Prelude

The soldier does not by his enlistment divest himself of the character of citizen. He is still subject to all the duties and has all the rights of the ordinary citizen, except so far as they have been expressly altered by statute. As we talk about the terms ‘tenure’, ‘termination’ and ‘processual justice’ in the defence forces, we undoubtedly talk about their constitutional nature and when we talk about the Indian constitution, we would be unwittingly referring to many constitutions in the world, primarily those on which our constitution is based. The principles which have universal application and acceptance are those which are recognised by the humanity at large and pass the test of public policy. Stephen R. Covey in his ‘The 3rd Alternative’ says, “We live in times when the walls are falling.” The concept of termination as a punishment in the Defence Forces worldwide, with all its legal and procedural hue in its present form is, however, of a relatively recent origin. The terms ‘terminate’ and ‘termination’ as per the Webster’s third New International Dictionary of the English Language, is, the ‘end in time or existence. This also suggests cessation of an undertaking

4. Ibid.
or an assignment. The same dictionary explains termination as an activity instrumental, ‘to bring to an ending or cessation in time’. The ending here applies to a ‘sequence’ or ‘continuity’. Cessation of service in terms of time period is what should be termed as the termination of service. The evolution of the concept of termination is found linked with that of the relationship of master and servant.

3.1 Service Tenures in the United Kingdom and the United States of America – A General View

The rule of tenure in the western world is maintenance of good conduct and the allegiance to the sovereign. Bernard Schwartz terms it as the rule of prescription. Hence, the rule of tenure would not accept violation of the ‘legislative or quasi legislative norm of prescription which establishes a pattern or course of conduct for the future.’ Commands emanate from the power of commander in the forces, what is termed as their rule making power or the power of adjudication which is partly statutory and partly customary, and creates for the forces in general what Schwartz termed as the ‘statements of general applicability.’ Thus, interpreted and understood in different parts of the world, the tenure and termination had one thing in common that it has to have a relationship with some service, and that the continuation of service should depend upon the fulfillment of certain conditions, primary among those is the maintenance of good conduct by the servant. In other words, actions leading to justiciable consequences have to conform to the rule of law. The law, here, in the words of Salmond, “In its

5. Ibid.
6. Ibid.
7. Ibid.
10. Ibid. p.142.
11. Ibid.
widest sense, include any rule of action; that is to say, any standard or pattern to which actions (whether the acts of rational agents or the operations of nature) are or ought to be confirmed.”

‘Tenure’ is in fact a term which appears in the Administrative Law. It is understood in relation to a tenure of office, officially conferred, regulated by a set of rules and has a definite date of termination. Termination of this nature is a sovereign function, exercised on behalf of the sovereign by a competent authority which for stated reasons would cause the tenure of office to cease.

George Nolte who has discussed the Military law systems of various countries in Europe, in his book European Military Law Systems, has remarked that a number of multinational units with a higher level of integration have come into being in the recent years including the Euro corps, the first German Netherlands Corps and the Multinational Corps Northeast. The military law which was till recently confined to only the national forces, has started influencing forces of other countries. European forces which generally operate jointly in missions have a necessity of a uniform code for the Euro forces. The same is however, not true in respect of the countries outside the European continent. The laws relating to the Defence forces of UK and USA no longer influence the national laws of countries outside Europe or the United States of America. They may not

12. Sir John Salmond, ‘Jurisprudence’, Sweet and Maxwell, 1948, p.20. The term law is understood in the terms “Jurisprudence generalis or universalis” or as the Rechts philosophie; philosophie du droit, i.e., the philosophy of law, Salmond, ‘Jurisprudence’, p.3.
15. Ibid.,p.832.
have much influence in their own respective continents, as the laws relating to forces are peculiar to the respective nations and wherever an attempt has been made to import new and different laws from a foreign soil, the host country has after some time reverted back to their own national law and ethics.

The defence forces of the United Kingdom consist of three major elements viz., the Army, the Navy and the Air force. The Army further comprises of the General Staff and the Field Army which is deployed in the operations. The other elements are the Regional Forces which support the main forces. Another peculiarity of the British Defence Force is the existence of the Joint elements which work at tandem with the Royal Navy and Royal Air Force. The tasks which the Army carries out are those assigned to it by the democratically elected Government of the United Kingdom. The primary responsibility of the Defence forces is to help defend the interests of the UK, which consists of England, Wales, Scotland and the Northern Ireland. This may involve service of the forces overseas, as a part of a North Atlantic Treaty Organisation (NATO) Force or deployment under any other multi-national Defence exercise. Soldiers from the United Kingdom may also be deployed on the missions ordered by the United Nations (UN) termed as the United Nations operations (UN Ops) and may also be used to help the nation and the International community in other emergencies. The governance of the Defence forces with regard to their discipline and their terms of service as well as the tenure and the termination aspect, is done under the respective statues passed by the Parliament. As far as the procedure before action is concerned, the statutes and the Service Regulations lay down an elaborate procedure for compliance. Coming to the Laws relating to the Defence Forces in England, George Nolte puts it, -
Basis of UK statute law applicable to the armed forces is generally one of imposing specific duties with attendant penalties for failure to comply rather than of granting rights.\textsuperscript{16}

George Nolte further explains certain peculiarities of the English Law. As per him, like most countries the current state of the law applicable to the armed forces of England owes more to the 'historical factors than to strict logic.'\textsuperscript{17} In fact, the law in England means the law enacted by the Parliament.\textsuperscript{18} However, the law whether it relates to the Defence forces or to any other organisation under the Royal influence, must be dealt with systematically or dogmatically in respect of its contents, historically in respect of the process of its development, and critically in respect of its conformity with justice and the public interest.\textsuperscript{19} In the same vein, the law in its most general and comprehensive sense signifies a rule of action, and is applied indiscriminately to all kinds of action whether animate or inanimate rational or irrational. Thus, we say, the laws of motion, of gravitation, of optics of mechanics, as well as the laws of nature and of nations.\textsuperscript{20} The law relating to the defence forces in England developed from custom of service, common law and the statute. If the rights can be traced back to the Magna Carta of 1215, the law relating to the forces can also be traced back to the same period or even earlier when the regular forces were yet to come into existence but the law of war was still followed.

\begin{footnotes}
\textsuperscript{16} George Nolte, 'European Military Law Systems', p.832.
\textsuperscript{17} Ibid., p.833.
\textsuperscript{20} Blackstone, as quoted by Salmond, 'Jurisprudence',p.20.
\end{footnotes}
3.1.1 The Development of Military Law in The United Kingdom

Parliament of the United Kingdom had been recognized as the final authority in all spheres was evident in the early seventeenth century itself. Keeping and maintaining an Army in the times of peace was mutinous as it posed a threat to the supremacy of the king. However, in the year 1689, the first Mutiny Act, put the law relating to the maintenance of discipline in the standing Army on a statutory basis; and this in time became what is now known as the Military law.\textsuperscript{21} The term Military Law, however came into vogue in England only at the end of the eighteenth century, and long after that period, the older term martial law is used interchangeably with it.\textsuperscript{22} The Military Law today rests on a statutory basis.\textsuperscript{23} It became the practice of the parliament to pass an Annual Mutiny Act and later an Annual Army Act, to comply with the strictures of the Bill of Rights. The annual Army Acts would recite the Bill of Rights as the justification for their submission to the parliament. As an example, the Army (Annual) Act, 1913, states in its preamble,-

‘Whereas the raising or keeping of a standing Army within the (UK) in time of peace, unless it be with the consent of Parliament, is against law. And whereas it is adjudged necessary by His Majesty and this present Parliament that a body of forces should be continued for the safety of the United Kingdom and the Defence of the possessions of His majesty’s Crown, and that the whole number of such forces should

\textsuperscript{22} Ibid.,p.174.
\textsuperscript{23} Ibid.,p.175.
consist of one hundred and eighty five thousand six hundred .... Yet nevertheless, it being requisite, for training of all the before mentioned forces ..... That an exact discipline be observed.....”

Section 2 of this Act provided that the Act of 1887 was to remain in force for another year. The Royal Air force adopted a practice virtually identical with the Army when it came into existence in 1919. The constitutional arrangement applied to the Royal Marines but not to the Royal Navy since it operated only outside the United Kingdom. The Army Act of 1887 was the relevant Act which dealt with the subjects as wide as the enlistment, billeting, courts martial, military prisons and detention etc. The Act also inter-alia dealt with the issue of ‘concurrent jurisdiction’ i.e., jurisdiction between the courts martial and the civil judiciary - an issue covered by Section 125 of the Army Act, 1950 in India read with the ‘Criminal Courts and the Courts Martial (Adjustment of Jurisdiction) Rules’ 1973. The Army, Navy and the Air force in England are governed by the Army Act, 1955, Navy Act, 1957 and the Air force Act, 1955. It is a genuine coincidence that in India where the Army, Navy and the Air force are modeled on the British Pattern, the statutes governing them are also similar not only in content but also in vintage. The Acts relating to the three Major forces of the Union in India are The Army Act, 1950, the Navy Act, 1957 and the Air force Act, 1950 respectively. The popular

27. Reproduced in the Defence Services regulations, in India, Para 418 of the ‘Regulations for the Army, 1987’.
adage in England, ‘the soldier takes the law with him wherever he goes’\textsuperscript{28} is applicable in India in equal measure.

Talking about the prerogative powers of the Army authorities, Section 134 of the Army Act 1955 gives a Commanding Officer the power to condone an offence. This power is very unusual as there is no parallel in UK law applying to the civilians. Exercise of this authority however, rests upon the objective satisfaction of the Commanding Officer who must have full knowledge of all relevant circumstances before exercising this authority in favour of the accused Military personnel. If an offence is condoned by his commanding officer a soldier cannot subsequently be tried by court martial (or be dealt with summarily) for that particular offence.\textsuperscript{29}

(a) The Army Act, 1955

The English Parliament passed an Act on 6th May 1955 to make provision with respect to the Army and termed it as the Army Act 1955. The Act which has been further amended by the Armed Forces Act 1966 and the Armed Forces Act 1971 which lays down the law with regard to the governance of the Army under the British crown and also provides the essential procedure therefor in the provision itself. The Act is supplemented by six schedules which contain the detailed procedure of enlistment etc. For instance Schedule I contains the format for enlistment. Certain provisions of the Act are being reproduced to highlight the similarities and the dissimilarities between the Indian and the British Army Acts.

\textsuperscript{28} George Nolte, ‘European Military Law Systems’, p. 834.
\textsuperscript{29} \textit{R v. Bisset} (1980)1 WLR 335.
(b) **Enlistment**

Enrolment into Army in England is called *enlistment* and is explained in section 2 of the Act. A person offering to enlist in the regular forces shall be given a notice in the prescribed form setting out the questions to be answered on attestation and stating the general conditions of the engagement. This will be done by a recruiting officer as per the procedure provided for enlisting a person in the regular forces set out in the First Schedule to the Army Act.\(^\text{30}\) Section 22 of the Act empowers the Defence Council to make necessary regulations in this regard.\(^\text{31}\)

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30. **Section 2. Enlistment. The Army Act, 1955.** (1) A person offering to enlist in the regular forces shall be given a notice in the prescribed form setting out the questions to be answered on attestation and stating the general conditions of the engagement to be entered into by him; and a recruiting officer shall not enlist any person in the regular forces unless satisfied by that person that he has been given such a notice, understands it and wishes to be enlisted.(2) The procedure for enlisting a person in the regular forces shall be that set out in the First Schedule to this Act.(3) A recruiting officer shall not enlist a person under the appropriate minimum age unless consent to the enlistment has been given in writing—(a) if the person offering to enlist is living with both or one of his parents, by the parents or parent;(b) if he is not living with both or one of his parents, but any person (whether a parent or not) whose whereabouts are known or can after reasonable enquiry be ascertained has parental rights and powers in respect of him, by that person;(c) if there is no such person as is mentioned in paragraph (b) of this subsection or if after reasonable enquiry it cannot be ascertained whether there is any such person, by any person in whose care (whether in law or in fact) the person offering to enlist may be.(4) Where the recruiting officer is satisfied, by the production of a certified copy of an entry in the register of births or by any other evidence appearing to him to be sufficient, that a person offering to enlist has or has not attained the appropriate minimum age, that person shall be deemed for the purposes of this Act to have attained, or as the case may be, not to have attained, that age. A document purporting to be a certificate signed by the recruiting officer, stating that he is satisfied as aforesaid, shall be sufficient evidence, until the contrary is proved, that he is so satisfied.(5) In this Part of this Act the expression “appropriate minimum age” means the age of eighteen or, in a case falling within any class for which a lower age is for the time being prescribed, that lower age."

