MARTIAL LAW IN ENGLAND

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Martial law has its roots in that body of law which was administered by the Court of the Constable and Marshal. This has been described by Coke as the fountain of Marshal Law.[1] It was by no means clear as to what the jurisdiction of this Court was. A Statute of Richard II defines the jurisdiction of the Court thus:

> "To the Constable it pertaineth to have cognizance of contracts touching deeds of arms and of war out of the realm, and also of the things that touch war within the realm, which cannot be determined nor discussed by the common law, with other ways and customs to the same matter pertaining, which other constables heretofore have duly and reasonably used in their time."[2]

The two main branches of the jurisdiction of the Court fell under two categories: (1) Jurisdiction over appeals of death or murder committed beyond the seas,[3] and (2) the offences and miscarriages of soldiers contrary to the laws and the rules of the army.[4]

For historical reasons the importance and use of the Court of Constable and Marshal was on the decline during the Tudor period. The common law courts during the 17th Century were ill-disposed towards it as they regarded it as a rival to their own authority. The Court of Marshal was also out of favour with Parliament, whose victory in 1640 spelled its down-fall.[5] It may be noted that the Court of Constable was not functioning since the time of

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1. Lowry, James M, *Martial Law within the Realm of England*, 1914, p. 1. "The criminal jurisdiction of the Court except in time of war was restricted to murder and other crimes committed by Englishmen abroad, but in war time it became a very powerful Court with widely extended functions." It followed the march of the Army and dealt summarily with all offenders, acting practically as a permanent Court Martial. *Ibid*, 11.
2. 13 Rich. II, St. 1, c. 2.; Holdsworth, "Martial Law Historically Considered," 18 *L.Q.R.* 117.
3. 1 Hen. IV, c. 14.
4. Hale, *History of Common Law*, 42.
5. It was voted a grievance in 1640, Rushworth, part 2, Vol. II, 1056; Holdsworth, 18 L. Q. R., 117, 118.

Henry VIII. In the time of Queen Anne an objection was raised as to the legality of the Court of Marshal in the absence of the Court of Constable.[6] It was held that it was not a properly constituted court and any jurisdiction exercised by it was "a mere encroachment."[7] The last case it tried was that of Sir H. Blount's.[8] It completely went into oblivion ever since.[9]

We are not here concerned with the jurisdiction of the Court over the army of the Crown, at home or abroad, nor are we here to deal with its jurisdiction over alien enemies within or outside the British territory. These are distinct subjects which fall under the military law and the prerogative of the Crown, which is expressed in the Mutiny Act and the Articles of War. What we are concerned with here is the nature and the scope of martial law as applicable to the citizens within the State at the time of rebellion, insurrection or invasion. As a matter of fact the jurisdiction of the Crown over the army has today gradually expanded, and it exercises more power over it through the medium of a systematic law than it does over the citizen. The Crown's authority over the citizen has of late decreased. Therefore, whether in war, or in peace, the Crown does not have the same authority over the citizen as it has over the military forces of the realm. Its control over the citizen has been completely altered in form and content. It may, therefore, be worth our while briefly to survey this relationship between the two through the panorama of British history from the time of the early kings down to the present.

One of the first instances of martial law in England was the rebellion of Wat Tyler in the reign of Richard II. Tyler was killed and his followers were defeated. But even then most of them were executed without any form or ceremony.[10] But, it may be interesting to note that an Act of Indemnity was passed to exempt the supporters of the king from responsibility for any excesses committed by them in suppressing the rebellion.[11] The practice of executing rebels and

6. Holdsworth, 118; see *Chambers* v. *Jennings*. (1701) 7 Mod. 125.
7. *Ibid.*
8. 8 Black. Com. (1st ed.) 103—106.
9. Lord Mansfield exhibits complete ignorance of this court, when he says: "As to plunder or booty in a mere continental land war.....it never has been important enough to give rise to any question about it.... There is no instance in history or law, ancient or modern, of any question before any legal judicature ever having existed about it in this kingdom." See Holdswoth, 118
10. Lowry, James M, *Martial Law within the Realm of England*, p. 12.
11. Lowry, p. 13; 5 Rich. II, c. 6.

those captured in war was carried out in the reign of Henry IV and Henry VI, during the Civil War. But whether a person was put to the sword or executed, there was no semblance of trial at all.[12] Lord Chief Justice of England, Sir A. Cockburn, in his charge to the Grand Jury, in the trial of Colonel Nelson and Lieutenant Brand, for the murder of George William Gordon, a leader in the Jamaica Rebellion, in 1866, says: "The first instance I can discover in which anything under the name and pretence of martial law, in the sense in which we are talking of it—that is, not of law exercised upon persons in rebellion, taken in arms or in hot pursuit from the field and which, if it can be called law at all, may more properly be called the law of arms or law of the sword than martial law—but the law exercised in the form of trial—is in the reign of Henry VII, and I think it very doubtful what the martial law was that historians speak of there."[13]

Lord Chief Justice Cockburn proceeds to state that some days after the restoration of order and peace and the complete control over the insurrectionary elements had been achieved, the King started on the pursuit of those who had allegedly acted as "abettors and fomentors of the recent troubles."[14] In the words of Lord Bacon the King "made a progress from Lincoln to the northern parts .....For all along as he went, with much severety and strict inquisition, partly by martial law and partly by commission, were punished adherents and aiders of the rebels. Not all by death, ...but by fines and ransoms, which spared life and raised treasure."[15] It may be noted that the martial law to which Lord Bacon referred to was some summary process, which differed from the ordinary tribunals of the country. It is not clear, however, what exact form and proceeding this procedure had. It is of great interest to note that this inquisition, trial and punishment was resorted to after the rebellion had been suppressed, and in the words of the Lord Chief Justice was "utterly illegal." Martial law could not be applied for bringing men to trial for treason after the rebellion had been suppressed.[16] Lord Cockburn says in this connection,

> "It is well established.....that the only jurisdiction of it is founded on the assumption of an absolute necessity—

12. *Ibid.*, p. 14.
13. Cockburn C.J. in *R.* v. *Nelson and Brand* cited by Lowry, pp. 14-15.
14. Lowry, 15-16. But Henry VII was not so much anxious for blood as he was desirous of money. To quote Lord Cockburn, "for to do Henry VII justice, it was not blood that he was greedy of, but gold." *Ibid.*, p. 16.
15. *Ibid.*, p. 16.
16. *Ibid.*, p. 17.

> a necessity paramount to all law and which, lest the commonwealth should perish, authorizes this arbitrary and despotic mode of proceeding: but it has never been said or thought,.....that martial law could be resorted to when all the evil of rebellion had passed away, and order and tranquility had been restored, for the mere purpose of trying and punishing persons whom there was no longer any sufficient cause for withdrawing from the ordinary tribunals and ordinary laws.' [17]

There is again a reference to martial law in the reign of Edward VI in the Commissions which were issued to the Lords Lieutenant of the Counties whose office was created on the occasion of the "routs" and "uproars" in most of the counties of England. In the Commissions these officers were referred to as the King's Justices as well as Lieutenants. The Commissions charged them, among other things, to "be the King's Lieutenants within the respective counties for levying of men, and to fight againt the King's enemies and rebels, and to execute upon them martial law."[18] In the same year when unrest and disorder was at a high pitch a severe Commission was given out in the month of March to John, Earl of Bedford, and several other great persons therein named, to put in execution all such martial law as shall be thought in their discretion most necessary to be executed."[19]

In the reign of Queen Mary a proclamation was issued in which it was said that the introduction of heretical and seditious works into England was to be punished by martial law, and whoever was found in possession of such books should be deemed a rebel and should be executed according to martial law.[20]

There is an instance of the Commission of Martial Law having been issued in the reign of Queen Elizabeth I. In 1369 the Earls of Northumberland and Westmoreland had risen in rebellion and besieged and taken Barnard Castle, and committed other acts of treasonable warfare. The rising took place and was suppressed in the month of December. The Earl of Sussex received from the Queen a Commission, evidently on the lines of those later issued in the time of Charles I. The Earl of Sussex appointed Sir George Bowes his

17. *Ibid.*, pp. 17-18.
18. Strype, *Ecclesiastical Memorials*, Vol. III, p. 278; Lowry, pp. 18-20. Lord Cockburn says that there is no evidence that this commission was ever acted upon. *Ibid.*, p. 21.
19. Lowry, p. 20.
20. Strype, Vol. VI, p. 459; Lowry p. 21.

