

DISCRIMINATION IN THE ARMED FORCES: A COMPARATIVE ANALYSIS OF THE IMPACT OF UK AND US CIVILIAN LAW ON THE MILITARY

Introduction

The civil-military relationship has predominantly been evaluated from a sociological¹ or political science² perspective. This paper will examine the position of the Armed Forces within society, this so-called civil-military relationship, from a legal perspective. It will undertake a comparative analysis of US and UK civil law, in particular discrimination law, to determine how civil law has impacted on the military per se, rather than military law. The argument presented will build on Schiff's concordance model³ of civil-military relations creating a socio-legal model of the inter-relationship of the armed forces with civil society grounded in cultural traditions but with absolute conditions. As such the paper will provide insights for armed forces in general, not just the UK and US, as to future directions for the military's relationship with civilian society.

Civil-Military Relationship

There has been much written about the civil-military relationship⁴ that has focused predominantly on the US military with the debate rarely coming alive in the UK⁵. The debate in the US has mainly been led by political scientists and sociologists.

¹ For example M Janowitz, *The Professional Soldier: A Social and Political Portrait* (Free Press, New York 1964); CC Moskos, 'From Institution to Occupation: Trends in Military Organization' (1977) 4 *Armed Forces and Society* 41; CC Moskos, 'Institutional/Occupational Trends in Armed Forces: An Update' (1986) 12 *Armed Forces and Society* 377

² For example SP Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Belknap Press, Cambridge 1957) and PD Feaver, *Armed Servants: Agency, Oversight, and Civil-Military Relations* (Harvard University Press, Cambridge 2003)

³ RL Schiff, 'Civil-Military Relations Reconsidered: A Theory of Concordance' (1995) 22 *Armed Forces and Society* 7; RL Schiff, *The Military and Domestic Politics: A Concordance Theory of Civil-Military Relations* (Routledge, London 2009)

⁴ See L Cohn, 'The Evolution of the Civil-Military "Gap" Debate'

i. Political science

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 Huntington⁶ and Feaver⁷. 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”⁸), but when it is allowed to be fully professional (“objective civilian control”⁹)”¹⁰. 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 intentions¹¹. The result is that there are considerable mechanisms for civilian oversight of the military¹², the availability of civilian punishment of the military¹³ and an overall goal of protecting democratic values¹⁴.

ii. Sociological

The sociological perspective of the civil-military relationship is dominated by Janowitz¹⁵ and Moskos¹⁶. Janowitz identified a convergence of the military and

http://www.poli.duke.edu/civmil/cohn_literature_review.pdf, 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

⁵ 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

⁶ SP Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Belknap Press, Cambridge 1957)

⁷ PD Feaver, *Armed Servants: Agency, Oversight, and Civil-Military Relations* (Harvard University Press, Cambridge 2003)

⁸ *Ibid.* at 80

⁹ *Ibid.* at 83

¹⁰ 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 at 15

¹¹ *Op. cit.* n.7 chapter 3

¹² *Ibid.* at 75

¹³ *Ibid.* at 87

¹⁴ J Burk, ‘Theories of Democratic Civil-Military Relations’ (2002) 29 *Armed Forces and Society* 7 at 22

¹⁵ M Janowitz, *The Professional Soldier: A Social and Political Portrait* (Free Press, New York 1964)

civilians with the civilianisation of the military leading to a “constabulary” role for the armed forces¹⁷. 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”¹⁸. Moskos¹⁹ 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.

iii. Schiff’s middle way

Schiff²⁰ has attempted to navigate a middle way utilising both political science and sociology. 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 relationship as several types are possible dependant on society’s institutional and cultural conditions.

iv. Legal

It is interesting that there is little legal analysis of the civil-military relationship. A recent attempt has been made by Woo²¹ in the USA from an administrative law angle and in the UK Rubin²² has examined the civilianisation and juridification of military law, particularly the military law aspects and the process of courts martial.

Why Legal Analysis?

¹⁶ CC Moskos, ‘From Institution to Occupation: Trends in Military Organization’ (1977) 4 *Armed Forces and Society* 41; CC Moskos, ‘Institutional/Occupational Trends in Armed Forces: An Update’ (1986) 12 *Armed Forces and Society* 377

¹⁷ Op. cit. n.15 chapter 20

¹⁸ Ibid. at 440

¹⁹ Op. Cit. n.16

²⁰ RL Schiff, ‘Civil-Military Relations Reconsidered: A Theory of Concordance’ (1995) 22 *Armed Forces and Society* 7; RL Schiff, *The Military and Domestic Politics: A Concordance Theory of Civil-Military Relations* (Routledge, London 2009)

²¹ J Woo, ‘Administration of War’ (2009) 58 *Duke LJ* 2277

²² GR Rubin, ‘United Kingdom Military Law: Autonomy, Civilianisation, Juridification’ (2002) 65 *MLR* 36

i. Clausewitz

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”²³. As such the armed forces are the organ of the State that conducts war as a political instrument.

ii. Power & politics

Politics is concerned with power²⁴ and the capacity of social agents to maintain or transform their social environment and to create a regulated order for managing human conflict and interaction.

iii. Law regulating human action & human social action

Law can be considered to be “the enterprise of subjecting human conduct to the governance of rules”²⁵ or “the human attempt to establish social order as a way of regulating and managing human conflict”²⁶. 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.

iv. Law thus is 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.

