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«The administration of discipline by the English is very rigid»

British Military Law and the Death Penalty (1868-1918)

Gerard Oram¹

Les historiens ont trop longtemps considéré le droit militaire isolément, comme s'il s'agissait d'une entité dont l'évolution n'avait pas de lien avec la société environnante. Cet article examine les similitudes dans la façon d'aborder les peines, entre code pénal et code militaire, en prenant pour point de départ la relative sévérité des peines – et en particulier de la peine de mort – dans l'armée britannique durant la Première Guerre mondiale. En dépit de plusieurs tentatives de réforme à la fin du XIX^{ème} siècle, les responsables de la discipline militaire restaient attachés à des châtiments traditionnels. De ce point de vue, la Grande-Bretagne ressemblait davantage aux anciens empires russe ou autrichien qu'à la France, l'Allemagne ou les États-Unis. La thèse défendue par cet article est que les différentes conceptions de la discipline militaire étaient clairement liées au régime des peines dans les sociétés concernées.

For too long, historians have regarded military law in isolation, as if it were an organic entity whose evolution is separate from the parent society. Taking as its starting point the relative severity of punishments – particularly the death penalty – in the British army during the First World War, this article analyses similarities in approaches to punishments in both the military and criminal codes. Despite attempts to reform the military code during the late nineteenth-century, those responsible for the regulation of discipline in the army clung to traditional forms of punishment rather than modernising practises. In this respect Britain had more in common with the older empires of Russia and Austria than it did with those in France and Germany or with the United States. It is argued that the varying approaches to military discipline was clearly related to practises in modes of punishment within the parent societies.

In a recent study of military discipline during the First World War David Englander rightly asserted that 'British and Belgian soldiers were more at risk [from capital punishment] than either their French or German counterparts'². This contradicts existing ideas about both Prussian militarism and popular notions of

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² Englander (1998, p. 191). I would like to acknowledge the enormous debt I owe to Dr. Englander who supervised my research until his tragic death in 1999.

French military justice – or more accurately injustice – such as conveyed by Stanley Kubrick in his film *Paths of Glory*. A comparison of statistics for discipline in the British, French and German armies, the three main combatants on the Western Front between 1914 and 1918, supports Dr. Englander: the British condemned more than 3 000 men compared with 2 000 in the French army and only 150 in the German army³. Indeed, the comparative harshness of the British was especially marked in the case of deserters on the Western Front⁴. Whilst it should be noted that the number of French soldiers executed (perhaps as many as 700) exceeded that of the British army (officially 346, but probably many more⁵) the two remain comparable given the relative size of the armies. Only 48 of the 150 German soldiers condemned by military courts were shot. On the face of it the British army was not beset by disciplinary problems any more than were the other major armies, yet no historian has adequately explained this striking differential. This is even more surprising given pervasive British attitudes of the time: Germany was castigated as authoritarian and militaristic and France was viewed from across the Channel as decadent. The French army, so it appeared, was not immune from this and its collapse at Sedan was regarded by many in Britain as evidence of the moral degeneration of the French, a view seemingly confirmed by the chaos of the Commune. Accordingly, when discipline in the French army collapsed in 1917, the British commander, Field Marshal Sir Douglas Haig, emphasised what he considered the lack of ‘moral qualities’ in the French army as its major cause⁶. Paradoxically, German authoritarianism and militarism had, according to some, been a major factor in securing the Prussian victory in 1871: British generals had a high regard for the discipline of the Prussian army if not their tactics⁷. Yet these continental armies exhibited more tolerance of their soldiers than the supposedly more progressive British. Paradoxically, therefore, it was in the country that believed it most espoused liberal values that military discipline appears to have taken on its harshest form.

None of this was lost on contemporary observers. In his diary Prince Rupprecht of Bavaria commented that:

The administration of discipline by the English is very rigid. Whilst on our side there is known to me only a single case in which a soldier on account of aggravated refusal of duty in the face of the enemy was shot, I gather from a compilation of the British orders which have been found, that at least 67 English soldiers have been shot under martial law in the period between 27 October 1916 and 30 August 1917⁸.

³ Moore (1974), Putkowski, Sykes (1992), Babington (1993).

⁴ Oram (1998a, pp. 51–56). In theatres far from home the British could afford to be less severe with deserters who in reality had nowhere to flee to and would inevitably return to their units after a short period of time. Disciplinary concerns in these far off places tended to focus on other matters such as men sleeping at their posts – an offence for which capital punishment was rarely carried out.

⁵ British figures are based on the War Office publication *Statistics of the Military Effort of the British Empire in the Great War 1914–1920* (HMSO, London, 1922), p. 648. However, this figure does not include native labourers, nor does it include Indian troops for whom no official records survive. A recent survey of the registers of courts-martial kept by the army has cast doubt on the accuracy of the official number of condemnations which, it appears, have been slightly under-estimated. See Oram (1998b). The number of executions in the British army, including Indian troops, certainly exceeded 400 although by how many it is difficult to say.

⁶ Blake (1952, p. 234).

⁷ Spiers (1992, p. 246).

⁸ Quoted in Babington (1993, p. 191).