Provost-Marshal, who made a circuit through Durham and Yorkshire between the 2nd and the 20th January, 1589, and executed at various places 600 persons.[21] There is another reference to a proclamation being issued by Queen Elizabeth I in which it was declared that any person introducing Bulls from Rome, or any traitorous works from abroad, should be punished by her lieutenants according to martial law.[22]

Lord Chief Justice Cockburn despite his sympathetic appraisal of the difficulties in which Elizabeth found herself at that time due to the opposition of Pope and the enmity of Spain, says that "we cannot doubt that she was going altogether beyond the powers with which the Constitution of England had intrusted her."[23] Lord Coke observes as to the legal character of such commissions and the punishments which they sanctioned, that "If a lieutenant, or other that hath commission of martial authority in time of peace, hang or otherwise execute any man by colour of martial law, this is murder for this is against Magna Carta, c. 29.[24]

King James I, issued a Commission to Lord Compton as Lord-Lieutenant of Wales to the effect that in times of necessity he would summon the Militia

> "To fight all enemies, traytors and rebels from tyme to tyme and them to invade, resist, suppress, subdue, slea, kill, and put to execution of death, by all waies and meanes from tyme to tyme by your direction. And further to doe, execute, and use, against the said enemies, traytors and such like offenders and their adherents from tyme to tyme as necessite shall require by your discretion, the Lawe called Martial Law according to the Lawe Martiall, and to slea, destroy and put to execution, such and as many of them as you shall think meete by your good discretion to be put to death."[25]

Three Commissions were issued in the reign of Charles I, on 24th November, 1617; 20th July, 1620 and 30th December, 1624. The first Commission is for the government of Wales and the counties of Worcester, Hereford and Shropshire. It is directed to certain persons to call out "the array of the county," and then to lead the array:

21. Stephen, *History of Criminal Law*, Vol. 1, p. 210.
22. Lowry, pp. 21-22.
23. Lowry, p. 24.
24. Coke, *3rd Institute*, c.7; p. 52; Hale, *History of Common Law*, p. 34; Stephen, *History of Criminal Law*, Vol. I, p. 210.
25. Lowry, p. 26.

> "As well against all and singular our enemies, as also against all and singular rebels, traytors, and other offenders and their adherents, against our Crown and dignities, within our said principalities and dominions of North Wales and South Wales, the marches of the same, and the counties and places aforesaid, and with the said traytors and rebels from tyme to tyme to fight, and them to invade, resist, suppresse, subdue, slay, kill, and to put to execution of death, by all ways and means, from tyme to tyme by your discretion.
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> "And further to doe, execute, and use against the said enemies, traytors, rebels, and such other like offenders and their adherents afore-mentioned, from tyme to tyme as necessities shall require, by your discretion, to the law called martiall law according to the law martial, and of such offenders apprehended or being brought into subjection, to save home you shall think to be saved and to slaye, detroye, and to put to execution of death, such and as many of them as you shall think mete, by your good discretion, to be put to death."

The second Commission empowers Sir Robert Munsell to govern the crews of certain ships intended for the suppression of piracy, and gives him "full powers to execute and take away their life, or any member, in form and order of martial law."

The third is a commission to the Mayor of Dover, and others, empowering them:

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

example of terror to others, and to keep the rest in due awe and obedience."[26]

A careful perusal of these Commissions from the time of Henry VII to the reign of Charles I, shows that they are marked by the feature of punishing the rebels after the revolt has been suppressed. The function of the tribunals trying such offenders is *prima facie* illegal, and in the words of Lord Coke already referred to "murder." Martial law could not be resorted to as a mode of punishing rebels after the rebellion had been suppressed and order restored. It is this widespread and enthusiastic tendency on the part of the English rulers which the Petition of Right attempted to arrest. It made illegal the application of martial law during peace to soldiers and civilians alike. It recited that "of late great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them in their house;"[27] that by 25 Ed. II and Magna Carta "no man shall be forejudged of life or limb against the form of the Great Charter and the law of the land," yet that "divers commissioners" have been appointed "with power and authority to proceed within the land, according to the justice of martial law against such soldiers and mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny or other outrage or misdemeanour whatsoever, and by such summary course and order as is agreeable to martial law, and as is used in armies in time of war," to try and execute such offenders according to martial law;[28] that offenders have escaped punishment "upon pretence that the said offenders were punishable only by martial law."[29] It therefore prays "that your Majesty would be pleased to remove the said soldiers and mariners," and "that the aforesaid commissions for proceeding by martial law may be revoked.....and that hereafter no commissions of like nature may issue forth."[30]

Whether or not these Commissions were absolutely forbidden by the Petition of Right both in time of peace and war has been left ambiguous. But it is certain beyond an iota of doubt that these commissions are unlawful during peace time. It will be discussed later in these pages at some length as to how far the prerogative right to promulgate martial law by commission or proclamation is still intact.

26. Stephen. *History of Criminal Law*, Vol. I, pp. 209-210.
27. S. 6 of the Petition of Right.
28. *Ibid.* S. 7.
29. *Ibid.* S.9.
30. *Ibid.* S. 10.

While discussing martial law the question arises as to who has the power to proclaim it. From the judgments delivered in the case of *Ship-money* two divergent points of view are noticeable. The majoriy opinion favours the recognition of the power of the Crown to proclaim martial law in its discretion to avert a possible danger to the country. The Crown alone was to judge as to whether or not the situation warranted promulgation of martial law. A passage from the judgment of Finch C.J., is directly in point:[31]

> "In time of imminent danger, *tempore belli*, anything, and by any man, may be done, murder cannot be punished; .....There hath been and may be as great danger when the enemy is not discerned as when in arms and on the land. In the time of war when the course of law is stopped, when the judges have no power or place, when courts of justice can send out no process, in this case the king may charge his subjects, you grant. Mark what you grant; when there is such a confusion as to law, then the king may do it..... Then there may be a time of war in one part of the kingdom, and the courts of justice may sit. Now whether a danger be to all the kingdom or to a part, they are alike perilous, and all ought to be charged..... Expectancy of danger, I hold, is sufficient ground for the king to charge his subjects; for if we stay till the danger comes, it will be then too late. And his averment of danger is not traversable, it must be binding when he perceives and says there is a danger;....."[32]

The contrary view finds expression in the arguments of Mr. Holborne, one of the counsels for Hampden. He observes:

> "Put the case an enemy has landed, to show what the powers are by our laws in that case for our defence; when there is a particular appearance of instant and apparent danger, in that case particular property must yield much to necessity. These cases our books warrant, as building of bulwarks on another man's ground, and burning corn. But where do our books say that upon fear of danger, though in the king's case, a man can without leave make a bulwark in another man's land? I do not read. As your lordships may observe in this case of apparent

