CHAPTER I MILITARY LAW IN INDIA : ITS ORIGIN AND DEVELOPMENT

The law alone is the real thing, the dispenser of justice, the disciplinarian. The law alone is the true governor that maintains order among the people. The law alone is their protector.

Manu.

A. Introduction to Military Law in India.

Every Commanding Officer considers that discipline is a number one priority. To keep good discipline means to ensure a high level of combat readiness. In our day-to-day life, we have gained some experience of maintaining a good military discipline. It implies involvement of all concerned, strictness on the part of Commanders and seniors and active involvement of collective effort, as a whole. Discipline is especially important under real combat conditions. Who can carry out a mission more quickly and more precisely and outdo a strong adversary? Only those who are better trained, more disciplined, more organised and more efficient. Officers are, above all, responsible for strengthening of military discipline. Right from the beginning in the Army, one is taught to be hard-working and self disciplined so as to maintain a strict military order. Hence, to achieve that, one’s behaviour is to be guided by certain laid-down instructions and order of the Superior military authorities. Military Law is such an instrument, meant for the members of the armed forces in general and the Army, in particular, which regulates their behaviour in a certain fashion so as to maintain not only discipline amongst the rank and file but also to achieve a professional standard of the highest order.

B. Military Law during the ancient period.

Although we do not have adequate literature on the military law of the ancient India as such, yet, we do find some information from the old epics such as Rigveda, Ramayana, Mahabharata, Kautilya’s Arthashasstra and the accounts given by foreign travellers like Magasthenes, Fahien and Hiuan.
Tsang etc. and particularly Sukranti which provide us vivid insight into the organisations and regulations in ancient India. It is said that all able-bodied men of the tribe took part in the war. Generally, the Army used to consist of the foot-soldiers, called ‘Pathi’ and ‘rathius’ (car warriors). As per Sukranti, death was punishable for disobedience of orders. “Let the soldiers always avoid committing a rash act, a murderous assault, delay in the service of the king, overlooking what is disagreeable to the king, and neglect in the performance of their duties. Let them avoid having conversation with strangers, nor should they enter a village without the permission of the king – I shall remove the soldiers who disobey these orders to the abode of death. The soldiers disbanded for plunder should show me what booty they have taken from the enemy”

According to TA Bhai, Indians were well conversant with the Dandaniti (Art of Warfare) and sastra (Rules and Regulations). Ancient Indians of both vedic and post vedic ages devoted a good deal of thought, time and expenditure in this matter and their contribution in organising and developing the art and conventions of war is considerable. It would, thus, be seen that military organisations and regulations in ancient India, though now only of historical interest to us, bore a striking resemblance to the modern rules for warfare and maintaining discipline in the Army and a deeper study will reveal that we can inherit, without any harm, something from their wisdom and experience, in our military affairs too.

C. Military Law during Mughal period.

After the establishment of their power in Delhi, the Mughal rulers used to administer justice in accordance with Quranic laws. They expanded their empire Eastwards and Westwards. They were very ruthless in enforcing discipline in the Army ranks. However, when Sultan Firoz Shah ascended to the throne on 23 March 1351, he abolished the practice of mutilation and torture under the former rulers. Sher Shah Suri maintained

1 Sukranti : Adhyaya IV; Cantor 1201, 1202, 1204, 1205 and Military Law in India by Dr OP Sharma, V.S.M. IN. page 23.

his authority by means of a powerful central Army, said to have been comprised of 1,50,000 cavalry, 25,000 foot soldiers and 5,000 elephants, though the Army organisation was still formed on the basis of classes and tribes. Nevertheless, Sher Shah Suri sought to make himself the focus of loyalty by personally inspecting, appointing and paying the soldiers, rather than the clan leaders. He, likewise, made himself accessible to their appeals against a local governor or commander. He prevented fraudulent ministers by branding the horses in government service — a system which, later on, was followed by Akbar and ‘munsifs’ were appointed for examining the brands in the armies on the frontiers. Justice of a rough and ready kind was administered under his strict personal supervision, and the responsibility of village communities for crimes committed within their areas of responsibility was enforced by heavy penalties. There was no discrimination on account of rank or position one held.

Akbar created regular departments with written regulations. His administration was framed on military lines. The governor of a province, the ‘Sudedar’, or ‘Sipahsalar’, maintained a court, modelled on the lines of the sovereign and possessed practically full powers so long as he retained office. Subject to his liability to recall, he was an absolute autocrat. All officials, administrative and military were called ‘Mansabdars’, meaning office-holders. These ‘Mansabdars’ were divided into thirty-three classes, each member of each class was required to provide a certain number of cavalry to the imperial army. The three highest grades of ‘Commander’ from 7,000 to 10,000 were ordinarily reserved for the Princes. The other ‘Mansabs’ ranged from 10 to 5,000. But the numbers used for grading purposes did not agree with the actual facts. At the end of the reign, a double rank was used, one element, the Zat or personal rank, denoting the grade of the official within the imperial service, the other, the ‘Sunwar’ showing what contingent must, in fact, be produced. Officers could hold rank of 7,000 soldiers. Those holding a rank of, 5,000 to 2,500 soldiers were called ‘Amirs’. Those holding more than 2,500 soldiers were called ‘Amir-e-Azam’. Highest ‘Mansabdar’ was called Khan-e-Zaman, later titled Khan-e-Khanan. Pay scales were so devised with a view to encourage the official to secure a high ‘Sunwar’ rank in relation to his Zat rank. The permanent regular army was very small.
The greater part of the imperial forces consisted of contingents provided by the ‘Rajas’ and ‘Mansabdars’, each under its own chief.

Every official exercised considerable general, administrative and the judicial powers, especially in criminal cases. Civil disputes were left to the ‘Qazis’ which were to be settled under the Quaranic laws. No regular judicial service existed then, except insofar as the Qazis formed such and each governor or other person exercised his authority what he pleased, subject to the risk of imperial displeasure. Written judgements were not delivered. There was hardly any value accorded to the statements of witnesses as such and the officers concerned could rely on their judgement based on knowledge of human nature. Even capital punishments were inflicted at discretion. Akbar’s exceptional gifts made him the most successful general and enabled him to construct a military machine much superior to anything of the kind possessed by other Indian states. This mechanism gradually deteriorated, due to the dogmatic and narrow-minded approach of his successors, which led to the decline of the Mughal Empire after the invasion of Nadir Shah in 1737, sack of Delhi, massacre of over 30,000 persons; and the defeat of the combined army of Marhatas and Mughals at the hands of Ahmed Shah Abdali in the year 1761, in the third battle of Panipat.

As per Maitland, the primitive people “every able-bodied adult male was considered a potential soldier and as such the whole male population was liable to constitute Militia to serve either by virtue of the feudal obligation or simply as kings’ subjects.” It is thus obvious that in the ancient times, the Army had two facets – firstly that all the able-bodied men were organised for the primary purpose of warfare on land, and secondly, that the entire trained manpower served the king or the state. During the middle ages, no king kept permanent armies. At the time of attack or defence, the king would raise a herd of mercenary troops. The armies were kept by the feudal lords who would lend their soldiers to the king on demand in times of war. This state of affairs continued till the 16th century.

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3 Excerpts from Col GK Sharma’s book ‘Study and Practice of Military Law’ as narrated in his Article ‘Military Law in Ancient and Medieval India’ in civil and Military Law Journal, page 238, 239.
D. **Military Law under the East India Company’s rule**

It was during the 16th century that the mercenary troops were found to be inadequate and a permanent standing army was raised by the king. This was the age when feudal institutions were in a state of decay and their place was being taken by the Nation States. The tendency of keeping a standing army increasingly grew due to the political developments and other factors of modern times.

The origin of the Indian Army was very modest. It sprung from the Guards who were enrolled by the East India Company for the protection of its factories and trading posts. Such trading posts were established at Surat, Musalipatnam, Armagon, Hoogly and Balasore in the early years of the 17th century. The Guards were primarily meant to protect the properties of the Company but their duties were multifarious in nature. They were also to add to the dignity of the higher officials of the Company. The native rulers entered into treaties with the East India Company binding the Company with the instructions not to increase the number of Guards and thus restricted the East India Company from giving military status to these Guards. But the Company improved the status of these Guards, and from these Guards sprang the Company’s European and native troops. The number of these troops increasingly grew until the mutiny of 1857.

