

THE REVOLUTIONARY EFFECT OF EQUALITY AND HUMAN RIGHTS LAW ON THE UK ARMED FORCES

Richard Ball*

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The UK armed forces have undergone an incremental transformation through the impact of civilian law since the 1960s. Gerry Rubin in a 2002 article for this journal analysed the impact of this civilian law on Military Law and described a course of civilianisation and juridification. However, the Human Rights Act 1998 and non-discrimination legislation, culminating in the recent Equality Act 2010, have had a combined effect that has been revolutionary taking the military further than Rubin's civilianisation and juridification and down a process of democratisation. This article will examine the relationship between civilian and military societies, the effects of civilian law on the military and the impact of that civilian law on the civil-military relationship, including the introduction of the Armed Forces Covenant in 2011. Finally lessons for the armed forces from this military democratisation will be considered.

INTRODUCTION

The UK military, as a public body funded entirely through taxation with these funds distributed by parliament, is held accountable to citizens through the legislative process and the judicial interpretation of the resulting legislation. That relationship between civilian and military society is therefore democratically regulated through civilian law and the rule of law. This regulatory framework has grown incrementally

since the 1960s but from the 1990s, and especially 2000¹ the significant advances in the fields of equality and human rights have led to a revolution in the UK military, that is far from complete. Gerry Rubin² in 2002 examined some of these changes, focussing predominantly on Military Law and the courts martial process, but touching briefly on the impact on the military itself³. He identified this process of change as one of civilianisation⁴ and juridification⁵ but Rubin was writing ten years ago and in the meantime civilian law has led a revolutionary transformative effect on the culture of the armed forces from one of discrimination on the basis of race, sex and sexual orientation to the embrace of diversity, equality and human rights. This process goes further than civilianisation and juridification to one of democratisation that has transformed the relationship between civil society and the military in the UK and facilitated the potential for further metamorphosis.

This article will focus on this democratisation process and examine the impact of civilian law, in particular anti-discrimination, equality and human rights law, on the military. As such this article consists of three parts: part 1 will consider the theory of the civil-military relationship; part 2 will describe the effects of civilian law on the armed forces; and, part 3 will critically evaluate this impact especially as it applies to the civil-military relationship and outline possible further challenges for the UK military in the years to come.

PART 1 – THE CIVIL-MILITARY RELATIONSHIP

* Senior Lecturer in Law, the University of the West of England. The author is grateful to Professors Roger Brownsword, Anthony Forster and Phil Rumney for their helpful comments on this paper. A draft of this paper was delivered at the Inter University Seminar On Armed Forces and Society Canada Conference in Toronto 17 October 2010

¹ Right Hon Geoff Hoon MP, Secretary of State for Defence, HC Deb vol 342 col 287-288 12 January 2000

² G.R. Rubin, 'United Kingdom Military Law: Autonomy, Civilianisation, Juridification' (2002) 65 MLR 36

³ *ibid* at 49

⁴ *ibid* at 44

⁵ *ibid* at 47

There has been much written about the civil-military relationship⁶ that has focused predominantly on the US military with the debate rarely coming alive in the UK⁷. The debate in the US has mainly been led by political scientists and sociologists.

The examination of the civil-military relationship from the political science experience has centred on political institutions, the relationship between the civilian political machinery and the military and the democratic control of the military. The two sides of the debate are exemplified by Huntington⁸ and Feaver⁹. Huntington focused on the professional officer corps and concluded that ‘the optimal balance between the functional imperative (military effectiveness) and the societal imperative (responsiveness) is achieved – contrary to conventional belief – not when the officer corps is forced to incorporate civilian values as the price of the authority and influence it requires to fulfil its duties (‘subjective civilian control’¹⁰), but when it is allowed to be fully professional (‘objective civilian control’¹¹)’¹². Feaver on the other hand establishes an agent-principal model with the armed forces as the agent acting in accordance with the civilian political principal’s intentions¹³. The result is that there are considerable mechanisms for civilian oversight of the military¹⁴, the availability of

⁶ See L. Cohn, ‘The Evolution of the Civil-Military “Gap” Debate’, paper prepared for the TISS Project on the Gap Between the Military and Civilian Society, 1999 for a comprehensive analysis of the literature up to 1999, copy on file with the author

⁷ A notable exception is the analysis conducted by a historian, H. Strachan, ‘The Civil-Military “Gap” in Britain’ (2003) 26 *Journal of Strategic Studies* 43

⁸ S.P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Cambridge: Belknap Press, 1957)

⁹ P.D. Feaver, *Armed Servants: Agency, Oversight, and Civil-Military Relations* (Cambridge: Harvard University Press, 2003)

¹⁰ *ibid* at 80

¹¹ *ibid* at 83

¹² B. Boëne, ‘How “Unique” Should the Military Be? A Review of Representative Literature & Outline of a Synthetic Formulation’ (1990) 31 *European Journal of Sociology* 3, 15

¹³ n 9 above chapter 3

¹⁴ *ibid* at 75

civilian punishment of the military¹⁵ and an overall goal of protecting democratic values¹⁶.

The sociological perspective of the civil-military relationship is dominated by Janowitz¹⁷ and Moskos¹⁸. Janowitz identified a convergence of the military and civilians with the civilianisation of the military leading to a “constabulary” role for the armed forces¹⁹. His focus, like Huntington’s, was on the officer corps. The officer undertakes his duties ‘because he is a professional with a sense of self-esteem and moral worth’, ‘who accepts civilian political control because he recognises that civilians appreciate and understand the tasks and responsibilities of the constabulary force. He is integrated into civilian society because he shares its common values’²⁰. Moskos²¹ observed a similar development to Janowitz but this was framed within the transition from conscription to an all-volunteer force. As convergence occurred between the military and civilians so the nature of the military personnel’s relationship with the armed forces also altered, moving from institutional to occupational.

A number of attempts have been made to find a middle way between Huntington/Feaver and Janowitz/Moskos. Schiff²² has attempted to utilise both the political science and sociology models. She advances a theory for a cooperative relationship between the military, the political elites and the citizenry. This concordance model however has no ideal typical blueprint of civil-military

¹⁵ *ibid* at 87

¹⁶ J. Burk, ‘Theories of Democratic Civil-Military Relations’ (2002) 29 *Armed Forces and Society* 7, 22

¹⁷ M. Janowitz, *The Professional Soldier: A Social and Political Portrait* (New York : Free Press, 1964)

¹⁸ C.C. Moskos, ‘From Institution to Occupation: Trends in Military Organization’ (1977) 4 *Armed Forces and Society* 41; C.C. Moskos, ‘Institutional/Occupational Trends in Armed Forces: An Update’ (1986) 12 *Armed Forces and Society* 377

¹⁹ n 17 above chapter 20

²⁰ *ibid* at 440

²¹ n 18 above

²² R.L. Schiff, ‘Civil-Military Relations Reconsidered: A Theory of Concordance’ (1995) 22 *Armed Forces and Society* 7; R.L. Schiff, *The Military and Domestic Politics: A Concordance Theory of Civil-Military Relations* (London: Routledge, 2009)

relationship as several types are possible dependant on society's institutional and cultural conditions.

Burk²³ has also attempted to find a third way by limiting his analysis to civil-military relations in mature democracies and observing that the question advanced by most theorists as to whom and how the polity controls the armed forces is not an issue in these countries²⁴. Instead the real problem is 'how to maintain a military that sustains and protects democratic values'²⁵ with Burk suggesting a military which is itself democratic and founded on the concept of the citizen-soldier²⁶. Both Schiff and Burk therefore open the debate up and in particular with a discussion over culture and democracy that leads to the consideration of rights and the possibility of a legal analysis of the civil-military relationship.

It is interesting that there is little evidence of this legal analysis of the civil-military relationship being carried out on either side of the Atlantic. A recent attempt has been made by Woo²⁷ in the USA from an administrative law angle and in the UK, as outlined previously, Rubin²⁸ has examined the civilianisation and juridification of military law though not specifically the civil-military relationship.

The question has to be asked why law should be considered to be a useful discipline for this analysis, apart from the suggestion above that culture, democracy and rights provide a possible path. Clausewitz famously described war as 'not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means'²⁹. As such the armed forces are the organ of the State that conducts war as a political instrument. Politics is concerned with power³⁰ and the

²³ n 16 above at 7

²⁴ *ibid* at 8

²⁵ *ibid*

²⁶ *ibid* at 23

²⁷ J. Woo, 'Administration of War' (2009) 58 *Duke Law Journal* 2277

²⁸ n 2 above

²⁹ C. von Clausewitz (Edited & Translated by M. Howard & P. Paret), *On War* (Princeton: Princeton University Press, 1976) 87

³⁰ D. Held, *Models of Democracy* (London: Polity, 2nd ed, 1996) 309

capacity of social agents to maintain or transform their social environment and to create a regulated order for managing human conflict and interaction. Law can be considered to be 'the enterprise of subjecting human conduct to the governance of rules'³¹ or 'the human attempt to establish social order as a way of regulating and managing human conflict'³². As such it deals with human action and human social action, is the method used to enact the rules required to regulate this human social action and is the final outcome of the political process. From these definitions politics and law are inevitably intertwined with the laws and rules of the polity providing the positive evidence of the policy stance of the polity. Therefore it is the law that needs to be examined to determine the political will of the polity and as war is a political instrument legal analysis is essential to determine the position of the military vis-a-vis society.

