

AN HISTORICAL SUMMARY OF DEVELOPMENT OF DISCIPLINE IN THE ARMED FORCES

PART 1- HISTORICAL INTRODUCTION TO NAVAL DISCIPLINE (TO 1957)

The Laws and Custom of the Sea

Just over 800 years ago, Eleanor of Aquitaine, wife of Henry II of England, promulgated the Laws of Oleron (the 'Code Nautique d'Oleron'). Oleron is off La Rochelle and it was the merchant court of this little island which codified, in simple language, the principles that should govern the relations between the parties concerned in maritime trade – masters, mariners, owners and merchants – and prescribed the action that might properly be taken in various contingencies.

This 'Code Nautique' was derived from the older sea laws of the Mediterranean – well tried and shaped in turn by the Phoenicians, the Rhodians and the Romans – and thereafter formed the basis for universal maritime customs and the traditional discipline of the sea.

Some 200 years after the publication of the Oleron Laws, King Edward III established the Court of Admiralty under Sir John Beauchamp, the First Lord High Admiral, with extensive judicial powers. At the same time, the Inquisition of Queensborough set down 'The Ancient Statutes of the Admiralty to be observed upon the ports and havens, the high seas and beyond the seas'. These statutes were contained in the Black Book of the Admiralty, so-called because of its black leather binding, and derived principally from the Laws of Oleron, becoming generally known as 'The Laws and Custom of the Sea'.

The Court of Admiralty played a large part in the mercantile and maritime life of the nation and, at the height of its power, held exclusive jurisdiction over acts of piracy, prize proceedings and suits brought by private persons relating to freight, mariners' wages, salvage and collisions. Its criminal jurisdiction (over pirates, etc) was transferred to the Central Criminal Court in 1834 and, in 1875, the Court of Admiralty lost its separate identity and was merged in the Probate, Divorce and Admiralty Division of the High Court of Justice. At no time, however, did the Court of Admiralty control Naval policy or administration, which remained the responsibility of the Lord High Admiral or Commissioners executing that office.

It was the 'Laws and Custom of the Sea,' taken from the Laws of Oleron and relating to discipline on board ships, which formed the original body of law for the day-to-day maintenance of order and discipline afloat, and no requirement for a statutory code of law was felt necessary, largely due to there being no standing Navy until the sixteenth century. Before then, fleets were raised as the nation's interest demanded – first from the remarkable men of the Cinque Ports and, later, from private ships, bought up for the occasion and fitted out by the Crown. When the expedition was ready, the commander of the expedition, under the Lord High Admiral's authority, would issue specific instructions to the assembled fleet for the punishment of offences and the maintenance of discipline, limited to the particular service for which the fleet had been assembled.

For subsequent occasions, Commanders would issue the broad instructions that had been made by their predecessors, modifying them as they felt necessary for their particular purpose, and thus developed an informal body of law based on and known as the laws and custom of the sea. There is remarkable similarity between the ordinance of King Richard I in 1190 and the instructions published by the Earl of Essex and Lord Howard of Effingham, Lord High Admiral of England, in 1596 for the expedition preparing for the capture of Cadiz.

The Ordinance of King Richard I 1190

The first record of any instructions for the discipline of the fleet is to be found in King Richard's Ordinance for the Great Crusade. In it, the King appointed certain high-ranking officers to be justiciaries over the combined fleets of England, Normandy, Brittany and Poitou, assembled to carry the troops to the Holy Land, and laid down a number of offences and their punishments. Among these were the following:

For murder	– the murderer was to be tied to the corpse of his victim and hove into the sea, or, if on land, to be buried alive.
For drawing a knife to stab another or for stabbing another	– to lose a hand.
For striking another with his hand	– to be ducked three times.
For defiance of, villifying or swearing at his fellows	– to pay one ounce of silver for each time.
For robbery and theft	– to have boiling pitch poured over his head and a shower of feathers shaken over him to mark him and to be cast ashore at the first point of land.

These stern and repressive measures the crews were sworn to obey. Moreover, it was laid down that the ordinance was to be copied out on parchment and was to be nailed to the foremast of each ship. As, however, in those days the great majority of the rank and file were quite unable to read, it became the custom to read out the ordinance monthly at a muster of the hands. Even today *The Queen's Regulations for the Royal Navy* require the Articles of War to be read out to the ship's company at the first opportunity after commissioning and to be displayed in a prominent position in the ship for the information of the ship's company.

Disciplinary powers were vested only in the Commander and he would delegate them to his Captains, reserving the right to deal with the more serious offences, e.g. mutiny, murder, manslaughter, wounding, fighting, etc. Powers of punishment delegated to Captains were to be exercised in accordance with the laws and custom of the sea and, according to the gravity of the offence. Captains might deal with malefactors as follows:

- Keep them in bilboes (fettters) during pleasure.
- Keep them fasting.
- Duck them at the yardarm.
- Haul them fast to the capstan and whip them there.
- At the capstan or mainmast, hang weights under their neck until their heart and back be ready to break.
- To gag and scrape their tongue for blasphemy and swearing.

A contemporary commentator remarks "This will tame the most rude and savage people in the world" and such severity was accepted as necessary by contemporary thought.

Lord Howard of Effingham's commission to oppose the Great Armada gave him power to make ordinances, to punish offences against them or to pardon them, and to try all capital or criminal charges. These powers were purely personal to the 'Admirall or Generall' and there was no obligation for him to consult anyone or to call a council of war. Councils of war, a gathering of all Captains presided over by the Admiral, undoubtedly were used extensively to assist the Admiral in his judicial functions by investigating offences and advising him.

A well-known use of a council of war for this purpose was when Drake, during his voyage round the world, summoned one on board the *Pelican* to try his cousin Doughty for mutiny, when the Fleet was off the coast of Tierra del Fuego. The council of war was of the opinion that Doughty was guilty and he was subsequently hanged from the yardarm.

The Commonwealth

Under the Commonwealth, a passion for tidiness can be observed as well as a real need to restore and make effective discipline in the Navy. For the first time rules of discipline were laid down and, in 1645, the Commissioners at the Navy Office produced an ordinance and articles concerning martial law for the government of the Navy. The Articles of War had officially arrived.

The 1645 ordinance enjoined trial by council of war and laid down three forms of trial. First, the Commander-in-Chief, assisted by a council of war, could try and punish all offences committed against any and every Article of War and ordinance of the sea, though the approval of the Navy Commissioners was required before inflicting the punishment of death or mutilation.

Second, the Flag Officer of a Division could call to council at least three of his Captains to try all offences arising in his division, but punishments involving the penalties of death, mutilation or the cashiering of a Captain were to be ratified by the Navy Commissioners and sentences of cashiering of Lieutenants and masters had to be approved by the Commander-in-Chief.

Then, third, was the ship's court. The Captain, with the assistance of his Lieutenant, Master, Mate, Clerk of the Cheque (Purser), Gunner, Boatswain and Carpenter – referred to as 'assemblies of upright and sensible judges of every rank and degree' – was empowered to try all offences committed by those on board his ship, but sentences of death, mutilation or the cashiering of any officer had to be referred to superior authority.

