposed in the hands of the karta. This philosophy was not confined only to the Northern region between Sutlej and Yamuna rivers but this was the time when the southern India watered by the sacred Krishna, Cauvery, Narmada and Tapti rivers was dominated by Agastya, Kapil and the Lopamudra, (the woman seer) who too were engaged in the creation of the Vedas and by and large followed the similar trend. In the East, the law on service evolved along with the great Brahmaputra river, in the valley of Assam, the eastern most outpost of Hindu culture. As the conglomerate humanity was yet to set its root on the earth, and no material about inhabitants of other parts of the planet were available. The Vedas thus become the most authentic source of knowledge and information about the mankind. The Rig Veda being a great collection of hymns, became the most sacred text of the inhabitants of this region.

Since the concept of tenured appointments was almost not in existence during the Vedic period, retention or termination in service, of the rank and file in all walks of life, during the period depended solely upon the accomplishment of the assigned tasks. The responsibility of accomplishment, within a particular period

5. Ibid., p.31 (Called as Sutudri).
7. A vast majority of the Rig Veda is believed to have been composed during the times of Agastya and the Lopamudra in the far south. The great Pandian dynasty is believed to have preserved these rare relics until the great deluge of the south submerging under the sea major portion of Sumeru and the Gondvana. Reading of commentaries on Vedic literature would reveal a strong trend among the Aryans to forge new alliances with the Southern, Eastern and Western India.
8. Supra note 1, p.2.
9. Ibid., p.2.
of time, lied with the subordinates. To make it binding, it was made sacrosanct and reprehensible in case of violation.

The Hindu jurisprudence or the legal system was embedded in Dharma—an expression of the widest import. Dharma in relation to the defence forces in this period cannot therefore, be construed anything beyond the performance of the duty as stipulated in the Dharma Shastra, part of which then was written and part thereof was unwritten but understood by everyone by usage. The first known law giver is the Manu and also the first one to say how important for the mankind was adherence to Dharma. Besides the fields uncovered by the Srutis and Smritis, which do not reveal any direct reference to the concept of tenure or termination, it is constructed from the exhortations and references made in these compositions. Other prominent compositions of the early period are of Narada, Parasara, Shukra, Yajnavlakya, Vasishtha and the Bhardwaja. These texts were originally seen as religious texts but with Dharma being taken to be an ordained duty, these are taken as treatises on law on all fields including the service in defence. The concept of tenure, termination and removal etc., is additionally inferred from the accounts of relationship of master and servant as it existed then and the related similes. Following verses from the Rig Veda amply illustrate the point. :-

_Udveyam Tamaspari jyotishpashyant uttaparam, Devam devatra surayamganma jyotiruttamam !_

11. Ibid.
12. Manu,‘Do not destroy dharma so that you may not be destroyed’ as quoted by Justice M. Rama Jois.
13. Verse 10, Rig Veda; also see Max Muller, ‘Sacred Books of the East.’
(Beholding the upspringing light above the darkness, we approach Surya, among the gods, the excellent light.)

Exhorting the power of Sun who lords over the firmament as a mighty king, saving his subjects from the enemy seeking submission to his kingly might, the next shaloka too is replete with a profound invocation which is as follows:-

_Ugdadayamadityo vishwayn sahasa saja, dwishantam mahayam randhyanmo aham dwishateyradham!_

This Aditya (the sun) has risen, with all his might and resplendence, annihilating my foe, for I am unable to resist my adversary. The all powerful king here is the god of gods, the Sun and his suzerainty extended over all those who lived in his light. In other words, this is an order for complete submission to the authority of the king.

As we move out of the _vedic_ period, two great Indian epics emerge in the firmament, viz., the _Mahabharat_ of the _Vedavyas_ and the _Arthashastra_ of _Kautilya_, as the two major treatises on the subject of the ‘State’, its constituents of which the _Armed forces_, the _King_ and the _Senapati_ (the _General_) are the most essential part and the functionaries. As observed by A.L. Basham, about 183 BC, Pushyamitra, a Brahman General ended the reign of Mauryas and succeeded to the throne of Magadha. He was throughout his reign referred to by the single title _Senapati_, or _General_ and he exercised all the power of royal prerogative on tenures and termination. The Chinese Buddhist monk _Fa-Hsien_ who also came around 700 years after Megasthanese observed that the administration of those times was mild.

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14. Verse 13, Rig Veda.
2.1.1 Dharma, Swadharma and Raj Dharma

The tenure of employment was dependent upon the adherence to the laid down code and the evolution of human interaction in the social, political and commercial fields centered on the vinimaye, the business, which had its roots fixed to the relationship of the master and the servant. All human activity was governed by swadharma\textsuperscript{15} i.e., one's own code of conduct. \textit{Dharma eva hato ahaṇi, Dharmo rāxati rāxata;}\textsuperscript{16} i.e., Dharma protects those who protect it but those who destroy it, perish.\textsuperscript{17} Thus Dharma which actually meant one's own rightful duty enjoined by some outward agency was simply evident to everyone and everyone performed or forbade in Dharma as understood by him/her; whether a master or a servant, a senior or a subordinate. It was a Stateless society, partitioned by the Varna, each acting as per its respective Dharma. Dharma as a code of duty was again divided into two viz., the vyavahar Dharma\textsuperscript{18} and the Raj Dharma,\textsuperscript{19} the rule of social and economic intercourse and the rule of the State also known as the rule of law. This was basically responsible for the establishment of the egalitarian society; the tenures were not fixed and those varied from a few days to many years. Everything was in fact tested on the anvil of social order. Justice M Rama Jois, Judge Karnataka High Court in his book ‘Legal and Constitutional History of India’\textsuperscript{20}, wrote that ‘in the Vedic society, the State of Dharma was required to be always maintained for peaceful coexistence and prosperity.’\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{15} Supra note. 2, also see 2:31, The Bhagwad Gita- Swadharmapi, Chavekshaye.
\item \textsuperscript{16} Supra note.12.
\item \textsuperscript{17} Ibid.
\item \textsuperscript{18} Supra note.10, p.9.
\item \textsuperscript{19} Ibid.
\item \textsuperscript{20} Ibid.
\item \textsuperscript{21} Supra note.10,p.8.
\end{itemize}
Dharmarajya was the rule of law and the Dharma here represented the law. Manu, the law giver, believed that orderly society would be in existence if everyone acted according to Dharma and protected Dharma i.e., action as per volition but within the prescribed limits of Dharma.\(^{22}\)

It is crystal clear that in the Indian subcontinent, the first comprehensive account of State, its components, functionaries, their duties and liabilities etc., was contained in the Mahabharat. The epic is divided into eighteen Parvas, each dealing with separate aspect of life. The epic theorises ‘the just war’ and lays down rules of conduct which are relevant till date. The researcher has to find in between the long discourses and dialogues, the essence of his subject, the tenure under the king and King’s powers to terminate - exercise of which was the predominant function of the king.

King's authority arose from the various yajnas like the Rajasuya, Vajpeya and ‘Ashwamedha’ performed by him and under his suzerainty, evolved the laws and procedures of services. Revealing episodes of Mahabharat like shifting of command of forces to Bheeshma then to Drona followed by Karna and then Duryodhana himself assuming the command during the battle of Kurukshetra, are the testimony of variation in tenures and promulgation of removals. In the Arthashastra’ or the ‘treatise on polity’ of Kautilya. written during 322 and 300 B.C. and comprising of 15 parts, the Arthashastra is considered as the masterly treatise on State craft and a valuable source of information on State administration of which the governance of defence forces constituted an inseparable part.

\(^{22}\) Ibid., p.7.
2.1.2 Termination of Service and Concept of Danda

It is not disputed that tenures are variable, but the terminations are invariably punitive and are found to be closely associated with the theory of punishment. Adverting to the ancient concept of punishment, Danda was synonymous with punishment but every kind of Danda, liberally expounded in the Shanti Parva of Mahabharata,\(^\text{23}\) required the royal fiat and the State was in any case supreme. The forces ensured that the State always remained as an integrated whole; what Dr Nagendra termed as ably protected\(^\text{24}\). But the existence centered on duty and sustenance. The first sutra of the Nitivakyamrta recites, “Let us first bow to the State for the sake of dharma and artha.”\(^\text{25}\) The role of the defence forces was thus not envisaged to be as varied as it is today. Though obedience appears to be a rule and yet it was not unqualified. The conduct occupied a higher pedestal “The rule of conduct is transcendent law”, declared the Manusmriti\(^\text{26}\) The concept of fixed tenures are not evident from the epics. Traces of superiority of the will of the ‘King’ or the authority appointed by the ‘State’ as it was, are seen in the scriptures. With the evolution of the institution of ‘king’, the exposition of rule of law centered on the State and its central authority- the king himself. This is evident from the writings of Kautilya. Kautilya wrote that the ruin of the society is wrought by the mutual quarrels.\(^\text{27}\) What puts to rest all squabbles is the authority of a strong king.\(^\text{28}\) Manu was the swayambhu (the self

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25. Ibid.
27. VR Mehta, Foundation of Indian Political Thought, (Manohar, 1992).
created), hence, became the king as a matter of right. Since all acted according to dharma, there was no violation of the code. The law of tenures, and termination in a crystallized form had to take its birth! Interpreted literally, violation of dharma understandably meant cessation of rights. *Dharma eva hato ahanti* i.e., destroyer of dharma must perish was the clarion call of the times of Vedas and a later part of history. Law on tenures cannot be separated from the system in vogue. The “*Dandaneeti*”, was an expression liberally used by Kautilya in his writings and sayings. From this record, Kautilya established himself as an exponent of *harsher punishments* for acts against the State and the king. Adverting to the Dwapar period of the Aryavarta, we find among the great seers, the one inimitable scholar and warrior, the great *Bheeshma*, who was adept in wisdom and valour at the same time and he gave to the world a lesson on kingship.

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29. Dr. R Shamasastry, *'Kautilya’s Arthashastra'*, Seventh Edition (Mysore printing and publishing house, Mysore, India 1961); also see A.L. Basham, p.79.

