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Historical Sketch of Military Law

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AN HISTORICAL SKETCH OF MILITARY LAW[1]

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In my annual report, I have urged the appointment of a committee to secure a series of papers on important topics appropriate to consideration and discussion by this society. I furthermore pointed out the advantage of choosing these topics systematically with the object of covering in the proceedings the broad subject of military law, before branching off to an investigation and discussion of the more intricate questions involving constitutional law and relations with the judiciary:—questions which offer a broad field for our activities in the future. With this in mind I endeavored in my report to set forth, subject to comment of our members, the different meanings sometimes applied to the term Military Law. By the same token, it seems pertinent to review in a very brief sketch the history of military law.

We have seen that military law must be distinguished from martial law; that it is the code governing the discipline of a military body in the service of the State; that it is the law administered by the military power upon those in military service; that military courts form no part of the judiciary and, except as to jurisdiction, that their procedure is not subject to review by civil courts; and finally, that they are courts for trial and punishment of violations of laws enacted by Congress for the government of its military forces—courts created in the Executive Branch of our Government by authority of that clause of the Constitution which authorizes Congress to make rules for the Government of the land and naval forces.

It is by virtue of this clause that Articles of War and the Articles for the Government of the Navy were enacted, and these "Articles" designate their own offenses, provide their own courts of adjudication, and prescribe their own punishments.

What is the history of this separation of the military from the civil? Despite their wisdom, how did the draftsmen of our Constition arrive at this feature so essential to military efficiency?

The answer is naturally, "From the English upon whom all of our early instructions were based." True, but how did it arise with the British? The early history of military law to those not already familiar with it is interesting, and, in that it gives an idea of the fundamentals upon which military law is based, is highly instructive.

[1]Read at the annual meeting of the American Society of Military Law, Chicago, August 30, 1916.

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It must be borne in mind that this sketch treats of military law in its strict meaning, and it must not be confused with martial law, Military Government, or the general laws relating to land or naval forces.

EARLY HISTORY.

In early times Great Britain was divided under the feudal system into many fiefs, each of which furnished forces to the crown, when required. Troops were thus raised for a particular service and were disbanded upon the cessation of hostilities. There was no permanent military force, or standing army; military forces existed only in time of war, and these men were retainers of the Crown rather than servants of the State.

The Crown, therefore, of its mere prerogative, made rules and regulations for the government and discipline of its troops while thus embodied and serving. These rules were known as Articles of War.

In the reign of Henry VI the offense of desertion was made a felony by statute. With this single exception, the Articles of War, issued as above described upon the mere prerogative of the Crown, remained practically the sole authority for the enforcement of discipline up to 1689, when the first Mutiny Act was passed by Parliament. This Act was necessitated by a mutiny (the details of which are unnecessary here) with which the Crown by its mere prerogative was unable to cope. Hence this Act defined and prescribed mutiny, treason and the like, and conferred authority upon the Crown to govern the Army under prescribed rules.

The military forces of the Crown then for the first time were brought under the direct and immediate control of the State. Even in time of Cromwell and Charles I, the then existing parliamentary forces were governed not by act of legislation, but by Articles of War similar to those issued by the King; these articles were authorized by an ordinance of the Lords and Commons which were in that respect exercising the prerogatives hitherto exercised by the Crown.

The power of law-making by prerogative of the Crown was held to be applicable during a state of war only, and attempts to exercise it in time of peace were ineffectual. Subject to this limitation it existed for considerably more than a century after the first mutiny act.

FIRST MUTINY ACT TO 1803.

During this period the Mutiny Act was during certain years suffered to expire, but a statutory power was given the Crown to make Articles of War operative in the Colonies and elsewhere beyond the seas at all times in the same manner as those heretofore made by

prerogative had operated in time of war. This continued up to the passage of the Mutiny Act in 1803, which effected a great constitutional change.

FROM 1803 TO 1879.

With the Mutiny Act of 1803 the power of the Crown to make any Articles of War became altogether statutory and the former prerogative was merged in the Act of Parliament. Thus matters remained until 1879, when the last Mutiny act was passed and the last Articles of War promulgated. The Mutiny Act legislated for offenses for which the sentence of death or penal servitude could be awarded, and the Articles of War, though repeating the provisions of the Mutiny Act, constituted the direct authority for dealing with offenses for which imprisonment was the maximum punishment, as well as numerous matters relating to details of trial and procedure.

In 1879 the Mutiny Act and the Articles were consolidated into one harmonious act, and after two years experience with it, the authorities having found it capable of improvement, this act was in turn superseded in 1881 by the Army Act. This Act contains a proviso saving to the Crown the former prerogative to make Articles of War, but provides that such Articles shall not apply to any crime made punishable by that Act. Inasmuch as the Army Act covers every conceivable crime, this retaining of the ancient prerogative will be seen to be an empty formality.

SUMMARY OF DEVELOPMENT OF ENGLISH MILITARY LAW.

From the above it will be seen that the development of Military Law in England divides itself into three distinct periods—

(1) Prior to the first Mutiny Act (1689). During this period the military forces were regarded as personal retainers of the sovereign rather than servants of the State; they were governed by will of the sovereign.

