

# COUP CULTURE: THE MILITARY AND THE FAILURE OF CONSTITUTIONALISM IN FIJI

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*Fiji's Interim Military Government has now been in power for nearly five years. Since that time elections have been promised for 2014, but whether those elections will take place, or how they will be carried out in practice, remains to be seen. This paper is a focus on the checks and balances on the Military Forces in Fiji, and how those could be adapted to restrict military power in the island state.*

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## **I INTRODUCTION**

In the 21st century an increasingly strong emphasis is placed on democratic values. The global community disapproves of states where those with decision making powers are also those with coercive powers. Government by the gun, in the absence of a democratic mandate, prevents democratic checks and balances from operating effectively.

The Government of the Republic of the Fiji Islands<sup>1</sup> has been overturned by its own military forces no fewer than four times since 1987. This paper will discuss the legal status of the Fiji Military Forces (FMF),<sup>2</sup> tracing the creation and development of the institution, its transition to independence and its present-day status in Fiji.

Military governments can cause a number of problems within a state, both legal and political, here focusing on the former. When the military is part of the government, the separation of powers

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\* This paper was submitted towards the completion of an LLB(Hons) at Victoria University of Wellington. Thanks go to my supervisor Professor Tony Angelo.

1 The state used to be the Republic of Fiji. The Interim Military Government since 2006 has referred to the state as the Republic of the Fiji Islands: Immunity (Fiji Military Government Intervention) Promulgation 2007 (Fiji), Interim Government Promulgation No 3.

2 Through some legislation, such as the Royal Fiji Military Forces Act 1949 (Fiji) [Military Act], the Fiji Military Forces are known as the Royal Fiji Military Forces. The physical institutions that both terms refer to are the same. This paper will refer to the FMF throughout.

is blurred and the ability for those exercising power to be directly accountable to citizens through elections is reduced. By contrast, an ongoing civilian government promotes certainty within the law, and stability of the legal system.

The aim of the paper is to determine how the FMF might be legally constituted in the long term, with the goal of preventing military interventions from being able to overthrow the Government. Given the different ways in which law can restrict military power, it is important to look at which kinds of legal restrictions are needed and which are more likely to be effective. While in practice, there is very little that can be done to absolutely guarantee military subservience to civilian power, this does not mean that constitutions, statutes and regulations should not be created in the best possible way in order to maintain the separation of powers within a state.

## ***II FIJI AND ITS MILITARY FORCES***

In order to understand the best ways to practically restrict the FMF, it is important to bear in mind the legal and historical context in which it has operated since its creation. As an institution, the FMF has existed in different guises within Fiji since the mid-19th century, even prior to the period of colonial governance by the United Kingdom.

### ***A Fiji at Cession and Military Origins***

The origins of the FMF date from 1871 when a military force was raised to support the authority of Ratu Seru Cakobau, the "titular head of Fiji's pre-colonial Government"<sup>3</sup> whose chiefly authority was disputed.<sup>4</sup> Membership was based on tribes supporting Cakobau's Government.

The islands were ceded to the British Crown in 1874.<sup>5</sup> The Deed of Cession stated:<sup>6</sup>

[P]ossession and full sovereignty and dominion over the whole of the group of islands in the South Pacific Ocean known as the Fijis ... are hereby ceded to and accepted on behalf of Her Majesty the Queen of Great Britain and Ireland

Following this, the predecessors of today's government institutions within Fiji were created. The Lieutenant Governor of New South Wales, Sir Hercules Robinson, was empowered to implement a

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3 Jim Sanday *The Military in Fiji: Historical Development and Future Role* (Strategic and Defence Studies Centre, Australian National University Research School of Pacific Studies, Canberra, 1989) at 19 [Sanday].

4 Anonymous *The Fiji Sun*, (Fiji, 16 September 1984) at 2; Giyannendra Prasad "Too big for the barracks: the Fiji Military and the 1987 Constitutional Breakdown" (LLB (Hons) Dissertation, Victoria University of Wellington, 1989) ["Too big for the barracks"].

5 The Letters Patent making the Fiji Islands into a colony were from 1875 (London Gazette, February 5 1875) at 475.

6 Deed of Cession of Fiji to Great Britain (10 October 1874) [Deed of Cession].

basic administrative structure.<sup>7</sup> The Governor<sup>8</sup> exercised jurisdiction over all British subjects within Fiji. This jurisdiction included the ability to make regulations and set up a judicial system.<sup>9</sup> For Fijians, day-to-day governance was effectively carried out by their chiefs<sup>10</sup> through a Native Affairs Ordinance.<sup>11</sup> A Great Council of Chiefs (GCC) was created to advise the Governor.<sup>12</sup>

In 1875 the first Legislative Council appropriated £999 13s 8d for the military forces, to assist in capacity-building for the institution and paying its existing members.<sup>13</sup> This was followed with an 1876 Ordinance, the long title of which referred to the FMF as the Armed Native Constabulary (ANC).<sup>14</sup> A new Ordinance was passed on 1889 to similar effect.<sup>15</sup> Throughout this time, the Governor had extensive powers over day to day FMF operations. These ordinances are the first evidence of any formal legal document constituting the military.