Statutory provisions for the maintenance of discipline in the East India Company’s troops was first enacted in 1754 for punishing mutiny and desertion by officers and soldiers in the service of the United Company of merchants of England trading in the East Indies, and for the punishment of offences committed in East Indies or at the Island of Saint Helena. Section 8 of this Act empowered the crown to make ‘Articles of War’ for the governance of these troops. Though this Act was wide enough to cover both the European and native troops, but the language of the Articles themselves shows that they were applied by the Governments of Bombay, Madras and Bengal, with such modifications as appeared necessary, to the bodies of
native troops maintained by them, of which the Indian Army is the heir and successor.4

- **The Articles of War**

The power to legislate for the native Army was vested in the Governor General in Council by Section 73 of the Government of India Act 1833. The application of this legislation was to the native troops, whether officers or soldiers, wherever they were serving. Three military codes were recognised at that time, in India, i.e., the Europeans and the other for the natives. Articles of war were applied to them to a great extent. On the basis of two enactments in 1813 and 1824, a military code was framed for each of the Presidencies. As per the above enactments, there was a difference in their applicability to the native officers and soldiers. While in the case of native officers, the punishments that could be awardable was death, dismissal, suspension and reprimand; whereas in the case of native soldiers, these were either death and corporal punishment. There was no provision as to the award of transportation or imprisonment at all. Under the powers conferred upon it by the Act of 1833, the Indian Legislature for the first time provided a common code for the native armies of India in 1845. ‘Articles of War’ was enacted by the Governor General in council as Act XX of that year for those armies. This Act was shortly after repealed and replaced by the Act XIX of 1847. This Act too, was later on amended after the mutiny of 1857.

E. **Military Law between 1858 and 1950**

After the mutiny of 1857, the Government of India felt the necessity of repealing the above Act. Accordingly the Act XXIX of 1861 came into being. The aim of this Act was primarily to consolidate and amend the Articles of War for the Government of the Native officers and soldiers in Her Majesty’s Indian Army. This Act was further repealed by the Act of 1869, i.e., Act V of 1869. With this enactment, it became clear that it was aimed at the

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The three native armies were amalgamated in 1895, which gave rise to considerable amendments of ‘Articles of War’. These amendments were effected by Act II of 1894, by which the Indian Articles of War were altered which gave statutory basis for enactment of the Indian Army Act 1911. The Indian Army began to take its share in the imperial responsibilities of the British Army, it was felt that the Act which originally had been enacted for three local forces, i.e., the Presidencies as mentioned above, had failed to provide adequately for the discipline and administration of the Army under the revised conditions.

- **The Indian Army Act of 1911**

The Act of 1911 was divided into thirteen chapters dealing with different subject, viz. Application of the Act, Definitions, Enrolment and Attestation, Dismissal and Discharge, Summary punishments, Offences, Punishments, Penal deductions, Courts Martial, Execution of Sentences, Pardons and Remissions, Power to make Rules, Property of Deceased persons, Deserters and Miscellaneous. Between 1911 and 1950, when the present Army Act came into existence, some temporary Acts were passed, providing for suspension of sentences. This was found useful as a permanent Act of 1920 was passed to provide for the suspension of sentences of imprisonment or transportation passed by the Courts Martial.

F. **The Military Law since 1950**

After India attained independence in 1947, a need was felt to update the laws relating to the Armed Forces. The first to come into existence was the Army Act 1950 (Act XLVI of 1950). It was mainly due to the fact that it was desired to consolidate the scattered provisions of law after the enactment of Indian Army Act 1950. The independence of the country was another major factor for doing so, and, lastly, it was to bring the provisions of the Army Act in conformity with the constitutional changes brought about
in the Constitutional law. Alongside, the Air Force Act also came into being in the same year, i.e., on 22 July 1950 whereas it took quite sometime for the revised Navy Act to come into being. The main reason was that the Naval Discipline Act 1934 was based on British Navy Act, which was quite distinct in many respects from the provisions of the Army Act and Air Force Act. Moreover, a special Committee had been constituted to revise the British Naval Code. So, it was thought that it would be better to wait for the report of the Committee, as they could be benefited by the recommendations or action of such committee. Consequently, the Navy Act was finally passed by the Indian Parliament on 27 December 1957, which came into force on 1st January 1958.

The Uniform Code of Military Justice also came into existence in 1950. This code combined laws for all the three services, i.e., Army, Navy and Air Force into one. It was felt that it would be a better idea to go in for this kind of Code so that by reference to a single statute, all the rights and duties of the Armed Forces personnel would be ascertainable. In pursuance of this realization, the Government of India set up a committee. The terms of references of this committee were to study thoroughly the historical background of the three codes of the Army, Navy and the Air Force, especially the difficulties encountered in their application to the members of the Armed Forces, vis-à-vis the other democratic developed countries of the world, especially the Uniform Code of Military Justice and also to draft a uniform code with regard to our Armed Forces, keeping in view various developments in the field of law, especially criminology and penology and other factors incidental thereto. However, the aim behind setting up the said committee could not be fulfilled since no tangible results have been achieved in fulfilling the objectives for which it was constituted.

The present military law is contained in the Army Act 1950, Army Rules 1954. The Army Rules had been made as supplemental to the Army Act under the authority of the Central Government. In order to bring the military (Army) law in parity with the law entailing on the civil side, 22 amendments were made to the Army Act in August 1992. More important of them being punishment of Junior Commissioned Officers (JCOs) by the
Commanding Officers (COs), removal of field punishment from the statute extending the scope of 'Period of Limitation', removal of 'Successive trial by Criminal Court', extending the scope of 'Summoning Witnesses', 'presumption as to certain documents', inserting the provisions as to 'Period of detention undergone by the accused to be set-off against the sentence of imprisonment'. Besides above, many amendments were carried out to Army Rules 1954 so as to bring them in lines with a modern requirements. Some of the important amendments in Army Rules relate to Termination of Service by the Central Government on account of misconduct, compulsory retirement of officers, General plea of 'Guilty', Plea of no case, Closing Addresses, recording of brief reasons in support of the finding, Revision, and allowing of counsel in certain General and District Courts Martial. Finding of insanity, opportunity for petition against sentence of death, and expanding the scope of admissibility of Court of Inquiry proceedings. The above amendments were effected through SRO 17E of 1993 to be in tune with the fast changing socio milieu, governed by the liberty-oriented constitution of India.

**MILITARY LAW IN THE UNITED KINGDOM**

Law treated historically becomes an interesting study; entertaining not only to those whose profession it is, but to every person who has any thirst for knowledge.

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5 A.A. Sec. 85.  
6 A.A. Sec. 80(j).  
7 A.A. Sec 122.  
8 A.A. Sec 127.  
9 A.A. Sec 135.  
10 A.A. Sec 142.  
11 A.A. Sec 169A.  
12 Army Rules (AR) 1954.  
13 AR 14.  
14 AR 16-A.  
15 AR 52.  
16 AR 57.  
17 AR 59.  
18 AR 62.  
19 AR 68.  
20 AR 96.  
21 AR 145.  
22 AR 170.  
23 AR 182.  
24 Statutory Regulatory Order.  
‘Gustavus Adolphus’ Articles of War 1621 are considered “a recognisable ancestor of the British Articles of War and the American Uniform Code of Military Justice (UCMJ)”. They provided regular procedures for the maintenance of discipline.

The Indian military law has its origin in the British Military Law in the same way as the Indian army had its genetic from the British Army.

A. Military Law in England in the 17th Century

It may not be worthwhile to dig into the very early period during which the military law in England developed. However, the period after which the main development in military law had developed could be cited from the Articles of War. The first Mutiny Act in England was passed by the Parliament in 1689. As per Holdsworth, it was not until the revolution of 1688 that the parliament legalised a standing army as a necessary evil. Prior to that, every able-bodied person was potentially a soldier, liable to render service, whether by virtue of feudal obligation or as king’s subject.

