A. UNDER THE CONSTITUTION OF INDIA

(i) Legal Provisions relating to Armed Forces Personnel and the Fundamental Rights in India

"Today, as always, the people, no less than their courts, must remain vigilant to preserve the principles of our bill of rights, lest in our desire to be secure we lose our ability to be free."  

Earl Warren

Indian Constitution, like most of the Constitution of the world, provides the basis for establishment of Armed Forces of the Union. Armed Forces are a necessary element to any state to maintain its sovereignty. Hence, the Armed Forces constitute an important part of the Executive.

Our Constitution provides for the establishment of the Armed Forces in List I of the seventh schedule, the constitution to in general at entry 1 and entry 2 provides for the military, naval and air forces of the Union. Entry 1, list II of the schedule provides for the public order and excludes the use of aforesaid forces. However, Sections 129 and 130 of the Criminal Procedure Code, 1973 contain provisions enabling a magistrate to requisition the services of the armed forces to maintain law and order. As we understand, the main role of the Armed Forces is to meet any external aggression. However, the assistance of such forces, sometimes, becomes equally necessary to assist the civil power so as to maintain law and order. The President of India is the Supreme Commander of the Armed forces, who acts on the advice of Council of Ministers, which is well regulated by law. The Union Government can employ the armed forces under Articles 355 of the Constitution to help State Government to maintain law and order, both against an external aggression or internal disturbance. In fact, we see a
very frequent use being made of our armed forces in aid to civil power, not only against external threat like the Jammu and Kashmir but generally to quell domestic violence, arising out of religious differences of particular communities. The Army Act 1950, which was enacted by the Parliament, draws its source from the Constitution of India.

(ii) The Scope of Legislative Power.

The Parliament, in relation to the Armed forces, does not have unbridled power to establish a special judicial system. It has to keep in mind the constitutional guarantees provided for its citizens, which includes the members of the Armed Forces as well. However, with a view to enable them discharge their duties efficiently and to maintain discipline amongst them, certain fundamental rights in their respect may be restricted by notifications. These are as under:

(a) to be a member of, or to be associated in any way with, any trade union, or any class of trade or labour unions or any society, institution or association, or any class of societies, institutions or associations;

(b) to attend or address any meeting or to take part in any demonstration organised by any body of persons for any political or other purposes;

(c) to communicate with the press or to publish or cause to be published any book, letter or other document.1

In relation to other forces, such as the Navy, Air Force, Border Security Force, National Security Guard and the Coast Guard, similar provisions have been included in their respective Acts.2

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1 A.A. Sec 21.
2 Navy Act (Sec 4 & 19), Air Force Act (Sec 21), Border Security Force Act (Sec 13), National Security Guard Act (Sec 12) and Coast Guard Act (Sec 13).
Although members of the Armed Forces, being the citizens of India, are entitled to enjoy the fundamental rights conferred by the Constitution of India, these rights, in their application to the members of the Armed Forces, have been curtailed by the Parliament. This has been done through Article 33 of the Constitution which states thus; “33. Parliament may, by law, determine to what extent any of the rights conferred by this part shall, in their application to :-

(a) the members of the Armed Forces; Or
(b) the members of the Forces charged with the maintenance of public order; Or
(c) persons employed in any bureau or other organisation established by the State for purposes of intelligence; Or
(d) persons employed in, or in connection with the telecommunication systems set up for the purpose of any Force, Bureau or Organisation referred to in clauses (a) to (c) be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them”.

Under the above Article, Fundamental Rights of the members of the Armed Forces can be restricted or abrogated in full or part, as deemed necessary, by the parliament. The purpose laid down for restriction or abrogation of Fundamental Rights is to ensure ‘proper discharge of duties’ and ‘maintenance of discipline’ amongst the members of the Armed Forces. Any restriction or abrogation which does not further the aforesaid purpose, would thus be violation of the Fundamental Rights and liable to be struck down as ultra vires of the Constitution.

In accordance with the provisions of Article 33, restrictions on various Fundamental Rights have been imposed on members of the Armed Forces.
Section 21 of the Army Act, as mentioned above, and Rules 19 to 21 framed thereunder are relevant. Ordinarily, one would consider that curtailment of Fundamental Rights of the Armed Forces personnel is confined to the Section and the Rules mentioned ibid. But it is not so. The Supreme Court in the case of *Ram Swaroop Vs Union of India*³ has laid down that restrictions on Fundamental Rights should not be thought to be limited to those set out in the ibid provisions of the Army Act and the Army Rules. According to the Supreme Court, the Complete Army Act was passed by the Parliament in pursuance of the powers vested in it under Article 33 of the Constitution. The pertinent observation of the Supreme Court is as under:

"The learned Attorney General has thus argued that the entire Act has been enacted by Parliament and if any of the provisions of the Act is not consistent with the provisions of any of the Articles in Part III of the Constitution, it must be taken that to the extent of the inconsistency parliament had modified the Fundamental Rights under those Articles in their application to the persons subject to that Act. Any such provision in the Act is as much law as the entire Act. We agree that each and every provision of the Act is a law made by Parliament and that if any such provision tends to effect the Fundamental Rights under part III of the constitution, that provision does not, on that account, become void, as it must be taken that Parliament has thereby in the exercise of its power under Article 33 of the Constitution made the requisite modification to affect the respective Fundamental Rights".

In view of the above ruling of the Supreme Court, restrictions on Fundamental Rights, seen in various provisions of the Army Act and the Rules made thereunder, can only be examined on the basis of the criterion contained in Article 33. If the modifications do not serve the purpose for

³ AIR 1965 SC 247
which it is permissible to impose restrictions, these would be violative of the Fundamental Rights. So far, none of the provisions of the Army Act (1950) or the Army Rules (1954) has been held to be violative of the Fundamental Rights4.

(iii) **Scope of Article 33 of the Constitution**

Shri VK Krishna Menon, during the debate on Navy Bill 1957 had stated in the Rajya Sabha on 13 August 1957, “We are an independent Country where every one has got the political right of choosing the Government of the Country in the last analysis and therefore while it is necessary in the Armed forces to make some inroads into fundamental rights by law, we should try and retain them as far as possible”. The Supreme Court, in the case of *OKA Nair V Union of India*, has held that the employees of the Defence establishments such as cooks, chowkidars, boot-makers, tailors etc answer the description of members of the Armed Forces and they cannot form trade Unions as their Fundamental Right in this regard has been completely taken away by the Central Government. The Central Government is competent to make rules restricting or curtailing their fundamental rights under Article 19 (1) (c)6. Similarly, with respect to members of the General Reserve Engineer Force (GREF), the Supreme Court in the case of *R Viswan Vs Union of India*7 has held that the members of the GREF are members of the Armed Forces within the meaning of Article 33 of the Constitution. As such, Section 21 of the Army Act (1950) can be legally applied to them by the Central Government. The mere applicability of Central Civil Services Rules 1965 to members of the GREF will not take them out of the category of the Armed Forces.

Dr KL Bhatia quotes Thomas Hobbes in his paper read at a Seminar on Military Disciple and Justice that the important function and character

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4 See AC Mangala, Maj Gen on “Commentary on Military Law in India” at PP 36 to 38.
5 AIR 1976 SC 1179
6 Gopala Upadhyai V Union of India, AIR 1987 SC 413.
7 1983 (2) SLR 193.
of law is not to bind the people from all voluntary actions but to hold them conduct themselves in such an acceptable way as not to lust themselves (inclusive of fellow beings) by their own reckless, impetuous desires, rashness or indiscretion; as hedges are set not to stop travellers, but to keep them in the way. Thus, both systems of law, whether civil or military, are wedded to the one single cardinal principle of the administration of Justice: Justice should not only be done, but it manifestly and undoubtedly seems to have been done.

Article 33 of the Constitution may be said to be an exception to the uniform applicability of fundamental rights to all its citizens, as also indirectly, to the rule of law with a view to achieve the two aforesaid objectives, i.e., “proper discharge of their duties” and “maintenance of discipline among them.” In addition to the restrictions imposed on the military personnel vide Army Act Section 21 and similar restrictions enacted in other services law, we also find exceptions provided to Articles 16, and Article 22, i.e., ineligibility for women to join certain Arms and Services of the Army and provisions relating to arrest/confine ment of personnel provided for in Army Act Section 101 read with Para 392 of the Regulations for the Army, Revised Edition, 1987.

The nature of job being performed by the military personnel is quite different as compared to the civilians, where it calls for absolute obedience to command, provided the command being given is capable of being executed by the personnel to whom it is given.

(iv) Courts-Martial and the Civil Courts

There are certain offences, which are purely military offences. For instance, offences relating to discipline, desertion, absence without leave,
disobeying a lawful command,\textsuperscript{13} insubordination and obstruction\textsuperscript{14} etc, while there are some others which are purely civil in nature, thus, may be triable by civil court as well. Such offences could be the offences relating to property,\textsuperscript{15} Extortion\textsuperscript{16} and civil restrictive offences like murder, culpable homicide not amounting to murder and rape\textsuperscript{17} etc. By a deemed fiction, all offences are triable by Courts-Martial under Army Act Section 69. However, exception has been provided for in Army Act Section 70 in case offences relating to murder, culpable homicide not amounting to murder and rape, where such offences cannot be tried by a Court-Martial having jurisdiction in the matter when those are committed while not on active service, outside India or on the frontier post. In such a scenario, there is bound to be some difference of opinion sometime whether a particular offence would fall within the jurisdiction of a Court-Martial or a criminal court. To resolve such an issue, it has been provided in the Service Acts as to what procedure would be followed.\textsuperscript{18} In addition, the central Government has framed certain Rules for adjustment of jurisdiction between the Courts-Martial and a criminal court. Perusal of these aforesaid laws make it amply clear that the initial discretion, whether to try the offence by a Court-Martial, lies with the Commanding Officer. The magistrate, having jurisdiction in the matter shall have to give the Commanding Officer a notice of at least 14 days whether he would wish to try the case. There have been cases, where non-compliance such provisions, had resulted into quashing of the proceedings held by the Criminal Court.

Courts-Martial have been kept away from the purview of the Supreme Court and the High Courts so far as any judgement, determination or sentence of the Court-Martial is concerned. Similarly, the Courts-Martial do not fall within their power of superintendence. Article 136(2) and 227(4) of

\begin{itemize}
\item \textsuperscript{12} AA Sec. 38.
\item \textsuperscript{13} AA Sec. 41.
\item \textsuperscript{14} SS Sec. 40.
\item \textsuperscript{15} AA Sec. 52.
\item \textsuperscript{16} AA Sec. 53.
\item \textsuperscript{17} AA Secs. 69 & 70.
\item \textsuperscript{18} AA Sec. 125 read with Army Rule 197-A, Para 418 of the RA and Section 475 of the CrPC, 1973.
\end{itemize}
the Constitution of India refer. However, under Article 32 of the Constitution of India, the Supreme Court may entertain a writ petition from any judgement, determination or sentence of a Court-Martial in case it finds any violation of the fundamental rights. In the case of *Harish Uppal Vs Union of India,* the Supreme Court entertained a Writ Petition against the sentence passed on the petitioner which as per him was in violation of Article 21, i.e., the right to life and personal liberty. The Supreme Court, however, held that Articles 21 had been duly complied with. Similarly, a High Court may also entertain a writ petition from a member of the armed forces under Article 226 of the Constitution of India on any of the aforesaid grounds. Rather the scope of the jurisdiction under Article 226 of the Constitution of India is wider than Article 32 of the Constitution since it can issue writs, not only merely restricting itself to the fundamental rights but for “any other purpose” as well. It implies that it can intervene where it finds that a Court-Martial had not been properly constituted or that it had acted in violation of any of the principles of natural justice, or that it had acted without or in excess of jurisdiction. However, the proceedings being conducted by these Courts-Martial are deemed to be ‘Criminal Courts’ within the meaning of law provided for. But, the Courts-Martial do not fall within the hierarchy of the Civil Courts.

(v) **Armed Forces Personnel and the ‘Doctrine of Pleasure’**

Conditions of service for the armed forces personnel have been provided for within the special law, as stipulated above. It has been laid down in these Acts that every personnel subject to these Acts shall hold office during the pleasure of the President. In addition, Sections 19 and 20 of the Army Act provide for administrative action by the Central Government for removal etc of any army personnel on administrative grounds. The procedure for dealing with such removal etc has been provided for in Army Rule 14 and 17 respectively, whereas there is no

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20 GCM, SGCM, DCM and SCM.
21 AA Sec. 18.
corresponding provision in Army Rules (1954), prescribing the manner in which a person subject to the Army Act can be removed. Hence, the provision "Pleasure of the President" is without any legal safeguards to check capricious, arbitrary, whimsical or fanciful discretion of the President. Or it may be said that it is an unguided provision unlike the case of civilians, where adequate legal safeguards have been provided for in Article 311 of the Constitution. The said Article does not include members of the Armed Force. Article 310 does not allow any such legal safeguards to be followed. To that extent, this provision can be said to be archaic in nature or Durante bene p dacito (hire and fire, i.e., termination of service at will of the President). We are living in a civilised society, a man to be provided an 'opportunity to be heard' which is one of the most important principles of natural justice, equity and fairplay. In other words, it should be Dum bane se qesserit or quadin se bene qesserit (so long as the employee conducts himself well).

(vi) 'Judicial Activism' and its effect on discipline in the Armed Forces

The Armed Forces have the highest regard for the civil judiciary. However, a few of the judges unwittingly and in their excessive zeal to uphold the 'rule of law' at times tinker with military discipline by passing orders, mostly interim, which can neither be supported by law nor logic. They do so without realizing that no army can play its role effectively if its discipline is jeopardised by frequent interference from outside influences and that too without adequate justification.

Although Courts-Martial constituted under the military law are exempt from the superintence and control of the Supreme Court and the High Courts, they are, however, amenable to their jurisdiction constitutionally. As brought out above, these Courts can issue writs in the

22 See MP Jain; supra note 9, at p.621.
form of habeas corpus, mandamus, certiorari, prohibition or Quo Warranto, as required in the case.23

(vii) Civil Courts are not Courts of appeal in relation to Courts-Martial

A peculiar situation has, therefore, arisen whereby the High Courts in spite of having been forbidden under Article 227(4) of the Constitution to exercise power of superintendence over Courts-Martial, can issue writs, directions, or other orders to these courts. This situation besides being anomalous often creates unnecessary confusion. It is, therefore, necessary that the High Courts while exercising powers under Article 226 should not convert themselves, inadvertently or otherwise, into courts of appeal in respect of decisions of any tribunal constituted under the law relating to the Armed Forces. In other words, they should not exercise supervisory powers over Courts-Martial contrary to the specific mandate provided for in Article 227(4).

