British judicial engagement and the juridification of the armed forces

Author(s): ANTHONY FORSTER

Source: *International Affairs (Royal Institute of International Affairs 1944-)*, March 2012, Vol. 88, No. 2 (March 2012), pp. 283-300

Published by: Oxford University Press on behalf of the Royal Institute of International Affairs

Stable URL: https://www.jstor.org/stable/41428606

British judicial engagement and the juridification of the armed forces

ANTHONY FORSTER*

The term 'juridification' was first used by Gerry Rubin over a decade ago to describe ways in which the British court-martial system was being altered by civil judgments that civilianized the military legal system and reduced the autonomy of the armed forces.[1] Since then, little scholarly attention has been focused on legal developments and their impact on traditional forms of governance of the British armed forces—especially its hierarchical and tradition-based approach to the conduct of its business. More recently, Christopher Dandeker has explored the 'right' of, versus the 'need' for, the British armed forces to be different from the society they serve, and I have explored the impact of wars since 1997 on the three branches of the British state and on the relationship of the state to its citizens.[2] The focus in the present article is on the consequences of changes to the legal framework for the British armed forces. This is of interest not just because the armed forces have been so regularly deployed in combat over the last decade and a half, but also because as an organization the British military has been based on strong hierarchies, self-referential judgments, strong internal (but poor external) transparency and, above all, certainty of process and basic presuppositions that underpin all its activities.

The way we were

For over 200 years wars have been governed by the laws of war and national legislation. For the UK, this regime comprised two elements: first, international humanitarian law, based on obligations on states (although individuals may benefit), and the Geneva Conventions, which stipulate that soldiers may in no circumstances renounce the rights secured to them by the conventions (though a soldier cannot enforce them directly),[3] and second, a family of domestic UK legal

* I am grateful to Richard Ball, Don Carrick, Ian Leigh, Peter Rowe and especially John Williams for comments on earlier drafts of this article.

1 Gerry Rubin, 'United Kingdom military law: autonomy, civilianisation, juridification', *Modern Law Review* 65: 1, 2002, p. 38.

2 Christopher Dandeker, 'Building flexible forces for the 21st century: key challenges for the contemporary armed services', in Giuseppe Caforio, ed., *Handbook of the sociology of the military* (New York: Kluwer, 2003), pp. 405–16. This article draws on ideas first raised in Anthony Forster, 'The military, war and the state: testing authority, jurisdiction, allegiance and obedience', *Defense and Security Analysis* 27: 1, March 2011, pp. 55–64.

3 Peter Rowe, *The impact of human rights law on armed forces* (Cambridge: Cambridge University Press, 2006), p. 2.

International Affairs 88: 2 (2012) 283–300

instruments, including the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957, which set out regulations, codes and military law governing the armed services. These were the fixed points of what was and was not lawful and formed the legal infrastructure underpinning the conduct of service personnel. This legal infrastructure depended upon a series of five connected principles that created commanding and uncontested assumptions about relationships and behaviours.

The first of these principles was that the government of the day set out the bargain between the armed forces and the state and then policed it. The government not only made decisions about whom the forces were to fight, but played a determining role in the legality of the conflict and considered itself the judge and jury on these matters. For example, though contested by other governments and the international community, the legality of the British intervention in the October 1956 Suez crisis was simply never investigated by Harold Macmillan or indeed subsequent British governments. Likewise, during the Northern Ireland troubles, the shooting in Londonderry of 26 unarmed civil rights protesters by British soldiers on 'Bloody Sunday' in January 1972, resulting in 14 deaths, was never appropriately investigated. In April 1972 the Widgery Tribunal, appointed to look into the events of Bloody Sunday, substantially exonerated British soldiers, and was seen both at the time and subsequently as a means of protecting service personnel rather than holding them to account for their actions.[4]

The second principle was that the unique circumstances in which service personnel found themselves—being placed in harm's way, possibly required to take human life, and subject to the need to preserve military operational effectiveness—required special treatment. This gave rise to the concept of Crown immunity, a provision which absolved the Crown from being treated like other employers. This had implications both on and off the battlefield. Dijen Basu argues that the assumptions of Crown immunity in respect of combat were that 'one soldier does not owe a fellow soldier a duty of care in tort when either are engaged with an enemy in the course of combat and that the Ministry of Defence (MoD) is not under a duty to maintain a safe system of work for service personnel engaged with an enemy in the course of combat'.[5] Likewise, David Connett notes that 'in relation to non-combat situations the MoD had an exemption from criminal prosecution for serious breaches of the rules through a privilege called crown immunity'.[6] These legal protections were considered vital to the effective functioning of the armed forces and their operational effectiveness.

[4] In the subsequent Saville Inquiry (1998–2010), Lord Saville declined to comment on the Widgery Tribunal, but the differences are pretty stark. For the Saville Report vs the Widgery Report, see http://www.guardian.co.uk/uk/2010/jun/15/bloody-sunday-saville-report-widgery, accessed 16 Feb. 2012.

[5] Dijen Basu, 'Challenging the combat immunity principle', Devereux Chambers, 13 May 2008, http://www.devereuxchambers.co.uk/downloads/challenging-the-combat-immunity-principle---dijen-basu.pdf, accessed 16 Feb. 2012. Crown immunity is to be distinguished from combat immunity, which is the legal principle that actions in accordance with international humanitarian law (killing and committing damage) do not attract domestic criminal sanction in circumstances of war. I am grateful to an anonymous reviewer for this point.

[6] David Connett, 'Army accident immunity "must end"', BBC News, 4 Nov. 2007, http://news.bbc.co.uk/1/hi/uk/7076328.stm, accessed 16 Feb. 2012.

The third principle, linked to the unique circumstances of the military, was a de facto presumption by the British government that citizens voluntarily joining the armed forces accepted some restriction on their human rights, notably the right to life and the curtailment of some of their freedoms and liberties (including the right to a private life), compared with other British citizens. The argument was based on a set of beliefs among senior officers that unit cohesion and fighting spirit were fundamental to operational effectiveness and enshrined in regulations, codes and military law governing service personnel. For example, the armed forces leadership claimed that permitting homosexuals to be open about their sexual orientation and permitting women to serve in front-line combat units would undermine operational effectiveness. For a considerable period of time this line of argument was accepted without demur.

The fourth principle was the military's assertion—supported by British governments—that the distinct obligations and responsibilities of the armed forces necessitated an essentially separate military judicial system. The three services had their own investigative organizations (the Services' Investigations Branch); defined their own offences (military, disciplinary and criminal) under UK military law; appointed their own defence and prosecutors—typically, officers; appointed their own judiciary (headed by the Judge Advocate of the Fleet and Judge Advocate General); and maintained their own military court system, which operated their own punishments, and their own detention and corrective training facilities.[7] Where service personnel died abroad, it was generally accepted that they would be buried abroad and not brought back to the UK, and thus they did not fall within the jurisdiction of domestic law. Articulating the 'right to be different', His Honour Judge Jeff Blackett, Judge Advocate General, argued that 'by and large the Military Justice System supports the operational effectiveness of the Armed Forces ... and in uncertain times secures the confidence of sailors, soldiers and airmen that they will be treated fairly by people who understand their unique position'.[8]

The fifth principle was that while there would always be specific cases that raised the possibility of a miscarriage of justice, there was tacit acquiescence from families and supporters that they had no say in decisions concerned with disciplinary issues nor any ability to challenge the decisions of the MoD. There was also rather general acceptance that the government of the day should determine the preparation and conduct of military operations—especially the appropriate levels of prior training, equipment and command responsibility.