B. Inception of Court – Martial

There was a Court of Chivalry to administer justice in the military. The judges appointed to this court were the Lord High Constable, who was King’s General and the Earl Marshal, whose duty was to muster the Army. Thus, the Court came to be known as the court of the Constable and Marshal, and it is from Marshal that courts Martial derive their name. The practice was then instituted of the king granting commissions to the Commander-in-Chief authorising him to hold courts for the trial of military officers. These officers came to be known as councils of War and also as Marshal’s Courts – Martial.

26 J. Bishop.
27 Statutes of the Realm 55, 1 W & M, Chapter 5.
29 Lewis Committee report (Comd. 7608) Page 3.
To start with, military law was only applicable during wartime. Ordinances, which later on were called Articles of War, used to be issued to muster soldiers during the time of War on advice of the Constable. Whenever the clouds of War ceased to exist, these ordinances or Articles of War had no applicability.

The court of chivalry was quite mobile and during the war, it followed the Army. In its early forms, the court became somewhat of a standing or permanent forum, rendering summary punishment in accordance with the existing military code or articles of War. The various articles of War promulgated by the crown during conflicts were drawn with the advice of the constable and marshal. For example, the preamble to Richard II’s articles read:

“These are the Statutes, Ordinances and customs, to be observed in the Army, ordained and made by good consultation and deliberation of our most excellent Lord the King Richard, John Duke of Lancaster, Seneschal of England, Thomas Earl of Essex and Buckingham Constable of England, and Thomas De Mowbray, Earl of Nottingham, Mareschall of England, and other Lords, Earls, Barons, Banneretts and experienced Knights, whom they had thought proper to call unto them; then being at Durham the 17th day of the month of July, in the ninth year of the Reign of our Lord the King Richard II.”

The court eventually fell into disuse and by the 18th century ceased to exist as a military court.

C. The “Council of War”

With the decline of Court of Chivalry (the Constable’s Court or the Marshal’s Court) the martial Courts or councils held under the various articles or codes of War became more prominent\textsuperscript{30}. Long before the court of

\textsuperscript{30} The more commonly cited articles of War, under the variety of titles are the ones of Richard I, Richard II, Henry V, Charles II and James II. Several of these codes are included as appendices in Winthrop’s work.
chivalry had faded, the problem of maintaining discipline in a widely dispersed army had prompted the formation of military Courts by issuance of law Commissions, or through inclusion of special enabling clauses in the Commissions of high-ranking Commanders. These tribunals, which eventually became the modern courts martial, were concerned by a general who also sat as presiding judge or president. The courts’ powers were plenary, and were limited to wartime. Sentences were carried into execution without confirmation by higher authorities. The exact origin of the term ‘Court-martial’ is open to some interpretation. SC Pratt in his book titled, “Military law”: Its procedure and practice (1915); states:

“The true derivation of the word ‘martial’ opens out an interesting field of Inquiry. Simmons and others hold that the courts-martial derive their name from the court of the Marshal; but there is a good deal to be said against this view, as the words ‘martial’ are in some of the old records synonymous.”

As with the Court of Chivalry, the emerging councils of war or Courts Martial frequently fell into abuse. More than once, royal prerogative expanded, or attempted to expand, the jurisdiction of these tribunals over civilians over soldiers in peace time arrives. For example, during the reign of Edward VI, Mary, Elizabeth I and Charles I, certain offences, normally recognised only at common law in civilian courts, could be punished under military law before Courts-Martial similar to those employed during times of war. Parliament was rightfully very sensitive about these and other attempted encroachments about the civilian populace. The struggle over court – martial jurisdiction simply fuelled the fires. The only legislative aid to enforcing military discipline was found in various statutes which could be enforced only before civil courts.

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31 A good discussion of the working of British Courts martial during this period is found in Clode, ‘Military and Martial Law (London 187).
32 See generally, C Fairman “The Law of Martial Rule.”
From 1625 to 1628, Charles I attempted to use Court-Martial jurisdiction as a lever on the populace in hope of obtaining supplies. He failed and, in seeking the needed money from Parliament, he was forced to assent to a petition of rights (1628) commissions proceeding under military law. Charles agreed to imprison no one except with due process of law, and never again to subject the people to Courts Martial.

D. Appointment of Judge Advocate

From the continuing struggle for control of the military, Parliament slowly gained a foothold on control of the conduct of military trials. In 1642, the first direct legislation affecting military law authorised the formation of military courts. A Commanding general and 56 other officers were appointed as 'Commissioners' to execute military law. Twelve or more constituted a quorum and the body was empowered to appoint a judge advocate, provost marshal, and other necessary officers.34

Beginning in 1662 with Articles of War issued by Charles II, there was a general recognition that a standing army needed power to maintain peacetime discipline. There was also an increased interest in military due process an evidenced in various provisions of the myriad Articles of War.

More detailed rules were set out two years later in the Articles of War of James II (1688), which also placed a limitation on certain punishments.

All other faults, misdemeanours and Disorders not mentioned in these articles, shall be punished according to Laws and Customs of War, and discretion of Court-Martial; provided that no punishment amounting to the loss of life or limb, be inflicted upon any offender in time of peace, although the same be allotted for the said offence by these Articles, and the laws and customs of war.35

E. The Mutiny Act

Parliament had a firm hold on conduct of Courts-Martial. In 1689, while William and Mary were asking the House of Commons to consider a bill which would allow the Army to punish deserters and mutineers during peacetime and thereby insure some degree of discipline, there was a massive desertion of 800 English and Scotch dragoons who had received orders to proceed to Holland. Instead, they headed northwards from Ipswich and sided the recently deposed James II, who had recruited them. No further royal pleading was required. Parliament quickly passed the bill known as the First Mutiny Act. The bill added teeth to military discipline. The death penalty was allowed for the offences of mutiny or desertion, with the proviso that:

And no sentence of death shall be given against any offender in such case by any court martial unless nine of thirteen officers present shall concur therein. An if there be a greater number of officers present, then the judgement shall be passed by the concurrence of the greater number of them so sworn, and not otherwise; and no proceeding, trial or sentence of death shall be had or given against any offender, but between the hours of eight in the morning and one in the afternoon.

Until 1712, the successive Mutiny Acts did not cover offences committed abroad. In the years that followed, the Act was extended to Ireland, and to the Colonies. In the 1717 Act, the Parliament approved the practices of the Crown in issuing Articles of War to extend the jurisdiction of the Court-Martial within the kingdom. In 1803, the Mutiny Act and the Articles of War were broadened to apply both at home and abroad. A general statutory basis of authority was thus given to the Articles of War, which had to that point existed by exercise of the royal prerogative. With

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36 D Jones notes on Military Law (London 1881) at p.17 state that at this point the soldiers were considered citizens and subject only to civilian tribunals. See also code in Military and Martial Law (London 1871) at p.32.
37 Winthrop, Military Law and Precedents (2nd ed. 1920 reprint), at p.930.
38 See generally Jones, supra note 36 at p.17.
the exception of a brief interval from 1698 to 1701, annual Mutiny Acts were passed until they, along with the Articles of War were replaced in 1879 by the Army discipline and Regulation Act, and finally, in 1881 by the Army Act.40

F. Summary of Development of the British Court-Martial System

According to Capt (P) A Schueter, firstly, the development of 'British Military Law System' can be summarised thus, that the struggle between the Crown on the one hand and the Parliament on the other, on control of the military justice system, was classic in nature. The British model typifies the reluctance of a populace to vest or allow to be vested, too much control in the military courts. In the British model, we see the metamorphosis from a forum serving under total royal prerogative, the court of Chivalry, to one acting pursuant to a legislative enactment – or blessing, of sorts, from the populace. Secondly, over a period of approximately seven hundred years, the British Court-Martial developed a system of military due process. From the Court of Chivalry with its trial by Combat, the system evolved to one which accorded more sophisticated rights to an accused, the right to receive notice, to present his defence, and to argue his case and, lastly, the jurisdiction of the Court-Martial was gradually restricted to exercising its powers over soldiers only, as opposed to the general populace. When expansion of those powers was attempted, at least in later years, legislative limiting action was taken.