It is submitted that no army can withstand aggression and protect the sovereignty and integrity of the country unless it is at all times possessed high morale and strict discipline. It is very glaring to note that the framers of the Constitution even placed the needs of discipline above the fundamental rights so far as members of the armed forces are concerned. Some orders which had caused unnecessary embarrassment to the service may be cited thus:

A Captain was tried by General Court Martial. On being found guilty, he was sentenced and dismissed from the service. Before the sentence given effect to, the court ordered that the proceedings for confirmation could continue, but the sentence would not be implemented till the next date. This order was

23 Maj Gen AC Mangala’s (Ex Judge Advocate General, Army) article ‘Military Justice and the Role of Civil Courts’ in the Civil and Military Law Journal, issue, p.
subsequently confirmed without final hearing. As a result of the court order, the officer continued in service. In a disciplined organisation, it is not possible to employ such an officer on any duty.

In another case, a very senior officer, before attaining the age of superannuation, obtained a stay order against his retirement. He continued to remain in service even after superannuation, while other officers, similarly circumstanced, retired on attaining the age of superannuation. Such orders certainly affect discipline; create bad precedents of the armed forces. In a number of cases, officers facing disciplinary proceedings succeed in obtaining stay orders against the court-martial proceedings. Such orders obviously would be irregular and prejudicial to the military discipline. The list of such cases is merely illustrative and not exhaustive. It appears that most of such orders might have been passed inadvertently, may be due to lack of understanding of the service laws and its ethos. It may thus be useful to the judiciary if some guidelines in this regard are framed.

(viii) Interim Orders

The High Court before passing an interim order staying the proceedings of a Court-Martial should carefully visualise the effect of such an order on the functioning of the unit or the formation concerned. They should remember that those proceedings cannot be seen in isolation, being a part of the command function which is a life-line for the Armed Forces. Such an order may, at times, be prejudicial to the cause of service discipline and in some cases may render the charges time-barred, which aspect, being inapplicable to most of the trials under the Criminal Procedure Code, is likely to be missed by the functionaries of the civil system of the judiciary. Many aspects on which interim orders are inadvertently passed are
primarily administrative and would thus not admit any interference by a
High Court within the limit of Article 227(4) which denies the power of
superintendence to a High Court over a Court-Martial constituted by or
under any law relating to the Armed Forces. While granting an interim
order, the High Court should carefully consider whether it would overstep
the limit set by the Constitution.

(ix) Premature Orders

The finding(s) and sentence of a Court-Martial (except a Summary
Court Martial) are not valid until duly confirmed. There may be a
possibility of relief being granted by the confirming authority. An order by a
High Court may not be required in that event. Therefore, the High Court
should allow the normal process to be exhausted before entertaining a writ
petition against any matter relating to a court martial. Even in
administrative matters, the High Court should refrain from passing an order
unless the petitioner has exhausted all the rights available to him, except in
a situation which if not stayed would result in irreparable damage to the
cause of justice.

The court should also not pass any interim order, except in very
exceptional circumstances, without giving the Armed Forces an opportunity
to put across their point of view.

In appropriate cases, where the court is doubtful about any point of
military law, the assistance of an officer of the Judge Advocate General's
Department may be sought.

The superiority of the civil judiciary is an unquestionable fact. The
Armed Forces wholeheartedly accept the pronouncements of superior courts
even at the expense of inconvenience. However, the latter should pause for
a while before taking any step as to what are going to be its immediate and

\[\text{AA Sec. 153.}\]
long-term repercussions on the overall functioning of an organisation like the Armed Forces, which a country could ill-afford to weaken. It may be worthwhile to bring out here the position of law as it entails in the United States of America. It may briefly be stated that in the case of Johnson Vs Zerbet, the Supreme Court of U.S.A. reversing the decision in Hiatt Vs Brown and completely overlooking had reminded the errant lower courts of their limited functions in military habeas corpus:

"It is well settled that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a Court-Martial. The single inquiry, the test is jurisdiction. The correction of any errors it may have committed is for the military authorities, which are alone authorised to review its decision."

Another case, which may be cited in the context, is of Curry Vs Secretary of the Army, 595 F.2nd 873 (D.C. Cir 1979) at p. 880. Curry had exhausted his military remedies through the Army Court of Military Review and the United States Court of Military Appeals. Judge Tamm, writing for the military court stated:

"We begin with the unassailable principle that the fundamental function of the Armed Forces is 'to fight or be ready to fight wars.' Toth Vs Quarles, 350 U.S. 11, 17 (1955). Obedience, discipline and centralised leadership and control including the ability to mobilize forces rapidly, are all essential if the military is to perform effectively. The system of military justice must respond to these needs for all branches of the service, at house and abroad, in time of peace, and in time of war. It must be practical, efficient and flexible."

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25 See Maj Gen AC Mangala’s Article, supra note 4, at pp 294, 295.
B. **POSITION OF ARMED FORCES PERSONNEL IN THE UNITED KINGDOM**

In England, the position prior to 1946, was more or less the same as it entails in India with regard to constitutional safeguards for the members of the Armed Forces. The Lewis Committee\(^\text{28}\) in 1946 thought that:

*In the matter of legal safeguards, citizens should be no worse off when they are in the forces than in civil life unless consideration of discipline or other circumstances make such a disadvantage inevitable.*

It is, therefore, not accurate to say of a man that, by joining the Army, he has entered into a contract\(^\text{29}\) under which his rights become the concern only of military men and not of the courts. Such an approach requires a distinction to be drawn between a conscript (seen at various times in military history) and a volunteer. Moreover, it tends to introduce a form of volenti under which a soldier is treated as an "outcast from the law".\(^\text{30}\)

Indeed, if any contract is to be applied here it must be that the soldier submits himself to military law and not to military illegality. In any democratic society, there must be means available by which a convicted soldier can test, outside the military legal system, the legality of a finding against him. Moreover, there is no provision in the Army Act prohibiting recourse to civil courts.\(^\text{31}\)

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\(^{28}\) Lewis Committee, Report of the Army and Air Force Courts-Martial Committee, Cmnd. No. 7608, at para 138 (1946) Abbott, 4 Taunt 401 (1812), as follows:

> It is, therefore, highly important that the mistake should be corrected which supposes that an Englishman, by taking upon him the additional character of a soldier, puts of any of the rights and duties of an Englishman.

\(^{29}\) R V. Army Council ex party Ravenscraft, 2 K.B.

\(^{30}\) Warden V Hailey, 4 Taunt 67, 84 (1811) (Argument of Sergeant Lens).

\(^{31}\) In Canada, servicemen are explicitly permitted to seek redress in the civil courts under Section 187 of
(i) Appeals from Courts Martial

A soldier did not have a right to appear to any civilian Court of appeal prior to 1951. However, a question of whether a right should be granted had been considered and rejected by a number of governmental committees. This was because it was felt that the military judicial system could, through confirmation, petition and review, correct errors that have arisen in any case. To this day, a soldier may not appeal to the Court – Martial Appeal Court on grounds of sentence alone, because the military authorities are considered the best judges of the levels of punishment that ought to be imposed.

The Courts – Martial (Appeal) Act \(^{32}\) now governs the rights and formalities of appeal and it follows closely the pattern set in appeals from civilian courts, although leave to appeal must be given by the Court – Martial Appeal Court even on a point of law on which there is an automatic right of appeal in civilian cases. The judges are drawn exclusively from those persons who are eligible to sit in the Court of Appeal; (criminal Division), and so it is truly a civilian court. Further, appeal may, as in a civilian case, be taken to the House of Lords.

Prior to 1951, the only way in which a civilian court\(^{33}\) could consider the findings of a Court – Martial was by way of the prerogative writs of certiorari, prohibition or mandamus\(^{34}\) or by habeas corpus proceedings. However, there have been very few occasions on which a civilian court, whether the High Court acting in its supervisory capacity or the court – martial appeal court, has considered a case arising from a court – martial.\(^{35}\)

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32 This statute was enacted in 1968.
33 At that time, the High Court of Justice would have performed this function.
34 These three writs are now termed “applications for judicial review”.
35 Rare usage of judicial review as not unique to the United Kingdom. For a United States example, see
Between 1970 and 1979, there were no reported cases in the High Court, while the Court-Martial Appeal Court dealt with only 65 cases out of approximately 18,000 court-martial hearings.

(ii) Armed Forces personnel, Civil Courts and the Fundamental Rights

The wide statement of Belly, C.B, in *Dawkin Vs Lord Rokeby* in 1866\(^36\) that "cases involving military duty alone are cognisable only in military tribunals and not by a Court of law" never gained wide approval. It was the product of a confusion of thought over different types of action. The precursor of this view was said to be the judgement of Lord Mansfield and Loughborough in *Sutton V Johnstone*\(^37\). That case involved a claim for damages in which their Lordship found for the defendant on the ground that there existed a reasonable and probable cause for the prosecution of the plaintiff by court-martial. Their lordships had not drawn any distinctions between a claim for one of the prerogative writs, a claim for damages alleging that the defendant had acted without jurisdiction, or a similar claim alleging malicious abuse of authority within jurisdiction. Indeed to a claim for prohibition, Lord Loughborough in 1792\(^38\) stated that:

*Military courts-martial .......are........liable to the controlling authority, which the courts of Westminster Hall have from time to time exercised for the purpose of preventing them from exceeding the jurisdiction given to them.*

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\(^36\) L.R 8 Q.B. 225, 271. Some support for the Dawkin's decision may be found in RV Army Council ex parte Ravenscot, 2 K.B. 504 (1917). Civil Courts cannot be invoked to redress grievances arising from persons both of whom are subject to military law". Ld at 512 (Ridlay, J.).

\(^37\) 1. Term Rep. 784 (1786). This decision has been labelled "the fountain of increasing ambiguity". Heddan V Evany, 35 T.L.R 642 (1919) (Mc Cardie, J.). The facts occurred flagrante bello. See also Barwis V Keppel, 2 Wils. K.B. 314 (1766). Grant V Could, 2 H.B 1 69 (1792).

\(^38\) Gellhorn, Summary of Colloquy on Administrative Law, 6 J Soc’y. Pub. Tehrs. L. 70, 72-73. Professor Walter Gellhorn was on the faculty of Columbia University School of law from 1933 to 1974.
The decisions of *In re Mansergh* and *R.V. Secretary of State for War, ex parte Martyn*, eighty-eight years apart, both emphasise that the High Court has jurisdiction over a Court-Martial where the latter has acted without or exceeded its jurisdiction. However, they restrict this supervisory function to cases where the “civil rights” of soldiers are affected.

To decide when an inferior tribunal can be said to be acting without or is exceeding its jurisdiction has been particularly difficult. If a court-martial purported to try a person who was not subject to military law, or if it exceeded its sentencing powers given by the Army Act, it would clearly be so acting. Many of those cases concerning army personnel that have been considered by supervising court have raised the issue of whether or not a person is subject to military law. If the court has decided that the applicant was so subject, his claim failed.

The civil or fundamental rights of a soldier must, therefore, relate to his common-law rights qua citizen, of which military law does not divest him, and which refer to his life, liberty or property. *In re Mansergh*, 1 B & S. 400, 406-7 (1861) (Cockburn C.J.), see also *Rv. Institutional Head of Beaver Creek Correctional Camp ex parte Mc Cand*, 2 D.L.R. 3d 545 (1969); *Orloff Vs Willoughby*, 345 U.S. 83 (1952). In the last cited case, Dr Stanley J. Orloff was drafted into the U.S. Army at the time of Korean war, though, a physician, he was not commissioned because he refused to state whether he was a member of the communist party. Orloff applied for a writ of habeas corpus, arguing that, since the army would not employ him as a physician, it had no authority to keep him on active duty. The Supreme Court, affirming two lower courts, held that the granting of a commission...
was a matter solely within the discretion of the President, and that, as Orloof's induction was not unlawful – otherwise, the writ could not be issued. Almost\textsuperscript{42} all the previous cases for certiorari, prohibition or mandamus have involved purely military offences, which may explain the courts' reluctance to intervene. If the conviction by Court-Martial is for a criminal offence, it is suggested that there is no justification for refusing to review on the grounds that a soldier's civil rights (fundamental rights) have not been affected. If the fundamental rights are distinct from military rights, convictions of a criminal offence is quite distinct from one of a purely military offence and it must affect civil rights.\textsuperscript{43} In military offence cases, it would be necessary to consider the ordinary incidents of military life to judge whether a soldier has been deprived, without authority, of his liberty. The normal conditions of military life, not abnormal ones, would have to be considered to determine this. The British Army Act does not use the expression, "loss of liberty". If none of a soldier's civil rights are affected by the decision of a court-martial but there has been a breach of procedure, this can only be remedied by the military authorities or by the Judge Advocate General.\textsuperscript{44}

(iii) British Armed Forces Personnel and the European Convention on Human Rights

It is probable that, when the European Convention on Human Rights was drafted, contracting states, which included Great Britain, never considered whether the convention would apply to purely military offences. The full title of this treaty is European Convention for the Protection of Human Rights and Fundamental Freedoms. The document was signed at Rome on November 4, 1950, and it entered into force on September 3, 1953. It has been supplemented by five protocols and an agreement of May 3,

\textsuperscript{42} R.V. Secretary of State for War ex parte Price, 1 K.B. 1 (1949).
\textsuperscript{44} R.V.O.C. Depot Battalion, R.A.S.C. ex parte Elliott, 1 All E.R. 373 (1949); RV Secretary of State for War, ex party Margyn, 1 All E.R. 242 (1949). If there has been such delay in bringing a man to trial as to amount to oppression, the High Court of Justice could interfere and admit him to bail. Ex parte Elliott, 1 All E.R. 373 (1949), see also Blake's cases 2.


France alone had the foresight to enter a reservation concerning the non application of the convention to national law dealing with military discipline. Specifically, the French Government stated that Articles 5 & 6 of the Convention should not be permitted to interfere with those provisions of French law dealing with discipline in the French Armed Forces. See also the separate opinion of Judge Buidschedler - Robert in the European Court case of Engel et al, series B, Vol 20, at 52 (1978). It is understood that, prior to ratification of the convention by the United Kingdom on March 8, 1951, no one in the British Government thought to refer the text of the convention to the Ministry of Defence to draft a reservation concerning military discipline.

By Article 43 of the Convention, military service is recognised as not being inconsistent with the Convention. (Article 1 of the Convention).

The distinction between purely military or disciplinary offence, on the one hand, and offences recognised as crimes under the civilian law, on the other hand, is equally clear in all rational legal systems. For example, under the Dutch Military Discipline Act of 1903, a number of what might be considered purely disciplinary or military offences were also made distinct
criminal offences in a civilian sense. A much clearer distinction is drawn in the British Army Act, 1955, especially in Section 70 thereof.

In the American Uniform Code of Military Justice, all the military offences and civilian offences are collected together without distinction in fifty-eight punitive articles (Articles 77 through 134, U.C.M.J.). These punitive articles together comprise sub chapter X of Title 10, United States Code (1976). Examination of the Table of maximum punishments, Section A, does not reveal that the maximum permissible punishments for military offences are, on the whole, either more severe or less severe than those permitted for civilian or common-law crimes. Manual for Courts-Martial United States, 1969 (Rev. ed.) refers.