It is clear from this analysis that law can legitimately be employed to examine the relationship between civil and military societies and when the focus is on culture, rights and democracy civilian law takes central stage. As such the aim now shifts to inspecting the civilian law that has had the most impact on the military.

PART 2 – THE EFFECTS OF CIVILIAN LAW ON THE UK MILITARY

In Part 2 this article will examine the effects of anti-discrimination, equality and human rights law on the armed forces.

2.1 Anti-Discrimination and Equality Law

Equality is an ephemeral concept that has engendered considerable academic debate about its substance and purpose. Westen³³ considered both formal and

³¹ L.L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969) 96

³² D. Beyleveld, R. Brownsword, *Law as a Moral Judgment* (London: Sweet & Maxwell, 1986) 2

³³ P. Westen, 'The Empty Idea of Equality' (1982) 95 HLR 537 and also see C.J. Peters, 'Equality Revisited' (1997) 110 HLR 1211. For criticism of Westen's position see K.W. Simons, 'Equality as a Comparative Right' (1985) 65 *Boston University*

substantive equality and concluded that equality was an empty vessel with no substantive moral content of its own. Without moral standards, equality remained meaningless, a formula that could have nothing to say about how we act³⁴. Barnard attempted to fill the vacuum of equality with the concept of non-discrimination³⁵ exemplified by the non-discrimination model that developed in the UK in an incremental and singular manner, described by Bell as a 'patchwork of protection'³⁶. The effect has been to establish discrete areas of non-discrimination without a defining principle of equal treatment imbued with moral values. However, the biggest shake up of UK anti-discrimination law has occurred with the introduction of the Equality Act 2010 (EA10) in the dying stages of the previous Labour government. As Hepple³⁷ notes the EA10 has three distinctive features. First, it is comprehensive, creating a unitary conception of equality and a single enforcement body, the Equality and Human Rights Commission. Second, it 'harmonises, clarifies and extends the concepts of discrimination³⁸, harassment³⁹ and victimisation⁴⁰ and applies them across nine protected characteristics'⁴¹, specifically, age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation⁴². Third, it transforms anti-discrimination protection into equality law although does not go as far as establishing a

Law Review 387, K.L. Karst, 'Why Equality Matters' (1983) 17 *Georgia Law Review* 245 and K. Greenawalt, 'How Empty is the Idea of Equality?' (1983) 83 *Columbia Law Review* 1167

³⁴ n 33 above at 547

³⁵ C. Barnard, 'The Principle of Equality in the Community Context: P, Grant, Kalanke and Marschall: Four Uneasy Bedfellows?' (1998) 57 *CLJ* 352; C. Barnard, 'Gender Equality in the EU: A Balance Sheet' in P. Alston, *The EU and Human Rights* (London: OUP, 1999) 215, 223

³⁶ M. Bell, 'A Patchwork of Protection: The New Anti-Discrimination Law Framework' (2004) 67 *MLR* 465

³⁷ B. Hepple, *Equality: The New Legal Framework* (Oxford: Hart Publishing, 2011) 1

³⁸ Direct discrimination is defined in EA10 s 13, indirect discrimination, applicable to all protected characteristics, is defined in EA10, s 19 and no real comparator is required to assess discrimination (EA10, ss 23 and 24). Furthermore EA10, s 14 contains a new provision on multiple discrimination

³⁹ EA10, s 26

⁴⁰ EA10, s 27

⁴¹ *ibid*

⁴² EA10, s 4, with definitions of each characteristic provided in ss 5-12

constitutional right to equality⁴³. This means that, unlike Germany⁴⁴ or South Africa⁴⁵ that utilise human dignity⁴⁶ as the moral value that underpins equality law⁴⁷, no one moral value supports the equality edifice and indeed Hepple identifies seven meanings for equality⁴⁸.

The EA10 contains some innovative developments in general and for the armed forces in particular. The first is the duty on public sector authorities to mainstream equality of outcomes as a result of socio-economic disadvantage when making strategic decisions on the exercising of functions⁴⁹. In the context of the military these authorities include Ministers of the Crown and government departments⁵⁰. Fredman⁵¹ suggested that this duty did not apply to the armed forces and on the face of the Act she was correct but it would have applied to the Ministry of Defence (MoD) and Secretary of State for Defence when making strategic decisions, eg the Strategic Defence and Security Review 2011⁵². As it was the Coalition government decided against bringing this duty into force although the aspirational nature of the obligation would have created difficulties for enforcement⁵³.

⁴³ J. Jowell, 'Is Equality a Constitutional Principle?' (1994) 47 *Current Legal Problems* 1. See also J. Stanton-Ife, 'Should Equality Be a Constitutional Principle?' (2000) 11 KCLJ 133 opposing Jowell's argument

⁴⁴ See J. Jones, "'Common Constitutional Traditions": Can the Meaning of Human Dignity under German Law Guide the European Court of Justice?' [2004] PL 167

⁴⁵ See E. Grant, 'Dignity and Equality' (2007) 7 *Human Rights Law Review* 299

⁴⁶ This is a highly contested concept – see for example D. Beylveld, R. Brownsword, 'Human Dignity, Human Rights, and Human Genetics' (1998) 61 MLR 661, D. Feldman, 'Human Dignity as a Legal Value' [1999] PL 682 and [2000] PL 61 and C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655

⁴⁷ See G. Moon, R. Allen, 'Dignity Discourse in Discrimination Law: A Better Route to Equality?' [2006] EHRLR 610 who suggest a structured approach to the use of dignity as the basis for equality law

⁴⁸ n 44 above at 12 and B. Hepple, 'The Aims of Equality Law' (2008) 61 CLP 1, 3

⁴⁹ EA10, s 1(1)

⁵⁰ EA10, s 1(3)(a) and (b)

⁵¹ S. Fredman, 'Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage Onto the Equality Agenda' [2010] EHRLR 290, 297

⁵² Ministry of Defence, *Securing Britain in an Age of Insecurity: The Strategic and Security Review*, Cm 7948 (London: HMSO, 2011)

⁵³ n 44 above at 142

The armed forces are classified as a public authority⁵⁴ and the new public sector duty set out in section 149(1)⁵⁵ applies to the military and is extended to persons performing a public function who are not public authorities⁵⁶. To demonstrate compliance with this duty, public authorities must publish annual equality information⁵⁷ covering all protected characteristics⁵⁸. Furthermore, according to section 29(6) of the EA10 '[a] person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.' However, this is disapplied when relating to relevant discrimination 'for the purpose of ensuring the combat effectiveness of the armed forces'⁵⁹ with 'relevant discrimination' made up of four of the protected characteristics, age, disability, gender reassignment and sex but does not include race and sexual orientation.

As a general employer the armed forces are prohibited by section 39(1) from discriminating when deciding who to or not to employ and the terms of employment and in section 39(2) from discriminating against an employee over terms of employment, opportunities for promotion, transfer or training, dismissal or any other detriment. However, there is another exception provided for the military when deciding who to or not to employ and opportunities for employees for promotion, transfer or training 'by applying...a relevant requirement if the person shows that the application is a proportionate means of ensuring the combat effectiveness of the armed forces'⁶⁰, where a 'relevant requirement' is either to be a man or not to be a

⁵⁴ Schedule 19, s 150(1)

⁵⁵ A public authority must 'in the course of its functions, have due regard to the need to: (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.'

⁵⁶ EA10, s 149(2). See S Fredman, 'The Public Sector Equality Duty' (2011) 40 ILJ 405

⁵⁷ SI 2260/2011, The Equality Act 2010 (Specific Duties) Regulations 2011 Article 2(1)

⁵⁸ *ibid* Article 2(4)

⁵⁹ Schedule 3, s 4(1)

⁶⁰ Schedule 9, s 4(1)

transsexual person⁶¹. Furthermore, Part 5 on Work, which contains section 39, does not apply to service in the armed forces as far as relating to age or disability⁶².

Finally there is a general exception for national security but only to the extent that it is proportionate to do so⁶³. However, there is no definition of national security and so the exception is uncertain.