31. **Section 22. Regulations as to enlistment. The Army Act, 1955.** "[1] The Defence Council] may make such regulations as appear to them necessary or expedient for the purposes of, or in connection with, the enlistment of recruits for the regular forces and generally for carrying this Part of this Act into effect. (2) Any power conferred by this Part of this Act to make regulations (including the power under paragraph 5 of Schedule 1 to this Act) shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament."
Similar to the provisions contained in Rule 10 of the Army Rules, 1954, where enrolment is in the nature of a contract signed by the enrolled person wherein the terms and conditions of his service are specified. By this contract of enrolment, the enrolled person undertakes to serve continuously for a specified period in the particular Corps or Department in which he has been enrolled in accordance with the process specified. Ordinarily he can, therefore, be transferred from the Corps in which he is enrolled to another corps, if the conditions of enrolment so permit. Under this Army Rule, an enrolled person can be transferred to any Corps or Department by the order of an authority exercising powers in this behalf. The authority, however, should not be less than that of an officer commanding a division if the Central Government has so directed by any general order or a special order, a provision exists under the U.K. Military Law. Section 3 of the U.K. Army Act, 1955 caters for transfer to another corps or department and provides that, (1) the recruits may, in pursuance of regulations of the Defence Council, be enlisted for service in particular corps, but save as may be provided by such regulations recruits shall be enlisted for general service; (2) The competent military authority shall as soon as practicable appoint a recruit, if enlisted for service in a

32. Rule 10 of Indian Army Rules.—"10. Transfer from one corps or department to another.—Where the Central Government by any general or special order published in the Official Gazette so directs, any person enrolled under this Act may, notwithstanding anything to the contrary contained in the conditions of service for which he is enrolled, be transferred to any corps or department by order of an authority exercising powers not less than those of an officer commanding a division."
corps, to that corps, and if enlisted for general service, to such corps as the competent military authority may think fit.33

(c) Attestation

The next important formality is the ‘Attestation’. Attestation is an important activity after enlistment under the British Army Act. Section 18 of the Army Act, 1955 lays down that Where a person has signed the declaration required by the First Schedule to this Act, and has thereafter received pay as a soldier of the regular forces, the validity of his enlistment shall

33. “3. Enlistment for general or corps service and appointment to and transfer Between corps”, Army Act, 1955. (1)Recruits may, in pursuance of regulations of the Defence Council under this Part of this Act, be enlisted for service in particular corps, but save as may be provided by such regulations recruits shall be enlisted for general service.(2)The competent military authority shall as soon as practicable appoint a recruit, if enlisted for service in a corps, to that corps, and if enlisted for general service, to such corps as the competent military authority may think fit: Provided that a recruit enlisted for general service before attaining the age of eighteen years need not be appointed to a corps until he attains that age.(3)A soldier of the regular forces may at any time be transferred by order of the competent military authority from one corps to another: Provided that except while a state of war exists between Her Majesty and any foreign power, or a call-out order under section 52 of the Reserve Forces Act 1996 is in force authorizing the call out for permanent service of members of the reserve, an order under this subsection shall not be made otherwise than by a member of the Army Board unless the person to whom the order relates consents to the transfer.(4)Where, in pursuance of the last foregoing subsection, a soldier of the regular forces is transferred to a corps in an arm or branch of the service different from that in which he was previously serving, the competent military authority may by order vary the conditions of his service so as to correspond with the general conditions of service in the arm or branch to which he is transferred.”
not be called in question on the ground of any error or omission in his attestation paper.\textsuperscript{34}

With the attestation having been done, the formalities with regard to the enlistment are complete and so is the subjection of the individual to the Army, Navy or the Air force Acts. The recruit who is now a fully fledged soldier, is now fully governed by the rules of tenure and termination applicable to the Royal Force.

\textsuperscript{34} “13. Validity of attestation and enlistment. - (1)Where a person has signed the Declaration required by the First Schedule to this Act, and has thereafter received pay as a soldier of the regular forces,—

(a) the validity of his enlistment shall not be called in question on the ground of any error or omission in his attestation paper; (b) if within three months from the date on which he signed the said declaration he claims that his enlistment is invalid by reason of any non-compliance with the requirements of this Act as to enlistment or attestation, or any other ground whatsoever (not being an error or omission in his attestation paper) on which apart from this subsection the validity of his enlistment could have been called in question, the claim shall be submitted as soon as may be to the Defence Council, and if the claim is well founded the Defence Council shall cause him to be discharged with all convenient speed; (c) subject to the provisions of the last foregoing paragraph, he shall be deemed as from the expiration of the said three months to have been validly enlisted notwithstanding any such non-compliance or other grounds as aforesaid; (d) notwithstanding any such non-compliance or other grounds as aforesaid, or the making of a claim in pursuance of paragraph (b) of this subsection, he shall be deemed to be a soldier of the regular forces until his discharge. In the case of a person who when he signed the said declaration had not attained the appropriate minimum age, paragraph (b) of this subsection shall have effect as if for the words “he claims” there were substituted the words “he, or any person whose consent to the enlistment was required under subsection (3) of section two of this Act but who did not duly consent, claims”.

(2) Where a person has received pay as a soldier of the regular forces without having previously signed the declaration required by the First Schedule to this Act, then—

(a) he shall be deemed to be a soldier of the regular forces until discharged; (b) he may claim his discharge at any time, and if he does so the claim shall be submitted as soon as may be to the Defence Council, who shall cause him to be discharged with all convenient speed. (3) Nothing in the foregoing provisions of this section shall be construed as prejudicing the determination of any question as to the term for which a person was enlisted or as preventing the discharge of a person who has not claimed his discharge.”
3.1.2 Tenure under the law of defence forces in the United Kingdom

The terms ‘tenure’ and ‘termination’ appear differently in the Royal texts but are eventually found dealing with the same subject and that is of the services in the Defence forces and other services under the crown. The terms, however need to be understood as they appear in different texts, service or otherwise.

The word ‘tenure’ though originated from the system of feudalism,35 in the instant study, is used in relation to the term of office with respect to the persons subject to the ‘Royal forces’.36 In other words the expression is relevant to the persons in the Royal Defence Employment. The Oxford Dictionary defines it as, ‘condition or form of right’,37 ‘the holding or possession of office’.38 It predicates a proposition.39 The most relevant to the study as per the tradition and the statute of the Great Britain, is the meaning given to it, by the same dictionary, i.e., ‘guaranteed permanent employment’.40 The word and expression includes the word term which as per the English dictionaries means, ‘a word is used to express a definite concept’.41 The tenure is also understood as the manner in which an office is held.42 ‘Permanent appoint’43 in a government appointment including that of service in the Defence forces, will also fall in this category. In the same vein the word ‘term’ is understood. It

38. Ibid.,p.853.
39. Ibid.,p.858
40. Ibid.,p.853.
41. Ibid.
43. Ibid.,p.1324.
means, the ‘period of time for which something lasts’. This period of time is definite and applies to the tenured appointments in the Defence services.

(a) Tenure of office

In England, all officers and servants of the Crown, hold office during the Crown’s pleasure, except where statute otherwise provides. The persons belonging to the Defence forces too are governed and are subject to the overall authority of the crown as their service in all circumstances, is to the crown of England. While the tenures are variable depending upon their terms of engagement, and are liable to be altered by the law passed by the parliament, Special statutory safeguards are provided for securing the tenure of the servants, including the Defence personnel, against ‘peremptory termination’. It, however, implies that resignation from an office held under the Crown is ineffective till accepted.

Here the law of England also casts a duty on all officials serving under the authority of the crown, competent to take decisions on behalf of the crown, to furnish a written or oral statement of the reasons for the decision after holding a statutory inquiry. There is, however, an exception to the rule. This rule, does not apply to the decisions in respect of which any other statutory provision has effect. The statement may be refused, or the specification of reasons restricted, on grounds of national security. But whenever, a statement in support of a

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44. Ibid.
46. Ibid. p.11.
47. Ibid. p.19.
48. Ibid.
49. Ibid.
decision is given, it must be taken to form part of the decision and be incorporated in the record.\textsuperscript{51} The reasons so given in pursuance of the obligation cast upon the official competent to take decision as aforesaid, must be full and sufficient; ‘they must be intelligible and deal with the substantial points which are at issue.’\textsuperscript{52} Parties to the proceedings and the courts of law should be able to see what matters have been taken into consideration and what view has been formed. The duty to give reasons may be enforced by mandamus.\textsuperscript{53}

\textbf{3.1.3 Termination under the law of defence forces in the United kingdom}

Termination is an expression which in the law of services, is applied, to the cessation of employment or the terms of engagement by whatever method. The manner, in which it comes about, is in fact not important. The dictionary meaning of this term is, ‘come to an end’\textsuperscript{54} or, ‘bring something to an end’.\textsuperscript{55} The same meaning is found given in the \textit{Revised and updated illustrated oxford dictionary},\textsuperscript{56} a well. It indeed is an act to terminate.\textsuperscript{57} Dismissal and removal are the other words and expression related to the service in the government employment, the Defence forces in this case, which are read in conjunction with termination. The word dismisses means; remove an

\begin{thebibliography}{57}
\bibitem{52} \textit{Ibid.},p.19.
\bibitem{54} \textit{Ibid.},p.1325.
\bibitem{55} \textit{Ibid.}
\bibitem{57} \textit{Ibid.}
\end{thebibliography}
employee from a position. It also means send somebody away i.e., allows somebody to leave. However, such permission is not voluntary on the part of the employee. It in fact is enforced on him mostly against his will. That is the primary reason why termination is considered as an unacceptable proposition to an employee, who in ordinary course of business, resists all attempts of the State to give effect to the intention of cessation.

Act of dismissing i.e., removing the employee from service is called dismissal. Removal is an expression, which is interchangeably used for dismissal. Remove thus means to dismiss somebody from a post. Removal thus means, removing or being removed. The Revised and updated Illustrated oxford dictionary, interprets it as, discharge from employment, office etc. ‘Dismissal’ is a noun of the verb ‘Dismiss’. Removal is an adjective of the word and expression, ‘remove’. This means the act or instance of removing. This also means the process of being removed. The word remove, when seen relevant to the service of an employee, soldier, or an officer in the Defence services of England would mean, ‘dismiss from office’.

The next important and relevant thing which needs explanation and determination under the English law is, the

59. Ibid.
60. Ibid.,p.346.
61. Ibid.
62. Ibid.,p.1066.
63. Ibid.,p.1067.
65. Ibid.,p.233.
66. Ibid.
67. Ibid.
68. Ibid.,p.695.
69. Ibid.
70. Ibid.
71. Ibid.
tenure of office which in fact is universally applicable in all cases including the official positions held in the three Defence services in England i.e., the land, air and the marine forces of the country is their tenure of office.

(a) The executive/administrative powers of termination vis-à-vis the persons belonging to the defence forces

As per the English writers, the meaning attributable to “the Executive” or “the Administration” is not uniform. This term is used to denote the central government, in England and then, it ‘refers to the Queen or the Crown’, or Her Majesty’s Government (including, in appropriate contexts, Her Majesty in Council, and the civil service). The Union Cabinet too is a part of it, or individual ministers or the government departments. The Royal forces which are governed by their respective legislations passed by the Parliament, are though not a part of the government directly, yet are subordinated to the government and the Parliament and are thus subject to the orders and resolutions of the government and the Parliament.

The term ‘executive’ which in fact is used with respect to the sole important authority in the field of the ‘tenure’ and the ‘termination’ in the Defence services, since the authority exercised by the military, Navy or the Air Force authorities in respect of their men and officers, is also on behalf of the government or ultimately the crown, may also be used more broadly, covering all bodies exercising functions of a public nature. However, the term in relation to the administrative

73. Ibid.
74. Ibid.
75. Ibid.
76. Ibid.
77. Ibid.
78. Ibid.
powers where, appointment and removal are a part of the
sovereign functions, the scope of the power which definitely
encompasses the power or discretion with respect to employment
and termination does not limit the scope of the executive
authority and thus de hors the above, there is no implication
that the functions of the Executive are confined exclusively to
those of an executive or administrative character. 79

Within the United Kingdom and its dependent territories,
the Parliament of England is sovereign and its legislative
competence is unlimited and possibly illimitable. 80 This power is
limited only in those cases where exercise of the power by the
Parliament will render ‘the formal concept of sovereignty
meaningless.’ 81 The Parliament of England can thus legislate in
disregard of international law. 82 The Parliament of England can
also legislate in disregard of the constitutional convention. 83

The defence forces are governed by the service conventions
and the definite rules in the statute which not only confer power
and discretion but also lay down the procedure for exercise of
those powers by the various authorities under the statutes. The
powers and duties vested by prerogative or statute in the Crown
are normally exercised or performed by constitutional
convention, on ministerial advice. 84 The judicial intervention in
all executive actions is founded on the public policy 85 and, ‘If the
repository of a power exceeds its authority, or if a power is
exercised without lawful authority, a purported exercise of power

80. Ibid.
81. Ibid.
82. Vauxhall Estate Ltd v Liverpool Corpn [1932] 1 KB 733.
83. Ibid.,p.20; The case law on the point is, Madzimbamuto v Lardner-Burke [1969] 1 AC 645 at 722, 723, [1968] 3 All ER 561 at 573, PC.
84. Ellen Street Estates Ltd v Minister of Health [1934] 1 KB 590.
may be pronounced invalid by the courts.86 The lawful exercise of a statutory power presupposes not only compliance with the substantive, formal and procedural conditions laid down for its performance but also with implied requirements governing the exercise of discretion.87 All statutory powers must be exercised in good faith,88 and for the purpose89 for which they were granted. The repository of a power must have regard to ‘relevant considerations’90 and not allow itself to be influenced by irrelevant considerations.91 It must act fairly, and in some contexts reasonably.92

(b) Exercise of power of termination - substantive limits

An important power conferred on the executive authority is the power to dismiss or terminate from service, a person subject to the Defence forces’ Law. It ordinarily encompasses all matters relating to employment of which tenure for a particular or specified period is the prime most. Incidental to the employment is its tenure and age of superannuation and the remuneration termed as the pay, salary and allowances, increments, leave, promotion, gratuity and eventually pension. An important factor incidental to employment is ‘termination’. The power in the hands of a commander is thus the exercise of his executive authority in relation to the tenures of the officers and soldiers, besides the authority to command forces, in war and peace. This, however, is an exercise of the Sovereign authority and is conferred on the commander by way of a delegated legislation, passed in the form of an Act, by the Parliament of England. The objective behind this delegation of powers on Military, Navy and

86. Ibid.
89. Ibid.
90. Ibid.
91. Ibid.
the Air Force authorities is primarily to achieve the specified purpose and not an extraneous purpose. Powers expressly conferred will, however, be so interpreted as to authorize, by implication the performance of acts reasonable and incidental to those explicitly granted, by the statute.

