

# United Kingdom Military Law: Autonomy, Civilianisation, Juridification

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*This paper argues that military law has undergone a long-term process of change. Previously an autonomous legal system with little civilian input at the administrative, judicial and policy-making levels, military law became subject to a consensual policy of civilianisation from the early 1960s, reflected primarily in the adoption of civilian criminal law norms by the military justice system. More recently there has emerged the juridification of significant areas of military relations in respect to discipline and certain other terms of service which hitherto have not been subject to externally imposed legal regulation. Explanations for the shifts from autonomy, through civilianisation, and then to juridification, ranging from political and social developments to new human rights and equal opportunities discourses, are offered for such changes.*

Over the past few years it has become increasingly clear that United Kingdom military law has ceased to be the narrow preserve of military lawyers and of a handful of civilian lawyers who occasionally appeared before courts martial. Thus challenges before the European Court of Human Rights (ECHR) in respect of the perceived lack of independence of courts martial (which eventually resulted in remedial legislation); superior court sentencing guidelines for courts martial; the criminal consequences of the use by service personnel of lethal force; and recent legislation in 2000 and 2001 designed to render military disciplinary powers compliant with the Human Rights Act are the most obvious manifestations of the change.<sup>1</sup> However, numerous equal opportunities and equal treatment cases against the armed forces which have been conducted before employment tribunals, divisional and appeal courts and European courts,<sup>2</sup> together with the launching of novel tort claims against the military,<sup>3</sup> are further evidence that military law and

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- 1 On these points see *Findlay v United Kingdom* (1997) 24 EHRR 221 and various provisions of the Armed Forces Act 1996, especially ss 15–17 and Sched 1 (court martial independence); *R v McEnhill*, *The Times*, 4 February 1999 (CMAC; sentencing guidelines); *R. v Clegg* [1995] 1 All ER 334 (HL lethal force); and the Armed Forces Discipline Act 2000 and the Armed Forces Act 2001 (disciplinary powers).
- 2 They include (a) sex discrimination cases now governed by the Armed Forces Act 1996, ss 21–27. See A. Arnall, 'EC Law and the Dismissal of Pregnant Servicewomen' (1995) 24 *Industrial Law Journal* 215; (b) sexual harassment claims, for example, *Sunday Times*, 4 January 1998; *The Times*, 25 May 1999; (c) sexual orientation discrimination cases, for example, *Smith and Grady v United Kingdom* (2000) 29 EHRR 493 and *Lustig-Prean and Beckett v United Kingdom* (2000) 29 EHRR 548; and (d) equal treatment claims, for example, *Sirdar v Army Board and Secretary of State for Defence* ECJ C-273/97, 26 October 1999.
- 3 They include claims raising a duty of care in respect to (a) post-traumatic stress disorder; see 13 *The Lawyer* No 24, 21 June 1999; (b) the conduct of battle; see *Mulcahy v Ministry of Defence* [1996] 2 All ER 753 (CA); (c) bullying; see *The Guardian*, 31 October 1996; (d) potentially fatal excessive drinking by subordinates and a failure to provide adequate medical care when a related emergency arose; see *Barrett v Ministry of Defence* [1995] 3 All ER 87 (CA); (e) 'Gulf War Syndrome'; see *The Lawyer* 30 September 1997; and (f) chemical warfare experiments at Porton Down; see *The Guardian*, 29 November 2000. See also *R v Ministry of Defence, ex parte Walker* [2000] 1 WLR 806 (HL), an unsuccessful judicial review challenge to a government refusal to award, in respect to an injury inflicted by local irregulars on a British soldier in Bosnia, sums made available under an overseas service injury compensation scheme

civilian law are intersecting on a wider front in domestic law and at greater frequency than hitherto.<sup>4</sup>

The regularity with which military activities are now being exposed to the scrutiny of the civilian courts constitutes a portrait of military law which would have been unrecognisable to its specialist practitioners forty (or even twenty) years ago. For prior to this development judicial approaches to military law were strongly characterised by a policy of abstentionism, whilst governments themselves avoided, except in rare and egregious cases (see below), close scrutiny of existing arrangements. Indeed the isolation from civilian legal oversight of military law, which I describe as military law autonomy, remained dominant notwithstanding the existence of the (civilian) Courts-Martial Appeal Court (CMAC) which had been created in 1951. For until very recently this civilian court has had only a marginal influence on military law.

The origins of the transformation in military law can be traced, first, to the mid-1960s when a combination of factors such as pressure group activity, greater parliamentary activism, the expansion of judicial review more generally, and even a limited commitment to legal 'modernisation' by the military authorities themselves, began to emerge. The initial shifts away from military law isolation were mainly reflected in the conscious borrowing by the court-martial system of substantive and procedural rules which had (usually recently) been introduced within the civilian criminal law system. This I describe as the process of civilianisation of military law.

Subsequently this development was complemented in recent years by more radical shifts within the framework of military law. These in turn were a reflection of both the widespread, indeed global, legal discourses on human rights and equal opportunities, and the rise, according to some, of a compensation culture (which all pointed to a decline in that unquestioning deference to superior authority which is associated with military service). External legal norms were now being *imposed* on the armed forces in situations where such legal norms had hitherto been absent. This constitutes the juridification of military law.

For much of the period under consideration in this paper, that is, from the mid-nineteenth to the mid-twentieth century, military justice applied in courts martial and dispensed summarily by commanding officers, as well as military 'administrative' law embodying the plethora of military regulations governing such matters as enlistment, terms and conditions of service and discharge and dismissal, constituted a legal system administered primarily by the armed forces themselves, and applicable, with few exceptions, only to members of the armed forces. Civilian input was limited to the presence of experienced barristers who, as judge advocates at some but not all courts martial, advised (but until 1997 did not give directions) on matters of criminal law, evidence and procedure. The civilian Judge Advocate General advised post-trial, but did not deliver judgments *per se* on the legality of court-martial proceedings. Finally it is relevant to note that until its repeal in the Crown Proceedings (Armed Forces) Act 1987, section 10 of the Crown Proceedings Act 1947 normally prevented legal proceedings against the Crown by service personnel or by their representatives in circumstances which might otherwise give rise to a claim in tort. The 1947 Act therefore enhanced the insulation of the armed forces from at least one sphere of judicial scrutiny.

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4 Lest it be thought that a compensation culture is one-sided, it may be noted that in February 1998, the Ministry of Defence issued a writ for more than £8 million against the estate of a pilot who died in a mid-air collision with a Jaguar aircraft. See *The Lawyer*, 24 February 1998.

As a consequence, for the bulk of academics and civilian practitioners military law was *terra incognita*, an autonomous realm *vis-à-vis* the civilian legal system. Indeed there are grounds for suggesting that military law exemplified what Arthurs has referred to as nineteenth-century legal pluralism, embracing those 'legal systems' in the United Kingdom which remained outside the orbit of control of the judiciary at Westminster Hall.<sup>5</sup> Arthurs cites Stannary law, commercial arbitration and tribunals of commerce as sites of legal pluralism during this period, that is, Alsacias wherein the King's writ did not run. In regard to military law, whether theoretically the latter did constitute a wholly separate 'legal system' may be to over-state the case (but only marginally) given the occasional judicial utterance in the nineteenth century suggesting that the civil courts might be prepared to accept jurisdiction over military questions in 'exceptional' circumstances. But somehow exceptional circumstances never seemed to arise and therefore for a period of perhaps a hundred years, from the mid-nineteenth to the mid-twentieth century, the civil courts adopted a 'hands-off' approach to military disputes, with the result that military law remained effectively autonomous of and immune to civilian judicial oversight.<sup>6</sup>

This autonomy essentially remained the case until the first stirrings of change in the 1960s when the 'civilianisation' of military law, that is, the (consensual) incorporation into military law of perceived beneficial civilian legal norms was accepted by government and approved by the armed forces themselves. It is that particular conceptual approach to the making of military law which, it will be argued, has characterised much of the rapid legal transformations in this field in the past twenty years.

However, we may now be witnessing, in addition to a continuation of the civilianisation process, yet another trajectory – towards the expanding 'juridification' of military law in the United Kingdom. To borrow Scott's definition, '[j]uridification describes a process by which relations hitherto governed by other values and expectations come to be subjected to legal values and rules ...'<sup>7</sup>

In regard to the military justice system, there is a *limited* colonisation by civilian legal norms, especially of crucial territory governing aspects of military discipline and terms of engagement, which had previously been unoccupied by explicit legal criteria. Although crucial inroads into military law have been made by juridification, there has not occurred, over the whole system of military justice, the elimination of local command authority.<sup>8</sup> For example summary dealing by a local commander, but not appeals therefrom, is still lawyer-free.