As the capability of the FMF expanded, so did its ability to overthrow a civilian government. This increased the need for stronger legal checks on military power. Forces were dispatched during both World Wars to assist the British Government, expanding the FMF.<sup>16</sup> By the end of World War II, it comprised an Infantry Brigade Group, a Heavy Artillery Regiment and a "large number of ancillary units".<sup>17</sup>

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7 Pacific Islanders Protection Act 1875 (UK) 38 & 39 Vict c 51, s 6. The British Settlements Act 1887 (UK) 50 & 51 Vict c 54, s 2 also provided for the Monarch to govern by Order in Council to establish courts and make laws.

8 Until 1953 the Governor of Fiji was also High Commissioner for the Western Pacific: Western Pacific Order in Council 1877 (UK), cl 7.

9 Pacific Islanders Protection Act 1875 (UK) 38 & 39 Vict c 51, above n 7. See also Foreign Jurisdiction Act 1843 (UK) 6 & 7 Vict c 94.

10 Ganesh Chand and Vijay Naidu *Fiji: Coups, Crises and Reconciliation 1987–1997* (Fiji Institute of Applied Studies, Suva, 1997).

11 Native Affairs Ordinance 1876 (Fiji), s 10.

12 Fijian Affairs Ordinance 1945 (Fiji), s 3; continued by the Fiji Islands Constitution (Amendment) Act 1997 (Fiji), s116 [1997 Constitution].

13 Appropriations Ordinance 1875 (Fiji).

14 Ordinance for the Regulation of a Force of an Armed Native Constabulary 1876 (Fiji). The Police Force was established by the Ordinance for the Regulation of the Police Force 1876 (Fiji).

15 The Armed Native Constabulary Ordinance 1889 (Fiji), s 2.

16 Sanday, above n 3, at 20.

17 Ian Thomson (ed) *Fiji in the Forties and Fifties* (Thomson Pacific, Auckland, 1994) at 155.

## ***B Current Status of the Royal Fiji Military Forces***

The FMF of today stands in a powerful position. Prior to the first coup in 1987, it comprised 2670 members,<sup>18</sup> but by 2009 that number had grown to 3570, with an estimated 6000 in reserve.<sup>19</sup> Between active service and the reserves, the military comprises approximately 1 per cent of Fiji's population. The 2009 Defence Budget was US\$52 million, approximately 1 per cent of total GDP.<sup>20</sup>

The military force is spread globally as peacekeepers.<sup>21</sup> However, as a result of international pressure, the UN has barred further deployments of Fijian peacekeepers as a result of the military Government.<sup>22</sup> This is something interim Prime Minister, Commodore Bainimarama, has been highly critical of in addresses to the UN.<sup>23</sup> As time passes and existing peacekeeping deployment contracts expire, this will further limit the funds available for the military forces, thus making it increasingly difficult for the institution to fund its continued operations.

## ***III LEGAL STATUS OF THE FIJI MILITARY FORCES***

Military law in Fiji derives from numerous sources. There is ongoing debate on how exactly the FMF exists within Fiji, and what its appropriate role and powers should be. Determining the best way to limit the power and influence of the FMF requires a discussion of the prior means that have been used, in particular those which have been proximate in time to Fiji's four coups, which may provide some guidance on better ways to manage the forces through law.

### ***A Pre-Independence***

The brief Deed of Cession did not provide for a military force within the colony.<sup>24</sup> It was not drafted to a great degree of specificity and was primarily focused on outlining the relationship between Fiji as a new colony and the United Kingdom

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18 Giyannendra Prasad "Too big for the barracks", above n 4, at 14.

19 International Institute of Strategic Studies "Chapter Eight: Asia and Australasia" (2010) 110 *The Military Balance* 377 at 405. The official FMF website does not provide any details. See generally RFMF Website <[www.rfmf.mil.fj](http://www.rfmf.mil.fj)>.

20 Ibid.

21 Fiji peacekeepers have been deployed in Africa, the Middle East and South-East Asia, among other places.

22 B Nicholson "Fiji Troops excluded from UN Peacekeeping Role" (2009) *Sydney Morning Herald* <[www.smh.com.au](http://www.smh.com.au)>. Bainimarama confirmed this in a speech to the General Assembly: Josaia V Bainimarama, Prime Minister for Public Service of the interim Government of Fiji ("Prime Minister's Statement", United Nations 63rd General Assembly, New York, 26 September 2008) available from <[www.un.org](http://www.un.org)>. There is no resolution from the General Assembly or Security Council formally restricting Fijian participation in peacekeeping.

23 Nicholson, above n 22.

24 Deed of Cession, above n 6.

Pre-independence laws in Fiji came from the following sources:<sup>25</sup>

- Imperial statutes applied to Fiji, such as the United Kingdom Army Act;<sup>26</sup>
- Orders in Council of the United Kingdom, which principally set out the administrative structure;<sup>27</sup>
- Ordinances passed by Fiji's Legislative Council; and
- Native Regulations; passed by Fiji's Native Regulation Board and approved by its Legislative Council.