These courts, again, were essentially courts of rough but effective justice, concerned only with the maintenance of discipline and harmony in the Fleet, and were most probably a continuance of previous practice, as there are early seventeenth-century references to a "Martial Court" which suggest that trial by jury was the common practice in the Navy. A definite resemblance to present courts-martial, however, occurs in 1653 when the Commander empowered to call councils of war was directed to inflict punishments 'according to the Civil Laws, Law Martial and Customs of the Sea' and to appoint at each trial a Judge Advocate who was authorised to administer an oath to witnesses and became responsible for advising the court on matters of law and for preparing minutes of the proceedings.

The term 'Judge Advocate', with its suggestion of completely opposite functions being performed by the same individual, is today a curious and potentially misleading title. It has been suggested that it might lead an accused to think the Judge Advocate is not only legal adviser to the court but also an advocate for the prosecution as well. Quite clearly, until late in the nineteenth century, it was the dual function of the Judge Advocate at a naval court-martial to act as 'assessor,' i.e. to advise the court on all points of law and practice which might arise, and also, when no prosecutor was appointed, to conduct the proceedings in support of the charge before the court on behalf of the public. A better explanation of the title may lie in the description given

in 1864 by Lord Cranworth on the duties of the Judge Advocate, where he refers to him as 'Judex Advocatus' – a judge called to assist the court though forming no constituent part of it. (Judge Advocates today are civilian lawyers appointed by the Judge Advocate General, are entirely independent of the Royal Navy and perform similar functions to those of judges in the Crown Court.)

The Restoration

These Commonwealth measures laid the foundation for the system of justice as we know it today and it was left to Pepys, then Clerk of the Acts and, as such, the executive Secretary to the Navy Board, with his characteristic industry, to prepare and introduce the First Naval Discipline Act in 1661, just after the Restoration. Statutory approval was now given for the enforcement of discipline in the Navy and for tribunals by which offences were to be tried.

Commissions were granted to Commanders-in-Chief of Fleets and Squadrons to assemble courts-martial consisting of Captains. Judge Advocates were to be appointed to administer the oaths to witnesses, although neither the Court nor the Judge Advocate were sworn to secrecy, nor was there any oath taken by the court to administer justice according to law without partiality, favour or affection. Ships' courts were abolished and summary offences were investigated and punished by the Captain of the ship.

There was no limit placed on the numbers who could sit on a court-martial and the Lord High Admiral or the Commander-in-Chief could appoint any Captain to sit on a court. Pepys himself records his delight at receiving a commission as a Captain in the Navy and his appointment as a member of a court-martial in 1668 into the loss of the *Defiance*. He was however sufficiently alive to evils of such a precedent and forbore to give judgment at the trial. His concern for the public good also made him regret the lack of an oath on members of a court-martial who were only too ready to excuse a fellow Captain's rogueries, however prejudicial they might be to the King and the naval service.

After the relapse of the Lord High Admiral's office into commission in 1673, an interesting point of procedure was raised over the case of the Earl of Torrington, whom King William desired to bring to trial by court-martial following his failure at the Battle of Beachy Head in June 1690. The Earl and his friends campaigned vigorously for his right to trial by his peers, disputing the authority of the Lords Commissioners to bring him to trial by court-martial, and received strong support in the House of Lords. Macaulay commented:

'There was an end of privilege if an earl was doomed to death by tarpaulins seated round a table in the cabin of a ship.'

However, the King was adamant, and a special bill was rushed through Parliament to make doubly certain that the Commissioners had the legal right to bring peers to trial by court-martial. In the event, Torrington was acquitted at the subsequent court-martial, but this did not prevent the King from dismissing him from the Service.

The term 'court-martial' appears for the first time in the Restoration legislation and is a natural successor to the former 'councils of war' of Captains and other officers previously mentioned. The name almost certainly originates from the earliest form of military law applicable to men at arms and was applied to fleets when such fighting men served at sea. The origin of a court to administer military law can be traced to the Curia Regis, the supreme court established by William the Conqueror, which had as part of its judicial body the Court of the Lord High Constable and of the Earl Marshal.

The Lord High Constable, until this office was abolished in the reign of Henry VIII, was Commander-in-Chief of the Army and the Earl Marshal was the Officer of state responsible for mustering the Army. The Court of the Constable and Marshal had criminal jurisdiction, in peacetime, for crimes committed in foreign lands by the King's subjects and, in wartime, over offences committed by the troops. It also had a civil jurisdiction, when it was known (and still exists) as the Court of Chivalry, over matters of honour, coat armour and other distinctions of families, civic bodies, etc.

The practice was instituted of including in the commissions of Commanders-in-Chief clauses authorising them to enact ordinances for the government of the Army under their command and to sit in judgment themselves or to appoint deputies to punish offenders at military tribunals. With the abolition of the post of Lord High Constable, these military tribunals became known as the Courts of the Earl Marshal, and it is from the shortened forms of this title, Courts of the Marshal or the Marshal's Court, that the present term 'court-martial' originated.

The Eighteenth Century

The latter half of this period rings with the names of glorious victories, but also records some infamous courts-martial – the Toulon trials of Mathew and Lestock and those of Byng and Keppel are examples. The principal reason can be laid at the door of the *Fighting Instructions*, the repressive strictures of which destroyed initiative, impaired morale and produced a harvest of painful recriminations from every important engagement.

In 1749, the Naval Discipline Act, which had been several times amended since 1661, was consolidated and, even by naval standards, was a severe code. It has been said, with some truth, that the penalty of death recurred in it as often as the curses in the Commination Service. Of the 36 Articles, 10 prescribed a mandatory sentence of death and 11 specified punishment of 'death or such other punishment as the court shall deem the offender to deserve'.

The trial of Admiral Byng, apart from its intense political flavour and the great popular interest it aroused, drew attention to the harshness of the 1749 Act. Byng was found guilty of negligence under the 12th Article of War – 'mortal article' as Pitt described it – for which death was the only penalty open to the court. Although the court strongly recommended Byng for His Majesty's clemency, he was to be the scapegoat for ministerial ineptitude and dishonesty. He was shot on board the *Monarque* in 1757.

It was not until twenty-two years after his death that the 12th and 13th Articles were amended to read 'death or such other punishment as the nature and degree of the offence shall be found to deserve'.

The numbers appointed to sit on a court-martial were fixed at a maximum of thirteen and a minimum of nine but all post Captains present at the place were to have a right (but not a duty unless so appointed) to assist thereat. In the Toulon courts-martial in 1744, the Commanders-in-Chief, one Rear Admiral and twenty-four Captains sat from September 23rd to November 7th. There was no provision for the accused to object to any member of a court-martial (this was not permitted until the 1866 Act) but no officer personally concerned in the subject matter of the trial was permitted to sit.