(2) *1689 to 1803.* Army recognized as a permanent force. Inside of realm governed by statute or by sovereign under authority derived from and limited by statute; outside (that is, in colonial possessions) by prerogative of Crown under authority of statute.

(3) *1803 to 1879.* Governed directly by statute, or by sovereign under an authority derived from and limited by statute.

(4) *After 1879.* Subsequent to this date the sovereign could not make Articles of War, but he could prescribe rules of procedure not inconsistent with law regulating the government and administration of the military forces. The statutes governing the land forces are contained in the Army Act. This contains the Mutiny Act and

Articles of War combined and harmonized, and is reenacted annually because of a constitutional tradition that a permanent standing army is contrary to the free institution of Great Britain, a clause in the preamble reciting the illegality of the realm having a standing army in time of peace except by consent of parliament.

AMERICAN DEVELOPMENT.

From the above it will be seen that at the time of gaining our independence, the Army of Great Britain was governed at home by statute, in the Colonies by Articles of War issued by prerogative of the Crown; therefore, it is but natural that, independence having been gained through force of arms, strict articles governing the discipline of the armed forces should have been adopted; the new State having been based upon republican ideas, it also followed that the gradual growth of the Mother Country through centuries should have been at once adopted and that the Articles of War be authorized entirely by legislature. This system was accordingly adopted in the beginning; Congress enacted the statutes known as Articles of War and has from time to time modified them, leaving to the President as Commander-in-Chief of the Army and Navy authority to prescribe regulations for the armed forces not inconsistent with law. Thus in our very cradle we adopted in effect the laws which England arrived at a century later.

MILITARY LAW AS APPLIED TO THE NAVY.

The "Articles for the Government of the Navy" correspond in the Navy to the Articles of War in the Army. Tracing back the history of these Articles, I have found that in 1749 in the reign of King George II an act was passed amending prior acts relating to the sea forces of the realm. In a very long preamble it provides that numerous prior acts, each of which is described at length by its title, "shall be and the same are hereby repealed to all intents and purposes whatsoever." The first and earliest of these acts mentioned as being repealed is "an act passed in the thirteenth year of the reign of King Charles the Second entitled 'An act for establishing articles and orders for the regulating and better government of his Majesty's Navies, ships of war, and forces by sea.'"

The date of the act referred to was some years earlier than the first Mutiny Act, and as the title uses the words, "better government," it would seem to indicate the existence of still earlier statutory enactments concerning the sea forces, but of this I have been unable to find a record. Certainly, therefore, as early as about 1650 the Navy was governed by Articles enacted by the legislature.

In America we find the Colonial Congress on November 28, 1775, passed Articles for the sea government of the United Colonies. These articles bear a remarkable similarity (as would be expected) to the Articles of 1749, passed in the reign of King George II. These articles of 1775 apparently governed until the first session of the first congress, 1799, passed Articles for the Government of the United States Navy. These were in turn superseded the following year by an act entitled "Articles for the Better Government of the United States Navy." These were extensively revised in 1862 and have been subject to certain changes in individual articles from time to time since that date, but no general revision has been enacted. The present Articles therefore bear (especially in form) a surprising resemblance to the Articles of 1749. Even the oath taken by members of a court relative to not divulging the vote of a member is illustrative of the antiquity of many of our present customs.

SUMMARY.

From the above we see—

(1) That the Articles of War were in early times actually what the name implied, viz., Articles for the Government and Discipline of the Fighting Forces in Time of War, such forces being assembled only in time of war. Being then regarded as personal retainers of the King rather than as servants of the State, the King issued these Articles as his prerogative.

(2) That gradually these conditions changed; fighting forces were maintained in peace as well as in war; these forces began to be recognized as servants of the State; the State began by enacting laws fixing penalties for only the most serious offenses, and after centuries of gradual change, only in recent years has the British Army come to be governed entirely by statutory enactment, the Crown being merely allowed to make regulations for administration of these forces.

(3) That in so far as the United States is concerned, each branch of the military forces has from the birth of the State been governed by its own Articles, modeled much after the parent country, enacted by legislature, enforced by military courts, and the President as Commander-in-Chief is granted authority to make regulations not inconsistent with law.

Thus it is seen that military law is a fundamental branch of the national law, has the same foundation, and its rules, its extent, and its limitations are as well defined as any other branch of the law

administered by the federal government, though it forms no part of the judicial branch thereof.

Military law extends its jurisdiction to every person regularly commissioned, appointed or enlisted in the organization in question, in time of war to all offenses, and in time of peace to practically every offense except murder committed within the United States. Though an officer or man is in all respects subject to the provisions of civil law, the sweeping jurisdiction of military courts, combined with the exclusive federal jurisdiction over federal property, gives practically to military courts in the United States a wider latitude and broader jurisdiction than that which is accorded in Great Britain, but in time of peace the civil law is recognized as supreme and military officers must ever remember that they are responsible to and may be required to render account in civil courts for their official acts which may be in contravention of civil law.