31. 3 S.T. at p. 1234.
32. *Ibid.*

> danger the power of the king; observe withal the power of the subject, and out of what principle this doth grow; whether out of form of law or out of necessity. In these cases of actual danger and actual invasion, it is not only in the power of the king, but a subject may do as much in diverse cases. For if there be an actual war, the subject may without any direction, may do any act upon any man's land, and invade any property towards defence; it is the law of necessity that doth it. Nay in that case the subject may prejudice the king himself in point of property..... *Levis timor* will not serve.....but such a fear as ariseth from an actual and apparent danger."[33]

This gives rise to an important issue in regard to martial law, namely, to what extent is martial law in the prerogative discretion of the Crown, and whether, on the other hand, it is governed by the necessity of the situation alone. As regards the prerogative of the Crown it may be of interest to students of constitutional law to note that the Petition of Right put an end to it as far back as 1628. Sections 7, 8, 9 and 10 of the Petition of Right in effect lay down that the commissions under Great Seal which had of late been issued to certain persons to proceed " according to the justice of martial law, " were " wholly and directly contrary to the said laws and statutes of this realm." It was provided that henceforth no commissions of this nature may issue forth to any person or persons whatsoever.[34]

In the context of the Petition of Right, therefore, the judgment of the majority in the *Ship-money* case appears to be wrong. But the question still remains to what extent the Petition of Right has superseded the prerogative. In 1799, the Irish Parliament passed an Act,[35] the effect of which was to put certain parts of the country which were affected by the rebellion, under martial law. This Act recites in the preamble " the wise and salutary exercise of His Majesty's undoubted prerogative in executing martial law for defeating and dispersing such armed rebellious force, and bringing divers rebels and traitors to punishment in the most speedy and

33. 3. S.T. at p. 975; of pp. 1012, 1013. "Royal power....is to be used in cases of necessity and imminent danger, when ordinary courses will not avail....as in cases of rebellion, sudden invasion, and some other cases when martial law may be used, and may not stay for legal proceedings." Crook J. at p. 1162,

34. Petition of Right, 3 Chas. I, c. 1; Stephen, *History of Criminal Law of England*, Vol. 1, p. 208-209.

35. See Holdsworth, "Martial law, Historically Considered" 18 *L.Q.R.*, p. 126.

summary manner," etc., etc. In Section 6 of the Act there is a proviso that " nothing in this Act shall be construed to abridge or diminish the *undoubted prerogative* of His Majesty for the public safety to resort to the exercise of martial law against open enemies or traitors."[36] In another statute, 43 Geo. III, c. 117, there is a reservation of this " undoubted prerogative " ; and a similar reservation finds place in the act known as the Insurrection Act, 3 & 4 Will. IV, c. 4 (1833) ; S. 40 of this Act lays down that none of its provisions shall be construed " to take away, abridge, or diminish the undoubted prerogative of His Majesty for the public safety to resort to the exercise of martial law against open enemies or traitors."[37]

The prerogative right of the Crown to issue proclamations of martial law has been a closely debated matter, and great legal talents have been arrayed, on either side in this behalf. But on a balance of authority it would seem that the Crown does not have any discretionary authority in this matter, and martial law in England has a completely different connotation as would presently appear from a consideration of its real nature and scope. It may, however, be worthwhile to consider a few leading authorities on this question in order to have a clearer view of it.

The opinion was held in the 18th century that the Crown could exercise boundless authority during emergency for the preservation of the State. In 1739 Lord Hardwicke stated the position thus:

> " By the very nature of our Constitution, the Crown has during the recess of Parliament, a sort of dictatorial power to take care ' *ne quid detriment respublica capiat* ' ; and in consequence of this power, both by sea and land, if it should become absolutely necessary, and he may concert such measures as any sudden exigency may require, without a previous authority from Parliament for that purpose."[38]

A similar opinion was voiced by his son Charles Yorke in 1754. He said:

> " If I rightly understand what is meant by prerogative, it is a power always lodged by our Constitution in the Crown, something like that power given by the Roman Republic to their Consuls upon any sudden and dangerous emergency, ' *ut dent operam ne quid respublica detrimenti capiat* ' . . . . . According to this opinion when it becomes necessary for the

36. Stephen, p. 210; Holdsworth, p. 126.
37. *Ibid.*
38. *Parliamentary Hist.* X, 1384; Holdsworth, W.S., *A History of English Law*, p. 366.

> public safety to exercise any act of power, not warranted by our statute or common law, and the emergency is so sudden, and the danger so pressing, as to admit of no delay, the king may then exercise that act of power by virtue of his prerogative." [39]

It is again in this perspective of prerogative that Lord Camden in 1778 accepted the legality of the proclamation of 1776 which sanctioned an embargo on all ships. The circumstances leading to the embargo were that harvest had failed throughout Europe; it was feared that the consequence might be a famine in the Kingdom; and Parliament was not in session then, and there was no possibility of its being so, within the next forty days. The Council was called and it was decided that a proclamation be issued laying an embargo on all shipping and thus stopping any export of corn from England.[40] In this connection Lord Camden makes the following remark:

> " I looked upon it as a case of necessity which justifies the internal position of the prerogative between the laws and the people ; a right I shall ever maintain the constitutional exercise of....As soon as Parliament met an indemnity was proposed; for my part I was against it; because I thought it unnecessary....The issuing of the proclamation was a strictly justifiable act of prerogative, an act of prerogative not only warranted by particular necessity, but supported upon general principles. "[41]

The position of the Crown in regard to the measures to be taken in connection with an emergency is an outgrowth of a mistaken view held by the lawyers in the 18th and the 19th centuries that the Crown by virtue of its prerogative had a " reserve of power "[42] to deal with national emergency. This view led to another, under which it was claimed by these lawyers that the Crown in order to meet the emergency could proclaim martial law. Once the proclamation of martial law was made, the Crown could adopt any measures to meet the situation. The logical consequence of this proclamation was that there would be an unlimited reserve of power in the hands of the Crown, which could be used without any let or hindrance. It would not then be open to any one to challenge the exercise of this power nor would it be necessary to justify it by means of an act of indem-

39. *Ibid.*
40. *Ibid.*
41. *Parliamentary Hist.* XIX 1247-1248; Holdsworth, *History of English Law*, p. 365.
42. Holdsworth, *op. cit.*, p. 709.

nity. It is this sweeping display of authority at the discretion of one individual, however strategically and highly placed in the polity of the country, which has been denied by the Petition of Right and challenged by legal authorities at the bar of judicial and public opinion.

Lord Mansfield exposed the fallacy of this argument when he gave his opinion in connection with the Gorden Riots of 1790.[43] He denied that the King, "in the orders he gave respecting the riots, acted merely upon his prerogative, as being entrusted with the protection and the preservation of the State, in cases arising out of necessity, and not provided for in the ordinary contemplation and execution of law."[44]

The question then is, what is the law in England regarding the power of the government to act in the time of an emergency which may arise due to a riot, rebellion or invasion, and where does the power to take speedy action in such a case or situation reside? It is necessary in this connection, therefore, to understand the prevailing view which underlies the legal position in this behalf.

Martial law is one of the weapons in the hands of the executive arm of the government which ordinarily helps it in overcoming serious disorders which might ensue from any of the situations mentioned above which would warrant a state of emergency. The very safety of the State may be in danger. Even a riot may be so serious that unless nipped in the bud, it might assume an ugly character and grow into a rebellion, for, in the words of W.S. Holdsworth, "rebellion is but riot 'writ large.'"[45]

In this connection, therefore, it may not be out of place to refer to the charge of Tindal C.J. to the Bristol Grand Jury,[46] in which he summed up the position in clear and precise terms. He emphasized that there was ample provision in the law of England for preventing riotous and disorderly meetings, and also for prompt and effectual suppression of them whenever they showed their ugly head. He then elaborated the sources of this legal authority and said:

> "by common law every private person may lawfully endeavour, of his own authority, and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power."