Five of the nine protected characteristics are particularly relevant for the military and have seen considerable development since the 1960s.

i. Race

Racial minorities have served for many years in the British military⁶⁴ but only since the Race Relations Act 1976⁶⁵ was there a duty on the armed forces not to discriminate against individuals on the basis of their race. Concerns grew through the 1980s and 1990s over reports of racial bullying⁶⁶, evidenced by the Commission for Racial Equality's critical investigation into the Household Cavalry⁶⁷ and a number of cases⁶⁸. The result was an adoption first by the Defence Council of a Code of Practice on Race Relations in 1993, second a partnership agreement between the MoD and the Commission for Racial Equality (CRE) in 1998 and third the setting of ethnic minority recruitment goals for the first time in the Strategic Defence Review (SDR) in 1998. The White Paper attached to the SDR emphasised that 'the armed forces will offer a worthwhile and rewarding career for all ethnic groups, both for men

⁶¹ Schedule 9, s 4(2)

⁶² Schedule 9, s 4(3)

⁶³ EA10, s 192

⁶⁴ S.W. Crawford, 'Racial Integration in the Army – A Historical Perspective' (1995) 111 *British Army Review* 24

⁶⁵ A.W. Bradley, 'Racial Discrimination and the Public Sector' [1991] PL 317 – the Race Relations Act 1965 exempted any act by the Crown or on Crown premises

⁶⁶ J.K. Wither, 'Battling Bullying in the British Army 1987-2004' (2004) 1 *Journal of Power Institutions in Post-Soviet Societies* 2

⁶⁷ Commission for Racial Equality, *Report of a Formal Investigation into the Ministry of Defence (Household Cavalry)* (London: CRE, 1996)

⁶⁸ *R v Army Board of the Defence Council ex parte Anderson* [1991] ICR 537

and women'⁶⁹. Furthermore '[w]e need to recruit high quality adaptable people in a rapidly changing society. We will be putting additional emphasis on recruiting and adapting our approach to better reach all sections of the community. We are particularly anxious to recruit more from the ethnic minorities and more women, whose potential we have not fully tapped.'⁷⁰ Supporting Essay No 9 was more explicit as to the relationship between society and the military requiring the armed forces to 'embrace all sections of the community, irrespective of gender or race'⁷¹. For ethnic minorities the aim was to increase numbers by 1% each year until eventually the composition of the armed forces reflected that of the population as a whole⁷². Finally the strategy was underlined by an overarching goal 'to put in place modern and fair policies which ensure that the armed forces and the MoD attract and retain the right people and truly reflect the society they serve.'⁷³

Therefore by the turn of the 21st Century the military policy for racial minorities had evolved from one of equal opportunities to one of diversity. In the early 2000s Dandeker and Mason⁷⁴ considered the situation of race and the military whilst Hussain and Ishaq⁷⁵ conducted empirical research into attitudes of civilian racial minorities towards the armed forces. The latter research identified reasons against joining the military which included: perceived racism in the armed forces; the nature

⁶⁹ Ministry of Defence, *Strategic Defence Review*, Cm 3999 (London: MoD, 1998) para 121

⁷⁰ *ibid* para 127

⁷¹ *ibid* Essay 9 para 18

⁷² *ibid* Essay 9 para 41

⁷³ *ibid* Essay 9 para 80

⁷⁴ C. Dandeker, D. Mason, 'The British Armed Services and the Participation of Minority Ethnic Communities: From Equal Opportunities to Diversity?' (2001) 49 *Sociological Review* 219; C. Dandeker, D. Mason, 'Diversifying the Uniform? The Participation of Minority Ethnic Personnel in the British Armed Service' (2003) 29 *Armed Forces and Society* 481

⁷⁵ A. Hussain, M. Ishaq, 'Scottish Pakistani Muslims' Perceptions of the Armed Forces' (2002) 38 *Scottish Affairs* 27; A. Hussain, M. Ishaq, 'British Pakistani Muslims' Perceptions of the Armed Forces' (2002) 28 *Armed Forces and Society* 601; M. Ishaq, A. Hussein, 'British Ethnic Minority Communities and the Armed Forces' (2002) 31 *Personnel Review* 722; A. Hussain, M. Ishaq, 'Promoting Equality of Opportunity in the British Armed Forces' (2003) 3 *Defence Studies* 87; A. Hussein, 'Careers in the British Armed Forces: A Black African Caribbean Viewpoint' (2003) 33 *Journal of Black Studies* 312

of a military career; a tendency to prioritise further and higher education over a service career; and religious and cultural considerations. It should be noted that this research was conducted with a small statistical sample and before the 9/11 or 7/7 terrorist attacks.

To help achieve the goals set out in the SDR, the MoD set in place three year Equality Schemes first published in 2002 (only for race) for 2002-2005⁷⁶, then 2006-2009⁷⁷, which was then superseded by the scheme for 2008-2011⁷⁸. No new scheme has been published for 2012 and beyond. Furthermore Annual Reports were produced with policy aims and objectives and detailed statistics⁷⁹, although no report was published for the reporting period of May 2010 to April 2011 and any further information will be provided on the MoD website rather than in the annual reports.

These MoD reports on Equality and Diversity point out the increasing percentage of racial minority representation, from 1% in 1999 to 6.6% in 2010 (3.4% for the Royal Navy, 9.4% for the Army and 2.1% for the RAF). However, it should also be noted

⁷⁶ Ministry of Defence, *Race Equality Scheme 2002-2005 for the Ministry of Defence: Armed Forces, Civil Servants and Ministry of Defence Police* (London: MoD, 2002) at http://webarchive.nationalarchives.gov.uk/tna+/http://www.mod.uk/issues/racial_equality/index.html (last visited 15 March 2012)

⁷⁷ Ministry of Defence, *Equality and Diversity Scheme 2006-2009* (London: MoD, 2002) at http://www.mod.uk/NR/rdonlyres/6D31D11A-8764-4DD8-9788-D20B5B14CA6D/0/eqdiversity_scheme2006_2009_ver1april06.pdf (last visited 15 March 2012)

⁷⁸ Ministry of Defence, *Equality and Diversity Scheme 2008-2011* (London: MoD, 2002) at <http://www.mod.uk/NR/rdonlyres/98E4EAB6-CE02-4F39-9EF2-17DD054C5905/0/eqdivschemes20082011.pdf> (last visited 15 March 2012)

⁷⁹ Race Equality Scheme Progress Reports were published for 2003, 2004 and 2005. Equality and Diversity Scheme Annual Reports have been published for 2006-2007 at

http://www.mod.uk/NR/rdonlyres/190B0D7E-83AB-4EDF-B845-0C310EE070C0/0/annrpt_eds0607.pdf (last visited 15 March 2012), 2007-2008 at http://www.mod.uk/NR/rdonlyres/190B0D7E-83AB-4EDF-B845-0C310EE070C0/0/annrpt_eds0607.pdf (last visited 15 March 2012) and 2008-2009 at

http://www.mod.uk/NR/rdonlyres/4C3078BC-DB83-4F88-AE68-4DE231C7003D/0/edsreport_200809.pdf (last visited 15 March 2012). The report for 2009-2010 has yet to be published on the MoD's website but a copy has been lodged in the House of Commons Library and a copy is on file with the author.

that much of this recruitment is made up of individuals from Commonwealth countries rather than recruitment from British racial minorities, with 6.3% of the Army's 9.4% coming from Foreign and Commonwealth countries. Therefore the actual percentage of UK racial minorities in the Army is 3.1%. All three services have a long way to go before they achieve the aim of 8%⁸⁰ of UK racial minorities employed within the military as the recent case of *DeBique*⁸¹ demonstrates.

ii. Sex

Women have served in the UK armed forces for many years but the Women's Services only became permanently established after World War II⁸². These services, as can be gathered by their name, meant that women served separately to men in highly limited and 'safe' capacities. In the early 1990s a major change occurred with the Women's Services being disbanded in 1994 and women becoming fully integrated in the Navy, Army and RAF. In 1997 the Secretary of State for Defence announced the opening up of job opportunities for women so that today 73% of jobs are open to women in the Navy, 70% in the Army and 96% in the RAF. The most recent figures for the percentage of women serving in the military are 9.5% in 2009 and 9.6% in 2010, a long way from the fairly 50-50 split of men and women in UK society in general.

Sex discrimination was regulated with the adoption of the Sex Discrimination Act 1975 (SDA75). The military experienced a number of difficulties with the SDA75. The first emerged over the treatment of pregnant servicewomen⁸³. The original SDA75 contained a provision, section 85(4), which excluded from the scope of the Act 'service in...the naval, military and air forces of the Crown'. Unfortunately no such

⁸⁰ See Equality and Diversity Scheme Annual Report 2009-2010 para 1.8

⁸¹ *Ministry of Defence v DeBique* [2010] IRLR 471

⁸² Women's Royal Army Corps formed on 1 February 1949 (taking over from the Auxiliary Territorial Service that had been formed in 1938); Women's Royal Naval Service formed in 1917, disbanded in 1919, reformed in 1939 and retained after the Second World War; Women's Royal Air Force formed in 1918, disbanded in 1920 and reformed on 1 February 1949 (taking over from the Women's Auxiliary Air Force that had been formed in 1939).