30. Renderings of the great epic, the Mahabharata by various authors brought forth the varied shades of this composition by the Vedavyasa. The one which gives out a comprehensive and interesting rendering of this treatise, is the one by Ramesh Menon. Written in two volumes the researcher has found it to be an authentic account of various Parvas in simple and comprehensible English. In the Shanti Parva, the author paints the scene of the battle field of Kurukshetra and the Lion of the Kurus, the Bheeshma, lying on the bed of arrows in the battle field of Kurukshetra while explaining the secrets of the Statecraft and other wisdom to Yudhishtra, who was the emperor to be of the Great Kurus of Hastinapur, speaks thus, “Long ago, in the ages of krita and treat, there were no kings and kingdoms. The world was one, and all men lived as one in love, sharing the plenitude of the earth. The pristine spaces of nature were man’s inheritance and he was fulfilled in them, he rejoiced in them. All men were like brothers; they cared for one another as parts of themselves. As time advanced, evil crept into the hearts of men. Covetousness was the first darkness to cloud the light of men’s minds: they became greedy, and wanted possessions. Ancient man was free of such possessiveness; he knew his natural place in the order of things, and exulted in time on its subtle fruit of wisdom and delight. The first step towards darkness was covetousness, but lust was not far behind. Lust never hunts alone; wrath arrived with it. The age grew dark, and
A careful reading of the extracts of Mahabharata would reveal that the king was first required to understand the purpose of his being the King. This duty is seen to be extended to the servants exercising powers on his behalf. As the king occupied the throne till his life time and the king had to relinquish his throne after certain age, despite this the Aryans of those days were subject to the dictates of the Ashrams, these points Clarifies that tenured appointments were not much in vogue during that period. The historians advert to the early law givers on all points of relevance. Manu is considered as the first law giver to the mankind. This belief has not weakened over the time rather it has grown stronger more than ever. Even the foreign scholars of Vedic history have in one voice echoed this belief. Noting about the duties of the head of State, Manu said, “all pervading function of the head of State for which he is created, is the protection of his subjects.”

anarchy and confusion swept the world. The original Veda vanished from the lips and the minds of men; dharma vanished with the Veda. The guardians of the world, the Devas took panic and came trembling before their sire Brahma in his Sabha. Indra cried, ‘Lord the world you created is plunging towards destruction. You must save it.’

It was then that Brahma composed the Neeti Shastra, an interminable treatise on conduct. It contained a hundred thousand edicts. So far, men had been pure, and had needed no more than their untainted natures to be their guru. Now they were corrupted, their hearts had grown dark; they had need of a law outside themselves. When there is a law, someone must enforce that law. First time, men were divided into rulers and the ruled…………

A man called Vena was chosen to be king. From Vena’s right arm, a son was born and he was as glorious as Indra. He was born wearing a coat of mail, and with all the occult and earthly weapons. He was born knowing the Vedas and the Shastras, the art of war and of kingship, and all the other arts, too. His name was Prithu and the rishis made him king of the world. Men said, in those days, that Prithu was the eighth son of Vishnu himself. …………… It was Prithu who first established dharma in the world, and elevated it above all else. Prithu brought peace and righteousness back to the earth, and because the people loved him, he was called Rajan: he who pleased all men; because he healed men’s sick minds, he was also called Kshatriya; because earth was pervaded by virtue during his reign, she was named Prithvi, after him.” (Ramesh Menon, ‘The Mahabharata, A Modern Rendition, Vol II’, Rupa & Co. (2004))
2.1.3 Rule on Tenured Appointments

This philosophy is found reiterated in the writings of Megasthanese and Kautilya viz., the ‘Indica’ and the ‘Arthashastra’ respectively. disposition of service is well explained by the examples given by these two. ‘Megasthanese much admired the Emperor Chandragupta for his energetic administration of justice, which he presided over personally in open darbar (Sabha)’.31 For instance description of dasa or the slave by Kautilya and Doulas (Greek) by Megasthanese meant the same person but both differed in their liability. Dasa (slave) for Megasthanese is a human being sold for ever with no ‘rights’ even as a human; master could dispose him of the way he willed. Dasa in Kautilya’s times, however, had a specific relation with respect to the services provided. His or her rights were only suppressed and not dissolved. Hence a relationship of master and servant howsoever feeble still existed between the two. Rights of dasa were redeemable and unlike the west were not extinguished. So the concept of tenure and termination had indeed taken root in India as early as 4th and 3rd century B.C.

Similarly, accounts of master-servant relationship which have been explained in the Shanti Parva of Mahabharat too exhorted mutual respect between the two. Srimad Bhagwat Puran eulogizes the concept of mutual rights as Lord Krishna tells his childhood friend Uddhava, “Panchatma Keshu Bhuteshu Smaneshu cha Vastutah”32 i.e., all beings are composed of five elements which are constant in all. Hence, there is no distinction

31. Supra note. 1,p.51.
between one and another except that of responsibility. Non fulfillment of responsibility can however, be a ground for removal from service i.e., divesting the incumbent from the responsibility itself. Sitting as a presiding judge in Family Court, Lord Denning gave to the world the famous dictum, *what is sauce for the goose is sauce for the gander*. In other words, state cannot use different standards for people similarly situated. In the same way the principle of *audi alteram partem* is understood in the Indian Jurisprudence as a principle of natural justice. If the five elements are similar in all living beings, their rights and liabilities too are similar. State is thus obliged to ensure full extension of rights while extracting from them adherence to duties. Pat and swat need to be set in balance at all times.

*Kautilya* has observed that no Aryan shall be reduced to slavery except at his own option and dire necessity. This also shows that the relationships of this nature stood on a pedestal different from that which is recognised in the order of tenure and termination and were, therefore, distinguishable. Kautilya also refers to the teachings of other thinkers of his time as also the profound thoughts of the omniscient yore. His views about command reflect his reliance on the pristine thought as he records, *Teachers say that the word *sasana*, command are applicable only to the royal writs (*sasana).* Command thus

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34. Dr. R. Shamasastry, *Kautilya's Arthashastra*; Seventh Edition, (Mysore printing and Publishing house, Mysore, India 1961); also see Chapter XIII p205 and preface to the same edition by the author dated 15th January 1915.

35. Ibid., p.71.
occupies a place of high importance in the field of tenure and termination of service.\textsuperscript{36}

The principles of tenure, termination and processual justice in the defence forces can be safely traced back to the pristine history if the relationship of the employer and employee is taken as central to the development of this concept. Even the interpretative treatises which though few in number exhorted this relationship in different ways presenting it as the right of the owner of a slave or a servant against the duty of the latter. Reliance is thus placed on the ancient recordings viz., the \textit{Srutis} and commentaries thereon of the \textit{seers}. In this series is the profound \textit{Anvikshaki} which comprised of the Philosophy of \textit{Sankhya Yoga}, and \textit{Lokayata}. The subjects were clearly earmarked as the righteous and unrighteous acts called the \textit{dharma\textit{dharma}} which were learnt from the three \textit{Vedas} viz., the \textit{Sama}, the \textit{Rik} and the \textit{Yajus} and the wealth and non-wealth from the \textit{Varta}. \textit{Atharva} joined the triumvirate much later. The other sources of knowledge were the \textit{Siksha} (phonetics), \textit{Kalpa} (ceremonial injunctions), \textit{Vyakarna} (grammar), \textit{Nirukta} (glossarial explanation of obscure Vedic terms), \textit{Chhandas} (prosody), and \textit{Jyotisha} (astronomy) from the \textit{Angas}.

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\textsuperscript{36} In the preface to the third edition of his masterpiece, Kautilya's \textit{Arthasastra}, \textit{a translation by Dr. R Shamasasry, the author wrote}," A glance at similar aspects of forms in antiquity points to us that the relation which the Kautilya period bears to the Vedic is quite similar to what the Grecian period bears to the Homeric period, and the period of the Etruscans to ancient Italy." This had definitely troubled the minds of those involved in the consolidation of word which the civility as it existed in the Bharatvarsha (Bharat) believed was the singular word \textit{Aum}, the inimitable \textit{Aumkar} - the source of all knowledge including Law. The school of \textit{Manu} (the first law giver to the mankind) known by the name \textit{Manav} held that knowledge constituted of three sciences alone : the three \textit{Vedas}, \textit{Varta} and the \textit{science of government}. Another term which gained prominence in the ancient scriptures is \textit{Anvikshaki36} which infact was nothing but a special branch of the \textit{Vedas}.
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2.1.4 Impact of Four Varna and the Ashrams on the Law of Service in the Defence forces

By the end of Rig Vedic period, the society was divided into four great classes later known as the varna. The rule of defence forces appears to have been determined on the basis of necessity. Rule of conduct determined the period of tenure, as this was not the time of standing armies. As the society was divided into four varna, the Vedas determined the respective duties of the four varna and of the four orders of religious life (the Varna ashram Dharma). These were considered as the most useful in the field of law and precepts. Though the Aryans followed a mixed pastoral agriculture economy, the duties of each varna were well demarcated.