This was an underestimate of British executions during that period, which actually numbered eighty-one. Ludendorff famously recorded his envy of Douglas Haig's power over matters of discipline and punishment estimating that the real loss to his army in terms of manpower ran to tens of thousands⁹. Indeed, that entry in his memoirs, published in 1929, doubtless reflected a variation in the stab in the back legend, widely held by former military commanders, that Germany's comparative leniency had cost her victory¹⁰.

However, the old-fashioned view that British disciplinary harshness was attributable to an oppressive and ultimately incompetent High Command will no longer do. British commanders, like their German and French equivalents, worked within a disciplinary and judicial framework inherited from the nineteenth-century¹¹. For too long, historians have ignored this inheritance, most especially the influence of the parent societies of armies: military discipline, law and organisation should be related to the parent societies. It is no longer sufficient to separate military law from the criminal code as if it had developed organically, isolated from contemporary views on criminal behaviour, punishments and penal policy. It is the development of the respective military codes, the context for military discipline and punishments during the First World War, which must now be analysed.

In this article I will discuss the evolution of British military law from the mid-nineteenth century to the outbreak of war in 1914, within the wider context of military law in other European countries, in particular that of the French and German armies, and America. I will show how the variations in numbers of capital punishments inflicted by each army between 1914 and 1918 reflected military traditions and pre-existing social structures as well as more general concerns about crime, punishment and control of the army. It will be shown that in terms of its military code, far from being progressive, Britain lagged behind its continental equivalents in key areas. The process by which men were selected for execution, being beyond the scope of this study, is the subject of a forthcoming article. Instead this article focuses on the role played by the lawmakers in the history of British military executions.

The judiciousness of the respective military codes often reflected the status ascribed by societies to both the army and to soldiering as a profession. This in turn was greatly influenced by the traditional method of recruitment. In Britain in particular obedience was often deemed to be attainable only through traditional concepts of punishment based on fear and deterrence. Indeed, an over-reliance on this type of control meant that, come the Great War – by which time corporal punishment had been abolished – senior commanders all too readily fell back on capital punishment as the sole means of maintaining discipline rather than exploring alternatives.

⁹ Moore (1974, p. 167).

¹⁰ See Jahr (1998).

¹¹ Christoph Jahr excepted, even in recent studies historians have concerned themselves with the consequences of the executions rather than the underlying causes. Sheffield (1994), analyses many of the army's traditions, but has largely avoided military law. The most recent publication on the subject of executions, Offenstadt (1999), as the title suggests, is concerned with processes that occurred after the executions rather than before them.

BACKGROUND

The harsh nature of military discipline in Britain owed much to tradition. The earliest armies were regulated by Articles of War issued on the prerogative of the Crown and valid only during the duration of any given conflict. This power, introduced by William I, was not superseded until the nineteenth-century. But if military law seemingly became more the concern of parliament than of the Sovereign, the Crown was still able to exert considerable influence in this area, playing the 'apolitical' card to great effect – the army shared with the Crown a (mythical) status that supposedly transcended politics. The nature of these earlier Articles was pejoratively described in a military manual of 1914 as being 'of excessive severity, inflicting death or loss of limb for almost every crime'¹². Ironically, a certain amount of this severity was to return in the years that followed.

The peacetime army, thanks to the British aversion to a standing army, did not exist in a modern sense and no regulations were thought necessary beyond what was covered by criminal and civil law. This changed, however, after the so-called Glorious Revolution whereupon the Mutiny Act was passed in 1689. The object of this annually renewable act, which made mutiny and desertion a capital offence, remained largely unchanged until 1878. It did, however, undergo a series of refinements each reflecting the circumstances of the time. The Act, often allowed to lapse during times of peace, was frequently re-introduced, usually with an extension of its jurisdiction to include overseas territories as the army's garrison duties expanded around the globe. The Mutiny Act finally superseded the prerogative power to make Articles of War towards the end of the Peninsular War in 1813 and remained in force, largely unaltered until our period.

INQUIRY: 1868-1879

Increasingly concerned by what it perceived as a drunkenness problem in the army, the British government ordered an inquiry into military discipline in March 1868 under the tutelage of the Right Honourable John Wilson Patten MP, a colonel in the Royal Lancashire Militia. It is clear from the evidence, however, that the Committee was uncertain about how to maintain discipline and control of the army in the event of the abolition of corporal punishment. Flogging (the usual nomenclature) had been partially abolished in 1867 following the death of Private Robert Slim from such punishment¹³, but it remained available as a punishment during peacetime for crimes of mutiny or insubordination involving violence and during wartime it was extended to cover desertion and even drunkenness. For a decade the army used flogging sparingly, but its re-emergence as a common punishment in Zululand in 1879 attracted the attention of Liberal politicians, including Gladstone, who rejected the 'necessary deterrent' argument and denounced the practice as anachronistic. The number of lashes was initially reduced by Parliament before its final abolition in 1881¹⁴.

¹² *Manual of Military Law*, 1914 edition (HMSO, 1914, p. 7).

¹³ Spiers (1992, p. 73).

¹⁴ Spiers (1992, p. 74).