Jointly and severally, these five interlinked principles profoundly shaped the values, beliefs, attitudes and behaviours of service personnel. Equally importantly, they provided the frame of reference for the position of the armed forces as a social institution, and thus supported the claim of the armed forces to the right to be

[7] There was, however, a right of appeal to the Courts Martial Appeals Court, made up of judges of the Court of Appeal (Criminal Division), and from there to the House of Lords. The Royal Navy, the British Army and the Royal Air Force had broadly similar arrangements but since 2009 all three services have operated under a single system of service law.

[8] Office of the Judge Advocate General, House of Commons Constitutional Affairs Committee, Second Report of Session 2005–06, HC 731 (London: The Stationery Office, 12 Dec. 2005), http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/731/731.pdf, accessed 16 Feb. 2012.

different from society at large. Together, they embodied commanding and uncontested assumptions about relationships and behaviours, creating and sustaining a 'civil–military relations gap' between the armed forces on the one hand and society on the other. They did, however, provide certainty and protection to service personnel, and their commanders, who were asked to use lethal force and lay down their lives in the service of their country—what James Burke terms the protection of a 'golden shield'.[9]

Challenging the way we were

In recent decades the old order, outlined above, has come under sustained challenge. Six developments in particular have been instrumental in disturbing the status quo. First is the creation of legal jurisdiction beyond UK national territory. Richard Ball notes that after the European Communities Act 1972 incorporated European Community law into the domestic legislation of the UK, the prevailing view was 'that Member States retained absolute competence over the military and the composition of the armed forces such that European Law had no impact on the operation of the military'.[10] However, in 1991 this claim was subject to judicial review (*Leale and Lane*) and further contested in two cases in the European Court of Justice (ECJ) (*Marshall II* and *Emmott*).[11] The judgments were that UK policy was incompatible with the legal rights provided by the EC Equal Treatment Directive and that compensation claims could be heard before industrial tribunals.

In attempting to respond to these judgments, in 1994 the government adopted a piece of secondary legislation to the Sex Discrimination Act to the effect that 'nothing 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.' This shored up the UK position, but the ECJ has made a series of further judgments which limit member states' competence to take decisions on the organization of their armed forces in order to ensure their security. For example, in the *Sirdar* case in 1999, the ECJ ruled that a blanket ban on women serving in the armed forces on the basis of combat effectiveness would be unjustified, while acknowledging that a more narrow restriction might apply.[12] Thus, women could be excluded if the organization involved 'special combat units pursuing activities for which sex is a determining factor'.[13] Furthermore, since 1976 Council Directive 76/207/EEC has required the UK to conduct a reassessment at least every eight years. Today, around 70 per cent of army and navy posts, and 95 per cent of those in

[9] James Burke, comment at the Inter-University Seminar on Armed Forces and Society, Chicago, 20–23 Oct. 2011.

[10] Richard Ball, 'Discrimination in the armed forces: a comparative analysis of the impact of UK and US civilian law on the military', paper presented at Inter-University Seminar on Armed Forces and Society, Chicago, 20–23 Oct. 2011.

[11] *R* v. *Secretary of State for Defence, ex p. Leale, Lane and EOC* [1993]); Case C-271/91 *Marshall* v. *Southampton and South-West Hampshire AHA* [1993] ECR I-4367 (ECJ) para. 24; Case C-208/90 *Emmott* [1991] ECR I-4269 (ECJ).

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

[13] Sean Rayment, 'Army warned by own lawyers over ban on women serving in combat units', *Daily Telegraph*, 27 Sept. 2008, http://www.telegraph.co.uk/news/newstopics/onthefrontline/3089327/Army-warned-by-own-lawyers-over-ban-on-women-serving-in-combat-units.html, accessed 16 Feb. 2012.

the RAF, are open to women.[14] In relation to industrial tribunals, after the ECJ judgments referred to above seven test cases were heard before the Employment Appeal Tribunal (EAT), leading to clear guidelines for industrial tribunals to apply in future compensation cases.[15] In 2009 an EAT ruling further established that the MoD could no longer automatically rely on national security arguments to justify its claim to hold hearings in private.[16] Since 2009 the Lisbon Treaty has given the Charter on Fundamental Rights of the EU the same legal value as the Treaties of the European Union: this, Richard Ball suggests, opens up yet another front for UK governments balancing the competence of the state over the military with the nation's obligations as an EU member state.[17]

In addition, the emergence of new EU regulations that have not been specifically drafted with the armed forces in mind, but have an impact on it, remains a continuing cause for concern. For example, James Kirkup reported alarm in the MoD at the 2011 EU Victims Directive, which as currently drafted 'would force the Armed Forces to offer additional counselling and other services to people alleging they had been mistreated by British personnel ... and anyone claiming they had been mistreated by British personnel anywhere in the world would acquire "directly enforceable rights" in the British military justice system'.[18] Similarly, in 2011 Mark Hookham suggested that guidance to reinforce the EU Directive on Habitats, 'which prevents the deliberate disturbance of protected species', might bar the Royal Navy from using sonar if cetaceans were in close proximity, or expose the MoD to legal action.[19]

In addition to the supranational role of the ECJ, various judgments from the European Court of Human Rights (ECtHR) have further challenged the British state's capacity to regulate the armed forces. The UK was a signatory to the Convention for the Protection of Human Rights and Fundamental Freedoms, known as the European Convention on Human Rights (ECHR), which came into effect in 1953, the exceptional right of individual petition to the ECtHR being granted in 1966. The impact of extraterritoriality received a further boost through the Labour government's passage of the 1998 Human Rights Act (HRA), which enacted into domestic law the ECHR, the primary effect of which is to make human rights as expressed in the ECHR justiciable in the domestic courts

[14] Ministry of Defence, 'Women in combat', http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/PolicyStrategyandPlanning/WomenInCombat.htm, accessed 17 Feb. 2012. For the latest report, see also Ministry of Defence, *Report on the Review of the exclusion of women from ground close-combat roles*, Nov. 2010, http://www.mod.uk/NR/rdonlyres/831909C3-F443-49AE-A245-EB5C528AE5F7/0/Report_review_excl_woman_combat_pr.pdf, accessed 23 Oct. 2011. On 8 Dec. 2011 the MoD announced a lifting of the ban on women serving in submarines from 2013 because claims of health risks to women were unfounded.