In 1905 the Armed Native Constabulary was included with the police force.<sup>28</sup> It was resurrected in 1914<sup>29</sup> for its role in both World Wars. It also intervened in internal matters such as a strike in 1920 which the Police Force was unable to resolve. The 1937 Letters Patent<sup>30</sup> made no mention of the military save for a provision which stated that the Governor-General was the Commander-in-Chief of the forces.<sup>31</sup>

There is a purpose statement of the military within the Fiji Military Forces Ordinance 1949:<sup>32</sup>

The Forces shall be charged with the defence of Fiji, with the maintenance of order and with such other duties as may from time to time be defined by the Minister.

The role of the military therefore could include assisting civil authorities for the purposes of maintaining order. Provisions such as these, while expressly giving powers over deployment to the Minister, do create difficulties in their interpretation. Arguably, the *defence* of Fiji could mean any number of things, from the more conventional definition of defence from external forces to the defence of the state from internal threats. It is this kind of imprecise definition which has become problematic at later stages, such as in the 1990 Constitution.

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25 O D Malcolm "Modes of Legislation in the British Colonies" (1896–1897) 1 J Soc Comp Legis 358 at 363.

26 See for example Army Act 1955 (UK) 3 & 4 Eliz 2 ch 18, in relation to the enforcement of discipline within the FMF, continued by the Military Act, above n 2, s 23.

27 Such as the original constitutions prior to 1970.

28 Sanday, above n 3, at 5.

29 Defence Force Ordinance 1914 (Fiji), s 4(1). The Governor-General needed to authorise calling out of the forces by proclamation (s 20(1)).

30 SR & O 1937 No 2383.

31 Ibid, s 3.

32 Military Act, above n 2, s 3(2).

The governments were administered by successive Letters Patent during the colonial years.<sup>33</sup> The Legislative Council sent military contingents to both World Wars, again leading to further expansion and strengthening of the military.<sup>34</sup> Yet there was no provision during this time for FMF representation in the legislature,<sup>35</sup> either in 1929 or the next Letters Patent in 1937.<sup>36</sup>

The last pre-independence constitution was in 1963.<sup>37</sup> It does not prescribe the existence of the FMF, but it does state that the Governor would act as Commander-in-Chief of the colony.<sup>38</sup>

During the colonial period, the FMF was restricted through a mixture of statutory and constitutional means, but its powers were subject to great uncertainty due to imprecision in drafting, particularly in terms of the responsibilities given to the force. There was also a strong focus on maintaining the chain of command, but there was no guidance within the law to determine the relationship with other institutions such as the Police Force.

Yet one major check on power existed that has not done so since. When Fiji was a colony there was always the potential for the United Kingdom to militarily intervene should there be problems or difficulties with the FMF. Since independence, this check no longer effectively exists in practice. Instead the emphasis is on a need for multilateral actions sanctioned by international organisations in the modern day world.

### ***B Tracking Laws of the Military through the Constitutions***

From 1970, the situation changed for the FMF. While most pre-colonial statutes remained in force, there was a new Constitution as the central legal document for the state. The first independence Constitution was attached to the Fiji Independence Order 1970 (1970 Constitution),<sup>39</sup> supplemented by a United Kingdom Act of Parliament formally granting Fiji's independence.<sup>40</sup> The

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33 For a discussion of the evolving colonial constitution see J J McHugh *The Colony of Fiji: 1874–1929* (Government Printer, Suva, 1929).

34 *Ibid*, at 168.

35 *Ibid*, at 15.

36 SR & O 1937 at 677.

37 The Fiji (Constitution) Order in Council, SR & O 1963 at 1393.

38 *Ibid*, ss 4(1) and (2).

39 Fiji Independence Order (UK), SR & O 1970 III, s 3 [1970 Constitution]. It revoked the following orders: The Fiji (Constitution) Order 1966, Fiji Royal Gazette No 40 1966, at 321; the Fiji Constitution (Amendment) Order 1967, SR & O 1967 at 5459; and the Emergency Powers Order in Council 1939, SI 1952 at 621.

40 Fiji Independence Act 1970 (UK).

first Constitution created a bicameral legislature with the Monarch as Head of State,<sup>41</sup> and provided for a Governor-General as the Monarch's representative within Fiji.<sup>42</sup>

The Constitution contained provisions for the Fiji Police Force and the Commissioner of Police<sup>43</sup> but did not specifically cover the military. What did continue to cover the military was the 1949 FMF Ordinance, which was a key piece of legislation in the new constitutional order. The long title of the Act "provide[s] for the establishment, maintenance and regulation of military forces". Provision for the FMF was probably excluded from the Constitution because of this provision in the Ordinance.

The Act states in s 3:<sup>44</sup>

(1) There shall be established in Fiji forces to be known as the Royal Fiji Military Forces...

(2) The Forces shall be charged with the defence of Fiji, with the maintenance of order and with such other duties as may from time to time be defined by the Minister.

(3) The Forces shall be under the supreme command of the Governor-General and, through the Minister, under the command of the Commander who shall be appointed by the Governor-General upon the advice of the Minister.

(4) The Minister may at any time ... order that the Forces or any part thereof shall be employed out of Fiji...

