PENI NADUANIWAI v COMMANDER, REPUBLIC OF FIJI MILITARY FORCES and Anor (HBM 0032 of 2004)

HIGH COURT — MISCELLANEOUS JURISDICTION

WINTER J

30 August, 6 September 2004

Defence — military law — courts martial — mutiny — constitutional redress under s 41 of the Constitution of the Republic of Fiji — whether High Court had original and exclusive jurisdiction to hear and determine redress applications — whether adequate alternative remedy available — sovereignty and incorporated amendments — military legislation, Bill of Rights, Public International Law and striking contextual balance — whether court martial breached Applicant's guaranteed right to fair trial — Constitution of the Republic of Fiji ss 2(1), 21(4), 29, 29(1), 41, 41(1), 41(2), 41(3), 41(4), 42(2), 42(3), 43(3), 120(1), 120(2), 194 — (UK) Army Act 1955 ss 31(2), 31(3), 92, 92(1) — (UK) Armed Forces Act 1971 — (UK) Armed Forces Act 1996 — (UK) Armed Forces Act 2001 s 2 — (UCA) Armed Forces Discipline Act 2000 — Australian Provision of the National Weights and Measures Decree of 1989 — Bill of Rights 1688 — Constitution and Customary International Human Rights Law s 29 — Criminal Procedure Code s 262 — Fiji Independence Order 1970 s 31 — Fiji Military Forces (Amendment) Ordinance No 56 of 1961 s 2 — High Court Rules O 1 r 7 — International Covenant on Civil and Political Rights Art 14(1) — Interpretation Act (Cap 7) s 2(1) — Penal Code (Cap 21) ss 50, 52, 233, 248, 251 — Republic of Fiji Military Forces Act 1978 (Cap 81) ss 2, 23, 25, 112(3(b)) — Royal Fiji Military Act 1949.

Corporal Naduaniwai (the Applicant) and six other members of the counter revolutionary warfare unit (CRW) of the Republic of Fiji Military Forces (RFMF) allegedly helped George Speight on the 19 May 2000 takeover of the parliament and overthrew the Labour Coalition Government. As a consequence, the Commander of the RFMF ordered the convening of a General Court Martial to try the Applicant and the other six members on charges relating to the alleged takeover of the parliament. Later, the Applicant and the six other members were charged with mutiny pursuant to s 31(2) and (3) of the Army Act 1955 (UK) and civil offences of wrongful confinement and misprision of treason pursuant to ss 233, 248, 251 and 52 of the Penal Code (Cap 21).

On 24 May 2004, the Applicant made an application for constitutional redress under s 41 of the Constitution of the Republic of Fiji. The issues raised by the Applicant were the following: (a) the jurisdiction of the High Court to make orders in respect of a court martial under s 41 of the Constitution; (b) whether there was an adequate alternative remedy; (c) sovereignty and incorporated amendments; (d) military legislation, the Bill of Rights, public international law and striking a contextual balance; (e) whether a general court martial likely to breach the Applicant's guaranteed right to a fair trial under s 29(1) of the Constitution.

Held — (1) The Applicant cannot make a redress application to any other court but the High Court under s 41(1) and (3) of the Constitution. Although General Courts Martial shares some of the High Court's power, it is not an inferior court. It does not have original jurisdiction and does not share the exclusive powers of the High Court to determine constitutional redress applications. Thus, the High Court in considering constitutional redress applications has original jurisdiction to make binding declarations, give directions or provide such relief it considers necessary against the convening authority of a General Courts Martial or the President and members of a General Courts Martial.

(2) The Applicant has the right to seek redress from the High Court in the event that his right to a fair trial has been infringed by the structure and proceedings of the general court martial convened for his trial. It is the High Court which has original jurisdiction over

these matters so the Applicant cannot make a redress application to any other court. He cannot make an application for constitutional redress to the courts martial as it has no jurisdiction over redress applications. However, while he can make an application for leave to appeal to the Court of Appeal, it does not have jurisdiction to hear constitutional redress applications.

(3) The amendments to the Army Act by the British Parliament subsequent to 10 October 1970 were automatically excluded and did not have any significant bearing to the Republic of Fiji. The amendments or replacements to the Army Act 1955 and its subordinate legislation were available to Fijian Law and does not subvert Fijian sovereignty. Rather, it was simply a Fijian legislation borrowed from the United Kingdom. They would only be excluded if those amendments contravened the constitution, the RFMF Act, the regulations, or require modification consistent with the principles of Fijian Military Law and practice

(4) Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) and Public International Law underscore the s 29 principles. When interpreting the "rights" provisions of the Constitution, the courts are obliged to consider public international law including laws from other international human rights tribunals. While the courts in Fiji are obliged to have regard to this body of law when interpreting s 29 rights, appropriate weight must be given to a balance to be struck on competing constitutional interests to maintain the discipline and operational efficiency of an armed force. The Constitution likewise contemplates a separate system of military justice where the Commander of the RFMF is in charge of making disciplinary action against members of the forces. The Applicant had insufficient facts to support his contention that the courts martial will be partial and unfair. The convening of the courts martial by the Commander does not provide evidence of unfairness or lack of impartiality as the Commander has delegated authority to convene under a presidential notice. The appointment of a judge advocate and members of the court by the convening officer does not indicate unfairness in the trial process. The convening officer also appoints the prosecutors and defence counsel. These appointments are not some portion of some plot to deny the applicant a reasonable trial rather, when perused with regard to armed forces discipline, these appointments are consequences of the chain of command.