Anti-Discrimination Law & the Military

1. Race

i. US

²³ C von Clausewitz (Edited & Translated by M Howard & P Paret), *On War* (Princeton University Press, Princeton 1976) at 87

²⁴ D Held, *Models of Democracy* (2nd Edn. Polity, London 1996) at 309

²⁵ LL Fuller, *The Morality of Law* (Yale University Press, New Haven 1969) at 96

²⁶ D Beyleveld, R Brownsword, *Law as a Moral Judgment* (Sweet & Maxwell, London 1986) at 2

The position of racial minorities, in particular persons of colour, improved significantly in military society before civil society followed suit²⁷. In 1948 President Truman issued Executive Order 9981 which stated “that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin.” (para 1). This was supported by the Department of Defense Directive 5120.36 of 1963 that declared: “[i]t is the policy of the Department of Defense to conduct all of its activities in a manner which is free from racial discrimination, and which provides equal opportunity for all uniformed members...irrespective of their color” (para I). Furthermore: “[e]very military commander has the responsibility to oppose discriminatory practices affecting his men and their dependents and to foster equal opportunity for them, not only in areas under his immediate control, but also in nearby communities where they may live or gather in off-duty hours” (para IIC).

As Karst notes, ending racial segregation was not the same thing though as ending racial discrimination²⁸. The US Constitution contains no right to equal treatment, although Amendment 14 does contain the Equal Protection Clause which prohibits the States from denying “to any person within its jurisdiction the equal protection of the laws”. However, the Supreme Court²⁹ has extended this protection to the federal government by a liberal interpretation of the Due Process Clause in Amendment 5 to include an equal protection element. It was though only in 1964 that general anti-discrimination law was adopted with Title VII of the Civil Rights Act (CRA64)³⁰ in s 703(a)(1)³¹. Unfortunately, “employer” is defined in s 701(b) as “a person engaged in industry affecting commerce” excluding the armed forces from the material scope of s 703. Furthermore, there is a comprehensive “national security” exclusion included in s 703(g). However, s 717(a) states that “[a]ll personnel actions affecting

²⁷ GD Jaynes, RM Williams (eds.), *A Common Destiny: Blacks and American Society* (National Academy Press, Washington DC 1989)

²⁸ KL Karst, “The Pursuit of Manhood and the Desegregation of the Armed Forces” (1991) 38 UCLA Law Review 499 at 521

²⁹ *Bolling v Sharpe* 347 US 497 (1954)

³⁰ Public Law 88-352, as amended

³¹ It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin. Note that s 703(a)(2) prohibits all forms of segregation

employees or applicants for employment in military departments...shall be made free from any discrimination based on race, color, religion, sex or national origin". Civil action for such discrimination (as set out in s 706) is sanctioned by s 717(c). Bringing an action for racial discrimination is therefore legislatively complex and further complicated by judgments of the Supreme Court.

In Adarand v Peña³² the Supreme Court held that all race-based statute or policy classifications must be subjected to the strict scrutiny standard of judicial review. This requires the aim of the statute or policy to pass three tests: a compelling governmental interest; narrowly tailored to achieve that aim; and, the least restrictive means for achieving the aim. The first test of a compelling governmental interest³³ is where the line of cases that incorporate the Military Deference Doctrine³⁴ has been utilised by the judiciary to strike down constitutional equal protection measures. The justifications for this Military Deference Doctrine are threefold³⁵. First the framers of the Constitution had explicitly granted Congress the power to regulate the navy and army³⁶ and so judicial intervention would be inappropriate. Second Congress was better equipped than the judiciary to determine the effects of legislation on military readiness and morale because of Congress' greater involvement in military matters. Third the necessity of regimentation and discipline for the military justified a different application of certain civil liberties for the armed services compared to civilian society. Indeed the Military Deference Doctrine has alarmingly claimed that "the military is, by necessity, a specialized society separate from civilian society"³⁷. The

³² Adarand v Peña 515 US 200 (1995)

³³ JF O'Connor, 'Statistics and the Military Deference Doctrine: A Response to Professor Lichtman' (2007) 66 Maryland Law Review 668 at 680

³⁴ See Parker v Levy 417 US 733 (1974), Schlesinger v Ballard 419 US 498 (1975), Greer v Spock 424 US 828 (1976) and Middendorf v Henry 425 US 25 (1976) where the policy was established and Rotsker v Goldberg 453 US 57 (1981) where it was emphatically pronounced by Justice Rehnquist

³⁵ JF O'Connor, 'The Original and Application of the Military Deference Doctrine' (2000) 35 Georgia Law Review 161 at 259. See also DH Mazur, 'Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law' (2002) 77 Indiana Law Journal 701

³⁶ See Article 1, Section 8

³⁷ Parker v Levy 417 US 733 at 743 (1974)

effects of this can be seen in Chappell v Wallace³⁸, where military service personnel were denied their rights to sue for unjust treatment based on race.

The outcome though of the removal of segregation and introduction of the prohibition of race-based discrimination is that in 2009 18.5% of the military were black, a further 11.7% were Hispanic and the remaining racial groupings each making up less than 5% of the armed services. In total 34% of the armed forces were from racial minorities³⁹.

ii. UK

Racial minorities have served for many years in the British military⁴⁰ but it only since the Race Relations Act 1976⁴¹ that there has been 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 bullying⁴², evidenced by the Commission for Racial Equality's critical investigation into the Household Cavalry⁴³ and a number of cases⁴⁴. 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 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 and women"⁴⁵. 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

³⁸ Chappell v Wallace 462 US 296 (1983)

³⁹ Accessed at

<http://prhome.defense.gov/MPP/ACCESSION%20POLICY/PopRep2009/download/PopRep09Summ.pdf>