In European Court of Human Rights in the case of Engle and Others\(^{45}\) considered the applicability, deals with freedom from unlawful detention, and article 6 concerned with the right to a fair trial, of the convention. The text of the relevant portions of Article 5, European Convention on Human Rights, is as follows:

\[
\text{No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:}
\]

\[(1) \quad \text{(a)} \quad \text{the lawful detention of a person after conviction by a competent court.}
\]

\[(b) \quad \text{the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;}
\]

\[(c) \quad \text{the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on}
\]

\(^{45}\) Judgement of 8\textsuperscript{th} June 1976, Series A, No 22; J. 386; Engel etal, series B, Vol 20 (1978). See also Engs V Switzerland, Applic No 7341/76.
reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by court and his release ordered if the detention is not lawful.

Article 6 in so far as it is relevant states:

(1) In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of the morals, public order or national security in a democratic society.

(3) Everyone charged with a criminal offence has the following minimum rights:

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so require.

(d) to examine or have witnesses examined against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.
Article 14 states, "The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Finally, in relation to Article 5, whilst the ordinary conditions of service life may be considered (as they were in relation to the question whether there had been any "deprivation of liberty"), the voluntary nature of submission to the special needs of the armed forces does not act as a waiver of those rights guaranteed in the convention. In the vagrancy cases, the court confirmed that the right to liberty in a democratic society is too important to be waived; "detention might violate Article 5 even though the person concerned might have agreed to it. The first matter to be decided in relation to Article 6 was whether the offences with which the applicants were charged were "criminal charges" and thus attracted the protection of that article. It will be recalled that a distinction has been drawn between disciplinary and criminal offences. In the Armed Forces of all the contracting states this distinction occurs, and each state its own classification. Some offences can only be considered as disciplinary, others as only criminal, but there is a broad category of 'mixed' offences where discretion can be applied by the prosecutor to charge an offence as criminal or not.

In England, there are no formal guarantees of liberty apart from the declarations of rights contained in the ancient charters and the restrictions on the arbitrary power of the crown imposed by the Revolution settlement of 1688. The citizen may go where he pleases and do or say what he pleases provided that he does not commit an offence against the criminal law or infringe the rights of others. If his legal rights are infringed by other, e.g. by trespassing on his property or defaming his reputation, he may present

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46 Eur Court H.R. De Wilde, Ooms and Versyp cases, Judgement of 18th June 1971, series A, No 12, p.36.
47 See, for example, Army, 1955, S.62, concerning forgery of an official document.
himself by the remedies provided by the law. It is in the law of crimes and of tort and contract, part of the ordinary law of the land, and not in any fundamental constitutional law, that the citizen finds protection for his political liberty, whether it is infringed by officials or by fellow citizens. In the Indian Constitution, like the American Constitution, there is a specific enumeration of the fundamental rights in Part III which are guaranteed to every citizen irrespective of his caste, creed or station in life. It is because of this similarity that it is proposed to examine the development of the applicability of Constitutional rights to servicemen before Courts-Martial in the United States.

C. POSITION OF ARMED FORCES PERSONNEL AND THE CONSTITUTION OF THE UNITED STATES OF AMERICA

(i) Constitutional Provisions

The sole authority for the establishment of a system of military justice is the United States Constitution, and we must look to that document for the source of the legislative power exercised by Congress in enacting the Uniform Code.

(ii) Congressional Powers to make rules for the Armed Forces Personnel

The express authority of Article 1, Section 8, Clause 14 of the Constitution, to make rules for the government and regulation of the land and naval forces, is a grant of purely legislative power, and is the prime source of the establishment of the system of military justice. Cognisance of this power is taken in the exception in the Fifth Amendment, “except in cases arising in the land and naval forces”, but that exception creates no system of courts and no jurisdiction. The President, as Commander in

Chief, may appoint any Court-Martial of the system, which his military subordinates, may lawfully appoint.\textsuperscript{51} And the Constitutional requirement of a presentment or indictment by a grand jury which might otherwise be applicable is eliminated in prosecutions under the system by the exception in the Fifth Amendment. Within the broad scope of the express legislative power, Congress may make all the basic rules for a judicial system within the armed forces, and all laws necessary and proper for the operation of that system, subject only to the other equally effective provisions of the Constitution, including the applicable guarantees of the Bill of Rights.\textsuperscript{52}

(iii) \textbf{The Guarantees Applicable to Courts-Martial}

(aa) \textbf{Inapplicable Guarantees}

As late as 1911, it was quite generally denied by the executive branch of the Government of U.S.A. that the personal guarantees found in the federal constitution were applicable to men in uniform. Subsequent to that time, it has been admitted that some of the guarantees are applicable. Since 1943, the judicial attitude of their federal courts towards the exercise of jurisdiction by Courts-Martial has become more parental, and some of the fundamental privileges of the men in uniform are being respected by the more enlightened jurists. This is in part due to the dissemination of information concerning the procedures and results of trials by Courts-Martial and a changing attitude towards them by the public, which in ever increasing numbers has made their acquaintance.\textsuperscript{52A}

All of the guarantees enumerated in the Constitution do not apply in Courts-Martial. Some are specifically excepted, and some are by their history inapplicable in whole or in part. The prohibition of prosecution for a

\textsuperscript{51} Swain V United States, 165 U.S. 553, 17, Sup et 448 (1897).

\textsuperscript{52} The first ten amendments to the Constitution of U.S.A. are often collectively referred to as the Bill of Rights.

\textsuperscript{52A} Note 41, Ill. L. Rev. 260 (1946).
capital or otherwise infamous crime except on presentment or indictment of a grand jury is specifically excepted from operation in cases arising in the land and naval forces. The right to a jury trial is excepted by implication since that right is interpreted as applicable to those to whom the right of grand jury action is guaranteed by the fifth Amendment. The right to a trial in the State where the crime was committed have never been held applicable to Courts-Martial procedure because they were not so applicable at the time of the adoption of their constitution and it is upon the background of the conditions existing at that time that the language of the constitution is interpreted. The prohibition of warrants issued upon other than probable cause, supported by oath, and being specific as to place, persons and things does not apply to Courts-Martial for the same historical reasons, but the failure to make any provision in the armed forces for the issuance of search warrants does not operate to give to military authorities unlimited power to make searches and seizures. The guarantee against unreasonable searches and seizures applies to persons in the armed forces, but greater latitude is allowed, due to the exigencies of military service, in the determination of what may be unreasonable.

(ab) **Applicable Guarantees**

The fundamental guarantees which apply to an accused in Court-Martial procedure include the following;

(1) Right to the informed of the nature and cause of the accusation;

(2) Right to have assistance of the counsel for his defence;

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53 U.S. Const. Amend. VI
54 U.S. Const. Amend. VII
57 U.S. Const. Amend. VI
(3) Right to a speedy trial;\textsuperscript{50}

(4) Right to a public trial;\textsuperscript{60}

(5) Right to be confronted with the witnesses against him;\textsuperscript{61}

(6) Right to have compulsory process for obtaining witnesses in his favour;\textsuperscript{62}

(7) Protection against compulsory self-incrimination;\textsuperscript{63}

(8) Protection against unreasonable searches and seizures;\textsuperscript{64}

(9) Due process of law;\textsuperscript{65}

(10) Prohibition of cruel and unusual punishments and excessive fines;\textsuperscript{66}

(11) Protection against double jeopardy;\textsuperscript{67} and;

(12) Other rights retained by the people and not delegated to the federal government.\textsuperscript{68}

\textsuperscript{50} Ibid.
\textsuperscript{60} One of the purposes in writing the Uniform Code of Military Justice was to ensure to an accused person for a speedy trial. House Hearings 829, 906.
\textsuperscript{61} U.S. Const. Amend. VI.
\textsuperscript{62} Ibid.
\textsuperscript{63} U.S. Const. Amend. V.
\textsuperscript{64} U.S. Const. Amend IV & V.
\textsuperscript{65} U.S. Const. Amend. VIII.
\textsuperscript{66} U.S. Const. Amend. V.
\textsuperscript{67} U.S. Const Amend. IX.
\textsuperscript{68} See United States v Simmons, 96 U.S. 360 (1877).
(iv) **Right to be informed of the Nature and cause of the accusation.**

- **Application in the Armed Forces**

Under the Uniform Code, an arrested person is to be immediately informed of the specific wrong of which he is accused, again informed of the charges against him as soon as practicable after they are formally drawn, advised of such charges when a pre-trial investigation is ordered, and served with a copy of the charges prior to trial. While a copy of the charges and specifications has always been furnished to an accused prior to his trial by Court-Martial, the right of an accused under the somewhat vague and indefinite articles making punishable conduct “to the prejudice of good order and discipline” and “conduct unbecoming an officer and gentleman” has sometimes in the past apparently been violated. Although legally based and constitutionally supported on the ground that violations are offences against customary military law, these indefinite articles have been broadly construed to include as offences/acts which are not sufficiently old or well-known to be customs, and which leave persons subject to the code in a position where they must decide at their peril whether their prospective conduct may be punishable.69

(v) **Right to have the assistance of Counsel for the Defence**

- **Application in the Armed Forces**

Under the Uniform Code, an accused has a right to be represented by counsel at the pre-trial investigation, during the trial, and, if his case goes to a board of review, or to the Court of Military Appeals, before those bodies upon appellate review.70 If he cannot procure his own choice of counsel, counsel will be provided for him. Defence counsel provided for a General

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69 Acts for which the punishment has been newly prescribed under the authority of the general article of the Code include communicating threats, uttering disloyal statements not punishable in federal courts, possessing marihuana and communicating insulting language to a female (See MCM II 127C.).

70 U.C.M.J. 32(b), 38(b) and 70(c) and (d).
Court-Martial must be either a member of the bar, or a judge advocate or a law specialist who is a law-school graduate; and in either event must be certified by the Judge Advocate General as competent to perform his duties as defence counsel.\textsuperscript{71} Defence Counsel provided for a special Court-Martial, however, need have no legal qualifications whatever unless the Government trial counsel is a Judge Advocate or a law specialist, or a member of the bar, in which event, defence counsel must be within one of those classifications.\textsuperscript{72} As a practical matter, it will not always be possible to spare a Judge Advocate or law specialist for duty as trial counsel in a Court-Martial, and such Courts-Martial, which can impose a bad-conduct discharge, can lawfully proceed with no lawyers in attendance. The accused has the right, however, to choose individual counsel which may be military, if reasonably available, or civilian, if provided by the accused; and such individual counsel may serve in cooperation with the appointed defence counsel as the legal representative of the accused.\textsuperscript{73}

\textit{(vi) Right to a Speedy Trial}

\textbf{Application in the armed forces}

Under the Uniform Code, the right to a speedy trial is recognised by a mandate that immediate steps be taken to try the accused or to dismiss the charges and release him and by a requirement that general court martial charges be forwarded to the convening authority within eight-days after arrest. This latter requirement contains the loophole, "if practicable", but forces the reduction to writing of the excuses for delay when the loophole is penetrated. There is, however, no Code remedy provided for the accused for violation of this right, and habeas corpus, as that privilege exists today, is ineffective to correct this type of wrong.

\begin{itemize}
\item \textsuperscript{71} U.C.M.J. 27(b).
\item \textsuperscript{72} U.C.M.J. 27(c).
\item \textsuperscript{73} U.C.M.J. 38(b). This has since been amended to read as a Defence Counsel having legal qualification.
\end{itemize}
(vii) **Right to a public trial**

- **Application in the armed forces**

The right to a public trial is not mentioned in the uniform code, however, and there was agreement that the right applied to military courts. When secrecy is necessary in wartime, the problem is solved by deferring trial until after the termination of hostilities, and involving the extension of the statute of limitations provided for that purpose. The exclusion from the courtroom of civilian defence counsel during the presentation of a secret map, where the appointed defence was present to advise the accused, however, has been held an insufficient ground for habeas corpus release.

(viii) **Right to be Confronted with the Witnesses against the Accused**

- **Application in the Armed Forces**

The right to confrontation is to some extent denied, the Code providing that the prosecution may, upon notice to the accused, take and admit into evidence a deposition of a witness who lives more than one hundred miles away or a witness who is unable or refuses to appear in person. No provision is made for the accused or his counsel to be present at the taking of the deposition; instead, an officer to represent the defence for this purpose alone can be appointed by the convening authority, who is the very officer at whose instance the accused is to be tried.

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74 House Hearings 743 and 983.
75 UCMJ 43(e); House Hearing 1044.
76 Romero v. Squier, 133 F. 2d 528 (C.C.A 9th, 1943).
77 UCMJ 49.
(ix) **Right to have compulsory process for obtaining witnesses in the accused’s favour**

- **Application in the Armed Forces**

The right to have compulsory process to secure witnesses for the defence is limited to the extent to which the prosecution may be allowed to subpoena witnesses for the government. The code provides that the trial counsel and defence counsel shall have “equal opportunity” under such regulations as the President may prescribe.\(^7\)\(^8\) If the prosecution is denied one distant witness, does this mean that the defence can then be denied one distant witness? Such a defence witness may be the only one who can prove the accused’s innocence. What the limitation means must await the decision of the Court of Military Appeals in a case where the constitutional right has been denied.\(^7\)\(^9\)

(x) **Protection against compulsory self-incrimination**

- **Application in the Armed Forces**

Under the Uniform Code, the protection against compulsory self-incrimination goes by prohibiting persons subject to the Code from interrogating or taking any statement from the accused before the accused is informed of the nature of the accusation and cautioned concerning his right to refuse to make any statement.\(^8\)\(^0\) The right is coupled with the effective remedy of exclusion of all statements obtained in violation of the right. For extra measure, protection against compulsory degrading statements immaterial to the issue is added.

\(^7\) U.C.M.J. 46.
\(^8\) U.C.M.J. 31. House Hearings 988.
(xi) **Protection against unreasonable searches and seizures**

- **Application in the Armed Forces**

The protection against unreasonable searches and seizure applies fully to the private homes and property of persons subject to military law which are located outside the limits of areas under military control. A Commanding Officer has no authority to search or seize such homes or property. The protection applies also to quarters and property inside areas under military control, but a search which would be unreasonable elsewhere might well be reasonable within such areas, considering the degree of impending danger and the responsibility of the commanding officer for safety, order and discipline in such areas. Knapsacks, seabags, suitcases and lockers on board their public vessels or within a military or naval shore establishment may be inspected and searched without the basis of an oath by the Commanding Officer. If a search or seizure be shown to be unreasonable, however evidence thereby discovered is inadmissible in federal courts-martial to the same extent as it would be in federal courts under the exclusionary rule.81

(xii) **Right to due process of law**

(aa) **Nature of the right**

Due process of law in the administration of military justice is the reorganising and respect of the substantial rights, other than the specific fundamental rights separately enumerated in the first eight amendments, to which the accused is entitled. Such substantial rights may include those legally prescribed by rules and regulations, as well as those generally recognised by Anglo-American jurisprudence as essential to a fair trial.