(5) The *Findlay* and *Coyne* cases were not applicable on the facts of the Applicant's case because he came to court with insufficient evidence to back his claim.

Application dismissed.

Cases referred to

R v Genereux (1992) 88 DLR (4th) 110; [1992] 1 SCR 259, applied.

R v Spear; R v Boyd; R v Saunby [2003] 1 AC 734; [2002] 3 All ER 1074; [2002] UKHL 31; *Cooper v United Kingdom* [2003] All ER (D) 283 (Dec); [2004] Crim LR 577, cited.

Grant v Gould [1792] EngR 3085; [1792] 2 HBL 69; (1792) 126 ER 434; *Morris v United Kingdom* (unreported, ECHR 38784/97); *Re Tracy: Ex parte Ryan* (1989) 166 CLR 518; 84 ALR 1; 16 ALD 730; (1989) 84 ALR 1, considered.

Coynev United Kingdom (unreported, App No 124/1996, 743/1942); *Findlay v United Kingdom* (unreported, SCHR 110/1995/616/706), distinguished.

Waqavonovono for the Applicant

Major Tuinaosara and *Col. Aziz* for the first Respondent

Miss Lord and *M. Rakuita* for the second Respondent

R. Solanki for DPP

Rt. J. Madraiwiwi and *Rt. Vili* for HRC Amicus

Winter J.

Introduction

The Applicant 28066 Cpl Peni Naduaniwai by notice of motion and supporting affidavit filed on 24 May 2004 made an application for constitutional redress under s 41 of the Constitution of the Republic of Fiji.

In summary he seeks declarations that his rights to a fair and impartial trial under s 29(1) of the Constitution and customary International Human Rights Law are likely to be breached if he is tried under Military Law by a General Court Martial.

He seeks injunctive relief from this court ordering the General Courts Martial to cease or its proceedings to be stayed until such time as a tribunal established by law is initiated to hear the charges against him.

The Commander of the Republic of Fiji Military Forces (RFMF) and Convening Officer for General Courts Martial is the first Respondent.

The state represented by the Attorney-General's Office and the Director of Public Prosecutions (as they claim an interest in the matter) is the second Respondent. At the court's request the Fiji Human Rights Commission under the kind auspices of its proceedings commissioner appeared as amicus curiae.

Background

Corporal Naduaniwai joined the Republic of Fiji Military Forces on 8 February 1988. In 1990 he was deployed to the Counter Revolutionary Warfare Unit (CRW). It is alleged that he and sixty other members of the CRW helped George Speight on 19 May 2000 takeover Parliament and overthrow the Labour led Coalition Government.

The Commander of RFMF ordered the convening of a General Court Martial to try the Applicant and soldiers on charges relating to this takeover of parliament.

The charges as they now stand after amendment on 10 June 2004 are for mutiny pursuant to ss 31(2) and 31(3) of the Army Act 1955 (UK) and "civil" offences of wrongful confinement and mis-prison of treason pursuant to ss 52, 233, 248, 251 of the Fijian Penal Code Cap 21.

The application raises several important and fundamental issues of constitutional and military law for the Republic. The General Court Martial is to convene on 7 September 2004. To provide the Applicant with any purposive remedy I am obliged to give my decision before then. In the short time available to me I cannot address as comprehensively as I would wish much of the complex and conflicting jurisprudence raised by the application.

It became clear during the course of the proceedings that there were five major issues for consideration and my judgment will address each in turn.

(1) The jurisdiction of the High Court to make orders in respect of a court martial under s 41 of the Constitution.

(2) The s 41 application is there an "adequate alternative remedy".
(3) Sovereignty and incorporated amendments.
(4) Military Legislation, the Bill of Rights, Public International Law and striking a contextual balance.
(5) Is a general court martial likely to breach the Applicant's guaranteed right to a fair trial under s 29(1).

Issue 1

The jurisdiction of the High Court

The jurisdiction of this court to make orders over a General Court Martial under s 41 constitutional redress applications was originally the subject of much dispute between the parties.

However, during the course of hearing before me these were resolved in favour of a general acceptance of this court's jurisdiction. For practical purposes I accepted that consensus as a correct statement of the law. My reasoning can be summarised in this way:

The Constitution is the supreme law of the state by virtue of s 2(1).

Courts martial are convened under the RFMF Act 1978 (Cap 81), the Army Act 1955 (UK) and subsidiary legislation. A General Courts Martial is not subordinate to the High Court (s 194 of the Constitution) but is subject to the provisions of the Constitution.