The shift away from traditional style punishments such as flogging during the late 1860s reflected a similar trend favouring a more progressive penal policy, which, aided by a statistical reduction in the crime rate, can also be detected in the criminal code¹⁵. Public whippings for criminal offences had been abolished in 1862 and the last public execution was carried out in 1868, largely thanks to growing public disquiet at the effects on society of such punishments¹⁶. The effects on offenders were, however, of less concern and in the 1860s penal policy did assume a harsher character once again, especially with the introduction of the draconian 'Garotters' Act 1862, which allowed for the administration of up to fifty lashes on prisoners convicted of violent offences. This was partly a response to the virtual end of transportation in the 1850s and a corresponding perceived rise in violent crime¹⁷. Britain was the last Western European country to cling to whipping as a punishment and in both the criminal and military codes we must look to Eastern Europe to find parallels. The number of floggings in English local prisons remained fairly constant (approximately 155 per annum) until a significant reduction was noted in 1894¹⁸. This was partly as a result of concerns about the number of corporal punishments and it was becoming increasingly clear to British military observers that the days of flogging in the army were also numbered. But concerns about how to control unruly soldiers closely mirrored the fears aroused by the end of transportation – pundits believed, after all, that most troops were drawn from that same criminal class. The need to find a suitable alternative became the focus of the subsequent report.

The report, published in two parts during 1869¹⁹, set in motion a process of yet further inquiry and eventually reform, culminating in the annually renewable Army Act of 1881 – the basis for the regulation of the British, Dominion and Empire armies during the Great War. This process coincided not only with the changing attitude towards crime and punishment, but also with a growing realisation amongst military pundits that the changing nature of warfare would necessitate an enlargement of the army, control of which became a real concern. Although the report provides a unique insight into perceptions about army recruits, discipline and punishment in Victorian Britain it has received little attention from historians. Before arriving at its conclusions the Committee examined military law in other countries, including France and Prussia, and whilst this evidence tells us more about how the British army viewed its continental neighbours, it remains a useful starting point for a comparison of military codes across Europe.

The various European military codes had much in common. Nowhere was the final arbiter of military justice a judicial or legal appointee. In some countries (Britain, Austria-Hungary, Italy) the Commander-in-Chief of the army performed this function during wartime. In others, France for example, the head of state theoretically held this position. Of course in some cases (Russia, Prussia) the head of state was also the Commander-in-Chief of the army making such distinctions superfluous. This had important implications in Britain where the role of the Judge

¹⁵ Taylor (1998).

¹⁶ Wiener (1990, pp. 92-101).

¹⁷ Emsley (1996, pp. 276-277).

¹⁸ McConville (1995, p. 246).

¹⁹ *The Report of the Courts-Martial Commission 1869* – hereafter referred to as either *The First Report* or *The Second Report*.

Advocate General (JAG), who oversaw the process of military justice, had come under considerable scrutiny in the mid-nineteenth-century. Army commanders had become increasingly concerned at the growing influence of the JAG and saw a threat to their authority if judicial considerations were given priority over disciplinary ones²⁰. This too was common in other European armies. In Russia, for example, a Judge Advocate (*procureur militaire*) attended courts-martial to prosecute only and did not act in a judicial capacity²¹. Typically, in the late nineteenth-century Habsburg army, where courts were composed of representatives of all ranks – an exceptional practice not continued after the turn of the century – a *Militäradvokat*, who was a qualified lawyer, performed a range of legal tasks, but could only make recommendations to the *military* judges. In common with other European countries ‘the [Habsburg] army managed to prevent any serious tampering with its [judicial] privileges’²². The role of non-military persons or departments was invariably restricted to purely administrative duties. Nowhere did these civil servants wrest a modicum of judicial authority from the military no matter how well qualified they were²³.

Other similarities included a hierarchical system of courts-martial with varying jurisdiction. Officers were normally only tried by the highest form of military court. However, in Italy there was no permanent court with jurisdiction to try officers, reflecting the rarity of such trials. It was also universally accepted that judicial procedure gave way to military expediency during wartime when it was usual for courts, often known as drum-head courts, to be convened in the field²⁴.

Despite the common heritage of much European law – not to mention military tradition – differences did exist and these often reflected the parent society. British observers reported, with apparent envy, on the French system which allowed for the removal of the persistent offender into a *compagnie de discipline* and the reputed bad character into light infantry units in Algeria ‘so that he may not taint his old comrades by going back into their ranks’²⁵. This aspect of French military justice, enshrined in the 1857 code, reflected the concept of the ‘dangerous classes’ familiar to those concerned with national security in France since 1840. This is now most usually associated with the period of the Paris Commune when police and army alike were fearful of ‘an uncontrollable and destructive rising of the ‘lower depths’²⁶. Control of the army in such circumstances was understandably considered crucial, and the military code allowed for the swift removal of soldiers who fell into this category. Extensive use was made of this provision and executions were certainly not unheard of during the revolutionary decades in the middle of the nineteenth-century: eighty-four men were executed between 1833 and 1851. Significantly, most of these occurred in units in North Africa. On the other hand about a third of French courts-martial resulted in acquittals – a rare finding in the British army²⁷.

²⁰ Rubin (1997, pp. 45-84).

²¹ The Second Report, p. 216.

²² Deák (1992, p. 146).

²³ The Second Report, pp. 211-223.

²⁴ The Second Report, pp. 211-223.

²⁵ The Second Report, p. 223.

²⁶ Tombs (1980, p. 234).

²⁷ Griffith (1989, p.172).