⁸³ See A. Arnull, 'EC Law and the Dismissal of Pregnant Servicewomen' (1995) 24 ILJ 215 for a full account of this episode

exception existed in the EU's Equal Treatment Directive⁸⁴ (ETD) with Article 5(1) prohibiting discrimination on grounds of sex with regard to working conditions and the conditions governing dismissal. In *Marshall I*⁸⁵ the ECJ held that Article 5(1) could be relied upon by an individual in a national court to avoid a national provision that was inconsistent with it and denied the right that flowed from it. Furthermore in *Hertz*⁸⁶ the Court found 'that the dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex, as is a refusal to appoint a pregnant woman'. Therefore it was now clear that section 85(4) of the SDA75 was irreconcilable with the ETD and that the armed forces were vulnerable to a legal challenge. In 1991 two judicial review applications were brought, with the backing of the Equal Opportunities Commission (EOC), challenging the military's policy to sack pregnant servicewomen⁸⁷. Before the case came to court the Secretary of State for Defence conceded that the policy was incompatible with the legal rights in the ETD and that compensation claims could be heard before Industrial Tribunals. Two further ECJ cases created further problems for the Ministry of Defence. First in *Marshall II*⁸⁸ Article 6 of the ETD required Member States' measures to be 'such as to guarantee real and effective judicial protection and have a real deterrent effect on the employer'. It went on to conclude that an upper compensation limit was inconsistent with Article 6 'since it limits the amount of compensation *a priori* which is not necessarily consistent with the requirement of ensuring real equality of opportunity through adequate reparation for the loss and damage sustained as a result of discriminatory dismissal'⁸⁹. Second in *Emmott*⁹⁰ it

⁸⁴ Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L39/40 now replaced by the general Equality Directive, Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast) OJ 2006 L204/23

⁸⁵ Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723 (ECJ)

⁸⁶ Case C-179/88 *Handels-og Kontorfunktionærernes Forbund* [1990] ECR I-3979 (ECJ) para 13

⁸⁷ *R v Secretary of State for Defence, ex parte Leale, Lane and EOC*, unreported (HC)

⁸⁸ Case C-271/91 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367 (ECJ) para 24

⁸⁹ *ibid* para 30

⁹⁰ Case C-208/90 *Emmott* [1991] ECR I-4269 (ECJ)

was held that a time limit could not start to run until the Directive had been correctly transposed into domestic law. Therefore the Ministry of Defence was exposed to damages actions from ex-servicewomen dismissed on the basis of their pregnancy from the transposition date of the Directive, August 1978, to the summer of 1990 when maternity leave was introduced for servicewomen. Many claims were brought for damages that were dealt with inconsistently by the courts. Eventually seven test cases were selected in *Ministry of Defence v Cannock*⁹¹ for an appeal before the Employment Appeal Tribunal (EAT) so that guidelines could be provided for industrial tribunals to apply in future compensation cases.

The response of the government was to amend section 85(4) of the SDA75, through the Sex Discrimination Act 1975 (Application to Armed Forces etc) Regulations 1994⁹², to read that '[n]othing in this Act shall render unlawful an act done for the purpose of ensuring the combat effectiveness of the naval, military or air forces of the Crown.' It was originally thought that the Member States retained absolute competence over the military and the composition of the armed forces such that EU Law had no impact on the operation of the military. Indeed the ECJ has held that the Member States have competence to take decisions on the organisation of their armed forces in order to ensure their security⁹³. However, this competence has to be exercised with the genuine aim of guaranteeing public security whilst being appropriate and necessary to achieve this aim⁹⁴. A blanket ban on women serving in the armed forces on the basis of combat effectiveness would be unjustified⁹⁵, whilst a ban on women serving in the Royal Marines would be justified⁹⁶ as it would be confined to a small force and applied to the principle of inter-operability, a requirement that all personnel would have to carry out a wide range of tasks and

⁹¹ *Ministry of Defence v Cannock and others* [1994] IRLR 509 (EAT)

⁹² SI 1994/3276, The Sex Discrimination Act 1975 (Application to Armed Forces etc) Regulations 1994

⁹³ Case C-273/97 *Sirdar v The Army Board & The Secretary of State for Defence* [1999] ECR I-7403 (ECJ) para 15

⁹⁴ *ibid* para 28

⁹⁵ Case C-285/98 *Kreil v Bundesrepublik Deutschland* [2000] ECR I-69 (ECJ)

⁹⁶ n 93 above

front-line fighting⁹⁷. This combat effectiveness exclusion has been utilised by the armed forces to continue to limit full integration of women in the military ensuring that women cannot serve in front line army units, the RAF Regiment, the Royal Marines and submarines⁹⁸. As Arnall⁹⁹ points out this combat effectiveness restriction is not included in Article 2(2) of the ETD that excludes from the scope of activities where the sex of the worker constitutes a determining factor, transposed into national law by the catalogue of situations in section 7 of the SDA75 and which is now applicable to the armed forces. He further notes¹⁰⁰ that the effect of the new section 85(4) was to create an exclusion of the armed forces on the basis of combat effectiveness where the sex of the worker is not a genuine occupational qualification for the job.

Since then the EA10 has been adopted with the appropriate provisions covering discrimination detailed above. It should be noted that the combat exclusion exemption remains in place even though the new Equality Directive still does not include an exception for the armed forces on the basis of combat effectiveness. At the start of 2010 there was much media speculation that the submarine service of the Royal Navy would be opened up to women¹⁰¹, especially with a new report on the combat exclusion exemption due¹⁰². As it turned out the report only considered

⁹⁷ For commentary see P. Koutrakos, 'Community Law and Equal Treatment in the Armed Forces' (2000) 25 ELR 433; M. Trybus, 'Case Note' (2000) 37 CMLRev 1433; P. Koutrakos, 'How Far is Far Enough? EC Law and the Organisation of the Armed Forces after Dory' (2003) 66 MLR 759; and, M. Trybus, 'Sisters in Arms: European Community Law and Sex Equality in the Armed Forces' (2003) 9 ELJ 631

⁹⁸ Ministry of Defence, 'Women in the Armed Forces', report by the Employment of Women in the Armed Forces Steering Group, May 2002 at http://www.mod.uk/NR/rdonlyres/A9925990-82C2-420F-AB04-7003768CEC02/0/womenaf_fullreport.pdf (last visited 15 March 2012)

⁹⁹ n 83 above at 233

¹⁰⁰ *ibid*

¹⁰¹ See I. Drury, 'Women Set to Serve in Submarines as Britain Follows US Navy Ruling' published 24 February 2010 at <http://www.dailymail.co.uk/news/article-1253546/Women-set-serve-submarines-Britain-follows-U-S-Navy-ruling.html> (last visited 15 March 2012) and listen to the BBC's Woman's Hour, 'Should Women Serve on Royal Naval Submarines?' broadcast 8 December 2010 at <http://www.bbc.co.uk/programmes/b00wdhd5#p00clxdx> (last visited 15 March 2012)

¹⁰² The original ETD Article 9(2) had only required Member States to 'periodically assess the occupational activities referred to in Article 2(2) in order to decide, in the light of social developments, whether there is justification for maintaining the

the exclusion of women from ground close-combat roles, which it decided to keep in place¹⁰³, and did not review the exclusion of women from service in submarines¹⁰⁴. Indeed compared to the 2002 report, the 2010 report was perfunctory with the basis of the exclusion's maintenance wholly attributed to unit cohesion¹⁰⁵. However, in a speech to the Royal United Services Institute on 8 December 2011¹⁰⁶, the new Secretary of State for Defence announced that the submarine service would be opened up to women with officers serving in the Valiant class from 2013, ratings from 2015 and all ranks in the Astute class from 2016.

iii. Gender Orientation

exclusions concerned'. The replacement Equality Directive specifies that this review should take place 'at least every 8 years' (Article 31(3))

¹⁰³ Ministry of Defence, 'Report on the Review of the Exclusion of Women from Ground Close-Combat Roles', November 2010, para 13 at http://www.mod.uk/NR/rdonlyres/B358460B-4B2A-4AB5-9A63-15B6196B5364/0/Report_review_excl_woman_combat.pdf (last visited 15 March 2012)

¹⁰⁴ *ibid* at Annex A

¹⁰⁵ *ibid* at para 13. However, it should be noted that this review was based on considerably more evidence obtained through the commissioning of Berkshire Consultancy Ltd. (BCL) to conduct two studies on women's roles in recent operations (BCL, 'Qualitative Report for the Study of Women in Combat' at http://www.mod.uk/NR/rdonlyres/49C587F5-5815-453C-BEB5-B409BD39F464/0/study_woman_combat_quali_data.pdf (last visited 15 March 2012) and BCL, 'Study of Women in Combat – Investigation of Quantitative Data' at http://www.mod.uk/NR/rdonlyres/9BFD1F54-2AB5-4CBA-9E82-9B413AAFBADC/0/study_woman_combat_quant_data.pdf (last visited 15 March 2012)) and the Defence Science and Technology Laboratory UK (Dstl) to analyse the experience of other nations and conduct a literature review (Dstl, 'Women in Ground Close Combat Roles: The Experiences of other Nations and a Review of the Academic Literature' at http://www.mod.uk/NR/rdonlyres/7A18C2A3-C25B-4FA1-B8CB-49204A109105/0/women_combat_experiences_literature.pdf (last visited 15 March 2012)

¹⁰⁶ P Hammond, 'Delivering on the Frontline: Operational Success and Sustainable Armed Forces', speech at the Royal United Services Institute on 8 December 2011 at <http://www.mod.uk/DefenceInternet/AboutDefence/People/Speeches/SofS/20111208DeliveringOnTheFrontlineOperationalSuccessAndSustainableArmedForces.htm><http://www.mod.uk/DefenceInternet/AboutDefence/People/Speeches/SofS/20111208DeliveringOnTheFrontlineOperationalSuccessAndSustainableArmedForces.htm> (last visited 15 March 2012)

The Sexual Offences Act 1967 (SOA67) was adopted following the 1957 Wolfenden Report¹⁰⁷. It decriminalised most homosexual offences between consenting adults over the age of twenty-one¹⁰⁸ in private¹⁰⁹ but excluded the armed forces¹¹⁰. As might be expected the impact of this piece of legislation was not immediate on the military but it did, over a period of time, create a perspective in society at large of acceptance of homosexuality. This normalisation of homosexuality and homosexual relationships created a lacuna between civilian society and the military, where the military was perceived by society at large to be out of touch and 'stuck' in a previous age.