He then proceeds to say:

> "not only has he the authority, but it is his bounden duty as

43. *Ibid.* 706.
44. *Ibid.* 707.
45. 18 *L.Q.R.*, p. 129.
46. 5 C. & P 261; Keir & Lawson *Cases in Constitutional Law*, 1933, p. 359.

> a good subject of the king, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evil-doers to keep the peace."[47]

He favors the view that the citizen, while performing this duty, acts in concert with the magistrate in order to avoid a disjointed and uncoordinated action, but where the situation has so deteriorated that this direction and orders of the magistrate is not available, he must " act for himself and upon his own responsibility."[48]

He does not, in this connection, draw any distinction between a citizen and a soldier:

> " The soldier is still a citizen, lying under the same obligation and invested with the same authority to preserve the peace of the king as any other subject. If the one is bound to attend the call of the civil magistrate, so also is the other ; if the one may interfere for that purpose when the occasion demands it, without the requisition of the magistrate, so may the other too ; if the one may employ arms for that purpose, when arms are necessary, the soldier may do the same. "[49]

It is apparent from these recitations that a duty is cast on the citizen and the soldier alike to act under the direction and command of the magistrate wherever and whenever possible in order to keep the peace and protect the State from subversion. But where the circumstances are such that due to chaos and existing peril to the safety of the State such direction and command from the magistracy of the country cannot be obtained, both the citizen and the soldier are free to take the initiative in their own hands and do everything possible to protect the society from subversion. It is not only in their discretion to do so, but there is a duty on them to act, and they will be answerable before the courts of law if they failed to act in such circumstances.[50] If in the discharge of this onerous duty, they did commit some excess, they would be protected by the common law, unless malice or negligence is proved on their part.[51] " And he may be assured ", says Tindal C. J. in his charge to the Bristol Grand Jury, already referred to, " that whatever is *honestly* done by him in the execution of that object will be supported and justified by the common law."[52]

It is out of this common law obligation that arises the duty

47. *Ibid.* 360.
48. *Ibid.* 360.
49. K & L (1933), pp. 360-361.
50. *Ibid.*
51. *Ibid.*
52. *Ibid.* p. 360.

of "every sheriff, constable, and other peace officer," to do all that lies in his power for the suppression of riot and the restoration of peace. This obligation invests him with the power to summon the help and assistance of every other citizen, and the citizen has no other choice but to render assistance according to his capacity and resource.[53] Any infringement of this duty is punishable under the law.[54]

Littledale J. in his summing up, in *Rex* v. *Pinney*,[55] reinforced these views when he said:

> "a party intrusted with the duty of putting down a riot, whether by virtue of an office of his own seeking (as in the ordinary case of a magistrate), or imposed upon him (as in that of a constable), was bound to hit the exact line between excess and failure of duty, though it might be some ground for a lenient consideration of his conduct on the part of the jury, was no legal defense to a charge like the present. Nor could a party so charged excuse himself on the mere ground of honest intention."[56]

If the principle of law enunciated above by Tindal C.J. and, emphasized by Littledale J. is borne in mind, it will be easy to comprehend the intricate legal channels through which the doctrine of martial law has moved and ultimately has been accepted as an important constitutional principle under the English legal system. It should not, therefore, unduly alarm the students of English constitutional law to find an authority like A.V. Dicey declare that " Martial law, in the proper sense of that term in which it means the suspension of the ordinary law and the temporary government of a country or parts of it by military tribunals, is unknown to the law of England."[57]

What Dicey means by this assertion is that the proclamation of martial law in the sense in which a county or a district is governed by military tribunals, which supersede the jurisdiction of the courts, is foreign to the law of England. There is nothing like the state of siege in France under which the authority for the maintenance of law and order passes to the military, during an insurrection or rebellion, and the guarantees of the Constitution are suspended for that

53. See 13 Hen. 4, c. 7; K & L., p. 361; 1 & 2 Will. 4, c. 41; 1 Geo. 1, st. 2. c. 5, the statute usually known as the Riot Act.
54. *Reg.* v. *Brown*, (1841), Car. & M. 314; K & L p. 364.
55. 3 St. Tr. (n.x) 11; K & L, *Cases in Const. Law*, p. 363; Forsyth, *Cases and Opinions*, p. 213.
56. *Ibid.*
57. Dicey, *Law of the Constitution*, 8th ed. (1915), p. 283.

period.[58] But martial law is used in another sense in England, and the use of the doctrine in this sense, Dicey fully recognizes.[59]

Dicey builds upon the doctrine of *R.* v. *Pinney*,[60] and proceeds to observe that if martial law is " employed as a name for the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot, or generally any violent resistance to the law," it is " most assuredly recognised .... by the law of England."[61]

Martial law is an extreme remedy which can be employed by the executive authority in the event of a rebellion or imminent danger to the safety of the State. It connotes " a particular system of legal relations which arise between the military and civilian subjects of the king in time of insurrection or civil war."[62] The military commander assumes the power to administer law as the civil authority comes to a halt due to disturbed conditions in the realm or any part thereof. This assumption of power by the military commander arises when emergency necessitates the restoration of peace and order, which has been threatened by insurrection, civil war, or invasion by a foreign enemy. The legal basis of this authority in the military commander has been a subject of inconclusive controversy.

According to Professor Dicey and some other eminent authorities[63] it arises out of necessity and the basis of the authority is common law. This authority is inherent in every other political system and arises from the right of self-preservation.[64] Each citizen as well as every soldier in England has not only the right but the duty to take up arms and do every other thing to preserve the State and the society. It is advisable to act under the command of the authorities,[65] but it is permissible to take independent action where the situation has so deteriorated that it is not possible to take orders from the authorities. The compelling reason for this is that the society and the State must be preserved, whatever cost in blood and property it might entail, for

58. *Ibid.* pp. 283-284.
59. *Ibid.* 284.
60. *Supra*, note 55.
61. *Dicey*, p. 284
62. K & L, *Cases in Const. Law* (1933), p. 368.
63. Dicey, *Law of the Constitution*, 8th ed. (1915), n. X., p. 539. Similar views are expressed by Comyns, Hargrave, Lord Loughborough, Stephen, Pollock, Sir David Dundas, Campbell Rolfe, Mackintosh, and Holdsworth. See Holdsworth, *History of English Law*, vol. IX, pp. 708-709; Forsyth, *Cases and Opinions*, 1869, p. 521 and pp. 204-206.
64. Forsyth, p. 563.
65. Dicey, c. viii.

peace and order are the *sine qua non* of social action and survival of the State.

It is an accepted legal axiom in England now that in the face of violence and subversion every citizen has a common law right to use force against force. The principle underlying this right is an extension of the right of self-defense which inheres in every citizen. Every citizen as well as soldier and sheriff has a right as well as a duty to use force in order to preserve peace. On the wider area of national defense, this principle applies with equal force and authority to the executive and the military. And organized violence like a rebellion or an invasion must be met by the combined resources of the government and the citizen. It is in such a circumstance that the common law allows the use of force by the military forces of the State and take all other steps which might be necessary to avert the danger. Martial law is one such means at the disposal of the military authorities which they employ to fight chaos and subversion. Necessity alone justifies taking of those measures which in the normal conditions would be trespass, and thus unlawful. But as Professor Dicey points out, necessity again justifies the continuance of these extraordinary measures. While, therefore, necessity lasts there should be no interference with the exercise of these powers by the military authorities and they should be left unhampered in the pursuit of the task by the judicial and civil branches of the government. It is, however, necessary to define the limits of military action and their relations with the judiciary during the period of the emergency at a subsequent stage of this enquiry.