[15] The government subsequently amended s. 85(4) of the Sex Discrimination Act 1975, through the Sex Discrimination Act 1975 (after amendment by the Sex Discrimination Act 1975) (Application to Armed Forces etc.) Regulations 1994.

[16] Equality and Human Rights Commission, 'MoD can no longer rely on national security argument to hold cases in private', 8 Sept. 2009, http://www.equalityhumanrights.com/news/2009/september/mod-can-no-longer-rely-on-national-security-argument-to-hold-cases-in-private/, accessed 16 Feb. 2012.

[17] Ball, 'Discrimination in the armed forces'.

[18] James Kirkup, 'EU directive for crime victims undermines armed forces, warns MoD', *Daily Telegraph*, 3 Jan. 2012, http://www.telegraph.co.uk/news/uknews/defence/8970346/EU-directive-for-crime-victims-undermines-Armed-Forces-warns-MoD.html, accessed 16 Feb. 2012.

[19] Mark Hookham, 'Navy to face legal action for whale worrying', *Sunday Times*, 8 Jan. 2012, p. 8.

rather than by petition to ECtHR. This permitted UK courts to further develop human rights judgments based on the ECHR and the jurisprudence of the ECtHR. Ball notes: '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'.[20] In addition, Parliament passed the International Criminal Court Act 2001 (ICCA), through which the UK agreed to be bound by the Rome Statute of the International Criminal Court (ICC). Among other elements, the Act incorporates into domestic law Rome Statute offences of genocide, war crimes and crimes against humanity. It also ends impunity provided by states for persons accused of genocide, crimes against humanity and war crimes, though prosecution at the court arises only if the signatory state is unable or unwilling to prosecute under domestic legislation.[21] The cumulative effect of the HRA 1998 and the ICCA 2001 has been that UK governments are no longer automatically the final arbiter of the legality of actions in certain circumstances—thus removing the 'golden shield' protection for UK service personnel.

A particular consequence of the effect of the ECHR as a treaty internationally binding on the Crown, and its subsequent incorporation into domestic law under the HRA, is that courts have become the principal arena for the determination of key aspects of the conduct of war, through important judgments about the extent of the obligations of the state extraterritorially under the ECHR.[22] There have been seven landmark rulings. Four cases between 1982 and 1992, and in particular *McKerr* (2001), led to rulings that ten suspected Irish republican terrorists had their human rights violated under article 2 of the ECHR through a failure to conduct proper investigations without which the right to life was violated.[23] In *Lustig-Prean and Beckett* (1999), and *Smith and Grady* (1999), based on claimants' right to privacy and private life under article 8 of the ECHR, the ECtHR judgment rejected MoD claims that morale and operational effectiveness would be undermined, leading directly to the lifting in 2000 of the ban on openly gay people serving in the armed forces.[24] This in turn led to the creation of an 'Armed Forces Code of Social Conduct', which has become the dominant reference point in regulating social misconduct on the part of all service personnel.[25]

In *Smith* (2010) the MoD conceded that the ECHR applies to British troops within military bases in Iraq, but only in certain circumstances.[26] In respect of

[20] Ball, 'Discrimination in the armed forces.'

[21] 'International Criminal Court "altered behaviour"—UN', BBC News, 31 May 2010, http://news.bbc.co.uk/1/hi/world/africa/10196907.stm, accessed 16 Feb. 2012.

[22] The French government issued a reservation (as did some more recent members of the Council of Europe) to the ECHR applying to discipline within their armed forces. I am grateful to Peter Rowe for this point.

[23] *McCann and Others* v. *United Kingdom* 18984/91 [1995] ECHR 31 (27 Sept. 1995); *McKerr* v. *United Kingdom* 28883/95 [2001] ECHR 329 (4 May 2001).

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

[25] Ministry of Defence, 'Armed Forces Code of Social Conduct: policy statement', http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/Personnel/EqualityAndDiversity/ArmedForcesCodeOfSocialConductPolicyStatement.htm, accessed 16 Feb. 2012.

[26] The concept of jurisdiction accepted in *Smith* (2010) now appears too narrow, since the ECtHR in *Al-Skeini* v. *United Kingdom* (2011) has decided that 'jurisdiction' is considerably wider than previously thought by the

service personnel killed overseas on operations in Iraq, the court set out the circumstances in which a coroner is obliged to hold an inquest compliant with article 2 of the ECHR, that is to say a transparent independent investigation that involves the family.[27] In *Albutt and Others* (2011), involving British soldiers killed or injured through poor equipment and/or training provided to troops in Iraq, the judge ruled that combat immunity 'should be "narrowly construed" (para. 99) and that in this case the claims as a result of allegedly faulty equipment should be allowed to proceed'.[28] In *Maya Evans* (2010), a judicial review of UK detainee transfer policy applying to Afghans captured by British soldiers, the ruling, drawing on the ECHR, concluded that transfers had to be lawful and established specific obligations, notably the need for British monitors to have regular access to the detainees and to ensure that transferred detainees were not subjected to torture or serious mistreatment.[29] In relation to *Al-Skeini and Al-Jedda* (2011), the ECtHR examined the MoD's investigative procedures in Iraq before the Armed Forces Acts of 2006 and 2010. Notwithstanding the MoD's concession before the House of Lords that the ECHR applied to those who were under the exclusive physical and legal control of the UK in Iraq, the Grand Chamber also found that Iraqi civilians in Iraq were within the jurisdiction of the UK for the application of the ECHR once detained (or killed) on the battlefield by British forces.[30] Finally, in the latest case of *Ali Zaki Mousa* (2011) the Court of Appeal found that the Iraq Historical Allegations Team (IHAT) set up under the Provost Martial (Army) to investigate allegations of abuse in Iraq was not sufficiently independent to conduct an investigation. It ruled that the government had failed to meet its duties under article 3 of the ECHR and should review the need to establish a public inquiry to meet those ECHR obligations.[31]

A second challenge to the status quo is that any sense of an enduring national interest has been replaced with something far more contested, and this has further transformed the relationship between the British armed forces and the government. In the decades following the Second World War, British governments were consistently unwilling to review previous governments' decisions in relation to the conduct of service personnel engaged in military operations on behalf of the Crown. But since 1979, and especially since 1997, this has changed. The actions of the Blair, Brown and Cameron governments have left an impression that it can no longer automatically be assumed that one government's view of what is appropriate in this context will be upheld by another. Indeed, the 1998 decision by

House of Lords. I am grateful to Peter Rowe for this point.

[27] *R (on the application of Catherine Smith) (Claimant)* v. *Oxfordshire Assistant Deputy Coroner (Defendant) & Secretary of State for Defence (Interested Party)* [2006] EWHC 694); *Smith and Ors* v. *Ministry of Defence* [2011] EWHC 1676 QB.

[28] *R (Allbutt)* v. *Ministry of Defence and Others* [2011]; Adam Wagner, 'Strasbourg ruling may change UK's responsibilities under the Human Rights Act', *Guardian*, 4 July 2011, http://www.guardian.co.uk/law/2011/jul/04/iraq-al-skeini-human-rights-act, accessed 16 Feb. 2012.