Section 41(3) of the Constitution provides the High Court with original jurisdiction to hear and determine redress applications from any person who considers that any of the "right" provisions of Ch IV has been or is likely to be contravened.

The High Court's power to hear any redress applications is reinforced by s 120(1) and (2) of the Constitution. These confirm the High Courts prime and exclusive role in constitutional matters.

The Applicant cannot make a redress application to any other court but the High Court as per s 41(1) and (3).

A General Courts Martial is not an inferior court. It shares some of the High Courts powers. It does not however have original jurisdiction. It does not share the High Court's exclusive powers to determine constitutional redress applications.

I find therefore that the High Court when considering constitutional redress applications has original jurisdiction to make binding declarations, give directions or provide such relief it considers necessary against the convening authority of a General Courts Martial or the president and members of a General Courts Martial.

Issue 2

Is there an adequate alternative remedy?

Despite consensus on the issue of jurisdiction there remained disagreement as to whether the proviso to s 41 might apply. It was submitted by the Respondents that I should dismiss the application as an "adequate alternative remedy" is available; (s 41(4)). In this judgment I later raise doubts over the use of the unamended Army Act 1955 (UK) for courts martial in Fiji. However, as this argument was made upon that law, my judgment follows its particular legislative scheme.

The Respondents supported each other in this argument and say that the Applicant has two remedies available. First by way of an objection under s 92(1) of the Army Act 1955 a right to challenge any member of the court. The section provides:

> An accused about to be tried by any court martial shall be entitled to object on any reasonable grounds to any member of the court whether appointed originally or in lieu of another officer.

The Section is supported by its own Rule of Procedure 27 (MML RP 27). The relevant subsection reads:

> If as the result of the allowance of an objection to a member there are insufficient officers available to form a court in compliance with the Act the court shall report to the convening officer without proceeding further with the trial and the convening officer may either appoint an officer as a member to fill the vacancy or convene a fresh court to try the accused.

Second, by offering a plea to the jurisdiction of the court under RP 36 which reads:

> The accused before pleading to the charge may offer a plea to the jurisdiction of the court. If he does so:
>
> (a) the accused may adduce evidence in support of the plea and the prosecutor may adduce evidence in answer thereto; and
>
> (b) the prosecutor may address the court in answer to the plea and the accused may reply to the prosecutor's address.
>
> If the court allow the plea they shall adjourn and report to the convening officer. When a court report to the convening officer under this Rule, the convening officer shall:
>
> (a) if he approves the decision of the court to allow the plea, dissolve the court
>
> (b) if he disapproves the decision of the court:
>
> (i) refer the matter back to the court and direct them to proceed with the trial, or
>
> (ii) convene a fresh court to try the accused.

For two reasons I reject this argument. The first relates to the lack of any real purposive remedy after an objection is taken.

Section 92 of the Army Act 1955 when read in conjunction with its corresponding rule of procedure 27 makes it clear that any objection is to a member as an individual and not a general objection to the officer's standing.

Further, if there are insufficient officers available to form a court as a result of successful objections then a report is to be made to the convening officer who can appoint another member to fill the vacancy or convene a fresh court to try the accused.

I note that applications objecting to jurisdiction under RP 36 are not usually considered in as wide a sense as objections based on constitutional rights claims in civilian courts. In military courts these normally relate to the liability of the accused to stand trial by military law or that some preliminary procedure such as investigation, has not been properly completed (MML RP 36 notes).

There is no right of appeal over these pre-trial applications. Objections to jurisdiction under RP 36 or challenges to members under RP 27 recirculate the accused through the system back to the convening officer who in theory simply continues to convene a series of courts martial for as long as it takes to secure a hearing. The accused has no purposive remedy. For a remedy to be adequate it must at the very least must have the possibility of a purposive outcome. Substantively and procedurally there is no purposive outcome available to an

accused for objections he takes to either the membership or jurisdiction of a General Courts Martial. I therefore reject the Respondents' argument.

The second reason I find there is no "adequate alternative remedy" arises as a result of the practical application of the constitutional redress provisions.

The right to make a redress application to the High Court is without prejudice to any other action with respect to the matter that the person concerned may have (s 41(2)).

The Applicant has the right to seek redress from the High Court if he feels that his right to a fair trial guaranteed by s 29 of the Constitution is likely to be contravened by the structure and proceedings of the general Court Martial convened for his trial.

Since the High Court has original jurisdiction over these matters then the Applicant cannot make a redress application to any other court but the High Court. He cannot make an application for constitutional redress to the courts martial as it has no jurisdiction over redress applications.

Further, while he can make an application for leave to appeal (and appeal) to the Court of Appeal, this court similarly does not have jurisdiction to hear constitutional redress applications.

Thus the Applicant does not have an adequate alternative remedy before either the court martial or, in the case of an appeal from a decision of the court martial, the Court of Appeal.

Again, for these reasons I find there is no adequate alternate remedy available to the Applicant. I reject the Respondents' arguments and refuse their application to pre-emptorily strike out or dismiss the application.