⁴⁰ SW Crawford, 'Racial Integration in the Army – A Historical Perspective' (1995) 111 *British Army Review* 24

⁴¹ AW 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

⁴² JK Wither, 'Battling Bullying in the British Army 1987-2004' (2004) 1 *Journal of Power Institutions in Post-Soviet Societies*

⁴³ Commission for Racial Equality, *Report of a Formal Investigation into the Ministry of Defence (Household Cavalry)* (CRE, London 1996)

⁴⁴ R v Army Board of the Defence Council ex parte Anderson [1991] ICR 537

⁴⁵ Ministry of Defence, *Strategic Defence Review, Cm 3999 White Paper* (MoD, London 1998) para 121

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.”⁴⁶ 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”⁴⁷. 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 whole⁴⁸. 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.”⁴⁹

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 Mason⁵⁰ considered the situation of race and the military whilst Hussain and Ishaq⁵¹ conducted empirical research into attitudes of civilian racial minorities towards the armed forces and found reasons against joining the military included: perceived racism in the armed forces; the nature 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 the latter research was conducted with a small statistical sample and before the 9/11 or 7/7 terrorist attacks.

⁴⁶ Ibid. para 127

⁴⁷ Ibid. Essay 9 para 18

⁴⁸ Ibid. Essay 9 para 41

⁴⁹ Ibid. Essay 9 para 80

⁵⁰ 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 *AF&S* 481

⁵¹ A Hussain, M Ishaq, ‘Scottish Pakistani Muslims’ Perceptions of the Armed Forces’ (2002) 38 *Scottish Affairs*; A Hussain, M Ishaq, ‘British Pakistani Muslims’ Perceptions of the Armed Forces’ (2002) 28 *AF&S* 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

To help achieve the goals set out in the DSR, the MoD set in place three year Equality Schemes first published in 2002 (only for race) for 2002-2005⁵², then 2006-2009⁵³, which was then superseded by the scheme for 2008-2011⁵⁴. Furthermore Annual Reports are published with policy aims and objectives and detailed statistics⁵⁵. 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 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%⁵⁶ of UK racial minorities employed within the military as the recent case of DeBique⁵⁷ demonstrates.

⁵² Ministry of Defence, *Race Equality Scheme 2002-2005 for the Ministry of Defence: Armed Forces, Civil Servants and Ministry of Defence Police* (MoD, London 2002) accessed at

http://webarchive.nationalarchives.gov.uk/tna+/http://www.mod.uk/issues/racial_equality/index.html

⁵³ Ministry of Defence, *Equality and Diversity Scheme 2006-2009* (MoD, London 2002) accessed at http://www.mod.uk/NR/ronlyres/6D31D11A-8764-4DD8-9788-D20B5B14CA6D/0/eqdiversity_scheme2006_2009_ver1april06.pdf

⁵⁴ Ministry of Defence, *Equality and Diversity Scheme 2008-2011* (MoD, London 2002) accessed at <http://www.mod.uk/NR/ronlyres/98E4EAB6-CE02-4F39-9EF2-17DD054C5905/0/eqdivschemes20082011.pdf>

⁵⁵ Race Equality Scheme Progress Reports were published for 2003, 2004 and 2005. Equality and Diversity Scheme Annual Reports have been published for 2006-2007 (accessed at

http://www.mod.uk/NR/ronlyres/190B0D7E-83AB-4EDF-B845-0C310EE070C0/0/annrpt_eds0607.pdf), 2007-2008 (accessed at

http://www.mod.uk/NR/ronlyres/190B0D7E-83AB-4EDF-B845-0C310EE070C0/0/annrpt_eds0607.pdf) and 2008-2009 (accessed at

http://www.mod.uk/NR/ronlyres/4C3078BC-DB83-4F88-AE68-4DE231C7003D/0/edsreport_200809.pdf). The report for 2009-2010 has yet to be published on the Ministry of Defence's website but a copy has been lodged in the House of Commons Library and a copy is in the possession of the author.

⁵⁶ See Equality and Diversity Scheme Annual Report 2009-2010 para 1.8

⁵⁷ Ministry of Defence v DeBique [2010] IRLR 471

Last year a significant new piece of legislation was introduced in the dying stages of the Labour government. This was the Equality Act 2010 (EA10) that amalgamated and enhanced previous anti-discrimination laws. Part 2 outlines the substantive issues of equality. Chapter 1 provides a list of protected characteristics constituting age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation (s 4) and a definition of each characteristic (ss 5-12). Chapter 2 outlines prohibited conduct of which direct discrimination, indirect discrimination, harassment and victimisation are significantly modified from previous legislation. Direct discrimination is defined in s 13(1) as “[a] person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others” and for race, less favourable treatment includes segregating B from others (s 13(5)).

A new development is the provision on multiple discrimination⁵⁸ contained in s 14 that provides that “[a] person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.”

Indirect discrimination in s 19(1) is defined as “[a] person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.” Paragraph 2 provides it is discriminatory if: “(a) A applies, or would apply, it to persons with whom B does not share the characteristic; (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it; (c) it puts, or would put, B at that disadvantage; and, (d) A cannot show it to be a proportionate means of achieving a legitimate aim.” It should be noted that ss 13, 14 and 19 do not require a real comparator and indeed a comparator is not mentioned. However, to determine if something is discriminatory

⁵⁸ See P Uccellari, ‘Multiple Discrimination: How Law can Reflect Reality’ (2008) 1 Equal Rights Review 24 and S Barri, D Sciek, *Multiple Discrimination in EU Law: Opportunities for Legal Responses to Intersectional Gender Discrimination?* (European Commission, Brussels 2009) for discussions about multiple discrimination

there has to be some form of comparison and s 23(1) requires there to be no material difference between the circumstances relating to each case when comparing and s 24(1) does not require person A to possess the protected characteristic for direct discrimination under s 13(1).