(c) **Satisfaction of competent authority before action, mandatory.**

The powers of removal, exercisable by the executive authorities, with respect to the crown servants who include the defence persons, are often conferred on them by the statute, in 'subjective terms'. The authority competent to take decisions is entitled to act when “in its opinion”, or when it is “satisfied”, or when it “appears to” the specified authority, that a prescribed state of affairs exists. This state of affairs has sometimes been considered by the courts as instrumental in depriving them of jurisdiction to determine independently whether the conditions precedent to the exercise of the power did in fact exist. The task of the courts is to ascertain whether the competent authority acted in good faith, within the four corners of the Act, and had any factual basis at all for its opinion as to the existence of those conditions.

(d) **Judicial review and the power of termination**

The courts in England have the inherent jurisdiction to determine whether the statutory powers of removal, dismissal or termination, have been exercised by the authorities in a bonafide manner and have not been exceeded in any case. This jurisdiction of the courts is ‘not readily ousted'.

95. Ibid.
96. Stocker v Minister of Health [1938] 1 KB 655 at 663, [1937].
fundamental principle is implicit in the following words of D.L. Keir and F.H. Lawson of Gray’s Inn and D.J. Bentley of the Lincoln’s Inn:

“The soldier does not by his enlistment divest himself of the character of citizen. He is still subject to all the duties and has all the rights of the ordinary citizen, except so far as they have been expressly altered by statute.”\(^{98}\)

But at the same time, by this enlistment, the soldier also subjects himself to a ‘special code of law, which completely regulates the relations of officers and soldiers in their military capacity.’\(^{99}\) It is open to a court to inquire whether a reasonable person could have come to the decision in question without misdirecting himself on the law or the facts in a material respect.\(^{100}\) Hence, the provisions that the rules, regulations or orders passed in respect of the Defence forces, shall have effect “as if enacted” in the enabling Act, will not give validity to any instrument which is \textit{per se} ultra vires.\(^{101}\) In \textit{Stutton v. Johnstone},\(^{102}\) Lord Mansfield and Lord Loughborough observed, ‘A commander in chief has a discretionary power by his military code, to arrest, suspend, and put any man of the fleet upon his trial.’\(^{103}\) However, in \textit{Re Mansergh},\(^{104}\) Cockburn, C.J. observed that ‘military matters should be left so far as possible in the hands of


\(^{99}\) Ibid., p.176.

\(^{100}\) Ibid., p.23.

\(^{101}\) Lord Diplock in, Secretary of State of Employment v Associated Society of Locomotive Engineers and firemen (No. 2) [1972] 2 ALL ER at 962.


\(^{103}\) Ibid, p.546; D.L. Keir & F.H. Lawson, p. 177.

\(^{104}\) D.L. Keir & F.H. Lawson, p. 176.
specialists.'

Thus a soldier cannot enforce in the civil courts a right which arises purely out of military status conferred on him by the Army Act. It is widely believed that although a soldier remains subject to common law duties of ordinary citizen, the fact that he is a soldier influences the attitude of the courts towards certain acts of him.

For instance the exercise of dual jurisdiction by the civil authorities empowered under the Army, Navy and the Air Force Acts and Regulations. Expressing its opinion on the issue of double jeopardy, the Supreme Court of India, in S.A. Venkataraman v. The Union of India & Ors, held that if a man is indicted again for the same offence in an English court, he can plead, as a complete Defence, his former acquittal or conviction, or as it is technically expressed, take the plea of “autrefois acquit” or “autrefois convict”.

The court further went on to observe that the corresponding provision in the Federal Constitution of the U.S.A. is contained in the Fifth Amendment, which provides inter alia: “Nor shall any person be subjected for the same offence to be put twice in jeopardy of life and limb.” This principle has been recognised and adopted by the Indian Legislature and is embodied in the provisions of section 26 of the General Clauses Act and section 403 of the Criminal Procedure Code. These were the materials which formed the background of the guarantee of the fundamental right given in Article 20(2) of the

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108. AIR 1954 SC 375.
109. Ibid., p.375.
110. Ibid.
111 S.A. Venkataraman v. The Union of India & Ors, AIR 1954 SC 375.
112 The General Clauses Act, 1897.
113 AIR 1954 SC 375; also see Cr PC, 1973.
Constitution of India.\textsuperscript{114} The ambit and contents of the guarantee, are much narrower than those of the common law rule in England or the doctrine of “double jeopardy” in the American Constitution.\textsuperscript{115}

Article, 20(2) of the Indian Constitution, does not contain the principle of “autrefois acquit” at all.\textsuperscript{116} Probably, our Constitution makers did not think it necessary to raise one part of the common law rule to the level of a fundamental right and thus make it immune from legislative interference.\textsuperscript{117} This has been left to be regulated by the general law of the land.\textsuperscript{118}

(e) **Determination of the legislative intent**

Whenever an issue of law or procedure is brought into focus before a court of law, its first and the foremost duty is to determine the legislative intent behind the provision in question. Lord Hailsham of Saint Marylebone, Lord High Chancellor, of England, explains this function of the courts in the following words:-

“...construing the ambit of statutory powers expressed in language that lends itself to more than one interpretation, the courts may have recourse to common law presumptions of legislative intent. These include presumptions against ousting the jurisdiction of the ordinary courts to determine the extent of statutory powers and the scope of civil rights and obligations.”\textsuperscript{119}

\textsuperscript{114} Ibid., p.375.
\textsuperscript{115} Ibid.
\textsuperscript{116} Ibid.
\textsuperscript{117} Ibid.
\textsuperscript{118} Ibid.
Besides the above, the legal position on the aforesaid subject has been settled in a host of judgments by the House of Lords.\textsuperscript{120}

\subsection*{3.1.4 Processual justice under the British law}

The question whether non-compliance with procedural or formal requirements by the authorities passing the executive orders, renders the purported exercise of a statutory power nugatory, has been in issue in a very large number of reported cases.\textsuperscript{121} An important principle elicited from these judgments is that the normal consequence of non-compliance with the requirements is invalidity.\textsuperscript{122}

\textbf{(a) Mandatory or directory provisions}

The procedural requirements are, classifiable as mandatory or directory and, where a provision is merely directory, substantial compliance will be sufficient, and in some cases total non-compliance will not affect the validity of the action taken.\textsuperscript{123} The provisions will, however, be considered to be mandatory, if they relate to the performance of a statutory duty and their non-compliance would result into some serious public inconvenience affecting individual interests.\textsuperscript{124} Another test for a procedure to be mandatory is that, if in the opinion of the court a procedural code laid down by a statute is intended to be exhaustive and strictly enforced; its provisions will be regarded as mandatory.\textsuperscript{125} All provisions relating to the composition of the repository of the power,\textsuperscript{126} obligations to consult,\textsuperscript{127} to give notice so as to enable

\begin{itemize}
\item \textsuperscript{120} \textit{Pyx Granite Co v Ministry of Housing and Local Government} [1960] AC 260 at 286, [1959] 3 All ER 1 at 6.
\item \textsuperscript{121} Halsbury’s Laws of England, p.24.
\item \textsuperscript{122} \textit{Howard v. Bodington} (1877) 2 PD 203.
\item \textsuperscript{123} \textit{Woodward v. Sarsons} (1875) LR 10 CP 733 at 846, 847.
\item \textsuperscript{124} \textit{Montreal Street Rly Co v Normandin} [1917] AC 170 at 175.
\item \textsuperscript{125} Ibid., p.25.
\item \textsuperscript{126} Ibid.
\item \textsuperscript{127} Ibid.
\end{itemize}
the affected person to make a representations,\textsuperscript{128} to conduct an inquiry,\textsuperscript{129}, to consider objections,\textsuperscript{130} to give reasons for a decision,\textsuperscript{131} and to give proper notice of rights of appeal.\textsuperscript{132}

(b) **Compliance of principles of Natural Justice in the orders of termination**

In the concept of fair adjudication two cardinal principles are implicit, namely, that no man shall be a judge in his own cause (\textit{nemo judex in causa sua}), and that no man shall be condemned unheard (\textit{audi alteram partem}).\textsuperscript{133} These two universal principles, viz., the compliance of rules of natural justice while contemplating termination of service under the Defence forces law, and all persons and bodies having the duty to act judicially, except where their application is expressly or by necessary implication, excluded, are mandatory and must be observed.\textsuperscript{134} The courts have given laudatory acceptance to these principles in their decisions and have also extended the scope of these requirements.\textsuperscript{135} For instance, other rules of natural justice have been suggested that a tribunal’s decision\textsuperscript{136} must be based on evidence having probative value, and that reasons must be given for decisions.\textsuperscript{137} This has been included in the Report of the Committee on Ministers’ Powers.\textsuperscript{138}

\begin{itemize}
\item \textsuperscript{128} Bradbury v Landon Borough Council of Enfield [1967] 3 All ER 434.
\item \textsuperscript{129} Franklin v Minister of Town and Country Planning [1948] AC 87 at 102, 103.
\item \textsuperscript{130} Ibid.
\item \textsuperscript{131} Franklin v Minister of Town and Country Planning [1948].
\item \textsuperscript{132} Ibid., p.25.
\item \textsuperscript{133} Halsbury’s Laws of England, p.76.
\item \textsuperscript{134} Ibid.
\item \textsuperscript{135} R v Industrial Injuries Commissioner, ex parte Moore [1965] 1 QB 456 at 476.
\item \textsuperscript{136} Tribunal in terms of the Royal Army, Navy or the Air force law would mean a court martial which has an explicit power of dismissal or cashiering in the case of Officers.
\item \textsuperscript{137} R v. Gaming Board for Great Britain, ex parte Benaim and Khaida [1970] 2 QB 417.
\item \textsuperscript{138} Halsbury’s Laws of England, p.76.
\end{itemize}
(c) Duty of the authorities ordering termination, to act fairly

The content of the rules of natural justice is not stereotyped. According to the rule that no man shall be condemned unheard, is a universal rule. It means, a person, irrespective of his rank or rating in the Defence forces, shall be given prior notice of the allegations levelled against him and a fair opportunity to be heard is provided to him. “This is a cardinal principle of justice.” This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act judicially in conformity with the rule has been imposed by...
the common law on administrative bodies not required by statute or contract to conduct them in a manner analogous to a court.\(^{144}\) This rule in fact applies to the conduct leading to a final act or decision, and not to the making of a preliminary decision.\(^{145}\) This would also not apply to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded.\(^{146}\)

The nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice.\(^{147}\)

Natural justice does not invariably require that the parties be entitled to an oral hearing. It will thus be fair to determine an issue on the basis of written representations but the parties concerned must still be apprised of and given a proper opportunity of replying to any allegations against them or other relevant evidential material unless they have waived their right to be informed of such material.\(^{148}\)

### 3.1.5 The doctrine of pleasure- the Royal Prerogative

Story of the British constitution is the story of Her Royalty, its various traits and power. The immortal words of the Duke of Wellington, before falling the battle of Trafalgar, that the queen

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144. Ibid., p.76.
145. Wood v Wood (1874) LR 9 Exch 190 at 196.
147. This rule of English service law is the exact replica of procedure adopted in India, in the Court of Inquiry assembled under the Army Rules,1954 in which the compliance of the provisions of AR 180 is mandatory in respect of a person subject to the Army Act,1950 whenever his character or military reputation is in question.
The Royal Prerogative extends to the deployment of forces abroad. The English polity works on the model of the Parliamentary supremacy, Parliament’s power in this field is ineffective as the Parliament is not required to vote in favour of deployment of the British Defence forces in peace or in war. The extent of the prerogative being necessarily somewhat vague, it has been found necessary at various times to define its limits more accurately by statute.\(^{149}\) The principal provisions, from a constitutional standpoint, are to be found in four great statutes or charters by which the rights and liberties of the subject are preserved and acts of tyranny by the Crown or its ministers restrained.\(^{150}\) These statutes must not be regarded as curtailments of existing prerogatives, but as declarations of the fundamental laws of England.\(^{151}\)

### (a) The Crown and the prerogative - definition and nature of the prerogative

Every person belonging to the Royal Army, Navy or the Air force holds office during the pleasure of the Crown. The democracies around the world have adopted and adapted this model of the Great Britain. This is the reason that the Defence forces in most of the countries are designed on the British pattern which not only includes their ranks and ratings but even the laws made for their governance. The royal prerogative finds its reflection almost in all constitutions of the world as the

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151. Ibid.
pleasure of their highest executive expressed in any form. For instance, the pleasure of the President in India and similarly the Pleasure of the crown in England also termed as the Royal prerogative. The king in England is subordinated to no authority and thus the law in England conforms to the following maxim of the common law:

“The King ought to be under no man, but under God and the law, because the law makes the King.”