Once assembled, a court-martial was not allowed to go ashore until the proceedings were finished, and this rule was not altered until strong representations were made after Keppel's trial in 1779 following the Battle of Ushant, which was fated to be the third naval engagement of the eighteenth century to provoke a popular scandal and a remarkable court-martial. Then the court-martial was confined on board for thirty-six days – a proceeding hardly conducive to good health or clear thinking.

A court-martial then regarded itself as essentially a board of inquiry with drastic powers of punishment. There was no regular form of charge and usually no prosecutor, the Judge Advocate being responsible for examining and taking depositions from witnesses on oath before the trial. At the trial itself, the deposition of a witness was read out and the witness would then be examined by the court and accused. At the Toulon court-martial, on the insistence of the House of Commons, two lawyers were sent by the Admiralty to prosecute, but the court-martial considered that they (the members of the court) alone were the proper persons to obtain the evidence of the witnesses and refused to allow the lawyers to be heard. This was modified as time went on and at later important trials, for example Byng and Keppel, legal officers from the Admiralty did prosecute.

It was not until the sentence was pronounced that the accused knew for certain which Article of War he 'fell under'. This, in a drastic code, had advantages in that, if so inclined, the court could perhaps find that he 'fell under' an Article involving a less degree of penalty.

The finding of the court was combined with the sentence and consisted of a number of resolutions. These were arrived at by a number of questions for decision being suggested, being voted upon and, if accepted, a majority decision on each being taken as a resolution of the court. Having arrived at their resolutions, it behoved the court to find the Article that the accused 'fell under' and to come to a decision on the punishment. In Byng's trial there were 37 resolutions in the finding and the whole cumbersome procedure explains the reason for the court taking six days to come to agreement upon it. In fact it was not until 1879 that it was laid down that offences were to be charged in the very words of the Act – to the great advantage of all concerned.

Naval Discipline Act 1866

The 1866 Act came into being just after the great mid-nineteenth century legal reforms, and brought the system of naval justice closely into line with the procedure of the English criminal law. It remained in force for 91 years, although there were numerous amendments to it passed during this time.

The functions of the Judge Advocate were made more judicial by this Act and he was available to assist either defence or prosecution on points of law. It is, however, interesting that, as late as 1877, he was still required to conduct the proceedings in support of the charge before the court on behalf of the public, but by then it was generally accepted that the duty of prosecuting rested upon the Captain of the accused's ship.

For the first time, the Prisoner's Friend is heard of, though it took some years to remove the qualifications that he must be approved by the court, that if serving he must be junior to the President and that he could only address the court by permission of the President.

Summary trials were still in the hands of the Captain, whose maximum punishment was ninety days imprisonment. Then, as they still are, the Captain's powers of punishment were controlled by stringent regulations, the more serious punishments requiring the sanction of the Admiralty, Commander-in-Chief or Flag Officer depending on the circumstances. The Captain was given no power of punishment over Commissioned or Warrant officers.

The following were some of the more important changes made during the period that this Act was in force.

In 1871, flogging was suspended as a naval punishment in peacetime and, in 1897, it was suspended as a wartime punishment. It was not formally removed from the list of punishments

until 1948, when corporal punishment for civil criminal offences was abolished by the Criminal Justice Act 1948.

In 1909, the punishment of detention was introduced for ratings, though it was not until 1911, when suitable detention quarters had been built, that this punishment became effective. The object of introducing this punishment was to prevent some ratings convicted of offences against the Naval Discipline Act being subjected to the stigma attaching to imprisonment. In this punishment, the Navy followed Army practice, where detention had been tried out some years previously and found to be satisfactory.

In 1914, disciplinary courts were introduced for the trial of officers, for certain relatively minor offences committed in wartime only. The President was to be a Commander, with two other officers as members and the original instruction was that one of the members was to be of the same rank as the accused. These courts follow a modified court-martial procedure.

In 1915, striking a superior officer became no longer a capital offence, and could therefore be tried summarily; in 1917, suspended sentences could be awarded.

Pilcher Committee 1950

After the 1939-45 war had ended, there was some criticism in the Press and elsewhere as a result of some aspects of courts-martial in the Army and Royal Air Force. A committee, under Mr. Justice Lewis, was appointed by the Government in 1946 to inquire into the Army and RAF systems of justice. After this committee's report had been tabled in the House of Commons a committee under Mr. Justice Pilcher was appointed in 1950 to report on the administration of justice in the Royal Navy.

This latter committee sat for just over a year and produced two balanced and generally favourable reports on the naval system. The committee was quite ruthless in its exposure of such dead wood as remained since Pepys's first Act and recommended the pruning of some cumbersome features of the disciplinary procedure, to bring Naval discipline and summary practice into closer conformity with that existing in the courts ashore. In particular, the functions and responsibilities of the Judge Advocate were enhanced and made more similar to those of a judge in an English criminal court – up to the retirement of the court to consider its finding.

The following extract from the Committee's report perhaps sums up their findings on courts-martial fairly:

- A naval court-martial is attended by considerable ceremonial and enjoys a high degree of prestige amongst officers and ratings in the Royal Navy. It is regarded by the Navy as essentially a naval court, and it is right that we should say that we have heard little evidence of any dissatisfaction in the Royal Navy with the present system of administration of justice by court-martial.
- We are satisfied that under modern conditions discipline can only be satisfactorily maintained if it is and is known to be firmly based upon justice. All the evidence before us goes to show that members of naval courts-martial take a serious view of their responsibilities.

The Courts-Martial Appeal Court

As a result of both the Lewis and Pilcher Committees' recommendations, the Courts-Martial Appeal Court was established in 1951, with in effect the same composition and following the

same broad rules as the Court of Criminal Appeal, now the Court of Appeal (Criminal Division). The rules for an appeal required a petition against conviction or sentence to have been submitted to the Defence Council (in practice, the Admiralty Board advised by the Judge Advocate of the Fleet) within a prescribed period, setting out the grounds of appeal. If the Defence Council refused this petition or did not deal with it within a prescribed period, application for leave to appeal could then be made to the Courts-Martial Appeal Court within a certain time limit.

Appeals by servicemen to the Courts-Martial Appeal Court lay against conviction only until the Armed Forces Act 1996 came into effect. Thereafter, persons convicted by naval courts-martial could appeal against both conviction and sentence to the Courts-Martial Appeal Court. With leave of the Court or of the House of Lords, an appellant or the Defence Council was able to appeal to the House of Lords against an unfavourable decision of the Courts-Martial Appeal Court. The Courts-Martial Appeal Court or the House of Lords also had the power to order a new trial by court-martial on the same charges when it appeared that the interests of justice so required.

Review by the Admiralty Board and Judge Advocate of the Fleet

When an accused person petitioned the Admiralty Board (acting on behalf of the Defence Council) against any finding or sentence, a delegated officer reviewed the trial and made a determination of the petition, based on the advice of the Judge Advocate of the Fleet. The latter was a civilian barrister of standing (usually a circuit judge) appointed by the Sovereign on the Lord Chancellor's recommendation, and was the Admiralty Board's adviser on the legal aspects of all matters connected with discipline.