MILITARY LAW IN THE UNITED STATES OF AMERICA

A. Introduction

The British system served as a firm stepping stone for the American system which thereby got a running start in 1775. Brig General Samuel T Ansell had written in 1919,41 “I contend – and I have gratifying evidence of support not only from the public generally but from the profession – that the

40 For discussion of the Act, see Jones, supra note 34, at p. 18 and Clode, supra, note 31, at p. 43.
existing system of Military Justice in America having come to us by inheritance and rather writ less adoption out of a system of Government which we regard as fundamentally intolerable; that it is archaic, belonging as it does to an age when armies were bodied of armed retainers and hands of mercenaries; that it is a system arising out of and regulated by the mere power of military command rather than law; and that it has ever resulted, as it must result, in such injustice as to crush the spirit of the individual subjected to it, shock the public conscience and alienate public esteem and affection from the Army that insists upon maintaining it.

The development of military law in America can be traced through the following periods; firstly, the period from 1775 to 1800; second, the period from 1800 to 1900; and last the period from 1900 to the present.

B. The Period from 1775 to 1800

The British system of military justice was an unwitting midwife to the American Court-Martial. At the outbreak of the Revolutionary War, the British soldiers were operating under the 1774 Articles of War. Ironically, even as American troops were fighting for independence — a break from British rule — colonial leaders were embracing the British system of rendering military justice.

In 1774, British Articles of War were adopted by the provisional Congress of Massachusetts42 Bay, with a little change. This code provided for two military courts; “general” court-martial, to consist of at least 13 officers43, and a regimental court martial, to consist of not less than five officers “except when that number cannot be conveniently assembled, when three shall be sufficient44.” Other provisions included an eight-day confinement rule, a limitation on the number of “stripes” to be meted out as

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42 Similar articles were adopted within the following months by the Provincial Assemblies of Connecticut, and Rhode Island, the Congress of New Hampshire, the Pennsylvania Assembly, and the Convention of South Carolina. See Winthrop, supra 37, at p.947.
43 Art 32
44 Art 37.
punishment\textsuperscript{45} and an admonition that “all the Members of a Court-Martial are to behave with calmness, decency and impartiality, and in giving of their votes are to begin with the youngest or lowest in commission."\textsuperscript{46}

Also included was a provision which survives, in form at least, to this day, that “No officer or soldier who shall be put in arrest or confinement more than eight days, or till such time as a court-martial can be conveniently assembled.\textsuperscript{47}

The continental Congress appointed a committee in June 1775 to author rules for the regulation of the continental Army. The committee presented its report, and on June 30, 1775, the Congress adopted 69 articles based upon the British Articles of War of 1774 and the 1775 Massachusetts Articles of War.\textsuperscript{48} In November of that same year, the Articles were amended. And again in 1776, the Articles of War were revised to reflect the growing American tradition of military justice. The revision in 1776 resulted from a suggestion by General Washington. The revising committee included John Adams, Thomas Jefferson, John Rutledge, James Willson and RR Livigston, ST Ansell, the acting Judge Advocate General of the Army 1917 to 1919, harshly criticised the American system of military justice. According to him, discussing the Articles of War of 1776, John Adams – "was responsible for then hasty adoption ..........to meet an emergency. The 1776 Articles of War were arranged in a manner similar to the British Articles of War, by sections according to specific topics. These Articles continued in force, with some minor amendments, until 1786, when some major revisions were accomplished.

The Section dealing with the composition of General Court-Martial was changed to reflect the need for smaller detachments to convene a General Court with less than 13 members, the requisite number under the 1776 Articles. The new provision, section 14, Administration of Military Justice, allowed a minimum of five officers\textsuperscript{49}.

\textsuperscript{45} Art 50.
\textsuperscript{46} Art 34.
\textsuperscript{47} Art 41.
\textsuperscript{48} See Aycock and Wurfel, supra note 39, at p. 10.
\textsuperscript{49} Art 1, Sec XIV, Also see Winthrop, supra note 37, at p.11.
These early Courts-Martial were of three forms: general, regimental and garrison. The general court martial could be convened by a general officer or an "officer commanding the troops."50 No sentence could be carried into execution until after review by the Convening Authority. In case of a punishment in time of peace involving loss of life, or "dismission" of a commissioned officer or a general officer (war or peace), Congress review was required.51 The regiment (or Corps) Court-Martial could be convened by any officer commanding a regiment or Corps. Likewise, the commander of a "garrison, fort, barracks, or other place, where the troops consist of different Corps could convene a garrison court-martial. The membership of these two latter courts consisted of three officers and the jurisdiction limits were as follows:

No garrison or regimental court-martial shall have the power to try capital cases or commissioned officers; neither shall they inflict a fine exceeding one month's pay, nor imprison, nor put to hard labour, any non-commissioned officer or soldier, for a longer time than one month.52

A Judge advocate (lawyer) or his deputy was assigned to the court to prosecute in the name of the United States and to act as a counsel for the accused, object to questions of the accused which might incriminate him.53 Winthrop discusses the dual role of counsel in these early proceedings and points out that the Judge Advocate could not act in a "personal" capacity as counsel for the accused – that would be inconsistent with his role as a prosecutor. Rather, the relationship was "official". This provision was carried forward to the 1874 Articles of War, under which the role of the counsel was to exercise "paternal-like" care over an accused. See also S. Ulmer Military Justice and the Right of Counsel at p.28 (1970). And no trials were to be held except between "8 in the morning and 3 in the afternoon", except in cases, which, in the opinion of the officer appointing

50 Art 2, Sec XIV.
51 Id.
52 Art 4, Sec XIV.
53 Art 6.
the court, require immediate example. It was this system of Court martial that was in existence when the framers of the Constitution met to decide the fate of the military justice system itself. Congress did not create the court martial it simply permitted its existence to continue. In effect, the Court-Martial is older than the Constitution and predates any other court authorised or instituted by the Constitution.

The point to be underlined here is that the Constitution framers provided that Congress, not the President could “make rules for the Government and Regulation of the land and naval forces”. The President was named as “Commander-in-Chief of the Army and Navy of the United States...”. With these parameters drawn, the framers avoided much of the political-military power struggle which typified so much of the early history of the British Court-martial system. And in 1797 the separateness of the military system of justice was further recognised in the Fifth Amendment provision which drew a distinction between civil and military offences. The Fifth amendment states in part: No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land and naval forces, or in the Militia, when in actual service in time of War or public danger.

C. The period from 1800 to 1900

The Articles of War of 1776 (as amended) remained in effect until 1806, when 101 articles were enacted by the Congress. The Composition and procedure for the Court – Martial changed little with the revised articles. The three courts, general, regimental and garrison, remained, but some minor changes affected the power to convene a general Court. Whereas the 1786 amendment had allowed a general or other officer commanding the troops to convene a general court, the 1806 articles established the more particular requirement that any general officer commanding an army, or Colonel Commanding a separate department could convene a general

54 Art II, Sec. XIV.
55 U.S. Const, art 2, Sec 8, cl 14.
56 U.S. Const, art 2, Sec 2, Cl 1.
57 See Winthrop, supra note 37, at P. 976.
The composition and jurisdictional limits of the three courts remained without change. Further developments included a clause barring double jeopardy, a provision allowing the accused to challenge members of the Court – Martial, and a provision that a prisoner standing mute would be presumed to plea innocent. Amidst these progressive procedural and substantive safeguards, one finds the provision: “The President of the United States shall have power to prescribe the uniform of the Army”.

The next seven decades were marked with relatively little change to the composition of the Court – Martial or the procedures to be employed. As we would see at a later stage that the periods of war during 1700’s and 1900’s usually spurred prompt and major revisions to the Articles of War. Such was not the case in 1800’s, at least prior to 1874, when the Country went through the war of 1812, the Mexican War, the civil, and part of the Indian Wars. During that Century, only minor changes were made to the governing Articles.