The severity of the Prussian code was also viewed with some envy from London. Undoubtedly there was a genuine regard for Prussian-style discipline, but it is also likely that Prussian military prowess during the 1860s had boosted the army's reputation. This admiration increased after the Franco-Prussian War when the draconian Prussian code was contrasted with the lenient French code seemingly confirming the view that linked military efficiency to strict discipline. The British military *attaché* responsible for the compilation of the report on the Prussian code was impressed by the sentence of 'loss of nobility' and all that it implied. He was equally impressed with the power granted to commanders summarily to inflict corporal punishments and the life-long disgrace that went with dismissal from the army²⁸. Indeed, notions of honour pervaded the Prussian code and only executions for military offences were performed by the honourable method of a firing squad. Otherwise, death was inflicted by beheading.

Such comparisons and the envy they provoked from British military observers took no account of the differences in attitudes towards the army in each society. In Prussia, soldiering was considered a noble and worthy profession – hence the disgrace resulting from dismissal from the army. The French army inherited much of its identity from its revolutionary and Napoleonic predecessors: the *poilu* was ideally an 'Intelligent Bayonet' – a concept partly formed from a reaction against so-called Prussian automata – and the State assumed a paternal responsibility towards those it compelled to serve in the ranks²⁹. In Britain the difference could not be more marked. Far from being an honourable profession soldiering was considered worthless by most classes, but most especially among the working class who regarded the army as a refuge for drunkards and criminals rather than a respectable trade. Hunger was the most effective of recruiting sergeants and it was no coincidence that the Irish disproportionately filled the ranks even of nominally English regiments³⁰.

It was in this context that British army discipline had evolved. The result was a form of discipline that was particularly harsh as this was believed to be the only effective means of ordering men drawn from the very bottom strata of society. However, the challenge to traditional ideas on punishments such as flogging was forcing the army to explore alternatives. There were three forms of serious punishment available to courts-martial: imprisonment, flogging and marking (known as branding, this was itself abolished in 1871) – whereby the prisoner was 'marked' with a letter 'D' for deserter or 'BC' for bad character. Analysis of punishments handed out by British courts-martial during the three years prior to the abolition of flogging for most military offences in 1867 shows a shifting of emphasis towards imprisonment at the expense of flogging (see figure 1)³¹. However, it is apparent that the army was still making wide use of flogging despite its imminent abolition.

²⁸ The Second Report, pp. 219-220.

²⁹ Griffith (1989, pp. 86-87).

³⁰ In 1830 it was estimated that the Irish made up approximately 42 per cent of the British army. This proportion steadily decreased up to 1914, but the number of Irishmen serving in the pre-Great War British army remained disproportionately high. See Denman (1991, pp. 352-365).

³¹ Soldiers could be sentenced to imprisonment with or without hard labour. The court could also sentence them to solitary confinement, again with or without hard labour. The figures presented here are an aggregate of all these categories. Only a minority (just over 600 in each year) underwent solitary confinement.

Figure 1: Punishments inflicted by British courts-martial 1865-1867³²

YEAR	No. imprisoned	No. flogged	No. branded
1865	16 804	601	1 636
1866	19 257	510	1 584
1867	19 854	150	1 805

Interestingly, the practice of marking had increased. Possibly some men who would otherwise have been flogged found themselves marked instead, but the most likely explanation of the dramatic rise in marking soldiers is that this represented an attempt by the army to ensure that unwanted recruits did not re-enlist after flogging had been partially abolished in 1867. The commissioners unwittingly alluded to this when they attempted to justify the unpopular practice, stating 'the real object of marking is not the punishment of the offender but the protection of the public'³³. More striking, though, is the comparatively little use made of the power to discharge offenders: only 106, 122 and 184 discharges in each respective year³⁴, reflecting ongoing concerns about poor manpower levels³⁵. The British army's reluctance to give up corporal punishments contrasts with the French army where corporal punishment had long been interdicted, and the Austro-Hungarian army where the flogging of recruits was abolished in 1868³⁶. István Deák has shown that a high proportion of courts-martial in the Habsburg army concerned cases of brutality against subordinates³⁷. This might suggest a general move away from violent disciplinary punishment during this liberal era in the Dual-Monarchy.

This clinging to flogging and the branding of offenders was not exclusive to the British. Russian courts-martial could order corporal punishments to be administered summarily in the presence of a soldier's company or battalion³⁸. Elsewhere corporal punishments were less apparent: most armies only allowed for some form of restraint rather than flogging. The procedure adopted in the Dual Monarchy after 1868 was to fix prisoners to an object such as a post or a tree by way of rings attached to the ankles and wrists³⁹.

The Commissioners concluded that existing punishments needed to be strengthened with more use being made of military prisons. Imprisonment, they suggested, 'should be made as severe and deterrent as a due regard for the health of the prisoner and the laws of humanity will permit'⁴⁰. Otherwise fines, which could be used to

³² Compiled from statistics contained in the appendix to *The Second Report*, pp. 255-278.

³³ *The Second Report*, p. x.

³⁴ Appendix to *The Second Report*, pp. 255-278.

³⁵ Spiers (1980, p. 37).

³⁶ *The Second Report*, p. 212.

³⁷ Deák (1992, p. 147).

³⁸ Report on the Various Methods of Punishment adopted by Foreign Armies in the Field (1879), PRO WO32/6045, pp. 2-3. Hereafter referred to as *The Ellice Report*.

³⁹ *The Ellice Report*, p. 5.