Whether or not an accused person formally petitioned the Admiralty Board, the transcripts of all contested trials by naval court-martial (or any uncontested cases when any point of law arises) were automatically sent to the Judge Advocate of the Fleet, who reviewed the legality and conduct of the proceedings. This automatic review was historically viewed as an important feature of the Naval procedure for administering justice and an advantage that no defendant possessed in the ordinary criminal courts.

The Naval Discipline Act 1957

Between 1952 and 1954, a long and thorough examination of the Army and Air Force Disciplinary Acts by a Parliamentary Select Committee culminated in the Army Act 1955 and the Air Force Act 1955. In 1956, a Select Committee was also appointed to consider the Naval Discipline Act and the Committee, at the outset of their deliberations, decided that their Bill should, whenever appropriate, keep as closely as possible to the wording of the Army and Air Force Acts.

However, when the Committee considered the draft Bill submitted to it and studied conditions of life and service in the Navy, it came to the conclusion that considerable differences were required. Outdated offences were removed, the language was modernised and, where conditions in the services were similar (e.g. billeting offences), the wording was approximated to that of the Army and Air Force Acts, but considerable differences were retained. It is worth recording that the new Act retained its original preamble, although in the slightly different form of... 'Her Majesty's Navy, whereon, under the good Providence of God, the wealth, safety and strength of the Kingdom so much depend' – an historical fact of life sometimes overlooked in any prolonged period of peace.

Of the many alterations, some of the more important changes were:

- Naval jurisdiction to try ordinary offences on shore in the United Kingdom.
- The composition of Naval courts-martial widened to include non-Seaman officers.
- The offences of desertion, drunkenness and mutiny redefined to have a common inter-Service wording, and a number of other military offences adopted from the Army Act.
- Civil courts debarred from trying a man for substantially the same offence if he had already been tried by a naval tribunal.

The overall structure of Naval discipline was in broad outlines very similar to those of the other two Services, but with some important differences. Among these were significantly greater powers of punishment (including the power to dismiss from the service) and (in theory at least) a much wider jurisdiction for the commander of a ship.

PART 2 - HISTORICAL INTRODUCTION TO MILITARY DISCIPLINE (TO 1955)

In the Middle Ages, the idea of a standing army was viewed with repugnance and it was not until the Revolution of 1688 that Parliament legalized a standing army. Before that time, every able-bodied adult male was potentially a soldier, liable to service either by virtue of feudal obligation or simply as the King's subject. By virtue of the Royal Prerogative the Sovereign of England commanded all military forces of the nation. This gave the Sovereign power to regulate and discipline the Army.

Rules and Ordinances of War

Rules and Ordinances of War, which later became known as Articles of War, were issued under prerogative powers by the King at the start of every war or campaign. These Articles of War were used to govern troops on active service from the time of the conquest and were not superseded until early in the nineteenth century. The Articles were severe, sanctioning death or loss of limb for almost every crime. The Rules, or Articles were the basis of a code of military law.

The Ordinance or Articles of War issued by Charles II in 1672 formed the ground work of the Articles of War issued in 1878 which were consolidated with the Mutiny Act in the Army Discipline and Regulation Act of 1879 which was in turn replaced by the Army Act of 1881.

Court of Constable and Marshal

Military courts originated from the Court of Constable and Marshal, which formed part of the *Curia Regis* or Supreme Court established in England by William the Conqueror. This was a Court in a double sense; first, in the sense of being composed of the great officers of State, and secondly, in the sense of being a judicial body. The commander-in-chief of the army was the Constable or *Comes Stabuli* or Master of the Horse and he had allotted to him the army and all persons and matters connected therewith, while he and the Marshal together constituted the Court which exercised both civil and criminal jurisdiction.

The court's civil jurisdiction (Court of Chivalry) was that of a court of honour, and consisted in redressing injuries of honour and correcting encroachments on coat armour, precedence and other distinctions of families.

The criminal jurisdiction of the court (Court of the Constable), was confined to the punishment of murder and other civil crimes committed by Englishmen in foreign lands, except in time of war. In time of war, its jurisdiction was extended and the court followed the march of the army and punished summarily (and in accordance with the Articles of War in force at the time) all offences committed by the troops.

From time to time the court had to be constituted at different places at the same time, for example where there were operations in different countries. During those periods several constables and marshals held office and exercised jurisdiction at the same time.

The administration of military law was provided for by commissions from the Crown, or by clauses inserted in the commissions of the commanders-in-chief authorising them to enact ordinances for the government of the army under their command and to sit in judgment themselves or appoint deputies. The deputies consisted of officers, from whom came a new form of military tribunal, known as a court or council of war, which sat at stated times under an officer of a certain rank who was called the President.

The transition to the courts-martial

The transition from a council of war to courts-martial in the present form was a matter more of name than of substance. The date on which courts-martial began to be known as such is not clear but they are mentioned with the distinction of 'general' and 'regimental' courts-martial in the 'Regulations for the Musters', 5 May 1663, and in the Articles of War in 1673 by the Commander-in-Chief, under the authority of Charles II. There were differences between the earlier courts-martial and the statutory court-martial: in the earlier courts the general or governor of the garrison who convened the court ordinarily sat as president; the power of the court was absolute; and sentences were carried into execution without confirmation.

The Mutiny Acts

On 1st March 1689, following a message from William and Mary suggesting the suspension of Habeas Corpus, there was a debate in the House of Commons regarding the proper regulation of the Army. On 13th March leave was given to bring in a bill to punish mutineers and deserters from the army and a committee was appointed to prepare it. Almost at the same time 800 men enlisted by James II, having been ordered by William to embark for Holland, mutinied at Ipswich, declaring that James was their king and that they would live and die by him. This was reported to both Houses on 15th March, which may have facilitated the passing of the bill which was introduced into the House of Commons on 18th March; it passed through all its stages by 28th March, was passed by the House of Lords on the same day and received the Royal Assent on 3rd April. This passed into law as the first Mutiny Act (1 Will. & Mary, Ch. 5), and was prefaced by a preamble which stated that: (a) The raising or keeping a standing army within the United Kingdom in time of peace, unless it be with the consent of Parliament, is against law and (b) No man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm, by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of this realm.

Mutiny and desertion were punishable by death or such other punishment as awarded when committed by persons in Their Majesties' service in the army. Power was given to Their Majesties or the general of their army to grant commissions for summoning courts-martial for

punishing such offences and it was further provided that the Act should not exempt any officer or soldier from the ordinary process of law.

Successive Mutiny Acts, with the exception of certain short intervals, were passed annually from the 1690 until 1878. The first period lasted till 1712. During this period the Mutiny Acts did not extend to the dominions of the Crown abroad, and the principal offences punishable under them were mutiny and desertion; the nation was at war during almost the whole period and the main body of the army was on active service and was governed by Articles of War issued by the Crown in pursuance of the prerogative so there was no difficulty with the narrow extent of the Act.

From 1698 to 1702 the nation was at peace and the Mutiny Act was allowed to drop. The greater part of the army was disbanded at the same time and, though the King was allowed to maintain 7,000 troops in England and 12,000 in Ireland, no special powers were conferred upon him for their government.