37. Supra Note 1, p.35.
38. Supra Note 1, p.137.
39. Supra Note 1, p.35.
40. The duty of the Brahman the first among the varna also called the dwij or the twice born or the dwijati, was to study, teach, perform sacrifices, officiate in others’ sacrificial performance and to give and receive gifts. That of a Kshatriya who represented the Rajas (the second among the three gunas), is study, performance of sacrifice, giving gifts, military occupation, and protection of life. Vaisya, the third varna was enjoined to study, performance of sacrifice, giving gifts, agriculture, cattle-breeding, and trade. The fourth varna was the Shudra. His duty was enjoined in serving of the twice-born (dvijati), agriculture, cattle-breeding, and trade (varta), the profession of artisans and court-bards. The duties of force was left solely to the kshatriyas. Hence the law relating to the force was the one which actually governed the conduct of the kshatriyas in the society. The duty of a householder is earning livelihood by his own profession, marriage among his equals of different ancestral Rishis, intercourse with his wedded wife after her monthly ablution, gifts to gods, ancestors, guests, and servants and the eating of the remainder. That of a student (Brahmacharin) is learning the Vedas, fire-worship, ablation, living by begging, and devotion to his teacher even at the cost of his own life, or, in the absence of his teacher, to the teacher’s son, or to an elder classmate. That of a vanaprastha (forest-recluse) is observance of chastity, sleeping on the bare ground, keeping twisted locks, wearing deer-skin, fire-worship, ablation, worship of gods, ancestors and guests, and living upon foodstuffs procurable in forests. That of an ascetic retired from the world (Parivrajaka) is complete control of the organs of sense, abstaining from all kinds of work, disowning money, keeping from society, begging in many places, dwelling in forests, and purity both internal and external. Harmlessness, truthfulness, purity, freedom from spite, abstinence from cruelty, and forgiveness are duties common to all.
The Kshatriya who represented the martial element of the society, had the bounden duty to study, performance of sacrifice, giving gifts, military occupation, and protection of own life and that of others. This responsibility does not seem to have shifted till very late in the history. The performance of duties was the concept of action and its imminent return. It was profoundly believed that the observance of one’s own duty leads one to Swarga and infinite bliss (Anantya)\textsuperscript{41}. It was preached to the kings that it was by means of the treasury and the Army obtained solely through Varta that the king could hold under his controls both his and his enemy’s party. That scepter on which the well-being and progress of the sciences of Anvikshaki,\textsuperscript{42} the triple Vedas, and Varta depended was known as Danda (punishment).

The popular belief was that when observance of one’s own duty is violated, the world will come to an end owing to confusion of castes and duties. Natural fallout of this concept was that performance of all ordained duties was mandatory to an extent that it ensured uninterrupted tenures. But its non performance invited immediate dismissal. Hence, the king never allowed people to sever from their duties. In this background, the law of termination can be presumed to be as a preliminary rule of all employments was kept out of the harsh rule of the Danda for violations of other nature as it does not seem to have been applied to the tenures. What came to be known as principles of natural justice appear to be observed as long as they were in consonance with the Dharamshastras and anything beyond them must have been abhorred as blasphemy! This is evident from the fact that no reference on any issue outside Dharam is found in the texts referred in the study. It can thus

\textsuperscript{41}. Kautilya’s Arthasastra; translation by Dr M Shamasstry, p.6.
\textsuperscript{42}. Ibid., Chap.II, Book I.
be concluded that the law on tenures and terminations was not considered as seriously as is being done now.

2.1.5 Removal from Service on grounds of Displeasure

Removal with or without reasons was generally outcome of falling from favours of the employer. This was a punishment though not prescribed or enjoined by the scripture but was a part of the Dandaneeti which provided dispensation of the employee as the first step where the latter had lost the confidence of the employer - the master. Kautilya believed that the unfaithfuls have no place in the State as the unfaithfuls are dangerous to the king inside as well outside the State.43 This was also a reason to advocate for very severe punishments for them. While Kautilya observed that whoever imposes severe punishment becomes repulsive to the people, he who awards mild punishment becomes contemptible.44 ‘Removal’ from an appointment in conditions which in ordinary course would warrant infliction of punishment, would be punitive and thus it would be an action as a punishment, though not ordained in the treatise, but as a corollary to the expression of ‘displeasure’ of an authority of the State. Such an action would be necessary to prevent disorder. ‘A commander of Army could be dismissed from service for receiving condemnable things’.45 Kautilya uses a proverb of fishes (matsyanyayamudbhavayati)46 to explain this state of affairs. Upholding the rule of law in state actions Kautilya puts it, in the absence of a magistrate

43. Ibid.
44. Ibid.
45. Supra note.34,p.16.
46. A great fish swallows a small one. Dr. M Ramashastry, ‘Arthashastra’.
(dandadharabhavhave), the strong will swallow the weak; but under his protection the weak resist the strong.  

While the emphasis was on the functionality of the king and his empire flawlessly, there was room for some fault lines in the system. For instance weak administrative machinery to oversee implementation of the king’s directives was anticipated. As seen in the later history, this was a recurrent problem and had given rise to rampant corruption at the lower levels of administration almost at all times. This was infact considered as a simple human trait but of course reprehensible if perpetrated by a State functionary.  

The office bearers of the State held their positions as a matter of right and could not be generally dismissed without difficulty. Besides, the law of the State provided for punishment as a monetary recovery into the State treasury or compensation to the victim if any. Arthashastra did not use the expression dismissal or removal for a defaulter. Rather it is presumed as a natural concomitant of a State action. So in a way the concept of removal and termination as we see it can be said to be of a relatively recent origin. Kautilya reposed immense faith in the government servants particularly those entrusted with the royal treasury. For instance in the 4th and the 3rd centuries B.C. the law on embezzlements was like this:  

Government servants shall not only be confiscated of their ill earned hoards, but also be transferred from one work to another, so that they cannot either misappropriate government money or vomit what they have eaten up; Those who increase the king’s revenue

47. Ibid., p.35-38.
48. There was no immediate remedy at sight as a result the masses invariably suffered at the hands of the State appointees. No effective complaint redressal system is found to be existing at the lower levels of administration as the justice was the prerogative of the king and there was a concentration of talent at the highest level.
instead of eating it up, and are loyally devoted to him, shall be made permanent in service.\textsuperscript{49}

Another instance which can be quoted from the \textit{Arthashastra} is of a deserter from service. For instance, a healthy person who deserts his company after work began shall be fined 12 panas.\textsuperscript{50} In other words where desertion from service generally invites dismissal from service, the punishment here is monetary.

Punishments to the government servants varied with the nature of misconduct. It was, however, clear that the ruler did not constitute the government all by himself. Kautilya wrote that Sovereignty (\textit{rajatva})\textsuperscript{51} is possible only with assistance. A single wheel can never move. Hence, he shall employ ministers and hear their opinion and that he shall despise none, but hear the opinions of all. A wise man shall make use of even a child's sensible utterance.\textsuperscript{52} The tenure of their engagement by the State, however, depended upon their efficiency in the assigned task. In all departments, whoever, whether as an officer (\textit{yukta})\textsuperscript{53}, a clerk (\textit{upayukta})\textsuperscript{54}, or a servant (\textit{tatpurusha})\textsuperscript{55}, misappropriated sums from one to four panas\textsuperscript{56}, or any other valuable things, was to be punished with the first, middlemost, and highest amercements and death respectively? Similarly, if the officer who is in charge of the treasury caused loss in money, he shall be whipped (\textit{ghatah})\textsuperscript{57}, while his abettors shall receive half the punishment; if the loss is due to ignorance, he shall be censured. It is apparent from the above, that, the offences

\begin{itemize}
\item 49. \textit{Supra note.} 41, p. 70.
\item 51. Sovereignty vested in the king by virtue of being the head of State but it came from the people- Pura Janapada.
\item 52. \textit{Supra note.} 41.
\item 53. \textit{Ibid.}
\item 54. \textit{Ibid.}
\item 55. \textit{Ibid.}
\item 56. \textit{Ibid.}
\item 57. \textit{Ibid.}
\end{itemize}
committed by the state officials were not taken kindly. Though termination is not seen as one of the punishments but perusal of *Arthashastra*, makes it more than clear that it also acted as a penal code for the king and his officials responsible for dispensation of justice. The law of services was not expounded as a separate law. The Commander-in-Chief of the forces was the Maha-Senapati and the law of the forces was the law of war and the customs relating thereto.

### 2.2 Roman Period

While discussing the ancient period, with regard to the evolution of law on *tenure, termination* and the *processual justice*, in the defence forces, reference to the Roman law is inescapable. The various terms of office, tenures, termination and the process of justice as found in the text books today have their origin in the Roman texts. As the name suggests, the *Roman law* received its nomenclature from the great empire of *Rome* and the profound vision and wisdom of its exponents.

#### 2.2.1 Early History

Rome is believed to have been founded in B.C. 753 and was ruled by kings for next two hundred and forty years.58 The Roman defence forces were the pride of the State, as is evident from the tales of the old victories of the Roman Army and Navy. Not much is available in the form of written records for the very early period as the written records of Rome met much the same fate at the hands of Gauls in BC 790 and were thoughtlessly burnt down by them as were the rich libraries of Taxila and Nalanda in India were burnt down by the invaders in the 11th century A.D. However, despite there being no record to support the genesis of the old system of administration in Rome, taking

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the later developments into consideration, it can be safely concluded that the State was run in accordance with the Rule of Law. Since, the early history of Rome was much similar to our own history, like the old Aryavarta, the social unit in Rome too was the patriarchal family.\textsuperscript{59} Kingship was agnate reckoned exclusively through males. The family consisted of a group subject to the power of a living male ascendant (paterfamilias).\textsuperscript{60} The community consisted of three elements viz., the king, the Council or the senate and the people. The king who held office for his life time was also the Justice- in-chief as well as the head priest of the State. Senate was an advisory body imposed upon the king. The popular element was “Comitia or the assembly of the people”\textsuperscript{61}. Another term used by the Romans was curiae which represented lesser units of people generally thirty in number and their assemblies were termed as ‘comitia curiata’.\textsuperscript{62} The citizenry comprised of Romans called the Patricians\textsuperscript{63} and plebeians\textsuperscript{64} with limited or civic rights in the Roman State.