[29] *The Queen (on the application of Maya Evans)* v. *Secretary of State for Defence [2010] EWHC 1445 (Admin)*; Richard Norton-Taylor, 'Afghan detainees must be safeguarded against abuse, says high court', *Guardian*, 25 June 2010, http://www.guardian.co.uk/uk/2010/jun/25/afghan-detainees-safeguard-high-court, accessed 16 Feb. 2012.

[30] *Case of Al-Skeini and Others* v. *United Kingdom* (2011) Application no. 55721/07; and *Case of Al-Jedda* v. *United Kingdom* (2011) Application no. 27021/08.

[31] The Queen on the application of *Ali Zaki Mousa)* v. *Secretary of State for Defence and Anr* (2011), EWCA Civ 1334.

Tony Blair to hold a public inquiry into the events of Bloody Sunday in 1972, and Gordon Brown's 2009 decision to launch an inquiry into the UK's involvement in Iraq and lessons to be learned from it, appear to have been based on calculations of political advantage rather than an enduring sense of the national interest.[32]

A third challenge to the status quo is the breakdown in cohesion of the parastatal organizations which in the past have often served the government of the day but now contest its authority.[33] The most active of these have been the Equality and Human Rights Commission (EHRC) and its predecessor organizations the Commission on Racial Equality (CRE) and the Equal Opportunities Commission (EOC), which have played an important role in contesting MoD policies and practices. Since the passage of the Race Relations Act 1976 (RRA 1976) there has been a duty on the armed forces not to discriminate against individuals on the basis of their race. Reported breaches and high-profile legal challenges led the CRE to launch an investigation into the Household Division in 1994.[34] On the basis of its view that the army had discriminated unlawfully it threatened to serve a non-discrimination notice—'effectively legal sanctions to impose race equality measures—against the Ministry of Defence'.[35] In 1996 the MoD agreed to implement a five-year action plan applicable to all three services, and this culminated in a partnership agreement between the MoD and the CRE in 1998, the setting of ethnic minority recruitment goals in 1998, and in 2002 the publication of equality schemes. The Armed Forces Act 1996 (and subsequent Acts) incorporated race relations provisions, and the RRA 1976 was amended to enable service personnel to bring cases of discrimination through (civilian) employment tribunals.[36]

Despite these developments, serious cases continue to come forward and these are now settled in employment tribunals. A notable such case was *DeBique* (2010), which raised the combined issues of race and sex discrimination.[37] The EAT accepted the right of the army to set a provision, criterion or practice (PCP) that required soldiers to be in a state of readiness at all times, that it was reasonable to define this as being available for duty 24/7 and that a PCP was necessary for combat effectiveness. However, the EAT also ruled that women were particularly disadvantaged in this context because they were more likely than men to be single parents with primary child-care responsibility, and that this relative disadvantage constituted indirect discrimination under the 1975 Sex Discrimination Act.[38] The

[32] Forster, 'The military, war and the state', p. 59; 'The leader: bloody ridiculous', *Spectator*, 14 June 2003, http://www.spectator.co.uk/politics/all/11218/bloody-ridiculous.thtml, accessed 16 Feb. 2012.

[33] Forster, 'The military, war and the state', p. 62.

[34] *R* v. *Army Board of the Defence Council ex p. Anderson* [1991] ICR 537.

[35] Commission for Racial Equality, *Report of a formal investigation into the Ministry of Defence (Household Cavalry)* (London: CRE, 1996); 'Army improves racism record', BBC News, 25 March 1998, http://news.bbc.co.uk/1/hi/uk/69507.stm, accessed 16 Feb. 2012.

[36] Memorandum from the Commission for Racial Equality (2 Oct. 2000), Select Committee on Defence, Minutes of Evidence, 25 Oct. 2000, http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmdfence/689/0102506.htm, accessed 16 Feb. 2012.

[37] *Ministry of Defence* v. *DeBique* [2010] IRLR 471.

[38] The EAT also ruled that indirect discrimination had taken place, contrary to the Race Relations Act 1976: 'Soldier on: *Ministry of Defence* v. *DeBique*', Thompsons Solicitors, 10 Dec. 2009, http://www.thompsons.law.co.uk/ltext/lelr-weekly-146-soldier-on.htm, accessed 16 Feb. 2012; 'Single mother soldier DeBique "lost hope in system"', BBC News, 13 April 2010, http://news.bbc.co.uk/1/hi/uk/8616866.stm, accessed 16 Feb. 2012.

EOC and EHRC have been equally active in sex discrimination cases, notably in relation to the right of women to serve in all branches of the armed forces.[39]

A fourth challenge to the status quo has been the erosion of Crown immunity. In relation to the duty of care beyond the battlefield, the Health and Safety at Work Act 1974 (Application Outside Great Britain) (HSWA) applies to the armed forces within the UK and to specified offshore facilities/activities within territorial waters. Lesley Casey argues that while service personnel 'cannot sue the MoD for injuries sustained in a combat situation with the enemy, the MoD are subject to the same duties that all employers have: to provide their employees with a safe system of work including supervision, training, equipment, competent colleagues etc.'.[40] Though the MoD remains exempt from criminal prosecution by service personnel, since a change to Crown immunity in 1987 service personnel are able to sue the MoD for negligence, and a number of landmark cases have subsequently shaped custom and practice with respect to the MoD's duty of care.[41] The Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA), which came into effect in 2008, was introduced to ensure that organizations which operate in a manner that is grossly negligent can be prosecuted through criminal law.[42] The CMCHA therefore allows juries 'to consider the attitudes, policies, systems and accepted practices within the organisation that may have contributed to the death and any accepted guidance that governs the activity'.[43] The MoD does not have Crown immunity from the legislation, though this law does not apply to the battlefield. The full implications of the CMCHA are currently being tested through the courts: the first case was concluded in 2011 and the outcome was reported to have caused anxiety in the MoD.[44]

A fifth challenge to the status quo has focused on the commanding and uncontested assumptions about the relationships and behaviours of service personnel themselves. Since 1997 families and service personnel have sought to use the legal process to hold the government to account in domestic courts for the conduct of war. Families and other interested parties, often with the support of legal advocacy groups and their representatives—notably Phil Shiner of Public Interest Lawyers,

[39] See e.g. EHRC evidence to the 2010 Ministry of Defence review, *Report on the Review of the exclusion of women from ground close-combat roles*, annex C.

[40] Lesley Casey, 'Claims against the Ministry of Defence (MOD): are they fighting fairly?', alexanderharris, 19 July 2004, http://www.alexanderharris.co.uk/News/Personal%20Injury/Pages/ClaimsagainsttheMinistryofDefence(MOD)-aretheyfightingfairly.aspx, accessed 16 Feb. 2012.