The difference between this common law right of the citizen, the soldier and the executive to take necessary action to preserve the State and the society, and the prerogative right of the Crown to enforce martial law by proclamation is this: In the former case, there are certain inherent limitations within which every one has to act and operate. They have to take all the steps necessary for fighting the emergency, but no more. The promulgation of martial law interferes with the fundamental liberties of the people. The constitutional guarantees of the citizen are suspended for the period of the emergency. This amounts to an invasion of the cherished rights of the people which is suffered only because there looms a greater emergency which might put an end to these rights forever, if steps are not taken to nip it in the bud. But when the emergency is over every one is accountable for any excesses or undue invasion of the rights of the people. It is right to say that a person acting under the pressure of

an invasion or a rebellion may not be expected to balance each step with consummate prudence lest he might tread on some one else's constitutional right or liberty. But one has surely to exercise a balance between " excess and failure of duty,"[66] for, he will be answerable for anything done unjustifiably or maliciously, after the emergency is over. It is, therefore, necessary to pass an Act of Indemnity granting them immunity from indictment or action for any excesses during the period of emergency. In the latter case, however, the Crown is free to sanction or authorize any measures for any period of time to meet the emergency. A mere proclamation is enough to introduce extraordinary measures suspending the guarantees of the Constitution and legalizing any action. No Act of Indemnity is subsequently necessary to grant exemption from criminal or civil responsibility to those who might be deemed guilty of any excesses during the period of emergency. But since promulgation of martial law by prerogative authority is denied in England by an overwhelming array of authority,[67] it is submitted that the only basis for introducing martial law in England today is the common law and inherent right of self-preservation based on the doctrine of necessity.[68]

It is in this sense Dicey says that "martial law" is used in England.[69] It is this basis of martial law which finds support in the opinion of Sir J. Campbell and Sir R.M. Rolfe. "The right of resorting to such an extremity," they point out, "is a right arising from and limited by necessity of the *case—quod necessitas cogit, defendit.*"[70]

This view also echoes an opinion of Sir James Mackintosh:[71]

66. Littledale J. in *R.* v. *Pinney*, K & L., p. 363.
67. *Supra*, note 63.
68. Proclamation of martial law by means of an Order-in-Council does not accord any special legal sanction to the exercise of function under martial law. A proclamation is merely a notice to the public that a certain state of facts exist. But the proclamation does not render legal those acts which would not be lawful if the Order-in-Council were not issued or the proclamation of martial law were not made. See Pollock, 18 *L.Q.R.*, p. 155-56.

    Sir David Dundas says in connection with martial law in Ceylon: "The proclamation of martial law is a notice, to all those to whom the proclamation is addressed, that there is another measure of law and another mode of proceeding than there was before that proclamation." Forsyth, p. 558.

    See to the same effect opinion of Stephen in *Governor Eyre's* case. Forsyth, p. 559.
69. Dicey, *Law of the Constitution*, 8th ed. n. x., p. 539-540. *Ibid.*, p. 540; Forsyth, p. 206; K & L, p. 383.
70. *Ibid.* Forsyth, p. 201; Dicey, p. 540 "martial law is merely a cession of all municipal law, and what necessity requires it justifies."
71. Dicey, citing from Clode, *Military Forces of the Crown*, vol. ii p. 486, at p. 541.

> "The only principle on which the law of England tolerates what is called martial law is necessity; its continuance requires precisely the same justification of necessity; and if it survives the necessity on which alone it rests for a single minute, it becomes instantly a mere exercise of lawless violence."

A leading case on the subject of martial law on trial by military courts, in which the question came up whether, when civil courts were open and unobstructed in the performance of their functions, persons, particularly civilians, could be tried by courts-martial or military tribunals is the trial of Theobald Wolfe Tone.[72] The circumstances leading to this trial were briefly these. In May, 1798, owing to the disturbed conditions in Ireland, the Lord Lieutenant (Lord Camden) issued a proclamation of martial law, which was put into force and many persons were executed under it. In November of the same year Wolfe Tone, an Irish resident, and formerly a member of the Irish bar,[73] who had gone over to France to procure French help for the liberation of Ireland, was captured by Sir John Borlase Warren's squadron on board *The Hoche*, French line of battleship, off the Irish coast. The prisoner was brought to trial by court-martial in Dublin, on the 10th of November, 1798.[74]

Mr. Tone was implicated, being a natural born subject of the English king, for traitorously entering into the service of the French Republic, which was at open war with the English government. He was charged for bearing arms against his king and country, and for assuming a command in the army of an enemy, which was on way to invading Ireland. He was also charged with the offence of acting in open resistance to His Majesty's forces, with several other charges of a treasonable nature.[75]

The prisoner admitted "the whole charge exhibited against him."[76] But he made a request to the military court to the effect that he be accorded "the death of a soldier, and to be shot by a file of grenadiers."[77]

72. Lowry, James Moody, *Martial Law within the Realm of England*, 1914, pp. 28-29; XXVII State Trials, p. 613.
73. XXVII St. Tr., pp. 615-16.
74. *Ibid.* see *life of Curran by his son*, vol. 2, p. 154-58.
75. XXVII St. Tr., p. 617.
76. *Ibid.* It is neither necessary nor relevant to go into details of the statements which the prisoner sought and was suffered to make before the tribunal in justification of his activities. For details see, XXVII St Tr. p. 617.
77. *Ibid.* pp. 621-622. He said: "This is the only favour I ask; and I trust that men, susceptible of the nice feelings of a soldier's honour, will not refuse the request."

The sentence of the court awaited the determination of the Lord Lieutenant, who subsequently confirmed the sentence of death passed on him by the court-martial, but did not accede to the request of the prisoner already referred to. He was to suffer death in "the most pubic manner for the sake of striking example."[78]

The prisoner could not bear the prospect of "such a torrent of public ignominy."[79] He therefore cut his throat with a pen-knife. But it was detected before he could succumb to it. The wound was dressed, bringing a brief recess "till the fatal hour of one O'clock appointed for execution."[80]

In the meanwhile a motion was made in the Court of the King's Bench by Mr. Curran, on an affidavit of Tone's father, stating that his son had been brought before a bench of officers, calling itself a court-martial, and by them sentenced to death.[81]

In presenting the application, Mr. Curran, the counsel for the petitioner, said that he did not pretend to say that Mr. Tone was not guilty of the charges of which he was accused, but on the basis of the affidavit he contended that Mr. Tone had no commission in the army of the king, and as such, "no court-martial could have cognizance of any crime imputed to him, while the Court of King's Bench sat in the capacity of the Great criminal court of the land."[82] He went on to say that "in times when war was raging, when man was opposed to man in the field, court-martial might be endured," but he contended vehemently that "martial law and civil law are incompatible; and the former must cease with the existence of the latter."[83]

The motion failed to achieve the desired result, as, despite the best efforts of the Court, the writ of *habeas corpus* could not be served and the prisoner brought to the Court on account of the prisoner having died of the wounds he had received in an attempt to cut his own throat.[84] The two most important issues therefore could not be