Issue 3

Sovereignty and incorporated amendments

The Applicant perceived that the incorporation into the RFMF Act of the Army Act 1955 and its subsidiary rules and regulations including all amendments and substitutions meant that any such amendments or substitutions were automatically assimilated into Fijian law.

Counsel wanted to gain support for the application by emphasizing procedural defects in the convening of this General Courts Martial under the "old" law as opposed to the Army Act (UK) as amended after the *Findlay* decision by the European Court of Human Rights (below p 22).

The Respondents and the Human Rights Commissioner preferred the view that such an assimilation went directly against the independence and sovereignty of the Republic. They were of the view that before any amendment to this UK legislation could truly be said to be available it first had to be adopted by an appropriate parliamentary process in Fiji.

Relevant statutory instruments

The Royal Fiji Military Forces Act was enacted in 1949.

The Army Act was enacted by the UK Parliament in 1955. Significant amendments have been made since then, most recently and of relevance to these proceedings the Armed Forces Act (1996), the Armed Forces Discipline Act (2000) and the Armed Forces Act 2001.

Section 2 of the Royal Fiji Military Forces Act was amended in 1961 by s 2 of the Fiji Military Forces (Amendment) Ordinance No 56 of 1961 to include a reference to the Army Act 1955 (UK), thereby incorporating the Army Act 1955 (UK) as part of the laws of Fiji.

The Fiji Military Forces Ordinance was further amended by s 31 of the Fiji Independence Order 1970 by inserting the words "of the United Kingdom" immediately after the figures "1955" in the first line of the definition of "Army Act" in section 2.

Section 2 of the Royal Fiji Military Forces Act states:

> "Army Act" means the Army Act, 1955 of the United Kingdom and includes all Acts amending, replacing or read in conjunction with the same and all rules, regulations and Articles of War made thereunder

After independence the 1955 Army Act (UK) continued in existence and together with its rules and regulations as amended from time to time remained the statutory instrument describing the systems and procedures for the discipline of all Fijian Military Forces.

A year after the Republic's independence the United Kingdom made amendments to the Army Act 1955 and its subordinate legislation consequent upon the Armed Forces Act 1971 (UK). The Armed Forces Act 1971 (UK) came into force on 1 July 1972. In conjunction with that change a 12th ed of the *Manual of Military Law (MML)* was published. This manual first published in 1884 provides officers in general with such legal knowledge as they may need to perform their duties. It defines the systems and procedures for army discipline. Traditionally members of the RFMF are ruled and disciplined by their officers in the same way as their UK brothers in arms.

The UK Law stated in the manual as printed was in the case of civil law correct as at 1 February 1972 and in the case of military law correct as of 1 July 1972. The 12th edition was intended to be taken into use by officers on the coming into force of the United Kingdom Armed Forces Act 1971.

The original ordinance amendments and acts providing for the establishment maintenance and regulation of military forces in Fiji have received various revisions in 1973, 1978, 1985 and 1998. The discipline of the forces and the application of the Army Act (UK) is primarily described in ss 2, 23 and s 25 of the RFMF Act 1978 (Cap 81).

In 1973 the Fijian Parliament re-adopted the Army Act 1955 (UK) and all acts amending, replacing or read in conjunction with the same and all rules, regulations and articles of war made thereunder. This was confirmed in 1978 where in s 23 of the Fiji RFMF Act, Parliament adopted the United Kingdom Armed Forces Act 1971 and its rules of procedure.

In 1985 there were amendments to the Royal Fiji Military Forces Act. The significance of them is that the definition s 2 from the 1955 Army Act (UK) remained unchanged. In the same year the incorporation of the UK military law was reinforced by the 1985 Royal Fiji Military Forces Regulations providing:

> the disciplinary powers of officers in the Forces shall be those laid down in the Army Act and the Queens Regulations for the Army in so far as such powers are not inconsistent with the provisions of the Act and these Regulations. Officers shall be guided by the Manual of Military Law and shall adhere to the rules of procedure therein contained.

In 1998 the Act was further amended by the Royal Fiji Military Forces (Amendment) No 16 of 1998. In that amendment Pt 2 of the Principle Act received attention primarily to realign the Principle Act to the 1997 Constitution. Again however s 2 was left substantively unchanged. By this time the cold breeze of the *Findlay* decision by the European Court of Human Rights had been felt by the United Kingdom.

I have detailed this legislative history to underscore the fact that parliament has exercised its sovereignty after independence by the adoption and incorporation of the United Kingdom Army Act of 1955 and its amendments, rules, regulations and articles of war for the purpose of the discipline and control of Fijian Military Forces.

I have not been referred to nor can I find any direct reference to the adoption of specific (UK) amendments. Rather incorporation by reference has been used as a legitimate drafting technique to bring into the Republic the United Kingdom's systems and procedures for the control and discipline of the Fijian Armed Forces.

Despite Amendments to the s 2 of the RFMF Act has remained largely unchanged. Legislators have seen fit to limit the use of the Army Act (UK) and its replacements or amendments only by making them subject to the provisions of the Principle Act or regulations made thereunder and with any modifications consistent with the RFMF Act as may be necessary (s 23 of the RFMF Act 1978 (Cap 81).

