



INTRODUCTION

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

War is too important to be left either to the generals or the politicians. It must be the people's business. David M Kennedy July 25, 2005 New York Times Editorial

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.

METHODOLOGY

A comparative case methodology will be used, incorporating the contextual, historical and political positioning within which the courts develop their jurisprudence. While the focus of this study is on the courts, and the relevance their jurisprudence has to the civil-military relationship, this cannot be understood without being situated in the contextual framework of the times in which the decisions of the courts are made.

Research Thesis

The thesis argues the analysis of civil-military relations is constrained by an 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 arguably reduces the effectiveness of the court's role within the constitutional framework of the state. The jurisprudence of the civilian courts in the U.K., Australia and the U.S. will be analysed in regard to the doctrine of deference. The thesis will consider 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?

As the common law courts rely on precedent and legal principles established in the past, the historical position, as well as the institutional situation, within which the court's operate will be important to an evaluation of their impact. This contextualising will also need to consider the changing nature of standing militaries, along with their roles.

Aims of Research

This study aims, by looking through the narrow lens of military discipline at the state level :-
To bring a fresh insight to the analysis of the civil-military relationship,

It also seeks 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 and only looks at fragmented segments fails to see law as coherent and systemic.

IMPORTANCE OF THE RESEARCH

Militaries are different from the so-called 'civilian armies' of World War II and earlier, they are now not only volunteer professional militaries, but they are becoming outsourced or privatised. Their role is broadening beyond the confines of defending the territory of their nation state to encompass multinational forces and peacekeeping roles defending global value systems, including human rights. For this purpose the term 'military' needs to be redefined to ensure any theory of civil-military relations encompasses all the players in the field, including private military companies and contractors (PMC). This is to avoid the distortions present in current theories, which take as a point of departure the standard conceptual units, namely the national enlisted defence personnel and the accepted reasons for their existence.



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