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5 H.W. Arthurs, 'Special Courts, Special Law: Legal Pluralism in 19th Century England', in G.R. Rubin and D. Sugarman (eds), *Law, Economy and Society: Essays in the History of English Law, 1750-1914* (Abingdon: Professional Books, 1984) 380-411.

6 It will be apparent that our conception of legal autonomy differs in some respects from the widely held understanding of the term which emphasises its theoretical autonomy from the political system. In regard to military law, the paper analyses its effective autonomy as a political choice by policy makers and judges. For general discussion of legal autonomy see Roger Cotterrell, *The Sociology of Law: An Introduction* (London: Butterworth, 1984) chs 2-3.

7 Colin Scott, 'The Juridification of Regulatory Relations in the UK Utilities Sectors' in J. Black, P. Muchlinski and P. Walker (eds), *Commercial Regulation and Judicial Review* (Oxford: Hart Publishing, 1998) 19.

8 One writer, referring to the juridification of construction contract arbitration, identified the 'monopolisation of the legal field by legal professionals'. See Penny Brooker, 'The Juridification of Alternative Dispute Resolution' (1998) 28 *Anglo-American Law Review* 1 (but *quaere* whether that particular field was previously 'legal'?). See also J. Field and A. Caiger, 'Lawyers and Arbitration: The Juridification of Construction Disputes' (1993) 56 *MLR* 412-440.

The rest of this paper will address the themes of military law autonomy, civilianisation and juridification. First it will ask what is meant by the autonomy of military law and how was that autonomy reflected in both judicial decision-making and in legislative policy. It will be apparent that for a century (c.1850–c.1950) the very distinctiveness of military life was broadly perceived as the justification for a separate legal regime. The paper will then examine the concept of civilianisation of military law and will seek to answer the question why civilianisation began to evolve, particularly from the 1960s, as a significant element in the construction of military law. It will suggest that changes in society persuaded policy makers to endorse a policy of convergence of civilian and military law wherever practicable. Thus in a climate where policy options were still available to the service departments, the test for continued legal divergence was now the ‘need’ to be different rather than the ‘right’ to be different. Finally the recent juridification of military law will be explored. In explaining its emergence, the paper will not offer any startling new insights. Instead it will identify as the principal explanatory factor the now-familiar international currency of human rights and equal opportunities in the particular form in which that discourse has been articulated through laws enforced domestically. Juridification thus reflects imposed law on the armed forces in a society which continues to recognise military subordination to civilian supremacy. Thus even the military community’s ‘need’ to be different from civilian society in order to maintain its perceived collective good may no longer prevail in the face of certain human rights or equal opportunities claims. To some extent both cause and effect, juridification is one of the manifestations of this culture clash.

## Autonomy and judicial abstentionism

Whether military law autonomy in the hundred years from the mid-nineteenth to the mid-twentieth century was a cause or a consequence of judicial abstentionism cannot be adequately explored within the limits of this paper. However, what is indisputable is the historical phenomenon of judges during this period deferring to the ‘autonomy’ of courts martial (notwithstanding that such subordinate courts were obliged, from 1881, to apply the rules of evidence under English law) and refusing to intervene in disputes relating to discipline (or indeed to service engagements or to other military questions). For example in regard to military “administrative” law, the *Manual of Military Law* (1914) stated that,

... if [an] injury affects only his military position or character, a court of law will not interfere. ... Thus the dismissal of an officer from the service, the deprivation of rank or the reduction or deprivation of military pay, will not be remedied by a court of law.<sup>9</sup>

This proposition might be explained on the footing that legal authority for enlistments, commissions and terms of service was derived from the Royal Prerogative, whose exercise was not then reviewable and which was taken to imply that service obligations were ‘voluntary only on the part of the Crown’.<sup>10</sup> Indeed

<sup>9</sup> *Manual of Military Law* (1914), HMSO 1914, 120.

<sup>10</sup> *R v Secretary of State for War* [1891] 2 QB 326. For discussions of the prerogative basis of much of military ‘employment’ law, see P. Rowe, ‘The Crown and Accountability for the Armed Forces’ in M. Sunkin and S. Payne (eds), *The Nature of the Crown* (Oxford: Oxford University Press, 1999) 267–282; G.R. Rubin, ‘Military Law and the Service Engagement: Some Preliminary Conceptual Observations’, in House of Commons, *Special Report from the Select Committee on the Armed Forces Bill* [henceforth AFBS 2000-01], Session 2000-01, House of Commons Paper 154-II, vol II, Minutes of Evidence and Appendices, March 2001, 242–243.

that doctrine provides the basis for the proposition that service personnel in the present day have no legal right to pay *per se* (notwithstanding that they are entitled to *equal* pay by virtue of the Armed Forces Act 1996, sections 30–31).<sup>11</sup>

In regard to military discipline and military punishments, the approach of the civil courts since *Mansergh's Case*<sup>12</sup> in 1858 was that they would only interfere in 'exceptional' cases where the plaintiff's or applicant's common law or statutory rights to life, liberty or property (which excluded pay or pension claims<sup>13</sup>) were infringed as a consequence of a military tribunal or officer acting without or in excess of jurisdiction. Since an infringement could occur where a lawfully authorised punishment was inflicted with undue severity,<sup>14</sup> it might have been concluded that *Mansergh* would accord protection to service personnel wrongly deprived of their liberty. However, the courts, faced with false imprisonment claims, consistently adopted the view that as a disputed detention was under the purported authority of military regulations, they ought not to interfere. For example, in *Heddon v Evans*,<sup>15</sup> the civil court in 1919 refused to quash summary proceedings when the commanding officer failed to offer, as required by the Army Act 1881, section 46(8), the right of a serviceman to elect trial by court martial. Similarly in *Marks v Frogley*,<sup>16</sup> the Court of Appeal opined in 1898 that no action would lie in respect to a disputed incarceration on the footing that the aggrieved soldier had a statutory right to seek redress of his grievance within the chain of command. As Mellor J. had previously insisted in 1869 in *Dawkins v Lord Paulet*,<sup>17</sup> military matters were for the soldiery, not for the civil courts.<sup>18</sup>

Such a view could successfully outflank eighteenth and early nineteenth century doctrines, for example, Lord Mansfield's famous dictum in 1812 in *Burdett v Abbott*<sup>19</sup> that a soldier was also a citizen, or the robust declaration of Lord Loughborough in *Grant v Gould*<sup>20</sup> in 1792 that,

Naval Courts-Martial, Military Courts-Martial, Courts of Admiralty, Courts of Prize, are all liable to the controlling authority which the courts of Westminster Hall have from time to time exercised for the purpose of preventing them from exceeding the jurisdiction given to them.

Perhaps the high point of judicial non-intervention came in the 1949 case of *R v Secretary of State for War, ex parte Martyn*.<sup>21</sup> Here the High Court refused to intervene when it was alleged that a rule of procedure obliging a particular court martial to be convened 'forthwith', failing which the detainee had to be released, had been breached. Goddard CJ retorted that whether a court martial had been properly convened in accordance with the rules of procedure (which were delegated legislation made under section 70 of the Army Act 1881) was 'purely a matter of military law and procedure and not one to interfere with which this court has any jurisdiction'. As an academic writer, D.C. Holland observed at the time,

11 See the classic article by Z. Cowen, 'The Armed Forces of the Crown' (1950) 66 LQR 478, and sources cited therein.

12 (1858) 1 B. & S. 400; 30 LJ (NS) QB 296

13 *Captain Roberts' Case*, *The Times*, 11 June 1879.

14 *Manual of Military Law*, n 9 above, 121.

15 (1919) 35 TLR 642.

16 [1898] 1 QB 888.

17 (1869) LR 5 Q B 96.

18 For a convenient summary of a number of such cases, see N. Ley, *The Law of False Imprisonment* (London: Jordans, 2001) ch 11.

19 (1812) Taunt 409.

20 (1792) 2 HBI 69.

21 [1949] 1 All ER 242.

... the court seems to have been misled by the words used in *Mansergh's Case* and by later cases [that the courts would only intervene exceptionally in regard to a serviceman's common law or statutory right to life, liberty or property] ... into imagining that if the applicant in order to succeed has to allege the infringement of a military law or regulation then a civil right is not infringed.<sup>22</sup>

As the author pointed out, the illegal award of a sentence 'involving loss of life, liberty or property' was no less an infringement of a civil right when it was awarded by a court martial or after summary dealing conducted under (but clearly not in accordance with) military regulations. The ousting of the jurisdiction of the civil courts could not therefore be defended, argued Holland. Moreover, the separate existence of an internal grievance procedure, while it might dispose a court not to issue a mandamus or to award damages, could not preclude the possible granting of the discretionary remedies of *certiorari* or prohibition.<sup>23</sup> Yet this academic view was at odds with prevailing judicial doctrine as *R v O/C Depot Battalion, RASC, Colchester, ex parte Elliot*<sup>24</sup> confirmed immediately thereafter.

