Civil-military 'legal' relations: Where to from here?

Pauline Collins

In recent years the nature of the military in western countries has been transforming. Legislation governing military discipline has gone through considerable review in countries such as Australia and the U.K. This process is largely in response to rights-based concerns of fairness and legitimacy in the treatment of service persons, to some extent led by human rights instruments such as the European Convention on Human Rights. The literature on civil-military relations concerns itself with the civil-military dynamic of control by the civil arm of the military arm. There is a constraining assumption that the 'civil' in the phrase civil-military means the executive and possibly legislative arms of government, but rarely the judicial arm of government. In the past courts appear to have voluntarily limited their oversight of military institutions, in a manner that has become known as the doctrine of deference. This deference by the courts towards the military reduces the effectiveness of the court's role within the constitutional framework of the state allowing considerable invasion of the civil domain by the military. The jurisprudence of the civilian courts in the U.K., Australia and the U.S. has been investigated in regard to the doctrine of deference. This paper will report the approach of the courts towards the military in the three chosen jurisdictions: what are the differences, if any; the reasons for these; and is there an indication that the courts' position as regards deference is evolving?

By looking through the narrow lens of military discipline at the state level, the aim is to bring a fresh insight to the analysis of the civil-military relationship, and to place the judicial arm in its proper institutional role within the civil-military relationship within the state. Analysis of civil-military relations that fails to encompass the whole of the constitutional legal system fails to situate the two arms in a coherent and systemic way.