

Book Review — Civil-Military ‘Legal’ Relations: Where to from Here? The Civilian Courts and the Military in the United Kingdom, United States and Australia

Pauline Collins

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There would be very few people who have not seen the 1980 Bruce Beresford-directed movie *Breaker Morant*, or Tom Cruise starring in the 1992 American military drama *A Few Good Men*. Military courtrooms make for great public interest viewing. Indeed, the screenplay writers for these two movies capture well the courts martial process. They place the military legal systems (Boer War and US Marine Base Guantanamo respectively) under a captivating spotlight. And few viewers would reach a conclusion from these stories other than that the military courts have the power and authority to determine the fate (even death in the case of the British and Australian soldiers in the Boer War) of those within their ranks who break the ‘rules’ with little objection or interference from the civilian courts.

We know, predictably, that the reality is not that simple. Pauline Collins, in this latest contribution to the publisher’s International Humanitarian Law Series, deftly and carefully explores the place of civilian courts in the civil-military nexus.¹ She notes the paucity of examples where civilian courts have exercised strong institutional control over members of the military. She concludes that that may well be the case because of the deference the civil courts give to members of the armed services.

True, there is a great deal of leverage arising from our legislatures and administrative departments that set the parameters for the behaviour of the military. But too many questions remain unanswered. What is the role of civil courts in determining governance issues arising out of military affairs? Are the legal rights of a member of the military better accommodated under a juridical regime (by virtue of the Australian constitution,² or the American constitution³ for example) where non-military courts play a role? What is the law regarding private military contractors? How does the use of private military contractors impact on the discipline of those in combat zones? What rules of international law apply if there are allegations of human rights abuses by military personnel? Should military personnel be subject to the same justice system as other citizens in the event that they are charged with, say, rape of a colleague?

¹ Pauline Collins, *Civil-Military ‘Legal’ Relations: Where to from Here? The Civilian Courts and the Military in the United Kingdom, United States and Australia* (2018, Leiden: Brill Nijhoff).

² *Australia Constitution Act 1901*, ch III.

³ *Constitution of the United States 1789*, art 3.

Each of these (and many other) questions is examined in detail. The author concludes that there is a great deal of ‘civil-military uncertainty’ in the law. The book thus fills a significant gap in the literature on civil-military legal governance.

Dr Collins uses, as her vehicle for exploration, three case studies from nations that have their roots in the common law legal system, namely the United States, the United Kingdom and Australia. I was not aware that it was only in the latter half of the twentieth century that the ‘civilianisation’ of military justice began to take a more exacting shape in these three nations. In 1950, the US adopted its *Uniform Code of Military Justice*.⁴ With the passage of the *Armed Forces Act*⁵ in 2006 (effective 2009), the UK set up a system of judge advocates, a permanent standing court-martial presided over by legally qualified civilians. Australia’s *Defence Force Disciplinary Act 1982* (Cth) is the last word our federal legislature has had to say on the subject, with the lapsing of both of the *Military Court of Australia Bill 2012* (Cth), and the *Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012* (Cth), in August 2013. Australia’s is a troubling landscape in this respect.

These are referred to by the author as ‘case studies’ but that term diminishes the depth to which the author outlines the relevant rules, protocols and procedures ascribed to the military in each jurisdiction. She probes what she perceives as a growing legal ‘militarisation creep’ and discusses the dilemmas and legal uncertainties attached thereto. The US material (running over 80 pages) examines the public-private military quandaries. The UK examination (running almost to 100 pages) tests the exercise of military law vis-à-vis the operation of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR)⁶ which established the European Court of Human Rights (ECtHR) and their consequential adoption of the British *Human Rights Act 1998* (UK).

Australian law on the subject of courts-martial (the focus of the Australian case study) began, we are told, with the reception of English military law (think *Breaker Morant*) and developed slowly, culminating in the *Defence Force Disciplinary Act 1982* (Cth). But reform attempts since that time have been largely unsuccessful, leading Dr Collins to conclude at page 285 that the ‘balance in the civil-military relationship in Australia is a troubled one.’ It is unsurprising, she surmises, that Australian military justice continues to be plagued with complaints. What else could be expected, she asks, where people who may have minimal legal training are being given

⁴ *Uniform Code of Military Justice 1950* (US) 10 USC Ch 47.

⁵ *Armed Forces Act 2006* (UK).

⁶ Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

responsibility for the meting out of significant punishments without a full curial process?

This book is a most welcome addition to ‘rights’ jurisprudence and is most timely today, given the seemingly unstoppable changes in global politics and principles including the growing power of the executive leg of government, the use of multinational military forces, the presence of non-state actors in conflicts, and the privatisation of defence. These changes, Dr Collins concludes, ‘suggest it is timely to take stock of the civil-military relationship and the workability of the principles that are to guide it.’⁷

The prevailing view of the author is, pleasingly to me (but possibly displeasing to those seeking a more dispassionate view), strongly in favour of greater civilian oversight of military justice. In a reflective final chapter, drawing down on her decade of engagement with this topic, Dr Collins writes forcefully and urgently:

One is compelled to conclude that the courts have lost sight of the purpose of civil-military control as a principle that maintains a healthy democratic liberal society with a military that remains in check and under the dominance of civilian society. ... The courts seem to have lost sight of their early jurisprudence that emphasises the use of civilian courts where they are open and operating and the need to contain military discipline to limited service connection requirements ...⁸

If I were to utter a note of slight disappointment regarding the book, it would be to observe that there is no reference by the author to the not unrelated issue of conscientious objection to military service in times of conscription. On this topic, readers can find excellent studies of Australia’s record on the subject in Bobbie Oliver’s *Peacemongers: Conscientious Objectors to Military Service in Australia, 1911-1945* (Fremantle Arts Press, 1997) (stopping short of Korean and Vietnamese conflicts), and for conflicts after 1945 in Charles Moskos and John Chambers II (eds), *The New Conscientious Objection: From Sacred to Secular Resistance* (OUP, 1993).

Another intersection of law and military justice more generally (and not touched in this book) is found in the very troubling period following the Second World War when Australian military judges were called upon (in concert with judges from a number of allied nations) to try Japanese military leaders for their war crimes. Few younger generation Australians would have any knowledge of how these trials unfolded, how they ended, and how many consequential executions occurred. Those interested in this topic will find a ready and accessible source in Adam Wakeling’s *Stern*

⁷ Collins (n 1) 33.

⁸ Collins (n 1) 325.

Justice: The Forgotten Story of Australia, Japan and the Pacific War Crimes Trials (Penguin/Random House, 2018).

Dr Collins' book presents to readers very solid scholarship that displays the author's clear-headed exegesis of the relevant statutory instruments and conventions, along with a precise knowledge of the field of military law across three complicated (if not dissimilar) legal jurisdictions. The work contains a vast array of relevant references, sources and cases. It is conscientiously prepared and beautifully edited. With apologies to those who may consider this next phrase as almost inevitable and trite, this book is essential reading for scholars of jurisprudential theory and those who have responsibility for or interest in the carriage of military instruments of justice.

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