(i) Court-Martial in The Confederacy

Having established a government and army, the Congress of the Confederate States in October 1862 promulgated “An Act to organise Military Courts to attend the Army of the Confederate States in the Field and to define the powers of the said courts.” The Court – Martial under the Confederate States model was a permanent tribunal, not like the traditional (and modern) temporary forum, which was formed only for a specific case. Each Court consisted of three members, two constituting a quorum, a judge advocate, a provost martial, and a clerk. Trial Judge Advocate in the field were supposed to have knowledge of law and also of military life. They were not explicitly required to be attorneys. The Confederate forces had no Judge Advocate General's Corps, nor even a Judge Advocate General. President Jefferson Davis recommended to the Confederate Congress the

58 Art 65.
59 Art 87.
60 Act of Oct 9, 1862. Also see Winthrop, supra note 37, at P. 1006.
creation of both, but no action was taken. The work of the reviewing records of trial was performed by an assistant Secretary of war, and other work was handed by a “Judge Advocate’s office” created within the office of the Adjutant General, and headed by an assistant Adjutant General. Initially, a court accompanied each army corps in the field and by later amendments courts were authorised for military departments, North Alabama, any division of cavalry in the field, and once for each State within a military department. The legislative foundation also provided:

*Said courts shall attend the army, shall have appropriate quarters within the lines of the army, shall be always open for the transaction of business, and the final decision and sentences of said courts in convictions shall be subject to review, mitigation and suspension, as now provided by the Rules and Articles of War in cases of Courts – Martial.*

(ii) **Post Civil-War Developments**

The next development of the court – martial occurred in the American Articles of War of 1874 was that the original three courts (general, regimental and garrison) were expanded to include a “field officer” Court:

*In time of war a field- officer may be detailed in every regiment, to try soldiers thereof for offences, not capital; and no soldier serving with his regiment, shall be tried by a regimental or garrison court – martial when a field officer of his regiment may be so detailed.*

The authority to convene a general court – martial was further delineated. A General Officer Commanding a army, a Territorial Division or a Department, or Colonel Commanding a separate Department, could appoint a general court. In time of war, a Commander of a division or a

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62 Section 5 of the Original Act.
63 Art 80
separate brigade could likewise convene a general court. In addition to new and expanded jurisdictional bounds applicable to certain offences in time of War, procedural changes included a provision allowing for the appointment of a Judge Advocate to any court-martial.

(iii) Establishment of a Summary Court-Martial

The Congress in 1890, established a Summary Court Martial, which in time of peace was to replace the regimental or garrison court-martial in the trial of enlisted persons for minor offences. Within twenty-four of arrest, the individual was brought before a one-officer Court which determined guilt and appropriate punishments. But the trial was a consent proceeding. The accused could object to trial by summary court and as a matter of right have his case heard by a higher level court martial where greater due process protections were available. Another important step was taken in 1895 when, by executive order, a table of maximum punishments was promulgated. Other specific guidance was given for considering prior convictions assessing punitive discharges and determining equivalent punishments.

D. The period from 1900 to the present: A time of rapid change

As we have seen that the nineteenth century was a time of relatively quite changes in the American military judicial system, however, the innovations marked by the twentieth Century are by comparison revolutionary. Periods of drastic change occurred in 1916, 1920, 1948, 1951 and 1968. Congress undertook a major revision of the Articles of War in 1916, and for the first time we see the three courts martial which exist today: the general court martial, the special court martial, which replaced the regimental or garrison court-martial; and the Summary Court, which replaced the field officer’s court which had been established in 1874. The authority of a commander to convene a court was expanded. For example, a general court could be convened by the President and commanding
officers down to the level of brigade commanders. However, only commanding officers could convene special and Summary Courts. Other important changes included:

1. Mandatory appointment of a Judge Advocate to general and special court-martial,

2. The right of the accused to be represented by counsel at General and special courts,

3. Explicit prohibition of compulsory self-incrimination, and

4. Addition of a speedy trial provision, according to which the accused was to be tried within ten days, and no person could be tried over objection (in peacetime) by a General Court Martial within a period of five days subsequent to service of charges.

In 1920, the whole military judicial system was re-examined in view of the complaints that the 1916 revision did not wholly stand the testing fires of global World War I. As a result, in 1920, the Congress enacted a new set of 121 articles of war, the main features of which included the following:

1. A General Court Martial would consist of any number of officers not less than five.

2. A trial Judge Advocate and defence counsel would be appointed for each General and Special Court Martial. (An accused could be represented by either a civilian counsel, reasonably available military counsel or appointed counsel).

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67 Art 8
68 Arts 9, 10.
69 Art 11.
70 Art 17.
71 Art 24.
72 Id.
73 Arts 11, 17.
3. A General Court Martial Convening Authority could send the case to a special court-martial if it was in the interest of the service to do so.\textsuperscript{74}

4. A thorough pre-trial investigation was to be conducted. The accused was to be given full opportunity for cross examination and to present matters in defence or mitigation.

5. A Board of Review, consisting of three officers assigned to the office of the Judge Advocate General, was tasked to review Courts-Martial, subject to presidential confirmation.\textsuperscript{75}

**MILITARY LAW IN RUSSIA**

The fundamental source of military law in Russia is the constitution of erstwhile U.S.S.R, which contains rules relating directly to the regulation of relationships in the area of army development. Particularly, Chapter 5 “Defence of the Socialist motherland” states that the defence of the Socialist motherland is one of the important functions of the State and is the concern of the whole nation. The duty of the Armed Forces of Russia 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. Articles 121 and 131 determine the powers of the higher bodies of State government and administration in the organisation of national defence.

**A. Sources of Military Law**

Other sources of military law are the law of Russia, the decrees of the Presidency of their supreme court and the decisions of the Russian council of Ministers. In addition, all Soviet servicemen are governed by the rules of military and naval regulations and manuals instructions, commands,
directions of the Russian Defence Minister, other commanders and the military officials.

B. Soviet Military since One Hundred Years Ago

During the initial years of Soviet power, martial law in the form of revolutionary – military tribunals was imposed in the country. The emergency measure, probably, was justified. Subversive counter-revolutionary elements had infiltrated the Red Army and were active on a large scale, and there were numerous cases of sabotage and desertion on the fronts. After the foreign interventionists were drawn out of the country and the internal counter-revolution smashed, the revolutionary – military tribunals were reorganised into courts-martial and adapted to the peacetime Red Army structure. They were to tackle now problems aimed, as before, at strengthening Soviet authority and increasing the combat readiness and fighting capability of military courts in the Army and Navy.

The Great Patriotic War posed new problems. Courts martial tried and punished enemy spies, cowards and panic-mongers, protecting the inviolability of the oath of allegiance and Commanding Officer’s orders. After the War, courts martial tried many people suspected of treason and having collaborated with the Nazis.

The March 4, 1965, decree of the Union of Soviet Socialist Republics (U.S.S.R) Supreme Soviet Presidium ruled that the term of limitation does not apply to those who committed acts of treason in the War, and courts-martial were still opening such cases. In December 1986, for instance, the Court Martial of the Bylorussian Military District found guilty a man by the name of Vasyura who had sided with the Nazis during the War and sentenced him to death by firing squad.76

76 Excerpts from Major General Ukolou's interview.

The competence of the Union of Soviet Socialist Republics (U.S.S.R), as represented by its highest organs of State authority and organs of State administration shall include Questions of War and peace.\(^77\) It further states that it shall be the duty of every citizen to abide by their Constitution to observe the laws, to maintain labour discipline, honestly to perform public duties and to respect the rules of Socialist intercourse.\(^78\) Military service in the Armed is to be treated as an honourable duty of their citizens.\(^79\) According to the Constitution, violation of oath of allegiance, desertion to the enemy, imposing the military power of the State, espionage – are punishable with all the severity of the law as the most heinous of crimes.\(^80\) The People’s Commission of Defence of their Country was the head of the People’s Commissariat of that country. He also was the head of the Worker- Peasant Red Army.\(^81\) Troops and Naval forces of the Worker- Peasant Red Army are divided for purpose of administration into military districts, armies and fleets. The Commanders of military districts, armies and fleets are directly subordinate to the People’s Commissar of Defence. All decisions of the Military Council are subject to confirmation by the People’s Commissar of Defence of the Country and are given effect by his orders and decrees. The military Commissar equally with the Commander is responsible for the political-moral condition of the unit, for the fulfilment of military duty and the execution of military discipline by all personnel of the unit from top to bottom, for preparedness for combat, operations and mobilization, for the condition of the armament and the military economy of the unit (command, administrative Headquarters and installation etc).