[41] However, the MoD is a Crown body and as a consequence the Health and Safety Executive can only issue Crown enforcement notices and issue a Crown censure in lieu of criminal proceedings. A number of cases have been important in clarifying the MoD's responsibilities, notably *Barrett* v. *Ministry of Defence* [1995] 3 All ER 87; *Mulcahy* v. *Ministry of Defence* [1996] EWCA Civ 1323; *Jebson* v. *Ministry of Defence* [2000] 1 WLR 2055; *Multiple Claimants* v. *Ministry of Defence* [2003] EWHC/1134 (QB); *Bailey* v. *Ministry of Defence* [2008] EWCA Civ 883; *Ministry of Defence* v. *Radclyffe* [2009] EWCA Civ 635; *Uren* v. *Corporate Leisure (UK) Limited and Ministry of Defence* [2011] EWCA Civ 66.

[42] Health and Safety Executive, 'Ministry of Defence (MoD) and the armed forces', http://www.hse.gov.uk/services/armedforces/faqs.htm, accessed 16 Feb. 2012.

[43] 'First corporate manslaughter case is sentenced', Eversheds, 21 Feb. 2011, https://www.eversheds.com/uk/home/articles/index1.page?ArticleID=templatedata%5CEversheds%5Carticles%5Cdata%5Cen%5CLocal_government%5CFirst_Corporate_Manslaughter_Case_is_Sentenced, accessed 16 Feb. 2012.

[44] Brian Brady and Jonathan Owen, 'One-third of deaths in Britain's military caused by accidents', *Independent*, 22 Feb. 2009, http://www.independent.co.uk/news/uk/home-news/onethird-of-deaths-in-britain8217s-military-caused-by-accidents-1628935.html, accessed 16 Feb. 2012.

Dan Leader, a solicitor with Leigh Day and Co., and Jocelyn Cockburn of Hodge Jones and Allen—have been prepared to challenge the MoD.

One high-profile example is the 'Shot at Dawn' campaign, in which families campaigned for a pardon for soldiers executed for cowardice during the First World War.[45] Peter Whiffen-Taylor notes that 'five successive governments rejected appeals to pardon the soldiers'.[46] In 2006 a test case was eventually brought by the family of Private Farr, one of the soldiers executed in 1916. They sought a judicial review on the grounds that the outcome was 'unreasonable, flawed and wrong in law', based on arguments that the effects of shell shock were known at the time and that Private Farr was not offered a defence counsel at his court martial. The High Court judge ruled that there 'was room for argument ... that the military authorities should not in all the circumstances have imposed the death penalty [and that] ... it seems to me a point which is worthy of a decision by the court'.[47] Rather than face more than 300 separate cases for judicial review, the Secretary of State for Defence waived 'the review announced somewhat reluctantly by the MoD' and tabled emergency legislation which granted a mass pardon through an amendment to the Armed Forces Act 2006.[48]

This increasing resort to the courts by the families of serving personnel might also reflect the different context in which the armed forces have been used in recent years. Conflicts since 1997, especially, have been 'wars of choice' rather than wars of national survival involving the direct defence of the UK homeland; moreover, these wars have not commanded widespread domestic support. Some actions of families have focused on the legality of military operations in Iraq, but in general families have focused on the government's duty of care to service personnel, especially in relation to provision of equipment, individual operational decisions and adequate medical care.[49]

It is doubtful that families could have achieved such a prominent 'voice' had it not been for the accidental consequences of two developments in a little-known part of the UK legal system. First, rule 42 of the 1984 Coroners' Rules saw the emergence of narrative verdicts that created an opportunity for coroners to provide a more nuanced description of how a death occurred as well as the established formulation 'unlawfully killed on active service'. Second, inquests were conducted by the coroner to whose jurisdiction the deceased was returned—which happened to be first Brize Norton in Oxfordshire and subsequently Lyneham in Wiltshire. This

[45] See '"Shot at Dawn" campaign', *BBC History*, 30 Oct. 2011, http://www.shotatdawn.info/index.html, accessed 16 Feb. 2012.

[46] Peter Taylor-Whiffen, '"Shot at Dawn": cowards, traitors or victims', *BBC History*, 3 March 2011, http://www.bbc.co.uk/history/british/britain_wwone/shot_at_dawn_01.shtml, 3 March 2011, accessed 16 Feb. 2012.

[47] Mark Honigsbaum, 'Judge offers hope to family of soldier executed for cowardice', *Guardian*, 17 May 2005, http://www.guardian.co.uk/uk/2005/may/17/military.markhonigsbaum, accessed 16 Feb. 2011.

[48] This granted posthumous conditional pardons to all soldiers executed in the First World War for military offences. See Ben Fenton, 'Pardoned: the 306 soldiers shot at dawn for "cowardice"', *Daily Telegraph*, 16 Aug. 2006, http://www.telegraph.co.uk/news/1526437/Pardoned-the-306-soldiers-shot-at-dawn-for-cowardice.html, accessed 16 Feb. 2012.

[49] In relation to the legality of the Iraq War, the appeal judges allowed the families to challenge the government's refusal to hold a public inquiry rather than the legality of the war itself. See 'Soldiers' families win Iraq war review', *Guardian*, 26 July 2006, http://www.guardian.co.uk/uk/2006/jul/26/iraq.iraq, accessed 16 Feb. 2012.

gave prominence to Andrew Walker and David Masters, who presided in the local coroners' courts and between them became responsible for passing judgments on almost all service deaths in Iraq and Afghanistan from 2006 to 2010.[50] For example, in February 2008, at the inquest on Captain James Philippson, Walker accused the MoD of betraying soldiers' trust by sending them to Afghanistan without adequate equipment. 'They [the soldiers] were defeated not by terrorists but the lack of basic equipment. To send soldiers into a combat zone without basic equipment is unforgivable, inexcusable and a breach of trust between the soldiers and those who govern them.'[51] Equally vociferous was David Masters's verdict on the inquest into the deaths of ten servicemen killed in a Hercules air crash in Iraq in January 2005, in which he spoke of a 'breach of trust' and 'systematic failures'.[52]

The combined effect of these two developments was to provide an arena independent from the MoD in which families could contest the cause of death of loved ones, using the powers of the coroners' courts to demand the MoD release information to families on the circumstances and cause of death. In addition, Walker and Masters quickly came to be seen as the champions of service families, willing to deliver verdicts which contained influential criticism of the MoD and individuals in their duty of care towards service personnel.[53] Indeed, so vociferous was the criticism by Andrew Walker in *Smith* (2010) that the Supreme Court was asked to rule on the Deputy Assistant Coroner's use of language that implied a civil legal liability on the MoD in breach of the laws governing inquest procedures (rule 42(b)).