⁴⁰ *The First Report*, p. viii.

fund 'rewards to well conducted men' and greater use of the power to discharge men who were 'beyond the power of reformation' were proposed⁴¹.

However, no immediate alterations were made to the manner in which the army was regulated and the Mutiny Act remained the key statute, continuing to reflect traditional ideas about discipline. For example, the 1876 version outlined a number of military offences for which the death penalty could be applied. These included mutiny, sedition, desertion, cowardice, sleeping at or leaving a post, striking or using violence towards a superior officer and disobedience⁴². It also established rules for the constitution of courts-martial and laid down procedures for the execution of sentences. The power of any court-martial to inflict corporal punishments was retained⁴³, but only during times of war and with an upper limit of fifty lashes⁴⁴. Such a sentence could be commuted to not more than forty-two days imprisonment or twenty days and twenty-five lashes⁴⁵. Clearly corporal punishment continued to be considered an essential element in the maintenance of military discipline.

The legislators had recognised that special powers were required in times of war and special provision was also included with regard to the death penalty. Only the highest form of court – the General Court-Martial – was granted the power to impose a sentence of death. This type of court was constituted of no fewer than nine commissioned officers (no upper limit), at least two-thirds of whom had to concur for a sentence of death to be lawful⁴⁶. Provision was made for these powers to be transferred to a Detachment General Court-Martial during wartime with a reduced constitution of at least three commissioned officers. To avoid any political involvement sentences had to be confirmed by the Monarch or, during active service, the Commander-in-Chief. There remained no right of appeal and, therefore, no appeal court.

REFORM: 1879-1881

The Army Council re-considered military discipline in 1879, ordering another report on punishments in other armies. Little had altered in the decade separating the two reports, but one significant change had occurred in Germany. The Prussian code, so admired by British generals, had been replaced with an altogether more progressive German one in 1872. The death penalty was retained, but soldiers received greater protection from the new code. The administration of law was the responsibility of the *Kriegsgerichtsrat* (Judge-Advocate), under the jurisdiction of the *Oberquartiermeister* (Administrative Staff), attached to the General Staff⁴⁷. Furthermore, German soldiers were granted legal rights, *Rechtsstaatlichkeit*, as protection from abuses of authority. However, for some reason this information was not considered worthy of inclusion in the report.

⁴¹ The First Report, pp. ix-x.

⁴² Mutiny Act, Section 15.

⁴³ Mutiny Act, Section 23.

⁴⁴ Mutiny Act, Section 22.

⁴⁵ Mutiny Act, Section 24.

⁴⁶ Mutiny Act, Section 8.

⁴⁷ *The Handbook of the German Army in War, January 1917* (EP Publishing, Wakefield, 1973, pp. 30-37). Also, *Militärstrafgesetzbuch für das Deutsche Reich vom 20. Juni 1872* (Berlin, 1912).

The report, compiled by General Sir Charles Ellice, largely confirmed the findings of the 1869 Inquiry, but had to take account of the new German code and the American one. Ellice identified twelve capital crimes in the German code including *repeated* desertion. A sole act of desertion, however, even if committed in the field, was punishable by a maximum of ten years imprisonment⁴⁸. Curiously, he omitted the offence of leaving a watch, contained in the German code (a similar offence, abandoning a post was a capital crime in the French army only if it was committed in the presence of the enemy). Like its French equivalent the German code allowed for the removal of individual offenders to penal battalions, but unlike the British in neither the French or the German armies was the offence of sleeping on post considered sufficiently serious to merit the death penalty.

Ellice drew attention to Article 54 of the 1874 American Articles of War, which prohibited both flogging and branding, but also pointed out that previously the United States had been forced to re-introduce flogging for deserters. Although corporal punishment was finally abolished in the American army in 1861, Ellice drew attention to the Judge-Advocate-General's remarks which allowed for other physical punishments:

courts-martial must needs often draw upon the customs of the service for a penalty which shall insure the description of a corporal punishment. Thus, the accused may be adjudged to carry a loaded knapsack for a certain time, stand on a barrel, or suffer any other ignominy which would naturally result in a degree of bodily pain or fatigue, provided the same were not excessive and physically injurious⁴⁹.

American military law at this time can still be regarded as a direct descendant of the British code. As such it was not as tightly constructed as the German code. Wide-ranging powers were bestowed on the Commander-in-Chief in times of war. For example, capital punishment was permissible, but the restrictions imposed by Article 47 could easily be bypassed:

No sentence of a Court-Martial or Military Commission, inflicting the punishment of death, shall be carried into execution until it shall have been confirmed by the President; except in the cases of persons convicted, in time of war, as spies, mutineers, deserters, or murderers, and in the cases of guerrilla marauders convicted in time of war; of robbery, burglary, arson, rape, assault with intent to commit rape, or of violation of the laws and customs of war; and in such excepted cases the sentence of death may be carried into execution upon confirmation of the Commanding General in the field, or the Commander of the geographical division or department, as the case may be⁵⁰.

However, there were signs that the American code was detaching itself from its heredity. Unlike the British code, the American Articles did at least envisage a role for a political person such as the President. This represented the start of a movement

⁴⁸ The Ellice Report, p. 5. The twelve capital offences listed by Ellice are: treason, unjustifiable surrender, repeated desertion, instigating a conspiracy to desert, deserting a post in the presence of the enemy, cowardice, disobedience, assaulting a superior, instigating a mutiny, participating in a mutiny, plundering (only if accompanied by killing) and breach of parole by POWs.