On the renewal of hostilities in 1702 the Mutiny Act was revived and extended in the next year with clauses added for the better enforcement of discipline abroad, providing that certain offences committed abroad should be triable in England as treason or felony. These clauses, however, were accompanied by a proviso saving the power of the Crown to make Articles of War and constitute courts-martial and inflict penalties by sentence or judgement of the same beyond the seas in time of war, and by a clause empowering the Crown to grant commissions for holding courts-martial within the realm, by which persons committing crimes out of the realm against the Articles of War, and not tried by courts-martial before their return, might be tried and punished according to the Articles of War.

Peace of Utrecht

On the conclusion of the Peace of Utrecht in 1712, the Mutiny Act expired and was replaced by an Act 'for better regulating the forces to be maintained in Her Majesty's service' by which mutiny, desertion and certain other offences were made punishable by such punishments as a courts-martial should adjudge, not extending to life or limb. At the same time, power was given to inflict corporal punishment not extending to life or limb on soldiers for immoralities, misbehaviour or neglect of duty. A statutory power was given to the Crown to make Articles of War and constitute courts-martial in any of Her Majesty's dominions beyond the seas, or elsewhere beyond the seas, 'in such manner as might have been done by Her Majesty's authority beyond the seas in time of war'.

During the rebellion of 1715, difficulties arose in maintaining discipline among the troops serving in the kingdom. Troops serving in the dominions of the Crown could be dealt with under statutory Articles of War, which could impose death for the most serious military offences but the troops in the kingdom were under the existing Mutiny Act. It was insufficient to maintain discipline. Accordingly an Act was passed in 1715 re-imposing the punishment of death for mutiny, desertion and the offence of fraudulent enlistment as it was known in the Army Act of 1881 (which no longer exists), in Great Britain and Ireland, and conferring on the Crown statutory power to make 'Articles for the better government of His Majesty's forces, and inflicting penalties to be proceeded upon to sentence or judgement in courts-martial to be constituted pursuant to this Act'.

Subsequently the two powers of making Articles of War for the troops in the Kingdom of Great Britain and Ireland and for those in the other dominions of the Crown were combined and in the Act of 1718 received the form which was retained until 1803. The Act of 1718 conferred on the Crown a power to make Articles of War and constitute courts-martial with

power to try offences under such Articles and inflict penalties by judgement of the same 'as well within the kingdoms of Great Britain and Ireland, as in any of His Majesty's dominions beyond the seas'. The Articles of War made under the Act of 1712 and subsequent Acts, not being limited to time of war, applied to the troops also in time of peace.

At about the same time the provisions of the Mutiny Act, which enacted death or corporal punishment for mutiny, desertion and other specified offences and which had previously been restricted to offences committed in Great Britain or Ireland, were extended to some of those offences if committed in His Majesty's dominions abroad and to others wherever committed; and the Act and statutory power were subsequently re-enacted annually in this form, without material alteration, until 1802. In 1781 the provisions of the Act enacting punishments for certain offences were extended to the specified offences wherever committed; but the power to constitute courts-martial was still restricted to the United Kingdom and the dominions overseas.

The Crown gradually acquired a complete statutory power for the government of the army in time of peace, whether at home or in the colonies by the Mutiny Act and the Articles of War made under the Act. This existed alongside the prerogative power of governing troops in foreign countries during a time of war by the Articles of War made under the prerogative. In *Barwis v Keppel* (1766) 2 Wilson's Reports 314 it was held that neither the Mutiny Act nor the Articles of War made under the Act applied to the Army when engaged in war abroad.

In 1803, the change was made of extending the Mutiny Act and the statutory Articles of War to the Army whether in the dominions of the Crown or outside of them. This alteration was made on the occasion of the Peace of Amiens in order to provide for the government of the troops engaged in the war then concluded who had not yet been brought home, and who could no longer be governed by prerogative Articles.

On the resumption of hostilities, the Act and statutory articles might have been restricted in their operation to the dominions of the Crown, and the troops engaged in foreign war might have been left to be governed as before by prerogative Articles. However, statutory Articles were applied in 1813 to the troops outside as well as to those within the dominions of the Crown. The prerogative power of making Articles of War in time of war was finally superseded by a statutory power. The law as then settled continued, and the Army both in peace and war was governed by the Mutiny Act and statutory Articles until the year 1879.

The Army Discipline and Regulation Act 1879 brought together the military code which had previously been contained within both an Act of Parliament and Articles of War. This was then repealed and re-enacted two years later with some amendment in the Army Act 1881.

The Army (Annual) Act brought into existence in 1881 afforded the opportunity of amending the Army Act every year. Since 1917 it was called the Army and Air Force (Annual) Act.

As mentioned in Part 1 of this summary the Courts-Martial Appeal Court was established in 1951 and a right of appeal against conviction created.

There was a distinct change with the bringing into force of the Army Act 1955, which came into operation on 1 January 1957. Although the Act was due to expire a year after coming into force, it included power for the first time for annual renewal (for a period total period not exceeding five years) by Orders in Council approved by both Houses of Parliament. By means of these provisions, and equivalent provision in subsequent Armed Forces Acts, the Army Act 1955 remained in force by annual Orders in Council and five yearly Armed Forces Acts until 2009. The 1955 Act made provision (though on a basis similar to earlier legislation) for structures which continued broadly in force until the Armed Forces Act 2006, including

district and general courts-martial and summary powers of investigation and dealing by commanding officers.

PART 3 - HISTORICAL INTRODUCTION TO AIR FORCE DISCIPLINE (TO 1955)

The Royal Air Force came into being as an independent Service on 1 April 1918. In tracing its origins, mention should be made of the Balloon School established by the Army at Chatham in 1879 to instruct Royal Engineers in Aeronautics. In 1911, that School was superseded by the Air Battalion of the Royal Engineers 'with a view to meeting Army requirements, consequent on recent developments in aerial science'.¹ In the following year, the Air Battalion was itself superseded by the Royal Flying Corps, the purpose of which was to provide a nucleus of 'efficient flying men' for both the Royal Navy and British Army. It therefore comprised a single force divided into 2 sections, a Military Wing and a Naval Wing. At this stage, aircraft were regarded as purely ancillary to military and naval operations. That was a perception which was to be radically affected by experience during World War One. Reports to a committee established by the Cabinet to examine the general organisation of the Air Services and Air Operations and prepared by Lt Gen J C Smuts proved crucial to the subsequent formation of the Royal Air Force. In August 1917, the War Cabinet accepted General Smuts' recommendation for the creation 'as soon as possible' of an Air Ministry under a minister and a Board on the lines of the Army Council or the Admiralty Board, together with an Air Staff on the lines of the Imperial General staff. He also recommended that the Royal Naval Air Service and the Royal Flying Corps should be absorbed into a new independent Air Service and that arrangements should be put in place for 'the legal constitution and discipline of the new Air Service'. These recommendations were accepted by the War Cabinet and a Bill was prepared which became the Air Force (Constitution) Act receiving the Royal Assent on 29 November 1917.