The royal prerogative may be defined as being that pre-eminence which the Sovereign enjoys over and above all other persons by virtue of the common law, but out of its ordinary course, in right of her legal dignity, and comprehends all the special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of England. This principle is applied *mutatis mutandis* to the tenure and termination of the persons belonging to the Royal Forces and subject to the respective legislations passed by the Parliament. The prerogative however, can be governed by the common law. It is believed to be created and limited by the common law. The English law presupposes a position where the Sovereign can claim no prerogatives except those which the law allows. The important test of the validity of the prerogative is that it should not be contrary to the Magna Carta or any other statute. It should also not be repugnant to the liberties of the subjects. The courts in England have jurisdiction, to inquire into the existence or extent of any alleged prerogative. If any prerogative is disputed, the courts must decide the question

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153. Ibid.
154. Ibid.
155. Ibid.
156. Ibid.
157. Ibid.
whether or not it exists in the same way as they decide any other question of law. If a prerogative is clearly established, they must take the same judicial notice of it as they take of any other rule of law.\textsuperscript{158}

(b) **Inviolable nature of the Sovereign**

Lord Hailsham says that it is befitting the person of the head of state, that the Sovereign’s person is said to be inviolable.\textsuperscript{159} Moreover, the person of the Sovereign is immune from all suits and actions at law, either civil or criminal.\textsuperscript{160} However, an exception has been made in this regard and that is, ‘the Sovereign is only bound by legislation by express mention or clear implications.’\textsuperscript{161}

(c) **The Sovereign can do no wrong**

The English law clothes the Sovereign’s person with absolute perfection.\textsuperscript{162} This state of affairs is responsible for the existence and belief in the maxim of the common law that “the King can do no wrong” which also goes to suggest that there is no remedy against the Sovereign in person either in civil or criminal matters.\textsuperscript{163} The fundamental principle of the prerogative is that, the prerogative is created for the benefit of the people and cannot be exerted to their prejudice.\textsuperscript{164} An interesting feature of this maxim is that, the ‘Sovereign is regarded in law as being incapable if thinking wrong or meaning to do an improper act.’\textsuperscript{165}

\textsuperscript{158} \textit{Ibid.}, p.583. Historically it is incorrect to say that the prerogative is “created” by the common law, because it is the residue of royal authority left over from a time before it was effectually controlled by law. (Halsbury’s Law of England, p.583.

\textsuperscript{159} \textit{Ibid.},p.585.

\textsuperscript{160} \textit{Ibid.}

\textsuperscript{161} \textit{Ibid.}

\textsuperscript{162} \textit{Ibid.},p.586.

\textsuperscript{163} \textit{Ibid.},p.586.

\textsuperscript{164} \textit{Ibid.}

\textsuperscript{165} \textit{Ibid.}
laches or negligence can be attributed to the Sovereign at common law, and no delay will bar her right, the maxim of law being that “time does not run against the King”.\textsuperscript{166} However, that does not in fact mean that the time runs without limits for the actions of the crown. In certain cases, ‘the Crown is limited by statute as to the time within which proceedings may be begun.’\textsuperscript{167}

(d) Crown not bound by custom

The relating to the royal forces is a merry mix of custom, usage and statute. Above all these, is considered, the authority of the crown. Hence the general rule at common law is that the crown is beyond all customs.\textsuperscript{168}

The important part of their legal protocol in the Defence forces is the status of their supreme commander. Thus the authority it holds in relation to them is equally important. There is no denying the fact that with respect to the ‘royal power and authority’\textsuperscript{169}, the ‘Sovereign is the supreme executive officer in the state.’\textsuperscript{170} The Queen of England is the titular head of the Church,\textsuperscript{171} the Law,\textsuperscript{172} the Navy,\textsuperscript{173} the Army\textsuperscript{174} and the Air force.\textsuperscript{175} The Queen is thus the source of justice and all titles of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{166} Ibid., p.587.
\item \textsuperscript{167} Ibid.
\item \textsuperscript{168} Ibid. “No custom which goes to the person or goods beings the Sovereign, and therefore she is not subject to toll or pontage and passage, nor is her personal property subject to many of the laws which are applicable in the case of the subject. As, however, the Sovereign may take advantage of statutes, although not bound, so also, it seems, she may take advantage of custom. Franchises may be claimed against the Crown by prescription.”(Halsbury’s Laws of England, p.587.)
\item \textsuperscript{169} Ibid., p.587.
\item \textsuperscript{170} Ibid.
\item \textsuperscript{171} Ibid.
\item \textsuperscript{172} Ibid.
\item \textsuperscript{173} Ibid., p.587.
\item \textsuperscript{174} Ibid.
\item \textsuperscript{175} Ibid.
\end{itemize}
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honor, distinctions and dignities as well.\textsuperscript{176} The law is executed and administered, solely in her name, although the Queen acts in such matters only on the advice of her ministers.\textsuperscript{177}

(e) **Sovereign as the source of Military justice**

By virtue of all the prerogatives vested in the Queen of England, she is the ‘Sovereign’\textsuperscript{178} and is the inexhaustible ‘source and fountain of justice’.\textsuperscript{179} All jurisdictions is thus derived from her.\textsuperscript{180} Hence in legal contemplation, the Sovereign’s Majesty is deemed always to be present in those authorities who take actions against the persons subject to the Army, Navy and the Air force Acts. In other words, during the inquiries essential for ordering terminations and the courts-martial trials, essential for the administration of justice in the Royal Forces, \textsuperscript{181} it is the authority of the Sovereign i.e., the Crown which is exercised by the officers on behalf of the Sovereign itself and is thus to that extent legal and unchallengeable.

(f) **General Powers of the Crown in relation to the Royal Forces**

Perusal of the Royal enactments reveals that with respect to the Royal Forces of the United Kingdom, the general control remains with the Queen or the Crown but the statutory control has been decentralized on various authorities. This is, in spite of all the faith that the Englishmen have in their Queen and the system of royal prerogative which the country so assiduously

\begin{itemize}
\item \textsuperscript{176} Ibid.
\item \textsuperscript{177} Ibid.
\item \textsuperscript{178} Ibid., p.603
\item \textsuperscript{179} Ibid.
\item \textsuperscript{180} Ibid.
\item \textsuperscript{181} Ibid., p.603. “By the terms of the coronation oath and by the maxims of the common law, as and, by the ancient charters and statutes confirming the liberties of the subject, the Sovereign is bound to cause law and justice in mercy to be administered in all judgments.”(Halsbury’s Laws of England, p.603.)
\end{itemize}
follows. It in fact is indicative of the constitutional progress which the English law has made as compared to the rest of the world.

(g) **The Statutory control over the Defence Forces**

The supreme command and governance of the royal forces are vested in the Crown of England at common law. But with the passage of time and rightly, the most of their service matters or the affairs are primarily regulated by the statute this includes all matters relating to the 'raising or embodying of the regular forces,'\(^\text{182}\) ‘the reserve’\(^\text{183}\), the ‘territorial and auxiliary forces’\(^\text{184}\) and their ‘subjection, when raised or embodied.’\(^\text{185}\) This further extends to the special codes of military or naval discipline;\(^\text{186}\) the general mode of enlistment and term of service of soldiers, sailors and airmen.\(^\text{187}\) Matters relating to pay, pensions, decorations are also dealt with under the statutes.\(^\text{188}\) The general administration of the Acts relating to these matters is controlled by the Ministry of Defence.\(^\text{189}\)

(h) **The Ministerial element responsible for the Royal Forces (The Service Ministries)**

Apart from the statutory provisions which have been made by the Parliament for the government of the Defence forces, many wide and important powers relating to the royal forces are, however, still retained by the Crown.\(^\text{190}\) This discretionary

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183. *Ibid*.
184. *Ibid*.
185. *Ibid*.
186. *Ibid*.
188. With many other matters relating to the pay, pensions, decorations, effects, billeting, privileges and exemptions, and civil duties and liabilities of soldiers, sailors and airmen; and the requisitioning of vehicles.\(\text{Halsbury’s Laws of England, p.620.}\)
190. *Ibid*.
authority is exercised by the crown with the aid and advice of the Minister. The other authorities who assist the Minister in the discharge of his duties are, the ‘Secretary of State for Defence, through the recognised executive channels of the Ministry of Defence’\textsuperscript{191}, the Defence Council,\textsuperscript{192} the Admiralty Board,\textsuperscript{193} the Army Board and the Air force Board.\textsuperscript{194}

3.1.6 The command of the Royal Forces

The supreme government and command of all forces by sea, land and air and of all Defence establishments is vested in the Crown by prerogative right at common law and also by the statute.\textsuperscript{195} This state of affairs has, however, changed over the period of time. Sovereign has, however, long since ceased to exercise the supreme command in person.\textsuperscript{196} The sovereign is now expressly empowered to make regulations in respect of the members of Her Majesty’s forces and also to specify the authorities in whom command over those forces or any part or member of them is to be vested, and as to the circumstances in which that command is to be exercised.\textsuperscript{197} The King gave up the personal command of the Army in 1793, when the first commander-in-chief was created.

In matters relating to the tenure and termination of the armed forces personnel, the Crown now acts upon the advice of the Secretary of State for Defence, who is a member of the Cabinet and of the Defence Council.\textsuperscript{198} He is responsible to the Parliament for the advice given to the Crown on these issues. He

\textsuperscript{191} Ibid.
\textsuperscript{192} Ibid.
\textsuperscript{193} Ibid.
\textsuperscript{194} Ibid. The matter was raised in Nissan v A-G [1968] 1 QB 286.
\textsuperscript{195} Ibid.,p.621.
\textsuperscript{196} Ibid.
\textsuperscript{197} Ibid.,p.621. see Order in Council dated 19th March 1908, S.R. & O. 1908 No. 256 (amended as respects the name by the Territorial Army and Militia Act 1921, S.1 (repealed); Reserve Force Act 1966, s.1 (i)).
\textsuperscript{198} Ibid.,p.622.
is also responsible to the ‘Crown as well to the Parliament for all the business of the Defence Council.’

Continuation in the service of the crown as a member of the royal force, is dependent upon one important factor and that is, the maintenance of discipline in the service. The common law specifies the authorities responsible for the maintenance of discipline in the forces.

The supremacy of the Parliament in the United Kingdom is recognised above everything else. The Crown is expressly prohibited from raising or keeping a standing Army within the kingdom in time of peace unless with the consent of Parliament. The raising and maintenance of the Royal Air force are authorised by a permanent Act, the Air force (Constitution) Act, 1917. But the Air force Act 1955, by which discipline is enforced, expires annually, annual legislation by statute or Order in Council is needed for its continuance, in the same way as for the Army.

The government in respect of the Royal Navy, is provided for by the Naval Discipline Act 1957, which, although by tradition and in principle permanent, is now made to expire every five years unless continued in force year by year by Order in Council according to the same rules as those applicable to the Army and the Air force.

The Royal Marines are a separate corps of the regular forces. An officer, non-commissioned officer or marine continues to be subject to military law notwithstanding that he

199. Ibid.
200. Ibid.
may, for the time being, be subject to the Naval Discipline Act 1957.\textsuperscript{205}

\textbf{3.1.7 Administration of justice in the Royal Defence Forces}

Military justice was originally administered in the Court of the Constable and Earl Marshal. Both these offices were hereditary, and on the former being extinguished by the attainder of the Duke of Buckingham in the reign of Henry VIII the jurisdiction of the court should have reverted to the Crown, but the court seems to have continued to exist, until in 1703 it was said that without the Constable the court was not properly constituted.\textsuperscript{206} The term “military law”\textsuperscript{207} is now applied in England to the legal code under the Army Act 1955, and has been distinguished from the term “martial law”\textsuperscript{208} which is applied to ‘proclamations of martial law by the Crown.’\textsuperscript{209}

After the revolution of 1688 the standing Army was placed on a legal footing by means of annual Mutiny Acts. From 1881 onwards the annual Army Act took the place of the Mutiny Act. An important change was made in 1955, when the Army Act 1955 was enacted to remain in force for one year, with power conferred to continue it annually up to a maximum of five years by Order in Council to be approved in draft by resolution of each House of Parliament.\textsuperscript{210} The Air force Act 1955 contained provisions for the annual continuation of the Act by Order in

\textsuperscript{205} Ibid.
\textsuperscript{206} Chambers v. Jennings (1702) 7 Mod Rep 125.
\textsuperscript{207} Ibid., p.623.
\textsuperscript{208} Ibid.
\textsuperscript{209} Ibid.
\textsuperscript{210} These provisions have been contained in subsequent Acts continuing the Army Act in force, e.g. the Armed Forces Act 1966, and the Armed Forces Act, 1971, Continuing the Army Act 1955 until the end of 1972, and conferring power to extend it annually by Order in Council, but not beyond the end of 1976. This power, and corresponding powers under the Air force Act 1955 and the Naval Discipline Act 1957, have been exercised by the Army, Air force and Naval Discipline Acts (Continuation) Order 1972 (Halsbury's Laws of England).
Council up to a maximum of five years, as in the case of the Army Act 1955.  

(a) **The determinant factors in the ‘Processual justice’ for the Defence persons of the Royal Army, Navy and the Air Force**

Officers Commissions Act 1862\(^{212}\) has laid down the manner in which the commission in the royal forces is to be regulated. Her Majesty may, by Order in Council, regulate the grant of commission in the Navy, Army and Air force\(^{213}\) and direct that commissions prepared under the authority of the sign manual may be issued without the sign manual but be signed by the Secretary of State for Defence or by the Secretary of State and a member or members of the Defence Council.\(^{214}\) Except where it is otherwise provided by statute,\(^{215}\) all public officers and servants of the Crown hold their appointments at the pleasure of the Crown,\(^{216}\) and all, (this includes Defence persons as well as all government servants), in general, are subject to dismissal at any time without cause assigned.\(^{217}\) The courts will not entertain an action for wrongful dismissal.\(^{218}\) This is notwithstanding the fact that even though the officer can prove

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213. Army Order 1967, dated 23rd March 1967, under which first commissions in the regular, reserve and auxiliary military forces are to be issued under the sign manual in the form set out in the schedule to the order and are to be countersigned by two members of the Defence Council or of the Army Board (Halsbury’s Laws of England).
214. Officers Commissions Act 1862, s.1; Defence (Transfer of Functions) (No.1) Order 1964, S.I. 1964 No. 488, art. 2, Sch. I, Part I.
217. Grant v Secretary of State for India (1877) 2 CPD 445.
218. Ibid., p.640.
that a contract existed in which the Crown ‘purports to restrict its right to dismiss him.’