A final challenge to the status quo has come from an action the government has taken itself. Often, in the face of criticism of a course of action or where there is no definitive view of events, governments and the courts have chosen to establish public or judicial inquiries, or departmental inquiries or reviews, regulated by the 1921 Tribunals of Inquiry (Evidence) Act and subsequently the Inquiries Act 2005.[54] In relation to the armed forces there have been or are now under way seven major public inquiries and reviews. The Hutton Inquiry, investigating the circumstances of the death of an MoD scientist, reported in 2004;[55] the Saville Inquiry, which looked at the events of Bloody Sunday, reported in 2010;[56] the Deepcut Review, led by Nicholas Blake QC, investigated the deaths of four soldiers at Deepcut Barracks between 1995 and 2002 and led to the appointment

[50] As a result of the Coroners and Justice Act 2009 coroners' inquests are now heard throughout the country. In 2011 RAF Brize Norton was permanently selected as a repatriation base to replace RAF Lyneham.

[51] Kim Sengupta, 'Defective military equipment is a breach of human rights', *Independent*, 12 April 2008, http://www.independent.co.uk/news/uk/home-news/defective-military-equipment-is-a-breach-of-human-rights-808142.html, accessed 16 Feb. 2012.

[52] '"Failures" caused Hercules deaths', BBC News, 22 Oct. 2008, http://news.bbc.co.uk/1/hi/7683909.stm, accessed 16 Feb. 2012.

[53] Nico Hines, 'Andrew Walker: the coroner the MoD couldn't gag', *The Times*, 11 April 2008, http://www.timesonline.co.uk/tol/news/uk/article3728831.ece, accessed 17 Feb. 2012.

[54] For a typology see Forster, 'The military, war and the state', p. 58.

[55] *Report of the inquiry into the circumstances surrounding the death of Dr David Kelly CMG* (London: TSO, 28 Jan. 2004), HC 247, 2004, http://www.the-hutton-inquiry.org.uk/content/report/, accessed 16 Feb. 2012.

[56] *The Report of the Bloody Sunday Inquiry* (London: TSO, 15 Jan. 2010), http://webarchive.nationalarchives.gov.uk/20101103103930/http:/www.bloody-sunday-inquiry.org/, accessed 16 Feb. 2012.

of an independent Service Complaints Commissioner;[57] and the Nimrod Review, led by Charles Haddon-Cave QC, was asked to assess where responsibility lay for the loss of Nimrod XV230 with the death of 14 personnel and reported in 2009 with an extensive range of recommendations, many related to health and safety and the duty of care owed by the MoD to service personnel.[58]

In 2011 Lord Philip's non-statutory independent inquiry concluded an investigation into a helicopter crash in 1994 in the Mull of Kintyre which killed 29 people on board. This was one of the worst losses of life in peacetime in the RAF.[59] The inquiry concluded that the senior RAF officers failed to adhere correctly to the standard of proof of 'absolutely no doubt' in deciding the question of negligence, and that senior officers used a standard of proof that meant whatever the RAF wanted it to mean. The Philip Inquiry cleared the aircrew of responsibility for the crash. In addition, the inquiry found that the MoD should reconsider its policy and procedures for the transport of personnel whose responsibilities are vital to national security. Whether correct or not, for some the impression was that senior officers were choosing to blame junior officers rather than admit to institutional and policy failures for which they were responsible. In 2008 boards of inquiry were replaced by service inquiries under the Armed Forces Act 2006, providing an opportunity for greater family engagement in cases where no operational or data protection considerations prevented it; and in 2011 an autonomous professional Military Air Accident Investigation Branch was created in response to Haddon-Cave's recommendations.[60]

In 2011 Sir William Gage's inquiry concluded its investigation into the death of Baha Mousa, providing a further example of quite how wide-ranging the impact of a public inquiry can be. It examined the death of Baha Mousa, an Iraqi civilian who died in the custody of British soldiers in Basra in 2003. In 2006 seven service personnel were charged with ill-treatment including war crimes under the ICCA: as a result, one soldier was convicted of inhumane treatment—thereby becoming the first member of the British armed forces to be convicted of a war crime. In 2008 the government admitted to 'substantial breaches' of the ECHR over the death of Baha Mousa and paid compensation to the family. Despite this outcome, the government remained concerned that there had been a conspiracy of silence and the Secretary of State established a new inquiry led by Sir William Gage.[61]

[57] *The Deepcut Review: a review of the circumstances surrounding the deaths of four soldiers at Princess Royal Barracks, Deepcut between 1995 and 2002* (London: TSO, 29 March 2006), HC 795, 2006, http://www.official-documents.gov.uk/document/hc0506/hc07/0795/0795.pdf, accessed 16 Feb. 2012.

[58] *The Nimrod Review: an independent review into the broader issues surrounding the loss of the RAF Nimrod MR2 Aircraft XV230 in Afghanistan in 2006* (London: TSO, 28 Oct. 2009), HC 1025, 2006, http://www.official-documents.gov.uk/document/hc0809/hc10/1025/1025.pdf, accessed 16 Feb. 2012.

[59] Alex Thomson, 'RAF pilots cleared of negligence over Mull of Kintyre crash', Channel 4 News, 13 July 2010, http://www.channel4.com/news/raf-pilots-to-be-cleared-of-mull-of-kintyre-crash, accessed 16 Feb. 2012.

[60] 'Apology as Mull of Kintyre Chinook crash pilots cleared', BBC News, 13 July 2011, http://www.bbc.co.uk/news/uk-scotland-glasgow-west-14130867, accessed 16 Feb. 2012; *Mull of Kintyre Review* (London: TSO, 13 July 2011), HC 1348, http://www.mullofkintyrereview.org.uk/sites/default/files/Mull%20of%20Kintyre%20Review%20Report.pdf, accessed 16 Feb. 2012.

[61] 'Q&A Baha Mousa Inquiry', BBC News, http://news.bbc.co.uk/1/hi/uk/8143982.stm, accessed 16 Feb. 2012. Reportedly this was not without some pressure from Public Interest Lawyers, who were seeking a judicial review to force a public inquiry.

In 2011 the public inquiry made 73 recommendations that affected almost every aspect of the military's handling of detainees.[62] The inquiry also criticized the chain of command for issuing army training manuals that failed to explain that key interrogation methods had been banned by the British since 1972 and were also illegal under the Geneva Conventions. The report's naming of individuals still serving in the army led to their immediate suspension accompanied by the possibility of legal action being taken against them. Lawyers and Amnesty International argued that there should now be prosecutions through the civilian courts.[63]

Public Interest Lawyers repeated their demands for a new public inquiry into allegations of mistreatment of other detainees in southern Iraq between 2003 and 2009 (the *Ali Zaka Musa* case), and drew on the outcome of the Baha Mousa inquiry to support their appeal against the earlier High Court judgment against them. The Al-Sweady Inquiry led by Sir Thayne Forbes QC is currently considering allegations (as yet unproven) that British soldiers shot a number of captured Iraqis in a UK base in the aftermath of the so-called Battle of Danny Boy when UK forces were attacked by several hundred insurgents, leading to fatalities on both sides.[64]

Establishing the new order

Applying Rubin's definition of juridification, defined as the colonization of the conduct of conflict by legal criteria which have drawn judges into arbitrating on issues previously based on trust, there appears to be a strong case that there has been a juridification of the armed forces—at least in the British context.[65] However, for others, notably Peter Rowe, since the rule of law should apply to all aspects of life, this should be seen not as a process of juridification but rather as a reflection of the principle that the armed forces must comply with national and international law.[66] At one level this is of course right; but the prism through which Peter Rowe sees the world masks what has happened, especially over the last decade and a half, in that there is now a greater opportunity for individuals (whether service personnel, their families or advocacy groups) to seek to challenge the professional autonomy of the armed forces.