As per Stalin, the military commissar shall be a moral leader of a unit (or command), the prime defender of its material and spiritual interests. If the commander of a regiment represents the head of the Regiment, then the

\(^77\) Art 14, Hasold , J Berman and Miroslav Kerner : "Documents on Soviet Military Law and Administration" (1955).
\(^78\) Art 130 of Const.
\(^79\) Art 130 of Const.
\(^80\) Art. 131 of Const.
\(^81\) (Coll. Laws U.S.S.R 1934, No 58, Art 430h), Harold J Berman and Miroslav Kerner (supra note 82, at p.7)
The armed forces of Russia consists of Worker-Peasant Red Army, the Worker-Peasant Navy, border troops and internal troops.

D. Lenin on Soviet Military Discipline

According to Lenin, strict discipline in the army is the most important condition of combat readiness. The need for strict discipline is determined by the character of its life and combat actions. Military organisation calls for firm centralisation, strict order of subordination and regimentation. He saw in the army a good example of organisation characterised by its flexibility and ability to give millions of people a single will, capable, in the pursuit of a single aim, of swiftly altering the forms, methods, means and the place of its activities in accordance with the changing conditions and the requirement of struggle. But such an organisation cannot exist without an iron discipline and an unbreakable military order. As per him, “An army needs the strictest discipline” and “Military discipline and military vigilance of the highest degree” are necessary.

Firm discipline in the Army is necessitated by above all by the very nature of armed struggle. As nowhere else, success on the battlefield depends on concerted action, accuracy, execution and endurance of the personnel. Even the slightest laxity is inadmissible for it can bring about the most lamentable results. Discipline makes for efficient troops control and hastens victory over the enemy. He repeatedly stressed that without the strictest discipline it would have been impossible to defend the gains of the October Revolution against the interventionists and White Guards. “We”, he said, “led the Red Army to victory by strict iron discipline as well as agitation.” According to Lenin, “Origination, multiplies the strength of the army tenfold.” Day-to-day service, life and training of troops are inconceivable with the strictest discipline. For it is impossible to vanquish the enemy without firm discipline, it is equally impossible to learn the art of winning victory without it.
According to Lenin, the soldier's discipline is inseparably linked with his moral and fighting qualities. Indeed, only he can be called disciplined who faultlessly performs his duties, carries out all orders and instructions of his superiors with rationale initiative and without demur, strictly keeps military secrets, is vigilant, sincere and truthful, holds dear comrades-in-arms, has a strong will and is capable of subordinating it to the interests of the common goal.

Lenin wrote that, "he who does not support order and discipline, is a traitor and treason – monger, playing into the hands of the enemy of the working people."\(^{82}\)

E. Basic Difference Between the Imperialist Armies and Soviet Military Discipline

Imperialist armies too have their discipline. As per Lenin, there the soldiers are not aware of its significance for combat actions. But there, the officer cannot tell his men why and for what they have to fight. Attempts are made to keep the soldiers away from politics and to deprive them of class-consciousness. They are made to believe that capitalism is the best form of organisation of society. Whereas, the Soviet military discipline is founded on consciousness, on the fighting men's profound understanding of their duty to the people, and their devotion to their country, the Communist Party and Soviet Government, as well as the internationalist tasks of the Armed Forces. He says that, “The Red Army is strong because it is consciously and unitedly marching into battle for the peasant's land for the rule of the workers and peasants for Soviet power. Lenin further stresses the point that, “It is its conscious character, which makes military discipline firm, cements the servicemen's will for victory and enhances his staying power in battle." “The heroism of the working people making voluntary sacrifices for the victory of socialism”, Lenin wrote, “this is the foundation of the new, comradely discipline in the Red Army, the

foundation on which that army is regenerating, gaining strength and growing."

**F. Self-discipline and Lenin**

Lenin laid a lot of stress on self-discipline. From the rostrum of Seventh Party Congress (1918), he counselled the officers and men, "set to work to establish self-discipline." In self-discipline, Lenin saw the basis of such human qualities as exactness, punctuality, organisation, accuracy, readiness under any circumstances to subordinate one's actions to the requirements of the laws promulgated by Soviet power, of the orders and instructions of superiors. Many heroes of the Great Patriotic Wars, who performed feats of valour not only on orders but also at the call of their hearts, were distinguished for their high self-discipline.

**G. One-man Command Principle**

The consolidation of one-man command principle is the tested way of raising military discipline. Lenin always stood for one-man command in the Armed Forces, seeing in it the most expedient and effective method of troop control. Uniting and directing the servicemen's will and actions towards a single goal, one-man command makes for the strictest personal responsibility of the commander for the morale, discipline, fighting efficiency and combat readiness of the troops. Lack of responsibility camouflaged by references to team work, Lenin said is the most dangerous vice which in military affairs quite often leads to chaos and defeat. In keeping with this principle, the party is steadfastly reinforcing one-man command, regarding it as one of the most important principles of Soviet military development. 83

According to Lenin, firm discipline is fostered on the basis of a correct combination of the method of persuasion and that of coercion through constant exactingness. "Not a single crime against discipline and

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revolutionary combat spirit must remain unpunished. In this connection, he attached great importance to publicity, demanding that each trespasser of discipline should know that the would have to answer for his actions before his commander as well as collectively, that public opinion would severely censure him. However, in all cases, the actions of the superiors must be well founded and just. It should not be forgotten that just punishment educates the fighting man whereas; abuse, rudeness or strong language would merely embitter him.

H. Socialist Legality

Theoretically, military discipline in the Soviet Armed Forces is positioned on the party's concept of 'Socialist legality'. Soviet military law and the general Soviet legal system are in essence and in principle indivisible. Soviet military law is, "organically related to the either structure of the Soviet State." Its function is to protect Soviet society and its governmental system ......... and educate the citizens of the country to a socialist awareness and a communist ethic-Soviet military law and discipline are an integral part of the total system of the Soviet law which has a principle task to direct the activities of the Soviet people in the construction of a communist society.

I. Collective Character

Although the Soviet commander is assigned full responsibility for the status of discipline in his unit, he actually shares this responsibility with the unit itself – "the military kollectiv." The "kollectiv" is a highly organised community of servicemen having the mission of defending the motherland. It is an organism of society, directly related to many other "kollectives" of the State.

Although the Disciplinary Code explicitly outlines significant disciplinary authority for the commander, he is constantly reminded of the collective character of the Soviet Military life and is instructed that he is obliged to make maximum use of the force of public opinion against
violations of military discipline. A commander is cautioned against using extreme measures of coercion but is advised to listen to the voice of the majority.

The Commander, who is usually a party member, is subordinate to the party organisation of the unit in which he serves. He is expected to bring disciplinary problems before the party and seek the party's counsel. The party also exercises its right to participate actively in disciplinary matters by sponsoring meetings for the entire “kollective” or, perhaps, only for the officer cadre in order to agitate publically for good discipline.84

Colonel Fedenko in his article on ‘Soviet Conscious Discipline’ states that the discipline in Soviet Armed forces is based on high political consciousness, whereas, in capitalist countries, it is based on pecuniary incentive, mechanical submission, subordination and the fear of punishment. Discipline there is induced by drilling and instilling blind obedience.

There are many differences observed between the American military judicial system and of other capitalist countries vis-à-vis Soviet military judicial system, especially in matters of command influence, speedy trials, severity of punishments, competence of counsels and many other procedural aspects which shall be dealt with under appropriate chapters.

**MILITARY LAW IN SWEDEN**

Gustavus Adolphus (1594-1632) is best known for his tactical and organisational genius, displayed during the Thirty Years’ War and in other conflicts. An important part of his programme of reform of the Swedish Army was an emphasis on improved discipline, embodied in Articles of War of 1621. Harsh and primitive by today’s standards, the code represented in its time a great improvement over the arbitrary and cruel disciplinary practices which were commonly employed in European countries.

A. Gustavus: Father of Modern Discipline

Gustavus Adolphus is recognised as a brilliant figure in military history, a leader who revolutionised the organisation and tactics of seventeenth century armies as “the true originator of the concept of the combined arms team, which is the basis of all modern tactics”. Less well known is the fact that he played an important role in the evolution of military justice. Gustavus achieved his victories with armies whose members were disciplined strictly but fairly under express codal provisions and procedures, especially those of Swedish Articles of War of 1621. An examination of these Articles and their impact on the evolution of military justice provide insight into our present system, a system under stress as it operates to maintain discipline in a modern volunteer army. Well before his campaigns in Russia, Poland and finally in Germany, Gustavus Adolphus promulgated his Articles of War to maintain order in his armies, armies which were remarkable for good behaviour in the cruellest of wars, thereby earning Gustavus recognition as “the father of modern military discipline.”