Thus the (almost) hundred year period from 1860 to 1950 is marked by a distancing of the courts from intervening in matters of military discipline, even where an infringement of liberty was alleged. So long as military regulations could be identified, notwithstanding their breach, the soldier was deprived of a civil remedy. Yet although one could conceive of circumstances of acting in excess of primary statutory authority (for example, the award of a punishment exceeding the statutory maximum) or of acting without jurisdiction, that is, where an alleged infringement of liberty could not be said to be connected with a military relationship (for example, where an officer spat at a soldier), it would be a rare situation where the courts would find that military regulations, lawfully applied or not, were *not* the basis for the restrictions imposed on a soldier's liberty. It was, indeed, a Catch-22 situation of which that master of military cunning, Captain Yossarian, would be proud.

## A policy of military law autonomy

In addition, state policy towards military law in this period was one of virtual detachment. Public campaigns had led to the abolition of military flogging (and of the military-related Contagious Diseases Acts) in the last quarter of the nineteenth century. Military detention was introduced in the Edwardian period to diminish military reliance on civil prisons and the death penalty was abolished in 1930 for most military offences such as desertion following a long campaign in the wake of the First World War executions. Summary dealing by commanding officers was also expanded in the 1930s. But thoroughgoing reform or the reconceptualisation of military law did not occur.

The complacent view of the Oliver Committee of Inquiry into courts martial which reported in 1938 reflected official attitudes at the time. The committee noted the 'very meagre response' to the publicity announcing its membership, from which it concluded that 'there was no widespread discontent with the existing system'. Moreover it was able to substantiate no cases going back to 1917 (when

22 D.C. Holland, 'The Law of Courts Martial' (1950) CLP 173–194, 186.

23 *R v Army Council, ex parte Ravenscroft* [1917] 2 KB 504 was cited as another example of the courts' muddled thinking in assuming that any breach of servicemen's rights involved only military grievances resolvable internally (if at all) and not through the courts.

24 [1949] 1 All ER 373.

the capital courts martial were sitting) which involved miscarriages of justice and to which its attention had been drawn. It therefore concluded that no civilian appeal court was required.<sup>25</sup> As Arthurs has observed more generally in relation to the historical experience and fate of legal pluralism, '[t]he linkage between legal institutions and their social context is what was of critical importance'.<sup>26</sup> Thus the context in 1938 was one in which politicians and society were largely at ease with military law autonomy.

The autonomous status of military law during this period, distant from civilian legal oversight, also reflected the predominantly professional (and among officers the elitist) character of the armed forces as separate communities living apart from the rest of society spatially, socially and cognitively. With the possible exception of the Invergordon naval mutiny in 1931, which protested against wage cuts (occurring widely in the public sector at the time),<sup>27</sup> civilian social and legal norms (which we would quickly recognise today as embracing, for example, broad claims to equal opportunities and human rights) had little purchase on military law policy.

Indeed the absence of conscription (apart from wartime conscription and its peacetime extension from 1949 until 1961) is perhaps a reflection of the non-statist character of a United Kingdom peopled with subjects and not, as in European states where the legal concept of the *Rechtsstaat* is constitutionally entrenched, inhabited by citizens.<sup>28</sup> In the latter societies, 'national service' would be perceived as the consideration for citizenship. In England legal bonds of this character, it is suggested, expired along with the compulsory militia muster in the early eighteenth century, a levy of the troops which perhaps represented the last vestiges of English feudalism.

Thus we see the period of military law autonomy as a lengthy one stretching for almost a hundred years between the mid-nineteenth and the mid-twentieth centuries. During this time military regulations, the authority of commanders, the awards of courts martial and disputes arising from military obligations overwhelmingly escaped the scrutiny of the civil courts regarding their legality despite earlier formal judicial pronouncements by Mansfield and Loughborough of civilian legal supremacy. Given the particular aims of courts martial to underpin military discipline, to determine criminal responsibility not just for civil offences but also for specifically military offences (such as conduct to the prejudice of good order and military discipline or behaviour in a scandalous manner unbecoming an officer (and until 1966 a gentleman!)), to uphold the custom of the service, to eschew lawyers and legal argument and to conduct themselves as a 'rude tribunal' disparaging the 'fiddle-faddle' of lawyers (in the words of Field-Marshal Lord Wolseley (1833–1913)),<sup>29</sup> this should be a matter of no great surprise. And as we noted above, public policy which might otherwise have prompted the restructuring

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25 *Army and Air Force Courts Martial Committee* (Ch, Mr Justice Oliver) Cmd 6200, HMSO, 1938, paras 6 and 8.

26 n 5 above, 402.

27 There are many studies of this episode. See, for example, D. Divine, *Mutiny at Invergordon* (London: Macdonald, 1970). The 'Officer in the Tower' case in 1933 under the Official Secrets Act 1911 attracted wide attention and confusion over the role of the judge advocate general. See Gerry R. Rubin, 'The Status of the Judge Advocate General of the Forces in the United Kingdom since the 1930s' (1994) *Revue de Droit Militaire et de Droit de la Guerre* Vol. XXX, nos 1–4, 243–271, 247–249.

28 According to Loughlin, the British state tradition reflects a 'largely non-juridified structure of administrative law'. See M. Loughlin, *Legality and Locality: The Role of Law in Central-Local Relations* (Oxford: OUP, 1996) 379, cited in n 7 above, 19.

29 Cited in G.R. Rubin, 'Military Law in World War One' (1998) 143 *Royal United Services Institute Journal* 58.

of military law manifested only occasional signs of dissatisfaction with the existing framework.

## Need to be legally different?

In support of a claim for military law autonomy is the strong argument that the ethos, tasks and obligations of the armed forces are unique and that the legal system should therefore reflect this. Whether the core values identified by the services, which include moral integrity, loyalty, honesty, mutual support, self-discipline and group identification (which are contrasted with the pursuit of individual advantage),<sup>30</sup> are the sole preserve of members of the armed forces may be debatable. Indeed the uniqueness of the claimed 'unlimited liability' of service personnel and of the degree of self-sacrifice which the military obligation may in certain circumstances require, including an obligation to put one's life at risk, may have to be qualified in the light of the actions of the New York fire and police services in the wake of the attack on the World Trade Center on September 11, 2001.

Yet it cannot be disputed that for practical reasons of military efficiency, not all the fundamental elements of a liberal democratic society can be made readily available to members of the armed forces. Thus it is widely recognised that the armed forces require special military laws, both empowering laws and exemptions and immunities, considered essential by them for the successful pursuit of military goals. Indeed, as the Lewis Committee of Inquiry into military law observed in 1949,

The tasks which [a soldier] may be called upon to perform . . . and the circumstances under which such tasks may have to be performed, call for a high degree of discipline; and the maintenance of such discipline in turn requires a special code of law to define the soldier's duty and to prescribe punishment for breaches of it. The civil law grants the remedy of damages in a case where a servant leaves his master's employment without proper notice; but such a remedy would hardly avail to prevent deserting from the Forces. Disobedience to the orders of a superior is not, in civil life, normally a criminal offence, but such disobedience in the Forces may be an offence of great gravity, imperilling the lives of many men and calling for exemplary punishment. In order to maintain the efficiency of a fighting force and the discipline upon which such efficiency depends, it has, therefore, always been recognised that a special code of military law is necessary.<sup>31</sup>

Freedom of movement, freedom of the person and free expression within the armed forces are necessarily more constrained than within civilian society (as the numerous provisos to ECHR articles acknowledge). Indeed as an American

30 Borrowing from Tonnies' celebrated distinction (reflecting in turn Durkheim's contrast between mechanical and organic solidarity), Deakin has recently suggested that a *Gemeinschaft* model is more apposite to the circumstances of the services than a *Gesellschaft* model, which might be more appropriate to civilian society. See S. Deakin, 'The British Military: Community, Society and Homosexuality' (1995) 110 *British Army Review* 27–34. Whether complex organisations can be reduced to such polarisations may be open to question.