Harassment is also prohibited conduct (s 26) and is defined as “(1) A person (A) harasses another (B) if: (a) A engages in unwanted conduct related to a relevant protected characteristic; and, (b) the conduct has the purpose or effect of: (i) violating B’s dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.” Specifically this can be sexual (s 26(2)&(3)). To determine harassment involves a substantive assessment (“the perception of B”), the other circumstances of the case and an objective analysis (“whether it is reasonable for that conduct to have that effect”) (s 26(4)).

Finally there is victimisation in s 27 where “(1) A person (A) victimises another person (B) if A subjects B to a detriment because: (a) B does a protected act; or, (b) A believes that B has done, or may do, a protected act.” Protected acts are: “(a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act; or, (d) making an allegation (whether or not express) that A or another person has contravened this Act.”

Part 3 deals with services and public functions. S 29(6) is important for the armed forces and provides that “[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, s 4(1) of Part 1 of Schedule 3 disapplies this when relating to relevant discrimination “for the purpose of ensuring the combat effectiveness of the armed forces”. The “relevant discrimination” is made up of four of the protected characteristics – age, disability, gender reassignment and sex but does not include race and sexual orientation.

Part 5 is entitled Work and Chapter 1 deals with employment. S 39(1) prohibits an employer (A) from discriminating against a person (B): (a) in the arrangements A makes for deciding to whom to offer employment; (b) as to the terms on which A offers B employment; (c) by not offering B employment. The provision goes on to prohibit an employer (A) from discriminating against an employee of A's (B): (a) as to B's terms of employment; (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service; (c) by dismissing B; (d) by subjecting B to any other detriment. Schedule 9, Part 1, s 4 provides an exception for the armed forces for s 39(1)(a) or (c) or (2)(b) "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", where a "relevant requirement" is either to be a man or not to be a transsexual person. Furthermore, Part 5 on Work does not apply to service in the armed forces as far as relating to age or disability (Sch 9 Part 1 s 4(3)).

Part 11 entitled "Advancement of Equality" creates a public sector equality duty in Chapter 1 that attempts to further mainstream equality. The main duty is set out in s 149(1) that requires a public authority to "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." This is extended to persons exercising public functions but not a public authority. Public authorities are specified in Schedule 19 (s 150(1)) and include the armed forces.

A final point to note is the general exception provided by s 192 on national security: "[a] person does not contravene this Act only by doing, for the purpose of safeguarding national security, anything it is proportionate to do for that purpose."

Interestingly this is not a catch all exception as the principle of proportionality applies but the extent of the exclusion is uncertain as national security is not defined.

2. Sex

i. US

Like race there is no constitutional provision that provides express equal protection between men and women. In 1972 the Equal Rights Amendment to the US Constitution was passed by Congress but failed to be ratified by enough States before the 1982 deadline. The Amendment consisted of three sections with the first being determinative: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex". The second section authorised Congress to adopt legislation to enforce this provision.

With the lack of a constitutional right to equal treatment the development of the prohibition of discrimination on the basis of sex has been piecemeal. First was Title VII of the CRA64 that provided similar rights for the sexes as it did for race. This was supplemented by the Pregnancy Discrimination Act of 1978 which added a new s 701(k) on the prohibition of pregnancy discrimination. As noted above for race though s 701 does not apply to the armed forces as the term "employer" is confined to the private sector.

In Frontiero v Richardson⁵⁹ the Supreme Court equated the "long and unfortunate history of sex discrimination"⁶⁰ to the experiences of ethnic minorities⁶¹. However, the standard of judicial review chosen has been that of intermediate scrutiny⁶² such that differences between men and women can be justified if they substantially related to an important state purpose⁶³. The Supreme Court went out of its way to identify physical differences as "enduring"⁶⁴.

⁵⁹ Frontiero v Richardson 411 US 677 (1973)

⁶⁰ *Ibid.* at 684

⁶¹ See VK Vojdik, 'Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat' (2005) 57 Alabama Law Review 303 at 307

⁶² United States v Virginia 518 US 515 at 533 (1996)

⁶³ *Ibid.*

⁶⁴ *Ibid.* and see Ballard v United States 430 US 199 at 223 (1977)

For women serving in the military the road to equal rights to men has been long and is on-going. It was only in 1948 that women gained the statutory permanent right to serve in the armed forces through the Women's Armed Services Integration Act of 1948 that created the Women's Army Corps and enabled women to join the regular navy and air force. However, there were strict limits to the number that could serve (2%) and a solid ceiling to promotion (no Admirals or Generals). Over the years these limits were removed⁶⁵ and the women became more important militarily. However, there are three areas where significant problems remain: sex discrimination and the military; registration for the draft; and, combat exclusion.

The first is due to the Supreme Court's judgments vis-à-vis the military. As has been seen the standard of judicial review for sex discrimination cases is lower than that of race discrimination and as such the judiciary have found it more straightforward to utilise the Military Deference Doctrine for sex discrimination than for race⁶⁶.