78. XXVII St. Tr. p. 623.
79. *Ibid.*
80. *Ibid.*
81. *Ibid.* p. 624-5.
82. *Ibid.* p. 625.
83. *Ibid.* p. 625.
84. It may be interesting to record the proceedings of the Court of King's Bench in this case after Mr. Curran requested that a *habeas corpus* be directed against the Provost Marshal or the barracks of Dublin, and Major Sandys to bring up the body of Mr. Tone.
Lord Chief Justice (Kilwarden)—Have a writ instantly prepared.
Mr. Curran—My client may die while this writ is preparing.
Lord Chief Justice—Mr. Sheriff, proceed to the barracks, and acquaint the

adjudicated upon in this case, namely, whether a court-martial could proceed against a person who was not commissioned in the army of the king, and whether military tribunals could try civilians when the civil courts were functioning in the realm. These points, therefore, remained unanswered till the decision of the Privy Council in *ex parte, D.F. Marais.*[85]

The case of *ex parte, D.F. Marais* is one of the most important decisions of the Privy Council on the subject of martial law. The facts briefly were that the petitioner was arrested on August 15, 1901, by the chief constable of the town of Pearl, about thirty five miles from Cape Town. The constable had no warrant, but stated that he acted on instructions from the military authorities. The petitioner was removed about three hundred miles on August 18, to the town of Beaufort West, and detained in custody there. He petitioned the Supreme Court at Cape Town on September 6 for his release on the ground that his arrest was contrary to the fundamental liberties secured to the subjects of His Majesty. It appeared from an affidavit sworn by the gaoler of Beaufort West that the petitioner was

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Provost Marshal that a writ is preparing to suspend Mr. Tone's execution; and see that he be not executed.

(The Court awaited, in a state of the utmost agitation the return of the sheriff.)

Mr. Sheriff—My lords, I have been at the barracks in pursuance of your order. The Provost-Marshal says he must obey Major Sandys. Major Sandys says he must obey lord Cornwallis.

Mr. Curran—Mr. Tone's father, my lords, returns, after serving the *Habeas Corpus*: he says General Craig will not obey it.

Mr. Sheriff, take the body of Tone into your custody. Take the provost-marshal and Major Sandys into custody: and show the order of this Court to General Craig.

Mr. Sheriff (who was understood to have been refused admittance at the barracks) returns.—I have been at the barracks. Mr. Tone having cut his throat last night, is not in a condition to be removed. As to the second part of your order I could not meet the parties.

(A French emigrant Surgeon, whom General Craig had sent along with the Sheriff, was sworn)

Surgeon—I was sent to attend Mr. Tone this morning at four O'clock, his wind-pipe was divided. I took instant measures to secure his life, by closing the wound. There is no knowing for four days, whether it will be mortal. His head is now kept in one position. A sentinel is over him to prevent his speaking. His removal would kill him. Mr. Curran applied for further surgical aid, and for the admission of Mr. Tone's friends to him. (Refused.)

Lord Chief Justice—Let a rule be made for suspending the execution of Theobald Wolfe Tone; and let it be served on the proper persons.

(The prisoner lingered until the 19th day of November, when he expired, after having endured in the interval the most excrutiating pain).

See XXVII St. Tr. pp. 625-626; 2 *Life of Curran* 166, note.

85. [1902] A.C. 109.

detained under the orders of the military authorities, which was dated September 8. The alleged cause of the arrest was contravention of martial law regulations.[86]

The Supreme Court at Cape Town, speaking through Buchanan J. refused the petition. The grounds for the refusal were that martial law had been proclaimed in the districts both of the Pearl and of Beaufort West, and that the Court ought not to go into the necessity of that proclamation nor accept any responsibility for the acts of the military authorities performed in pursuance of it. The decision clearly pointed out the Court's inability to do anything as long as martial law lasted.[87] Marais appealed to the Privy Council but the appeal was dismissed.

The reasons for the refusal to grant the petition were given by the Lord Chancellor, Lord Halsbury. At the outset he held that both the districts, the one in which the petitioner's arrest took place and the other to which he was removed, were under martial law. The main point for consideration, as urged by the petitioner, was whether, when some of the courts were open, it was impossible to apply the ordinary rule that where actual war is raging the civil courts have no jurisdiction to deal with military action, but where acts of war are in question the military tribunals alone are competent to deal with such questions.[88] The Privy Council laid down in unmistakable terms that:

> "They are of opinion that where actual war is raging acts done by military authorities are not justiciable by the ordinary tribunals, and that war in this case was actually raging, even if their Lordships did not take judicial notice of it, is sufficiently evidenced by the facts disclosed by the petitioner's own petition and affidavit."[89]

They refused to countenance the fact that since some courts were open, there was no war raging at that time. In their own words:

> "The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging."[90]

The Lord Chancellor referred in this connection to the earlier decision of the Judicial Committee in *Elphinstone* v. *Bedreechand*[91] and

86. *Ibid.* at 110.
87. *Ibid.* at 110.
88. [1902] A.C. 109, at 114.
89. *Ibid.*
90. *Ibid.*
91. (1830), 1 Knapp p.c. 316; 2 St. Tr. N.S. (1830) p. 379. Refer to the opinion of Lord Tenterden, C. J., cited in [1902] A.C., p. 115.

came to the conclusion:

> "Where war actually prevails the ordinary courts have no jurisdiction over the action of the military authorities."[92]

The Lord Chancellor did not pause to lay down any rule as to the determination of the fact of war, that is, whether or not the civil courts were competent to determine whether war was in existence or not. But he did add the cryptic statement that the question of the severity of the steps taken by the military may arise, but did not add to it the necessary explanation as to who would determine the questions involved in the proposition. He rather added to the complexity of the matter in his further remarks when he said:

> "but once let the fact of actual war be established, and there is an universal consensus of opinion that the civil courts have no jurisdiction to call in question the propriety of the action of military authorities."[93]

This decision as it comes from the Judicial Committee of the Privy Council deserves serious consideration. The pronouncements of the Judicial Committee although in form are merely reports to the Sovereign of England from appeals in cases from the overseas empire and dominions, yet in effect they have all the attributes of a decision from the highest court of appeal in the empire. They do not have a legally binding effect, yet they will not be ordinarily ignored by the British judiciary.[94] It is, therefore, not out of place to examine briefly the various issues which found their solution in this case, a few others which remained unanswered, and some which gave rise to further complications and controversies without providing a clear answer for themselves.

An analysis of the decision reveals two propositions worth noticing at this point.[95] The first is: Where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals.

The second proposition is: The fact that for some purposes some tribunals have been permitted to pursue their ordinary course is not conclusive that war is not raging.

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92. [1902] A.C., p. 115.
93. [1902] A.C., 109 at 115.
94. See Cyril Dodd, "The Case of Marais", (1902) 18 *L.Q.R.* p. 14-3: He says: "Any decision of the Privy Council.....is not limited to the particular occasion or to the particular place, but extends to the whole of the dominions of the Crown beyond the sea."
See also, Pollock, "What is Martial Law," 18 *L.Q.R.*, 158.
95. The controversy regarding Petition of Right has been noticed elsewhere.