2.2.2 Administration of the Roman Army

In the early second and third centuries, the Roman Army was made up of companies of a hundred men called “Centuries”.\textsuperscript{65} Assembly of armies was called “Comitia Centuriata”.\textsuperscript{66} Rome in those years was one of the few nations to have a standing defence force which was governed by a definite law which again was partly ordained by the king and partly by the custom of war. Since the Army for instance Comitia

\textsuperscript{59} Ibid.
\textsuperscript{60} Ibid p.1 Termed as “delightful textbook” the ‘Elements of Roman Law’ with a translation of the ‘Institutes of Justinian originally titled as ‘Cupidae Legum Juventuti’, RW Lee recorded, “the highest living ascendant under the Roman Law was the sole proprietor.
\textsuperscript{61} Ibid.
\textsuperscript{62} Ibid
\textsuperscript{63} Ibid.
\textsuperscript{64} Ibid.
\textsuperscript{65} Ibid.
\textsuperscript{66} Ibid., p.3.
Centuriata consisted of ten centuries of Cavalry, rich patricians and main body of Infantry, the law on the regularity of the force was indeed dependent upon the combined will of the rich patricians who formed the leadership of the force. The positions in Army in fact varied with ownership of land and property.\footnote{Ibid.} The Comitia Centuriata would always meet outside the city in the Campus called the ‘Martius’.\footnote{Ibid.} The law that governed them was the Le\textit{x Curiata de imperio}.\footnote{Ibid.} Scholars refer to the writings of Cicero, who has referred to the ‘meetings of the Comitia for the purpose of taking auspices’.
\footnote{Supra note. 41, p.4} Reference is also made to the ‘\textit{Jus civile Papirianum}’\footnote{Ibid.} the book of \textit{Sextus Papirius}\footnote{Ibid.} who was the contemporary of the last king of Rome. \textit{Jus civile Papirium}\footnote{Ibid.} was an anthology of the statutes reduced to writing. These statutes were standing on the borderland between law and religion. It is thus clear that Rome had a definite law for the governance of its forces.

\textbf{2.2.3 Role of Defence forces in the Roman Republic}

The later developments in the law relating to the defence forces in Rome were affected by subsequent events of history for instance, the expulsion of \textit{Terquinius superbus},\footnote{Ibid.} the last of the kings in B.C. 509 brought the monarchy to an end. The king for life was replaced by two annual officers called first as ‘Proctors’\footnote{Ibid.} and later as ‘Consuls’\footnote{Ibid.} with increased power of the senate. This also brought change in the role of the defence forces in the republic. The purpose of maintaining a regular Army and Navy
was the protection of the Roman Empire from attacks but this was now replaced by an increased desire to establish an orderly State. This in reality was the time when not only the civil law developed but the law of the defence forces was also evolved.

### 2.2.4 Law of the Roman People

Since it would be futile to read the evolution of law of defence forces in isolation without understanding the law in the civil, the development of civil law in Rome too was of immense importance. With the increased importance of popular assembly which had now replaced the king for enactment of laws, it passed laws of general application. It also entertained appeals against capital sentence. The armed forces were now placed under the control of the Senate applying to them the modified law of the people, the *Lex Plebiscitum*.  

Another body exclusively consisting of plebeians was the ‘Concilium Plebis’. It chose the ‘Tribunes’. It passed resolutions called the ‘Plebiscite’ which originally bound the plebeians only but later became the ‘Rule of Law’ and bound the whole people. *Jus Gentium* was another brand of rules which was the law of the people but did not include the defence forces not being the people in the civil sense. The defence forces, due to the peculiar nature of their duties had to be governed by their own rules but the law passed by the popular bodies (the *Senate*) remained supreme. Senate was powerful and could adopt resolutions with serious powers.

77. *Supra note*. 58, p.5.
83. *Ibid.*, p.7. It is recorded that Cicero as consul had ‘put to death’ conspirators of B.C. 63 without trial which was eventually avenged by them by securing for Cicero, Banishment from Rome for exceeding his constitutional authority in this case.
2.2.5 The law of Twelve Tables and the Service in the Defence forces

The defence forces which comprised of the Army and the Navy, were well organised and played an important role in the Roman Empire. While in the civil society the law was in its advanced stages of evolution, the law relating to the forces was still mainly the customary law. No explicit reference to the law of the forces is found in the Institutes of Justinian or the law evolved in early Rome but the study of the law relating to the defence forces in England and India, makes it apparent that the basis of law of service is also the Roman law—the Lex Plebiscitum. A little further, in the history of evolution, a landmark in the history of Roman law was the law of ‘twelve tables’\(^84\). The plebeians had expressed their discontent on the ground that the knowledge of law which was withheld from them by the Patricians had resulted into arbitrary and tyrannical administration of the commonwealth by the patricians who had to themselves usurped vast power of administration. \(^85\) The reforms to the law were proposed as early as BC 462 by one of the Tribunes named the Gaius Terentilius Arsa.\(^86\) During this period another body of ten men called the ‘Decemvirs’\(^87\) was formed to draw the tables of laws. They were appointed only for a period of one year. This body of ten men drew two additional tables of laws making a total of twelve tables\(^88\) which eventually became the fountain head of all later law (public and private law). This was ultimately superseded by Justinian, nearby ten centuries later. This assortment of laws did not see much change in the laws of the defence services as those laws were confined

\(^84\) Supra note. 58.
\(^85\) Ibid.
\(^86\) Ibid., p. 7.
\(^87\) Ibid.
\(^88\) Ibid.
only to those who were involved with the defence of the State. The jurists were mainly concerned with the administration of the civil society. Governance of Army was left to another class of functionaries, the Generals called the Centurions. Compared with the modern age, the law relating to the tenures of the defence forces did not see much research and generally remained shrouded in the cloak of mystery.

2.2.6 Contribution of the Roman Jurists

Jurists of the early period in Rome were referred as Veteres or ancients and if seen from the point of view of the law of service in the defence forces, theories propounded by the scholars of the civil law were willy-nilly expected to apply to the law of terminations. This primarily was due to the fact that the Roman jurists had started emphasizing on the need to follow the rule of law in all fields of justice. Mucii Scavolae Publius Mucius scaevola (consul) BC 33, later (Pontifex maximus) and with him Brutus and Manlius, came to be known as the “founders of the civil law”- Jus civile. The law came in the form of edicts- the Roman Edicts. The proctors were required to abide by the edicts. Proctor’s edicts became the sense of law and existed side by side with the civil law just as equity of English chancellor existed alongside the common law. “Proctorian law”- orders of Proctor termed as emporium or residuary sovereignty. Perpetual edicts (Edictum perpituum) perpetuated year after year. Since the law of defence forces was also seen as branch of civil law, the

89. Ibid., p.10.
90. Ibid.
91. Ibid.
92. Ibid.
93. Ibid.
94. Ibid., p.11.
95. Ibid p.12.
96. Ibid.
97. Ibid.
98. Ibid., p.12.
jus civile, it could not remain unaffected by the developments in the civil law.

2.3 Medieval Period

The early medieval period can be construed to be from the seventh to the eleventh centuries A.D. This period was generally concerned with the governance of Indian states by the Rajput kings. The law on tenures and terminations during this period evolved as per the State norms which though similar being their origin in the olden Hindu scriptures, in all the states, had some peculiar provincial differences.

2.3.1 Administration of the Defence forces during Seventh to Eleventh centuries A.D.

Medieval period was widely interspersed by the Rule of Law promulgated in the various Rajput States of the Indo-Gangetic area variously described as Hindustan or Aryavarta. As against the ancient chaturanga or fourfold theory, the medieval Rajput State had a three-wheeled defence mechanism based upon the foot, horse, and elephant. The fourth arm was in the shape of Navy which as borne out by the Bhagalpur inscription. This completed the structure of the defence forces of those times and brought the customs of Navy into the defence force. The custom of recruitment and dismissal in the Navy was universally followed as the interaction of Navy with other nations and its adaption to the universal code of service is far older than that of the other arms of the defence forces.

In the 8th century A.D., with the help of a well administered Army, the Chauhans of Ajmer had successfully

100. Archaeological Survey of India, 1903-04, p.280 as quoted by Dr Nagendra Singh.
resisted the Arab advance in Sind.\(^{101}\) Similarly the Pratihars of Ujjain, the Candelas of Mahoba (Jelakabhukti) lead by an able king Yasovarman from A.D. 930-950,\(^ {102}\); the Solankis of Gujarat lead by their king Mularaja who founded the famous dynasty of Chalukyas or Solankis of Anhilwara in A.D. 961 relied heavily on a standing Army governed by the set service norms atleast of tenure, and remuneration. Finally, the Parmars of Malwa out of whom Raja Bhoja is considered to be the greatest king of this dynasty who had equal mastery over his Army as well as his civil subjects had an enviable system of military administration. A mention of Maha-senapati or Commander-in-Chief over the other Senapatis commanding the three arms is found in the older records.\(^ {103}\) Thus the Maha-senapati was the supreme military commander for all the arms and was in immediate communication with the king. He exercised the power of appointment and termination with respect to the subordinates in the force on behalf of the King but in the case of Officers, he kept the King informed and in cases where Royal intervention was deemed necessary, the King himself heard the case and passed the judgement. The process of justice was generally unwritten but promulgated by word of mouth. An interesting episode has been cited by Dr Nagendra Singh while explaining the order and cohesion in the Rajput confederacies in the following words:-

*When victory was within sight of the Rajput confederacy-the third of its kind within a decade - the unforeseen incident connected with the elephant of Anandapala which took fight and fled from the battle-field caused disaster as it was*

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taken to be a signal of defeat and the Rajput forces dispersed in utter confusion in all directions.\textsuperscript{104}

This clearly indicates that there was no regular military gradation of commanders or a line of rulers or officers by which command would descend. In the modern days, defence forces, the after action follow-up would have been serious and the law of cashiering, dismissal, termination, removal and reduction in rank would have been scrupulously used as per responsibility apportioned to the commanders and the soldiers at all levels thereby affirming the rule of law in all ranks which is conspicuously seen missing from the military set up of medieval India.

2.3.2 Administration of the Defence forces during the reign of Mahmud Ghaznavi

The Army of Mahmud was an assortment of cavalry, camels and foot infantry. The soldiers were mustered for the campaign that on return to the homeland would go back to their original vocations. In the words of H.S. Bhatia, “They enlisted with the Army singly, or with their horses and men for the fair season of the year and when the rains approached, they returned to their homes and cultivated their ancestral land.” The dual obedience to the Sultan and the religion kept the forces together and again in the words of H.S. Bhatia, the, “Army lived on land, loot and plunder.”\textsuperscript{105} This shows an element of irregularity in the defence forces cadre during the medieval period. Since the tenures were campaign based and the soldiers lived on paltry remuneration, cases of administrative removal are hard to find. One inference can, however, be unfailingly drawn that is all prerogative powers

\textsuperscript{104} Supra note. 2, p. 108-110.
were vested in the Sultan. Hence the power of removal, dismissal and reduction etc., was exercisable by the Sultan alone and the marked feature of this power was absence of any appeal. Mahmud, who was the Sultan of Ghazna was the supreme legislative, judicial, and executive authority of the empire he had created. The Council of Ministers consisted of all the important civil and military officers whom the Sultan chose to summon. On the military side he was his own Commander-in-Chief, and either personally led all the campaigns or directed them from the capital. On the civil side his authority was supreme since he was “an autocrat of the most absolute kind” and the Council was nothing more than “a deliberative and consultative body.”