⁴⁹ Ellice Report, p. 2.

⁵⁰ Ellice Report, p. 2.

away from British influence and towards a military code with a distinctly American identity – a process not completed until 1916 when a new military code was approved in time for America's entry into the First World War. Perhaps Ellice was unaware of this development or had attached no importance to it, but other 'modernising' provisions were present in the 1874 Articles. As well as an allowance for adjournments there was an increased role for the Judge-Advocate-General who could be appointed to any court-martial. This direct role for a judicial rather than a military figure was a sure sign that the emphasis was beginning to shift from the disciplinary function of the court-martial to one of a dispenser of justice. David Schleuter has remarked that these provisions 'marked to some extent an increased realization [sic] by Congress that due process considerations should apply'⁵¹. The exigencies of the war did force the British army to belatedly introduce similar provisions, but even then it was not by Act of Parliament. However, the creation of thirty-four Court-Martial-Officers⁵² (CMO) – legally trained personnel who could attend trials to ensure their legality – in 1916 had little impact: condemnations continued apace during 1916 and 1917⁵³. Nor did the creation of the post appease critics in the Labour Party – arguably its true purpose.

Developments across the Atlantic passed-by the British legislators, who clung firmly to tradition. The Army Discipline and Regulation (Annual) Act of 1879, which parliament had to approve annually, rationalised the disparate military law under one statute, but it was not until the 1881 version that flogging was finally abolished (Section 6). Other punishments – bearing an uncanny resemblance to those of the Austrian army – were introduced instead (Section 4), revealing the influence of other European models⁵⁴. These entailed handcuffing offenders to a cart or wagon or requiring them to carry extra weights known as 'burdens'⁵⁵. However, here the army was clearly out of step with the criminal code where the use of irons or other mechanical restraints as punishments had been forbidden by the Prison Act, 1865, except in exceptional circumstances – themselves the subject of further restrictions in 1893⁵⁶.

The Army Act, also 1881 and renewable annually, was the culmination of the process of inquiry and was intended to reform and modernise British military law. Yet it bore a closer relationship to earlier British models and to those of the old empires in Eastern Europe than it did to the more progressive ones in Western Europe. The Act outlined a total of twenty-seven capital offences – twelve were punishable by death at any time and fifteen were so punishable on active service only. These are summarised in figures 2 and 3:

⁵¹ Schleuter (1980, p.154).

⁵² Hurst (1919, p. 323).

⁵³ There were 895 condemnations in the British army during 1916 and a further 904 in 1917 – equivalent to a monthly average of 75.

⁵⁴ Army Discipline and Regulation (Annual) Act 1881.

⁵⁵ Draft Rules as to Summary Punishments Proposed to be made by the Secretary of State under Section 4 of the Army Discipline and Regulation (Annual) Bill 1881-1882.

⁵⁶ McConville (1995, p. 148).

Figure 2: Offences punishable by death

SECTION	OFFENCE
4 (1)	Abandoning post
4 (2)	Shamefully casting away arms in the presence of the enemy
4 (3)	Corresponding with the enemy
4 (4)	Assisting the enemy
4 (5)	Whilst a prisoner of war, serving with enemy forces
4 (7)	Cowardice before the enemy
7 (1)	Causing a mutiny
7 (2)	Inciting others to mutiny
7 (3)	Joining a mutiny
7 (4)	Failing to inform C.O. of mutiny
8 (1)	Striking or threatening to strike a senior officer
9 (1)	Disobedience

Figure 3: Offences only punishable by death if committed on active service

SECTION	OFFENCE
4 (6)	Commission of an act which imperils H. M. Forces
6 (1) (a)	Leaving C. O. to go in search of plunder
6 (1) (b)	Leaving a guard, picquet, patrol or post
6 (1) (c)	Forcing a safeguard
6 (1) (d)	Striking a soldier acting as sentinel
6 (1) (e)	Impeding Provost Marshal
6 (1) (f)	Act of violence towards person bringing provisions
6 (1) (g)	Housebreaking
6 (1) (h)	Causing false alarms
6 (1) (i)	Treacherously revealing the parole or watchword
6 (1) (j)	Misappropriation of provisions
6 (1) (k) (i.)	Whilst sentinel: sleeping or drunk on post
6 (1) (k) (ii.)	Whilst sentinel: leaving a post
12 (1) (a)	Desertion
12 (1) (b)	Inciting others to desert

Clearly capital punishment was available for a wide range of offences, both military and criminal. Of particular interest here is the inclusion of certain criminal offences such as housebreaking, which had ceased to be a capital crime in the criminal code some decades earlier. This is an unambiguous indication of the status ascribed to British troops and the nature of the concerns about their anticipated behaviour. Indeed, during the First World War there were a number of death sentences passed on British soldiers for housebreaking, robbery and even four (unlawfully) for being drunk⁵⁷. The

⁵⁷ Oram (1998b, p. 15).