In my view this leaves open an argument for the automatic inclusion into Fijian Domestic Law, of amendments to the United Kingdom Army Act 1955 and all the body of accompanying military law contained in the subsidiary regulations and rules as replaced or amended from time to time.

In my view the following principles exist:

> No statutory law, procedural law or adjectival law in Fiji can contravene the current Constitution.

Since the first Constitution of 1970 and the commencement of the Republic the British Parliament ceased to have its pre-existing power to legislate for Fiji, then its colony.

However, as a law drafting technique it was lawful in 1970 and remained lawful after 1970 for the Parliament of Fiji to exercise its sovereignty by adopting the legislation of any other country as its own. Parliament can do this expressly or impliedly. In this way the Army Act 1955 (UK) and its replacements or amendments became Fijian law, subject only to the Constitution, and any restriction imposed by Parliament in the Act, regulations, or by such modifications consistent with the Act as may be necessary (s 23 of the RFMF Act 1978 Cap 81).

Incorporation by reference is a legitimate drafting technique. It is still widely practiced in many countries. It permits the specified or detailed legislation of foreign countries to be boldly introduced into domestic law in an expedient way. The respected author FAR. Bennion, in his work "*Statutory Interpretation*" 4th ed Butterworths Edinburgh 2002 at p 647 describes the process in this way:

> It is a common devise of legislative drafters to incorporate earlier statutory provisions by reference rather than setting out similar provisions and form. This saved space, and also attracts the case law and other learning attached to the earlier provisions. Its main advantage is a parliamentary one, however, since it shortens bills and cuts down the area for debate.

The exercise of sovereign power by the use of incorporation in the RFMF Act is not unique. The extent and application of incorporated acts in Fiji is found in other examples such as:

(1) Provision for the offence of treason under s 50 of the Penal Code is adopted from the Laws of England.

(2) The adoption of English Civil Practice and Procedure in the Fiji High Court where no express provision exists (O 1 r 7 of the Fiji High Court Rules).

(3) The s 262 of the Criminal Procedure Code which provides that the practice of the criminal jurisdiction "shall be assimilated as nearly as circumstances will admit" to the practice of Her Majesty's High Court of Justice in its criminal jurisdictions of courts of Oyer and Terminer and General Jaol Delivery in England in procedures in trials before the High Court.

(4) The adoption of the Australian Provision of the National Weights and Measures Decree of 1989.

(5) Reference to "applied acts" that are recognised in s 2(1) of the Interpretation Act (Cap 7) as amended by Decree No 35 of 1989 and Act 6 of 1998) where it provides:

> "applied act" means any act of the Imperial Parliament for the time being applied to Fiji by virtue of the provisions of any Act

I find the intention of parliament in enacting the Royal Fiji Military Act 1949 and confirming its applicability after independence was ambulatory, so that all successive amendments to the original English Act became available as part of Fijian law. That is certainly confirmed by the subsequent legislative treatment and practical use of amendments to the United Kingdom Army Act 1955 and its subordinate law.

It is more likely that the intention of Parliament included that if the Army Act 1955 was ever repealed, as has happened in part, its replacement would also become Fijian law on the basis that the Fiji Parliament intended that the Law of the United Kingdom regarding courts martial (whatever it was) was to be taken as the contemporary law for courts martial in Fiji.

The intention of the Fijian legislation was to enact a shorthand reference to the United Kingdom Law so that any improvements by amendment in the UK Law also became part of Fijian law as long as they were not inconsistent with Fijian law and our Constitution.

In this application it can therefore be argued that the Army Act 1955 plus its amendments or replacements are in force as Fijian law but have to be seen through the prism of the Fiji Constitution and RFMF military law to gauge their applicability to claims for breach of s 29.

This approach does not subvert Fijian sovereignty on the contrary, it is simply Fijian legislation that has borrowed from the United Kingdom, a body of ambulatory law.

When seen in this way amendments to the Army Act 1955 (UK) or its subsidiary legislation are by a legitimate process available for incorporation into the law of Fiji. They would only be excluded if those (UK) amendments contravened the Constitution, the RFMF Act, the regulations, or require modification consistent with the principles of Fijian military law and practice.

I disagree with the Respondents and with the greatest of respect the proceedings commissioner of the Fiji Human Rights Commission that the amendments enacted to the Army Act (UK) by the British Parliament subsequent to 10 October 1970 are automatically excluded and do not apply to the Republic of Fiji. The process of assimilation of that law by incorporation has seen an exercise in sovereignty by the Republic of Fiji borrowing this legislation from the UK together with its amendments.

The Republic of Fiji Military Forces has chosen as a matter of practice to follow some of the amendments enacted by the British authorities. They have done so quite lawfully. The Army is reluctant to embrace the more recent amendments.