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When any of these rights are denied to the accused, and the denial substantially prejudices him in his defence, there has been a defiance of due process. The denial of each individual's right may not create substantial prejudice, and yet the totality of the denial of several such rights may have the commutative effect of defying due process of law.

Among the substantial rights are the following:

(a) Rights to have criminal liability depend upon a standard of conduct readily ascertainable in advance by men of ordinary intelligence.

(b) Right in a Court-Martial to be tried by a legally constituted and properly organised court.

(c) Right to have a reasonable time for the preparation of his defence.

(d) Right to challenge for cause.

(e) Right to have all testimony given under oath or affirmation.

(f) Right to cross-examine witnesses against him.

(g) Right to a fair trial from intimidation.

(h) Right to acquittal unless guilt is established beyond a reasonable doubt.

(i) Right to the prescribed review of the case.
The guarantee of due process of law is not well covered in the Code. The readily standard of conduct, which every criminal statute should embody, is still missing in some of the punitive articles.\textsuperscript{82} What conduct is unbecoming "an officer and a gentlemen", after 177 years of military justice experience in the American armed forces, is still dependent subjectively upon the moral intuition of the convening authority\textsuperscript{83} and its vague and defined scope still leaves a considerable penumbra in which a conscientious officer must operate at his peril. The language of the general article\textsuperscript{84} derived from the Army’s Articles of War 96, from which, however, much has been extracted and set forth as specific offences, is still too broad to allow of setting an ascertainable standard of conduct. The requirement for an impartial pre-trial investigation is not treated as a right accruing to an accused but only as a duty imposed upon the military authorities. In fact, the observation of the Supreme Court in \textit{Humphrey V Smith}\textsuperscript{85} that the congress had apparently not intended to make compliance a jurisdictional pre requisite, was taken to indicate that such a remedy was unnecessary, rather than as a challenge to so modify the statute as clearly to show an intent to provide that remedy. The right to a properly constituted court remains as unenforceable as ever. The requirement that none shall be tried by his juniors is limited by the possibility that such cannot be avoided; and the requirement of enlisted members when an enlisted accused so requests is limited by the possibility that physical conditions may prevent. The federal courts have always refused to go behind the executive decision on such possibilities, on the theory that an absolute discretion was vested in the deciding officer.\textsuperscript{86} No language in the code would guide a court to any different result today. The right to sufficient time to prepare the defence is

\textsuperscript{82} "But when you undertake to define a crime, it seems to me you ought to define all elements of the crime and define it clearly", House Hearings 1255.

\textsuperscript{83} U.C.M.J. 133.

\textsuperscript{84} U.C.M.J. 134.

\textsuperscript{85} U.S. 695, 69 Sup. Et. 830 (1949).

\textsuperscript{86} Hiatt V Brown, 339 U.S. 103, 70 Sup Ct 495 (1950).
not specifically mentioned, although a minimum period of delay between the service of charges and the beginning of trial is assured in time of peace. The period is five days in General Courts Martial cases and three days in Special Court Martial cases, but this period bear no relation to the difficulty of preparing the defence in various situations. The Courts Martial is given a discretionary power to grant continuances, but no criterion is established upon which a right to such a continuance may be based, and no remedy for an arbitrary refusal to grant a continuance is provided. The right to challenge for cause is stated, but is rendered somewhat less effective by the provision that challenges are to be decided, not by an impartial law officer, but by the members of the court, any of all of whom might be subject to challenge themselves.87 No challenge to the array is provided, and the code specifically forbids the challenging of more than one person at a time. The right to cross examine the witnesses against the accused at his trial is not mentioned in the code, and is left to be provided for by the President in his prescription of procedure, including modes of proof. The code leaves the application of the principles of law and rules of evidence as recognised in federal district courts to the discretion of the President, and not only authorises him to delegate that authority but also to provide for its sub delegation. The right of cross examination is necessarily denied, however, where the right of confrontation is not accorded, as can be the case where the dispositions are admitted into evidence against the accused. It is not denied by the admission of former testimony taken before a Court of Inquiry involving the same issue and to which the accused was a party, because the accused will have had, at that time, an opportunity to cross examine the now unavailable witness. The right to have guilt proved by a quantum of legal and competent evidence equivalent to that "beyond reasonable doubt" is recognised by the Code as a part of the trial procedure, but no measure is provided for the guidance of the reviewing authorities in determining whether or not to reverse a conviction. A right of the accused to the

87 U.C.M.J 41.
prescribed review of his case is implicit in the provisions for review, but no remedy seems to have been provided in the event of its denial.

(xiii) **Prohibition of cruel and unusual punishments and excessive fines**

- **Applications in the Armed Forces**

In the Uniform Code, the right to be protected against cruel and unusual punishments is enumerated through their prohibition. The Code still authorises confinement on bread and water, but limits its imposition as a non-judicial punishment to three consecutive days and to offenders attached to or embarked in a vessel. Since this punishment, in the present state of our civilisation is not yet to be classed as cruel and unusual, the door to its extensive use as a Court-Martial punishment, under the blanket authorisation of “any punishment not forbidden”, is wide open, subject only to such limitations as the President may deem desirable.\(^8\)

(xiv) **Protection against double jeopardy**

- **Application in the Armed Forces**

The right to protection against double jeopardy is abrogated in the same article of the code in which it is recited. The power of military authorities to disapprove a conviction and order the accused retired an indefinite number of times in subsequent court-martial proceedings technically called “rehearings” is specifically granted, and applies to cases where the accused has not in any manner waived his constitutional right.\(^9\) The Senate added one paragraph to deny the power to subject the accused to second jeopardy in the one situation where the prosecution of the case is abandoned prior to a finding because of the failure of available evidence or

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\(^8\) U.C.M.J 18, 19, 20. The President has limited bread and water sentences to thirty days. MCM II 125.

\(^9\) U.C.M.J. 44(b), 63. The purpose was to prevent “an obviously guilty man” from escaping punishment “on a technicality”, House Hearings Continuation of the former proceedings. House Hearing 1180.
witnesses for the prosecution. This affords somewhat more protection to
the accused than the superseded laws, but does not take care of the
situation where the convening authority, faced with difficulty in securing
witnesses, puts his abandonment of the prosecution on other ground. The
Code does not clarify what constitutes jeopardy in court-martial
proceedings, or establish any test for the determination of identity of
offences. In this respect, the Code issued a wonderful opportunity to turn a
spotlight on the existing confused reasoning, and allows the military to
continue working in the dark in a manner quite unpredictable by the
persons the constitution was designed to protect.

(xv) Other rights retained by the people

- Application in the Armed Forces

The presumption of innocence is expressly mentioned by the Code,
which provides for its being brought to the attention of a Court-Martial in
every case before a vote is taken as to the accused's guilt or innocence. The
burden of proof is similarly handled.

(xvi) Dismissal or removal etc of a person subject to military law
by the President

In England, an officer or a non commissioned officer or an enlisted
personnel holds commission/appointment at the will of the crown and no
action can be brought against it for wrongful dismissal or removal. In
U.S.A, the power of the President, in the absence of Statutory Regulations,
to dismiss an officer of the Army or Navy from service in unquestioned in
any case. \textit{Mimmark Vs U.S.} 97 U.S. 426, \textit{Blake Vs U.S.} 103, 227. The
President has an authority under an Act passed by the Congress for the
purpose of reducing the Army, in other words, reducing the number of

\begin{footnotesize}
\footnote{The prohibition of a rehearing in a case in which there was a lack of evidence to support the findings, U.C.M.J 63(a), was also viewed as cutting down the "standard notion of double jeopardy in the military" by precluding a trial at a 'rehearing' of an accused against whom no prima facie case had been established. House Hearing 1180.}
\footnote{Brig. General James Snedeker, "Military Justice Under the Uniform Code", p.467.}
\end{footnotesize}
officers by retaining the best and mustering out the others. *Street Vs U.S.* 133 U.S. 299 = 33 Led 631. An officer cannot be dismissed by the Secretary concerned, but only by court-martial as provided by the general laws. *U.S. Vs Perkins* 116 U.S. 483 = 29 Led 700. In *Humphery's Executor Vs U.S.* 295 U.S. 602 (1935), the Supreme Court had held that the Congress could limit the President's power to remove officers appointed with the advice and consent of the senate.

**xvii** Armed Forces personnel and the curtailment of Fundamental Rights in U.S.A.

In *Dawkins Vs Panlet* (1869) 5 Q.B. judgement observed, "It is undoubtedly true that a man on entering the Army or Navy subjects himself to military law and wherever that law conflicts with the civil law applicable to the ordinary subject, he must be content to forego the rights which the ordinary law affords. And if by any provision of military Code, a party subjected to its authority was prohibited from resorting to civil tribunals for the redress of a wrong inflicted under colour of military authority, there would be an end of the question.

**xviii** Courts-Martial and the Civil Courts in the U.S.A.

Proceedings by courts-martial when confirmed, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its power in the sentence pronounced.92

In 1938, in *Johnson Vs Zerbst*, the Supreme Court cautiously extended the scope of habeas corpus review of civil courts judgements to include the denial of constitutional rights amongst the jurisdictional issues it would adjudicate in such proceedings. The lower courts took advantage of

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92 Carter V. Roberts, 177 U.S. 496, 44 L. Ed. 861.
this new freedom to hold that constructional rights in the Bill of Rights, with the exception of right to grand and petit juries, applied to courts-martial. But the issue again became clouded when in 1950 the Supreme Court, reversing Hiat Vs Brown and completely overlooking, as it now appears, Johnson Vs Zerbst reminded the errant lower courts of their limited functions in military habeas corpus:

_It is well settled that by habeas corpus that the civil courts exercise no supervisory or correcting power over the proceedings of a Court-Martial – the single inquiry, the test is jurisdiction. The correction of any errors it may have committed is for the military authorities which are alone authorised to review its decision._

The Supreme Court had to reach all the way back to 1890 for a military precedent in re Grimley. The above statement led many people to think that the court was quietly indicating that the constitutional guarantees are inapplicable to Courts-Martial. But in 1953, the Supreme Court decided Burns Vs Wilson where the court held that claims of denial by court-martial of constitutional rights should be considered on merits by the civil courts to determine whether the military have given fair consideration to each of these claims. The petitioners in Burns Vs Wilson, two air force men convicted of rape and murder on Guam, claimed that they had been illegally detained. They contended that their confessions were coerced from them, that they were denied the effective assistance of a counsel, that evidence favourable to them had been suppressed while perjured testimony was procured by the prosecution and that they had been tried in an atmosphere of terror and vengeance. The District court dismissed the petition. The Court of Appeals, after full examination of the record had held the allegations were insufficient to require a rehearing on

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95 Id; at pp 110-11.
96 In re Grimley, 137. U.S. 147 at p.150 (1890).
the merits. The Supreme Court affirmed the dismissal but none of the four opinions filed attracted the majority. Justice Minton alone was willing to affirm the lower courts along the narrow jurisdictional lines of In re Grimley and Hiat Vs Brown. Chief Justice Vinson, speaking for himself and Justice Reed, Burton and Clarke, affirmed on the grounds, that, when a military decision has dealt fully and fairly with an allegation raised in the application for a writ of habeas corpus, it is not open to a federal court to grant the writ simply to re-evaluate the evidence.

Vinson C.J. went on to state, however,

_Had the military court manifestly refused to consider those claims, the District Court was empowered to review them de novo. For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers as well as civilians._97

While the Supreme Court has merely shown its concern, the military courts have judiciously extended broad constitutional rights to servicemen. Thorough system of appellate review was created within the military system for the first time in 1950 when Congress codified military law and made it uniform throughout the services.98 Under the Uniform Code of Military Justice, all Courts-Martial proceedings in which the sentence includes a punitive discharge or confinement for one year or more are referred to a Board of Review, which may reconsider findings of law or fact. Cases in which Board of Review has approved a death sentence go automatically to the United States Court of Military Appeals either by order of the Judge Advocate General or when accused by the Court, on petition of the accused. The Court of Military Appeals reviews only matters of law — and has been a stern guardian of servicemen’s rights. As Professor Bishop has pointed out:

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97 Ibid.
98 The Uniform Code of Military Justice (U.C.M.J.) was created by the Act of May, 1950, 10 U.S.C. 801-964 (1964). In recodifying the military law, Congress extended to the military by statutory provision many of the explicit guarantees of the Bills of Rights.
The delicate perception of the present Court of Military Appeals ..... have sniffed out fatal denials of due process in situations in which their presence would probably not have been noticed by most civilian judges.¹

Initially, the rights protected with such care by the Court of Military Appeals were only those provided by the Uniform Code of Military Justice, since the court decided in an early case that the military trials were beyond the ken of the Bill of Rights.² The past few years have, however, seen a radical upheavals in the doctrine and the court has begun to elevate protection of the individual soldier above the exigencies of military service by an expansion of the due process clause. The court has now moved to the position that the protections in the Bill of Rights except those which are expressly or by necessary implication inapplicable, are available to members of our Armed Forces.³

Over the years, the Congress has gradually extended the serviceman’s protection by Statute and today the person in uniform enjoys the effective assistance of a counsel; he is accorded full privilege against self-incrimination; he has the right for compulsory process for witnesses; he has the protection against double jeopardy; due process of law in the sense of essential fairness is a concept fully enforced in a court-martial proceedings and servicemen are granted considerable freedom of speech within the limitation necessary in a military society.

The expansion of the Bill of Rights suggested sometime back, to make essential parts of it applicable to men in the land and naval forces, will not encounter the community mores. Congress has, in fact, applied most of the Bill of Rights guarantees in the Uniform Code of Military Justice. Moreover, the services themselves have espoused the view that the soldiers and sailors have constitutional rights. Finally, and this perhaps the most important – a comparison with the position, number, composition of the Armed Forces in 1789-1791 with the present strength of the Armed Forces would clearly indicate that an approach which was adequate and commonplace then is wholly unsatisfactory and inappropriate; in today's war, whole nations are in arms. Then a commander could disapprove proceedings in which a lawyer appeared because the tribunal was a Court of Honour. Today, the Court-Martial has developed into a Court of general criminal jurisdiction trying capital cases everywhere, and fighting a losing rear guard action in the face of the recent restrictions in its jurisdiction over accompanying civilians. Besides, as Colonel Weiner has demonstrated that the founders did not intend the bill of Rights to the miniscule Army and non-existent Navy of 1789-91 but it does not follow that they would have been led to a similar conclusion had they been dealing with the greatly enlarged Armed Forces and greatly widened military jurisdictions that are with us today.