As regards the first proposition, it must be said that it is open to serious criticism.[96] It places in the hands of the military authorities a weapon which, as it is kept out of the vigilance of the courts, is capable of grave misuse. If this proposition is intended to apply to the facts of the present case, which does not appear from the judgment at all, it may be less open to criticism. But if the intention of the Privy Council was, as seems to be the case, to lay down the broad proposition that military authorities cannot be held answerable for their acts, however arbitrary and unwarranted by the necessity of the situation, then it is much beyond the scope of the recognized law.[97] It has been held by high judicial authorities that proclamation of martial law by itself is no proof of the existence of necessity. It puts the citizen on notice that a situation of that kind has arisen in which measures of martial law have become necessary. "Proof of actual war does not exempt the soldier from all liability to answer after the war for all acts done during war."[98] As regards the power of the courts to inquire into the acts of the military authorities, it would appear that the modern view is against such exclusion. They have the jurisdiction to inquire about the fact of the necessity.[99] It would also depend on whether or not they are able to function freely and for all purposes, or on the other hand they are allowed to function on a limited basis by the permission and under the protection of the military authorities.[1] In the latter case, it is true their authority will be limited.[2] But if they are functioning in the normal way in their own right, it is not correct to say that they have no jurisdiction over the acts of the military authorities. It is another matter that situated as they might be in the particular situation obtaining at the moment, their authority may be flouted by the military authorities, but nonetheless, they retain the jurisdiction to inquire into the acts of the military personnel after the war is over, and are always free to enquire whether the necessity of war or emergency did exist to justify the measures taken.[3]

Taking the second proposition regarding the open court rule, it is now agreed that it no longer holds good in the present context.

96. 18 L.Q.R., pp. 148-151, 157-8.
97. *Wright* v. *Fitzgerald* (1799), 27 St. Tr. 759, 765 .
98. Dodd, "The Case of Marais", 18 *L.Q.R.* p. 149.
99. *Ibid*, p. 145: K & L Cases, (1933), p. 383 opis. Campbell Rote.
1. 18 L.Q.R., 149.
2. See *Hawaiian Martial Law* case, K & L. p. 372; See 2 I.R. p. 326, Molony C.J. in protest.
3. *Sterling* v. *Constantin*, 287 U.S. 378 (1932) ; *Wright* v. *Fitzgerald*, (1799), 27 St. Tr. 759. See Molony, C.J. in *R.* v. *Strickland*, (1921) 2 I.R. 317 at p. 329.

When the rule was enunciated and accepted as an axiom of law, justice was in a large measure based on legal fictions. These fictions do not exist in the present time. It would be injurious to society and the State to ignore the hard facts of war and insurrection, and cling to fictions and formulaes of a bygone age when modern scientific knowledge and technological developments have revolutionized the very concept of warfare. War cannot be said to be non-existent merely because a few triubunals are functioning for certain purposes.[4] In this sense, therefore, the present case puts an end to this old rule, which did hold the field for a long time.[5]

It has been by now a settled law in England that civil courts cannot take cognizance of sentences passed by military courts administering martial law. These military tribunals are not treated on a par with the lower civil or criminal courts from whose judgments appeals may lie before higher judicial bodies. They are rather thought to be no courts at all in the eye of the law, and therefore out of the appellate jurisdiction of the higher tribunals.

This question came before the Judicial Committee of the Privy Council in *Tilonko* v. *The Attorney-General of the County of Natal*[6] on appeal from a court-martial sitting at Pietermaritzburg, in the country of Natal. This was a petition for special leave to appeal from a judgment of a military tribunal and the sentence following thereon.

The petitioner in this case was on July 30, 1906, indicted before a court-martial claiming to sit under a declaration of martial law for

4. See Pollock, "What is Martial Law", 18 *L.Q.R.*, p. 157. He says: "The only point it [*ex Parte, Marais*] decided, in my opinion, was that the absence of visible disorder and continued sitting of the courts are not conclusive evidence of a state of peace. This, I venture to think, is right....."

   See also, Dodd, "The Case of Marais", 18 *L.Q.R.*, p. 147. "It was not to be expected that a Committee of the Privy Council should feel bound by any such general rule to the extent of being compelled to hold, contrary to actual fact that war did not exist."

5. 18 L.Q.R. p. 147.

   In two leading Irish cases, *R.* v. *Allen* (1921) 2 Ir. R. 241, and *Egan* v. *Macready*, (1921) 1 Ir. R. 265, *ex parte, Marais* came up for consideration. It was followed in the former case, but in the latter it was distinguished by O'Connor M.R., although the facts were similar in the two cases. He refused to follow *ex parte, Marais* on the ground that it could not apply to a case where a prisoner had been sentenced to death, and not merely detained by military authorities. See K & L, 1933, p. 378-381.

   These cases, despite their great legal importance, are not directly in point in an English court as they have no binding effect there. There is only one case which, being a decision of the House of Lords, has such effect, and that is the case of *Clifford* v. *O'Sullivan* [1921] 2 A.C. 570.

6. [1907] A.C. 93.

the crimes of sedition and violence. The petitioner contended that his trial before the military court was without jurisdiction and illegal. The question, therefore, was whether an appeal could lie from the order of the court-martial.

The Judicial Committee disposed of the argument of the counsel for the petitioner that leave could not be refused by asserting that there was no analogy between the proceedings of a military court functioning under the Mutiny Act and the proceedings of martial law which are not constituted under any system of law. Lord Halsbury observed:

> "It is by this time a very familiar observation that what is called "martial law" is no law at all. The notion that 'martial law' exists by the reason of the proclamation .....is an entire delusion. The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon the question whether there is war or not. If there is war, there is right to repel force by force, but it is found convenient and decorous, from time to time, to authorize what are called 'courts' to administer punishments, and to restrain by acts of repression the violence that is committed in time of war, instead of leaving such punishment and repression to the casual action of persons acting without sufficient consultation, or without sufficient order or regularity in the procedure in which things alleged to have been done are proved."[7]

The Lord Chancellor denied that these "courts" were in any way similar to the ordinary courts of justice.[8] The only justification for these courts and the course they pursued was necessity and war. He, however, conceded that the question may arise regarding the fact of the existence of war itself. But no such question arose in this case, and an Act of Parliament in Natal covered any such anamoly. The Court was bound by the provisions of the Act, and therefore had no jurisdiction to review the judgment of the court-martial.[9]

This case was later followed in *Clifford* v. *O'Sullivan*, [10] by the House of Lords. This was an appeal from the judgment of the Court of Appeal in Ireland dismissing an appeal from an order of Powell J. a judge of the Chancery Division of the High Court of Justice in

7. *Ibid.*, pp. 93-94.
8. [1907] A.C. p. 95.
9. *Ibid.*
10. [1921] 2 A.C. p. 570.

Ireland, who had refused an application by the defendants for a writ of prohibition. The application was made on behalf of the appellants, who were civilians. They were arrested by military forces near Mitchelstown in the county of Cork[11] and were found with arms and ammunition in their possession.[12] On May, 3, 1921 the appellants were formally charged before certain officers sitting as a military court under the proclamation of December 12, 1920, with being improperly in possession of arms and ammunition. After hearing they were sentenced to death, the sentence being subject to confirmation.[13] Upon this, application was made to Powell J. that a writ of prohibition might be issued and directed to the above-mentioned military court and to General Macready and Major-General Strickland to prohibit them from further proceeding with the trial of the appellants, or from pronouncing or confirming any judgment upon the appellants as a result of the trial, or from carrying into execution any such judgment or otherwise interfering with the appellants on the ground that the military court was illegal.[14]

The application was heard and the learned judge, following a decision of a Divisional Court of the King's Bench Division in Ireland in a similar case,[15] held on the authority of *ex parte, Marais*[16] that a state of war existed in the above-mentioned counties of Ireland, and that where such a situation obtained the civil courts had no jurisdiction to interfere with the proceedings of the military authority.[17] He, therefore, refused the application. The Court of Appeal, however, refused the appeal from this order of Powell J. on the ground that they had no jurisdiction to entertain an appeal from a judgment of the High Court "in any criminal cause or matter," under the provisions of s. 50 of the Judicature Act (Ireland).[18]

The House of Lords held that in order that a case may be a criminal charge or matter it must fulfil two conditions. "It must involve the consideration of some charge of crime, that is to say, of an offense against the public law (Imperial Dictionary, tit. 'Crime' and 'Criminal'); and that charge must have been preferred or be

11. On December 12, 1920, a proclamation was issued whereby martial law was declared in the counties of Cork, Tipperary, Kerry and Limerick.
12. It was an offence punishable with death under the proclamation.
13. By the military commander.
14. [1921] A.C. 578
15. *Rex* v. *Allen*, [1921] 2 Ir.R. 241.
16. [1902] A.C. 109.
17. [1921] 2 A.C. 579.
18. *Ibid.*

about to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence. If these conditions are fulfilled, the matter may be criminal, even though it is held that no crime has been committed, or that the tribunal has no jurisdiction to deal with it."