And in s 16:

The Governor-General may by proclamation, disband or discontinue the services of the Forces... whenever it seems to him expedient so to do.

Power is also granted to the Governor-General to dismiss individual soldiers on ministerial advice.<sup>45</sup> The office of Governor-General no longer exists, and the role is now fulfilled by the President. As discussed above, the lack of definition of the word *defence* can be problematic without further clarification of what is actually being defended, and against whom. The provision does however clearly enunciate the chain of command over the FMF. Section 3(3) specifies that the Governor-General has *supreme command* but that the Commander only has powers to *command*. The hierarchy of these terms makes it clear that the Commander, while possessing a great deal of

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41 1970 Constitution, above n 39, s 30.

42 Ibid, ss 45 and 79.

43 Ibid, s 85.

44 Military Act, above n 2, s 3(3). The Interpretation Act 1978 (Fiji), s 2(1) defines the Minister as the Minister responsible for the administration of the Act.

45 Military Act, above n 2, s 13.

power over the forces, is still subject to the further command of the Governor-General. By virtue of s 16, the Governor-General holds power over the existence of the force and has the authority to disband it.

Another crucial way of restricting the powers of the FMF is by intervening at the recruitment phase. The military can be employed by anyone duly authorised under the Military Act. Enlistment of new soldiers can be carried out by anyone authorised by the Commander, or by any officer; this suggests that those who recruit are not those who maintain full power over their employment.<sup>46</sup> The actual day-to-day control of the forces may remain with those who recruit them, but the full power over the future of the forces, in terms of its existence in the long term, lies instead with the Governor-General. Such a disjunct between those who employ the forces and those who can terminate their appointment, with no requirement for consultation between the two, could have created administrative difficulties and confusion between the President and the Commander. This may have, in turn, reduced the effectiveness of the restrictions on recruitment for the FMF.

The 1970 Constitution embodied a clear intention to ensure that the military bore a strong level of accountability to the executive and the public.<sup>47</sup> Budgetary constraints on the military connect it to the government through a need for regular appropriations.

In 1987, two coups were carried out and an interim military Government declared Fiji a Republic. A President was appointed, who was until then the Governor-General.<sup>48</sup> Decrees planned a new constitution and repealed the entire 1970 Constitution, but left all other laws consistent with the military decrees, to enable the state to continue to function.<sup>49</sup> This left the Military Act in place throughout the coups.

At this point in Fiji's history, any new constitutional provisions started from a clean slate, only infrequently referring to or continuing past constitutional provisions. This at least provided some certainty, given that the military had chosen to repeal the 1970 Constitution in its entirety and not merely sections of it with which they disagreed.

A draft replacement constitution was submitted to a Constitution Inquiry and Advisory Committee, who delivered their report in 1989. There was no elected government to pass this reform.

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46 Ibid, s 17.

47 The principal mechanism for bringing the executive into this is the placement of the relevant Minister in the chain of command. While under s 3(3) the actual power to supremely command the forces lies with the Governor-General, this is a power which must be exercised at the advice of the Minister. In this way, accountability is directly to the executive, and then indirectly to the public through elections and the citizens' chance to hold the executive themselves accountable.

48 Appointment of Head of State and Dissolution of Fiji Military Government Decree 1987 (No 25).

49 Fiji Constitution Revocation Decree 1987 (No 1).



The report considered the following proposals:<sup>50</sup>

- Section 78(2): the Commander will be appointed by the President for five year terms, on the advice of the Prime Minister.
- Section 38(7): the Commander will be appointed by the President to be a member of the House of Representatives on the advice of the GCC.
- Section 67(3)(b): the Commander will be appointed as the Minister responsible for Defence and Security.
- Section 78(3): the FMF will ensure the "wellbeing" of the people of Fiji.

The Committee had concerns with the latter three provisions as they could create difficulties with accountability and "administrative awkwardness".<sup>51</sup>

The provisions which led to particular debate were those which would have given the FMF an unelected place within the legislature, and then a place for the Commander in the executive, as the responsible Minister. If accountability for the FMF and for performance reports lay with that Minister, it would have effectively meant that the Commander reports to nobody for a five year term. They could not be removed from their position by the electorate, as the system is not one contingent on elections. This makes it much more difficult for the powers of the FMF to be restrained and monitored. Earlier Letters Patent had never made similar provisions. This kind of provision had no precedent within Fiji. In the end, neither policy was amalgamated into the Constitution that was passed in 1990 (1990 Constitution), possibly because of the concerns enunciated by the Constitution Advisory and Inquiry Committee.

In the resulting 1990 Constitution as passed, s 94 provided for the existence of the Force and the appointment of its Commander. It also retained the following role of the FMF: "It shall be the overall responsibility of the Republic of Fiji Military Forces to ensure at all times the security, defence and wellbeing of Fiji and its peoples."<sup>52</sup>

The phrase *wellbeing* of Fiji is an extremely broad one. Submissions to the Committee suggested the provision was a "charter for a coup".<sup>53</sup> It essentially raises similar, but greater, concerns as the provision for the 'defence' of Fiji within the Military Act. When terms used to define the role and purpose of a military are used imprecisely, or are not well defined within a separate

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50 Paul Manueli (Chair) *Report of the Fiji Constitution Inquiry and Advisory Committee* (Fiji Constitution Inquiry and Advisory Committee, Suva, 1989) at 50.