31 *Report of the Army and Air Force Courts-Martial Committee, 1946* (Ch Mr Justice Lewis), Cmd 7608 HMSO 1949, para 11. Cf similar remarks in the *Manual of Military Law*, Part 1 (Amendment No 20, 1998) ch 1, para 6. Even those who argue that service personnel should not be tried by court martial for civilian offences acknowledge that disciplinary procedures in regard to 'military' offences may still be required. See the evidence submitted by Liberty to the AFBSC 2000–01, vol II, *op cit*, Memorandum 9.

judgment discussing the First Amendment put it, '[a]n army is not a deliberative body. It is the executive arm. Its law is that of obedience'.<sup>32</sup>

## Civilianisation

So much can readily be conceded. However, especially from the 1960s there emerged challenges to the long-standing autonomy of military law, prompted in part by the earlier Lewis Committee report of 1949. In particular, there took place a public policy reconsideration of the military community's longstanding detachment from civilian legal developments and norms. What eventually emerged was a significant policy shift towards a broadly consensual civilianisation of military law, that is, towards the gradual adoption by the services themselves of a number of hitherto exclusively civilian legal norms. While we shall later suggest why this change began to emerge in the early 1960s, the term 'civilianisation' must first be explained.

Although it has also been applied in the United Kingdom to those situations where civilians are replacing service personnel on certain tasks such as military vehicle repair or flying instruction,<sup>33</sup> the distinctive meaning of the term for our purposes is that offered by the House of Commons Select Committee on the Armed Forces Bill 1995–96,<sup>34</sup> which stated that,

It has been the policy of successive Governments to preserve consistency, as far as appropriate, practical and sensible, between civilian and military law. Civilian law may reflect changing social attitudes, and these have in recent years involved some relaxation of the stricter discipline and formal personal relationships of former generations.

While observing that the armed forces derived their strength from their structured environment and from military discipline, the committee added that,

The purpose of the [Government's] five yearly review [of service discipline law] is to consider any changes which might helpfully be made to military law and practice, including those which reflect changes to civilian law over the preceding five years.

It is apparent that by referring to such terms as 'helpfully' and 'appropriate, practical and sensible', the committee considered that the civilianisation of military law implies an absence of coercion; indeed a positive policy commitment on the part of the armed forces to aligning military and civilian law. Thus civilianisation is, in effect, internally driven legal change and one where the services themselves retain a certain amount of control over the law reform agenda.

One institutional mechanism by which civilianisation proceeds is through government preparation for the quinquennial re-enactment of armed forces law which is necessary as a consequence of the Bill of Rights prohibition on standing armies in peacetime without the annual consent of parliament. Thus a small committee within the Ministry of Defence, with the unwieldy title of the Service Discipline Acts Review Working Party (SDARWP), comprising service lawyers from all three branches of the armed forces together with civilian departmental lawyers, pursues two aims. First, it seeks to identify new legal initiatives or necessary amendments to existing law which the service authorities believe will

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32 *Parker v Levy* 417 US 733, 743–744 (1974), citing *In re Grimley* 137 US 147, 153 (1890).

33 See, for example, House of Commons Defence Committee, *Ninth Report: Military Training*, House of Commons Paper 93, Session 1993–94, paras 10–11.

34 House of Commons, Session 1995–96, *Special Report from the Select Committee on the Armed Forces Bill* [henceforth AFBSC 1995–96], House of Commons Paper 143, 30 April 1996, para 4.

enhance operational effectiveness (examples in recent years include provisions amending firearms legislation (Armed Forces Act 1996, section 25) or provisions for compulsory drug testing of servicemen (1996 Act, section 32) or for compulsory alcohol or drugs testing after serious accidents (Armed Forces Act 2001, sections 32–33 and Schedule 5). However, a second aim of the committee is to align as closely as practicable relevant provisions of military and civilian law and to present legislative proposals to parliament accordingly.

Thus there is an *a priori* assumption that the provisions of civilian criminal law and of service discipline law in respect to substantive ‘civilian’ offences and to adjectival law, embracing the areas of investigation of offences, powers of arrest and detention, the functions of prosecuting authorities, remand in custody or bail, the rights and duties of accused persons, evidence and procedure in courts, and sentencing powers should be broadly in line with each other.<sup>35</sup> Indeed rather than having to await the quinquennial review for primary legislation the Secretary of State has now been granted by section 31 of the Armed Forces Act 2001 a general rule-making power to secure this objective in respect to future civilian criminal justice legislation or to existing legislation which (with the exception of sentencing powers in respect to young offenders under the Powers of Criminal Courts (Sentencing) Act 2000) is to be amended. Any variations in regard to the rules of evidence will be those which appear to the Secretary of State ‘to be necessary or proper for the purposes of proceedings before a court-martial’.<sup>36</sup>

For example, the provisions in the Powers of Criminal Courts (Sentencing) Act 2000 regarding mandatory minimum sentences for civilian offenders convicted on a second or third occasion of certain serious offences are now applied to court-martial jurisdiction by section 22 of and Sched 3 to the Armed Forces Act 2001. Section 21 of the same Act permits the Attorney-General to ask the CMAC to review what he considers to be unduly lenient court martial sentences, thereby bringing his powers in military law into line with those in respect to Crown Court sentences. Similarly section 30 enables subordinate legislation to be introduced to bring civilian and military law into line by permitting bail applications pending appeals to the CMAC against finding and/or sentence by court martial.

In regard to criminal evidence and procedure, the abrogation of the common law rules in the civilian criminal courts requiring the judge to issue a mandatory warning to the jury that in the absence of corroboration it is dangerous (albeit not forbidden) to convict on the evidence of certain kinds of witnesses, that is, children, accomplices and complainants in sexual cases, was extended to courts martial in 1996,<sup>37</sup> while section 34 of and Schedule 6, Part 1 to the 2001 Act provide that the anonymity afforded in civil and service proceedings in the United Kingdom to alleged victims of certain sexual offences is not to be denied them in overseas courts martial (reminding us that courts martial are ad hoc, not standing, tribunals which can be convened anywhere in the world). Similarly, section 7 of the Armed Forces Act 1996 extends to courts martial Schedule 13 to the Criminal

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35 See Army/Air Force Act 1955, s 99(1); Naval Discipline Act 1957, s 64A(1) as amended by the Armed Forces Act 2001, s 31: ‘The rules as to the admissibility of evidence to be observed in proceedings before courts-martial [sic] shall (subject to Sched 13 of the Criminal Justice Act 1988 (evidence before courts-martial etc) and to service modifications) be the same as those observed on trials on indictment in England’. A provision similar to s 99(1) had been included in the predecessor Army Act 1881.

36 Army/Air Force Act 1955, s 99(2); Naval Discipline Act 1957, s 64A(2) as amended.

37 Armed Forces Act 1996, s 6, extending to courts martial section 32 of the Criminal Justice and Public Order Act 1994 and section 34(2) of the Criminal Justice Act 1988.

Justice Act 1988 in respect to child video evidence. Schedule 13 permits pre-recorded video evidence by children to be admissible where the accused is charged with certain specified violent or sexual offences, and was prompted by a concern not to subject children to any further stress in such cases than was strictly necessary.<sup>38</sup> The amendment also extends to courts martial the provision preventing a defendant from cross-examining a child witness in person or by a live television link (though video recording of cross-examination is permissible).<sup>39</sup> These examples represent the civilianisation of military law in its purest, most unambiguous, form. They are also a recognition that much of the court-martial case load covers not only military offences such as desertion but also civilian offences such as assault, theft, fraud or criminal damage committed by service personnel.

Other civilian law provisions respecting children at risk have previously been incorporated into military law statutes. Thus the Armed Forces Act 1981 permitted the temporary holding for eight days in the first instance (and subject to an extension for a further 20 days), in a place of safety, of any children at risk of service personnel serving abroad. This would follow an order by a commanding officer on the ground that the child was being ill-treated, exposed to moral danger or beyond control, that is, on the same grounds as were available in civilian law.<sup>40</sup> In the Armed Forces Act 1986, this was extended to those circumstances where a longer-term problem was identified and where it was considered that the child should be returned to care in the United Kingdom.<sup>41</sup>

By the time of the 1990–91 Armed Forces Bill Select Committee, the Children Act 1989 had been passed. In consequence, a Commons report addressing *military* law spent much of its time reflecting on the changes made to family law by the 1989 Act. As it declared,

At first sight it may appear surprising that service law should include legislation about children at risk. However, some 50,000 children of Service or Ministry of Defence civilian personnel accompany their families overseas, mostly to Germany, and thus come under Service law. It is only to be expected that among so many a few should require protection. In the last year [1990], about 50 children were on the Services 'At Risk' Register, six Place of Safety Orders were made and four children were subsequently received into local authority care in the United Kingdom.<sup>42</sup>

In consequence the Armed Forces Act 1991, Part III, 'Protection of Children of Service Families', mirrored broadly the relevant provisions of the Children Act. The caveat was that, while endeavouring to reflect the 1989 Act as closely as possible, the legislator took account of the distinctive feature that the provisions would only apply overseas and within a closely-knit military community.