Second involves the legislative requirements for civilian registration under the Military Selective Service Act of 1967⁶⁷. The registration requirement for 18-25 year old males was terminated in 1975⁶⁸ but was retroactively re-established in 1980⁶⁹ for all 18-26 year old males born after 1 January 1960. This has been challenged on a number of occasions on the basis of sexually discriminating men and women, all of which have failed. The lead judgment is Rostker v Goldberg⁷⁰ where the Supreme

⁶⁵ See in particular Public Law 90-130 of 1967 that *inter alia* removed the 2% ceiling and the promotion restriction, and enabled women to serve aboard ships, participate in aviation and opened up service to most positions apart from those that were direct combat related. The Department of Defense Appropriation Authorization Act of 1979 (Public Law 95-485) s 820 disbanded the Women's Army Corps with women taking up positions within the regular army. The National Defense Authorization Act for Fiscal Years 1992 and 1993 (Public Law 102-190) s 531 removed the specific statutory prohibitions on the assignment of navy and air force women to aircraft engaged in combat missions

⁶⁶ See Schlesinger v Ballard 419 US 498 (1975), Walch v Adjutant General's Department of Texas 533 F.3d 289 (2008) and Weatherall v Geren 616 F.3d 789 (2010). Cf Owens v Brown 455 F.Supp. 291 (1978)

⁶⁷ Public Law 90-40. Now designated the Military Selective Service Act by Public Law 92-109

⁶⁸ Proclamation 4360, Terminating Registration Procedures Under Military Selective Service Act

⁶⁹ Proclamation 4771, Registration Under the Military Selective Service Act

⁷⁰ Op. Cit. n.34

Court held that the Military Deference Doctrine enabled Congress to pass statute dealing with the military that was sexually discriminatory. This has been followed in subsequent cases⁷¹ although in Elgin v United States Department of the Treasury⁷² a further petition has been presented to the Supreme Court appealing the judgment of the United States Court of Appeals for the First Circuit.

Third is the combat exclusion provisions for women. The current Department of Defense policy on women's combat exclusion is contained in a 1994 Memorandum issued by the then Secretary of Defense Les Aspin⁷³. This provided that military personnel could be assigned to all positions that they were qualified, except that women were to be excluded from assignment to units...whose primary mission was to engage in direct combat on the ground. This latter term was defined as "engaging an enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force's personnel". Furthermore this took place "well forwards on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect". The different Services set their own assignment policies based on the objectives outlined by the Department of Defence with the following restrictions allowed: costs for appropriate berthing and privacy arrangements would be disproportionate; physical collocation whilst remaining with direct ground combat units closed to women; engaged in Special Operations; and, physical limitations for women. This is now included in the Direct Ground Combat Assignment Policy (DGCAP)⁷⁴.

⁷¹ Lewis v United States Army 697 F.Supp. 1385 (1988), Schwartz v Brodsky 265 F.Supp. 2d 130 (2003) and Elgin v United States Department of the Treasury 641 F.3d 6 (2011)

⁷² Filed 7 July 2011 as Docket 11-45, accessed at http://sblog.s3.amazonaws.com/wp-content/uploads/2011/08/Elgin_pet.pdf

⁷³ L Aspin, 'Memorandum on Direct Ground Combat Definition and Assignment Rule' 13 January 1994, accessed at <http://cmrlink.org/CMRNotes/LesAspin%20DGC%20DefAssign%20Rule%20011394.pdf>

⁷⁴ DACOWITS, 'Defense Advisory Committee on Women in the Services Report 2009', accessed at <http://dacowits.defense.gov/Reports/2009/Annual%20Report/dacowits2009report.pdf>, at 6

Since the 1994 Memorandum the opportunities for women have widened considerably with new positions created and units that had been previously closed opened to women⁷⁵. Indeed in September 2010 women made up 14.5%⁷⁶ of the armed service personnel. Arguments for the retention of the combat exclusion rule have moved from views based on moral perspectives of women to objections based on unit cohesion and physical abilities. However, with the wars in Iraq and Afghanistan, the nature of warfare in general has changed with significant numbers of women conducting tours alongside their male counterparts, an enemy that is difficult to accurately determine and operating on a battlefield with a far more fluid definition. In 2010 the Defense Advisory Committee on Women in the Services (DACOWITS) recommended an immediate elimination of the combat exclusion policy contained in DGCAP, services to eliminate their assignment rules and ending of gender-based restrictions on military assignments⁷⁷. This was supported by the findings of the final report of the Military Leadership Diversity Commission⁷⁸ which also called for the elimination of combat exclusion policies for women but with a time-phased approach. These recommendations will feed into the Secretary of Defense's review that was supposed to report by 15 April 2011⁷⁹ but will now report in October.

ii. UK

Women have served in the UK armed forces for many years but the "Women's Services" only became permanently established after World War II⁸⁰. These

⁷⁵ MC Harrell, LL Miller, *New Opportunities for Military Women: Effects Upon Readiness, Cohesion and Morale* (RAND Corporation, Santa Monica 1997) at 4

⁷⁶ Figures accessed at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg1009f.pdf> and <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg1009.pdf>

⁷⁷ DACOWITS, 'Defense Advisory Committee on Women in the Services Report 2010', accessed at <http://dacowits.defense.gov/Reports/2010/Annual%20Report/dacowits2010report.pdf>, 16

⁷⁸ Military Leadership Diversity Commission, 'From Representation to Inclusion: Diversity Leadership for the 21st Century Military' Final Report, accessed at <http://mldc.whs.mil/index.php/final-report>, 127, Recommendation 9

⁷⁹ Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383) s 535

⁸⁰ 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

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 Sex Discrimination Act 1975 (SDA75). The military experienced a number of difficulties with the SDA75. The first emerged over the treatment of pregnant servicewomen⁸¹. The original SDA75 contained a provision, s 85(4), which excluded from the scope of the Act “service in...the naval, military and air forces of the Crown”. Unfortunately no such exception existed in the EU’s Equal Treatment Directive⁸² (ETD) with Article 5(1) prohibiting discrimination on grounds of sex with regard to working conditions and the conditions governing dismissal. In Marshall I⁸³ 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 Hertz⁸⁴ 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 SDA75 s 85(4) was irreconcilable

and reformed on 1 February 1949 (taking over from the Women’s Auxiliary Air Force that had been formed in 1939).