Mr Chief Justice Warren in his speech, after indicating the danger to democratic institutions posed by standing armies and the importance of maintaining civilian control of the military, had admitted the court’s attitude towards the military control of its own personnel has traditionally been “hands off”. The obvious reason for this attitude was that the courts-martial are ill-equipped to determine the impact upon discipline that any particular intrusion over military authority might have. But in contrast to the

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country's early history, the military establishment is so large and affects so many citizens that the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question. He broadly construed Burns decision as authorising habeas corpus challenge of any court-martial decision denying the accused his fundamental rights. The Jacoby decision was seen to evidence a similar respect for soldier's constitutional rights on the part of Court of Military Appeals. The suggestion that expanding the rights of servicemen had already impaired discipline was dismissed with a quotation of the then Chairman of the Joint Chiefs of Staff that “under the Uniform Code of Military Justice, the Army today has achieved the highest state of discipline and a good order in its history.”

Thus, it would appear that the rationale underlying the present trend is that the emergence of a large standing army requires increased judicial scrutiny of the military and that discipline was never better notwithstanding the resulting greater privileges for the individual soldier. Although, the Court of Military Appeals has been less explicit in its attitude, if seems likely that it is moved by similar considerations.8

(XX) Military Justice Act, 1983

The salient provisions of the Military Justice Act, 1983 relate to the following matters: -

1. It amends articles 25, 26, 27 and 29 to modify rules governing detailing and excusing of courts-martial personnel;

2. Deleting requirement that the convening authority should personally select and detail military judges and counsels;

8 Anon: Constitutional Rights of Servicemen in Civilian Courts, 64 Col. L.R. 142 (1964).
(3) Allowing military judges to excuse numbers for good cause after the assembly of the court-martial and amendment of Articles 34, 60, 61, 63 and 64 in this regard;

(4) Convening authority is not required to examine case for legal sufficiency before or after the trial.

(5) In the post trial scenario, the convening authority may disapprove findings and the sentence as a matter of command prerogative – no legal review is required.

(6) No post-trial review – Staff Judge Advocate prepares brief recommendation in case of a General Court Martial and Special Court-Martial, where bad conduct discharge is adjudged.

(7) On the appeal side, Government may appeal to Court of Military Review on certain adverse rulings of trial judge.

(8) The accused may seek review by the Court of Military Review in all except capital cases;

(9) Cases actually reviewed by Court of Military Appeals shall be subject to Supreme Court review on writ of certiorari;

(10) Trial Judge Advocate’s powers under Article 69 expanded. It now includes expansion of his powers to review appropriateness of the sentence;

(11) The amendment entitles a nine – members commission, including two members of public, to study the following:-

(a) Sentencing by the military judge alone;
(b) power of suspension by the Military Judge;

(c) tenure for military judge;

(d) to consider retirement programme of judges of the Court of Military Appeals.

(A) Creating new punitive article (Article 112A) on drug offences.

(aa) **Matters relating to the Military Judge, Counsel and Members of the Courts-Martial.**

Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the Court from participating in the case. Under such regulations as the Secretary concerned may prescribe, the convening authority may exercise his authority under this section (section 825 - Article 25) to his Staff Judge Advocate or to any other principal assistant.

Section 826 (Article 26) has been amended by striking out sub-section (a) and inserting in lieu thereof the following:

*A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which the military judges are detailed for such courts-martial and for the persons who are authorised to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.*
Section 827(a) [Article 27(a)] has been amended by striking out "for each" and all that follows through "appropriate" and inserting in lieu thereof the following: "(1) Trial Counsel and Defence Counsel shall be detailed for each general and special court-martial. Assistant trial counsel and assistant and associate defence counsel may be detailed for each general and special court-martial.

Paragraph (7) of Section 838(b) [Article 38(b)(7)] is amended by inserting after the first sentence the following new sentence, "such regulations may not prescribe any limitation based on the reasonable availability of counsel solely on the grounds that the counsel selected by the accused is from an armed force other than the armed force of which the accused is a member."

Section 5(a)(1), Section 860 (Article 60) is amended to read as under:-

"(a) The findings and sentence of a Court-Martial shall be reported promptly to the convening authority after the announcement of the sentence."

"(b) (1) Within 30 days after the sentence of a General Court-Martial or of a Special Court-Martial which has adjudged a bad-conduct discharge has been announced, the accused may submit to the convening authority matters for consideration by convening authority with respect to the findings and the sentence. In the case of all other special courts-martial, the accused may make such a submission to the convening authority within 20 days after the sentence is announced. In the case of all Summary Courts-Martial, the accused may make a submission to the convening authority within seven days after the sentence is announced. If the accused shows that additional time is required for the accused to submit such
matters, the convening authority or other person taking action under this section, for good cause, may extend the period-

“(A) in the case of a general court-martial or a special court-martial, which has adjudged a bad conduct discharge, for not more than an additional 20 days.

(B) in the case of all other courts-martial, not more than an additional 10 days.

(2) In a Summary Court-Martial case, the accused shall be promptly provided a copy of the record of trial for use in preparing a submission authorised by paragraph (1).

(3) In no event, shall the accused in any general or special court-martial case have less than a seven-days period after the day on which a copy of the authenticated record of the trial has been given to him within which to make a submission under paragraph (1). The convening authority or other person taking action on the case, for good cause, may extend the period upto an additional 10 days.

(4) The accused may make his right to make a submission to the convening authority under paragraph (1). Such a waiver must be made in writing and may not be revoked. For the purposes of sub-section (2), the time within which the accused may make a submission under this sub-section shall be deemed to have expired upon the submission of such a waiver to the convening authority.

(c) (1) The authority under this section to modify the findings and the sentence of a court-martial is a matter of command
prerogative involving the sole discretion of the convening authority. Under Regulations of the Secretary concerned, a commissioned officer commanding for the time being, a successor in command or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

(2) Action on the sentence of a court-martial shall be taken by the convening authority or by another person authorised to act under this section. Subject to the Regulations of the Secretary concerned, such action may be taken only after consideration of any matters submitted by the accused, under sub-section (b) and, if applicable, under such section (d), or after the time for submitting such matters expires, whichever is earlier. The convening authority or other person taking such action, in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part.

(3) Action on the findings of a court-martial by the convening authority or other person acting on the sentence is not required. However, such person in his sole discretion may –

(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or

(B) change a finding of guilty to a charge or specification to a finding of guilty of an offence that is lesser included offence of the offence stated in the charge or the specification.

(d) Before acting under this section on any general court-martial case that includes a bad conduct discharge, the convening authority or other person taking action under this section shall obtain and
consider the written recommendations of his Staff Judge Advocate or legal officer. The convening authority or other person taking action under this section shall refer the record of trial to his Staff Judge Advocate or legal officer, and the Staff Judge Advocate or legal officer shall use such record in the preparation of his recommendations. The recommendation of the Staff Judge Advocate or legal officer shall include such matter as the President may prescribe by regulation and shall be served on the accused, who shall have five days from the date of receipt in which to submit any matter in response. The convening authority or other person taking action under this section, for good cause, may extend that period for up to and additional 20 days. Failure to object in the response to the recommendation or to any matter attached to the recommendation waives the right to object thereto.

(e) (1) The convening authority or other person taking action under this section, in his sole discretion, may order a proceeding in revision or a rehearing.

(2) A proceeding in revision may be ordered if there is an apparent error or omission in the record or if the record shows improper or inconsistent action by a court-martial with respect to the findings or sentence that can be rectified without material prejudice to the accused. In no case, however, may a proceeding in revision –

(A) reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty;

(B) reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a
specification laid under the charge, which sufficiently alleges a violation of some article of this chapter; or

(c) increase the severity of the sentence unless the sentence presented for the offence is mandatory.

(A) A rehearing may be ordered by the convening authority or other person taking action under this section if he disapproves the findings and the sentence and states the reasons for disapproval of the findings. If such person disapproves the findings and sentence and does not order a rehearing, he shall dismiss the charges. A rehearing as to the findings may not be ordered where there is a lack of sufficient evidence in the record to support the findings. A rehearing as to the sentence may be ordered if the convening authority or other person taking action under this subsection disapproves the sentence.”

(ab) Review by a Judge Advocate (Section 864, Article 64)

“(a) Each case in which there has been a finding of guilty that is not reviewed under section 866 or 869(a) of the title [Article 66 or 69(a)] shall be reviewed by a Judge Advocate under Regulations of the Secretary concerned. A Judge Advocate may not review a case under this sub-section if he has acted in the same case as an accuser, investigating officer, member of the court, military judge, or counsel, or has otherwise acted on behalf of the prosecution or defence. The Judge Advocate review shall be in writing and shall contain the following:

(1) conclusion as to whether –
(A) The court had jurisdiction over the accused and the offence;

(B) the charge and the specification stated an offence; and

(C) the sentence was within the limits prescribed as a matter of law.

(2) A response to each allegation of error made in writing by the accused.

(3) If the case is sent for action under Sub-section (b), a recommendations as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.

(b) The record of trial and related documents in each case reviewed under sub-section (a) (above) shall be sent for action to the person exercising general court-martial jurisdiction over the accused at the time the court was convened (or that person's successor in command) if –

(1) the Judge Advocate who reviewed the case recommends corrective action;

(2) the sentence approved under section 860© of this title [article 60©] extends to dismissal, a bad conduct or a dishonourable discharge or confinement for more than six months; or
(3) such action is otherwise required by regulations of the secretary concerned.

(c) (1) The person to whom the record of trial and related documents are sent under sub-section (b) may :-

(A) disapprove or approve the findings or sentence, in whole or in part;

(B) recruit, commute or suspend the sentence in whole or in part;

(C) Except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or

(4) If a rehearing is ordered but the convening authority finds a rehearing impracticable, he shall dismiss the charges.

(A) If the opinion of the Judge Advocate in the Judge Advocate’s review under sub-section (a) is that corrective action is required as a matter of law and if the person required to take action under such-section (b) does not take action that is at least as favourable to the accused as that recommended by the Judge Advocate, the record of trial and action thereon shall be sent to the Judge Advocate General for review under section 869 (b) of this title [article 69(b)].
(ac) **Action of the Judge Advocate General on the finding(s) and/or the sentence**

**Section 866 (b) [article 66(b)] is amended**

“(b) The Judge Advocate General shall refer to a Court of Military Review the record in each case of trial by court-martial —

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet or midshipman, dishonourable or bad conduct discharge, or confinement for one year or more; and

(A) except in case of a sentence extending to death, right to appellate has not been waived or an appeal has not been withdrawn under Section 861 of this article”. [article 61]

**The text of Section 869 [art 69] is amended to read as follows:**

“(a) The record of trial in each general court-martial that is not otherwise reviewed under Section 866 of this title [article 66] shall be examined in the office of the Judge Advocate General if there is a finding of guilty and the accused does not waive or withdraw his right to appellate review under Section 861 of this article. [article 61]. If any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is inappropriate, the Judge Advocate General may modify or set aside the findings or sentence or both. If the Judge Advocate General so directs, the record shall be reviewed by a Court of Military Review under Section 866 of this title [article 66], but in that event there may be no further review by the Court of Military Appeal, except under Section 867 (b) (2) of this title [article 67(b) (2)].
(b) The findings or sentence, or both, in a court-martial case not reviewed under sub-section (a) or under Section 866 of this title (article 66) may be modified or set aside, in whole or in part, by the Judge Advocate General, on the ground of newly discovered evidence, fraud on the Court, lack of jurisdiction over the accused or the offence, error prejudicial to the substantial rights of the accused, or the inappropriateness of the sentence. If such a case is considered upon application of the accused, the application must be filed in the office of the Judge Advocate General by the accused on or before the last day of two-year period beginning on the date the sentence is approved under Section 866 (c) of this title [article 60(c)], unless the accused establishes good cause for failure to file within that time.

(A) If the Judge Advocate General sets aside the findings or sentence, he may except when the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If he sets aside the findings and sentence and does not order a rehearing, he shall order that the charges be dismissed. If the Judge Advocate General orders a rehearing but the Convening Authority finds a rehearing impractical, the convening authority shall dismiss the charges”.

(ad) Supreme Court Review

Section 10(a) (1), Chapter 81 of title 28, United States Code is amended

Section 1259. Court of Military Appeals; Certiorari

“Decisions of the United States Court of Military Appeals may be reviewed by the Supreme Court by writ of certiorari in the following cases :-
(1) Cases reviewed by the Court of Military Appeals under section 867 (b) (1) of title 10.

(2) Cases certified to the Court of Military Appeals by the Judge Advocate General under Section 867(b) (2) of title 10.

(3) Cases in which the Court of Military Appeals granted a petition for review under Section 867 (b) (3) of title 10.

(A) Cases, other than those described in paragraphs (1), (2) and (3) of this Sub Section in which the Court of Military Appeals granted relief”.

Section 2101 of title 28, United States Code, is amended by adding at the end thereof the following new sub-section

“(g) The time for application for a writ of certiorari to review a decision of the United States Court of Military Appeals shall be as prescribed by the rules of the Supreme Court”.

“(h)(1) – Decisions of the Court of Military Appeals are subject to review by the Supreme Court by writ of certiorari as provided in Section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under such section any action of the Court of Military Appeals in refusing to grant a petition for review.

(2) The accused may petition the Supreme Court for a writ of certiorari without payment of fees and costs or security therefore and without filing the affidavit required by Section 1915 (a) of title 28".
“(c) Appellate defence counsel shall represent the accused before the Court of Military Review, the Court of Military Appeals or the Supreme Court? –

(1) When requested by the accused;
(2) When the United States is represented by a Counsel; or
(3) When the Judge Advocate General has sent the case to the Court of Military Appeals”.

“(d) The accused has the right to be represented before the Court of Military Review, the Court of Military Appeals, or the Supreme Court by civilian counsel if provided by him”.

MARTIAL LAW PROVISIONS IN INDIA, UNITED KINGDOM AND UNITED STATES OF AMERICA

A. In India

(i) Meaning of the term

“Martial Law” means that the ordinary Government of the country is suspended and exceptional powers in consequence assumed by the military authority. The exceptional powers do not depend on any preliminary proclamation of “martial law” but abruptly emerge out of the exceptional circumstances of the environment. Military Courts are then set up, which turn out not to be courts at all; prohibition will not issue to control their proceedings and the ordinary law courts refuse to intervene. It is illusory to find in these tribunals administering justice under the supervision of a military commander, any analogy to the regular proceedings of ordinary

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9 Section 870(b) [Article 70(b)] has been amended to include ‘Supreme Court’.
courts of justice. Stephen, the Historian of English Criminal law, described these tribunals as merely, “Committees” formed for the purpose of carrying into execution the discretionary powers assumed by the government. In the corresponding circumstances of the Milligan’s case it was insisted that the invasion must be real; the courts must be closed and the civil administration deposed. Congress could not invest military commissioners with jurisdiction to try citizens for offences in a state not invaded and not in rebellion – a state in which the federal courts were open. In the South African war, the Privy Council in England held that the sitting of some civil courts for some purpose did not show that the war was raging. Crisis legislation – 80. Supreme Court has had the occasion to consider its scope and has pointed out that martial law is the exercise of the power which resides in the executive Branch of the government to preserve order and ensure public safety in times of emergency when the other branches of the government are unable to function, or their functioning would itself threaten the public safety. It is a law of necessity to be prescribed and administered by the executive power. Its objects, the preservation of the public safety and good order, defines its scope, which will vary with the circumstances and necessities of the case. The exercise of power may not extend beyond what is required by the exigency, which calls it forth.