The policy towards homosexuals serving in the armed forces undertook incremental changes before the ban was lifted in January 2000. The criminality of homosexual behaviour in the military continued until 1992 when a statement was made by the responsible minister in the House of Commons to the effect that in future individuals who engaged in homosexual acts would not be prosecuted under military law¹¹¹ and that section 1(5) of the Sexual Offences Act 1967 would not apply in future. This was only given legal effect in 1994 with the passing of section 146(1) of the Criminal Justice and Public Order Act 1994. However, section 146(4) provided that a homosexual act could continue to constitute a ground for discharge from military service. This policy was challenged in a judicial review action by four ex-service personnel¹¹² who had been discharged from the services for their homosexuality. In the Court of Appeal¹¹³ the challenge was rejected as the MoD policy did not meet the high threshold requirement of irrationality, the only ground of judicial review available. Furthermore it was held that as the European Convention of Human

¹⁰⁷ Committee on Homosexual Offences and Prostitution, *Report of the Committee on Homosexual Offences and Prostitution*, Cmnd 247 (London: HMSO, 1957)

¹⁰⁸ Homosexual and heterosexual age of consent was eventually equalised at 16 by the Sexual Offences (Amendment) Act 2000, s 1

¹⁰⁹ SOA67, s 1(1), 'with no other person present'. This requirement was repealed with the passage of the Sexual Offences Act 2003

¹¹⁰ SOA67, s 1(5)

¹¹¹ Right Hon Jonathan Aitken MP, Minister of State for Defence Procurement, HC Deb vol 209 col 989-990 19 June 1992

¹¹² The four were Jeanette Smith, Graeme Grady, Duncan Lustig-Prean and John Beckett

¹¹³ *R v Ministry of Defence, ex parte Smith and others* [1996] 1 All ER 257 (CA); see M. Norris, 'Ex parte Smith: Irrationality and Human Rights' [1996] PL 590

Rights (ECHR) was not part of UK law then Article 8 ECHR, the right to private life, was not applicable and that there was nothing in EU Law that could be used to overrule the policy. The four former service personnel continued with their legal action after their request for a House of Lords hearing was dismissed and took their cases to the European Court of Human Rights (ECtHR) in 1999¹¹⁴. Here the judges ruled that the MoD policy was incompatible with the claimants' right to privacy and private life under Article 8 ECHR. The result was the lifting of the ban and the adoption of an Armed Forces Code of Social Conduct¹¹⁵ that applied generally across all personnel.

Since then there have been two reviews of the abolition of the ban on homosexuals serving in the military, first in October 2000¹¹⁶ and then in 2002¹¹⁷. Neither reported significant problems with the application of the new rules. Unfortunately the military now consider homosexuality to be a non-issue and so no empirical research has been carried out since the lifting of the ban to determine the number of homosexuals serving or to investigate their experiences. This failure to monitor and evaluate this issue may possibly lead to a challenge being brought against the military under section 149(1) of the EA10, especially if the claims of Basham¹¹⁸ that arguments of social cohesion behind the concept of combat effectiveness lead to situations of harassment for women and homosexuals are upheld. The requirement to provide equality information across all protected characteristics may alleviate such an

¹¹⁴ *Lustig-Prean and Beckett v United Kingdom* [1999] ECHR 71 (ECHR) and *Smith and Grady v United Kingdom* [1999] ECHR 72 (ECHR)

¹¹⁵ Ministry of Defence, 'Armed Forces Code of Social Conduct: Policy Statement' at <http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/Personnel/EqualityAndDiversity/ArmedForcesCodeOfSocialConductPolicyStatement.htm> (last visited 15 March 2012)

¹¹⁶ Ministry of Defence, 'MoD Policy on Homosexuality; A Review on the Armed Forces Policy on Homosexuality' at <http://www.proud2serve.net/military/2000modupdate.htm> (last visited 15 March 2012)

¹¹⁷ Service Personnel Board, 'Tri-Service Review of the Armed Forces' Policy on Homosexuality and Code of Social Conduct Paper 12/02' at http://www.mod.uk/NR/rdonlyres/ACED4F62-2C04-4B19-AC50-E49552732385/0/impact_studies_homosexuality.pdf (last visited 15 March 2012)

¹¹⁸ V. Basham, 'Effecting Discrimination: Operational Effectiveness and Harassment in the British Armed Forces' (2009) 35 *Armed Forces and Society* 728

opportunity but as the military are starting from scratch then there is likely to be a time lag before meaningful data becomes available.

The opportunities for homosexual ex-servicemen and women to obtain compensation for sex discrimination on the grounds of their dismissal on the basis of their homosexuality were severely curtailed in the case of *MacDonald*¹¹⁹ before the House of Lords. The SDA75 required a real comparator to be used to determine discriminatory treatment. MacDonald was dismissed from the RAF because he was attracted to men and so it was argued that the comparator to be used should be a woman who was attracted to men, ie a heterosexual woman. The Lords disagreed and concluded that the real comparator had to be a woman who was attracted to the same sex, ie a lesbian. As the armed forces had the same policy towards lesbians as they did to homosexual men then there was no discrimination. The EA10 has now removed the requirement of a real comparator for the determination of a sex discrimination case and as such the outcome could well be different now.

The final point to note on the development of the law on homosexuals and the armed forces is the effect of the Civil Partnership Act 2004¹²⁰. This opened the way to service personnel being able to register their civil partnerships and having access to the same welfare benefits and service allowances as married heterosexual personnel (eg access to Service Family Accommodation, pension rights, travel benefits etc).

¹¹⁹ *MacDonald v Advocate General for Scotland* and *Pearce v Governing Body of Mayfield School* [2003] ICR 937 (HL); see E. Fry, S. Buckley, 'Pearce, MacDonald and the New Legislation – Three Steps Forward, Two Steps Back?' (2003) 8 *Journal of Civil Liberties* 67; P. Roberts, 'Case Note' (2003) 25 *Journal of Social Welfare and Family Law* 383; and, R. Wintemute, 'Sex Discrimination in MacDonald and Pearce: Why the Law Lords Chose the Wrong Comparators' (2003) 14 *KCLJ* 267

¹²⁰ See M. Bell, 'Employment Law Consequences of the Civil Partnership Act 2004' (2006) 35 *ILJ* 179

iv. Age¹²¹

Article 1 of the EU Framework Directive on Equal Treatment in Employment¹²² provides for the prohibition of discrimination on, *inter alia*, the grounds of age. However, Article 3(4) enables Member States to derogate from the Directive on the grounds of age for the armed forces. The UK, as we have seen in the EA10, has taken advantage of this derogation. There is a danger here though in a line of case law from the ECJ. In *Mangold*¹²³ the Court held that although the Directive could not apply when an individual brought an action against another individual (horizontal direct effect), discrimination on the basis of age was a general principle of EU Law and as such existed prior to the entry into force of the Directive. This has been further entrenched and extended in the case of *Kücükdeveci*¹²⁴ where the ECJ held that this fundamental right could be enforced by an individual in a national court.