The above examples demonstrate that civilianisation is a political and proactive option to secure uniformity between civilian and military law so far as practicable. However, pragmatic advantages might also be identified. This may

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38 In 1993, for example, there were 32 cases of child abuse in the British Army world-wide. See R. Mills and K. Mann, *Redcaps: Policing the Army* (London: Boxtree Ltd, 1995) 66. The Royal Military Police have a child protection team. See *Royal Military Police Journal*, April 1999, 25.

39 See also the Youth Justice and Criminal Evidence Act 1999 whose relevant provisions have now been extended to courts martial by Sched 7, part 5 to the Armed Forces Act 2001.

40 One such order was made in 1984, and four in 1985, one of which was extended to 20 days. See House of Commons, Session 1985–86, *Special Report from the Select Committee on the Armed Forces Bill*, House of Commons Paper 170, March 1986, Q 278.

41 Armed Forces Act 1986, s 13, amending Armed Forces Act 1981, s 14. Scots law would apply where a child was returned to Scotland, notwithstanding that service discipline law applies English law.

42 House of Commons, Session 1990–91, *Special Report from the Select Committee on the Armed Forces Bill*, House of Commons Paper 179, April 1991, para 7.

be the case in respect to recruitment and retention benefits arising from the adoption of civilian equal opportunities law, or in regard to more useful sentencing options for courts martial, for example, those arising from the adoption by the Armed Forces Act 1996, section 8 and Schedule 2 thereto of the provisions of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991. Prior to the 1996 Act a person found unfit to stand trial by court martial or found not guilty by the court martial by reason of insanity at the time of the offence could only be ordered to be kept in unsuitable military custody until the Home Secretary could commit him to an appropriate institution. With the military adoption of the civilian scheme contained in the 1991 Act, courts martial can now make more appropriate disposal decisions such as a hospital or guardianship order, a supervision or treatment order or discharge.

In sum civilianisation is a social and legal process of convergence between military and civilian law where no detriment to military effectiveness can be perceived (indeed where military advantage might be gained). It is a development which has undoubtedly proved uncontroversial since its inception in the early 1960s. Indeed it might receive further indirect endorsement as military tasks are increasingly undertaken in support of the law-enforcement activities of the civil power, whether in respect to terrorism in Northern Ireland or to crimes with an international dimension such as drug-running.<sup>43</sup> Such consensus cannot, however, be confidently asserted in respect to those changes to military law which embody the juridification of military law.

## Juridification

It is a central argument of this paper that what is emerging *beyond* the increasing civilianisation of military law is a slow but gradually expanding *juridification* of that law, as that term was defined earlier in this paper. Juridification in this context may perhaps be comparable to the process occurring in industrial relations in the early 1970s where the *legal* resolution of certain disputes over, say, the application of collective agreements or dismissals of employees, was intended to replace the voluntary or unilateral settlement of such issues.<sup>44</sup> Three initial points might be made.

First, as the industrial relations example suggests, one feature of juridification is the endeavour to introduce into a site of disagreement a third party independent judicial authority. This may well have the consequence of weakening unilateralism (as exemplified by sacking employees; going on strike; giving orders to subordinates) and boosting bilateralism (by virtue of undermining managerial prerogative; curbing wildcat strikes; or undermining the authority of local commanders whose decisions are overturned by third party civilians outside the chain of command). It is a prospect that can strike at the heart of a local military community culturally attuned to strict obedience on an hierarchical basis.

Second, it is not suggested that juridification will *always* fill a totally law-free zone. For it may replace informal arrangements or even systems of 'social control,

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43 A. Hills, *Doctrine, Criminality, and Future British Army Operations: A Half-Completed Understanding* (Camberley: Strategic and Combat Studies Institute, 2000).

44 H. Collins, *Justice in Dismissal: The Law of Termination of Employment* (Oxford: Clarendon Press, 1992) 30–40, and references therein to Simitis and Teubner.

*reglementation*, normative systems or folkways' which possess law-like characteristics.<sup>45</sup> Indeed even if legal authority could be cited by the military command to govern a specific case, juridification will introduce a qualitative change in those situations where that "authority" is likely to be standing on legally insecure foundations which can no longer be sustained in the post-Human Rights Act era. Thus the *Manual of Military Law* (1992 edition), Part I, Chapter VI, paragraph 14(b) stated that,

A CO [commanding officer] has by virtue of his position and responsibilities an inherent power without a warrant to make a full search of any camp, barracks and married or other quarters within his command.

As we shall see, juridification has driven a coach and four through most such claims.

Third, as was the case with the industrial relations experience, one should not exaggerate the reach of the juridification of military law. It has not yet wholly taken over the asylum. But as suggested previously, and as illustrated below, it has made some highly significant inroads extending well beyond the abandonment in the later twentieth century of judicial abstentionism.<sup>46</sup> Thus what we seek to identify are important swathes of military discipline law and military administrative and employment law where external legal norms have, essentially, been *imposed* upon, as distinct from having been (consensually) adopted by, the military law system.

This distinctive juridification of military law, which has become a significant feature of change in military law especially over the past ten years, can be attributed to a number of causes (some of which have already been sketched out in the introduction). Thus it may be the result of the findings of committees of enquiry set up by governments, such as the post-war Lewis Committee which, contrary to the services' wishes, recommended the creation of a civilian appeal court (the CMAC, established in 1951) from court-martial findings.<sup>47</sup>

The courts' encroachment on non-legally regulated territory may also be the result of the successful litigation activities of pressure groups seeking to invoke international legal norms. Notable are Rank Outsiders and Stonewall in respect to the lifting of the ban on homosexuals serving in the armed forces. Or it may derive from successful political lobbying as in the case of the now-disbanded, because successful, Section Ten Abolition Group (STAG) in respect to departmental tort immunity under the Crown Proceedings Act 1947. Furthermore the remit of public bodies such as the Commission for Racial Equality and the Equal Opportunities Commission, while particularly relevant to the civilianisation of military law in respect to, say, recruitment or promotion, may also impact on the juridification process by raising doubts whether military procedures which the

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45 H.W. Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985) 3.

46 Of course particular legal norms, for example, an accused's right to legal representation (apart from field general courts martial), evidence to be presented on oath and the application of the rules of evidence in English law have been elements of courts martial (but not of Army and Royal Air Force summary dealing) for centuries. However judicial abstentionism between 1850 and 1950 undermined those protections. Instead the judge advocate general merely advised confirming officers on these matters. See also A.P.V. Rogers, 'Judicial Review and the Military' (1995) 2 *Military Law Journal* 87–105. This paper, published in the in-house journal of [British] Army Legal Services, and which plots shifts in the courts' attitudes, deserves a wider audience.

47 Rubin, n 27 above, 258–263.

armed forces wish to defend, for instance in respect to redress of grievance, are ECHR-compliant.<sup>48</sup>

At one level, of course, juridification will reflect *broad-brush* government policy in terms of the latter's commitment to applying EU law or Convention rights in the Human Rights Act; and in that respect it might be confusing to refer to *imposed* law. But at the organisational or departmental level, much litigation and legislation in those areas have been viewed in that negative way; and armed forces' compliance with directives and judicial rulings will simply reflect both their failure to obtain opt-outs of one form or another and their unquestioned, if unhappy, acceptance of the constitutional principle of civilian supremacy over the military. In other words juridification will frequently emerge from external legal compulsions (or from the services' anticipation thereof, especially in respect to the Human Rights Act 1998) such as EU directives, rulings of the European Court of Human Rights or judgments in the United Kingdom courts revealing domestic inconsistencies in those areas.

## Equal opportunities

To illustrate this theme of juridification, we need do no more than cite the pathbreaking case of *R v Secretary of State for Defence, ex parte Leale, Lane and EOC*.<sup>49</sup> Here an application by a discharged servicewoman who had become pregnant while still serving was withdrawn by consent when the Ministry of Defence conceded that the exemption in favour of the armed forces in the Sex Discrimination Act 1975, section 85(4)(a), permitting the discharge of pregnant servicewomen, was *ultra vires* Article 2(1) EC Directive 76/207 (Equal Treatment).<sup>50</sup> From this settlement, the whole sorry saga unravelled<sup>51</sup> of compensation claims before industrial tribunals for illegal discharges,<sup>52</sup> for compensation for pregnancy termination in order to continue serving in the forces,<sup>53</sup> and for claims in respect to discriminatory redundancy payments.<sup>54</sup> While *Leale and Lane* did give rise to numerous applications to industrial tribunals in respect to the EU Equal Treatment Directive, it also obliged the government to present legislation consistent with European Law. In consequence, the Armed

48 The CRE and the EOC expressed the view to the Select Committee on the Armed Forces Bill 1995–96 that the requirement that service personnel must exhaust internal redress procedures before resorting to employment tribunals in respect to discrimination claims breached EU and/or ECHR provisions regarding access to courts on not less favourable terms. The ministry's position in respect to the Armed Forces Bill 2001 was that it was seeking to expedite the investigation of complaints. See AFBSO 2000–01, Vol. II, *op cit*, 186. Thus scope for further juridification remains. See also *R v Army Board of the Defence Council, ex parte Anderson* [1991] 3 WLR 43 (DC).