(b) **Good behaviour as a prime factor**

It is an universal rule that good behaviour is fundamental for continued government service. “Behaviour”, in this respect means, ‘behaviour in matters concerning the office.’ An exception to the rule is also available in the case of conviction upon an indictment for any infamous offence of such a nature as to render the person unfit to exercise the office. This in fact amounts to misbehavior in legal sense ‘though not committed in connection with the office.’ “Misbehavior” or misdemeanor which is in fact a more acceptable term in relation to the office, to the contrary means, ‘improper exercise of the functions appertaining to the office.’ This may be in the form of non-attendance, or neglect of or refusal to perform the duties of the office.

(c) **Removal from office**

Removal like appointment is a sovereign function performed by the Minister, or the Secretary or any other empowered authority on behalf of the Crown. Where an office is held during good behaviour subject to a power of removal by the Crown, the removal can be effected if proven misconduct or misdemeanor of an officer, or soldier, Airman or a Sailor is brought on record. The prerequisite of such a dismissal or the removal is that, the charges upon which the proceedings are grounded must, however, be distinctly and specifically alleged and must be such as would, if proved be sufficient to warrant an

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address to the Crown for dismissal. These powers of appointment and termination in respect of the Defence personnel are exercised by designated bodies. The rules of governance in

225. M'Cleland’s Case (1819) 74 Commons Journal 493.
226. In 1964 arrangements were made under the royal prerogative for a Principal Secretary of State to be charged with general responsibility for Defence; for the establishment of a Defence Council having powers of command and administration over Her Majesty’s armed forces, and of an Admiralty Board, an Army Board and an Air force Board to be charged (under the Defence Council) with the administration of statutory relating to the naval, military and Air forces respectively; and the appropriate statutory functions were transferred to the Secretary of State for Defence and the Defence Council. The Ministry of Defence is an authorised government department for the purpose of suing and being sued, and is subject to investigation by the Parliamentary Commissioner for Administration. The expenses of the department are provided by Parliament. (Halsbury’s Laws of England).

**The Defence Council: constitution.** The Defence Council consists of the Secretary of State for Defence as chairman, the Minister of State for Defence, the Minister of State for Defence Procurement, the Parliamentary Under-Secretaries of State for Defence, the Chief of the Defence Staff, the Chief of the Naval Staff and First Sea Lord, the Chief of the General Staff, the Chief of the Air Staff, the Chief of Personnel and Logistics of the Ministry of Defence, the Chief Scientific Adviser of the Ministry of Defence, the Chief Executive (Procurement Executive) of the Ministry of Defence and the Permanent Under-Secretary of State of the Ministry of Defence. The Permanent Under-Secretary of State is Secretary of the Defence Council, but the council may appoint other persons to act as secretary or secretaries in addition to the permanent under-secretary.

The powers and duties of the Defence Council may be exercised and performed by any two members, and any document may be signed on its behalf by any two members or by the secretary or person acting as secretary (Letters Patent dated 10th September 1971. A certificate purporting to be given under the hand of the secretary (or person acting as secretary) to the Defence Council that any person was at a time specified in the certificate a member of the Defence Council, the Admiralty Board, the Army Board or the Air force Board is to be evidence of the fact certified: Defence (Transfer of Functions) Act 1964, s.1 (6)). (Halsbury’s Laws of England).

**The Defence Council: functions.** Certain functions have been transferred to the Defence Council. These are the functions exercised under the royal prerogative as to command and administration of the royal forces and appointments in those forces, together with the functions conferred by any enactment on the Army council or on the Air Council, and the functions conferred on the Admiralty: (1) by any enactment or (2) by any enactment contained in the Naval Discipline Act 1957 except for those transferred to the secretary of state or by the provisions as to Royal Marines in the Army Act 1955; or (3) by certain enactments which provide for the discharge, training, posting etc. of naval personnel (Letters Patent dated both 10th September 1971).
this respect were laid down by the Parliament by passing certain

Subject to any directions of the Defence Council, the council’s functions under any enactment (including any function of reviewing the findings or sentences of courts-martial and other functions of a judicial nature) may be discharged by the Admiralty Board, the Army Board or the Air force Board. For the purpose of any enactment, anything done by or in relation to any of those boards in or in connection with the discharge of any such functions of the Defence Council is to be of the same effect as if done by or in relation to the Defence Council. (For the purposes of the Defence (Transfer of Functions) Act 1964, s.1 (2), (3), (5), “enactment” includes any legislative instrument having effect under an enactment, or any Order in Council transferring to the Defence Council functions conferred by such an instrument on the Admiralty and which would apart from the order be transferred to the Secretary of State: s.1 (7)), (Halsbury’s Laws of England).

The Admiralty Board of the Defence Council. The Admiralty Board is concerned with the administration of matters relating to the naval forces. It is composed of the Secretary of State for Defence as chairman, the Minister of State for Defence, the Parliamentary Under-Secretary of State for Defence for the Royal Navy, the Chief of the Naval Staff and First Sea Lord, the Chief of Naval Personnel and Second Sea Lord, the Controller of the Navy, the Chief of Fleet Support, the Vice-Chief of the Naval Staff, the Chief Scientist of the Navy Department, the Deputy Under-Secretary of Staff (Navy) of the Ministry of Defence, and the Second Permanent Under-Secretary of State (Administration) of the Ministry of Defence. (Defence (Transfer of Function) Act 1964, s.1 (1) (b)). The board is established by the Defence Council (Letters Patent dated 10th September 1971), (Halsbury’s Laws of England).

The Army Board of the Defence Council. The Army Board is concerned with the administration of matters relating to the military forces. It is composed of the Secretary of State for Defence as Chairman, the Minister of State for Defence, the Parliamentary Under-Secretary of State for Defence for the Army, the Chief of the General Staff, the Adjutant General, the Quartermaster General, the Master General of the Ordnance, the Vice-Chief of the General Staff, the Chief Scientist of the Army Department, The Deputy Under-Secretary of State (Army) of the Ministry of Defence, and the Second Permanent Under-Secretary of State (Administration) of the Ministry of Defence. (Defence (Transfer of Function) Act 1964, s.1 (1) (b)). The board is established by the Defence Council (Letters Patent dated 10th September 1971), (Halsbury’s Laws of England).

The Air force Board of the Defence Council. The Air force Board is concerned with the administration of matters relating to the Air forces. It is composed of the Secretary of State for Defence as chairman, the Minister of State for Defence, the Parliamentary Under-Secretary of State for Defence for the Royal Air force, the Chief of the Air Staff, the Air Member for Personnel, the Air Member for Supply and Organisation, the Controller of Aircraft, the Vice-Chief of the Air Staff, the Chief Scientist of the Air force Department, the Deputy Under-Secretary of State (Air) of the Ministry of Defence, and the Second Permanent Under-Secretary of State (Administration) of the Ministry of Defence. (Defence (Transfer of Function) Act 1964, s.1 (1) (b)); The board is established by the Defence Council : see Letters Patent dated 10th September 1971 (Halsbury’s Laws of England).
legislations. In a famous case, Ridge v. Baldwin, the House of Lords observed, “the watch committee, or any two justices having jurisdiction in the borough, may at any time suspend, and the watch committee may at any time dismiss any borough constable whom they think negligent in the discharge of his duty, or otherwise unfit for the same.”

(d) Discharge from service

The Black’s law dictionary, terms discharge as, ‘to release’, ‘to annul’, to ‘unburden’ or to ‘dismiss’. It also means to ‘extinguish an obligation’. When used in relation to an employee, it means, ‘to terminate his employment’. For persons in the Defence forces, it means, ‘release from the military service’. The term release which is generally used for officers from service is included in the word discharge.

In the English law, discharge is one of the modes of cessation of service in the Defence forces of England. Section 11 of the Army Act, 1955 lays down the law with regard to the discharge from service. The section provides that every soldier of the regular forces, upon becoming entitled to be discharged from the military service, shall be discharged with all convenient
speed. Similarly, the provisions relating to this aspect are found in the Navy and the Air force Acts.

3.2. The ‘Tenure’ ‘Termination’ and the Processual Justice in the U.S. Defence Forces

The history of colonization of the United States of America appears to be similar to the one in India. The U.S.A. was colonized by the French, the Spanish, the Dutch, Portuguese, and above all, the English. The year 1776 saw the breaking out of the war for independence and the fragile ties between England and the country on the, this side of the Atlantic, changed forever with U.S becoming independent from the colonial rule.

238. **Discharge.** (1)Save as hereinafter provided every soldier of the regular forces, upon becoming entitled to be discharged, shall be discharged with all convenient speed but until discharged shall remain subject to military law.
(2)Where a soldier of the regular forces enlisted in the United Kingdom is, when entitled to be discharged, serving out of the United Kingdom, then—
(a)if he requires to be discharged in the United Kingdom, he shall be sent there free of cost with all convenient speed and shall be discharged on his arrival there or, if he consents to his discharge being delayed, within six months from his arrival; but
(b) if at his request he is discharged at the place where he is serving he shall have no claim to be sent to the United Kingdom or elsewhere.
(3)Except in pursuance of the sentence of a court-martial (whether under this Act, the Naval Discipline Act 1957 or the Air force Act 1955, a soldier of the regular forces shall not be discharged unless his discharge has been authorised by order of the competent military authority or by authority direct from Her Majesty; and in any case the discharge of a soldier of the regular forces shall be carried out in accordance with Queen’s Regulations.
(4)Every soldier of the regular forces shall on his discharge be given a certificate of discharge containing the following particulars, namely—
(a)his name, rank and service number;
(b)his reserve liability (if applicable); and
(c)the reason for his discharge and the date of discharge, together with any other particulars which are required to be included in the certificate by directions of the Defence Council or an officer authorised by them.
(5)A soldier of the regular forces who is discharged in the United Kingdom shall be entitled to be conveyed free of cost from the place where he is discharged to the place stated in his attestation paper to be the place where he was attested or to any place at which he intends to reside and to which he can be conveyed with no greater cost.”
The U.S. constitution was drawn in the year 1787, in the form of a charter, which is “the highest law of the land.” The constitution was promulgated and the country had its first President, George Washington who was the repository of all executive power. With regard to the spread of law in the United States, Friedman writes, “The law of the United States spread east to west, not by conquest so much as by natural infection from the original states.”\(^{239}\) The author further writes, “New States borrow heavily from the law of old States.”\(^{240}\)

A marked feature of the U.S. was its Black Slavery. The first African slaves arrived in Virginia and other southern colonies before the middle of the seventeenth century.\(^ {241}\) By the time the war of independence was won, in 1776, the slavery as such had been institutionalized in the U.S. This had a profound impact on the framing of the laws not only affecting the civilian populace but also the Defence forces when the military and the Navy were in their nascent stages.

### 3.2.1 The Evolution of the U.S. Military Law

Prior to the advent of the Uniform Code of Military Justice, the rules for each branch of the armed forces were separately enacted and were different from the rules enacted for the other branches. Customary Military Law, although unwritten, was recognized by these rules, but as the time passed, more and more of the customs were embodied in the written enactments.\(^ {242}\) In the year 1775,\(^ {243}\) rules were framed for the governance of the colonial troops. These rules were repealed the very next year and

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240. Ibid., p.43.  
243. Ibid., p.28
new rules were enacted. These too were modified in 1777 and 1786. These rules were recognized in 1789 when the constitution was adopted. A new set of Articles of War was enacted in 1874 in the year 1916 and in 1920. A major overhaul was carried out in the year 1940.

For the U.S. Navy, the Congress provided rules for the tiny fleet of 1775. This set of rules was revised in the year 1800 which remained in effect until 1862. Termed as the ‘Articles for the Government of the Navy’, remained unrevised for eighty-one years and eventually became the ‘law’. These were re-enacted in the Revised Statutes of 1874, and enlarged from time to time thereafter.

The Air force was integral to the Army and was separated there from only after the World War II. With regard to the law for its government, the U.S. Congress provided that the Articles of War, applicable to the Army, is applied to the Air force too with such adaptations and modifications as would fit the necessities of the discipline and justice in the service.