The was the chief adviser of the Sultan in all military matters was called the arid. His duty was to see that the Army was maintained at the highest standard of efficiency. Hence recourse to the customary law of war and the Holy Book conjointly constituted the law of the defence forces for all purposes but it came mainly as a mode of coercion and fear to keep the citizenry into the standing Army. Tenure was limited to the campaigns and terminations in the sense as we see them today were rare as service to the Sultan itself was considered as service to the cause of empire and the larger cause of Islam, because the purpose of a standing Army besides protecting the empire was to assist the Sultan in the spread of Islam which was considered noble for every believer.


2.3.3 Administration after the reign of Mahmud Ghaznavi

The organisation of the defence forces in India during the medieval period can be said to have commenced with the ascension of Mohammed Ghori to the ‘throne of Delhi in A.D.1192.’ Since the dynasties which followed the reign of Ghori did not last more than two decades each except the one from the house of Tughluq, who ruled India from 1320 to 1413 A.D., the law on the service tenures evolved during this period could not be anything beyond the customary law of war. With the defeat of Ibrahim Lodi in the war of Panipat on April 21, 1526 at the hands of Babur from the house of Timur, and his coronation as the Emperor at the Jami Mosque, Delhi, on 27 April 1526, the foundations of the Mughal Empire were laid and with this came the necessity of a standing Army. The next twelve tears were the years of reorganization of the armed forces. Their discipline and administration were the prime objectives of the emperor. But before any noticeable organisation of the force could be reckoned, the Empire of Babur fell into the hands of the Sher Shah Suri. The throne of Delhi was occupied by him. Shershah of the Sur Dynasty was known for strict discipline in the defence forces. Though he knew the consequences of a weak Army loosely administered, his emphasis on development of infrastructure for instance the laying of the Grand Trunk Road from Lahore to Calcutta, digging of wells and canals for irrigation, planting of shady trees all along the grand trunk road, establishment of travellers’ serai en-route were more everlasting than the administration of his military. This became evident when he was eventually over thrown by Humanyun, the son of Babur in the second war of Panipat on 5th November 1556 and

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108. Supra note.10, p.3.
109. Ibid.
110. Supra note.10.
thus the saga of the following three hundred years of the Mughal rule in India started. The Army was mainly constituted of farming youths and the artisans who in their own terms were respectable citizens and thus would not take to unceremonious dismissals. Since the paid Army was limited, the rule of tenure and termination, dismissal was applicable only to that portion of the defence forces which was maintained out of the royal treasury.

This has been discussed that during the medieval period, service to the empire was mandatory and its continuum just a prerogative of the ruler. It could be terminated without much ado and there was no appeal. Justice in the service matters was again the royal prerogative and a very important function of the emperor, often attended by a divine aura, to be exercised by the Emperor initially by his own judgment and later by the tenets of the holy book as interpreted to him by his Quazi or by his own understanding of the law as ordained. The processual justice was accordingly subject to the availability of time and place with emperor. The ruler himself would spend major part of his time in campaigns winning or losing battles, consolidating the empire. Hence, time available for devising elaborate procedures was scant. As a result, summary procedures of dismissal, removal and reduction in rank were generally in vogue.

2.3.4 Moderation in Defence service administration during the reign of Akbar

The first ruler who exhibited tolerance in administration was the Mughul Emperor Akbar. During his reign, he made the following amongst other provisions:-
1) He repealed the discriminatory law regarding citizenship
and created one common citizenship as also one
unanimous system of justice for all.\textsuperscript{111}

2) Organised the defence forces and 'prohibited the making
of war prisoners as slaves.'\textsuperscript{112}

3) Abolished Hindu Pilgrim’s tax as also Jizya which made
invidious discrimination against Hindus.\textsuperscript{113}

4) Modified the service law with the help of one of his
_Navratnas_, Raja Todarmal.\textsuperscript{114}

Though, unlike in the field of revenue and district
administration which made historical progress, no major
treatises on the law of service in the defence forces was written
down in this period, yet the law of service was well understood
by usage, by all concerned. Parchments were frequently issued
with the Emperor himself or under his authority which
promulgated new terms and conditions of service and also laid
down new rules for regulating the conduct of forces.\textsuperscript{115}

_2.3.5 Governance of the Defence forces during Mughal
Empire_

Owing to administrative exigencies a set up of ministers
was evolved during the Moghul period and their designations
were _Wazir_, _Sadr-us-Sudur_, _Dabir-i-Khas_, _Bhird-i-Mumalik_ and

\textsuperscript{111} History and Culture, Vol. 7 pp 539-541, as per Dr Nagendra Singh.
\textsuperscript{112} _Ibid._
\textsuperscript{113} _Ibid._
\textsuperscript{114} Beveridge, ‘_Akbar Nama by Abul Fazal_’ Translation from Persian,
p545.
\textsuperscript{115} _Ibid._
their portfolios with respect to each were also specified. The four ministers were considered as the four pillars of the Muslim Government. The will of the ruler was final in all matters. Though Military was the most prominent organ of the State and had the main role but once the victory was achieved, the other organs were set in motion and the defence was in a way relegated to the second place. Out of the four Ministers, viz., Diwan, Mir Bakshi, Khan-i-Saman and Sadr, Diwan occupied the highest rank amongst the ministers. Mir Bakshi occupied the position next to Diwan. He was the chief military adviser to Moghul Emperor. At the capital, several heads of departments were under Mir Bakshi. During the medieval period, the status of the non Muslims was that of downgraded citizens. Their rights even while in service were subject to the Rule of Jizya.

116. 1. Wazir: He was incharge of civil administration. Finance was special responsibility.
   2. Sadr-us-Sudur: The department under his control was Diwan-i-Riasalat. This department was required to deal with religious matters, pious foundations, payment of stipends to scholars and men of piety.
   3. Dabir-i-Khas: He headed the department of Diwan-i-Insha which was entrusted with the responsibility of State correspondence.
   4. Bhird-i-Mumalik: This minister headed the information department.

117. The four Ministers were,-
   1) Diwan - He was responsible for the finance of the State. All the orders of the Emperor were first recorded in the office of the Diwan and thereafter they were being sent to other high officers of the State. Some of the famous and the ablest of the Diwans appointed by the Moghul Emperors were Raja Todarmal, Raja Raghunath, Diwan Sauullah Khan and Jafar Khan who made the provisions for public service.
   2) Mir Bakshi - He occupied the position next to Diwan. He was the chief military adviser to Moghul Emperor. At the capital, several heads of departments were under Mir Bakshi.
   3) Khan-i-Saman - He was the minister incharge of household department of the emperor which included royal buildings, roads, gardens, purchases, stores and workshops.
   4) Sadr - He was the Chief Justice and Minister of Ecclesiastical affairs.

118. Under the Muslim Law, non-Muslims did not enjoy all the rights and privileges which the Muslims did. They were not treated as equal to Muslims in law and were called 'Zimmis'. Their evidence was inadmissible in the courts against Muslims. They had to pay an additional tax called 'Jizya' and as regards other normal taxes also they had to pay at the double the rate than what a Muslim paid.
The tenure of such non Muslims was subject to the mercy of the employer. In short there was no service law worth its name. This part of the study is thus based on inference and derivations based on the study of the system as it existed then.

2.3.5.1 Administration as per the tenets of Quran

Under the Muslim Law, there are no specific provisions regulating the constitution and organisation of the State. However, the fundamental concept underlying Muslim Law, like the Hindu Law was that the authority of the King was subordinate to that of Law. In view of this basic principle every Muslim ruler was required to rule in conformity with the tenets of their sacred law, the Quran, which laid down only the broad principles governing the social life of the Muslims. According to Quran, all persons professing Muslim faith, wherever they may be, belong to one community. The injunction of Quran was that all Muslims should obey the constituted authority (Quran III 102-XLI 38).

2.3.5.2 Fundamental Rules of tenure and termination

The prime purpose of the defence forces during this period was,-

i) To protect the faith as defined by Ijma.

ii) To defend the territories of Islam.

iii) To maintain and enforce the criminal code.

iv) To strengthen the frontiers of Muslims territory against possible aggression.
v) To wage a holy war against those who are hostile to Islam\textsuperscript{119}.

vi) Additionally, the defence forces added to the ceremonial vanguard of the ruler in a great measure.

Though during 305 B.C. the Mauryan Empire had developed a highly organised bureaucratic administration\textsuperscript{120} the intensity of the provisions governing the services including the defence forces can be measured from the kind of punishments provided in the Arthashastra. However, factual accounts on administration of the defence forces during the medieval period are scant. Material whichever is available is in the form of eulogies and verses written in praise and exhortations. Reading of *Prithviraj Raso* and *Akbar Nama* reveal less of history and more of eulogistic exhortations tempered with a strong flavour of personal loyalty to the dynasty. Service has been explained in *Akbar -Nama* as a grant from the Sultan who has been destined to rule by the will of Allah.\textsuperscript{121} Accordingly, the concept of tenure was solely dependent on the will of the Sultan and the Termination too was an expression of will of the Sultan. Removals were in a summarily way in the nature and there was no set of appeal. The processual justice was a remote fiction, even if it existed in some form, the document exhorts the *Jahanabani*\textsuperscript{122} as the epitome of justice, compassion and profound wisdom who has the last word in all affairs including mandatory procedures and much reliance is placed on customs and precedents. Interestingly even certain customs of desert are followed scrupulously. Tenures of the servants of the ruler, their

\textsuperscript{119}. History and Culture, Vol. 6 pp 444-445 as per Dr Nagendra Singh.
\textsuperscript{120}. Supra note 1, p. 51.
\textsuperscript{122}. Ibid.
terminations and the dispensation of justice in the process is
livid and to an extent uncertain. It was once the *Hadeeth* (Hadis)
was followed and put to effect, that some procedures suitable to
the different situations were devised and followed. Help was
sought from what Justice Rama Jois termed for the partnerships
in the olden times from the ‘maxims of general experience’\(^{123}\). The
exercise of powers of appointment and removal was prerogatively
done by the rulers or their appointed officers by the tacit
approval of the ruler. However, the servant had the duty to act
honestly. What was done for the administration during the
Medieval India is an interesting account?