Many of the "post-Findlay" amendments to the Army Act (UK) appear to me to compliment the Fijian Constitution, the provisions of the Principal RFMF Act and its subordinate legislation. The purpose of the "post-Findlay" amendments was to better secure for service members an independent and fair trial process under military law. In my view that does not subvert the rights entrenched in the Constitution by virtue of s 29, it enhances them. It may have practical implications for the convening of courts martials but is not "inconsistent" with that body of military law.

However, despite this finding for the reasons detailed in the subsequent section of this judgment I do not find it necessary to declare the system used to convene this court martial as likely to breach the Applicant's s 29 constitutional rights to a fair trial by an independent and impartial tribunal. Accordingly the argument remains open. I must be careful not to restrict the General Court Martial's absolute right to report to its convening officer upon its proper constitution. I must also leave open Parliament's right to urgently attend to any necessary amendments to the law to restrict if it desires the incorporation of any one or more of the various amendments made to the Army Act 1955 (UK).

For these reasons I leave my finding as a rejection of the absolute sovereignty arguments of the Respondents and amicus in preference for a moderate approach. I find all of the amendments to the UK Army Act 1955 and its subordinate legislation available to Fijian law.

Issue 4

Military Legislation, Bill of Rights, Public International Law and striking a Contextual Balance

Prior to the 17th century, standing armies were unknown. When the king was not engaged in foreign hostilities when there was peace within the realm, there was no necessity for military law. That position changed after the restoration in 1660. The growth of the army was always regarded with some fear and degree of jealousy. The necessity of special powers for the maintenance of "decipline" (sic) was felt strongly when William and Mary were invited to the throne. The Bill of Rights 1688 (1 Will and Mary 2c 2) noted that "the raising or keeping of a standing army within the Kingdome in a time of peace unless it be with consent of Parliament is against law". However, Parliament gave consent for a standing army by the first Mutiny Act (1 Will and Mary c 5) and made provision for its good order and discipline. Lord Loughborough in the Court of Common pleas 1792 in *Grant v Gould* [1792] EngR 3085; [1792] 2 HBL 69; (1792) 126 ER 434 at 99–100 (p 450) summarised the need for such provisions:

> the army being established by the authority of the legislature, it is an indispensable requisite of that establishment that there should be order and discipline kept up in it, and that the persons who compose the army, for all offences in their military capacity, should be subject to a trial by their officers. That has induced the absolute necessity of a mutiny act accompanying the army it is one object of that act to provide for the army; but there is a much greater cause for the existence of a Mutiny Act, and that is, the preservation of the peace and safety of the kingdom: for there is nothing so dangerous to the civil establishment of a state, as a licentious and undisciplined army; and every country which has a standing army in it, is guarded and protected by a mutiny act. An

> undisciplined soldiery are apt to be too many for the civil power; but under the command of officers, those officers are answerable to the civil power, that they are kept in good order and discipline The object of the mutiny act, therefore, is to create a court invested with authority to try those who are a part of the army, in all their different descriptions of officers, and soldiers; and the object of the trial is limited to breaches of military duty. Even by that extensive power granted by the legislature to his Majesty to make articles of war, those articles are to be for the better government of his forces, and can extend no further than they are thought necessary to the regularity and good discipline of the army.

The scope of military law and of special jurisdictions to enforce it has been the subject of much controversy that has been well historically documented (compare "Marshall Law Historically Considered," 1902, 18 Law Quarterly Review 177 and The Military Forces of the Crown; Their Administration and Government [1869] volume 1).

The various mutiny acts acknowledge the Crown's authority to make Articles of War. The articles were constrained to conform to statute and ultimately the prerogative authority to make Articles of War were superseded by a statutory power. In 1879 the Army Discipline and Regulation Act (42 and 43 Vict c 33) consolidated the Articles of War and many of the provisions of the Mutiny Acts. It was re-enacted with amendments as the Army Act 1881 (44 and 45 Vict c 58) which was thereafter continued and enforced by annual acts of the imperial Parliament, leading eventually to the Army Act 1955 and its amendments.

The *Manual of Military Law* comments on the object of military law in this way: *(MML Introduction — para 6)*

> The object of military law is two fold. First it is to provide for the maintenance of good order and discipline among members of the army and in certain circumstances among others who live or work in a military environment. This it does by supplementing the ordinary criminal law of England and the ordinary judicial system with a special code of discipline and a special system for enforcing it. Such special provision is necessary in order to maintain in time of peace as well as war, and overseas as well as at home, the operational efficiency of an armed force

In *Re Tracy: Ex parte Ryan* [1989] 166 CLR 518; 84 ALR 1; 16 ALD 730 (*Re Tracy*) the Australian High Court was considering a courts martial appeal. First that the defence force magistrate was exercising the judicial power of the Commonwealth contrary to Ch 3 of the Constitution. Second that each of the charges was an indictable offence against the law of the Commonwealth and was required by the Constitution to be heard before a jury as a trial on indictment. Third that the Discipline Act was invalid as contrary to the Constitution. The full High Court (Mason CJ, Wilson, Brennon, Dean, Dawson, Toohey and Gordron JJ) held the trials for service offences were not under the Discipline Act, trials on indictment. I have earlier adopted some historical themes from this judgment. At [33] the court observes:

> Courts martial were constituted not by judges and jury but by naval and military personnel. A power, especially necessary in times of civil unrest or during overseas service in times of war to maintain or enforce discipline within the armed services, can be exercised effectively only by commanding officers and other service tribunals. A grant of power to a Ch III court constituted by judges appointed in conformity with a constitution to administer justice in the armed services could not be conducive to the efficient execution of the defence power. History and necessity combine to show that courts martial and other service tribunals though judicial in nature and though erected in modern times by statute stand outside the requirements of Ch III of the constitution.