51 *Ibid.*, at 51.

52 Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990, s 94 [1990 Constitution]. Section 164 granted retrospective immunity for those involved in the coups.

53 *Ibid.*

interpretation section, this can lead to confusion about the appropriate role of the military in a specific situation. As a result, this makes them more likely to intervene in situations which the constitutional makers may not have intended to be within the ambit of their powers.

The 1990 Constitution was unclear as to who controlled the FMF in terms of employment, due to inconsistencies in the wording of some sections. The Public Service Commission was authorised to control the FMF by making appointments and "exercising disciplinary control over those holding such [public] offices".<sup>54</sup> Yet that section also expressly stated that it would not apply to members of the FMF or of the Police Forces.<sup>55</sup> The interpretation section of that constitution said that "public service" meant "service of the state, whether in a civil or military capacity, in respect of the government of Fiji".<sup>56</sup> This seems to indicate that it was the Public Service Commission which employed the FMF and which would have control over them. A separate Police Service Commission also existed,<sup>57</sup> which dealt with employment matters for the Police Force. There was no separate institution for the FMF. Employment matters relating to the FMF must have fallen within the Public Service Commission, as otherwise there would have been no other institution appropriate to deal with them. Such provisions which are inconsistent or unclear engender uncertainty as to who exactly has the proper authority to check the power of the FMF, and create the risk that such checks may not be carried out effectively.

The 1990 Constitution was severely criticised.<sup>58</sup> A new constitutional review was swiftly begun and a new Constitution came into force in 1997. The Fiji Constitution Amendment Act 1997 (1997 Constitution) made a number of key changes.

The Constitution Review Commission, when reviewing the draft 1997 Constitution, was concerned with *constitutional provision* for military forces. The Commission noted potential inconsistencies with the key principles in the United Kingdom Bill of Rights 1688,<sup>59</sup> which required that a standing army within peacetime could only exist with express Parliamentary consent.<sup>60</sup> When provision is made for a military within a constitution,<sup>61</sup> it removes the need for that consent to be

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54 Ibid, s 127(1).

55 Ibid, s 127(4)(f).

56 Ibid, s 149(1).

57 Ibid, s 128(1).

58 Ganesh Chand and Vijay Naidu *Fiji: Coups, Crises and Reconciliation*, above n 10, at 24.

59 Bill of Rights 1688 (UK) 1 Will & Mar c 2.

60 Brij V Lal, Tomas Rayalu Vakatora and Paul Reeves (Chair) *The Fiji Islands, Towards a United Future? Report of the Fiji Constitution Review Commission* (Parliament of Fiji Parliamentary Paper No 34, 1996) at [12.86] [Reeves Commission].

61 See 1997 Constitution, above n 12, s 112.

regularly renewed, although appropriations would still be needed in practice for the force to function.<sup>62</sup>

There is an ongoing legal provision mandating the FMF's existence, according to the 1997 Constitution. To alter this, the constitution itself must be amended. The stringent voting thresholds for constitutional amendments contained in s 192 make it more difficult for the Government to alter any provision authorising FMF existence than if such a provision were within an ordinary statute. The existence of entrenched provisions relating to the military within a constitution can cause problems by making it more difficult for any given Parliament to amend those sections, compared with provisions in ordinary statutes. This suggests that the most effective military controls are ones that permit the legislature to respond more easily when dealing with any issues that may arise.

The 1997 Constitution devoted s 112 to the FMF:<sup>63</sup>

- (1) The military force called the Republic of Fiji Military Forces established by the Constitution of 1990 continues in existence.
- (2) The President, acting on the advice of the Minister, must appoint a Commander of the Republic of Fiji Military Forces to exercise military executive command of the Forces, subject to the control of the Minister.
- (3) The Commander of the Republic of Fiji Military Forces is responsible for:
  - (a) making appointments of members of the Forces;
  - (b) taking disciplinary action against members of the Forces; and
  - (c) removing members from the Forces.
- (4) The Parliament may make laws relating to the Republic of Fiji Military Forces.

The 1997 Constitution is reliant on Parliament as a means of checking military power, particularly when compared with its 1990 counterpart. The 1997 Constitution did not provide the ambit of the FMF's powers. As a result, the FMF can claim to justify its actions through an implied licence within the Constitution. The controls in terms of the chain in command remain relatively similar to the 1970 Constitution at independence.

There is also a need for Parliamentary authorisation for the purposes for which the armed forces may be deployed. The report conceded that the military may have a useful role in assisting the police.<sup>64</sup> There was not fundamental disagreement with the idea of having a military force assist in

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62 See later discussion of the Auditor-General cases.

63 1997 Constitution, above n 12, s 112.

64 Reeves Commission, above n 60, at [12.96].

domestic matters. Rather, the committee seemed more concerned that resolving domestic crises by utilising military intervention, as a method that ought to be used sparingly and only in particular circumstances. Frequent use of the military can blur the roles of the FMF and the domestic Police Force.