¹²¹ See generally E. Muir, 'Of Ages in – and Edges of – EU Law' (2011) 48 CMLRev 39; D. Schiek, 'Age Discrimination Before the ECJ – Conceptual and Theoretical Issues' (2011) 48 CMLRev 777

¹²² Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L303/16

¹²³ Case C-144/04 *Mangold v Helm* [2005] ECR I-9981 (ECJ); noted M. Schmidt, 'The Principle of Non-Discrimination In Respect of Age: Dimensions of the ECJ's Mangold Judgment' (2005) 7 *German Law Journal* 505; S. Krebber, 'The Social Rights Approach of the European Court of Justice to Enforce European Employment Law' (2006) 27 *Comparative Labor Law and Policy Journal* 377; E. Muir, 'Enhancing the Effects of Community Law on National Employment Policies: The Mangold Case' (2006) 31 *ELR* 879; D. Schiek, 'The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation' (2006) 35 *ILJ* 329; O. Thomas, 'Case Commentary' (2006) 18 *Denning Law Journal* 233; L. Waddington, 'Recent Developments and the Non-Discrimination Directives: Mangold and More' (2006) 13 *MJ* 365; J.H. Jans, 'The Effect in National Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community Law' (2007) 34 *LIEI* 53; A. Masson, C. Micheau, 'The Werner Mangold Case: An Example of Legal Militancy' (2007) 13 *EPL* 587; A. Wiesbrock, 'Case Note' (2011) 18 *MJ* 201

¹²⁴ Case C-555/07 *Kücükdeveci v Swedex* [2010] ECR I-365 (ECJ); noted A. Albors-Llorens, 'Keeping Up Appearances: The Court of Justice and the Effects of EU Directives' (2010) 69 *CLJ* 4555; M. de Mol, 'Case Note' (2010) 6 *EuConst* 293; S. Peers, 'Case Comment' (2010) 35 *ELR* 849; T. Roes, 'Case Note' (2010) 16 *Columbia Journal of European Law* 497; G. Thüsing, S. Horler, 'Case Note' (2010) 47 *CMLRev* 1161; A. Wiesbrock, 'Case Note' (2010) 11 *German Law Journal* 539; P. Cabral, R. Neves, 'General Principles of EU Law and Horizontal Direct Effect' (2011) 17 *EPL* 437; F. Fontanelli, 'General Principles of the EU and a Glimpse of Solidarity in the Aftermath of Mangold and Küçükdeveci' (2011) 17 *EPL* 225; A. Gabinaud, 'Case Note' (2011) 18 *MJ* 189; E. Howard, 'ECJ Advances Equality in

v. Disability

As with age above, the Directive prohibits discrimination on the basis of disability but Article 3(4) enables Member States to exclude this for the armed forces, which as we have seen the UK has taken advantage of. As yet no cases have been brought or argued before the courts, in particular the ECJ, but there is a possibility that similar case law could develop as for age discrimination.

2.2 Human Rights Law¹²⁵

The Human Rights Act (HRA) 1998 came into force in 2000, enabling the UK courts to develop human rights judgments based on the ECHR and the jurisprudence of the ECtHR. Section 6(1) of the HRA states that '[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right'. A limited and non-exhaustive definition of 'public authority' is included in section 6(3) of the HRA that includes 'any person certain of whose functions are functions of a public nature'¹²⁶. Furthermore to bring a claim against a public authority that has acted in a way that is unlawful under section 6(1) of the HRA, section 7(1) of the HRA requires an individual to be, or potentially to be, a victim. The armed forces undoubtedly come within the definition of public authority as do individual members of the armed forces when on duty and furthermore they can also be victims of the military operating as a public authority.

However, the HRA does not incorporate all the provisions of the ECHR into UK domestic law with Article 1 ECHR being a notable exclusion¹²⁷ which requires the contracting States to 'secure to everyone within their jurisdiction the rights and

Europe by Giving Horizontal Direct Effect to Directives' (2011) 17 EPL 729; T. Papadopoulos, 'Criticising the Horizontal Direct Effect of the EU General Principle of Equality' [2011] EHRLR 437

¹²⁵ See in particular P. Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge: CUP, 2006)

¹²⁶ HRA, s 6(3)(b)

¹²⁷ See HRA, s 1(1) and Schedule 1

freedoms' of the ECHR. This has not hindered cases being brought before the UK courts, and then onto the ECtHR, over the meaning and extent of the term 'jurisdiction'. In *Bankovic*¹²⁸ the ECtHR followed public international law in finding that jurisdictional competence of a State was primarily territorial¹²⁹ with 'other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case'¹³⁰. This extra-territorial jurisdiction was exercised when the State, 'through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government'¹³¹. Further examples included cases 'involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State'¹³². The sphere of this extra-territorial jurisdiction was considered again by the House of Lords in *Al-Skeini*¹³³ where it was held that the death of five Iraqis in separate shooting events involving British forces fell outside the UK's jurisdiction, but the death of an Iraqi civilian in UK custody at a British military base was within the UK jurisdiction so that the HRA applied. The case reached the Grand Chamber of the ECtHR¹³⁴ that restated the principles involved with jurisdiction in a structured manner. First the general rule is that enunciated in *Bankovic*, that a State's jurisdictional competence

¹²⁸ *Bankovic v United Kingdom* (2007) 44 EHRR SE5 (ECtHR); noted L.G. Loucaides, 'Determining the Extra-Territorial Effect of the European Convention: Facts, Jurisprudence and the Bankovic Case' [2006] EHRLR 391

¹²⁹ *ibid* para 57

¹³⁰ *ibid* para 59

¹³¹ *ibid* para 69

¹³² *ibid* para 71. See *Öcalan v Turkey* (2005) 41 EHRR 45 (ECtHR)

¹³³ *R (Al-Skeini and others) v Secretary of State for Defence* [2008] 1 AC 153 (HL); noted N. Bamforth, 'The Methodology and Extra-Territorial Application of the Human Rights Act 1998' (2008) 124 LQR 355; D. Feldman, 'The Territorial Scope of the Human Rights Act 1998' (2008) 67 CLJ 8; T. Thienel, 'The ECHR in Iraq: The Judgment of the House of Lords in *R (Al-Skeini) v Secretary of State for Defence*' (2008) 6 JICJ 115; H. King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 HRLR 521; H. King, 'Unravelling the Extraterritorial Riddle: An Analysis of *R (Hassan) v Secretary of State for Defence*' (2009) 7 JICJ 633

¹³⁴ *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 (ECtHR): noted M. Schaefer, 'Al-Skeini and the Elusive Parameters of Extraterritorial Jurisdiction' [2011] EHRLR 566; C Mallory, 'Case Note' (2012) 61 ICLQ 301; F Messineo, 'Gentlemen at Home, Hoodlums Elsewhere'? The Extra-Territorial Exercise of Power by British Forces in Iraq and the European Convention on Human Rights' (2012) 71 CLJ 15; and, P. Ronchi, 'The Borders of Human Rights' (2012) 128 LQR 20

under Article 1 is primarily territorial with acts performed, or producing effects, outside the State's territory only coming within Article 1 in exceptional circumstances¹³⁵. The court went on to identify three specific exceptional cases. First is when there is State agent authority and control¹³⁶. The ECtHR provides three examples of this, although it is unclear if this is an exhaustive list: acts of diplomatic and consular agents¹³⁷; the exercising by a contracting State of all or some of the public powers normally exercised by another State through the consent, invitation or acquiescence of that State¹³⁸; and, the exercise of physical power and control over an individual by a contracting State's agents operating outside the domestic territory¹³⁹. Second is when a contracting State exercises effective control over an area as a consequence of lawful or unlawful military action¹⁴⁰. Third is the Convention's legal space which is situated firmly within the European public order, governing only the actions of contracting States and not requiring contracting States to impose ECHR standards on non-contracting States¹⁴¹. A contracting State occupying the territory of another contracting State is though accountable for breaches of human rights within that occupied territory. Establishing the occupying State's jurisdiction in such cases does not mean that jurisdiction under Article 1 ECHR can never exist outside the European sphere¹⁴². This rather confusing reasoning suggests that a contracting State acting as an occupying power in a non-contracting State can still be found to be covered by Article 1 ECHR, depending on the facts of the case. When these principles were applied to the facts the ECtHR found that the UK had assumed the exercise of some of the public powers, namely the responsibility and maintenance of security in South-East Iraq, normally exercised by the sovereign government of Iraq. These, it was deemed, amounted to the necessary exceptional circumstances that established that the UK, through the security operations conducted by British soldiers, exercised authority and control

¹³⁵ *ibid* para 131

¹³⁶ *ibid* para 133

¹³⁷ *ibid* para 134

¹³⁸ *ibid* para 135

¹³⁹ *ibid* para 136

¹⁴⁰ *ibid* para 138

¹⁴¹ *ibid* para 141

¹⁴² *ibid* para 142

over individuals killed during such security operations. Thus the jurisdictional reach of the ECHR included these deceased individuals¹⁴³.