‘Martial Law’ is no law at all. There, the commander of the forces, who declared law and commanded that it should be carried into action, was bound to lay down the rules, regulations and limits, according to which his command will be carried out. Civil laws in many countries do not recognise the exercise of force which is generally understood by the terms “Martial Law”. It does not derive authority from the people, nor it is a written law and there is no practice under martial law laid down anywhere.

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(ii) 'Martial Law' and the Indian Constitution

As regards suspension of fundamental rights during a proclaimed period of emergency, it may be worthwhile to remember the words of Alladi Krishnaswami Ayyar who, while defending Article 34 of the Constitution of India, moved by Dr BR Ambedkar, the Chairman of the drafting committee of the Constitution, declared, “A War cannot be fought on the principles of Magna Carta, and that in a situation threatened by war, in a country with a large population and some people with divided loyalties. Freedom of speech might be used for the purpose of endangering states and crippling the resources of the country.” He added, “if only we realise that the country must exist .............. if liberty and other things are to granted, there can be no possible objection to this Article.” The indemnity clause (Article 34) in the constitution supposes the possibility of martial law in any area within the territory of India and protect public servants or any other person in respect of any act done by him in connection with the maintenance or restoration of order in the affected area. Extraordinary situation might arise in any part of the country which could not be tackled by the ordinary law of the land and, therefore, indirect provision for martial law was found necessary.

Dr Ambedkar was of the view that when martial law was introduced – usually when there was a riot, insurrection or rebellion and threat to overthrow of authority – the officer in charge of martial law declared that and certain acts would be offences against his authority and prescribed his own procedure for the trial of person who offended against acts notified by him as offences. An act, so notified by the military commander, would not be an offence against a law in force because the commander was not the law-making authority; nor would the procedure laid down by him be
According to the law. If Article 34 was not included in the Constitution, the admission of military law would be impossible.14

According to Dr Durga Das Basu,15 Article 34 of the Constitution merely empowers parliament to make an Act of Indemnity to cover illegalities committed during the operation of martial law. It says nothing of the suspension of habeas corpus which would not ipso facto follow from a mere declaration of martial law.16 The only provision for suspension of habeas corpus is Article 359. But since Article 21 cannot be suspended by an order under Article 359 hence, even though Article 32 is suspended, a person who is detained without authority of law would be competent to move for habeas corpus.

(iii) Martial Law and Emergency

Sir David Dundas has said that “the study of martial law is not very common, certainly not with lawyers”. This, I believe, is true. In countries, where dictatorships or rather totalitarian or near totalitarian regiones exist and life is fully or partially regimented, martial law would, perhaps, be regarded with equanimity. In recent years, martial law has been imposed in certain countries. On Indian continent, martial law was declared first in Bangla Desh and therein Pakistan. It was also imposed in Iran. It is certainly not a law in the sense of the expression, “rule of law”.

Where a country is government by a written constitution, such as we have, with effective provisions for emergency, both internal and external, martial law must remain a stranger. Provisions relating emergency must necessarily be less stringent, for a threat to the rule of law is repugnant to our constitution. However, recent events in India have shown that emergency provisions can be abused and people can live in fear without any military rule. Preventive detention and other repressive measures embrace

14 Ibid, p 218.
many aspect of life. How for the emergency provisions can go and be upheld is amply borne out by the now widely known judgement of the Supreme Court in *A.D.M. Jabalpur V Shukla*.17

B. **In United Kingdom**

(i) **Introduction**

Martial law as the term is used by English lawyers, connotes not a code of rules, but a state of society in which absolute power is assumed by the military authorities, who are temporarily placed above the ordinary law and beyond the jurisdiction of the ordinary courts, for the purpose of suppressing an insurrection or resisting an invasion.18

“Marshall law” as martial law appears to have been originally spelt, was administered in the Court of Constable and the Marshall of England.19 It was recognised by Statute as early as the reign of Richard II, by about the end of the 14th Century. This court was a part of the Curia Regis, the Supreme Court established in England by William, the conqueror. The Constable or Comes Stabuli (the master of the Horse, as he is known at the present day) was the Commander in Chief of the King’s army and in that capacity exercised jurisdiction over all offences committed in the army, especially, it was on service overseas. The Court constituted by him exercised both civil and criminal jurisdiction.

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19 W. Holdsworth wrote: “In the middle ages, martial law meant the law administered by the court of the Constable and the Marshal. To that court, we must look for the origin both of the military and the martial law of today. “(Holdsworth, “Martial Law Historically considered”, 18, Law Quarterly Review 117).
The Court is sometimes mentioned in records by another name, the Curia Militaris, the Court of Chivalry. The proceedings of the court were “not according to the course of the common law”.\textsuperscript{20}

The court is seen to have exercised jurisdiction over three classes of persons:

(i) the soldiers of the Crown.  

(ii) all citizens in time of riot or rebellion.  

(iii) alien enemies.  

\textbf{(ii) Martial law Commissions}

With the disappearance of the Constable’s court, martial law in the sense in which it was then understood began to be administered by the Generals acting under the king’s commissions. The commissions were directed against two classes of offenders, namely mutineers in the army and rebels or enemy captured in war. They were usually issued to the Generals and lords – lieutenants and occasionally to municipal authorities.\textsuperscript{21} It was one of such commissions that Queen Elizabeth I granted in 1569 to the Earl of Sussex for suppressing the rebellion led by the Earls of Northumberland and Westmoreland. Sir George Bower, who was appointed provost marshal by Earl of Sussex executed within less than three weeks nearly 600 persons. In 1588, Queen issued a proclamation which declared that those who circulated traitorous libels or papal bulls against her were to be punished by martial law. In 1595, during the riots in London, she granted a commission to try and execute the rioters according to the justice of martial law.

The terms of one of the early commission will throw light upon the system they introduced. A commission issued to the mayor of Dover and others in 1624 authorised them

"to proceed according to the justice of martial law against such soldiers with any of our lists aforesaid, and other dissolute persons joining with them, or any of them, as during such time as any of our said troops or companies of soldiers shall remain or abide there, and not to be transported thence, shall within any of the places or precincts aforesaid, at any time after the publication of this our Commission, commit any robberies, felonies mutinies, or other , outrages or misdemeanours, which by the martial law should or ought to be punished with death, and such summary course and order as is agreeable to martial law, and as is used in armies in times of war, to proceed to the trial and condemnation of such delinquents and offenders, and there cause to be executed and put to death according to the law martial, for an example of terror to others, and to keep the rest in due awe and obedience."

What is meant by, “Justice of Martial law” cannot be gathered from the text of the commission. Clode thinks that the omission was perhaps intended to be supplied by the Articles of War issued by the Crown for the government of the Army, for the Articles issued by the King in 1625 contained reference to the methods by which martial law was to be administered. The offences mentioned in the Articles were partly civil and partly military, but they were all punishable by the commanding officer or the Marshal’s court. They gave authority to “any three or more of the commissioners to call a Marshal Court, and sit in commission to hear, judge and determine, any act done by soldiers; but to have no power to put to death till they have advertised the General that shall have authority of life and death for such troops as he shall command”.

The commissions were issued and executed not only in time of War, but of peace as well. They were aimed more at the speedy

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22 Quoted by James and Stephen in their opinion on the Jamaica Insurrection – Forsyth cases and opinions on Constitutional law. p. 554.
punishment of crimes committed either by soldiers or civilians associated with them than at maintaining discipline and order in the army. They authorised not merely the suppression of revolts by military force, but the subsequent punishments of offenders by marshal courts. They also authorised trial by martial law of persons who were guilty of ordinary crimes.

Contemporary legal opinions considered these opinions illegal. That, “Government may put down force by force, but when there is no rebellion, or when the rebellion is suppressed, it has no authority to direct the trial of prisoners, except in the ordinary courts and according to the known law of the land, was the prevalent opinion.

Cockburn referred to the first instance he could discover in which anything under the name and pretence of martial law, in the sense in which “we are talking of it – that is, not of law exercised upon persons in rebellion, taken in arms or in hot pursuit from the field and which if it can be called law at all, may more properly be called the law of arms or law of the sword than martial law – but the law exercised in the form of trial – is in the reign of Henry VII, and I think it very doubtful what the martial law was that historians speak of there”. In reference to Queen Elizabeth’s issuance of martial law commissions, the chief said that, “We cannot doubt that she was going altogether beyond the powers with which the Constitution of England had entrusted her. Coke has something similar to say about the legality of the commissions. He said, “if a Lieutenant or other that hath commission of martial authority in time of peace, hang or otherwise execute any man by colour of martial law, this is murder, for this is against Magna Carta, C. 29.”

24 Id. p. 19.
26 Ibid.
29 Coke, 3rd Institute, C. 7.
(iii) Petition of right

It was this general opinion against the issuance of commission of martial law to punish rebels after a rebellion had been suppressed that led to the Petition of Right. The immediate cause, however, for presenting the petition to the king was the decision in Daruel's case (1627) usually referred to as the Five Knights's case. Hyde C.J. accepted the contention of the Attorney General that the king was justiciaries regni that all justice was derived from him and that he had absolute power to commit anyone. The defendants were imprisoned for their refusal to pay contributions to a forced loan.

The Petition of Right protested against all kinds of taxes and such like charges without common consent by Act of Parliament, and sought to prohibit arbitrary imprisonment, the use of commissions of martial law, the law of the Constable and Marshall in time of peace and the billeting of soldiers upon private persons. These four grievances formed the foundation of the Petition of Right.30

(iv) Martial Law since 1628

After 1628, "martial law has never been attempted to be exercised in prerogative of the crown.31 But there have been a few instances when a qualified form of it appears to have been applied under Parliamentary authority.

During Cromwell’s rule, he divided England into eleven military districts and put each of them under a major general who was given responsibility to keep the entire population of the district under subjection.

31 RV Nelson and Branch, Special Report, at p.45.
These military officers showed scant respect for any form of civil rule. The repression which followed this system of government gave the nation a lasting distaste for rule by military authorities.

During the rebellion of 1715, the government issued a proclamation authority all civil and military officers to suppress the rebellion, if necessary, by force of arms. The habeas Corpus Act was suspended and authority was granted to seize the horses of suspected persons and to try the rebels in any district even when the offences were committed in another district.\(^{32}\)

After 1780, there has been no instance of application of martial law in England, but there were a number of such instances in the Colonies and possessions of the United Kingdom.

(v) Emergency Legislation during the World Wars

During World War I, the Defence of Realm Acts, 1914-15 were passed. The Defence of the Realm (Consolidation) Act, 1914, vested in his Majesty in Council power to make regulations during the continuance of the war, for securing the public safety and the defence of the Realm, and provided, among other things, that the offenders should be tried and punished by courts martial for breach of such regulations.

Sometimes before the outbreak of World War II, the Emergency Powers (Defence) Act, 1939, was passed. It empowered His Majesty in Council to make such Defence regulations, “as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order, and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services to the life of the community.”

Such enactments clearly indicate that the Parliament has empowered the executive to assume exceptional power during an invasion or rebellion or riot or in expectation of any of these. In Dicey’s interpretation of the concept of martial law, the term means the common law right of the crown and its servants to repel force by force and to take any such measures as may be necessary and expedient for restoring peace and order. It may be that what Parliament did was to give statutory form to the common law right.

It may be mentioned that Cockburn C.J., Holdsworth and other eminent jurists are of the view that martial law would be illegal, if there was no war or conditions of war existing within the realm.

(vi) **Martial Law in cases of apprehended danger**

The Tudor and Stuart kings, in their attempt to establish absolute monarchy, did not accept the proposition that martial law could be declared only during time of war. They did not consider themselves bound by the legal definition of “a time of war”. They assumed that they could subject ordinary citizens to the jurisdiction of the Marshall or his deputies whenever in their opinion such measure was necessary for preservation of order. They may be said to have extended this jurisdiction in two ways (i) They extended to persons, not members of the army. (ii) They made it during a time of war means a time of apprehended danger.

One of the interesting questions raised about martial law, therefore, was whether it could be employed in case of apprehended danger. In *Rex Vs Hampden*, commonly referred to as the case of Slip Money, the assumption that martial law may be employed in cases of apprehended danger received judicial support.

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35 (1637) 3, State Trials 825.
In this case, the majority of the judges including Finch, C.J. accepted the contention on behalf of Crown that though the king could in peace time tax only with the consent of Parliament, it was different in a situation of emergency and that he could take away property not only when war actually raging, but also on mere apprehension of war. Finch, C.J., said:

"Expectancy of danger, I hold, is a sufficient ground for the king to charge his subjects, for if we stay till the danger comes, it will be then too late. And his averment of the danger is not traversable, it must be binding when he perceives and says there is danger."\textsuperscript{36}

Crooke, J, however, expressed the view that royal power was to be used in cases of necessity and imminent danger, when ordinary courses will not avail \ldots\ldots\ldots\ as in cases of rebellion, sudden invasion, and in some other case, where martial law may be used, and may not stay for legal proceedings.\textsuperscript{37}

Though 'prevention is better than cure' may be regarded as a sound principle, juristic opinions in later years, tended to support Crooke, J's views rather than those of the Chief Justice. As Holdsworth puts it, "It is only the actual presence of pressing danger which gives to the crown and to the subject alike the right to do what is necessary to ward off danger."\textsuperscript{38}

Sir James Stephen who endorsed Sir David's view on the subject as substantially correct wrote in his celebrated, "History of the Criminal Law in England":

\textsuperscript{36} Id. p.1237.  
\textsuperscript{37} Id. P.1162  
\textsuperscript{38} W Holdsworth, supra note 48, at p.125.
1. Martial Law is the assumption of officers of the crown of absolute power, exercised by military force, for the suppression of an insurrection and the restoration of order and lawful authority.

2. The officers of the Crown are justified in any exertion of physical force, extending to the life and property to any extent, and, in any manner that may be required for the purpose. They are not justified in the use of cruel and excessive means, but are reliable civilly and criminally for such excess. They are not justified in inflicting punishments after resistance is suppressed, and after the ordinary courts of justice can be reopened.