49 Unreported, 1991.

50 Rogers n 46 above, 978; *Daily Telegraph*, 18 December 1991. Queen's Regulations were in fact amended in August 1990 to introduce maternity leave arrangements; almost certainly another example of anticipatory reaction to adverse court rulings, that is, to the launch of the *Lane and Leale* applications for review.

51 See, generally, K. O'Donovan, 'From Pregnant Worker to Pregnant Soldier: Oxymorons for Traditionalists' unpublished workshop paper, December 1995.

52 Arnall, n 2 above.

53 *Ministry of Defence v Mutton* [1996] ICR 590 (EAT); *Ministry of Defence v Pope* [1997] ICR 296 (EAT); *Ministry of Defence v O'Hare (No. 2)* [1997] ICR 306 (EAT).

54 *The Times*, 16 May 1995. The breakthrough in respect to equal opportunities in the armed forces does not encroach on the "combat effectiveness" exclusion prescribed in the Sex Discrimination Act 1975 (Application to the Armed Forces etc) Regulations 1994, SI 1994, No. 3296 and implicitly upheld by the European Court of Justice in *Sirdar*, n 2, above.

Forces Act 1996, sections 21–27 now enables members of the armed forces to take complaints of discrimination in regard to race, gender and equal pay to employment tribunals.<sup>55</sup>

Other areas of imposed law, and therefore of juridification, on previously autonomous areas of military administration have related (or may potentially relate) to gender-free fitness tests,<sup>56</sup> employment of trans-sexuals,<sup>57</sup> the recruitment and retention of homosexuals in the armed forces,<sup>58</sup> health and safety legislation,<sup>59</sup> the Working Time Regulations,<sup>60</sup> the prohibition on the employment of ‘child’ soldiers (that is, those under 18, according to the United Nations Convention on the Protection of Children),<sup>61</sup> data protection,<sup>62</sup> or ‘posted’ workers under an EU directive<sup>63</sup> (no further discussion of these detailed and complex issues will be offered here).

One might even speculate that the process might also occur as a consequence of European Convention-based challenges raising the lack of a domestic legal remedy for service personnel who are administratively discharged or for officers required to resign their commissions.<sup>64</sup> For currently unfair dismissal claims in respect to termination of engagement are available to members of the armed forces only in claims of race or sex discrimination<sup>65</sup> and not more generally.<sup>66</sup>

## Independent judicial element

Perhaps the most interesting recent example of the juridification of military law, in order to make current military practice Human Rights Act-compliant, is the

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55 Applicants must first invoke the internal redress of grievance procedure, a requirement justified by reference to the importance of unit cohesion in the armed forces for operational effectiveness. As noted elsewhere in this paper the EOC questions the legality of this procedural requirement.

56 Not as yet, so far as is known, currently a matter of litigation. See, for example, *Soldier*, April 1998, 21; (Joint) Defence Council Instruction (DCI) 233/98.

57 See *Sunday Times*, 29 April 2001. See also *The Guardian*, 6 August 1998; *Daily Telegraph*, 25 August 1999. The leading civil authority is *P v S and Cornwall County Council* [1996] IRLR 347 (ECJ).

58 See n 2, above.

59 See *The Army's Terms and Conditions of Service*, Army Code 63804, 1997, 46–7; cf Julian Brazier MP, ‘Who Will Defend the Defenders? How the Ignorance of Parliament and the Judiciary Undermines the Military Ethos’, in G. Frost (ed) *Not Fit to Fight: The Cultural Subversion of the Armed Forces in Britain and America* (London: The Social Affairs Unit 1998) 63, 65.

60 SI 1998, No. 1833. In some but not all circumstances the armed forces are exempt from the provisions of the regulations. See regs 18, 25, 37 and 38.

61 Amnesty International, *United Kingdom: U-18s: Child Soldiers at Risk*, 2000. The United Kingdom signed the Optional Protocol to the Convention in September 2000 subject to the reservation that this would not preclude the deployment of under-18s in certain circumstances. See also AFBSC 2000–01, vol II, *op cit*, Appendix 10, ‘Memorandum submitted by The UK Coalition to Stop the Use of Child Soldiers’.

62 The Data Protection Act 1998, implementing a 1995 EU Directive on Data Protection, No 95/46/EC, has prompted changes in the services’ reporting procedures in regard to confidential reports.

63 Lt Col Peter Lamb, ‘Neutralisation by Stealth’ (1998) 1 *Armed Services Forum* 26–30. See also *Office National de L’Emploi v Naruschawicus*, Case C.308–94, ECJ, 1 February 1996.

64 It is understood that such legal challenges are being considered in respect to number of recent, highly publicised cases where officers were required to resign their commissions. cf, *Bartlett v Army Board*, (unpublished, July 2000): decision of Army Board to require Army officer, acquitted of rape, to resign his commission upheld by Blofeld J. The legal position with regard to servicemen who are discharged may be different (irrespective of differences in those respects between the Royal Navy and the other two branches of the armed forces).

65 Armed Forces Act 1996, ss 21–23.

66 See R. Watt, ‘The Crown and its Employees’ in Sunkin and Payne (eds), n 10 above, 298–305.

requirement for an independent judicial element at various points in military disciplinary proceedings. Thus certain decisions which hitherto had been taken exclusively by commanding officers simultaneously occupying investigatory, prosecuting and judicial roles *vis-à-vis* a military suspect are now in the hands of civilian judicial officers.

The decisions in question relate, first, to pre-trial custody of military suspects, that is, who should determine whether an accused serviceman, awaiting court martial, or investigation into charges, should be held (or continue to be held) in open, closed or no arrest (i.e. custody). The ECHR in *Hood v United Kingdom*<sup>67</sup> held that since a commanding officer who was authorised to decide on the pre-trial detention of the accused was also liable to intervene later in the proceedings as a representative of the prosecuting authority, there was in consequence a violation of Articles 5(3) and (5) and 6(1) of the European Convention. As a result, the Armed Forces Discipline Act 2000, sections 1–10 as amended by section 29 of and Schedule 4 to the Armed Forces Act 2001 now requires a pre-trial procedure conducted before a civilian judicial officer (unless there are exceptional circumstances) similar to bail applications in the civilian criminal justice system.

The insertion of a civilian judicial element into a hitherto exclusively military discipline procedure, thereby reflecting the requirements of Article 6 of the ECHR, has also occurred in respect to servicemen's appeals to a newly created Summary Appeal Court against commanding officers' decisions in summary dealing (Armed Forces Discipline Act 2000, sections 14–25). Finally, as previewed earlier, the authorisations of entry, search and seizure in respect to servicemen's rooms, lockers and property etc on military premises (in the light of the provisions of Article 8 and Protocol 1, Article 1 of the Convention) are, unless exceptional circumstances arise, to be granted by civilian judicial officers and no longer by military authority (by virtue of Part 2 of the Armed Forces Act 2001).

Whether the introduction of an independent judicial element into the disciplinary relationship between a commanding officer and his subordinates (the juridification of command relations) will indeed pose a threat to those authority relations, as some have alleged,<sup>68</sup> is not the concern here. It should, however, be noted that the commanding officer still retains discretion, when 'investigating' charges at an early stage of the proceedings, to dismiss the charge or, in some cases, to deal with the accused summarily, in preference to referring the charge to the brigade or divisional commander. Command authority in disciplinary matters is constrained, not eliminated.

However, external codes may not be the sole source of the juridification of military law. For as we noted previously, the existing boundaries of tort liability in respect to service personnel, exposed since 1987, are regularly being tested, and increased prospects for compensation for negligence are emerging.<sup>69</sup> The drunken guardsman who climbed onto, and then promptly fell off, the tailgate of an Army

67 (2000) 29 EHRR 365.

68 cf 'Will those "impartial" judicial officers protect or interfere with the commanding officer who has little or no judicial experience? No doubt it will depend largely on the individual but interference with the military ethos is inevitable', HL Deb vol 607 col 673 29 November 1999, (Lord Burnham). See also the Second Reading debate in the Commons on 17 February 2000, where similar concerns regarding the undermining of commanders' authority were expressed.