⁸¹ See A Arnall, ‘EC Law and the Dismissal of Pregnant Servicewomen’ (1995) 24 ILJ 215 for a full account of this episode

⁸² 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

⁸³ Case 152/84 Marshall v Southampton and South-West Hampshire AHA [1986] ECR 723 (ECJ)

⁸⁴ Case C-179/88 Handels-og Kontorfunktionoerernes Forbund [1990] ECR I-3979 (ECJ) para 13

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 challenging the military's policy to sack pregnant servicewomen⁸⁵. 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 II⁸⁶ 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"⁸⁷. Second in Emmott⁸⁸ it 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, and 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 and others⁸⁹ 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 s 85(4) of the SDA75, through the Sex Discrimination Act 1975 (after amendment by the Sex Discrimination Act 1975

⁸⁵ R v Secretary of State for Defence, ex parte Leale, Lane and EOC, unreported (HC)

⁸⁶ Case C-271/91 Marshall v Southampton and South-West Hampshire AHA [1993] ECR I-4367 (ECJ) para 24

⁸⁷ *Ibid.* para 30

⁸⁸ Case C-208/90 Emmott [1991] ECR I-4269 (ECJ)

⁸⁹ Ministry of Defence v Cannock and others [1994] IRLR 509 (EAT)

(Application to Armed Forces etc.) Regulations 1994⁹⁰, 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 security⁹¹. However, this competence has to be exercised with the genuine aim of guaranteeing public security whilst being appropriate and necessary to achieve this aim⁹². A blanket ban on women serving in the armed forces on the basis of combat effectiveness would be unjustified⁹³, whilst a ban on women serving in the Royal Marines would be justified⁹⁴ 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 front-line fighting⁹⁵. 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 submarines⁹⁶. As Arnall⁹⁷ points out this combat effectiveness restriction is not included in Article 2(2) of the Equal Treatment Directive that excludes from the scope activities where the sex of the worker constitutes a determining factor, transposed into national law by the catalogue of situations in SDA75 s 7 and which is now applicable to the armed

⁹⁰ SI 1994/3276, The Sex Discrimination Act 1975 (Application to Armed Forces etc.) Regulations 1994

⁹¹ Case C-273/97 Sirdar v The Army Board & The Secretary of State for Defence [1999] ECR I-7403 (ECJ) para 15

⁹² Ibid. para 28

⁹³ Case C-285/98 Kreil v Bundesrepublik Deutschland [2000] ECR I-69 (ECJ)

⁹⁴ Op. Cit. n.91

⁹⁵ 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

⁹⁶ Ministry of Defence, ‘Women in the Armed Forces’, report by the Employment of Women in the Armed Forces Steering Group, May 2002, accessed at http://www.mod.uk/NR/rdonlyres/A9925990-82C2-420F-AB04-7003768CEC02/0/womenaf_fullreport.pdf

⁹⁷ Op. Cit. n.81 at 233

forces. He further notes⁹⁸ that the effect of the new s 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 covered above. It has been 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 women, especially with a new report on the combat exclusion exemption due. As it turned out the report only considered the exclusion of women from ground close-combat roles, which it decided to keep in place⁹⁹, and did not review the exclusion of women from service in submarines¹⁰⁰. Indeed compared to the 2002 report, the 2010 report was perfunctory. The basis of the exclusion's maintenance was wholly down to unit cohesion¹⁰¹.

3. Gender Orientation

i. US

In the USA there were no specific laws criminalising homosexuality or homosexual behaviour at the federal level. At state level 36 States had repealed sodomy laws or had them overturned by court judgments by 2002. The remaining sodomy laws were invalidated by the 2003 Supreme Court decision Lawrence v Texas¹⁰².

However, in the US military Article 125 of the Uniform Code of Military Justice made sodomy a criminal act to be tried by court martial. Even after Lawrence the Court of

⁹⁸ Ibid.

⁹⁹ Ministry of Defence, 'Report on the Review of the Exclusion of Women from Ground Close-Combat Roles', November 2010, accessed at http://www.mod.uk/NR/rdonlyres/B358460B-4B2A-4AB5-9A63-15B6196B5364/0/Report_review_excl_woman_combat.pdf, para 13

¹⁰⁰ Ibid. at Annex A

¹⁰¹ Ibid. at para 13

¹⁰² Lawrence v Texas 539 US 558 (2003)

Appeals for the Armed Forces¹⁰³ held that Article 125 was constitutionally valid when military factors but the behaviour outside of the Lawrence ruling.

In 1993 the National Defense Authorization Act for Fiscal Year 1994¹⁰⁴ was adopted that introduced the “Don’t Ask, Don’t Tell” policy on homosexuality in the military. This ameliorated the absolute ban on homosexual orientation¹⁰⁵ and instead outlawed homosexual behaviour. In 2010 Phillips J in the District Court for the Central District of California held in Log Cabin Republicans¹⁰⁶ that DADT violated the Fifth and First Amendments to the Constitution and a permanent injunction was put in place barring its enforcement. Although the Court of Appeals for the Ninth Circuit stayed the injunction pending an appeal on 1 November 2010¹⁰⁷, the Don’t Ask, Don’t Tell Repeal Act of 2010¹⁰⁸ was adopted on 22 December 2010 and came into effect on 20 September 2011. The Department of Defense Directive 1332.14 was amended 30 September 2011¹⁰⁹, removing “homosexual conduct” as a ground for administrative separation.