The jurisdiction issue can therefore be seen to cover two scenarios occurring outside the territory of the contracting State and the collective territory of the European public sphere: a situation where civilian personnel are killed during security operations conducted by the armed forces; and, a situation in which service personnel are killed during security operations. The former is now regulated by the findings of *Al-Skeini*, but the latter remains controversial. In the case of *Gentle*¹⁴⁴ Lord Bingham held that the death of two UK soldiers in Iraq did not fall within the jurisdiction of the ECHR as Iraq was not part of the territorial ambit of the UK. The new Supreme Court, on a 6-3 split, confirmed this previous case law in *Smith*¹⁴⁵ and suggested that Article 1 ECHR, unlike the other articles of the ECHR, was not to be interpreted as a living document subject to changing conditions and so should not be construed as reaching any further than the jurisprudence of the ECtHR¹⁴⁶. It should be noted there were strong dissenting judgments by Baroness Hale, Lord Mance and Lord Kerr, supporting the Court of Appeal's judgment given by the Master of the Rolls, Sir Anthony Clarke¹⁴⁷. Indeed there is a significant element of artificiality in the majority's view that a soldier operating abroad and outside a British military base was not within the jurisdiction of the UK as section 367(1) of the Armed Forces Act 2006 provides expressly that '[e]very member of the regular forces is subject to service law at all times'¹⁴⁸. It should be further noted that the former European Commission consistently observed that 'authorised agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property "within the jurisdiction" of that State,

¹⁴³ *ibid* para 149

¹⁴⁴ *R (Gentle and another) v Prime Minister and others* [2008] 1 AC 1356 (HL) para 8(3) (Lord Bingham); noted S. Palmer, 'Military Intervention, Public Inquiries and the Right to Life' (2009) 68 CLJ 17

¹⁴⁵ *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1 (SC)

¹⁴⁶ *ibid* para 60 (Lord Phillips)

¹⁴⁷ n 145 above (CA) paras 28-30 (Sir Anthony Clarke MR)

¹⁴⁸ n 145 above (SC) para 190 (Lord Mance)

to the extent that they exercise authority over such persons or property'¹⁴⁹. In *Smith v MoD*¹⁵⁰, a case involving the deaths of a number of British service personnel in Iraq and decided seven days before the ECtHR's ruling in *Al-Skeini*, Owen J held that the deceased soldiers were outside the jurisdiction of the ECHR. This case will be heard on appeal before the Court of Appeal in June 2012 and it is submitted is likely to be overturned. However, this issue may require a final resolution from the ECtHR, the proper tribunal to resolve these issues according to Lord Phillips¹⁵¹.

Part 3 – The Civil-Military Relationship and Civilian Law

Part 3 of this article will critically evaluate the impact of this civilian law on the military, the civil-military relationship and policy lessons that can be learnt by the UK armed forces for the future.

i. The Problem – Distancing of Military Society from Civilian Society

The history of recruitment for the UK armed forces since the nineteenth century is dominated by a professional, all-volunteer force. However, conscription was utilised during both world wars in the twentieth century¹⁵² and following World War II National Service¹⁵³ continued until the Sandys Defence White Paper of 1957¹⁵⁴ announced its demise, the final soldier leaving service in 1963¹⁵⁵. With the move away from a conscripted military and the necessary close relationship between the civilian population and the military and the full embrace of professional all-volunteer forces there was a danger of detaching the military society from civil society. Indeed

¹⁴⁹ *Cyprus v Turkey* (1975) 2 DM 125 (European Commission on Human Rights) para 8(2)

¹⁵⁰ *Smith v MoD* [2011] HRLR 35 (QBD)

¹⁵¹ n 145 above (SC) para 60 (Lord Phillips)

¹⁵² Military Service Act 1916 for World War I and the Military Training Act 1939, followed by the more comprehensive National Service (Armed Forces) Act 1939, for World War II

¹⁵³ National Service Act 1948

¹⁵⁴ Ministry of Defence, *Defence: Outline of Future Policy* Cmnd 124 (London: HMSO, 1957) para 47

¹⁵⁵ See M.S. Navias, 'Terminating Conscription? The British National Service Controversy 1955-56' (1989) 24 *Journal of Contemporary History* 195

by the 1980s the reality of the UK armed forces was military society being strongly dislocated from civilian society. A young recruit in the 1980s would move from a society that was regulated by non-discrimination standards for race, sex and sexual orientation to a society that was almost wholly white, male and heterosexual¹⁵⁶. In effect the UK armed forces retained the social standards of the 1950s whilst the rest of society had moved forward and was in danger of creating a separate and different society within the larger society. This dislocation could, if extreme conditions prevailed, lead to two possible positions: either complete control of the military by the civilian society such that the armed forces obey orders without question¹⁵⁷; or, complete control of civilian society by the military, which in a democracy produces a coup d'état¹⁵⁸. As Burk has suggested, in mature democracies both of these scenarios are highly unlikely¹⁵⁹. Therefore the aim of the military in a mature democracy is to defend the democratic values of society in general and if there is a lacuna in civil-military relations then such an objective has the potential to become increasingly alien to the military.

ii. Democratic Values, Citizens and the Military

The solution to the problem of the lacuna in civil-military relations for mature democracies is two-fold: first, the rather trite requirement to close the gap; and, second to determine the means necessary to achieve that gap closure. Burk suggests that for the military to protect society's democratic values then society must embrace the concept of the citizen-soldier¹⁶⁰. Of course this is directed towards the US military which has a strong connection with this concept but the UK military could also utilise the citizen-soldier concept by focusing on the idea of the citizen and provide a logical route to the democratic underpinning of the armed forces needed to protect the overall democratic values of society. Such a suggestion could be considered controversial in this consummate hierarchical organisation that relies

¹⁵⁶ This was precisely the experience of the author who joined the Royal Navy in 1983 and left in 1996

¹⁵⁷ See T. Taylor, *The Anatomy of the Nuremberg Trials* (London: Bloomsbury, 1993) 353 for the example of Field Marshall Wilhelm Keitel who was prepared to follow Hitler's orders "regardless of law and morals".

¹⁵⁸ See D. Mazur, *A More Perfect Military: How the Constitution Can Make Our Military Stronger* (London: OUP, 2010) chapter 11

¹⁵⁹ n 16 above at 8

¹⁶⁰ *ibid* at 18

significantly on the concept of discipline to ensure good order but it is submitted this is not the case.

In 2011 the government issued the Armed Forces Covenant¹⁶¹, building on the Army's Military Covenant¹⁶². The aim of the non-legally binding¹⁶³ document was to establish a covenant between the 'Armed Forces Community, the Nation and the Government'¹⁶⁴ setting out a framework for how the Armed Forces Community could be expected to be treated¹⁶⁵ and attempting to explain the mutual obligations¹⁶⁶ and expectations¹⁶⁷ that exist between the parties to it. As McCartney notes, 'it outlines a foundational bargain'¹⁶⁸ in which the military fulfil the government's responsibility for defence of the realm, sacrificing some civilian freedoms, facing danger and possibly suffering serious injury or death as a result, and the nation in return has a moral obligation to respect, support and treat fairly members of the armed forces and their

¹⁶¹ Ministry of Defence, 'The Armed Forces Covenant' (henceforth Covenant) at http://www.mod.uk/NR/rdonlyres/4E9E2014-5CE6-43F2-AE28-B6C5FA90B68F/0/Armed_Forces_Covenant.pdf (last visited 15 March 2012)

¹⁶² Ministry of Defence, 'Soldiering – The Military Covenant' at <http://www.abnetwork.org/articles/military-covenant/> (last visited 15 March 2012). The original document ADP5 was available on the MoD's website but has since been removed. See A. Forster, 'Breaking the Covenant: Governance of the British Army in the Twenty-First Century' (2006) 82 *International Affairs* 1043 and C. Tipping, 'Understanding the Military Covenant' (2008) 153(3) *Royal United Services Institute Journal* 12

¹⁶³ Although the Prime Minister David Cameron has stated that the principles of the Covenant were to be enshrined in law (at <http://www.number10.gov.uk/news/military-covenant-to-be-enshrined-in-law/> (last visited 15 March 2012)), it remains a "soft law" document with only the production of the annual armed forces covenant report mandated by law (Armed Forces Act 2011, s 2, amending and inserting a new Part 16A into the Armed Forces Act 2006)

¹⁶⁴ n 161 above at 3

¹⁶⁵ *ibid* at 6

¹⁶⁶ *ibid* at 10. These expectations are expanded in Ministry of Defence, 'The Armed Forces Covenant: Today and Tomorrow' (henceforth Today and Tomorrow) at http://www.mod.uk/NR/rdonlyres/0117C914-174C-4DAE-B755-0A010F2427D5/0/Armed_Forces_Covenant_Today_and_Tomorrow.pdf (last visited 15 March 2012)

¹⁶⁷ *ibid* at 6

¹⁶⁸ H. McCartney, 'The Military Covenant and the Civil-Military Contract in Britain' (2010) 86 *International Affairs* 411, 412

families¹⁶⁹. Indeed one of the aims of the Covenant as Forster points out ‘was to defend the right of the Army to be different from the society from which it came’¹⁷⁰. The Covenant attempts to set this out by stating that the military sacrifice some civilian freedoms¹⁷¹ but does not spell out what these entail. Indeed the expectations section includes a statement that the ‘Armed Forces Community should be able to participate as citizens to the same extent as any UK citizen, subject to the necessary constraints on the activities of public servants’¹⁷². Thus members of the armed forces are citizens and retain the rights that citizens possess, notwithstanding the general exception for public servants.

iii. Democratisation of the Military

The proposition advanced here is that the emphasis on the defence of democratic values and the member of the armed forces as a UK citizen can only achieve the aim of closing the civil-military relations gap if the armed forces themselves are constrained and at the same time liberated through democratic values. This process of democratisation enshrines the basic rights of citizens whilst recognising the reality of military life that necessitates restrictions on certain freedoms. This process has been described by Rubin as juridification¹⁷³, which has recently been explored further by Forster¹⁷⁴, but it is suggested that a more accurate term would be democratisation. The Covenant equates citizenship with the right to vote but this is highly limited and should also include basic rights. These include the right to equal treatment and the protection of human rights, the former included in the Covenant and Today and Tomorrow as part of the expectations section but the latter not mentioned in either document. These have, as we have seen above, been extended to individuals by civilian laws and enforced through the courts. By empowering individuals so that they are not discriminated against on the basis of a characteristic and providing them with the same opportunities to hold their employer, the armed forces, to account as an individual in the civilian world actively encourages the