### 2.3.5.3 Salient Aspects

Despite the predominant feudalism under the Islamic State
in India, State as such had a standing Army. This in particular
was with reference to the Delhi Sultanate. The regular troops
were called Wajihs\(^ {124}\) and the irregulars were called the ghair-

\(^{124}\) Wajihs

\(^{125}\) ghair-

\(^{126}\) ‘Allaudin Khilji commanded four hundred and seventy five

\(^{127}\) Muhammad Bin Tughlak is recorded to

\(^{128}\) Honesty in

\(^{123}\). Supra note.10.

\(^{124}\). Supra note.104, p.153.

\(^{125}\). Ibid.

\(^{126}\). Ibid.

\(^{127}\). Ibid.

\(^{128}\). Supra note.2,p.141.
rule.\textsuperscript{129} The analogy appears to have been applied to the employment and governance of the defence forces in the same measure. Instances of removal were not too many but wherever those are, the underlying factor seems to be the desire of the Emperor or the Sultan to either reward a loyalist or to punish a defector. Removal or dismissal during this period too was seen as punitive since dismissal involved removal or stoppage of all privy purses accruing from the Royal exchequer. Permanency of service under the State as a matter of right is thus a recent concept. The service could in the medieval times, be terminated on some strange pretext say for instance besides ‘falling out of favour’, retrenchment was common when the exchequer could not bear the burden of a huge force, it could be reduced without much ado. As much of the Army was mustered only at the time of war, the permanent force kept at readiness was much smaller than what we see in the present times. The Mir Bakshi who was responsible for the defence matters was also responsible to see that the military was dealt with in the appropriate manner as far as their service conditions were concerned. This meant proper administration of the forces of which the guarantee of tenure was the prime-most requirement. It was indeed rare that any matter relating to the service of a military man was ever brought to the notice of the ruler. The law of summary punishments was in vogue and was effective. Removal from service though punitive in nature, comes out to be a minor punishment to the servants. The delegation of power and authority in this period is evident from the system of administration in vogue during Akbar’s reign. Abul Fazal in his Akbar Nama observed:

“One of the occurrences was the arrival of Mazaffar Khan and his being promoted to the lofty office of Vakil. Though such an

\textsuperscript{129} Supra note.10.
adorner of the throne of realm and religion requires not a Vakil, nor Vizier, for his far seeing capacity is responsible for all the duties of Sovereignty, yet H.M.(His Majesty, the Akbar) either in order to veil himself, or from humility before God, or in order to increase the dignity of loyal servants, from time to time makes over the duties of Sovereignty to a courtier.”

With regard to the nature of administration during the medieval period the following views of Jadu Nath Sarkar as quoted by Dr Nagendra Singh are the most apt:-

“By its nature it was military rule and, therefore, necessarily a centralized despotism.”

As per Dr Nagendra Singh, “Every official who performed a civil function was accorded a military rank and given a mansab as a nominal commander of horsemen which determined his pay and status.”

A reading of these and other writings about the medieval period make it clear that Bakshi was the Military pay master and the power of appointment and removal of the officers was vested in the Monarch who was autocratic. Though the service law was not a very developed branch of law during the medieval India, and the main components of law were civil and criminal, the Muslim Criminal Jurisprudence treated Criminal Law as a branch of private law than of public law. The principle governing the law was more in the nature of providing relief to the person injured as in a civil matter rather than to impose penalty for the offence committed. To a certain extent, crimes against God were treated as offences against public morals, and other offences were treated as offences against individuals. One

131. Supra note 2 p.158; Sarkar, J.N. Moghul Administration, pp 4-8.
132. Ibid., p.158.
classical example of appointment and termination in service of the State of Bengal was the appointment of _Mir Qasim_ during the period of Nawab Sirajudaulla of Bengal.

**2.4 Modern Period**

The glory of the Mughal Empire had yet to reach its zenith, when, in obscure, far away England, an institution was born which was to prove its successor. On 31 December 1600, a Royal Charter was granted to “the Governor and Company of the Merchants of London, trading unto the East Indies,”\(^{133}\) which empowered the Company to trade with “the countries and parts of Asia, Africa and America, or any of them beyond the Cape of Bona Esperanza to the Straits of Magellan.”\(^{134}\) With the advent of the East India Company on the Indian soil marked the beginning of a new era on the Indian scene. The modern period is thus considered to have begun with the arrival of the British on the Indian shores. The law of the defence forces which was a mix of customs and charters for the British and a relative flux for the natives, received a shot in the arm in the form of the new administration for the now disorganized and scattered forces in the country divided into tiny states with little or no uniform code or a written rule for their governance.

**2.4.1 Origin of the Indian Defence forces and the Law of their tenures of service and termination**

The mighty Indian defence force which we see today, and the statutes which govern them, had indeed a modest beginning. In the first half of the seventeenth century, guards were enrolled by the East India Company at Surat, Masulipatam, Armagon, Madras, Hooghly and Balasore, for the protection of the factories

\(^{133}\) _Ibid._ , p.181.

\(^{134}\) _Ibid._
or the trading posts. This was first time that Indians were recruited for duties in an official manner as an amount of formality appears to have been adopted in the form of code of conduct and dress for the recruits. The organization of these guards was similar to those being used in England as there was no other better model to follow except the British model. Since no permanent service as guards had yet been instituted, the tenures were decided by the Company on a fixed remuneration and the termination of such services had no after effects since service in the Company did not create any vested right of the guard in the service to the Company. As for the duties, the twin tasks of the guards at first besides adding to the ostentation of the officials of the company were to protect the company property from intruders. Special restrictions were placed on the strength of the guards, so as to prevent them from acquiring any military importance. As the time passed, the strength and organisation of these guards was improved, so did their duties and from them sprang the East India Company’s European and native troops. Both of these steadily increased in numbers, until in 1857, when the native Army reached its maximum strength, it numbered (including local forces and contingents, and a body of 38,000 military police) no less than 311,038 officers and men. The tenures of these troops were more or less akin to those in England. British rules of tenure and termination were generally applied to them. While the defence force in the form of the great Indian Army was in its nascent stages, the East India Company in its own way was busy consolidating its position in India not overlooking the requirement of clear service laws for the defence forces in their employ. Thus, followed the important charters

135. Supra note.2, p.182.
136. Ibid.
which the English used after the first great charter viz., the Magna Carta of 1215.

The administrative setup in India was now being put on firm footing and after having established settlements in Calcutta, Madras and Bombay, the East India Company brought into existence, an administrative set up and headed it by a President and Council at each of these settlements. This necessitated new and effective rules of tenures, salaries, gratuities, and the removal, dismissal, discharge and termination from service. This was initiated by the Charter of 1600 which gave to the Company the power to make law or to issue orders for regulating the management of the Company and the affairs of its servants. This was vested in the General Court of the Company. The power conferred under Charter of 1600 and the Commissions issued subsequently were confined to the action which could be taken in voyages. As a result, on 4th February 1623, James-I conferred on the Company, the power to issue commissions to any of its Presidents or other Chief Officers in the Company’s settlements in India or terms similar to those conferred on the Company.\(^{138}\) This set the precedent for the delegation of powers of appointment and dismissal of the Company servants which by then had included its troops engaged in India as well, on the Management exclusively.

### 2.4.2 Introduction of the English Service law and procedure on tenure and termination

As the activities of the Company increased and their establishment on the Indian soil expanded, on the representation made by the Company, Charles II issued a new

Charter on 3rd April 1661 authorizing the Company to try causes, both civil and criminal, relating to all persons whether servants of the Company or others according to Laws of England. Through this charter the Laws of England were for the first time made applicable in the territory of India. It was in fact an irony of fate that India which had the history of having driven the enemies across the Himalayas during the reign of Chandragupta and prided in having given to the world its largest epic, the Mahabharat, had to borrow even the language of law from the British who came centuries later and this was followed by the Charters of 1668 and 1726. The defence forces which had by now inherited much from the English customs, immediately submitted to the new code which was given to them in the form of statutes for their governance.

2.4.3 East India Company Mutiny Act

More than ensuring the continuity of tenures, maintenance of discipline has been the primary requirement of the forces. The first statutory provision ever for the discipline of the East India Company’s troops was made by an Act passed in 1754.139 This was done primarily for “punishing Mutiny and Desertion of officers and soldiers in the service of the United Company of Merchants of England trading to the East Indies, and for the punishment of offences committed in the East Indies, or at the Island of Saint Helena.”140 Section 8 of this Act empowered the Crown in England to make the Articles of War for the governance of these troops, and such articles were accordingly made and published.141 Perusal of the terms of the Act reveals that the provisions of the Act were wide enough to cover both European

139. Ibid.
140. Ibid.
141. Ibid.
and native troops, but the language of the articles shows that those were originally intended for Europeans only. In the absence of any other code, however, the Governments of Bengal, Madras, and Bombay seem to have applied these articles, with such modifications and omissions as appeared necessary, to the bodies of native troops maintained by them, of which the present Indian Army is the descendant. In the year 1813, certain provisions were inserted in the Act which was passed in that year itself giving power to the Governments of Fort William, Fort Saint George and Bombay to make laws, regulations, and Articles of War for the government of all officers and soldiers in their respective services who were “natives of the East Indies or other places within the limits of the Company’s Charter.” It was further provided in 1823 that such legislation should apply to the native troops of each presidency, wherever serving, and whether within or beyond His Majesty’s dominions. This can be termed as the beginning of application of statutory provisions on the conditions of service of the Indian defence forces in India.