Section 43(2) and (3) of the Constitution (referring to the Bill of Rights Chapter) provides:

> (2) In interpreting the provisions of this chapter, the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to Public International Law applicable to the protection of the rights set out in this chapter.
>
> (3) A law that limits a right or freedom set out in this Chapter is not invalid solely because the wording of the law exceeds the limits imposed by this Chapter if the law is reasonably capable of a more restricted interpretation that does not exceed those limits. In that case, the law must be construed in accordance with the more restricted interpretation.

The section is mandatory.

Article 14(1) of the International Covenant on Civil and Political Rights — ICCPR and Public International Law underscore s 29 principles. Fiji has not ratified ICCPR. I find that when interpreting our "rights" provisions of the Constitution courts are obliged to consider Public International Law including law coming from other international human rights tribunals such as the European Court for Human Rights.

However, while the courts in Fiji are obliged to have regard to this body of law when interpreting s 29 rights there is a balance to be struck competing constitutional interests to maintain the discipline and operational efficiency of an armed force must be given proper weight. The wording of the constitution not only contemplates the protection of the rights and freedoms of citizens but also a separate system of military justice where the Commander of the Republic of Fiji Military Forces is responsible for taking disciplinary action against members of the forces: s 112(3)(b).

It must be remembered that s 43(3) allows a narrower interpretation of Ch 4 rights if the subject law is reasonably capable of a more restricted interpretation that limits a right or freedom set out in the chapter: s 43(3).

Further when considering the application of Ch 4 rights the courts are bound by s 21(4) to interpret the right contextually having regard to the content and consequences of the particular legislation under consideration including its impact not only upon individuals but also groups or communities.

The insurmountable difficulty faced by this Applicant is that the body of Public International Law particularly concerning service members rights in courts martial has not had to wrestle with these unique contextual restrictions and justified limitations.

In *R v Genereux* (1992) 88 DLR (4th) 110, a member of the Canadian Forces was charged with narcotics offences and desertions. He was convicted before a General Court Martial but, on appeal, contented that his right to trial by an independent tribunal had been infringed. Section 11(d) of the Canadian Charter of Rights and Freedoms guarantees a person charged with an offence, the right "to be presumed innocent until proven guilty according to law on a fair and public hearing by an independent and impartial tribunal".

The Supreme Court of Canada held that trial before a General Court Martial convened under the National Defense Act of Canada did not meet the requirement of a fair and public trial by an independent and impartial tribunal. Madam L'Heureux-Dube dissented. Her Honour focused on the military nature of the tribunal upholding that it was not appropriate to apply civilian criteria to evaluate the validity of a General Courts Martial. Her Honour considered that the three essential conditions identified by the majority could not always be

applicable to every tribunal. In a strongly worded dissent for a jurist well-known as a champion of Human Rights, her Honour's contextual approach to constitutional interpretation on this issue is one with respect that I adopt as it is particularly relevant to the provisions I have just discussed from the Fijian Constitution. She said:

> when measuring the general court martial against the requirements of the charter, certain considerations must be kept in mind. Among those considerations are that the armed forces depend upon the strictest discipline in order to function effectively and that alleged instances of non adherence to rules of the military need to be tried within the chain of command.

These cases arise in a context of military tribunals convened under Fijian law and sufficient weight must be given to that context in deciding whether or not a breach of a given right or freedom might occur. Her Honour observed and I agree that a right or freedom may have different meanings in different circumstances. I accept as a principle that the constitutional standards applicable in the civilian system of justice for assessing an independent and impartial tribunal are wholly inapplicable to measuring a trial by General Court Martial.

Challenges to the independence of General Court Martials may fall squarely within s 29 rights but must be considered in the context of Armed Forces discipline. Security of tenure, financial security and institutional independence are all suited to the task of assessing the constitutionality and independence of particular tribunals but are not absolutes. In the context of the armed forces these characteristics are subordinate to the chain of command and the responsibility for discipline within a standing army. History and necessity have made this so, (re: *Tracy*). Fiji knows this all too well.

The recent challenges from overseas jurisdictions to the independence and impartiality of courts martial have in my view overlooked this fact. They certainly have not had to subject the various "rights" to the rigour of a proper contextual analysis under constitutional law that permits a restricted contextual interpretation. Accordingly, any reliance on the perceived ratios of those decisions as champions of rights-based remedies for military accused in Fiji is misplaced. Their applicability to our individual courts martial process is not a matter of assumption.