It should be noted that the repeal of DADT provides no course of private action for individuals (DADT Repeal Act 2010 s 2(e)). The effect of this is to prevent military

¹⁰³ United States v Marcum 60 MJ 198 (2004), United States v Stirewalt 60 MJ 297 (2004) and United States v Bullock 2004 CCA Lexis 349 (the latter was actually a case before the US Army Court of Criminal Appeals)

¹⁰⁴ Public Law 103-160 s 654

¹⁰⁵ Department of Defense, ‘Directive 1332.14 Enlisted Administrative Separations’, 28 January 1982, Part 1 Section H1(a): “Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the armed forces to maintain discipline, good order, and morale; to foster mutual trust and confidence among service members; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of service members who frequently must live and work in close conditions affording minimal privacy; to recruit and retain members of the armed forces; to maintain the public acceptability of military service; and to prevent breaches of security.”

¹⁰⁶ Log Cabin Republicans v United States Of America 716 F.Supp. 2d 884 (2010)

¹⁰⁷ Log Cabin Republicans v United States Of America 2010 US App Lexis 22655 (2010)

¹⁰⁸ Public Law 111-321

¹⁰⁹ Department of Defense, ‘Directive 1332.14 Enlisted Administrative Separations’, 30 September 2011, accessed at

<http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf>

personnel bringing actions to enforce the Act, as well as providing a green light for the judiciary to utilise the Military Deference Doctrine if a case does proceed to court.

ii. UK

The Sexual Offences Act 1967 (SOA67) was adopted following the 1957 Wolfenden Report¹¹⁰. It decriminalised most homosexual offences between consenting adults over the age of twenty-one¹¹¹ in private¹¹² but excluded the armed forces¹¹³. 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 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 law. This was only given legal effect in 1994 with the passing of s 146(1) of the Criminal Justice and Public Order Act 1994. However, s 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 personnel¹¹⁴ who had been discharged from the services for their homosexuality. In the Court of Appeal¹¹⁵ the challenge was rejected as the Ministry of Defence policy did not meet the high threshold requirement of irrationality, the only ground of judicial

¹¹⁰ Committee on Homosexual Offences and Prostitution, *Report of the Committee on Homosexual Offences and Prostitution* (HMSO, London 1957)

¹¹¹ Homosexual and heterosexual age of consent was eventually equalised at 16 by the Sexual Offences (Amendment) Act 2000 s 1

¹¹² Sexual Offences Act 1967 s 1(1): “with no other person present”. This requirement was repealed with the passage of the Sexual Offences Act 2003

¹¹³ Sexual Offences Act 1967 s 1(5)

¹¹⁴ The four were Jeanette Smith, Graeme Grady, Duncan Lustig-Prean and John Beckett

¹¹⁵ 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

review available. Furthermore it was held that as the ECHR was not part of UK law then Article 8, 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 ECtHR in 1999¹¹⁶. 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 Conduct¹¹⁷ 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 2000¹¹⁸ and then in 2002¹¹⁹. 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 the public sector equality duty of the EA10 (s 149(1)), especially if the claims of Basham¹²⁰ that arguments of social cohesion behind the concept of combat effectiveness lead to situations of harassment for women and homosexuals are upheld.

¹¹⁶ Lustig-Prean and Beckett v United Kingdom [1999] ECHR 71 (ECHR) and Smith and Grady v United Kingdom [1999] ECHR 72 (ECHR)

¹¹⁷ Ministry of Defence, 'Armed Forces Code of Social Conduct: Policy Statement' accessed at

<http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/Personnel/EqualityAndDiversity/ArmedForcesCodeOfSocialConductPolicyStatement.htm>

¹¹⁸ Ministry of Defence, 'MOD Policy on Homosexuality; A Review on the Armed Forces Policy on Homosexuality' accessed at

<http://www.proud2serve.net/military/2000modupdate.htm>

¹¹⁹ Service Personnel Board, 'Tri-Service Review of the Armed Forces' Policy on Homosexuality and Code of Social Conduct Paper 12/02' accessed at http://www.mod.uk/NR/rdonlyres/ACED4F62-2C04-4B19-AC50-E49552732385/0/impact_studies_homosexuality.pdf

¹²⁰ V Basham, 'Effecting Discrimination: Operational Effectiveness and Harassment in the British Armed Forces' (2009) 35 AF&S 728

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 MacDonald¹²¹ 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, i.e. a heterosexual woman. The Lords disagreed and concluded that the real comparator had to be a woman who was attracted to the same sex, i.e. 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 2004¹²². 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 (e.g. access to Service Family Accommodation, pension rights, travel benefits etc.).

4. Age

i. US

Age discrimination in the USA is regulated by the Age Discrimination in Employment Act of 1967¹²³. For a member of the military to bring an action they must be at least

¹²¹ 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

¹²² See M Bell, 'Employment Law Consequences of the Civil Partnership Act 2004' (2006) 35 ILJ 179

¹²³ Public Law 90-202

40 years of age (s 15(a)) and may either elect to bring an action through enforcement by the Equal Employment Opportunity Commission (EEOC) (s 15(b)) or by civil action in a Federal district court (s 15(c)&(d)).

ii. UK

The EU Framework Directive on Equal Treatment in Employment, Directive 2000/78¹²⁴, provides for the prohibition of discrimination on, *inter alia*, the grounds of age (Article 1). 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 Mangold¹²⁵ 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 Kücükdeveci¹²⁶ where the ECJ held that this fundamental right could be enforced by an individual in a national court.