Applying these criteria to the present case, the Court came to the conclusion that neither of these conditions were fulfilled here.[19] They said: "The so-called 'military court,' whose proceedings were in question before Powell J. was not and did not claim to be a court or judicial tribunal in any legal sense of those terms... They sat, sat not as a tribunal for hearing charges of crime, but as a military committee for considering a matter arising under the proclamation and advising the commanding officer thereon."[20]

As such their lordships thought that the proceedings before the military tribunal were no criminal proceedings at all. Hence, Powell J. they thought, in reviewing the proceedings of the "so-called military court"[21] was not seized of a "criminal cause or matter."[22] Therefore, an appeal would not lie from his decision.[23]

They further came to the conclusion that a writ of prohibition did not lie, because the military officers who purported to act in this case did not do so as a court in any legal sense of the term.[24] The other reason for refusal to issue the writ was that the writ of prohibition directed to the officers would be of no avail as they had long completed their work. The prohibition could also not be granted against Generals Macready and Strikland restraining them from carrying out the sentences, because they were not officers or agents of the military court, and therefore prohibition would be ineffective against them.[25]

In the result, therefore, the House of Lords approved the same result arrived at by the Judicial Committee of the Privy Council in *Tilonko* v. *Attorney-General of Natal*,[26] and refused to disturb the sentences passed by a military tribunal on the ground that the

19. *Ibid.* 581.
20. *Ibid.* The House of Lords followed *Tilonko* v. *Attorney General of Natal* [1907] A.C. 93, 94. See *Ibid.* 581.
21. [1921] 2 A.C. 582.
22. *Ibid.*
23. *Ibid.*
24. *Ibid.* p. 584. See *Ibid.* p. 583: The Court considered *Chamber* v. *Jennings*, 2 Salk. 553, E.R., in which Holt C.J. is reported to have said that "a prohibition would lie to a pretended court;" but in a fuller report of that case (7 Mod. 125 E.R.), no such statement is to be found.
25. [1921] 2 A.C. p. 584.
26. [1907] A.C. 93, 94.

military courts were not judicial tribunals and therefore did not function as court of law from whose decision appeal could lie to higher tribunals. It is needless to say that the position taken by the House of Lords will be followed by the tribunals in England. The same authority accrues to a decision of the Privy Council wherever it has jurisdiction. These decisions lead to one anamoly. Since military tribunals are not courts, their decisions have no validity beyond the time of martial law. After the expiry of martial law, therefore, sentences passed by them would expire unless given statutory sanction by Parliament or the Legislature. But, where a death sentence has been awarded and carried out, the remedy at a later stage is impossible. These decisions shut out municipal courts from undoing any wrong or arbitrary sentences awarded by the military courts.[27]

In World War I, there was no declaration of martial law in England although the country was involved in a bloody struggle with Germany in Europe and other theatres of war. England itself did not experience a state of war within the borders of the country, despite a few "enemy air-raids and bombardments from the sea." But still the Parliament had given the military power over the civil population to try certain offences by court-martial.[28] The Defence of the Realm Consolidation Act, 1914,[29] provided for vesting in His Majesty-in-Council power to make regulations, during the continuance of the war, for securing public safety and defense of the realm.[30] There was a specific authorization for making regulation for the purpose of "trial by court-martial" and also by courts of summary jurisdiction in minor cases, and punishment of persons committing offences against the regulations.[31]

With a view to implementing this provision, regulations[32] were framed providing for punishment by courts-martial of persons alleged to be guilty of an offence against the regulations. The punishments ranged from penal servitude either for a short term or life, to death penalty.[33]

These regulations placed the whole country under the jurisdiction

27. See Wade and Philips, *Constitutional Law*, 1946, p. 356. It is doubtful whether *habeas corpus* would lie in such cases. The question was left undecided in *Sullivan's* case. It is true *Marais* and *Allen* cases are not binding in England.
28. This power was vested by the Defence Act, 1914.
29. 5 George 5, c. 8.
30. *Id.* Sec. 1 (1).
31. *Id.*
32. Defence of The Realm (Consolidation) Regulations, 1914 (1914—No. 1699). See Regulations 56-58.
33. *Id.* Reg. 57.

of the military authorities, and suspended the functions of the civil courts for the trial and punishment of these offences. This was considered to be too severe and therefore the Defence of the Realm Act, 1914, was amended by the Defence of the Realm (Amendment) Act, 1915[34], which provided that the offences against the regulations may be tried instead by a civil court with a jury, provided that the person against whom a charge is made, claimed to be tried by a civil court.[35] This guarantee, however, was suspended in the event of invasion, or other special militay emergency which might arise out of the war.[36]

In World War II, again, there was no proclamation of martial law in England. It was not even necessary for a moment to deprive the ordinary civil courts of their jurisdiction by substituting courts-martial in their place.[37] But certain precautions were taken to cope with the emergency of a large scale invasion. This aim was designed to be achieved in two ways: one by passing the Treachery Act, 1940,[38] and inserting therein a provision for trial by court-martial of an enemy alien on the direction of the Attorney-General,[39] and the second by providing in the Emergency Powers (Defence) (No. 2) Act, 1940, for creating by regulation, special courts.[40] It was specifically provided in the Act that these special courts were not to be courts-martial. The regulation could provide for the apprehension, trial, and punishment of offenders by such special courts, in accordance with the procedure which may be prescribed by the regulations.[41]

Pursuant to this authorisation, His Majesty-in-Council issued The Defence (War Zone Courts) Regulations, 1940.[42] Under these regulations, the Minister of Home Security was authorized to set up by order special courts, which were to be known as War Zone Courts. But such courts would not function unless and until the area or areas in which the War Zone Courts were to operate had been declared by an order of the Minister as a war zone area.[43] Such declaration by the Minister would be made if he was satisfied that due to recent or immediately apprehended enemy action the military situation in an

34. 5 Geo. 5. c. 34.
35. *Id.* Sec. 1 (1), (2).
36. *Id.* Sec. 1 (7).
37. Wade and Phillips, *op. cit.*, p. 337.
38. 3 & 4 Geo. 6, c. 21.
39. *Id.* Sec. 2 (1) (b).
40. 3 & 4 Geo. 6, c. 45.
41. *Id.* Sec. 1 (1).
42. S.R. & O. 1940 (No. 1444) 11, p. 252.
43. *Id.*, Sec. 2.

area was such that criminal justice could not be administered by ordinary courts with sufficient expedition.[44] But such an exigency never arose, and so there was no need to invoke these provisions.[45] These powers in the special courts did not affect the common law power of the military to take action on their own initiative if need arose, but it never did in England over a long period of time.[46]

44. *Id.*, Sec. 5.
45. *Ridges' Constitutional Law*, 8th Ed., p. 256.
46. Wade, *op. cit.*, 357-358.