2.4.4 Tenure and termination in Presidency Armies

Under the statutory sanction of the Acts of 1813 and 1823, in each Presidency, a military code was framed by the government of each presidency for the governance of its troops. The punishments awardable to native Officers were death, dismissal, suspension, and reprimand, and to native soldiers, death and corporal punishment. Dismissal or removal, termination did not find mention as a punishment. It rather was a natural concomitant of the other punishments when awarded at the end of a disciplinary process.
2.4.5 Tenure and termination under the Government of India Act, 1833, and the “Articles of War.”

Section 73 of the Government of India Act, 1833, the power to legislate for the whole native Army was restricted to the Governor General in Council, and laws so made were given general application to all “native officers and soldiers wherever serving.”\textsuperscript{142} This placed on a firm footing the law on tenure and termination and also laid down a procedure for such actions. This is confirmed by the fact that in later legislations, the specific tenures of service and the related service privileges were found incorporated along with the powers conferred upon the legislature to terminate the services of the defence personnel. By the Act of 1833 the Indian Legislature for the first time provided a common code for the native armies of India. The year 1845, saw the enactment of the “Articles of War” by the Governor General in Council. These were repealed in 1847, 1861 and 1869. In 1869, the Articles of War were rechristened as the ‘Indian Articles of War’. The status of followers which find mention in Section 2(1) (i) of the present Army Act, 1950, was first time recognized by a statute\textsuperscript{143} and were accordingly governed by the Rules of tenure and termination. In 1857, the Governor General-in-Council was recognized as the Commander-in-Chief of the defence forces in India and he exercised the powers of appointment and removal on behalf of the crown in respect of the Indian officers and troops.

2.4.6 Tenure and termination in the Defence Forces under the Crown

The British resorted to ruthless and almost inhuman counter-measures to quell the revolution. Removals, Dismissals

\textsuperscript{142} Ibid., p.22.
\textsuperscript{143} Ibid.
and terminations en-mass brought the tenures of service in respect of many loyal Indian soldiers to an end abruptly. But measures like dismissals, removals etc., were considered lenient hence trials were held by courts martial which awarded dismissals and death. The trial of mutineers in Meerut of which the trial of Mangal Pandey was the most prominent resulted into dismissal and death at the hands of foreign power. The sentence was executed with utmost contempt and ruthlessness. The sentiment was of fear and apprehension hence for any misconduct, the field punishment was seen as the only answer as termination would have lessened the strength of the loyalists in the forces. There was also a palpable disappearance of any agreeable procedure in conformity with the rule of law while meting out these punishments.

The armies of the Presidencies were amalgamated. The process of unification was cemented when, in 1884, the three ordnance departments of the Presidency armies were combined and placed under the Government of India, and commissariat regulations applicable to the whole of India were issued. Two years later, the Punjab Frontier Force was removed from the control of the Punjab Government and placed directly under the Government of India. In 1891, the Staff Corps of the three Presidencies were formed into a single Indian Staff Corps. Finally, after these gradual measures and years of discussion, the Presidency armies were abolished from 1 April 1895. In this scenario, the tenures of service were governed by the orders of the Government of India but the law on tenures and termination remained the same. Loyalty to the crown administration remained the first requisite.

144. Supra note 2, p.215.
With the conditions of service in the armed forces having been defined the new organization divided the “Army of India” into four separate commands, each headed by a Lieutenant-General. Apart from the new commands of Punjab, Bengal, Madras, and Bombay, there were a few local and irregular units, like the Hyderabad Contingent and the Malwa Bhil Corps, which were directly under the Government of India. The new commands, although they had a common head in the Commander-in-Chief in India, were kept as separate and distinct as the Presidency armies had been. At the head of each of these “Armies” was a General Officer, responsible for their training and command.

Lord Kitchner gave a hierarchical diagram describing the then existing system in India and compared it with the organization which was in existence in England. The chart describing the Indian system in 1905 from where the authority of appointment, commission, junior commission and dismissal, cashiering, removal and termination can be easily inferred, was as follows :-

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145 Ibid.
This was akin to what had been in existence in England and the success of this model had been tested.

2.4.7 Amendment of “Articles” In 1894 with respect to Their Service aspect

The amalgamation of the three native armies into one in 1895 necessitated considerable amendments in the service aspect of the “Indian Articles of War.” These amendments were affected by Act XII of 1894 and the Indian Articles of War, as altered by this Act, and by various minor amending Acts, furnished the statutory basis of the Indian military code until 1911. This caused the crystallization of law on tenures and termination reflections of which are seen in Sections 18, 19, 20 of the Army Act, 1950 and the Rules 13, 14, 15 and 17 of the Army Rules, 1954. As time went on, however, and the Indian Army began to take its share in the imperial responsibilities of the British Army, it was found that an Act originally framed for three separate local forces, each serving as a rule in its own Presidency, failed to provide adequately for the discipline and administration of that Army under modern conditions. Owing also to the mass of amendments super-imposed on the original articles, these were often difficult to understand, and sometimes even self-contradictory.

2.4.8 Tenure under the Indian Army Act, 1911

The amendment of the Indian Articles of War was therefore again taken up in 1908, but the consideration then given to the subject showed that a new consolidating and amending Act would be necessary, any further amendment of the Articles of 1869 being only likely to accentuate the existing confusion. A Bill was accordingly drafted consolidating the existing law as to the service in the Indian Army, its nature, extent and procedure
for termination of service making it as one simple and comprehensive enactment and adding such provisions as experience had shown to be necessary. This was passed into law on the 16th March 1911 as the “Indian Army Act” and came into force on the 1st January 1912. All previous statutes dealing with the subject were repealed by Section 127 of the Act. The Act also had a clause on the administrative power of the Governor General to terminate.

2.4.9 Effect of subsequent legislations

Since dismissal from service had now become one of the major punishments and a prefix to the serious sentences during the First World War from 1914 to 1918, temporary Acts were passed to provide for the suspension of sentences primarily to save the armies from being depleted at crucial junctures. These measures were found to be beneficial, and on the 23rd March 1920 a permanent Act to provide for the suspension of sentences of imprisonment or transportation passed by courts-martial on persons subject to the Indian Army Act, which repealed the temporary Acts, came into force. This Act which is known as the “Indian Army (Suspension of Sentences) Act” had to be read as one with the Indian Army Act.

2.4.10 Indianisation of the Services and the tenure of service under the State

After the First World War, the Indian colony assumed immense importance in the affairs of Britain. Lord Macaulay called it as the ‘Imperishable Empire’146 now with the national movement gaining speed and strength, various reforms became inevitable. In the climate created by the Reforms Act of 1919, it

was inescapable that the Indianisation of the Services and the commissioned ranks of the Army and the law dealing with their service aspect had to be given due priority. The first Central Assembly, striving to reflect national aspirations, thus put the issue squarely in the forefront of its programme and scored an early victory.\textsuperscript{147} A commission on the public services was appointed in 1922 under the chairmanship of Lord Lee of Fanham.\textsuperscript{148} The pace of Indianisation gained further momentum during the World War II, so that when independence dawned in 1947, the Indian element in both the Indian Civil Service and the Indian Police were strong enough to maintain the stability and efficiency of the administration. The Army had already proved its mettle in the battles abroad. The Army, exclusively officered by Britons, was as much a target of attack, whether on public platforms or in legislative debates, as the ICS-the preserve of the “heaven born”\textsuperscript{149} as it was derisively called. The military budget itself came in for violent criticism on the ground that it bled the country white. A committee presided over by Lord Inchcape in 1923 trimmed this expenditure. Departmental heads were won’t to remark flippantly that their schemes had founded on the “Inchcape Rock”\textsuperscript{150} and its labours gave Indian opinion very little comfort.\textsuperscript{151} The demand for the grant of King’s Commissions to Indians had always come up against stout resistance, especially after the “Mutiny” of 1857. The kernel of the British argument against Indianisation was summed up by Curzon when he said: “Great stress has been laid on the military danger of reawakening a martial spirit that is now dormant among the higher ranks of Indian society, and of creating trained military


\textsuperscript{148} Ibid., p.103.

\textsuperscript{149} Ibid.

\textsuperscript{150} Ibid., p.103.

\textsuperscript{151} Ibid.
leaders who, in times of emergency, might turn their experience acquired in British schools to the detriment of British interests.”

As the removal was no longer a threat, the British hastened with the reforms. Curzon, nevertheless, relaxed the ban and set up the Imperial Cadet Corps, to which a few Indians carefully selected from among the Princes and the loyal landed aristocracy were admitted. This toehold was converted into a foothold during the time of Montagu, who saw the fulfilment of the promise to throw open King’s Commissions to Indians as a concomitant of the declaration of August 1917 but the British India authorities ensured that the trainees at Sandhurst belonged only to families of proven loyalty. The next limping step forward was the announcement amidst a great fanfare on 17th February, 1923, of Commander-in-Chief Lord Rawlinson’s scheme under which eight units of infantry of cavalry would be officered by Indians. Simultaneously, Indian officers would continue to be posted to other units. No sooner was this scheme announced than I was interviewing legislators in the lobby along with my colleague Iyengar. We were able to put out a strong condemnation of a “blacklisting” plan intended to prove Indian unfitness for leadership, a scheme moreover vitiated by an insidious racialism inasmuch as it would prevent Indians from holding command over British officers. In other words the power of removal from service or discharge from service could not be exercised by the Indian Officers against the British troops on the Indian soil however the vice – versa could be done. The Central Assembly witnessed a stormy protest against the Rawlinson scheme of segregation. But the Commander-in-Chief, defending himself in the House, was outspoken. It was impossible, he declared, to envisage a self-governing India

152. Ibid., p.104.
153. Ibid.
154. Ibid., p 255.
without an Indianised Army and such an Army was unthinkable in the absence of an urge for the hardships of a military career and of “a definitely Indian patriotism.” What really knocked the bottom out of the theory of Indian unfitness for a military career was the phenomenal expansion of the Indian Army on the outbreak of World War II and the grant of commissions to hundreds of Indians, many of whom won distinction for gallantry on the field of battle. But for all that, no Indian had attained a rank of higher than that of brigadier when the country became independent.