5. Disability

i. US

Disability in employment is regulated in the USA by the Americans with Disabilities Act of 1990. Unfortunately this only provides remedies for employees in an industry engaged in commerce. For Federal employees the Rehabilitation Act of 1973¹²⁷ applies, providing similar anti-discrimination provisions as those incorporated in the

¹²⁴ Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L303/16

¹²⁵ 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; 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; E Muir, 'Enhancing the Effects of Community Law on National Employment Policies: The Mangold Case' (2006) 31 ELR 879; A Masson, C Micheau, 'The Werner Mangold Case: An Example of Legal Militancy' (2007) 13 EPL 587

¹²⁶ Case C-555/07 Kücükdeveci v Swedex [2010] ECR I-365 (ECJ); noted T Roes, 'Case Note' (2010) 16 Columbia Journal of European Law 497; A Wiesbrock, 'Case Note' (2010) 11 German Law Journal 539; G Thüsing, S Horler, 'Case Note' (2010) 47 CMLRev 1161

¹²⁷ Public Law 93-112

ADA90. It is unclear however whether these provisions apply to armed services personnel.

ii. UK

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.

Comparative Critical Analysis

The impact of civilian discrimination law has had a marked effect on the UK and US military with some similar policy development but also significantly different approaches for achieving end goals. It is notable that with the exception of the Log Cabin Republicans case involving DADT, the US military establishment has experienced little in the way of juridification. This is mostly due to the Military Deference Doctrine as enunciated by the Supreme Court and in particularly Chief Justice Rehnquist¹²⁸. This must be compared to the situation in the UK where no such deference is evident, with personnel matters being treated by the judiciary as judiciable. The UK courts have been influenced to a certain extent by European judgments, from both the Luxembourg and Strasbourg courts, but it is submitted that the UK judiciary hold a strong tradition of enforcing the law that Parliament provides to ensure that individual rights are protected, no-one is considered to be above the law and that all human beings are treated equally. The result of this is that powerful employers and society, which includes the military, must treat their employees and citizens with mutual respect and dignity. In return military personnel reciprocate with their service and equal respect. This positive protection of personnel rights and empowerment of the individual must be compared with a conservative lack of progress towards integration evidenced by the level of British born racial minorities serving and the failure to eliminate the combat exclusion rule. The swift changes in policy and positive integration when forced to do so through judicial judgments

¹²⁸ See Op. Cit. n.33 and Op. Cit. n.35 Mazur

should encourage the abandonment of such reticence. In contrast the USA has noticeably embraced integration, particular with reference to race, and should be encouraged to do so with sex and gender orientation. Indeed it is the US military's willingness to assimilate groups within the armed forces that provides encouragement for the future of gay servicemen and women, and women in general. However, the Military Deference Doctrine has a tendency to treat armed forces personnel as second class citizens when they are far from that.

From the fore-going analysis we can now see how anti-discrimination law has influenced the civil-military relationship. With the move away from a conscripted military and the necessary close relationship between the civilian population and the military there is a danger with professional all-volunteer forces of detaching the military society from civil society. The two extremes of this position are either complete control of the military by the civilian society such that the armed forces obey orders without question¹²⁹ or complete control of civilian society by the military, which in a democracy produces a coup d'état¹³⁰. The suggestion made in this paper is that anti-discrimination laws are the glue that sticks the military and civil world together. By empowering individuals so that they are not discriminated against on the basis of a characteristic and providing them the same opportunities to hold their employer, the armed forces, to account as an individual in the civilian world enables the objective of creating a military that is representative of society at large to be achieved. 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.

¹²⁹ See T Taylor, *The Anatomy of the Nuremberg Trials* (Bloomsbury, London 1993) at 353 for the example of Field Marshall Wilhelm Keitel who was prepared to follow Hitler's orders "regardless of law and morals".

¹³⁰ See D Mazur, *A More Perfect Military: How the Constitution Can Make Our Military Stronger* (OUP, London 2010) chapter 11

The final point to note is the position of human rights and equality when contemplating the civil-military relationship. In Britain the Human Rights Act (HRA) was passed in 1998 that enabled the UK courts to develop human rights judgments based on the European Convention of Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR) but did not come into force until 2000. Section 6(1)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 s 6(3)HRA that includes “any person certain of whose functions are functions of a public nature”¹³¹. Furthermore to bring a claim against a public authority that has acted in a way that is unlawful under s 6(1)HRA, s 7(1)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. The EA10 has introduced the principle of equal treatment into UK law and has continued the process of integrating the military as part of society rather than as a separate and different society within a society. 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. This is an area that the US has yet to address, with individuals in the military environment seen as separate from the civilian society.

Conclusions

The UK and USA armed forces have travelled down a long and sometimes difficult road over the last fifty years. There is much to admire but still much to improve. Both the UK and USA need to fully embrace the opportunities that women bring to the armed services and finally eliminate the combat exclusion rule. For the USA the Equal Rights Amendment to the Constitution would be welcome as a substantive provision for equal treatment and the UK provides a good model for embracing a section of the military community, homosexuals, when a bad policy is put right. In the UK the current restructuring of the armed forces creates opportunities to forge a

¹³¹ HRA s 6(3)(b)

more integrated armed service. For all the UK's vaunted diversity policies and despite 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.