This Act did not bring the Royal Air Force into being, but empowered the Sovereign to do so. An Order in Council of 17 December 1917 determined the composition and duties of the Air Council. A second Order in Council of 2 January 1918 fixed the date, 3 January 1918, on which the Air Council was to come into being. On 7 March 1918, King George V proclaimed, under the authority of the Air Force (Constitution) Act, his 'will and pleasure' that the Air Force to be established pursuant to the said Act shall be styled the 'Royal Air Force'.² On 1 April 1918, the Royal Flying Corps and the Royal Naval Air Service ceased to exist and were absorbed into the new Service. Thus, in 1918, Britain created the world's first truly independent Air Force.

The purpose of the 1917 Act was 'to make provision for the establishment, administration, and discipline of an Air Force, the establishment of an Air Council and for purposes connected therewith. Section 1 of the Act authorised the raising of the force and provided that Parliament would from time to time provide for its membership. Section 2 of the Act provided for 'His Majesty, by Order signified under the hand of a Secretary of State, to make orders with respect to the Government, discipline, pay, allowances, and pensions of the Air Force....' Section 2(3) of the Act gave the statutory authority for the making of more detailed regulations which came to be known as Queen's Regulations for the Royal Air Force.

It became necessary to make more detailed statutory arrangements for the new force and so, in 1920, the Air Force Act was enacted. This statute provided for crimes committed by those in air-force service, for the punishment of those crimes and dealt with matters of arrest

¹ Army Orders, 28 Feb 1911.

² London Gazette, 15 March 1918, Page 3322.

and with the associated procedures. The Act also addressed the enlistment of personnel to the force, billeting and impressment of carriages. The statute also included supplementary arrangements dealing with pay, exemptions, jurisdiction, summary proceedings and other matters. In this way the Air Force Act became the core of air-force law.

A clause in the Bill of Rights of 1688 states:

‘That the raising or keeping of a Standing Army within the Kingdom in time of peace, unless it be with the Consent of Parliament, is against Law’.

As mentioned in Part 2 of this summary, this declaration was repeated annually in the preamble to the Army and Air-Force (Annual) Act, which from 1920, legalised the existence of a regular Air Force in peacetime. Although this legislative arrangement was modified by legislation in 1955 which restricted arrangements of the sort required by the Clause, the fundamental Bill of Rights requirement continued to apply to the Royal Air Force.

Air-force law very closely reflected the structures of Army discipline and, as for the Royal Navy and the Army, the Courts-Martial Appeal Court was established in 1951 and a right of appeal against conviction created for air-force personnel.

In 1955, both the Army and Air Force Acts were replaced with new statutes in which the preceding legislation was considerably re-written and brought up to date. The Air Force Act 1955, as it is known, covered broadly similar subjects to the Air Force Act of 1920 but was no longer made dependent upon the passage of the Annual Act. As for the Army Act, the Air Force Act was due to expire a year after coming into force, but included power for the first time for annual renewal (for a period total period not exceeding five years) by Orders in Council approved by both Houses of Parliament. This, and subsequent equivalent provision in subsequent Armed Forces Acts, has ensured the continuation of Parliamentary control over the raising and maintenance of the Royal Air Force.

These new Army and Air Force Acts of 1955 made necessary the passage of certain further transitional enactments as well as the repeal or modification of some other Acts relating to the Armed Forces of the Crown. These requirements were met by a third Act, known as the Revision of the Army and Air Force Acts (Transitional Provisions) Act 1955. The latter Act also provided that the old Army and Air Force Acts should be kept in force until, but not beyond, the end of 1956. Among the Acts which it repealed were the Annual Acts continuing the Army Act or the Army and the Air Force Acts which had been passed between 1882 and 1954.

Reserve air forces

Sir Hugh Trenchard planned in 1919 for a comparatively small initial regular force which, in the first instance, was to be backed by a small reserve. The latter consisted mainly of officers who had served in the War and been demobilised but a much larger reserve was planned on a territorial basis. Thereafter, in 1924, the Auxiliary Air-Force was created by the Auxiliary Air Force and Air Force Reserve Act and by an Order in Council.³

The original statutory authority for the raising of the Air Force Reserve was to be found in the Air Force (Constitution) Act 1917, section 6(1) which was repealed and replaced by section 1 of the Air Force (Reserve) Act 1950. That provision was in turn repealed by section 157(1) of the Reserve Forces Act 1980. Section 8 of the 1980 Act provided in similar terms for the

³ Auxiliary Air-Force Order 9 October 1924. The Auxiliary Air Force was reconstituted at the end of the Second World War (see Air Ministry Order A758/1945) and the prefix ‘Royal’ was authorised by the Sovereign in 1947.

raising of the Air Force Reserve and the Royal Auxiliary Air Force and that the number of personnel belonging to these forces shall be as determined by Parliament.⁴

These parts of the 1980 Act were repealed by Section 131(2) of the Reserve Forces Act 1996. Section 1 of the 1996 Act provides for the maintenance of the Reserve Forces consisting, in the air-force context, of the Air Force Reserve and the Royal Auxiliary Air Force.

PART 4 - DEVELOPMENTS SINCE THE ACTS OF 1955 AND 1957

The Army and Air Force Act 1961

The 1961 Act maintained the requirements included in the Army and Air Force Acts 1955 for annual renewal by Order in Council (approved by Parliament) and five-yearly renewal by Act of Parliament. The main substantive provisions of the 1961 Act were about enlistment and discharge.

The Armed Forces Act 1966

The Armed Forces Act 1966 continued and amended the Army Act 1955 and the Air Force Act 1955 and also amended for the first time the Naval Discipline Act 1957. The constitutional considerations which required annual renewal of legislation for the Army did not apply to the Royal Navy. The House of Commons Select Committee recommended however that it should in future be reviewed at the same time as the Army Act 1955 and the Air Force Act 1955 as a move "towards harmonisation on the enlistment, disciplinary and conditions of service codes of the three Services". They also recommended "that the Ministry of Defence, with the aim of standardisation, should consider over the next five years what practical advantages and disadvantages stem from the difference in status between the 1955 and the 1957 Acts".

The main changes made by the Act also included bringing the Armed Forces closer into line in their provisions for engagement and discharge and providing for terms of service drafted by the Defence Council to be laid before parliament in draft. The Act made no major changes to the Armed Forces' disciplinary systems.

The Courts-Martial (Appeals) Act 1968

The Courts-Martial (Appeals) Act 1968 consolidated the Courts-Martial (Appeals) Act 1951 and the enactments amending it.

The Armed Forces Act 1971

Following the recommendation of the 1966 Select Committee, the Armed Forces Act 1971 provided for the Naval Discipline Act 1957 to be subject to the same requirements as the 1955 Acts for annual renewal by an Order in Council approved by Parliament and renewal by Act of Parliament every five years.

⁴ Sections 8 and 9 of the Reserve Forces Act 1980 (Repealed).