(vii) Martial Law in India under the British rule

During the British rule in India, there had been many occasions when martial law was declared in various part of the country at different times. According to Encyclopaedia Americana, it was the problem of British rule in Ireland and India that brought a change in the English opinion held during the 17th century that martial law came into existence only on the outbreak of war or rebellion and even then it applied only to members of the armed force. As early as 29 October, 1817, Governor General, the Marquis Hastings issued a proclamation of martial law. In the year 1835-36, a serious insurrection occurred in the Doomsur district (Madras). On that occasion, Government of Madras by a proclamation delegated extra-ordinary powers to a special commissioner. Under his order, rebels were tried summarily by a court composed by military officers, sentenced to death and were forthwith executed by the order of the special commissioner. The objects of martial law, and the trials of offenders under it were stated in Bengal Regulation X of 1804, the Madras Regulation XX of 1802 and Bombay Regulations XIV of 1827, to be immediate punishment for the safety of British possessions and for the security of lives and property of the inhabitants thereof. In a letter dated 27 April 1818, addressed to W.B. Bayley, Secretary to Government Judicial Department, Bengal Presidency,
Advocate General R Spankie wrote about martial law in India as thus, “It is, in fact, the law of social defence superseding under the pressure, and, therefore, under the justification of an extreme necessity, the ordinary forms of justice, courts martial, under martial law, or during the suspension of law, are invested with the power of administering that prompt and speedy justice, in cases presumed to be clearly and indisputably of the species of guilt. Massacre in Jallianwala Bagh, Amritsar and proclamation of martial law in the Punjab in 1919 are an example of that martial law, which Spankie called, “the law of social defence”. The event turned even Mahatma Gandhi into a rebel who announced: “Our duty clearly is to invite martial law and evolve the courage to draw the rifle fire not in our backs but in our open and willing breasts.39

C. In United States of America

(i) Introduction

“Martial Law” as is understood means that ordinary government of the country is suspended and exceptional powers are in consequence assumed. In Milligan’s case, it was insisted that invasion to governmental functioning must be real; the court must be closed and the civil administration deposed. Congress could not invest military commissioners with jurisdiction to try citizens for offence in a state not invaded and not in rebellion – a state in which the federal courts were open. Supreme Court of U.S.A. has had the occasion to consider its scope and has pointed out that martial law is the exercise of the power which resides in the executive branch of the government to preserve order and ensure the public safety in times of emergency when other branches of the government are unable to function, or their functioning would itself threaten the public safety. Luther V Borden, 7 How. 1, 45. It is a law of “necessity” to be prescribed and administered by the executive power. Its object, the preservation of the public safety and good order, defines its scope, which will vary with the

circumstances and necessities of the case. The exercise of the power may not extend beyond what is required by the exigency, which calls it forth. Mitchell Vs Harmony, 13 How. 115, 133; United States Vs Russel, 13 Wall. 623, 628; Raymond Vs Thomas, 91 U.S. 712 (716).

(ii) Proclamation of Martial Law

In cases of “necessity”, the President or his subordinates at the scene of action, may proclaim martial law, of which two grades are today recognised - preventive and punitive. The latter, which is equivalent to military government, is not by the Milligan case, allowable when the civil courts are open and properly functioning, nor in the presence of merely ‘threatened invasion’. The “necessity” must be actual and present; the invasion real. And it was by applying the test literally that a divided court held in 1946 that the President had no constitutional power to institute military government in the territory of Hawaii following the Japanese assault on Pearl Harbour, or to continue it after that date. 237 U.S. 304 (1946).

(iii) Suspension of Civil Authority

When there is no actual war raging in a particular place, citizens who are not members of the armed forces cannot be tried by military courts. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; invasion real such as effectually closes the courts and deposes the civil administration. There are occasions when martial law can be properly applied. If in foreign invasion or civil war the courts are actually closed and it is impossible to administer criminal justice according to law then on the theatre of actual military operations where war really prevails there is a necessity to furnish a substitute for the civil authority, thus overturned, to preserve the safety of the army and society, and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits the duration of such rule; for if this government is continued after the courts are
reinstated, it is a gross usurpation of the power. Martial law can never exist where the courts are open and in the proper and authorised unobstructed exercise of the jurisdiction. It is also confined to the locality of the actual war. Because during the late Rebellion, it could have been enforced and the courts driven out, it does not follow that it should obtain in India, where that authority was never disputed and justice was always administered. And martial law may become a necessity in one state, when in another, it would be 'mere lawless violence'. When there is no actual war raging in a particular state, citizens who are not members of the armed forces cannot be tried by military courts. The fact that for some tribunals have been permitted to pursue their ordinary course in a district in which martial law has been proclaimed is not conclusive that war is not raging in that district. Ex parte D.F. Marais (1902) 1902 App. Cas. 109.

(iv) Military Tribunals

A military tribunal is a tribunal set up by the military authorities for the trial of civilians, when martial law is proclaimed in an area and when it is not physically possible for ordinary courts to function on account of the conditions of War. Military tribunals so set up are not judicial bodies. They have an advisory role to advise the military commander who is administering the martial law. So long as the emergency exists or war or rebellion is going on, ordinary courts have no jurisdiction to interfere with the finding of the military tribunals in restoring order, or to entertain any civil proceedings against military authorities for torts committed by them – wrongful acts against person or property. The question whether there was a state of war is a question of fact to be determined by the civil courts. If they come to the conclusion that there was no state of war or rebellion, the setting up of military tribunals is absolutely void. In such a case, a writ of habeas would be, even after the restoration of peace, unless, in the

40 (1946) 327 U.S. 304.
41 Clifford V. Dullivan (1931) 2 A.C. 262.
42 Higgins V Wills (1951) 2 Ir. R. 386.
meanwhile, an Act of indemnity has been passed.\textsuperscript{43} But when war is going on, the courts have no power to review the decisions of the military tribunals.\textsuperscript{44} But it has been held that "constant exposure of danger of invasion" would not justify the setting up of military tribunal in substitution of ordinary courts.\textsuperscript{45}

Military tribunals are not courts with jurisdiction in law or equity.\textsuperscript{46} They can be established in conquered territory.\textsuperscript{47} Their proceedings cannot be attacked in the federal courts. Military courts are not part of the judicial branch of the government, being instrumentalities of the executive for disciplinary purposes,\textsuperscript{48} yet when double jeopardy was pleaded before a civil court by a man tried by court-martial for the same offence, it was sustained.\textsuperscript{49}

When martial law is proclaimed and Congress sets up military tribunal for the trial of civilians for non-military offences in such area or when the President as the commander-in-chief of Armed Forces establishes military commissions and tribunals for the trials of civilians in occupied territories, where civilian government cannot function\textsuperscript{50} or when congress appoints military commissions for trial of offences against the laws of war,\textsuperscript{51} a writ of habeas corpus will lie against the orders of the above-mentioned tribunals.

(v) \textbf{Act of Indemnity}

In \textit{Phillips Vs Eyre} (1809) 4 Q.B. 225, it was held that, "There can be no doubt that every so-called indemnity Act involves a manifest violation of justice, in as much as it deprives those who have suffered wrongs of their

\textsuperscript{43} Tiltono V. A.G. (1907) A.C. 93.
\textsuperscript{44} (1864) 1 Wall 243.
\textsuperscript{45} Ducan V. Kohanomoku (1946) 327 U.S. 304.
\textsuperscript{46} 45 L ed. 118.
\textsuperscript{47} 22 L ed. 871.
\textsuperscript{48} Dynes V. Hoover 20 Howard 65 (1857).
\textsuperscript{49} Ex parte Reed, 100 U.S. 13 (1879)).
\textsuperscript{50} Madesen V Kinsella (1952) 343 U.S. 341; Reed V Covert (1957) 354.
\textsuperscript{51} Yamihta V. Styer 327 U.S. 2.
vested right to the redress which the laws would otherwise afford them, and give immunity to those who have inflicted those wrongs not at the expense of the community for whose alleged advantage the wrongful acts were done, but at the expense of individuals who are innocent possibly of all offences, have been subjected to injury and outrage often of the most aggravated character. It was equally untrue as was forcibly urged on us, such legislation may be sued cover the acts of the most tyrannical, arbitrary and merciless character, acts not capable of being justified or palliated even by the plea of necessity, but prompted by local passion, prejudices or fear – acts not done with the temper and judgement which those in authority are bound to bring to the exercise of so fearful a power but characterised by reckless indifference to human suffering and an utter disregard of the dictates of the common humility. Other hand, it must not be forgotten that against any abuse of local legislative authority in such a case, protection is provided by the necessity of the assent of the sovereign acting under the advice of the ministers themselves, responsible to Parliament. We may rest assured that no such enactment would receive the Royal assent unless it were confined to acts honestly done in suppression of existing rebellion, and under the pressure of the most urgent necessity. In Wright Vs Fitzgerald, (1799) 27, State Tr 759, it was held that martial law must not be forced wantonly and without due regard to the humanity. In Mayor Vs Peadbody (1909) 58 Law Ed. 410, the Governor of a State was empowered under the law to call upon the military arm of the State Government to suppress an insurrection and he in good faith, ordered the arrest of a certain person, although without sufficient reason for doing so, the act of the Governor was held justified. Such arrests are not necessarily for punishments by are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action, after he is out of office, on the ground that he had not reasonable ground for his belief.52

52 See DR Prem, “Commentary on Military Law” and “Law of Indian and American Constitution” Chapters 155, 162 and 163 at pp. 403, 409 to 411.
D. POSITION OF ARMED FORCES PERSONNEL IN SOME OTHER COUNTRIES

(i) Russia

(aa) Introduction

Military law in an effective means of Army Development. It comprises a body of enacted Rules establishing principles for the development of the armed forces, regulating matters of Military Administration and everyday life and defining the system of recruiting and service and the rights, obligations and responsibilities of servicemen in Russia.

Military law is one of the important instruments for the Soviet State to strengthen the Russian Armed Forces. With the army and navy now being equipped with complex weaponry and their effective use being dependent on the coordinated and precise interaction of many persons, the part played by military law has become increasingly more important.

The fundamental source of the military law, as mentioned above, is the constitution of erstwhile Union of Soviet Socialist Republics (U.S.S.R.) which contains rules relating directly to the regulation of relationships in the area of army development. In particular, Chapter 5, “Defence of the Socialist Motherland”, which states the defence of Socialist Motherland is one of the most important functions of the state and is the concern of the whole nation. The duties of the armed forces personnel to the people is to provide reliable defence of the Socialist Motherland and to be in constant combat readiness guaranteeing that any aggressor is instantly repulsed.

All Russian servicemen are governed by the rules of the Military and naval regulations and manuals, instructions and commands and directions of the Russia Defence Minister and other military commanders.
Rights and obligation of servicemen under the laws

The Communist Party and the Soviet State consider it one of their major duties to provide broader and more secure rights and freedoms to their citizens. As we know, under socialism, there can be no rights without obligations. This principle applies equally both servicemen as well as their citizens. Article 68 of the law on Universal Military Service states: “All servicemen and all reservists mustered for periodic training are eligible for all socio-economic, political and private rights and freedoms and all citizenship obligations prescribed by their Constitution. The legal status of servicemen is essentially determined by the entire complex of rights and obligations of Russian people, as applied to specific service conditions.

These rights and obligations can be divided mainly into three categories, as given hereunder:-

(a) First, the basic constitutional rights and obligations determining the status of servicemen as a Russian citizen. These socio-economic, political and private rights and freedoms cannot be changed, abolished or restricted by any other legal Act.

(b) The second category rights and obligations, which specifically apply to army and naval personnel. For instance; under the laws on administrative offences, no serviceman can be fined a penalty for such offences.

(c) The third category includes rights and obligations arising from military service conditions. These rights and obligations are enforced under the law on Universal Military Service, army regulations and Acts by the military administration.
In brief, if may be said that the military law in Russia entails no restriction on serviceman’s civil rights. In other countries, military law is different in both essence and purpose. In the United States and India, only special laws enacted by their legislative bodies (Congress and Parliament respectively) for their armed forces are binding on persons subject to the Service Acts. Their military laws is a body of rules separate from the federal law, which means not only a restriction of rights, but also the separation of the military from the people as a whole. The American Constitution empowers the Congress to use the National Guard as part of the U.S. army for law enforcement and for suppression of civil disturbances. The same position is true in India as well. As per their allegiance, the military personnel in U.S.A. and India are obliged to defend their Constitutions against all enemies, both external and internal. It may be during war or otherwise.

Military law in Russia is intended to strengthen democratic tendencies in the life of society and the armed forces and to improve the legal status of armed forces personnel. In the recent years, many Acts regulating service in the ranks of the armed forces relating to their rights, obligations, responsibilities and privileges have gone up.  

(ac) Military Law and Martial Law

It has been recognised that the military may lawfully exercise its authority in three situations. First, military law proper exercised over armed forces personnel both in times of War and peace. Second, military government is usually exercised in occupied areas overseas where the belligerents had rebelled and no civilian government remained. Third, martial law is exercised at home in emergencies, where ordinary law no longer secures public safety and private rights of the individuals. Soviet military law has effect upon soviet occupied lands, the prisoners of war.


54 Ex parte Milligan, 71 U.S. (4 Wall.) 2, 142 (1866).
taken by the Soviet forces and, in certain cases, upon alien and civilians with the Soviet land.\textsuperscript{55}

The purpose of military law is to promote national security by helping to maintain an effective armed force.\textsuperscript{56} Not only must the military instil strict order and obedience into its fighting men, but it must do so by some system of impartial justice, so that men have full sense of loyalty to their system. Since such purposes are similar to both the Soviet and the United States armed forces, it is not surprising that military law is quite similar under the two systems. It is, perhaps, in this field of military law that the Soviet and American systems of law have the greatest similarity.

Soviet substantive military law proper has been a part of the general criminal law,\textsuperscript{57} with all articles of the general criminal code applicable in principle. Under Article 193, however, thirty-three military crimes were specifically prescribed. Twenty-five of these pertained to military order, such as disobedience or absence without authority.\textsuperscript{58}

The scope of Soviet military jurisdiction is quite broad. All servicemen, of course, live under the military law,\textsuperscript{59} as well as all reservists.\textsuperscript{60} There can be no doubt that the Soviet system would extend military law into the traditional fields of occupied territories areas of emergency and prisoners of War. But the jurisdiction of Soviet military law goes much further. Civilians living in unsettled areas, lacking courts are subject to military law. Any civilian those work is involved with the armed forces becomes subject to military law.\textsuperscript{61} In United States, however, the

\textsuperscript{55} See The Trial of the U2 (1960).
\textsuperscript{56} Campbell: An Introduction to Military Law (1946).
\textsuperscript{57} R. S. F. S. R. Code of Criminal Procedure, art 28.
\textsuperscript{58} Milit. Crimes, arts 1-13, 19-29.
\textsuperscript{59} Milit. Crimes, art 1.
\textsuperscript{60} Ibid.
\textsuperscript{61} Milit. Crimes, art 1.
Supreme Court decisions have struck down similar provisions in the Uniform Code.62

The Soviet military law makes no distinctions of rank, high and low alike, shares its weight and fear its impact. Indeed, the more senior the officer, more apprehensive he may be, for in many instances, even a minor infraction may mean the end of a career, regardless of prior distinctions and merits.63

(ii) **SWEDEN**

Gustavus Adolphus' fame, as brought out, as perhaps the greatest leader in the revolutionary development of warfare in the seventeenth century64 overshadows his more permanent contribution to the developments of modern armies, that of a disciplinary Code, which gives meaning to command and control. His Articles of War of 1621 inaugurated the history of modern military justice.65 They, in effect, formalized recognition of the "four moral virtues necessary to any army: order, discipline, obedience and justice".66 His Articles of War are a foundation upon which is structured the military justice in Sweden today.