69 See, for example, *Cox v Ministry of Defence* (unreported; see *The Lawyer*, vol 13, no 25, 28 June 1999).

lorry after a three-hours drinking binge in Portsmouth even managed successfully to sue the Ministry of Defence for negligence (although subject to contributory negligence).<sup>70</sup>

Judicial review challenges and habeas corpus applications have also become more widely employed in respect to the armed forces' disciplinary practices and procedures.<sup>71</sup> This occurred, for example, in the case of Drummer Stephen Jordan who, prior to his successful ECHR judgment in March 2000 (Application no 30280/96) under Articles 5(3) and (5), had obtained his release from detention in December 1995 after instituting habeas corpus proceedings. This was followed in February 1996 by proceedings for compensation resulting in payment (part damages and part out-of-court settlement, it appears) from the Ministry of Defence for the admitted unlawful detention. Similar cases raised by other service personnel (even before travelling to Strasbourg became fashionable) and successfully alleging torts such as unlawful detention, false imprisonment and trespass to the person could be cited, though arguably such proceedings might reflect a reversion to eighteenth century legal principles. Whether, as some military commentators fear, increased litigiousness does (or will) undermine military effectiveness cannot be debated here.<sup>72</sup> Our point is that the term juridification may also apply to the coercive extension to military society of civilian legal norms through litigation.<sup>73</sup> In other words, the imperative to effect change in military law may be emerging not only from pressures within the European, human rights and international legal order exploring inconsistencies within United Kingdom law but also from unconnected developments within the domestic courts.

## Summarising juridification

Summarising these points, juridification can be located in the provision in armed forces legislation of 2000 and 2001 of an independent judicial element in respect to executive decisions on entry, search and seizure, to pre-trial custody decisions (following *Hood*) and to summary dealing, all hitherto the exclusive province of the military chain of command. They therefore extend beyond the impact of the landmark *Findlay* decision,<sup>74</sup> which had led to the enlargement of the role of the independent judge advocate in court-martial proceedings and to the creation of both services' prosecuting authorities and a court administration officer outside the chain of command. The creation of these new institutions had followed the abolition, in the light of *Findlay*, of the non-judicial post of convening officer who, as part of the chain of command against the accused, had responsibility for a prosecution, would then appoint as members of the court subordinate officers from within his own command, and would usually also be the confirming officer in respect to the court's finding.

But juridification also entails the constraining of a commander's discretion in a large range of personnel matters (partly with a view to combating discrimi-

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70 *Jebson v Ministry of Defence*, *The Times*, 28 June 2000 (CA)

71 Judicial review challenges to military tribunals subject to appeal are now precluded by the Armed Forces Act 2001, s 23.

72 G. Frost, 'How to Destroy an Army' in Frost (ed), n 59 above, 15–16; General Sir Charles Guthrie, 'British Defence- the Chief of the Defence Staff's Lecture' *RUSI Journal*, vol 146, no 1, February 2001, 1–7, 7. The remarks attracted extensive press coverage.

73 See n 3 above.

74 See n 1, above.

nation).<sup>75</sup> It includes the imposition of new legal duties in respect to health and safety, requiring the appointment of a ‘plethora of officers and senior NCOs with the responsibility for fire, environmental health, heat and light, road safety, safety in the workplace and other responsibilities’;<sup>76</sup> the possibility of the removal of the current exemption of the armed forces from the provisions of the Disability Discrimination Act 1995;<sup>77</sup> and the qualified application to the armed forces of the Working Time Regulations.<sup>78</sup> Such measures all reflect *imposed* law on the armed forces, with *external* monitoring of their conduct, with reduced collective autonomy and with enhanced individual entitlements. In addition they are underpinned by new judicial institutions with jurisdiction over the armed forces or by the extension of existing tribunals to the services which had hitherto been exempt from their jurisdiction. In this manner is the juridification of military relations expanded (irrespective of the wisdom or otherwise, or of the constitutional significance for civil-military relations, of such developments).<sup>79</sup>

## Limits to juridification

It is important, however, to remind ourselves that the juridification of military law has its limits. Apart from the obvious point that, as with most occupations, armed forces tend not to view their world through the prism of the law (and that service personnel employ devices aimed at law-avoidance),<sup>80</sup> much of what might otherwise be perceived by lawyers as substantive military law (albeit policy or administrative guidance within a security organisation) remains hidden from public scrutiny. They include, to select at random, *Provost Manuals* prescribing procedures for the exercise of arrest powers and the Army Commissioning Regulations 1999 which derive from the Royal Prerogative (as does much of military law). Solicitors or barristers representing service or ex-service clients who require access to restricted documents such as the procedures for dealing with enlisted or commissioned conscientious objectors or full access to board of inquiry reports might seek to institute discovery proceedings in the event of departmental

75 In November 1995, the Commission for Racial Equality (CRE) threatened to issue a ‘non-discrimination notice’ in respect to the Household Cavalry, in particular, and to the Ministry of Defence in general. An ‘action plan’ was agreed in March 1996 and the threat withdrawn in March 1998. See CRE, *Ministry of Defence (Household Cavalry): Report of a Formal Investigation* (London: CRE, 1996). There may be a double-edged effect in that the identification of certain discriminatory practices may result in the lawful withdrawal of the advantages from the beneficiaries rather than the extension of the benefits to all. Examples include the withdrawal of certain premature voluntary release (PVR) entitlements on marriage. See General (ret'd) Sir Michael Rose, ‘Sustaining the Will to Fight in the British Army’, *Officer*, vol 10, no 1, January–February 1998, 40–41, 40. Another example is the withdrawal of an additional travel warrant entitlement for service personnel to visit children of a previous marriage. Legal advice suggested that loss of the entitlement on remarriage breached the Sex Discrimination Act 1975, s 74. The additional warrants were therefore withdrawn rather than extended on remarriage. See *Soldier*, vol 54, no 3, March 1998, 26; *Navy News*, March 1998, 40.

76 Brazier, n 59 above, 65

77 *The Guardian*, 15 July 1999; *Daily Telegraph*, 5 December 1999. The then Minister for the Disabled, Margaret Hodge MP, opposed the exemption. See *The Guardian*, 21 December 2000. It should be noted that the loss of limbs is not a disqualification for certain positions in the services.

78 See n 59, above, and see below.

79 For discussion of some of the constitutional issues, see G.R. Rubin, ‘Observations on Change in Military Law’ House of Commons Defence Committee, Second Report, Session 2000–01, *The Strategic Defence Review: Policy for People*, HC Paper 29–II, February 2001, Appendix 8, 253–254.

80 J. Hockey, *Squaddies: Portrait of a Sub-Culture* (Exeter: University of Exeter Press, 1986) 19–20.

refusal to disclose.<sup>81</sup> Occasional glimpses of this 'hidden' world of military law do therefore emerge in a very small number of cases (and, one suspects, more will be uncovered as the subject-matter of litigation against the Ministry of Defence is expanded).<sup>82</sup> Parliamentarians have also made scathing reference in the past to (now withdrawn) obscure Defence Council Instructions on medical examinations which were prescribed for the detection of serving homosexuals.<sup>83</sup> Again the world of DCIs is one which is generally unfamiliar to most lawyers.

Thus a considerable element of the law making agenda remains within the effective control of the service department itself (eg enlistment rules, Pay Warrant, reserve forces, and rules of evidence in courts martial). Perhaps most relevantly, the hidden (and usually closed) world of Army General and Administrative Instructions [AGAI], Fleet Administrative and General Orders [FLAGOs], DCIs, Standing Orders, Rules of Engagement (whether in respect to the United Kingdom or to overseas theatres), Local Purchase Regulations, Road Transport Regulations and Military Flying Regulations all testify to a land of military law scarcely known to, or penetrated by, civilian society. In this reclusive world juridification can claim few triumphs. Instead the autonomy of military law continues to thrive.

## Conclusions

We have sought to analyse the changing character of military law by observing an evolutionary process commencing with the long period of legal autonomy from the mid-nineteenth century to the mid-twentieth century. A new trajectory was then noted as the civilianisation of significant areas of military law was approved by the armed forces themselves (as well as by government) from the 1960s. Finally while the latter process continues, a new shift towards the juridification of military law has been identified for the past decade. This has occurred most notably (but not only) where equal opportunities and equal treatment claims are made and where third party civilian judicial intervention has been interposed between a subordinate and his or her commander in an organisation premised on command authority.

Tracking such changes is easy. To explain such changes is more difficult. For example while the grip of a powerful ideology of deference to military command seems to be an attractive explanation for the judicial abstentionism of the period 1850–1950, it remains conjectural in the absence of solid and systematic historical research beyond the scope of this paper (indeed to reinforce such an argument, perhaps one would also have to demonstrate that the interventionist judiciary *prior* to 1850, such as Mansfield and Loughborough, were *not* deferential).