¹⁶⁹ n 161 above at 1

¹⁷⁰ A. Forster, ‘The Military Covenant and British Civil-Military Relations: Letting the Genie out of the Bottle’ (2012) 38 *Armed Forces and Society* 273

¹⁷¹ n 161 above at 1

¹⁷² *ibid* at 9 (point 13)

¹⁷³ n 2 above

¹⁷⁴ A. Forster, ‘British Judicial Engagement and the Juridification of the Armed Forces’ (2012) 88 *International Affairs* 283

achievement of the objective to create a military representative of society at large. It is further enhanced if integration policies are pursued with energy and vigour. The danger of an individual failing to question orders when he or she should do so is diminished if that person knows they can take a case to court and potentially win without any victimisation. The possibility of a military coup is weakened if the armed services resemble the civilian society and believe that they represent them. The combination of human rights and equal treatment creates a situation where a member of the armed forces can be confident in their personnel identity whilst secure within the hierarchical structure of the military and able to conform to military discipline. Furthermore democratisation of the military and the empowerment of members of the armed forces tend to reinforce and protect the democratic values of the wider civilian society.

iv. Lessons for the Military

The UK military has come a long way in a short space of time and must be highly commended for embracing anti-discrimination rules in particular. Indeed the acceptance of homosexuals serving in the armed forces and realising the potential for recruitment must be commended¹⁷⁵. However, there is some way to go yet before this policy can be hailed as a success especially when considering that British ethnic minorities only make up 3.4% for the Navy, 3.1% for the Army and a particularly disappointing 2.1% for the RAF, and women total 9.6% of armed forces personnel. There are undoubtedly significant factors that limit the recruitment and retention of ethnic minorities and women, which remain outside the scope of this article. However, if the aim is for the military to reflect the civilian society at large, to defend society's democratic values through democratisation of the armed forces and to embrace the concept of the citizen at the heart of the military personnel experience then there needs to be an enhanced policy towards achieving the goals set out in the SDR of 1998.

¹⁷⁵ See for example the RAF manning a float at Gay Pride in 2004 at http://menmedia.co.uk/manchestereveningnews/news/s/128/128291_raf_joins_gay_parade.html (last visited 15 March 2012), the Army marching in 2005 at <http://www.proud2serve.net/news-a-updates/432-aug-05-british-army-participates-in-first-gay-pride-parade> (last visited 15 March 2012) the Royal Navy in 2006 at <http://www.proud2serve.net/military-news/146-jul-06-royal-navy-parades-for-europride> (last visited 15 March 2012). Since 2006 the Royal Navy has been allowed to wear full dress uniform and the RAF and Army from 2008

Indeed if citizenship is a key part of being a member of the armed forces then all aspects of citizenship need to be embraced. This includes the right to actively serve in the military and to participate fully under all operational circumstances. By excluding women from ground combat roles there is a danger of creating second class citizenship for women when compared to their male companions¹⁷⁶. Furthermore by limiting women from undertaking frontline operational combat missions a promotional glass ceiling is created, which is difficult to break through¹⁷⁷.

As we have discussed, the defence of society's democratic values through the democratisation of the military also requires the armed forces to embrace these democratic values. Therefore there should be an acceptance of human rights for military personnel within the territorial jurisdiction of the UK and also outside when conducting operations in accordance with a soldier, sailor or airman's duties as specified in the Armed Forces Act 2006.

Finally the changes that have taken place within the armed forces through the impact of anti-discrimination law in particular but also human rights are it is suggested far from over. The influence of European law, be that EU law or the ECHR, has had a marked effect on the UK's civil-military relations and it is likely to continue to do so. Indeed there are four areas of possible activity. The first is in the appeal of *Smith* due to be heard in the Court of Appeal in June which could eventually reach the ECtHR and is undoubtedly going to be influenced by the ECtHR's judgment in *Al-Skeini*. The second and third involve the incremental advance of age and disability anti-

¹⁷⁶ See E. Reuter, 'Second Class Citizen Soldiers: A Proposal for Greater First Amendment Protections for America's Military Personnel' (2007) 16 *William and Mary Bill of Rights Journal* 315 and D.M. Iskra, *Women in the United States Armed Forces: A Guide to the Issues* (Oxford, Praeger, 2010) chapter 3

¹⁷⁷ A. Evertson, A. Nesbitt, 'The Glass Ceiling Effect and Its Impact on Mid-Level Female Officer Career Progression in the United States Marine Corps and Air Force' unpublished MSc and MBA thesis Naval Postgraduate School 2004 at <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA422296> (last visited 15 March 2012)

discrimination measures and the possible impact of General Principles of EU Law after *Mangold* and *Kücükdeveci*. Even though there is a specific derogation in the Framework Directive on Equal Treatment in Employment that the UK has taken advantage of, the General Principles could be utilised if the ECJ chooses to do so. The fourth area is that of sex discrimination and the combat exclusion policy. As Ellis observes¹⁷⁸, the judgment of the ECJ in *Sirdar* was blighted by gender stereotyping, failing to question whether arguments of the UK government were grounded on prejudice or evidence. Indeed as Arnall has pointed out the exclusion in section 85(4) of the SDA75, and now included in the EA10, was and remains on the basis of combat effectiveness as the determining factor rather than that of sex. This has not been challenged since the case of *Dory*¹⁷⁹ and it is possible that the ECJ could now come to a different conclusion. It is certainly the case that the qualitative study of women in combat by BCL found the following principle concerns over having women in close ground combat roles¹⁸⁰: lack of women's physical capability/robustness; women being a distraction/problems with relationships between men and women; and, men want to protect women/react differently if hurt/harder to deal with female casualties. It is interesting that these are similar reasons expressed before women went to sea in the Royal Navy that were swiftly negated after a short period of time¹⁸¹. In fact unit cohesion, the reason given in the final report¹⁸² maintaining the combat exclusion policy, was only a minor concern in the BCL qualitative study¹⁸³ whilst in the quantitative study, just on the basis of answers provided to the questionnaire used, it was concluded that men did not perceive the presence of women to reduce cohesion¹⁸⁴. Interestingly women appeared to be harder on themselves than men as they considered cohesion to be lower if women were present in small team combat situations¹⁸⁵. When interviews were conducted to test

¹⁷⁸ E. Ellis, *EU Anti-Discrimination Law* (Oxford: OUP, 2005) 281

¹⁷⁹ Case C-186/01 *Dory v Germany* [2003] ECR I-2479 in which the German policy of confining military service only to men was challenged

¹⁸⁰ n 105 above Qualitative Report at 34

¹⁸¹ The author served in HMS *Invincible* in 1990, the first ship on which women served at sea, and heard many arguments similar to these before they joined. Interestingly when the author returned to sea in HMS *Cardiff* in 1993 following flying training, women were totally integrated and accepted as members of the crew

¹⁸² n 103 above

¹⁸³ n 105 above Qualitative Report at 35

¹⁸⁴ n 105 above Quantitative Report at 40

¹⁸⁵ *ibid*

this finding it was found that in fact both men and women found unit cohesion to be high in mixed gender small team combat situations¹⁸⁶. The result is that the MoD, by grounding the combat exclusion policy on the basis of unit cohesion, could have opened the door to a legal challenge, as the evidence does not appear to support such a finding.

CONCLUSION

The first duty of government is defence of the realm¹⁸⁷ and as the armed forces are the organ of the State that conducts defence or war as a political instrument then law, as the military are regulated by laws as political instruments, is a legitimate instrument to examine the civil-military relationship. The basis of the civil-military relationship in the UK was positively established in the SDR of 1998 and then clarified by the law. The aim of the military is now recognised as attempting to reflect society as closely as possible with mainstreaming equality and diversity is part of the military set up. This is readily seen in the development of non-discrimination and equality in what is traditionally seen as an unequal and hierarchical organisation alongside the protection of human rights. The result is a modern and forward thinking military, able to reach out to the societies it serves and offer examples of best practice to other countries' armed forces. The process of civilianisation and juridification identified by Rubin in 2002 has been replaced by democratisation through the empowerment of military personnel as citizens with equal worth.

However, there are challenges that remain for the military with the issue of combat effectiveness as an exclusion retained within the EA10 and yet to be tested before the ECJ, the case of *DeBique*, the inability to recruit satisfactory numbers of racial minorities and women from the UK population and the possible problems with age discrimination protected by general principles in EU Law. As a consequence despite

¹⁸⁶ *ibid* at 43

¹⁸⁷ n 161 above at 1

the best efforts of the MoD and the military, the UK armed forces continue to be a very white and male environment with aspirations for greater diversity.