B. The Articles of War (1621)

In July 1621, Gustavus Adolphus promulgated his famous Articles of War. The thirty years war was a period of savage excess in warfare. It was also a time for religious fervour, and Gustavus personally and publically supported the latter. In his forces, daily prayer services were held. The preface to the above Articles of War and first sixteen articles dealt specifically with religious requirements and the regulations of Chaplains. The first several articles of Gustavus’ code provided death for dishonour of God by deed or word, or with other punishments falling upon soldiers and ministers alike who missed prayer services. These Articles encouraged discipline by prohibiting plunder, abuse of “Churches” colleges, schools or

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86 George B. Davis, A Treatise on the Military law of the United States, at iv (1906).
hospitals or maltreatment of non combatants. From the moment that Gustavus Adolphus personally promulgated the Articles of War to govern his forces, the internal discipline was and remained very high.

C. Courts Martial

Gustavus Adolphus' Articles of War are cited by legal luminaries 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 martial. Of course, the origins of courts-martial have roots deep in military history. 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 Europeans sovereigns had written codes with forms of courts-martial.

From 1625 to 1628, King Charles I of England sought to bring certain offences under military law and courts-martial otherwise, but was forced to relent under Parliament pressure. During this critical period of conflict between crown and Parliament, Gustavus Adolphus Articles of War were published in London in 1639. Gustavus’ code was to serve as a model for future English military codes, partly because so many British soldiers had served with Gustavus on the continent and were satisfied with the effects of the Articles of War in 1621.

D. The Articles of War (1621) and the Uniform Code of Military Justice (U.S.A.) and the British Articles of War

Gustavus Adolphus’ Articles of War of 1621 are recognised as “a recognisable ancestor of the British Articles of War and the American Uniform Code of Military Justice.” Offences were set out in detail and punishments were specified. Of more significance is that the Articles of War

87 See Winthrop, Supra note 37, at p.907.
90 The Earl Marshal was one of the military officials who presided over the court of chivalry in England, in 1521, it because as the Marshal’s Court. Hence, the origin of the Court Martial, according to one authority. See also Suedecker, "A Brief History of Courts-Martial 9 (1954).
91 See J Bishop, Supra note 94, at p.4.
contain provisions which are critical features of modern military justice. Gustavus' Code addressed offences, which, although not specifically enumerated, were 'repugnant to Military Discipline'.92 Today's Uniform Code of Military Justice contains similar language, wherein, “all disorders and neglects to the prejudice of good order and discipline in the armed forces"93, are punishable by courts-martial. Such a broad general article for punishing otherwise unspecified offences contrary to military discipline was an essential part of the British Articles of War94. It was adopted in the American military codes, surviving constitutional attacks on vagueness. We, in India, too have a similar provision in the Army Act. 95

Although Gustavus code was undoubtedly harsher in terms of punishment (a quarter of the offences being punishable by death) than our present military code, but then it probably, reflected the need of that time. Gustavus' dual system of Courts, “a high court and a lower court” is essentially parallel today to that of our General Court Martial and a District Court Martial (In U.S.A. parlance, a Special Court Martial). In Sweden, they had a court martial, called 'regimental' which used to deal with minor cases.

Gustavus’ Articles of War 1621 ‘inaugurated the history of modern military justice96. They, in effect, formalised recognition of the four moral virtues necessary to an army: order, discipline, obedience and justice.97 Gustavus Adolphus was not only a great soldier, but a true military genius whose Articles of War of 1621 are the foundation upon which is structured military justice system today.

92 Article 116, Code of King Gustavus Adolphus of Sweden (1621) cited in W Winthrop, supra note 37, at p.914.
94 Articles LXIV, Articles of War of James II (1688), cited in W. Winthrop supra note 37, at p.920. See also Charles M Clode, "Administration of Justice under Military and Martial Law 12 (2nd ed 1874)."
95 Clode notes that, in the British Code of 1639 and 1642, "the last clause in each Code was ....... for punishing indefinite crimes for which no special order has been set down.
96 AA. Sec. 63 (Army Act 1950)
97 J. Bishop, supra note 94 at p.5.
98 Barbara W. Tuchman, 'A Distant Mirror 576 (1978)."
MILITARY LAW IN FRANCE

Origin and development

Military justice in France, as in the United States of America and some of the other common law countries, is rooted in antiquity. Although no military codes exist from the times of the Greeks or Romans, many present military offences and punishments have filtered down from those periods without substantial modifications. The history of the early armies of Rome reflects that justice was administered by the magistri militum, especially by the legionary tribunes, either as sole judges or with the assistance of councils. The first European laws were included in the Salic Code, originally promulgated by the Chiefs of the Saliens at the beginning of the fifth century. Later, they were revised and matured by the successive Frankish kings.

In 1347, under his mandate of Mount – Didier Phillip VI protected his men of arms by removing them from the jurisdiction of ordinary tribunals. The first Conseils de Guerre (Councils of War) appeared with the ordinance of 1665, and the first French Code of Military Justice was enacted into law on 4 August 1857. Under the 1857 Code, no civilian magistrate could interfere with the administration of military justice. The public furore which followed the Dreyfus Affair, and severe criticism of certain Conseils de guerre during World War I, led to the law of 1928 concerning only France's land armies. This code represented a first step in bringing military and civilian forums of justice together by placing a civilian magistrate as president of military courts in time of peace. In 1934, the French Air Force

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1 Capt Alfred Dreyfus was arrested in October 1894 for allegedly passing classified information to German officials. The main evidence against him, a letter called the bordereau, was forged by one of his superiors. At a closed court-martial in December 1894, a secret dossier was smuggled to the court which resulted in his conviction and subsequent confinement on Devil's island. Revision proceedings in 1899 reaffirmed his conviction. The proceedings were fraught with deceit, forgery and antisemitism. Dreyfus was finally exonerated in 1906 and restored to duty. See G Paleologue, An intimate journal of the Dreyfus case (1957).
was placed under the jurisdiction of the Code of Justice Militaire pour L'Armée de terre. Thereafter, in 1939, a separate code was enacted for the French Navy.

The promulgation of the new French Code represents more than a mere combination of the separate codes then in effect for the Army and Navy. It was the purpose of the revision to enact legislation applicable to all the three services, adapted to the realities of modern times, resembling common law procedures, yet conserving the specific characteristics of military law. The salient points which can be seen in the latest French military law are that administration of military justice in France approaches, to a great extent, French Civil Criminal procedure. This seems to be lacking two cornerstones of our common law system – trial by jury and the adversary concept. Written evidence is the basis of evidence of French Criminal Procedure, impartial and thorough investigation by the police and juge d'instruction containing process verbaux or written statements, by witnesses and possibly the accused, forms the 'dossier' which is transmitted to the trial judges before the actual trial. The experts, selected from a list maintained by the court for that purpose, may be granted broad powers to examine and investigate, but they may not interrogate the accused. Their opinions may be attacked or reinforced by the appointment of other expert witnesses. With regard to matter of appeal, French law is also fundamentally different. Their concept of an appeal usually consists of a trial de novo as a matter of sight, a second chance given to the loser before judges of a higher grade concerning both the law and facts. Details on the aforesaid new French military code will be dealt under the relevant chapters subsequently.

**MILITARY LAW IN CANADA**

- **Origin and development**

The first military force organised under an Act of the Parliament of Canada was the Militia, which was established under the Militia Act of

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The Act made English military legislation applicable to the Canadian Militia, providing that:

from the time of being called out for actual service, and also during the period of annual drill or training under the provisions of this Act, and also during any drill or parade of his troops at which he may be present in the ranks or as a spectator, and also while wearing the uniform of his Corps.......

Officers of the Militia were subject;

to the Rules and Articles of War and to the Act for punishing mutiny and desertion, and all other laws then applicable to Her Majesty's Troops in Canada, and not inconsistent with this Act.....