In respect to civilianisation it is also necessary to ask why the armed forces themselves began to embrace this approach to military law, particularly from the 1960s. A number of obvious, but perhaps not conclusive, explanations can be advanced. Thus one might suggest that following the creation of the precedent of a

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81 The classified administrative instructions were made available to the defence led by Helena Kennedy QC in the prosecution of Gunner Vic Williams who had refused to serve in the Gulf War. See Col [now Maj Gen] G. Risius, 'Conscientious Objection and the Gulf War: The Case of Gunner Williams' (1995) 2 *Military Law Journal* 25, 34. For discovery proceedings see, for example, *R v Secretary of State for Defence, ex parte Sancto* (1993) Admin LR 673 (DC).

82 Army General and Administrative Instructions, which are mostly classified documents, were cited in *R v Ministry of Defence, ex parte Walker* [2000] 1 WLR 806 (HL). See n 3 above. Perhaps even the limits to juridification will have to be redrawn in the not-too-distant future.

83 HC Deb, 6th Series, vol 227 col 137 June 21 1993 (Tony Banks).

civilian-controlled CMAC (whose establishment might perhaps be attributed to a public desire at the time for more 'democratic' control of courts martial following a number of controversial post-war prosecutions), it made sense *professionally* (and possibly politically), at least to military lawyers, to expand the civilianisation of military justice procedures appropriately. The SDARWP indeed offered a congenial institutional framework for such exercises and governments of differing hues were on board.

Moreover there was now, since 1960–61, a highly focussed parliamentary procedure, a select committee scrutinising the terms of a Bill. In due course members who served on successive committees were able to acquire a sufficient level of expertise in posing questions in this specialised area not to be fobbed off by obfuscatory answers supplied by senior civil servants appearing before them (opaque responses formerly delivered would perhaps contain the unspoken assumption that non-defence professionals were quite incapable of appreciating military issues). Moreover in the 1990s, at least, there was considerable overlap between the members of the Armed Forces Bill committees and the House of Commons Defence Committee [HCDC] which according to its chairman had,

... become more effective as time went on. The HCDC is a much more professional committee [than previously]. Expertise within the committee itself has grown [notwithstanding the decline in the numbers of MPs with defence-related or military experience]. Greater use is made of a variety of external advisers and both military and civil leaders are summoned more frequently.<sup>84</sup>

In short, scrutiny of the defence sector has become more refined and impressive. Indeed the spectacle at Armed Forces Bill select committee hearings of well-informed bodies such as Stonewall (for the first time in 1990–91) and Rank Outsiders (1995–96) appearing in person before a defence-related select committee and campaigning at the time for a civilianised solution (though in due course compelled to seek a juridified one), does represent a level of access by pressure groups to legal policy-making not hitherto experienced in this sphere.<sup>85</sup> The ineluctable conclusion was that the *principle* of furthering civilianisation where practicable was now unchallenged. Complacent military claims to a *right* to be different were no longer, if ever, appropriate. While it was the military lawyers themselves who searched out the civilian domestic criminal law rules which should be made applicable to the military justice system, exemption would hereafter be based only on military *need*.

While explanations for civilianisation might be attributed to the professional influence of military lawyers who perceived practical advantages for military discipline in adopting certain civilian criminal rules, or to a government (and departmental) ideology favouring a limited convergence of civil and military law, juridification was a different matter. Here one can identify not a proactive nor wholly consensual process of legal change, but one which, certainly in the initial stages, has been viewed by the armed forces with at best wariness and at worst hostility at the perceived prospect of military effectiveness being imperilled

84 B. George and J.D. Morgan, 'Parliamentary Scrutiny of Defence' (1999) 5 *Journal of Legislative Studies* 1, 4.

85 In previous years only ministry witnesses were called to give evidence in person at the 1980–81 hearings while at the 1985–86 hearings the committee voted to decline to question the Campaign for Homosexual Equality (though the AT EASE organisation was permitted to raise the issue of homosexuality during its appearance before the committee). The Campaign for Homosexual Equality did submit written evidence in 1980–81 and in 1985–86. The Conservative Group for Homosexual Equality did so in 1985–86.

(though experience of the law in action has tended, to date, to remove most of the suspicions; apart, of course, from the perennial groans regarding the amount of new paperwork generated).

As to accounting for juridification it is trite but nonetheless valid to find explanations in terms of a familiar human rights and equal treatment discourse with its international, especially European, flavour. Some have argued that globalisation has prompted the decline of mass militarism, mass armies and mass military culture, with the latter, in particular, being refashioned to embrace non-nationalistic principles of gender, race and cultural equality.<sup>86</sup> The pattern of such changes globally is, of course, uneven, and it may by-pass some societies.

However, in regard to the relevance of such discourses to the circumstances of the United Kingdom's armed forces, one might cite a familiar catalogue of indirect influences, a number of which were listed in the introduction to this paper. They include the relative openness of British society; the gradually changing profile, in percentage terms, of members of the armed forces which reflects better educated officers and other ranks, more women and (slightly) more ethnic minorities; a decline in deference involving fewer inhibitions about challenging authority in courts or elsewhere, especially where such challenges are successful; and the vigorous debates within the armed forces and elsewhere of the relationship between civil and military society.<sup>87</sup>

These debates have ranged far and wide. Among the many issues (which cannot be explored further here) are the perceived shift from institutionalism (or vocationalism) to occupationalism on the part of service personnel, perhaps more sharply reflected recently in the emergence of the limited commitment 'military local service engagement'; whether post-modernist trends relating to sexual or gender identity or to the nature of the family itself are manifesting themselves in the armed forces<sup>88</sup>; and the consequences for military ethos and military communities of the increasing number of service families now settling within civilian communities. As one commentator has noted,

The Services have to think through how to incorporate the principles of individual choice, consultation about career and lifestyle, and the need for sufficient non-working time with family, alongside the demands of the military ethos.<sup>89</sup>

These issues all accentuate *individual* preferences. However military ethos has always been uncomfortable with, and (given a choice) will favour exemption from, civilian laws which stress rights and not duties, and individual benefit and

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86 cf M. Shaw, 'The Post-Military Citizen' paper to conference on 'Redefining Society-Military Relations from Vancouver to Vladivostok', Birmingham University, April 1999.

87 Wider social changes which include the decline of deference, including youth culture challenges to authority, are noted in, *inter alia*, A. Marwick, *British Society Since 1945* (Harmondsworth: Penguin, 1982); A. Sked, *Britain's Decline: Problems and Perspectives* (Oxford: Blackwell, 1987); J. Obelkevich and P. Catterall (eds), *Understanding Post-War British Society* (London: Routledge, 1994); and P. Johnson, 'Youth Culture' in P. Johnson (ed), *The Twentieth Century* (London: Longman, 1998).

88 On challenges to the traditional concept of the military family, see G.R. Rubin, 'Equal Opportunities, Pregnancy Dismissals and the Armed Forces: The Context of Social Change and Conceptual Re-definition' unpublished workshop paper, December 1995.

89 C. Dandeker, 'Challenges to the Uniqueness of British Military Cultures' in C. Dandeker et al (eds), *The Future of British Military Culture* (London: British Military Studies Group, 1998) 25. A particularly useful collection which addresses many of these themes is H. Strachan (ed), *The British Army: Manpower and Society into the Twenty-first Century* (London: Frank Cass, 2000). See also the essays in Frost, n 59 above, and, for the institutionalism/occupationalism debate, C.C. Moskos and F.R. Wood, *The Military: More than Just a Job?* (Washington: Pergamon-Brassey's, 1988).

enhancement rather than the collective good. In this clash of values, juridification was always likely to be a consequence, whether articulated through the directives of the EU, through the rulings of the courts declaring the incompatibility of military procedures with the requirements of the ECHR and of the Human Rights Act, or through the re-writing of military manuals to take account of anticipated legal pit-falls.<sup>90</sup>

A final reflection as we survey the sweep of coercively imposed civilian legal norms on the armed forces is that it is perhaps reassuring that it is for military sociologists and not for lawyers to assess whether military ethos has indeed been destroyed by lawyers' 'fiddle-faddle' and by a cult of individualism. However, were that indeed to be the case, it would surely not be without irony that the recent rapid increase in the number of military lawyers (one of the very few branches of the armed forces to increase recruitment) has been, and may well continue to be, not only a consequence of the juridification of military law but also a cause of it.<sup>91</sup>

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90 For example should only married couples be entitled to occupy married quarters in the light of Convention rights?

91 Assuming that their advice is followed. It should be noted that military lawyers assert that they are officers first and lawyers second. See Captain G.E. Davies, 'Attached to the Infantry: A Lawyer's Perspective' (1999) 8 *Adjutant General's Corps Journal* 104.