His Articles of War of 1621 are considered as "a recognizable ancestor of the British Articles of War and the American Uniform Code of Military Justice."67 They provided regular procedures for maintenance of discipline. Offences were set out in detail and punishments were specified. They are cited as providing the rudiments of what would become a regular judicial process for the ascertainment of guilt and the assessment of punishment through tribunals, denominated as Courts or Councils of War or Courts

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62 Reid V. Covert, 351 U.S. 487 (1956).
67 See J Bishop, supra note 95, at p. 4.
The Romans had specific laws to govern their legions, the feudal system provided for military jurisdiction in the form of a Court of Chivalry and various European Sovereigns had written codes with forms of Courts martial.

(iii) **FRANCE**

(aa) **Armed forces personnel and the military justice in France**

The administration of military justice in France approaches, to a great extent, French civil criminal procedure. To an American observer, French criminal trials lack two of cornerstones of common-law system – first, the trial by jury and second, adversary concept. Basic to the civil law procedure is proposition that a competent, well-trained, impartial judge should decide both on law and facts. Rules of evidence, unless they have become part of the substantive law, should be suppressed. A competent judge knows what is relevant and the practicing lawyers realize this. Less technicality and more realism is the goal in French military judicial system.

(ab) **The New French Code**

The 474 articles now governing military justice for all French armed services replace 274 articles previously relating to the French Army, 276 articles heretofore applicable so the Navy, and the special legislation enacted in 1934 pertaining to their air force. The prior code was long, complex, confusing and not set forth in a logical order. It is reasonable to assume that the administration of military justice in France would not escape the extensive judicial reforms vigorously instituted by the De Gaulle regime since its accession in power in 1958.\(^69\)

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\(^{68}\) Ibid, p. 5.

The hostilities in Algeria led to increased jurisdiction on the part of French military courts. A great number of cases arose, many of which caused considerable public awareness of the antiquated, slow and overly complex hierarchy of military justice.

The reforms were undertaken by the Minister of the Armies in close liaison with the Minister of Justice and the most eminent members of the Military Justice Corps. Under these conditions and with the firm support of the chairmen of both French legislative assemblies, the deputies and senators adopted the proposed new legislation almost without discussion. The new Code has four chapters governing organisation and jurisdiction, military penal procedures, offences and punishments and the last chapter dealing with provost tribunals.

(ac) Significant aspects of the new French Military Code.

In order to effect the purposes of the new legislation, the emphasis was placed on incorporating to the maximum extent existing civil criminal procedures, interjecting more civilian judges into the stream of military jurisprudence and streamlining judicial bodies.

--- Legal Professionalism Strengthened.

In 1956, a law establishing a Corps of military magistrates was enacted fusing together the trained judges of both the Army and Naval services. These civilian jurists, familiar with the procedures under military law, form the basis of the operation of military justice at both the pre trial and trial stages. Both the government prosecutor and the military examining magistrate are members of the military judicial Corps. The powerful positions of President of permanent judicial district courts and principal assistant judge are now held by these magistrates. Even in time of war, a civilian judge remains as President of a military tribunal in

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70 Colas, Le Nouveau Code de Militaire, Revue De Science Criminelle et de droit penale compare 909 (1965).
contrast with the prior practice of replacing the military magistrate with a senior military officer.

The new and exceedingly important Chambre de Controle de l’Instruction is also dominated by magistrates of the military judicial Corps. In peacetime, the President of the Chamber and his principal assistant, both military magistrates, form two-thirds of this three member body. During wartime, the assistant is replaced by a military judge and the President may be a military magistrate of the mobilized Military Judicial Corps. The military magistrates are all appointed each year by the Minister of Justice and are absolutely independent of any control or influence by the military Commander whom they serve.

It has been provided therein that all the personnel under the jurisdiction of military courts would be afforded most of guarantees of la garde a vue as set forth in the Code of Penal Procedure. The term la garde a vue refers to detention of a suspect by judicial police and is not technically an arrest. A person found at the scene of a crime who is unable to satisfy the police of his identify or who may be able to furnish information about the Crime may be detained for the purpose of watching him or obtaining more information. A person so detained must be released after 24 hours unless the procureur, or, in a case involving military jurisdiction, the commissaire due gouvernement, authorises an extension for another 24 hour period.

The enactment of the new French Code of Military Justice represents far more than a codification of prior legislation governing the three French military services. The material changes in the New Code have been designed

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71 CJM art. 50.
72 CJM art. 52.
73 DOLL 29.
to expedite military justice proceedings and align military justice procedures more closely to those found in the Civilian Courts.

(iv) **CANADA**

(aa) **Introduction**

Law as a process reflects the pressures of a changing society. Implicit in the process is the continuing appraisal of different interests, an appraisal which makes possible both the formulation of appropriate standards and their practical application. The great test of the legal process is its ability to accommodate competing interests for the good of society. Democracies like tyrannies, maintain armies; and military efficiency depends on the maintenance of discipline. Unlike tyrannies, however, democracies are also interested in seeing that soldiers retain the fundamental rights of citizens.\(^75\)

Realistic legal responses involve a continuing and careful weighing of the competing interests in the light of changing circumstances. Though, the circumstances may, at times, require one interest to be emphasised at the expense of the other, altered conditions demand that old questions be asked anew. Necessity often dictates the abrogation of certain of soldier’s fundamental rights as citizen: Only a continuing appraisal of changing circumstances can ensure the restoration of these rights when the conditions responsible for their abrogation no longer exists.

(ab) **Jurisdiction of Civil Courts: Double Jeopardy.**

It has been observed in the Canadian law relating to the defence forces that one who joins the Canadian armed forces does not cease to be a citizen and that in general, the law which applies to all citizens applied to

\(^75\) Burdett V. Abbot,(1812), 4 Taunt. 401, 128 E, R. 384 (Ex,Ch.) at P.403, per Mansfield C.J.: "It is, therefore, highly important that the mistake should be corrected which supposes that an Englishman, by taking upon him, the additional character of a soldier, puts off any of the rights and duties of an Englishman");
members of the armed forces. Yet, in many cases, a soldier who has been tried on merits and convicted or acquitted by a competent service tribunal can be tried for the same offence by a civil courts.\textsuperscript{76} The code of service discipline provides for two classes of offences. The first class comprises of those acts and omissions which are peculiar to the forces.\textsuperscript{77}

These offences have no exact counterparts in the civil law and, therefore, do not give rise to the risk of double jeopardy. The second class of offences comprises those offences punishable under the criminal code or any other Act of the Parliament of Canada.\textsuperscript{78} Clearly persons convicted or acquitted of offences in this class are liable to subsequent prosecution for the same offence in the civil courts.\textsuperscript{79} This class also includes acts and omissions that are minor offences under the civil law but serious offences under military law. For instance, for one man to strike another blow causing no bodily harm is in civil law, a common assault; but for a soldier to strike his superior or an officer to strike a soldier, under the military law, a serious offence, involving a heavy punishment. Since these minor changes are recognised by the civil law, albeit with lesser punishments, the risk of double jeopardy is present.

The attitude of service authorities towards this unfair situation is inconsistent. While defending it as necessary, they have attempted to meliorate the harsh consequences flowing from it. For instance, the National Defence Act requests the civil court to take the military conviction into consideration in mitigation of sentence.\textsuperscript{80} But the possibility of double punishment for the same offence remains.\textsuperscript{81} The concern of service authorities for soldiers placed in this unfair legal position is also reflected in

\textsuperscript{76} National Defence Act, S.62(1): “Nothing in the Code of Service discipline affects the jurisdiction of any civil court to try a person for any offence triable by that court”. To date, these have been no cases where the civil cases have tried servicemen with whom service authorities have purported to deal.

\textsuperscript{77} For instance, desertion, the first class, includes offences charged under S.119(1) the omnibus provision prohibiting “Conduct prejudicial to good order and discipline”.

\textsuperscript{78} Ibid. S. 199.

\textsuperscript{79} See Special Committee on Bill No 133. op.cit. footnote 22. p.125.

\textsuperscript{80} S. 62(2).

\textsuperscript{81} See Special Committee Bill No 133, op. cit., footnote 22, pp. 127-128.
Section 62(3) of the National Defence Act, which provides that on a civil conviction or acquittal, the unexpired portion, if any, or the service punishment shall be remitted and the offender affected only by the civil sentence. Unfortunately, this provision would be of little help to a man who had undergone a considerable portion of the punishment awarded by a service tribunal at the time when he was prosecuted and convicted of the same offence by a civil court.

It is very long established principle of the common law that a person charged with a criminal offence may plead autrefois acquit or autrefois convict if he has previously been acquitted or convicted of the same offence by a court of competent jurisdiction.82 The National Defence Act provides for these special plea before a service tribunal where a person has been previously been convicted or acquitted of the same offence by a service tribunal or a civil court.83 Yet, they are not available to members of the Canadian forces who have been tried and convicted or acquitted by a service tribunal when they are tried in a civil court for the same offence.

Section 133(2) of the Army Act 1955 makes it clear that a civil court need do no more than take into account a previous conviction by a service tribunal in mitigation of the punishment which it awards on conviction of the same offence. This portion has been supported on the ground that it is vital to maintain the control of the civil authorities who may be prevented from trying a person who has been tried by a service tribunal on the same offence. Members of the armed forces could be withdrawn entirely from the jurisdiction of the civil courts by having any criminal offences committed by them dealt with quickly by service tribunal.84 Today, however, the civil courts have exclusive jurisdiction over persons charged with murder, rape or

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82 S. 516 (1) of criminal code: "An accused may plead the special pleas of (a) autrefois acquit, (b) autrefois convict". However, S. 4 provides, "Nothing in Act affects any law relating to the government of the Canadian forces".
83 S. 57 (1).
84 See: Special Committee on Bill No. 133, op cit. footnote 22, pp.127-128.
manslaughter when the offence is committed in Canada. There is no possibility of removing a soldier who commits one of these offences from the jurisdiction of the civil authorities by means of a hasty court-martial and acquittal. Since the National Defence Act leaves with the civil authorities control over main means of possible intimidation of civilians by the armed force, the agreement for continuing the liability of service offenders to a second trial fails.

It is observed that the provisions ibid normally correspond to a law prevailing in a common law country except certain aberrations such as no protection being made available against double jeopardy, which are serious issues to be considered by their legislative assembly.

(v) **AUSTRALIA**

**Introduction**

Courts martial, in Australia, are an anomaly from a judicial point of view. They developed under “leveller” influences in the Crown-wellian army. They usually consist, of five officers one of whom acts as President. There is also a Judge Advocate and a prosecuting officer and an accused may be represented by a friend or qualified counsel of his own choice. The procedure followed is contained in the respective Manuals of Military Law and Air Force for the Army and Air Force and in B.R. II in the Navy. These are the bibles’ of the military and naval officers. The relevant Australian statutes are the Defence Act 1903-1956 (Cth), the Air Force Act 1923-1956 (Cth) and the Naval Defence Act 1910-1952 (Cth). Regulations made thereunder also apply. Laws, statute and otherwise of the United Kingdom are often made applicable by these statutes to the Australian servicemen. This has the result that repealed English laws are often applied to

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85 Section 516(1) of the criminal code provides, “An accused may plead the special pleas of (a) autrefois acquit, (b) autrefois convict”. However, S.4 provides, “Nothing in this section affects any law relating to the government of the Canadian forces.”

Australian servicemen but not applied to English servicemen on servicemen in Australia. In Manuals, there are the statements of the law to be applied but no authority is given and there is uncertainty whether they are the laws or merely expressions of some unknown author's opinion on the law. Both the substantive and adjective laws are peculiar to the service in which the accused serves. There is no uniform Code for the three services. Some service offences are common to the ordinary criminal law to which a serviceman is also subject. In a court-martial, a plea of autrefois acquit or autrefois convict in an ordinary criminal court will be a defence, but an acquittal or conviction by a court-martial may not be pleaded as a defence in an ordinary criminal court. Theoretically then, a serviceman can be tried twice for the same offence although visiting forces servicemen under visiting forces legislation can only be tried once, and if a serviceman successfully appeals against a court-martial conviction, he cannot be convicted again by any other court.

The relevance of a non-compliance with the judges Rules, if it arose in a court-martial, is still uncertain. In an increasing number of matters, Australian law and particularly Australian Criminal law, is moving away from English Criminal law, yet, there seems little doubt, for example, that when an Australian serviceman is charged with an offence under "the general (devil's) article," i.e., conduct to the prejudice of good order and military discipline, he will be judged by English and not by Australian law. Many of these uncertain aspects of Australian military law will only be completely remedied by the enactment of a uniform code of military law. In the meantime, the Tribunal deals with the problems that arise before it but is unable to introduce any major reforms. It does its best to determine the applicable law and insists that the minimum standards at courts-martial be no lower than those which courts of criminal appeal demand in trials at Quarter Sessions.

As the Tribunal's judgements expose the uncertainties and anomalies, we can expect legislation to introduce reform. Service life is changing and
old concepts which seemed basic are also changing. It is in keeping with these changes that the Tribunal should “civilianise” the procedures at courts-martial. It must not be forgotten that the 1955 Act did not itself change any service law. It merely engrafted the system of appeals to the Tribunal on to the existing service system of confirmation, review and petition. The presentation of an unsuccessful petition was made a prerequisite to an application for leave to appeal.\textsuperscript{90}

**Conclusion**

Thus, we observe that there are no formal guarantees of liberty in England so far as members of the Armed Forces are concerned unlike the U.S.A. and India, where fundamental rights have been enumerated for the citizens of these countries. The earlier position of courts in America was that they felt that they had no supervisory jurisdiction over the courts martial. Only place, where they felt they could intervene was 'jurisdiction' of the court-martial. The District Courts could review certain cases de novo where they found the constitutional guarantee of ‘due process’ was denied to a soldier. The latest position in the U.S.A. is that the protections in the Bill of Rights, except those which are expressly forbidden, being inapplicable, are available to the members of the armed forces. In our context, it is abundantly clear that the Parliament had intended to extend the scope of fundamental rights, as far as possible, to men in uniform as seen from the observations of Shri VK Krishna Menon in Rajya Sabha, wherein he had echoed the view that we should retain fundamental rights to the armed forces personnel to the extent that they do not interfere with the performance of their duties. Though, there are some bottlenecks because of which some applicable guarantees provided by our Constitution are still not being cherished by the persons in uniform viz denial of effective assistance through counsel at a Summary Court Martial etc, yet it appears that we are moving in the right direction in realising availability of fundamental rights to the armed forces personnel, though at a slow pace.