2.4.11 The Auspicious Hour

The Constituent Assembly, as the Provisional Parliament, assumed sovereign power at midnight on 14th/15th August calling upon its members to pledge themselves to serve India and her people, Nehru said: “We end today a period of ill fortune and India discovers herself again.”

2.4.12 Tenure of service in the Indian Navy

After the termination of the East India Company’s rule in India in 1858, the Indian Navy also came under direct control of the British Crown. It was rechristened as the “Her Majesty’s Indian Navy” and the provisions applicable to the Royal Navy in England were made applicable to the Navy in India. Like the Indian Army, the Navy was also re-organised soon thereafter. In 1863, the name was changed to Bombay Marine and a new code of Naval Regulations was issued, and the recruitment of European seamen or ratings to the force was stopped but it was allowed to resemble the Royal Navy in its outward appearance.

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155. Ibid.
156. Ibid.
157. Ibid.
158. Ibid.
159. Ibid.
Its role, however, remained mainly surveying and maintenance of stations in what were called “Indian dependencies.”\textsuperscript{160} This small and weak force was manned by 1846 men of all ranks. The ratings were all Indians, but the officers were predominantly British. Unlike the Indian Army, the officer ranks of the Indian Navy had, in theory, always been open for Indians but, till 1928, no Indian actually obtained a naval commission. During the Second World War, the Royal Indian Navy also was expanded tremendously. After the end of the war, mobilization began in the Royal Indian Navy also. By 1 July 1945, the force was reduced to 15,001 men, including all ranks, civilians, non-combatants, nurses, etc. But it still remained a far stronger and more modern force, compared to the pre-war years. At the head of Naval Headquarters was the Flag Officer Commanding Royal Indian Navy (FOC-RIN)\textsuperscript{161} who was responsible to His Excellency the Commander-in-Chief for the administration and efficiency of the Royal Indian Navy. However, the FOC-RIN had no direct access to the Governor-General.\textsuperscript{162} He was essentially a technical adviser to the Commander-in-Chief and it was through him that he was responsible to the Government of India on matters connected with the Royal Indian Navy. The force was being governed by the Navy Act of 1932 later replaced by the Navy Act of 1957. The power and procedure for removal was akin to what had been followed by the Army, some service specific and customary differences were there.

## 2.4.13 Tenure of service in the Indian Air Force

While the Army and Navy began in the weak dawn of history, the Air Force was born in the twentieth century.\textsuperscript{163}

\begin{itemize}
\item \textsuperscript{160} _Ibid._
\item \textsuperscript{161} _Supra note.104_, p.254.
\item \textsuperscript{162} _Ibid._
\item \textsuperscript{163} _Supra note.147._
Airplanes as weapons of attrition in the war first came into prominence in the First World War, and even the Royal Air Force was not established as a separate service till then, and the Indian Air Force did not appear on the scene till the early thirties. The rule of tenure and termination was thus the same which was applied to the Army then. In 1918, there were in India only two squadrons of the Royal Air Force, with a complement of 80 officers and 600 men to service to fly them.\textsuperscript{164} The necessity to have a separate law for the Air Force was not felt and though appointments to the service were natural, terminations were seldom seen. The service in the force was now governed by a definite tenure.

By 1924, there were only six squadrons left in India, with a total establishment of 218 British officers, 1,757 British NCOs and airmen, and 138 Indians purely on maintenance duties.\textsuperscript{165} The law on tenures and terminations in respect of the Air Force Officers was for all reasons the law applicable in England. The power of removal was vested in the Crown and controlled by the legislations of the Parliament as in England the pleasure of the crown was subjected to the parliamentary control. The role of the Air force in India was to co-operate with the Army in controlling the tribesmen on the northwest frontier and defending India against external aggression. Hence it was probably in the interest of the service not to separate it from the terms and conditions which were applicable to the Army from the past and had the advantage of having been tested for their usefulness. It was a strictly subordinate role. In 1929, the Chief of the Air Staff in the UK proposed that the air force should be made primarily responsible for tribal control on the northwest frontier and should be slightly enlarged at the cost of the Army, but the

\textsuperscript{164} Ibid.
\textsuperscript{165} Ibid.
Commander-in-Chief in India strongly and successfully opposed it. The greatest change in the Indian defence machinery brought about by World War II was not merely its expansion which was indeed vast and out of all proportion to the shape and size of the armed forces before hostilities broke out in 1939, but it was the dilution of the defence forces in the sense that recruitment to all ranks was thrown open to Indian rejecting the principle of exclusiveness which had hitherto held the field reserving higher ranks of all arms and even all ranks of certain arms for the conquering race. This had far-reaching results on the organization of defence in India and momentous indeed were the consequences as far as the future of the country was concerned.

The Air Officer Commanding India, who was the head of the Air Forces of the Indian Command was in the position of an Air Advisor to H.E., the Commander-in-Chief.\(^\text{166}\) Thus the Commander-in-Chief in India was not only the Supreme Commander of the three Services but also in his dual role of War Member responsible to the Governor-General for the administration not only of the Army but also the Air Force and the Navy.\(^\text{167}\) In the Republican Constitution of India, the Supreme command of the defence forces of the Union came to be vested in the President and the principle of Parliamentary control of the armed forces was firmly established. With this the law of tenures and termination as was modified after the Army Act of 1911 was made applicable to the Army as well as to the Air Force. The perusal of Air Force Act, 1950 reveals that with the requisite modifications, the Army Act, 1950 has been mutandis adopted for the Air Force as well as far as the provisions relating to tenures, terminations and the processual justice are concerned.

\(^{166}\) Supra note. 104, p.254.

\(^{167}\) Ibid.
Appraisal

With the evolution of the human species, the need for a body politic protected by a well trained defence force was felt. The need for peaceful co-existence was predominant. Organisation of the families, the villages the communions and later the States came in the wake. Need for a State head and a set of rules to regulate conduct of the forces under the overall control of the king was the next thing important that brought to fore the need for bodies empowered to make laws. The State which was generally an authoritarian Military State could govern itself well only if they had well laid down rules of tenures and termination of the defence service. The concept of tenure and termination has evolved over the years particularly during the ancient and medieval period. It was therefore necessary to trace its history from the earliest times for the sake of convenience, dividing it into following three periods:-

(a) The ancient period;

(b) The medieval period; and

(c) The modern period.

The system of tenured appointments as are prevalent under the modern service law was hard to find during the Vedic period and is seen to have come much later, retention in service of the rank and file or their termination depended solely upon the accomplishment of the assigned tasks within a particular period of time. To make it binding, it was made sacrosanct and reprehensible in case of violation. The Hindu jurisprudence or the legal system was embedded in Dharma- an expression of the widest import.168 Dharma in relation to the defence forces in this

168. Supra note.10,p.3.
period cannot therefore, be construed anything beyond the performance of the duty as stipulated in the *Dharma Shastra*\(^{169}\), part of which then was written and part thereof was unwritten but understood by everyone by usage. The first known law giver is the *Manu* and also the first one to say how important for the mankind was adherence to *Dharma*.\(^{170}\) Besides the fields uncovered by the *Srutis* and *Smritis*, which do not reveal any direct reference to the concept of tenure or termination, it is constructed from the exhortations and references made in these compositions. Other prominent compositions of the early period are those of *Narada, Parasara, Shukra, Yajnavlakya, Vasishtha* and the *Bhardwaja*.

Medieval age started with the invasions of the country by the Mahmud of Ghazni, Timur the lame and later Mughals by their armies which were partly regulars and partly irregulars. The conditions of service were generally unrecorded and based on usage and the theocratic injunctions. The defence soldiers were adhering to the rule of the Sultan while the unmindful masses of this nation, the inhabitants of the Aryavarta, still prided in the pristine *sanatan dharma* (the old order of living). This impressed the likes of Babur who decided to make India his kingdom and framed the laws of service for his defence forces as per the Quran and the usage which not only governed their conduct but also their tenures and terminations. This lasted till the advent of the foreign traders in the form of the Portuguese, the Dutch, the French, and finally the British who heralded the era of the pre independence India.

**Army Refashioned.** The supreme importance of defence in the body politic of the state, whether oriental or accidental, cannot

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169. *Supra note.1,2,&10.*
170. *Manu, ‘Do not destroy dharma so that you may not be destroyed’* as quoted by Justice M. Rama Jois.
be overemphasized. The civilization of the ancient world, whether Roman, Indian or Chinese had its special feature in centralization of power and administration which alongside its imperial conception was based upon the mind machine. It was the decentralization and disruption of this machine which brought the end of ancient world and the beginning of the middle ages with its feudalism which is characteristically described as decentralized defence.

The researcher further continues that with the independence, the partition of the country and the creation of Pakistan involved the tragic necessity of dividing the force into two, one portion coming to India, the other going to Pakistan. Thus, if the quality of its theory and the purity of its laws are the acid tests of the greatness of a civilisation, it can be asserted that neither the ancient nor the medieval nor the modern in the constitutional history of India lacked greatness. Nor did the laws are governing forces and in particular the provisions relating to tenures terminations and the processual justice in relation to the defence forces of the Union. Durga Das, the famous reporter and writer in his book referred to the General Smith’s forecast on 14th August that the Army would break up within six months. World War I had proved that the Indian soldier was valiant and could fight in any terrain or climate. Another factor which was etched into the pages of the Military records was that for the Indian soldier, his honour was far dearer than anything material in life as a result he valued his service above everything else. Removal, discharge, dismissal or termination was thus not taken kindly in any circumstance.

After partition, there was an urgent requirement to give fresh cohesion and refashion the existing defence forces into efficient fighting forces. Hence, it was deemed appropriate to
take advantage of the British experience in this regard besides using the British laws of tenures and termination. ‘General Bucher was invited to continue as the Commander-in-Chief and so also the British officers heading the Navy and the Air Force.’ The powers of the C-in-C in the case of appointment and termination, however, underwent a sea change. While tracing the evolutionary path of the tenure and termination in the defence forces, one is impelled to understand the nature of the forces protecting the length and breadth of this country - an aspect which has been a subject of interest and research for innumerable western scholars. Some of whom conducted an in-depth study into the dynasties and cultures of India.