A Socio-Legal History of the Laws of War

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A Socio-Legal History of the Laws of War: Constraining Carnage

BY

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INVESTOR IN PEOPLE

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About the Author

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Preface

This book examines how over the course of centuries different human societies and cultures have structured and enclosed their war making with norms that are designed to either maintain good military order or to reduce the impact of the violence inherent in warfare on soldiers and citizens. This book has attempted to survey and analyze values that address the root problem of warfare: that its effects go well beyond those actively engaged in hostilities. Most societies looked at in this volume have norms and practices which attempt to curtail the damage caused by warfare in various ways. Of course, what is important varies in time and place and earlier concerns do not always mirror later concerns. Yet all societies acknowledge the inherent danger in allowing war to be uncontrolled. What is perceived as needing control and what sort of controls are needed vary widely, especially early on. By the tenth century CE in Europe we see the emergence of attempted theological control of warfare for humanitarian reasons by the medieval Catholic church.

Through the thirteenth and fourteenth centuries we would see armies adopting formal articles of battle which dictated the behavior allowed and not allowed of troops in battle, camp, or on the march. While rarely followed to the letter, they were enforced. The fifteenth through nineteenth centuries saw an increase in the use of formal articles which proscribed certain behaviors and prescribed others. Later articles begin to contain procedural law aspects as well as substantive law. They become longer, come complex, and more legalistic. During the nineteenth century, we will see these codifications of norms become more extensively used by militaries and we will begin see a strong civilian push for humanitarian law, a social movement that lay dormant since the Church's ninth- and Tenth-century campaigns. This book stops at end of the eighteenth century. At this historical juncture we see fully codified articles of battle that are law in all but name (i.e., the Continental Congress' articles of 1775 and 1776). The nineteenth, twentieth, and twenty-first centuries see proliferation of military law, both domestic and international; it is a story that requires its own book.

The main assumptions behind my analyses here come from social science approaches to understanding law by placing it in its sociohistorical context. As a scholar, I come out of anthropological and sociological theoretical worldviews and traditions, and thus look at both macro and micro level forces shaping behavior. My thinking is driven from a cultural materialist standpoint (See Harris, 1968) that sees nonmaterial culture, such as norms and laws, as deriving from the material conditions of a society's existence. Economics, in the

anthropological sense, drive social structure and some aspects of cultural norms. These norms will frame certain phenomena as "problems" to be solved, and other norms and cultural forces will influence how those "problems" are approached, if they are dealt with at all. Existing elements of material and nonmaterial culture will influence formation or transformation of norms and laws. As will broader contexts, including interactions with other societies or communities.

As examined early on in the book, war is an inversion of daily social norms of interaction. The central acts of war – injuring and killing people and the destruction of property – are typical prohibited by mores and ordinary law. The fundamental aspects of the social contract that focuses on peaceful coexistence and cooperation are abandoned and a new set of rules adopted: the laws of war, whatever they may be in the given context. Often symbolic and ritual observances mark the beginning and ending of a war, to mark the transitions between norm sets. It also makes war an isolated social space, a liminal space where warfare can occur without the total elimination of civilian and international rules. It is a social space that both belligerent parties agree to create and enter, though the closing of the space may depend more upon one belligerent party than the other. All social spaces and contexts have rules, be they formal or informal (see Goffman, 1959). Warfare is not an abandonment of rules. Armies couldn't function without them, as our early chapters here show. But entering the liminal space of war indicates that different rules apply. While this gives soldiers permission to violate central social mores around the harming of others, all conflicts appear to have norms designed to reduce the harm caused by war and by the armies. They create boundaries to reduce and constrain carnage. As with any law, they are not always going to be successful in every case. Yet historical evidence shows that strong rules can keep armies behaving appropriately toward citizens, property, and the like most of the time (i.e., Gustavus' Swedish Army of the Thirty Years' War) (Macmunn, 1920).

This book follows the evolution and codification of norms surrounding the behavior of soldiers on the battlefield in the western context. Its analysis is limited to the west and what is often seen as the cultural roots of the west (i.e., the Levant and Mesopotamia). This is done for a number of reasons. First, while there are cultural differences across the societies examined, there are strong similarities in the way they approach war, especially by the first century CE. There is a traceable tradition of military norms, values, tactics, and attitudes from the Ancient near-east through eighteenth-century Europe and her colonies. This does not mean there is not a rich tradition of military norms and laws in other cultural traditions. The Laws of Manu as presented in the Upanishads form the foundation of a South Asian military tradition that could similarly be traced forward. The same could be done for China and east Asia, or Africa. Doing so is beyond the scope of this book; each of those traditions deserves their own in-depth analysis and exploration. They are also regions of the globe that, while I do not lack interest, I have less ability to work in due to languages, source

availability, and deep familiarity with the historical-cultural background. Also, this book will not cover military behavior in European colonies directed at indigenous populations. The rules for colonial warfare are highly different than those for noncolonial warfare, especially in terms of the treatment of prisoners of war and civilians. It too deserves its own treatment (see volume two). This book ends as the European colonial push is occurring in the New World and the Indian subcontinent.

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