(a) The Sources of command authority under the U.S. law relating to the Defence Forces- The President of the United States of America

The main sources of authority as revealed by the texts on the Military, Naval and the Air force Law, in the U.S. are firstly, Article II, Section 2 of the United States Constitution which

244. Ibid., p.23.
245. Ibid.
246. Ibid.
247. Ibid.
248. Ibid.
249. Ibid.
250. Ibid.
251. Ibid.
252. Ibid.
253. Ibid.
provides the original source of command authority as the President of the United States, in the capacity of the ‘Commander-in-Chief’ of the three forces, viz., the Army, the Navy and the Air Force. The constitution vests in the President the executive power and the title of the Commander-in-Chief of the Army and Navy. ‘The Air force’ was added later. This investiture is a source of authority for the issuance of regulations. His function as the commander in chief authorizes him to issue, personally, or through his military subordinates, such orders as are necessary and proper to enforce discipline in the armed forces. The ‘President’ is the official title of the ‘Chief Executive Officer of the federal government in the United States.’ Tenure and its subsequent termination under the Defence law are dependent upon the basic executive set up of the organisation of the State machinery. Being a federal structure, the government in the U.S., exercises its powers through its executive authorities. The President, personally or through his Secretaries of the various departments, in the case of the Defence forces, the Secretary for Defence, prescribes regulations for the proper executions of the Statutes relating to the armed forces. The general meaning of the executive orders is thus understood to be the orders or

256. James Snedeker, p.36.
257. Ibid., p.36.
258. The Army Regulations were issued in the year 1881. These regulations listed four types of authority, viz., (1) Orders which the President had the right to issue under his constitutional prerogative as the commander in chief, (2) departmental regulations issued under the Revised Statutes, Section 161, (3) regulations not approved by Congress but made by the President in the exercise of legislative authority conferred by the statute, and (4) regulations expressly approved by the Congress.(Snedeker, p.37, F.N. 9.)
259. Ibid., p.36.
260. Ibid., p.37.
261. Ibid.
263. Ibid., p.37.
regulations issued by the President being the Highest executive officer of the country, or some administrative authority acting under his directions-Secretaries of the various departments. James Snedeker has rightly observed, that, ‘the office of the commander in chief is a source of considerable and undefined powers.’ To have the effect of law, such orders must be published in the ‘Federal Register.’

The second source of command authority in the U.S., Defence forces for all purposes including the tenure and termination, is the Chain of Command, which runs from the President and the ‘Secretary of Defense’ to the ‘combatant commander’ of the troops. The chain of command is headed by the ‘Chairman of the Joint Chiefs’ who is responsible for transmitting communications to the ‘commanders of the combatant commands’ from the ‘President’ and ‘the Secretary of Defense.’ The service chiefs are responsible to the ‘Secretary of the military department for management of the services.’ The subordinate command authority may be ‘conferred by statute, delegated, or assumed.’

Command carries dual functions viz., the legal authority over the persons under command which includes power to discipline and the operational responsibility. Command is exercised by virtue of the office and the special assignment of

264. Ibid.
267. Ibid.
269. Ibid.
270. Ibid.
271. Ibid.
272. Ibid.
officers holding military grades who are eligible by law to command. A commander exercises control through subordinate commanders. The commander’s authority over military members extends to conduct of the members whether on or off the installation. The commander exercises authority by virtue of his or her status as a superior commissioned officer. Enlisted members take an oath upon enlistment to obey the lawful orders of those appointed over the member. Articles 89, 90, and 92 of the Uniform Code of Military Justice, include prohibition of disrespect towards, or the failure to obey, superior officers.

An officer succeeds to command, either by assuming command, or by appointment thereto. Both assumption and appointment of command are generally based on seniority and may be either temporary or permanent. The assumption of command and the discharge of command responsibility which includes the power to dismiss, remove and terminate is governed by the Statute and the Defence Services Regulations. The ultimate power of appointment and removal vests in the President, or the Secretary of State for Defence exercised on behalf of the President.

3.2.2 The ‘Tenure’ and ‘Termination’ in the U.S Defence Forces

The terms ‘tenure’ and ‘termination’ under the US law of Defence services has not been found to be substantially different from that of England or India. However, some acceptable and understandable peculiarities of service are there due to difference in culture, societal norms and service sensibilities. To that, the systems in practice in the Great Britain or the common

274. Ibid., 03 Mar 2013, 2345 hrs.
275. Ibid., 03 Mar 2013, 2345 hrs.
law countries, or, the countries that were the erstwhile colonies of Britain, are slightly different from the one being followed in the United States of America. The necessity to know this difference and to understand it is as simple, as to know, the rule of the road in the two countries, that the common law countries follow the left hand drive while the US follows the rule of the right hand drive as their rule of the road and both the systems are sound as well as right in their respective territories.

The concept of tenure and termination in the United States is a concept which emanates from the word 'employment'. Universally used in the whole world, the employment when studied as a subject under the administrative law, it refers to the employment under the 'State' or the state authorities. The employment is governed by statutes with respect to its definite tenure and the rules prescribing its termination.

(a) Employment

The word employment in the allocation of the words indicates that it relates to employment by the 'State' and has a reference to employment in service than as contractors. The concept of tenure and termination thus clearly relates to the tenure of office in the government employment which has for itself a fixed term and definite guidelines of discharging service.

(b) The ‘Tenure’

So as to understand the plain and simple meaning of the terms tenure and termination, in the U.S. parlance, a reference is first made to the dictionary meaning of these terms. Black’s law dictionary, defines tenure as ‘right’277, ‘term’278 or a ‘mode of

holding’ or ‘occupying’. When referred to in relation to the holding of a particular office, it means the ‘tenure of office’ suggesting the ‘manner in which it is held’ especially with respect to the ‘time’. The ‘duration of holding a public or a private office’ is also included in this term. The word and expression ‘tenure’, includes in itself the word ‘term’, which word ‘term’ means, ‘a fixed and definite period of time’. When used in relation to an employment in a discipline, which undoubtedly will include the employment in the Defence forces of the United States of America. This would imply, ‘a period of time with some definite termination’.

Termination here would restrict itself only to the termination of employment or that of the service in the Defence forces in whatever rank or rating held at the time of termination. The specific interpretation is being added in view of the subject at issue being the tenure of office and termination of the said tenure (also termed as the service) by an order of the competent authority. The variation, however, could be in the manner in which the termination is brought about.

The ‘term of office’, literally means, the period during which an ‘appointee is entitled to hold office’. This implies in no uncertain terms that the holder of such office is also entitled to, in a bonafide manner ‘perform the functions’, enjoined by that office and, simultaneously, to ‘enjoy its privileges and

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279. Ibid., p.1469.
280. Ibid.
281. Ibid.
282. Ibid.
283. Ibid.
284. Ibid.
285. Ibid., p.1470.
286. Ibid.
287. Ibid.
288. Ibid., p.1471.
289. Ibid.
290. Ibid.
emoluments'\textsuperscript{291}, which accrue or are integral to or are incidental to such an office.

\textbf{(c) The ‘Termination’}

The word termination is visited by the consequences which are invariably unfavorable to the individual. However, when seen objectively and dispassionately, in its larger perspective, it is found to be an instrument in the hands of the sovereign which ensues from the discharge of the sovereign function (as interpreted under the common law), or from the executive authority (the US Law). When referred to as a rule of the service law, termination means the cessation of employment. The word termination which also in itself includes the words, ‘removal’ and ‘dismissal’, means, ‘end in time or existence’.\textsuperscript{292} It also means ‘close’\textsuperscript{293}, ‘cessation’\textsuperscript{294} or ‘conclusion’.\textsuperscript{295} The law on termination of service though evolved from the custom, has a firm statutory base. It is thus settled that the ‘termination of employment should never be a matter taken lightly and employers must always be aware that if they get it wrong they could face a claim for wrongful or unfair dismissal’.\textsuperscript{296} Employment and the consequent tenure of office are deemed to originate from a contract. A wrongful dismissal would occur where the employer has terminated the employment in breach of the terms and conditions of the contract. Hence the thumb rule of employment is, always follow the wording of the contract and act accordingly. Unfair dismissal of a servant can also arise under the legislation

\begin{itemize}
\item \textsuperscript{291} \textit{Ibid.}
\item \textsuperscript{293} \textit{Ibid.},p.1471.
\item \textsuperscript{294} Edwards v. Equitable Life Assurance Society of the United States, 296.
\item \textsuperscript{295} \textit{Ibid.},p.1471.
\item \textsuperscript{296} http://www.acs.org.uk visited at 1400 hrs on 17-2-2013.
\end{itemize}
governing the employment if the dismissal is not for one of the following reasons:

1. Conduct;\(^{297}\)
2. Capability (not able to do job for which employed, including through ill-health);\(^{298}\)
3. Redundancy;\(^{299}\)
4. A statutory ban (e.g. driver unable to do job because licence suspended);\(^{300}\)
5. Some other substantial reason.\(^{301}\)

### 3.2.3 Processual Justice in the U.S. Defence Forces

Article 138 of the Uniform Code of Military Justice (UCMJ) provides to every member of the Armed Forces, the right to complain that he or she was “wronged” by his or her commanding or superior officer. The issues which can be covered under Article 138 include discretionary acts or omissions by a commander which have adversely affected the member of the armed force. The exercise of power by a commander can be challenged on the following grounds:

- (a) Violation of law or regulation; or
- (b) beyond the legitimate authority of that commander; or
- (c) arbitrary, capricious, or an abuse of discretion; or
- (d) clearly unfair, e.g., selective application of administrative standards/actions; or
- (e) disciplinary action under the UCMJ, including non judicial punishment under Article 15; or

\(^{297}\) Ibid.  
\(^{298}\) Ibid.  
\(^{299}\) Ibid.  
\(^{300}\) Ibid.  
\(^{301}\) Ibid.
(f) actions initiated against the member where the governing directive requires final action by the Secretary Defence.

(a) “Reproof” in the form of ‘Administrative Counseling’, ‘Admonition’, or ‘Reprimand’

Counseling, admonition, and reprimand are called the ‘quality force management tools’ (referred to as “reproof” under the regulations for the Army in India), available with the supervisors, superiors, and commanders. These management tools are designed to improve, correct, and instruct those who depart from standards of performance, conduct, bearing, and integrity and whose actions are repugnant to the force’s ethos. These tools are only corrective in nature, not punitive.

The ‘counseling’ is the lowest level of administrative action. An admonition is more severe than counseling. A reprimand is further severe than a counseling or admonition and carries a stronger degree of official censure. Primary Considerations for taking the administrative action are, two fold viz., firstly, the nature of the incident and secondly, the previous disciplinary record of the delinquent. The counseling, admonition or the reprimand may be either verbal or in writing. Usually, it should be in writing because the corrective action is thus more meaningful and the infraction of discipline is documented. The guideline is that, the counseling, admonition, or the reprimand should be used as a graduated pattern of discipline in response to repeated infractions of discipline. In other words, each time a service person commits an act or omission prejudicial to the

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discipline, the response should become severe gradually. It may eventually culminate into “separation”.303

(b) Enlisted members

Enlisted members of the Defence forces are ‘involuntarily separated’ in two different ways viz., (1) by notification, termed as the notification procedure, and (2) by the discharge board, termed as the board hearing procedure. Most of the involuntary separations in the U. S. armed forces are dealt with through the notification procedure. However, if a Defence person is entitled as per the Defence regulation, to an administrative discharge board, the board hearing procedures is invoked. An important role is played by the ‘Department of the Judge Advocate General’ in all such procedures as they are responsible to ensure that the procedures adopted are legally sustainable.

(c) Prior hearing

The due process clause requires that the affected person must, if a noncommissioned officer, or has six years or more service, at the time of discharge, be afforded a prior hearing by the competent commander before ultimately authorizing the discharge from service.

(d) Officers’ Separations

The procedure for the officer separations is almost similar to those of enlisted persons. However, certain differences exist due to the difference is definitions, terminology, and the competent authorities specified for the officer separations. For instance, there are, Non probationary officers, Regular officers and Reserve officers with five years or less federal commissioned

303. A word and expression commonly used for removal, discharge or dismissal from service in the U.S.
service. This in fact brings variation in the rights against involuntary separation.

**Voluntary Separation**

Officers as well enlisted men may apply for voluntary separation prior to expiration of term of service under for a various reasons. However, the same is subject to approval by the respective commanders and in respect of the officers by the Secretary Defence, on behalf of the government. Voluntary separation may be denied on the ground that charges have been preferred against the officer or are under investigation; the officer is absent without leave; or has defaulted with respect to public property or funds; or has been sentenced by a court-martial to dismissal; or is being considered for administrative discharge proceedings; or submits an application during war, when war is imminent, or during an emergency declared by the President or Congress.\(^{304}\)

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304. The other grounds of discharge are listed in the Instructions for the respective armed forces for instance in respect of the Air force, officers, the grounds for discharge may be:

1. Failure to achieve acceptable standards of proficiency required of an officer in his or her grade;
2. Failure to discharge duties equal to his or her grade and experience;
3. Substandard performance of duty resulting in an unacceptable record of effectiveness;
4. A record of marginal service over an extended time as shown by performance reports covering two or more jobs and prepared by at least two different supervisors;
5. Mental disorders that interfere with the officer's performance of duty and do not fall within the purview of the medical discharge process;
6. Apathy or defective attitude;
7. Failure in the fitness program as specified in AFI 36-2905;
8. Failure to conform to prescribed standards of dress, physical fitness, or personal appearance. For cause separation under AFI 36-3206, Chapter 3, is appropriate if failure is deliberate;
9. Inability to perform duties because of family care responsibilities;
10. Failure to maintain satisfactory progress while in an active status student officer program;
11. Before discharging an officer under this chapter, there should be a documented history of problems and documented efforts to correct the officer's conduct;
12. If an officer is being separated for reasons under this chapter and received education assistance, special pay, or bonus money, the officer is subject to recoupment;
13. Misconduct, Moral or Professional Dereliction, or In the Interest of National Security;
14. When officers engage in some form of misconduct, discharge under this chapter is often the most appropriate basis;
15. Although not necessarily considered misconduct, discharges for homosexual conduct and fear of flying for rated officers fall under this chapter;
16. Some other specific grounds for discharge, besides homosexual conduct and fear of flying for rated officers, include:
17. Having human immunodeficiency virus (HIV) and not complying with lawfully ordered preventive medicine procedures (i.e., safe-sex order)
18. Failure to meet financial obligations
19. Intentional or discreditable mismanagement of personal affairs
20. Drug abuse, which is defined as the illegal, wrongful, or improper use, possession, sale, transfer, or introduction onto a military installation of any drug
21. Serious or recurring misconduct punishable by civilian or military authorities
22. Intentional neglect or intentional failure to either perform assigned duties or complete required training
23. Misconduct resulting in the loss of professional status necessary to perform duties
24. Intentionally misrepresenting or omitting facts concerning official matters
25. Sexual perversion, including lewd and lascivious acts, sodomy not of a homosexual nature, indecent acts with a child
26. Sexual deviation, including transvestitism, exhibitionism, voyeurism
27. Retention is not clearly consistent with interests of national security
28. Sentence by a court-martial to a period of confinement for more than six months and not sentenced to a dismissal;
29. The service of officers separated under this chapter may be characterized as under other than honorable conditions (UOTHC). The exceptions to this are homosexual conduct, (unless it is accompanied by aggravating factors), and drug use revealed as a result of self-identification or commander-directed urinalysis;
30. If an officer is being separated for reasons under this chapter, except homosexual conduct, and received education assistance, special pay, or bonus money, the officer is subject to recoupment. Special rules apply concerning homosexual conduct cases that may or may not make the officer subject to recoupment.