Army Act also created a greater number of capital offences than existed in the French or German armies illustrating what is perhaps the most important difference between European military codes: the fundamental question of offences and punishments. These varied more widely than is often thought by historians. Therefore, simple comparisons of death sentence statistics without some analysis of the respective codes are wholly unsatisfactory. What was a capital offence in one army was not necessarily punishable by death in another: sleeping on post, abandoning a post or single acts of desertion most notably.

Furthermore, capital offences were variously constructed and defined in different armies. Take, for instance, the crime of desertion, which according to a British pamphlet of 1916, was 'at any time a serious one, but more especially so when the deserter's regiment is on active service'⁵⁸. In fact desertion accounted for approximately seventy-five per cent of the executions in the British army between 1914 and 1920. A British soldier was guilty of desertion if he:

- a) Deserts [that is *intends* to avoid a particular duty] or attempts to desert Her [or His] Majesty's service; or
- b) Persuades, endeavours to persuade, procures or attempts to procure, any person subject to military law to desert Her Majesty's service.

And:

if he committed such offence when on active service or under orders for active service, [he shall] be liable to suffer death, or such less punishment as is in this Act mentioned⁵⁹.

The French code was not so straightforward and broke the offence into two types: *désertion à l'ennemi* and *désertion à l'intérieur*. Only the former was punishable by death with the lesser offence of *désertion à l'intérieur* attracting a maximum penalty of five years penal servitude even in time of war. The German code of 1872, as opposed to the Prussian code, also regarded desertion as a more complex affair than the British: in the German army offenders could only be sentenced to death in the case of recidivists who had previously been convicted of the offence⁶⁰.

Paradoxically, therefore, Britain had adopted a harsher military code than the mass armies of its European neighbours with Germany and France legislating for a greater degree of tolerance, particularly in the case of desertion. The reasons for this are not so elusive as might appear. Britain had retained the voluntary principle as the basis for recruitment and with it came a crucial difference in attitudes towards absenteeism. In France and Germany a certain degree of desertion was tolerated, expected even, amongst soldiers who had been compelled to serve. This was reflected in the separation of the different types of desertion identified by the French code and the corresponding leniency of sentence in the case of men convicted of *désertion à l'intérieur* and in the German principle of *Rechtsstaatlichkeit*. For the British, however, no such tolerance was considered necessary for men who had enlisted of their own volition.

⁵⁸ Grierson (1916, p. 52).

⁵⁹ Army Act 1881, Section 12.1 as published in *The Public General Acts passed in the forty-fourth and forty-fifth years of the reign of Her Majesty Queen Victoria* (Eyre and Spottiswood, London, 1881, p. 209).

⁶⁰ *Militärstrafgesetzbuch für das Deutsche Reich vom 20. Juni 1872* (Berlin, 1912).

Other traditions were at play as well. In its criminal code Britain was consistently more reliant on capital punishment than most other European countries. During the period 1900-1914 there were on average twenty-seven death sentences passed annually by criminal courts in England and Wales, with an average of fifteen executions carried out. By contrast, in France, where juries could accept mitigating circumstances in order to avoid the death penalty, the figures were twenty-three and five respectively. Capital punishment was not practised in nineteenth-century Prussia and in other German territories executions were rare although it was reintroduced by Bismarck in 1878. Despite the change during the Wilhelmine era, when clemency was generally refused as a matter of state policy⁶¹, Britain remained exceptional in its reliance on the death penalty. Even in Tsarist Russia the death penalty was rarely used in criminal cases – although continued use of the knout resulted in many deaths and little restraint was shown in the army. Nineteenth-century abolitionists castigated Britain as ‘the most merciless of Christian countries’ with a ‘backward and unsatisfactory’ criminal law⁶². In America too, many states had abolished the death penalty⁶³. Britain, though, clung on to capital punishment – a practice reflected in its military code.

The concentration of power in the office of the Commander-in-Chief, although common in most European armies, was effectively unfettered in the British army. There is a parallel here with the role performed by the Home Office in the nineteenth-century, which acted to mitigate capital convictions especially where insanity was suspected. The process of assessing a condemned prisoner’s sanity to prevent injustices and avoid adverse publicity, in spite of the assumption of adult responsibility established by Common Law⁶⁴, anticipated the role the Commander-in-Chief later performed in relation to soldiers suspected to be suffering from the condition known as shell-shock. What singled out military law, however, was the absence of any appellate system: other officers and indeed the JAG made recommendations, but the Commander-in-Chief was the only authority who could set aside the sentence of the court. In the German army soldiers were protected to a certain extent by statutory rights and French soldiers had the theoretical protection of the President of the Republic⁶⁵. Even Russian and Austrian soldiers were not theoretically denied a right of appeal to a higher court⁶⁶. But British soldiers had to place their faith entirely in the hands of a Commander-in-Chief who was required to put discipline above justice. *The Manual of Military Law* was explicit that ‘The object of military law is to maintain discipline among the troops and other persons forming part of or following an army’⁶⁷. The role of the Commander-in-Chief has to be understood in this context.

⁶¹ Figures based on comparative tables in Evans (1996, pp. 914-935). See also Radzinowicz and Hood (1986, pp. 671-677).

⁶² Cited in Radzinowicz & Hood (1986, p. 672).

⁶³ Galliher, Ray & Cook (1992, pp. 538-578).

⁶⁴ Roger Chadwick (1992, pp. 231-285).