First, the British government no longer sets out the bargain between the state and the armed forces—or no longer does so in quite the way that it did in the past. British governments and the military chain of command do not have exclusive ability to regulate unlawful or inappropriate conduct. Reference points that

[62] *Report of the Baha Mousa Inquiry* (London: TSO, 2011), HC 1452, http://www.bahamousainquiry.org/, accessed 16 Feb. 2012; 'Baha Mousa inquiry makes 73 recommendations', *Guardian*, 8 Sept. 2011, http://www.guardian.co.uk/world/2011/sep/08/baha-mousa-inquiry-recommendations, accessed 16 Feb. 2012.

[63] 'Army suspends Baha Mousa soldiers as more prosecutions are considered', *Guardian*, 9 Sept. 2011, http://www.guardian.co.uk/world/2011/sep/08/army-suspends-baha-mousa-soldiers, accessed 16 Feb. 2012. http://www.haguejusticeportal.net/Docs/NLP/UK/Mousa_and_others_v_SSDefence_and_another_High_Court_16-07-2010.pdf, accessed 17 Aug. 2010.

[64] Al-Sweady Public Inquiry, http://www.alsweadyinquiry.org/, accessed 16 Feb. 2012.

[65] Rubin, 'United Kingdom military law', p. 38.

[66] Email correspondence 4 Nov. 2011.

frame appropriate and inappropriate values, beliefs, attitudes and behaviours on the part of service personnel have moved from being internal, under the direct control of the government and the senior command of the armed forces, to being driven by external legal reference points, most notably the European treaties, the ECHR and the Rome Statute of the ICC, all of which are having a profound effect on how the state discharges its judicial obligations. Key decisions taken are more likely to be made in public inquiries, the civilian courts of the UK—ranging from coroners' courts to the Supreme Court—and beyond the UK to the ECJ in Luxembourg and the ECtHR in Strasbourg. No longer can service personnel act with impunity under the protection of the British government.

Second, the twin foundation stones of the legal protection of the UK armed forces and the MoD—combat immunity and Crown immunity—have also been substantially altered. As Basu argues, human rights have been 'the most fertile ground for limiting or reducing the scope of the combat immunity principle'.[67] Rulings based on the ECHR have extended rights to service personnel (and those held under their jurisdiction, notably detainees), who are now entitled to have expectations of reasonable care under article 3 and potentially article 8 of the ECHR, notably in relation to the provision of adequate equipment.[68] There has been equivalent challenge to the concept of Crown immunity, eroded as it has been by health and safety legislation and the CMCHA, the totality of which has led to substantial change in the legal protection afforded to service personnel beyond the battlefield and new access to civilian justice.

Third, in joining the British armed forces, service personnel are no longer willing to accept restrictions on their human rights to the extent that was hitherto the case. In the UK, service personnel now have rights protected by law in relation to race, gender, sexual orientation, religion or belief, and marriage/civil partnership, as well as some more limited rights in relation to disability and age. Moreover, the adjudication of the application of these rights in the courts over the past 20 years, and especially in the past decade and a half, has led to a very significant revolution in the culture, conduct and organization of the armed forces. The cumulative effect is a transformation from a 'professional soldier' voluntarily eschewing their rights to a 'citizen soldier' who is in a unique position, but whose fundamental rights are nonetheless protected.

Fourth, the legal system governing the armed forces is no longer autonomous but nested within and connected to a wider European legal governance regime. Military investigations, evidence and proof now have to meet equivalent standards found in civilian life. In particular, the ECtHR has established key benchmarks of what is and is not acceptable, notably that a military justice system must be independent and impartial and punishments proportionate. In addition to the replacement of boards of inquiry with service inquiries, in 2010 the MoD created the IHAT, led by a retired senior civilian policeman, to provide additional

[67] Basu, 'Challenging the combat immunity principle', p. 21.

[68] However, it appears that courts 'will remain unmoved by criticisms of mistakes made in (or in relation to) the heat of battle': Basu, 'Challenging the combat immunity principle', p. 22.

independent investigative capacity to address allegations of abuse of Iraqis using civilian 'achieving best evidence' guidelines.[69] The repatriation of the dead (post *Falklands and Smith* (2010)) means that the deaths of service personnel fall within the jurisdiction of domestic law and the requirement that an inquest be conducted.

Fifth, the range of actors demanding—or holding—a position in policing the norms, behaviours and practices of the British armed forces has also changed. Not only have families played a key role; so too have human rights campaign groups and legal practices such as Public Interest Lawyers, Leigh Day and Co., and Hodge Jones and Allen. In addition, senior legal figures who have led public inquiries (Hutton, Saville, Blake, Haddon-Cave, Philip and Gage) and coroners (such as Walker and Masters) have all passed judgments that have had a profound impact on the British armed forces. Even inside the armed forces the role of legal advisers has started to shift, causing significant tensions. In one well-publicized case, the senior legal adviser in Iraq (Commander Legal Land Forces, Iraq) claimed that in 2003 he provided written advice that key practices such as hooding, and failure to observe the need for individual assessment of prisoners and the right of prisoners to legal representation and review of their cases, all contravened the Geneva Conventions and the ECHR. He also alleges that he was told by senior commanders to change his legal opinion which 'contradicts the government line' or face the sack.[70]

The cumulative effect of juridification is that the certainties of the old order have indeed disappeared. This is very worrying for those who need to know the legal basis of the actions service personnel are being asked to undertake—and who will judge them if and when things go wrong. It has also highlighted the contested and fluid definition of many practices of the armed forces—and the much smaller set of practices that remain the exclusive *domaine réservé* of the armed forces. Indeed, following fierce challenge over the last six years to the MoD's treatment of service personnel, the government decided to place the military covenant—the duty of care owed to service personnel—on a legal basis. This is a further symptom of juridification but not its cause.[71] As Christopher Hood and Martin Lodge note, the government has tried to 'enact the Covenant more explicitly into the Act without making military operations fully subject to the oversight of the European Court of Human Rights, involving a balancing act in legislative drafting of the highest (and perhaps ultimately impossible) delicacy'.[72] All this ambiguity sits uneasily in an institution that has drawn strength from clarity of purpose, conduct and culture.

[69] 'Iraq Historical Allegations Team starts work', *Defence Business News*, 1 Nov. 2010, http://www.mod.uk/DefenceInternet/DefenceNews/DefencePolicyAndBusiness/IraqHistoricAllegationsTeamStartsWork.htm, accessed 16 Feb. 2012.