A perusal of the aforesaid grounds makes it very clear that misconduct on the part of an officer is the prime most ground for the dispensation of service in whatever form. It may take the form of separation, discharge, dismissal or removal, administratively if not tried by a court martial under the Uniform Code of Military Justice.
(f) ‘Process’ with respect to the Processual Justice in the Defence Forces

‘Process’ when referred with respect to the expression *processual justice*, represents a mode of proceeding a series of actions, motions or occurrences, method, mode or operation whereby a result or effect is produced.\(^\text{305}\) The expression processual justice, however, an adjective of the word process, means relating to process or involving the study of process.\(^\text{306}\) The processual justice as such comprises of the procedure culminating into a result which is an intended result. The procedure has a legal connotation and thus means, ‘the mode of proceeding by which a legal right is enforced.’\(^\text{307}\) Another connotation of the word procedure is, the machinery for carrying out a process that which prescribes method of enforcing rights or obtaining redress for their invasion.\(^\text{308}\) Procedure is related to another word ‘*processus*’ in Latin.\(^\text{309}\) The term ‘processual’ is understood in the manner of an established or official way of doing something\(^\text{310}\) particularly in relation to the due process which in fact is a guarantee of procedural fairness. Known as ‘adjective law’\(^\text{311}\) the law of procedure is what determines the scope of processual justice in an organisation. Read together, justice as the end of procedure implies ‘just behavior or treatment’.\(^\text{312}\) The same is read as, ‘to do justice, to see justice done’\(^\text{313}\), to dispense justice etc. The process relating to it and the study thereof is what constitutes the subject of processual


\(^{306}\) Ibid., p. 1144.

\(^{307}\) Ibid., p.1203.

\(^{308}\) Ibid.

\(^{309}\) Concise Oxford Dictionary, Oxford University Press, New Delhi, p.1144.

\(^{310}\) Black’s Law Dictionary, p. 1144.

\(^{311}\) Ibid.,p.1204.

\(^{312}\) Concise Oxford Dictionary, Oxford University Press, New Delhi, p.772.

\(^{313}\) Ibid.,p.772.
justice. The process legis i.e., the process of law to render every man his due. This also means proportional equality in dealings, a fair disbursement of advantages.

(g) Processual Justice and the law relating to the Defence Forces

When we think about the processual justice under the U.S. Defence services administration, we generally refer to the procedure invoked to achieve the desired end to a disciplinary or an administrative process. The Uniform Code of Military Justice, lays down a comprehensive procedure for the investigation and trial of offences listed in the respective legislations with respect to the armed forces. Since infraction of certain rights of the delinquent is always anticipated in such processes, the entire process has been tempered with the certain mandatory procedures at every stage to avoid miscarriage of justice. The Uniform Code of Military Justice lists out the following constitutional guarantees available to a person subject to trial by a court martial:

1. Right to be informed of the nature and the cause of accusation;
2. Right to have the assistance of a counsel for his Defence;
3. Right to speedy trial;
4. Right to public trial;
5. Right to be confronted with the witnesses against him.

315. Ibid.
316. Ibid.
318. Ibid.
319. Ibid.
320. Ibid.
321. Ibid.
(6) Right to have compulsory process for obtaining witnesses in his favour;\textsuperscript{322}

(7) Protection against compulsory self-incrimination;\textsuperscript{323}

(8) Protection against unreasonable searches and seizure;\textsuperscript{324}

(9) Due process of law;\textsuperscript{325}

(10) Prohibition of cruel and unusual punishments and excessive fines;\textsuperscript{326}

(11) Protection against double jeopardy;\textsuperscript{327}

(12) And other rights retained by the people and not delegated to the federal government.\textsuperscript{328}

The parameters applicable in the case of a court martial are though not applicable in the case of termination administratively, in Toto but there is no denying the fact that in a system where besides the maintenance of discipline, the next constitutional duty of the commanders is to ensure that no prejudice is caused to their men or officers due to non compliance of the laid down procedures due to their being in an exclusive environment. In other words the parameters of justice cannot be different for the men in uniform. Perusal of the above process also reveals that, on the issue of processual justice, consequent to the peculiar nature of the service in the Defence forces and the necessity of maintenance of discipline in the organisation, the “civilian status and Military status are mutually exclusive.”\textsuperscript{329} However, the transparency of the process of justice in the services is the hallmark of the American

\textsuperscript{322} Ibid.
\textsuperscript{323} Ibid.
\textsuperscript{324} Ibid.
\textsuperscript{325} Ibid.
\textsuperscript{326} Ibid., p.447.
\textsuperscript{327} Ibid.
\textsuperscript{328} Ibid.
\textsuperscript{329} James Snedeker, p.13.
system. The U.S. law is known to be entrenched in the belief that transparency has a healthy effect on the system of justice. This also justifies a strong antipathy for inherent secretiveness of government agencies in the U.S. One manifestation of this is the refusal of the courts to accept extreme claims of executive privilege and allow the government, by its mere fiat, to suppress evidence needed by parties to legal proceedings.\textsuperscript{330} The judicial attitude in this respect was strongly reaffirmed in the case of Watergate tapes, where the claim of the President to an unreviewable privilege to withhold evidence was rejected.\textsuperscript{331} Congress in 1966 enacted the Freedom of Information Act. Before then, the people’s right to know was a ‘journalistic slogan’ rather than a legal right.\textsuperscript{332} The power of a commander what is termed as the rule making power and the power of adjudication? What Schwartz termed as the ‘statements of general applicability.’\textsuperscript{333} ‘Rule making power is an outstanding feature of the modern administrative agency.’\textsuperscript{334} In this context it would be essential to understand the nature and scope of Administrative law. In the words of Bernard Schwartz, Administrative law is that branch of law which controls the administrative operations of government. It sets forth the powers which may be exercised by administrative agencies lays down the principles governing the exercise of those powers, and provides legal remedies to those aggrieved by administrative action.\textsuperscript{335}


\textsuperscript{332}. Ibid., p.123.

\textsuperscript{333}. Ibid., p.144.

\textsuperscript{334}. Ibid., p.147

**Grounds for removal from office**

The main ground for removal of Defence personnel from office is the ‘misdemeanour’ of the incumbent. As late as 1911 it was denied by the executive branch of the U.S. Government, that, the personal guarantees found in the Federal Constitution were applicable to the Defence in uniform.\(^{336}\) Subsequent to that time, however, it has now been admitted that some of the guarantees are applicable to the Defence personnel. “Some of the fundamental privileges of the man in uniform are being respected by the more enlightened jurists.”\(^{337}\) What to talk of the administrative actions for termination, in the Navy, it was not until 1920, that it was made clear that certain constitutional guarantees applied in letter as well as in spirit to the Naval courts martial.\(^{338}\)

**‘Due processes and its applicability in the Military Justice System.’**

Due process is a term coined by the American Law and the courts. Literal meaning of due process is ‘fair procedure’. It means, ‘fair treatment through the normal justice system.’\(^{339}\) This is a principle of universal obligation.\(^{340}\) It requires notice and a full evidentiary hearing before termination.\(^{341}\) It also stresses for ‘Need for formal record’.\(^{342}\) As per Bernard Schwartz,\(^{343}\) the adversary hearing tradition goes back to the very origins of Anglo-American law.\(^{344}\) This in reality means that a party in question

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\(^{336}\) Ibid.
\(^{337}\) Ibid.
\(^{338}\) Ibid., p.445.
\(^{339}\) Concise Oxford English Dictionary, p.443.
\(^{342}\) Schwartz, p.243.
\(^{344}\) Ibid., p.191.
shall not suffer ‘in person or in purse without an opportunity of being heard’. This opportunity of being heard, in reality, is more than just a principle of natural justice; it is a basic constitutional right. Due process requires full evidentiary hearing, called the “per termination hearing” before termination. The liberty so granted is more like property than a gratuity. There is another expression viz., “Flexible due process.” Flexible due process means that every where due process empowers a right to be heard, it does not necessarily demand all the essentials of a judicial trial in every case.

(j) Discharge as an incidence of service in the U.S. Defence Forces

Discharge is a term which appears in the U.S. Military Law in the Uniform Code for Military Justice (UCMJ). This is a method adopted for cessation of service in the Defence forces of the United States and is thus applicable to the three services viz., the Army, Navy and the Air force. The U.S. Congress is empowered to provide, ‘when necessary and proper, that certain discharges (from service) shall not irrevocably change the status from Military to civilian in such a way as to terminate all obligations to the armed forces.

A discharge, in one aspect at least, is in the nature of a release from contractual obligation to the armed forces. If the

346. Ibid.,p.192; termination of welfare benefits to the New York City was in question.
351. Ibid,p.23.
obligations have been fully discharged, the certificate of discharge is mere evidence of that fact. An expression “absolute discharge” was coined and was used to represent cessation of Defence which implied termination of, ‘full military status of a person.’ Unconditional discharge under any enlistment would absolutely terminate any contractual relation between the government and the enlisted man.

Service during the pleasure of the executive (the president) is applicable to the Defence personnel of the US Army, Navy and the Air force. The doctrine is not only based upon any special prerogative but on public policy. The basis of the pleasure doctrine is that the public is vitally interested in the efficiency and integrity of the services and, therefore, public policy requires that servants who are inefficient, dishonest or corrupt or have become a security risk should not continue in service.

(k) The Military Jurisdiction

A person in one of the armed services is subject to military law, only if he has military status with respect to that service. The status of persons in service and later, after discharge was an important issue as the jurisdiction of the courts-martial was being decided by the Congress. This was the first ever attempt to laid down and define the jurisdiction of a military court. In fact it was being extended even to those persons who had been

355. Per Chandrachud, CJ. V.D. Tulzapurkar, R.S. Pathak & D.P. Madon JJ.- M.P. Thakkar, J. dissenting, Union Of India And Another v Tulsiram Patel And Others, AIR 1985 1416.
357. Ibid.,p.20.
discharged and no longer subject to the law of the Defence forces of the United States.

James Snedeker of the United States Marine Corps gives four classes of military jurisdiction.\(^{358}\) As per him, Military jurisdiction is the power to exercise military authority over certain categories of persons. The situations which give rise to its exercise fall into the following four\(^{359}\) classes:

(i) The first is the system of military justice established by Congress for the government and regulation of the armed forces of the United States, including such persons as have some connection or association with organized military units without being members of any branch of the armed services. Functional relation to the mission of the armed forces is the common factor which gives rational unity to this head of jurisdiction. It is called military law, and is exercised by a government in the execution of that branch of its municipal law which regulates its military establishment.\(^{360}\)

(ii) The second situation is that which concerns measures of military control, unlawful under normal conditions, which in time of war or other public emergency have been taken within domestic territory enjoying the protection of the Constitution and the laws of the United States. This is called martial law, and is exercised by a government temporarily governing the civilian population of a domestic


area without the authority of written law, as necessity may require.\textsuperscript{361}

(iii) The third situation is that which concerns the supreme authority assumed by an armed force in territory occupied in wartime in displacement of and substitution for the previously existing government of that territory. This is called military government, and is exercised by a belligerent over the lands, property, and the inhabitants of enemy territory, or of allied or domestic territory recovered from enemy occupation or from rebels treated as belligerents. Military necessity in the conduct of operations as well as the obligation upon invading forces under international law require that such forces institute military government in occupied area.\textsuperscript{362}

(iv) The fourth situation is that which concerns punitive action taken against violators of the law of war. There is jurisdiction to try such violators regardless of the place where the violations were committed, and the constitutional guarantees of indictment and jury trial do not apply to them.\textsuperscript{363}

(I) The power of termination administratively exercised

The power to appoint into service of the State and terminate it is basically an administrative power exercisable by the executive authorities. It in fact is available in the form of discretion in the hands of the appointing and the removing authority, in the realm of its \textit{administrative powers}. The tenure and termination aspects of the Defence forces, which are, otherwise governed by the Defence services regulations, are the

\begin{itemize}
\item \textsuperscript{361} \textit{Ibid.}
\item \textsuperscript{362} United States Army and Navy Manual of Military Government and Civil Affairs, Army FM27-5 and Navy Opnav 50 E-3, Dec. 22, 1943.
\item \textsuperscript{363} \textit{Ex parte} Quirin, 317 U.S. 1, 63 Sup. Ct. 2 (1942).
\end{itemize}
subjects of the executive and administrative part of the law relating to the Defence forces and thus operate in a manner much similar to the one applicable to those in England or India. The constitution of the United States of America, in Article I has authorised the U.S. Congress to legislate for the governance of the Defence forces. The supreme executive authority is vested in the president. Besides the above, the constitution also contains provisions relating to the superiority of the civil power over the Army, Navy and the Air force.