The Applicant faces another difficulty highlighted by the amicus. He has insufficient facts to support his contention that the courts martial will be partial and unfair.

The Commander of RFMF is obliged to take disciplinary action against members of the forces.

The convening of the courts martial by the Commander does not provide evidence of unfairness or lack of impartiality as the Commander has delegated authority to convene under a presidential notice and must do so (Notice 11/11/1965 and s 25 of the RFMF Act).

The appointment of a judge advocate and members of the court by the convening officer does not on a contextual interpretation indicate unfairness in the trial process. The convening officer also appoints the prosecutors and defence counsel. These appointments are not part of some plot to deny the Applicant a fair trial rather, when read in the context of a need for armed forces discipline, these appointments are a corollary of the chain of command.

Issue 5

Is a General Court Martial likely to breach the Applicant's guaranteed right to a fair trial under s 29(1)

The two relevant European Court of Human Rights cases primarily relied on by the Applicant are: *Findlay v United Kingdom* (unreported, SCHR 110/1995/616/706) (*Findlay*) judgment delivered 21 January 1997 and *Coynev United Kingdom* (unreported, App No 124/1996, 743/1942) (*Coyne*).

In reviewing *Findlay* and *Coyne* and the statutory amendments made by the United Kingdom Parliament to the Army Act as a result it is clear to me that while some independence has been created by the separation of roles in a General Courts Martial in fact the essential structure and process of military trials has not been forced to change radically at all. The ECHR acknowledges this in the decision of *Morris v United Kingdom* (unreported, ECHR 38784/97) (compare para 59):

> a military court can, in principle, constitute an "independent and impartial tribunal" for the purposes of article 6(1) of the Convention … However, the Convention will only tolerate such courts as long as sufficient safeguards are in place to guarantee their independence and impartiality.

The decisions in *Findlay* and *Coyne* can be distinguished from the present application in four significant ways.

First, the convening authority in the Fiji case is not the confirming authority. The convening authority is the Commander of RFMF; the confirming authority is the President of Fiji. Second, the court in *Findlay* had the advantage of knowing exactly how central the convening officer was to the prosecution and trial of the Applicant. There are no similar facts available to the court to determine whether such a central role was played by the convening officer in the court martial under consideration. Third, it does appear from the facts provided that the Applicants defence counsel are barristers who have not been appointed from the army but have been chosen by the accused persons themselves. In the present case, the Applicant is represented by the Legal Aid Commission. While that appointment must also be formalised by the convening officer it could not be said that there is therefore a presumption of bias or influence in that appointment. Finally, the Judge Advocate is a civilian judge. The decision as to guilt or innocence and any sentence is made by military personnel. The Judge Advocate can only provide guidelines on the law. In *R v Spear; R v Boyd; R v Saunby* [2003] 1 AC 734; [2002] 3 All ER 1074; [2002] UKHL 31 at para 67, the court said that a military court martial is a trial by peers similar to a jury trial, with Judge Advocate having the role of a civilian judge in a jury trial.

The *Findlay* and *Coyne* cases are not applicable on the facts provided by the Applicant. He has come to court with insufficient evidence to back his claim. He has the further difficulty of the ECHR retreat from its first *Findlay* pronouncements.

Greater reliance must be placed on the later decisions such as (*Cooper v United Kingdom* [2003] All ER (D) 283 (Dec); [2004] Crim LR 577 (*Cooper*). Cooper was decided by the ECHR subsequent to the Army Act (UK) amendments. The amendments widened the checks and balances contained in the 1955 Act, specifically with respect to the separation of roles of each of the officers responsible for convening, prosecuting, hearing and confirming courts martial trials and decisions.

The court in *Cooper* was more accommodating towards the court martial structure provided for in the amended Army Act. In reviewing the amendments, it is clear that while there is some separation of roles, in fact, the structure and process in trials of military personnel have not changed. For example, there was no suggestion in *Findlay* or *Cooper* that a civilian trial should replace a military trial or that the position of officer convening a court martial should be eliminated. Neither has the role of Judge Advocate undergone any significant changes.

There seems to be a clear acceptance by the ECHR that military courts have a place and that consideration should be given to making the process fairer rather than demolishing the courts altogether. The legislative changes made by virtue of the decisions and the amendments of the ECHR, while not cosmetic by any means, have strengthened the courts martial structure as a military entity, without replacing it.

Conclusion

In the shadow of the coup the courts will be vigilant to uphold the rights of all its citizens. A soldier remains a citizen throughout his service to the nation. The wearing of a uniform does not strip him of his rights, nor does it protect him from justice or discipline. Justice can and must be done by the courts martial process. I cannot at this time say the Applicant's rights to a fair and impartial trial under s 29(1) of the Constitution are likely to be breached if he is tried under military law by a General Courts Martial.

The application is dismissed.

The Applicant is legally aided. The case he raised had wider importance than just his own needs. There will be no order for costs.

Application dismissed.