Similarly, the Militia Act of 1927, made the Army Act, for the time being in force in Great Britain applicable to the Canadian Militia. The first Naval Service Act, passed when the Royal Canadian Navy was organised in 1910, incorporated by reference the provisions of the Naval Discipline Act of 1940 incorporated the provisions of the Air Force Act (1917) for the time being in force in the United Kingdom.

By 1944, however, it was becoming increasingly difficult to determine the extent of which the Air Force Act and the Rules of Procedure in force in the United Kingdom applied to the Royal Canadian Air Force. A Canadian consolidation of the Manual of Air Force was undertaken in order to indicate the various modifications, adaptations and exception which had been made to the Air Force Act and to the rules of procedure in their application to the Royal Canadian Air Force. Instead of detailing proposed changes in the application of the Naval Discipline Act of the United Kingdom to the Royal Canadian Navy, the Parliament of Canada in 1944 passed a new Naval
Service Act, containing a Canadian Disciplinary Code for the Navy. This Code was used as the basis for drafting many sections of the National Defence Act.

The Army and Air Force remained subject to modified United Kingdom military legislation until after the end of Second World War, when a careful examination of existing legislation was undertaken, culminating in the enactment of the National Defence Act. The war time experience of legal officers using the various Canadian and United Kingdom’s Statutes and Regulations indicated the desirability of making the rights and duties of the members of the Canadian armed forces readily ascertainable by reference to a single Canadian Code.

The examination of legislation which led to the passing of the National Defence Act was undertaken, in part, in response to a work a day need. But in its final form the Act, with its substantially Uniform Code of Service Discipline for the three services, reflected the pressures of a democratic society as well as military requirements.

**MILITARY LAW IN AUSTRALIA**

- **Origin and development**

  The respective Manuals of Military Law and Air Force Law for the Army and Air Force, and in B.R. II in the Navy are called the ‘bibles’ of the Military and Naval lawyers. The relevant Australian Statutes are the Defence Act 1903-1956, (Common-Wealth in short ‘Cth’). Regulations made thereunder also apply. Laws, statutes 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 Australian servicemen but not applied to English servicemen on service in Australia. In manuals, there are the statements of law to be applied but no authority is given and there is uncertainty whether they are the law or

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10 National Defence Act (ibid, S.2(6) provides; “Code of Service Discipline means the provisions of Part IV, V, VII and IX.”
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 unlike the U.S.A. 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, 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 tried 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 a increasing number of matters, Australian law and particularly Australian criminal law, is moving away from the English 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. As the Tribunal's judgements expose the uncertainties and anomalies, we can expect legislation in Australia 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 the existing service system of confirmation, review and petition was made a pre-requisite to an application for leave to appeal.

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MILITARY LAW IN CHINA

- Origin and development

The origin and development of military judicial system in China has been shrouded in mystery. However, it is understood that the Chinese Military Law is being governed by the Regulations relating to such law, which had been promulgated by the Presidential Mandate on March 26, 1951. Subsequently, these Regulations were revised on April 17, 1918 and on August 18, 1921 respectively.

The Chinese military law has been divided into seven chapters, having a total number of fifty-seven Articles. These Articles relate to General provisions, organisation of Military Courts-Martial, Powers of the Military Courts-Martial, Power of Procurators of Military Authorities, Trials, Judgements, New Trial and Supplementary provisions.

Military Courts-Martial are approved to be organised by the Ministry of War or the Highest authority concerned unlike our military judicial system, where convening authorities at different levels of Command structure; for example Army Command, Corps or Division, can convene the highest form of Court-Martial i.e. the General Court Martial.

Depending upon the rank of the accused officer, a particular type of Court-martial is being organised. For instance, for trial of a General or equivalent rank, the Court-Martial by which he would be triable would be ‘High Military Court Martial’, whereas upto the rank of Colonel or their equivalent, such officers would be triable by ‘Military Court-Martial’ only.

Articles 1 to 5.
Articles 6 to 8.
Articles 9 to 16.
Articles 17 to 24.
Articles 25 to 30.
Articles 31 to 44.
New Trial.
Supplementary Provisions.
To perform the duties of prosecution (prosecutor) at the trials, they employ officers and non-commissioned officers of the Military police and personnel from Provincial Army. In case of an ‘escape’ (deserter), judgement can be made and pronounced during his absence.

**DEVELOPMENT OF MILITARY LAW IN THE EARLY EUROPEAN MODELS**

### Roman Model and of Germany

One of the models, out of the European models, with regard to the development of military law, was Sweden, about which we have covered earlier in this chapter. With regard to the Roman model as also in Germany, it was as given in the succeeding paragraphs.

The roots of the military law in general and the Courts-Martial in particular run rather deep. They predate written military codes designed to bring order and discipline to an armed, sometimes barbarous fighting force. Although some form of enforcement of discipline has always been a part of the every military judicial system, for our purposes we would first trace the roots as far back the Roman system, to start with.

In Roman armies, justice was normally dispensed by the magistri militum or by the legionary tribunes, as brought out above, who acted either as sole judges or with the assistance of the councils. The punishable offences included cowardice, mutiny, desertion and doing violence to a superior. While these offences or their permutations have been carried forward to contemporary settings, many of the punishments imposed upon the guilty have long since been abandoned: decimation, denial of sepulture, maiming and exposure to the elements. Other punishments remained, such as dishonourable discharge.

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23 Article 19.
24 Article 34.
25 See Winthrop, supra note 37, at p.17 & 45. Also see G Squibb, “The High Court of Chivalry” (1959).
26 See Winthrop, supra note 37, at p.18.
The Roman model was no doubt employed or observed by the later continental armies and is credited by most commentators as the template for later military code of the Salic chieftains, circa fifth century, contained phrases closely approximately those in the Roman twelve tables. By the ninth century, the Western Goths, Lombards, and Bavarians were also using written military codes.27

The early European Court-Martial took on a variety of forms and usages. Typically, the earlier tribunals operated both in war and in peacetime conditions, the forms occupying the greater part of any army's time. The Germans, in peacetime, conducted their proceedings before a court who was assisted by a assemblages of freeman, and in war before a duke or military chief. Later, courts of regiments, the “regiments” being a mace or staff serving as a symbol of judicial authority, were held by the commander or his delegate. For proceedings involving high-ranking commanders, the king formed courts composed of bishops and nobles.28

In Germany, Courts-Martial, or militargerichts, were formally established by Emperor Fredrick III in 1487, specially provided for in the penal code of Charles V in 1533, and refined still further under Maxmillan II in 157029. In France, although a military code existed as early as 1378, Courts-Martial, conseils de guerre, were not formally instituted by ordonnance until 1655.30

But the contribution of the German systems to the overall development of the court-martial is overshadowed by two contributions, which were very different, and yet very similar: the age of Chivalry and the written military Code of King Gustavus Adolphus.

Of elusive origins, the age of Chivalry is most often linked with the middle ages – those centuries after the fall of Roman Empire and before the Renaissance. Amidst the intense rivalries for land and power and the usual accompanying dishonourable practices, “Chevaliers” vowed to maintain

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27 See Winthrop, supra note 37, at p.18. See also W. Aycock and S. Wurfel, supra note 39, at 0.4.
28 See J Snedekar, supra note 34, at p.7.
29 See Winthrop, supra note 37, at p. 18.
30 Id.
order, and to uphold the values of honour, virtue, loyalty and courage. The position and power of the Chevalier rendered him an arbiter in matters affecting his peers, and also his dependents who held estates under the feudal system. From this informal system arose the more formal court of Chivalry. The Duke of Normandy (William the Conqueror) vested the power and authority of his court of chivalry in his high officials. It was this system of military justice, which he carried to England in the 11th century.\(^3\)

Thus, we see that the growth of military law can be traced to early Roman periods which developed to a great extent in Sweden, through Gustavus’s popular Articles of War of 1621. These Articles of War were the forerunner to the British Articles of War, which, as mentioned above, were operative in India as well during the period when the Britishers were extending their empire through the East India Company. So far as the Indian military law is concerned, we can say that it was the British Articles of War, which laid its foundation.

\(^3\) Aycock and Wurfel, supra note 39, at p.4.