The transitional provisions within the 1997 Constitution make it clear that the 1990 Constitution was to be repealed in its entirety, save for a few expressly reserved provisions, none of which applied to the FMF.<sup>65</sup> Other laws not specifically repealed were to continue,<sup>66</sup> and were to be interpreted with necessary modifications to ensure consistency with the 1997 Constitution.<sup>67</sup> This provision continued the Military Act in the background of the broader constitutional changes that were taking place at the time.

The confusion in the 1990 Constitution regarding the role of Public Service Commission (PSC) was clarified in the 1997 Constitution. It clearly removes the role of the PSC in employing or dismissing members of the FMF. It expressly states that the powers of the PSC do not extend to FMF officers,<sup>68</sup> and the definition of public service includes only the "service of the state in a civil capacity".<sup>69</sup> This clarifies the control over the military forces in an employment sense to ensure that it is clear that day to day responsibility remains with the Commander, both for the enlisting and disciplinary management of its members. There is no longer separation between who recruits and who employs the FMF in the long term, as both are essentially managed by the Commander. This makes it easier to hold the Commander accountable for the exercise of such powers.

One final issue for consideration is the auditing of military funds, as a means of governmental review of the FMF, and who has the power to carry this out. Methods of accountability like auditing provide a check on the FMF and thus incentivise future actions to be taken within the ambit of the law. The crucial provision is s 176(1) of the 1997 Constitution, which requires that all money received for Government purposes is paid into a Consolidated Fund.<sup>70</sup> This means that all money that is paid to the Government for FMF service as peacekeepers would go to the central Government, which could then allocate the funding as necessary. Such spending is then subjected to regular review by Fiji's Auditor-General.

The dilemma that occurs in the case of the FMF is that some military funds do not come from public sources. In 2004, Fiji's Supreme Court had to consider the issue of whether or not additional

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65 1997 Constitution, above n 12, s 195(1).

66 *Ibid*, s 195(2)(e).

67 *Ibid*, s 195(3).

68 *Ibid*, s 147(2)(c).

69 *Ibid*, s 194(1).

70 *Ibid*, s 176(1).

military funds were subject to Government checks through the Auditor-General. The funds in question<sup>71</sup> included a Canteen Fund and a Regimental Fund,<sup>72</sup> and were funded from private sources, including donations and fundraising. Having separate sources of funding makes it more difficult for civilian governments to monitor and place limitations upon FMF actions, thus ensuring that it only acts within its powers accorded by statutes and the Constitution.

The matter came before the courts when the Auditor-General was denied access to audit these funds. The 1997 Constitution authorised the Auditor-General to audit all public accounts and the control of public money.<sup>73</sup> The Auditor-General was required to examine the accounts of all accounting officers.<sup>74</sup> Accounting officers were defined as "every public officer who is charged with the duty of collecting, receiving or accounting for ... any public moneys."<sup>75</sup>

The issue then became whether the Auditor-General could hold the FMF accountable for the funds, and thus exercise greater oversight over funds which did not derive from the consolidated fund, but were arguably public funds nonetheless. Auditing of accounts is one way an elected government can continue to hold a military force accountable for its actions. In theory this greater transparency could restrict the ability of the military forces to covertly plan a coup or any other actions to interfere with government operations.

The issue went through both the High Court<sup>76</sup> and the Court of Appeal.<sup>77</sup> The Supreme Court concurred in determining that the Auditor-General did have jurisdiction over these funds.<sup>78</sup> The Supreme Court thus confirmed the Auditor-General's powers to scrutinise the FMF.

The constitutional changes did not maintain civilian Government in Fiji. In 2000 a coup was carried out by George Speight, a civilian, and his supporters. The coup was relatively short lived, with the FMF taking control after ten days.<sup>79</sup> Elections were held in 2001, and then again in 2006.

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71 The authority for these funds are drawn from the Military Act, above n 2, s 66.

72 *The Commander of the Republic of Fiji Military Forces v The Auditor-General of Fiji* [2004] FJSC 8 at [7].

73 1997 Constitution, above n 12, s 167(1). Public money is defined in the Audit (Amendment) Act 2006 (Fiji), s 2 as "revenue or money raised or received for the purposes of government".

74 Audit Act 1969 (Fiji), s 6(1).

75 *Ibid*, s 2. The definition of 'public officer' comes from the Interpretation Act 1978 (Fiji); "a person in the ... employment of the government of Fiji" (s 2(1)).

76 *Auditor-General v Commander of the Republic of Fiji Military Forces* [2000] FJHC 247, [2000] 2 FLR 1.

77 *Commander, the Republic of Fiji Military Forces v Auditor-General* [2003] FJCA 74.

78 *Commander of the Republic of Fiji Military Forces v The Auditor-General of Fiji*, above n 72, at [30] and [47].

79 Rajendra Prasad *Tears in Paradise: A Personal and Historical Journal 1879–2004* (Glade Publishers, Auckland, 2004).

Later that same year Commodore Frank Bainimarama intervened with the military to overthrow the elected Government and has been the Prime Minister in an interim military Government since. The constitutional checks put in place by the 1997 Constitution were insufficient to stop the events that were designed to prevent. This shows that the way in which legislative provisions operating on the military in Fiji must be improved.