As per Schwartz, in America, a generation ago the Administrative Law (which has the services as its domain), was divided into the subjects of power and remedies. In recent years has come the realization that of equal if not greater importance is the exercise of administrative power. With this realization comes the emphasis upon procedural safeguards to ensure the proper exercise of administrative authority – an emphasis that found legislative articulation in the French Administrative Act, 1946 – a law which lays down the basic

364. Article. I. - The Legislative Branch, Section 8 - Powers of Congress. To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress. (Lawrence M. Friedman, ‘American Law’, 2nd Indian reprint, Universal Book Traders, New Delhi, 1991); http://www.usconstitution.net.

365. Article. II. - The Executive Branch
Section 1 - The President The executive Power shall be vested in a President of the United States of America.
http://www.usconstitution.net.

366. Section 2 - Civilian Power over Military, Cabinet, Pardon Power, Appointments
The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment. http://www.usconstitution.net.

368. Ibid., p.2.
procedure which must be followed by federal agencies.\textsuperscript{369} To quote the words of Bernard Schwartz, “Focus today is administrative process itself”\textsuperscript{370}, “Administrative law in one sense is the law controlling the administrative agencies, not the law produced by them”.\textsuperscript{371} The law relating to the tenures and terminations, which deals with an important administrative aspect of Defence services thus assumes importance, and the regulation of the armed forces by the laid down rules becomes a major task in itself as, in the U.S., as in any other country, in the world, the force alone is not the determinant factor in the national policy.

(m) Procedural compliance, a mandatory requirement

In all the cases of administrative termination of service, the question whether non-compliance with procedural or formal requirements renders nugatory the purported exercise of a statutory power, is important. This aspect has been in issue in a large number of reported cases, from which but few principles can be elicited. ‘The normal consequence of non-compliance with the requirements is invalidity.’\textsuperscript{372} Those requirements are, however, classifiable as mandatory or directory and, where a provision is merely directory, substantial compliance will be sufficient, and in some cases total non-compliance will not affect the validity of the action taken. It is broadly true that such provisions will more readily be held to be directory if they relate to the performance of a statutory duty, especially if serious public inconvenience would result from holding them to be mandatory, rather than to the exercise of a statutory power affecting individual interests, the greater is the likelihood of

\begin{itemize}
\item \textsuperscript{369} Ibid., p.3.
\item \textsuperscript{370} Ibid.
\item \textsuperscript{371} Ibid.
\item \textsuperscript{372} Ibid., p.3.
\end{itemize}
procedural or formal provisions being held to be mandatory. If in
the opinion of the court a procedural code laid down by a statute
is intended to be exhaustive and strictly enforced, its provisions
will be regarded as mandatory.

Among requirements likely to be held to be mandatory are
provisions as to the composition of the repository of the power;
and obligations to consult. This also extends to the conduct of
an inquiry, consideration of objections, to record reasons in
support of a decision and to give proper notice of rights of
appeal. Any breach of the rules of natural justice where they are
applicable, will invalidate any action taken. Marbury v. Madison
made the beginning of the judicial reviewing the
United States, which came to be followed almost in all
democracies in the world, India being the foremost in adopting
the federal point of view on the power and jurisdiction of courts
and the prime most, their independence and status as compared
to the other two organs of the government.

3.4 Indian View on The U.S. Law of Services

The Supreme Court of India examined certain issues such
as the principles of ‘double jeopardy’ and ‘equality of opportunity’
in service, in the light of the universally applicable principles of
natural justice, as enforced under the U.S. system of
administration and gave to the readers a firsthand view of the
systems prevalent therein. For instance, in S.A. Venkataraman’s
case, the Supreme Court of India explained the following
aspects of the law prevalent in the U.S:-

(a) If a man is indicted again for the same offence in an
English court, he can plead, as a complete Defence,
his former acquittal or conviction, or as it is technically expressed, take the plea of “autrefois acquit” or “autrefois convict”. The corresponding provision in the Federal Constitution of the U.S.A. is contained in the Fifth Amendment, which provides inter alia:

(b) “Nor shall any person be subjected for the same offence to be put twice in jeopardy of life and limb”,

This principle has been recognised and adopted by the Indian Legislature and is embodied in the provisions of section 26 of the General Clauses Act and section 403 of the Criminal Procedure Code. Although these were the materials which formed the background of the guarantee of the fundamental right given in article 20(2) of the Constitution, the ambit and contents of the guarantee, as this court pointed out in the case referred to above, are much narrower than those of the common law rule in England or the doctrine of “double jeopardy” in the American Constitution.

(a) **Equality of opportunity in matters of employment**

Article VI of the Constitution of the United States which is analogous to the section 116 of the Commonwealth of Australia Constitution Act; and sections 275 and 298 (1) of the Government of Indian Act 1935, provides equal opportunity for employment and promotion. This obviously is a sound protection against arbitrary dismissal or termination. This guarantees freedom from discrimination. Support is drawn from the

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376. Ibid.
377. Ibid.
378. Ibid., 375.
379. Ibid.
Supreme Court of India in its decision in *Amrit Lal v. Collector, C.E.C. Revenue case,*380 The Supreme Court held that, to seek a writ for violation of Article 16 of the Indian Constitution, the violation so alleged needs to be ‘Satisfactorily shown’381 This fact as understood by the American writers, however, divides the law dealing with it into the following three parts: -

(i) the powers vested in the administrative agencies;

(ii) the requirements enforced by law upon the exercise of those powers and

(iii) Remedies against unlawful action.

The aforesaid applies in situations applicable in England, where an office held during good behaviour is conferred by letters patent, procedure by criminal information or impeachment may, it seems, be necessary in order to vacate the office. There are, however, several offices which are held neither during pleasure nor during good behaviour, and the holding of which is specially protected by the terms of their appointment.

(b) Confidentiality of action relating to termination of service

Privilege based on the doctrine of separation of powers which is peculiar to the American system, excludes the executive from disclosure requests applicable to the ordinary citizen or organisation. This exemption is extended to the material on the military operations, diplomatic secrets and to the documents integral to the exercise of the executive authority for the decisional and policy making functions. This in fact contains, the frank expression of advisors and their deliberative

381. Ibid., p. 533.
communications, which are instrumental in arriving at the decision of removal, dismissal etc. But in other circumstances, where the principles of natural justice and due process are given precedence, the need for confidentiality of high level cannot be considered as an absolute unqualified privilege, particularly when it confronts the public policy. This immunity from the judicial process is thus permeable and flexible.

(c) **Comparative Table**

A table is drawn to highlight the comparative aspects of tenure and termination of service in India, U.K. and the U.S.

<table>
<thead>
<tr>
<th>Law relating to the Defence forces in India</th>
<th>Law relating to the Defence forces in United Kingdom</th>
<th>Law relating to the Defence forces in the United States of America</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Every person subject to the respective legislations governing the Defence forces of the Union holds office during the pleasure of the president.</td>
<td>1. Every person subject to the respective legislations governing the royal Defence forces holds office during the pleasure of the crown.</td>
<td>1. Every person subject to the respective legislations governing the Defence forces of the United States holds office during the pleasure of the executive (the President).</td>
</tr>
<tr>
<td>2. The pleasure of the president with respect to the appointment and dismissal, termination or discharge, is unfettered.</td>
<td>2. The pleasure of the crown with respect to the appointment and dismissal, termination or discharge, is subject to the parliamentary control.</td>
<td>2. The pleasure of the executive with respect to the appointment and dismissal, termination or discharge is subject to judicial review.</td>
</tr>
<tr>
<td>4. Limited Judicial Review of pleasure doctrine permitted.</td>
<td>4. Judicial Review limited to the interpretation of pleasure only.</td>
<td>4. Removal under pleasure is subject to detailed judicial review.</td>
</tr>
<tr>
<td>5. Pleasure subject to</td>
<td>5. No <em>mala fides</em></td>
<td>5. Executive falls beyond</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Examination on the ground of <em>mala fides</em>.</th>
<th>Attributable to the crown.</th>
<th>The purview of <em>mala fides</em>.</th>
</tr>
</thead>
<tbody>
<tr>
<td>6. Pleasure subject to Writ Jurisdiction of High Courts and The Supreme Court.</td>
<td>6. Pleasure not subject to Writ Jurisdiction the Court.</td>
<td>6. Pleasure of the Executive subject to the Writ Jurisdiction of the Federal Court.</td>
</tr>
<tr>
<td>7. Pleasure should be based on subjective material.</td>
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<td>7. Pleasure should be based on subjective material.</td>
</tr>
<tr>
<td>3. Powers of dismissal, termination or discharge conferred on the central government or the other prescribed officers under the respective legislations, are subject to the procedure prescribed under the Rules.</td>
<td>3. Powers of dismissal, termination or discharge conferred on the prescribed officers under the respective legislations, are subject to the principles of natural justice.</td>
<td>3. Powers of dismissal, termination or discharge conferred on the prescribed officers under the respective legislations, are subject to the due process clause.</td>
</tr>
<tr>
<td>10. Continuance of employment under the State subject to public policy.</td>
<td>10. Continuance of employment under the State subject to Royal necessity.</td>
<td>10. Continuance of employment under the State subject to public policy.</td>
</tr>
<tr>
<td>15. Reserve liability after retirement with variation in period depending upon the mode of retirement. For e.g., ‘Premature...”</td>
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<tr>
<td><strong>e.g., ‘Premature retirement’ etc.</strong></td>
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<td><strong>retirement’ etc.</strong></td>
</tr>
<tr>
<td><strong>16.</strong> Termination of service without trial by Court martial, non punitive in nature, except when ordered consequent to service misconduct or proven misconduct in a court of law.</td>
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</tr>
<tr>
<td><strong>17.</strong> Concept of merger of offences not an issue for the principle of double jeopardy.</td>
<td><strong>17.</strong> Concept of merger of offences not an issue for the principle of double jeopardy.</td>
<td><strong>17.</strong> Doctrine of merger of offences has been supplanted by the principle of double jeopardy.</td>
</tr>
<tr>
<td><strong>18.</strong> No distinction between honourable or dishonourable discharge.</td>
<td><strong>18.</strong> Discharge is of two kinds’ viz., honourable discharge and dishonourable discharge.</td>
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</tr>
<tr>
<td><strong>19.</strong> No provision is yet made to raise a women exclusive unit in the Army, Navy or the Air force; though may, however, be enrolled or granted commission in those corps of Army, Navy or Air force as may be specified by the central government from time to time.</td>
<td><strong>19.</strong> Queen is empowered to raise and maintain a women exclusive Army, Navy or Air force unit.</td>
<td><strong>19.</strong> The congress may provide for maintain a women exclusive Army, Navy or Air force unit.</td>
</tr>
</tbody>
</table>

**Appraisal**

Though thousands of nautical miles apart, the underlying thought between India, U.K., and America was interestingly similar on certain principles. With slight variations in the time period during which the legislations governing the tenure and the termination aspects of the three countries appeared, the nature, intensity and relevance of their provisions have a stark similarities. For instance, almost identical accounts of evolution of the law on tenure and termination in the Defence forces in
these countries are found recorded in the historical texts. The law of the Defence forces in India, U.K. and the U.S. is found to have evolved from the old feudal system and the custom of war which is almost identical. Certain differences have been recorded in the three systems but those if seen carefully, are just cosmetic. The crux lies in the unitary and the federal structure of governance in the two countries and an interesting mix of both being available in our own country. The military, naval or the Air force law in all the three countries is similar. Until quite recently the rules relating to the tenure and termination of the government servants, particularly in relation to their dismissals pursuant to the exercise of pleasure, made the position of civil servants legally precarious, though in practice dismissal would take place only as the result of well-established disciplinary processes. Now, however, although the Crown still retains the right to dismiss at pleasure, the legal position of the civil servant has been radically changed. Article 16 of the Indian Constitution laid down, “Equality of opportunity in matters of public employment”.

This is similar to the concept of The rules of Natural justice under the English law wherein, implicit in the concept of fair adjudication, lie two cardinal principles, namely, that no man shall be a judge in his own cause (nemo judex in causa sua), and that no man shall be condemned unheard (audi alteram partem). These two principles of the rules of natural justice must be observed by courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially save where their application is excluded expressly or by necessary implication. In other words, compliance to these basic principles of justice can be excluded in certain genuine cases where public policy so demands for instance, where an exhaustive procedural code has been prescribed by statute, or where disclosure of relevant
information to an interested party would be contrary to the public interest. The principles of natural justice are represented in the U.S. Defence forces by the due process clause. It means, ‘fair treatment through the normal justice system.’ This is a principle of universal obligation. It requires notice and a full evidentiary hearing before termination. It also stresses for ‘Need for formal record’.

The comparative study of the three systems has revealed more similarities than differences. The main reason for this is the unitary federal structure of our constitution. We have borrowed not only from the common law but also from the U.S. constitutional model and to an extent followed a federal system of government. The law relating to the tenures and termination and the underlying procedures provided in the military legal systems or even in the Defence services regulations are almost similar and so are the customs and conventions of the services.