Following the same committee's recommendation for harmonisation, the 1971 Act completely replaced the disciplinary offences under the 1955 Acts and the 1957 Act with unified and revised offences and related maximum punishments common to the three Services. The Act also introduced harmonised provision for courts-martial to award detention for up to two years. For civilians tried by court-martial a right of appeal against sentence to the Courts-Martial (Appeal) Court was introduced. However the major procedural differences in the administration of service discipline between the Royal Navy on the one hand and the Army and Royal Air Force on the other remained, particularly with regard to the greater summary powers and wider jurisdiction of naval commanding officers.

A significant clarification to powers of prosecution was the inclusion of specific provision that a requirement in any Act for the fiat or consent of the Attorney General or the Director of Public Prosecutions did not apply to Service prosecutions.

The Armed Forces Act 1976

The Armed Forces Act 1976 established the Standing Civilian Courts for the trial, outside the United Kingdom, of civilians subject to Part 2 of the Army Act 1955 or the Air Force Act 1955 or to Parts 1 and 2 of the Naval Discipline Act 1957. It also increased the general maximum period of detention that could be awarded by a commanding officer of the Army or RAF from 28 to 60 days.

The Armed Forces Act 1981

The Armed Forces Act 1981 made no major changes to the Armed Forces' disciplinary systems. It included a provision limiting maximum sentences for offenders under age 21 and abolished the death penalty under section 93 of the Naval Discipline Act 1957 for spying, leaving only five disciplinary offences for which the sentence of death could be awarded. All of these, except mutiny and incitement to mutiny, had to be committed with "intent to assist the enemy".

The Police and Criminal Evidence Act 1984

The important changes to the investigation of offences by civilian police forces also affected the Service police, which had operated almost entirely under undefined powers derived from powers of command. Section 113 of the Act provided for provisions of Part 5 of the Act governing investigations, for example the searching of detained persons, fingerprinting and access to legal advice, to be applied by subordinate legislation to investigations under the Service Discipline Acts. It also provided for codes of practice governing the Service police, which were also introduced by subordinate legislation.

The Criminal Justice Act 1988

This Act continued a trend towards the application of civilian criminal justice provisions to the Armed Forces, applying directly to Service courts a number of new provisions on evidence.

The Armed Forces Act 1991

The Armed Forces Act 1991 included further provision on juvenile offenders, derived from civilian provisions and provision for compensation for miscarriages of justice before courts-martial.

Findlay

The case of *Findlay v. UK* (judgment of 25 February 1997) had a major effect on courts-martial. The European Court of Human Rights held that a court-martial was not “independent and impartial” as required by Article 6 of the Convention. The court was mainly concerned about the conflicting roles of the ‘convening officer’. The convening officer had a key prosecuting role, but at the same time appointed the members of the court-martial who were subordinate in rank to him and fell within his chain of command. He also had the power to dissolve the court-martial before or during the trial and acted as ‘confirming officer’ after the trial, so that a court-martial’s conviction and sentence were not effective until confirmed by that officer. The judge advocate’s role, even on points of law, was only advisory.

The Armed Forces Act 1996

Subsequent to Findlay’s complaint to the European Commission of Human Rights, but before the judgment of the European Court of Human Rights in his case, the Armed Forces Act 1996 made fundamental reforms to court-martial proceedings.

Under the 1996 Act, the role of the convening officer was abolished. Instead three different authorities were created: the ‘higher authorities’, the prosecuting authority and, the court administration officers. The higher authority (an officer senior to the commanding officer) decided whether any case referred to him by the accused’s commanding officer should be dealt with summarily, referred to the new prosecuting authority, or dropped. On any case referred to him, the prosecuting authority decided whether to continue the proceedings and if so, what the charge was to be. The prosecuting authority was solely responsible for conducting the prosecution. Court Administration Officers for each Service were independent of both the higher and the prosecuting authorities. They were responsible for making the arrangements for courts-martial, including the selection of its lay members. Officers under the command of the higher authority could not be selected as members of the court-martial. Each court-martial would include a judge advocate as a member. His advice on points of law became rulings binding on the court and he had a vote on sentence (but not on conviction). The casting vote, if needed, rested with the president of the court-martial, who gave reasons for the sentence in open court. Confirmation of conviction and sentence was abolished. Review of convictions and sentence was not abolished. A right of appeal against sentence to the Courts-Martial Appeal Court was added to the existing right of appeal against conviction.

The Act was very wide-ranging and included changes in many aspects of the Service Discipline Acts. They included further changes relating to evidence and Service police powers (again in line with civilian legislation) but also, for example, to the redress of complaints regime, creating essentially a single regime for all ranks.

The Act left the right to elect court-martial trial slightly different between the Royal Navy and the other two Services. In the Royal Navy the right to elect was offered immediately before summary trial, but only if the commanding officer considered that, if the charge were proved, he would award certain punishments. Under the Army and RAF rules, in any case in which a commanding officer decided that the charge had been proved; he had then to offer the accused a right to elect court-martial trial.

The Human Rights Act 1998 and the Armed Forces Discipline Act 2000

The Human Rights Act 1998, creating powers for the direct application by UK courts of rights under the European Convention on Human Rights, came into force in 2000. Beforehand there was an extensive review of aspects of the Services' disciplinary systems with a view to ensuring compliance, especially with Articles 5 and 6 of the Convention.

The result was a number of changes made by the Armed Forces Discipline Act 2000. The Act introduced a time-based regime for pre and post-charge custody, closely based on the civilian provisions and involving regular reviews and the application of strict criteria before custody could be authorised. It required the authorisation by a judicial officer for extended periods of pre and post-charge custody.

In relation to summary proceedings before a commanding officer or appropriate superior authority, the right to elect court-martial trial in the army and RAF was amended, so that in all cases the right to elect was offered immediately before the charge was to be dealt with. The Royal Navy provision remained restricted, depending on the seriousness of the sentence which the commanding officer had in mind. For all the Services the powers of punishment of the court-martial on an election were limited to those which could have been awarded summarily.

The 2000 Act also provided for the Summary Appeal Court for each Service to hear appeals against summary finding or punishment. In order to meet the requirement for a compliant first instance hearing, an appeal to the new court was by way of a complete re-hearing. The court could not impose a punishment which, in its opinion, was more severe than that originally imposed.

The Armed Forces Act 2001

The Act extended the process of defining the powers of the Service police. For the first time these were defined in relation to stopping and searching persons subject to Service jurisdiction, and in relation to powers of entry, search and seizure in investigating offences under the Service Discipline Acts. The new regime was closely based on civilian police powers, but limited, broadly speaking, to defined Service living accommodation. Special provision was also made for commanding officers to act in an emergency. Among other changes in the Act, provision was made for warrant officers to sit on courts-martial in certain circumstances and new powers to test for drugs or alcohol after a serious incident were created. The Act also recognised the difficulties arising from the amount and frequency of legislation on civilian criminal investigations, proceedings and sentencing; in response it included power for provision equivalent to criminal justice enactments to be made for the Services by subordinate legislation.