### *C Decrees of the Military Governments*

After the two most recent coups, the status of the laws governing the FMF was unclear. The military issued various decrees on both occasions. The decrees were intended to continue all existing laws,<sup>80</sup> subject to the attempted removal of the 1997 Constitution and changes to accommodate alterations to related legislation.<sup>81</sup> These decrees provided clear examples of, in many cases, inappropriate ways of dealing with the military forces. The decrees were drafted by the FMF themselves, and consequently contained few limitations on the exercise of military power. The absence of an elected government made it even more difficult for the citizens of Fiji to monitor and check FMF actions.

As civil unrest grew, the Emergency Decree 2000<sup>82</sup> was passed, granting the military broad powers to use any force which they considered necessary to disperse processions, meetings or assemblies and to apprehend those involved.<sup>83</sup> It also created offences for acts likely to cause mutiny, sedition or disaffection among members of the armed forces.<sup>84</sup> There were very limited restrictions on the exercise of those powers.

Following the 2006 coup the military Government issued further decrees, including one providing retrospective authorisation for the FMF to overthrow the Government of Laisenia Qarase.<sup>85</sup> It purports to grant immunity to those involved in the coup.<sup>86</sup> These decrees were clearly inconsistent with the need for Parliament to make all laws relating to the military forces, as s 112(4) of the 1997 Constitution required.

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80 Existing Laws Decree 2000 (Interim Military Government of Fiji Decree No 2) (Fiji).

81 Fiji Constitution Amendment Act 1997 Revocation Decree 2000 (Interim Military Government Decree No 1) (Fiji).

82 Emergency Decree 2000 (Interim Military Government Decree No 4) (Fiji).

83 Ibid, s 3(2).

84 Ibid, s 15.

85 Immunity (Fiji Military Government Intervention Promulgation 2007) (Interim Government Promulgation No 3) (Fiji), s 1.

86 Ibid.

### ***D Relevant Judicial Decisions***

There were two crucial court cases following each of the most recent coups, detailing the military's legal status and ruling on the ongoing relevance of the 1997 Constitution.<sup>87</sup> Both cases held the coups to be unlawful and upheld the 1997 Constitution as still being in force.

A recent crucial court case suggests that the judiciary also sees itself as having certain powers of review over the FMF. Between the two most recent coups, a case arose regarding the ability of a Lieutenant Colonel to resign from his commission. The officer in question, Filipo Tarakinikini, had played a role in the interim Government following the 2000 coup, and had sought to resign his commission. The Supreme Court applied the 1949 Act and 1997 Constitution in its discussion of the law.<sup>88</sup> The Court refused to quash the Commander's decision not to accept the resignation, because the officer had not given correct notice of his resignation.<sup>89</sup> However, the court did not indicate that it would have lacked the power to quash the decision if it decided that step was appropriate. At the very least, this was a finding that the FMF was subject to reviews of its decisions by the courts.

### ***E Fiji Human Rights Commission Report***

Another institution, the Fiji Human Rights Commission, can also provide a check on military power by reporting on the relevant law and creating political pressure, as opposed to having legislative power to enact change. In January 2007, the Commission published a report on the legality of the 2006 coup.<sup>90</sup> In the Report, the Commission noted its support for the 1990 Constitution because of the broad powers it prescribes for the military; giving the FMF responsibility for the wellbeing of Fiji and its citizens. While the 1997 Constitution narrows these powers, the Human Rights Commission argued that the omission of such a discussion in the 1997 Constitution means that the 1990 Constitution was the most recent and clearest articulation of the military's role within Fiji.<sup>91</sup> The Commission argues that the 1990 provision should be imported into the 1997 Constitution to formally broaden the military's role, despite the express revocation of the 1990 Constitution by s 195 of the 1997 Constitution.

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87 *Republic of Fiji Islands v Prasad* [2001] FJCA 2 (Fiji CA) and *Qarase v Bainimarama* [2009] FJCA 9 (Fiji CA). Both ruled on the validity of the 1997 Constitution and the legality of the Government. In *Prasad* the Court held that the 1997 Constitution remained effective.

88 *Tarakinikini v Commander of the Republic of Fiji Military Forces* CBV0007, 21 May 2004 (Fiji SC).

89 *Ibid*, at [49].

90 Dr Shaista Shameem *The Assumption of Executive Authority on December 5th 2006 by Commodore JV Bainimarama, Commander of the Republic of Fiji Military Forces: Legal, Constitutional and Human Rights Issues* (Fiji Human Rights Commission, Suva, 2007) at 4.

91 *Ibid*, at 6.

The report is concerning for a number of reasons. Firstly, it seeks to vest broad power for civilian protections in unelected institutions with few checks and balances on such power. Secondly, it advocates the existence of the 1990 Constitution despite its express repeal in 1997. Thirdly, the Report's support for coups which have led to violence and property damage against Fijian civilians suggests it is no longer acting in accordance with its mandate of protecting human rights. The Commission's arguments cannot stand up in the face of expressly repealed provisions.