⁶⁵ During the First World War the President was slow to exercise this power and the army commanders were unrestrained for the first year or so. However, the existence of this safeguard was an important feature of French military law. The same type of power was conferred on the President of the USA, who exercised it from the outset in the American army.

⁶⁶ It should be noted that appeals remained problematic in both the Russian and Austrian armies, but were certainly not unprecedented.

⁶⁷ *Manual of Military Law*, p. 6.

By 1881 all the countries that would be at war in 1914 had formulated the rules that were to regulate their armies. Tradition had been a major factor. So too had varying attitudes towards crime and punishment. For these reasons the British army adopted a code more closely resembling those of the old authoritarian empires of Eastern Europe than those of Germany or France.

CONCLUSION

Unwittingly, the legislators had laid down the very conditions which ensured that, in terms of capital punishment, the British soldier was more vulnerable than his French or German counterparts. In one respect this is surprising: this does not appear to have been the intentions of the legislators who, by removing the old practices of flogging and branding, were attempting to ring the changes to what had become the unacceptable face of military discipline. However, the new code reflected much of the criminal law, which itself placed enormous emphasis in the death penalty as a means of deterring crime. During the First World War military commanders adopted just such an approach and the law encouraged them to do so.

Why was military law so framed? For the answer we must again look to the criminal code. The parallels are not so elusive and tradition remained an important influence. Military law, as represented by the Army Act 1881, simply followed earlier British models and reflected traditional fears about control of the army and the quality of recruits. In fact it was highly unlikely that the British could have envisaged a military code such as existed across the Channel or the Atlantic. The result was a code that placed additional responsibility on the Commander-in-Chief during wartime. His function as the final arbiter in legal matters bore a marked similarity to the role of the Home Office: both were expected to mitigate condemnations from the courts to an acceptable level. One had to balance public opinion against public order, the other troop morale and discipline. Yet in practice this judicial role was not compatible with the Commander-in-Chief's overriding responsibility for army discipline. Unlike the French or American armies, which placed ultimate judicial responsibility on their respective Presidents, British tradition dictated that politicians were not to be trusted with a modicum of control over the military. In peacetime the Crown fulfilled the role which was delegated to the Commander-in-Chief during wartime. No doubt his role was delegated further, but the important feature of the system was that British soldiers had to rely on the benevolence of senior officers who were virtually unaccountable, at least for the duration of the war.

It seems likely that the army got what it wanted from the legislators: a code that reflected army traditions. Like the Crown, the army was not as apolitical as it was usually painted. Despite the reforms the army retained its traditional approach to discipline in a code that remained immune from interference from civil servants such as the JAG or from politicians. The army's reputation as a non-political organisation is indeed mythical. As Hew Strachan has shown, the army, far from being apolitical, was capable of political intervention and not always was it subtle about its actions: take for instance the Curragh incident of 1914⁶⁸.

⁶⁸ Strachan (1997). Chapter 5 (pp. 92-117) is most relevant here, not only for its assessment of the Curragh incident, but for the analysis of the army's political activities during our period.

French and German soldiers on the other hand had a legal apparatus constructed around them to protect them from the excesses of military discipline. The law was framed in a manner that offered at least a degree of tolerance of desertion. It is no coincidence that such a view existed in Germany and France, but not in Britain where there was no tradition of compulsion and it was not thought necessary to show leniency to men who had accepted the regulations when they volunteered⁶⁹. German soldiers also benefited from statutory rights whilst French *poilus* enjoyed the theoretical protection of their President, which although slow to be enacted doubtless saved many from the firing squads after 1915. Pre-war attitudes and traditional military practices were also markedly different in these continental armies with commanders accustomed to other forms of managing discipline such as the penal battalions. Alternatives were limited in the British code.

British commanders were imbued with notions of authority rather than management. In this they were aided by the law, which was constructed around the concept of deterrence. It is hardly surprising, therefore, that when confronted by a stalemated war, British commanders invariably grasped at traditional ideas rather than exploring less well-trodden paths. This approach was epitomised by General Sir Horace Smith-Dorrien, commander of the 2nd Army, when reviewing a case in 1915:

There is a serious prevalence of desertion to avoid duty in the trenches, especially in the 8th Brigade and I am sure that the *only* way to stop it is to carry out some death sentences [my italics]⁷⁰.

In short the British went to war in 1914 with a military code that allowed a proliferation of capital punishment to go unchecked. Paradoxically, the abolition of flogging – one of the few progressive features of the reforms – was a contributory factor. Lacking alternatives, British commanders were simply bereft of ideas short of capital punishment when it came to controlling the army during wartime. This had not proved to be a major problem in the minor wars at the end of the nineteenth-century – not even the war in South Africa. But the intensive nature of warfare on the Western front in particular cruelly exposed the inadequacies in the rules for management of the army. Commanders, fearful of losing control of a much-enlarged army, were encouraged, expected even, to resort to capital punishment. Complicit in all this were the legislators who followed draconian criminal as well as military traditions when they acquiesced and allowed the army to maintain its grip on such a harsh and rigid system.

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⁶⁹ This is an important theme and one to which I will return in a forthcoming article. In short it is worthy of note at this point that after conscription was introduced into the British army there followed a sharp decline in the number of condemnations by courts-martial. See Oram (1998a, p. 42 and 1998b, p. 14).

⁷⁰ Private Scotton, executed February 1915. PRO WO71/396.

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