Morris and subsequent ECHR cases

In *Morris v. UK* (no. 38784/97, ECHR 2002-I) the European Court of Human Rights found that the 1996 Act had gone a long way towards remedying the non-compliance found in *Findlay*. The Court further found that the independence of the court-martial was not undermined by the manner of appointment of its members. However, and while considering the Permanent President to be a "significant guarantee of independence" and the presence of the judge advocate to be an "important guarantee", these and other safeguards (rules on eligibility for selection and the oath taken by members) were considered insufficient by the Court to exclude the risk of outside pressure being brought to bear on the ordinary officer

members. Moreover the court decided that the review power amounted to an interference with the finality of the judicial process, and so infringed Article 6.

Subsequently the Grand Chamber of the European Court of Human Rights considered the working of the review provisions in more detail in the case of *Cooper v United Kingdom* (no. 48843/99, ECHR 2003). They also considered again the other issues that had been addressed in *Morris*, including whether there were sufficient safeguards against improper interference with the lay members of the court-martial. The court had the benefit of a very detailed examination of the system by the House of Lords in the case of *R. v. Boyd and Others* (House of Lords 18 July 2002). This time the Strasbourg Court accepted that the system was not in breach of Article 6. In addition to the roles of the independent, civilian judge advocate and of the Permanent President, the Court referred to the prohibition on reporting on lay members' judicial decision-making and the briefing notes distributed to them. The Court also decided that review did not render the trial non-compliant, because any decision made by the reviewing authority was itself subject to the right of appeal to the Courts-Martial Appeal Court.

But the Strasbourg Court remained concerned about review, because it involved interference with the judicial process and perhaps also because the power to reduce sentence involved a partly subjective decision of what amounted to a lower sentence.

In addition to this concern, there was a growing recognition that it was questionable as to how an officer who has not been present at the trial and has not gone through any formal procedure can properly decide whether to overturn a conviction or to substitute another sentence. As a result, one of the changes made by the Armed Forces Act 2006 is the abolition of review in relation to courts-martial.

At the same time as it considered the case of *Cooper*, which was about an RAF court-martial, the Grand Chamber considered largely the same issues in relation to a Royal Navy court-martial in the case of *Grievess v. UK* (no. 57067/00, ECHR 2003). However, the Court reached a different conclusion. The most important reason for this was that the judge advocate in a naval court-martial was a serving naval officer who, when not sitting in a court-martial, carried out regular naval duties. Following this judgment, the use in naval courts-martial of serving officers as judge advocates was ended. Civilian judge advocates are now appointed as in Army and RAF courts-martial.

The Armed Forces Act 2006

The Strategic Defence Review 1998 stated that:

“We believe there would be advantages to be gained from combining the three Service Discipline Acts into a single Act. Those differences which the Services need to retain for operational reasons would be kept but reduced to the absolute minimum. That would require a complete rewrite of the legislation but would allow the Services to define their needs for the next millennium and translate them into legislation where necessary. That would be a substantial and complex undertaking which will take some years to complete, but one which we consider would be very worthwhile.”

This reflected the recognition by the Review that there would be a need for more integrated operations after the fall of the Iron Curtain. Before this, work had progressed on a consolidation of the legislation for each of the three systems. The MoD set up the Tri-Service Act Team to develop proposals, which might range from continuing consolidation to full integration of the separate systems.

Key to the rationale for proposals which emerged was the recognition that the existence of separate legislation and disciplinary systems could only increase the administrative burden and the risk of error, especially in joint units and organisations. A tri-Service Act was necessary to allow command and disciplinary chains to be amalgamated and thereby improve command and control in operational theatres and ultimately operational effectiveness. The other side of this observation was that as members of different Services were increasingly working together, it became more difficult to see a justification for maintaining three systems, under which members of different Services were subject to different procedures, rights and punishments. The Tri-Service Act Team concluded that members of the separate Services should not be subject to different rights, powers and procedures in respect of the same alleged misconduct unless there was an objective justification for the difference. Once this was accepted in principle the main task was to obtain agreement on what the harmonized provisions were to be.

The main purpose of the Armed Forces Act 2006 was accordingly to replace the three separate systems of law with a single system of service law governing all members of the Armed Forces. The Act does so not only in relation to the disciplinary provisions, but in relation to all other areas previously covered by the Service Discipline Acts, such as redress of complaints and service inquiries. The key elements of the discipline systems remain, in particular a jurisdiction for commanding officers to deal with a very limited number of less serious offences, with more serious offences being required to be tried by court-martial.

The Act creates offences and provides for the investigation of alleged offences, the arrest, holding in custody and charging of individuals accused of committing an offence, and for them to be dealt with summarily by their commanding officer or tried by court-martial. Instead of courts-martial being set up to deal with particular cases, the Act provides for a standing court-martial, called the Court Martial. Like the Crown Court, the court may sit in more than one place at the same time, and different judge advocates and service personnel will make up the court for different trials.

More serious cases must be notified to the Service police and passed direct to the independent Director of Service Prosecutions for a decision on whether to prosecute. In other cases the commanding officer will consider whether to deal with the matter summarily (if it is within his jurisdiction) or to refer the case to the Director of Service Prosecutions with a view to proceeding to trial by the Court Martial. In all cases intended to be tried by the Court Martial, it will be the Director of Service Prosecutions who takes the decision to prosecute and determines the charge or charges. Those facing charges which the commanding officer intends to deal with summarily have a right to elect trial by the Court Martial, or, if they agree to be dealt with summarily and if the charge is found proved, to appeal to the Summary Appeal Court. A person convicted by the Court Martial will be able to appeal to the Court Martial Appeal Court.

The Act provides for certain offices and organisations which are currently single- Service to be replaced by a tri-Service equivalent. The aim is to enhance efficiency and to support consistency in the application of the Act. These are:

- The appointment of the Director of Service Prosecutions to replace the existing three single-Service prosecuting authorities;
- A standing court, called the Court Martial, to replace the current courts-martial which are set up for each case;
- A tri-Service Summary Appeal Court to replace the existing single-Service Summary Appeal Courts;

- The Service Civilian Court to replace the existing Standing Civilian Courts;
- The merger of the two offices of Judge Advocate General and Judge Advocate of the Fleet; and
- A single court administration officer for the Court Martial, the Summary Appeal Court and the Service Civilian Court.

The Armed Forces Act 2006 repeals the Service Discipline Acts. However, between the 2006 Act receiving Royal Assent in November 2006 and its full implementation, the Service Discipline Acts remain in force, and important transitional provisions mean that provisions of the Service Discipline Acts will apply in certain circumstances relating to the past. The main purpose of the Manual of Service Law is to explain and provide guidance on the disciplinary provisions of the Armed Forces Act 2006 and of the subordinate legislation and transitional provisions which supplement it.

The Act was due to expire one year after receiving Royal Assent (which was on 8th November 2006), but include, like the main Acts it replaces, power for annual renewal (for a total period not exceeding five years) by Orders in Council approved by both Houses of Parliament. By this means the Constitutional requirement for Parliamentary consent to the continuation of the Armed Forces is maintained and satisfied.