[70] 'Top army lawyer slams MoD over human rights abuses', Channel 4, 12 Oct. 2011, http://www.channel4.com/news/top-army-lawyer-slams-mod-over-human-rights-abuses, accessed 16 Feb. 2012.

[71] Anthony Forster, 'Breaking the military covenant: governance and the British army in the twenty-first century', *International Affairs* 82: 6, Nov. 2006, p. 1044.

[72] Christopher Hood and Martin Lodge, 'The politics of two PSB codifications: the UK's Civil Service Act and military covenant in comparative perspective', paper presented at the European Consortium for Political Research Conference, Reykjavik, 25–27 Aug. 2011, p. 12.

Conclusions

The process of juridification raises the question whether the current situation can best be described as liminal: that is, as defined by Agnes Horvath, Bjørn Thomassen and Harald Wydra, an 'in-between situation ... characterised by the dislocation of established structures, the erosion of hierarchies, and uncertainty regarding the continuity of tradition and future outcomes' that is followed by the establishment of a new and stable order.[73] Some senior commanders in the MoD argue that the British armed forces have been through a specific historical moment in which a new legal regime has been established through a painful but rapid recalibration, and that the current liminality will dissolve for four reasons.

First, the new legal superstructure derived from the ECHR, the HRA and ICCA is bedding down and becoming a settled part of the governance regime. Legal rulings and soft law recommendations from public inquiries and coroners' courts will, over time, lead to black letter law—the emergence and widely accepted interpretation and implementation of new policies and procedures on a wide range of issues such as the handling of prisoners (including hooding, conditioning and the conduct of interrogation); the duty of care to service personnel; and conduct on operations. Perhaps the best example concerns the question of when a soldier is entitled to the right to life while serving overseas.[74] Of the ruling in this case, the Chief of Defence Staff commented: 'This outcome is not about denying rights to our people, it is about ensuring that we have a clear and workable set of rules under which they can carry out their demanding and dangerous work.'[75]

Second, the government is itself taking actions to try to 'fix' the context in which the armed forces are used in a manner that is likely to provide much greater stability. Perhaps the best example is the constraining of coroners through the new Coroners and Justice Act 2009, among other measures by spreading inquests across the country rather than concentrating them in Oxford and Wiltshire, limiting the scope of narrative verdicts, and investing more MoD resources in directly supporting bereaved families.[76]

Third, the armed forces are themselves committed to operating within the law: they have recognized this and have responded to the changed circumstances in which they find themselves in several ways. The MoD has created a Directorate of Judicial Engagement Policy; has enhanced training for service personnel on the application of law of armed conflict; and has established the IHAT to ensure that MoD investigations of reports of abuse are compliant with the ECHR. Even if the

[73] Agnes Horvath, Bjørn Thomassen and Harald Wydra, 'Introduction: liminality and cultures of change', *International Political Anthropology* 2: 1, 2009, p. 1.

[74] I am grateful to Peter Rowe for this point. See Victoria Dawson, 'The right to life: a blunted sword in a soldier's armoury?', *Defence Viewpoints*, 5 July 2010, http://www.defenceviewpoints.co.uk/articles-and-analysis/the-right-to-life-a-blunted-sword-in-a-soldiers-armoury, accessed 16 Feb. 2011; Angus Crawford, 'Analysis: troops human rights ruling', BBC News, 30 June 2010, http://www.bbc.co.uk/news/10467062, accessed 16 Feb. 2012.

[75] 'Judges quash UK troops human rights ruling', BBC News, 30 June 2011, http://www.bbc.co.uk/news/10450556, accessed 16 Feb. 2012.

[76] Lisa Mitchell, 'Ten years of war, 10 years of inquests', BBC News, 4 Oct. 2011, http://www.bbc.co.uk/news/uk-15005484, accessed 16 Feb. 2012.

ECtHR finds the IHAT deficient, it buys time to put in place more independent features than previously existed within the MoD investigative system.[77]

Finally, albeit belatedly, senior commanders have taken a very public stance on the application of the law. In responding to the findings of the 2011 Gage Inquiry into the death of Baha Mousa,

> the charge that [MoD] have an 'ambivalent attitude' to human rights is vigorously rejected by the MoD ... the chief of the general staff has already apologised for the loss of discipline and lack of moral courage that occurred ... troops now undergo training in international humanitarian law and in Afghanistan, where detaining and interrogating key insurgents is critical to our mission, high standards are being set and adherence to them is rigorously monitored.[78]

However, the view that this is merely a process of transition from an old to a new order misdiagnoses the significance of the changes under way. The hierarchical and impenetrable nature of the armed forces directly resulted from the interaction of the five principles constituting the commanding and uncontested assumptions about relationships and behaviours.[79] The erosion of that closed, uncontested and uncodified constellation of norms does more than just close a civil–military relations gap, codifying the relationship between armed forces and society through contestation. It is transforming the very nature of claims to authority over the armed forces that were previously reliant on tradition, hierarchy and a highly privileged account of the state—allied to a notion of national interest and the distinctiveness of military life. In particular, a rights-based system has replaced self-regulation and social notions of authority, tradition, national interest and distinctiveness that underpinned 'the way we were', with a set of claims about the irreducible status of rights and their manifestation in law.[80] A new stability cannot therefore arise from the process of juridification. Rights-based systems bring with them permanent instability because of the inevitable conflicts that arise in relation to rights; and they are inherently unstable, because it is almost impossible to bring all the rights possessed by all the parties involved into alignment. Moreover, moral dilemmas, hard choices and the legal actions which often follow in their wake become an inescapable part of life in a rights-based world. Judicial outcomes are permanently open to new challenge based on different readings of where the proper balance of rights lies. Thus the effects of juridification have initiated a permanent liminality—an enduring instability and the absence of any

[77] Public Interest Lawyers have accused the IHAT of failing to meet civilian standards of evidence collection and have withdrawn their cooperation: see Angus Crawford, 'Iraq Historical Allegations Team probe "is a shambles"', BBC News, 14 June 2011, http://www.bbc.co.uk/news/uk-13757766, accessed 16 Feb. 2012. The approach of buying time to put in place policies and practices amenable to service culture has all the hallmarks of the approach the MoD took in the late 1990s in managing claims that gays should be able to serve openly in the military.

[78] Crawford, 'Iraq Historical Allegations Team probe "is a shambles"'.

[79] Peter Feaver and Richard Kohn, eds, *Soldiers and citizens: the civil–military relations gap and American national security* (Cambridge, MA: Harvard University Press, 2001).

[80] I am very grateful to John Williams for developing my thinking on this issue in relation to rights-based social systems.

final settlement—for the government, the armed forces and for society.[81] They have also provided a new social, political and legal context in which British armed forces now have to operate.

[81] The analytical concept of permanent liminality is taken from Bjørn Thomassen, drawing on the work of Arpad Szakolczai. See Arpad Szakolczai, *Reflexive historical sociology* (London: Routledge, 2000), p. 220; Bjørn Thomassen, 'The uses and meanings of liminality', *International Political Anthropology* 2: 1, 2009, p. 15.