#### ***IV POSSIBILITIES FOR REMOVAL OR DECREASE OF MILITARY POWER***

The wording of constitutional and statutory provisions plays a key role in maintaining military subservience to civilian government within a state like Fiji. Fiji could borrow provisions from other jurisdictions that have been successful. Different jurisdictions have different types of instruments constituting the military forces and different ways of defining their role.

##### ***A Constitutional Comparisons***

Every military force has its powers defined in a statute or constitution. But the similarities end there. Some states have a provision which enables them to have a regular army at all times, while others maintain a small force which is swelled by reservists when needed. This section examines provisions across different countries, ranging from the Costa Rican Constitution<sup>92</sup> to the Papua New Guinea Constitution.<sup>93</sup> These countries all have distinct ways of regulating their military forces and the distribution of checks and balances within their respective governments.

##### ***I Costa Rica<sup>94</sup>***

In 1949, the National Army of Costa Rica returned power to a democratically elected Government.<sup>95</sup> Following this, the new Government put in place a constitution which prohibited the military from existing. Article 12 of that Constitution states:<sup>96</sup>

The Army as a permanent institution is abolished. There shall be the necessary police forces for surveillance and the preservation of the public order. Military forces may only be organised under a continental agreement or for the national defence; in either case, they shall always be subordinate to the civil power: they may not deliberate or make statements or representations individually or collectively.

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92 The Constitution of Costa Rica 1949 (Costa Rica), art 12.

93 Constitution of the Independent State of Papua New Guinea 1975 (Papua New Guinea), art 201.

94 Japan's constitution contains a similar provision: "land, sea and air forces, as well as other war potential, will never be maintained" (The Constitution of the State of Japan (1947) (Japan), art 9(2)).

95 Robert Holden *Armies without Nations: Public Violence and State Formation in Central America 1821–1960* (Oxford University Press, New York, 2004) at 216.

96 The Constitution of Costa Rica, above n 92, art 12.



This provision remains unaltered since its passage, and Costa Rica has not raised a military force for any reason.

This is the most extreme way for a constitution to restrict a military, by completely proscribing it. Yet provisions which limit the military but do not provide a corresponding limitation upon the police force may mean that the latter institution effectively *becomes* the former. In such a circumstance this provision might not operate to prevent coups, as the institution, being the police, would still possess the capability to carry out a coup in practice.

## 2 *Australia*

Australia has clear statutory separation between the powers of the Governor-General and those of the Minister; the former is Commander-in-Chief,<sup>97</sup> while the latter manages general control and administration of the defence forces, not extending to command.<sup>98</sup> The two of them have the combined power to govern all aspects of the military. This clear delineation makes the day to day management of the Australian Defence Force clear, and reduces the likelihood of disputes or problems regarding the question of jurisdiction over any particular matter.

One provision which Australia uses could be used in Fiji to ensure that coups are reported. Alternatively, it could ensure that any coup attempts involve smaller numbers of individuals, thus reducing their chances of success.<sup>99</sup> Specific legislation deals with the Defence Force and mutiny attempts:<sup>100</sup>

A defence member is guilty of an offence if:

- (a) a mutiny is taking place or is intended; and
- (b) the member knows of that fact; and
- (c) the member does not take reasonable steps:
  - (i) to suppress or prevent the mutiny; or
  - (ii) to report to proper authority without delay that the mutiny is taking place or is intended.

This kind of conspiracy provision could easily be applied to increase the risk for those choosing to take part in a coup. If this offence existed, it would mean that even if immunity has been granted for those who carried out the coup, there is still an offence for those who knew of the coup and failed to report it. If, as a consequence of this provision, retrospective immunity was extended to

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<sup>97</sup> Defence Act 1903 (Australia), s 8.

<sup>98</sup> *Ibid*, s 9.

<sup>99</sup> Charles Sampford "Coups d'État and Law" (1989) 13 *Bull Austl Soc Leg Phil* 253 at 283.

<sup>100</sup> Australian Defence Force Discipline Act 1982 (Australia), s 21(1).

those who knew of the coup, the additional level of potential liability could perhaps be enough in itself to encourage people to report coups before they take place.

Fiji's coups were not sudden or unanticipated. The last in 2006 came after months of exchanges between the Government and the FMF, during which threats of coups were made on multiple occasions. Having a conspiracy offence in place may be completely ineffective, as the Government may have been aware that the coup was coming and been powerless to stop it even if it was reported early on. However, provisions such as these may increase the ability of the law to *deter* people from involvement in coups and that in turn may reduce the likelihood of them actually taking place.

### 3 *New Zealand*

In New Zealand, the Defence Act 1990 envisages that the military may be utilised for a number of civilian purposes, including "the protection of interests of New Zealand"<sup>101</sup> and "the provision of any public service".<sup>102</sup> The Governor-General is Commander-in-Chief and the armed forces cannot direct themselves to intervene in any situation. In New Zealand in 2010 and 2011 the military was used to assist in the aftermath of the Christchurch earthquake, for example; and in Fiji itself there has been historical precedent for this, including in an oil industry strike in 1959.<sup>103</sup>

New Zealand has no mutiny provision equivalent to Australia, but could possibly cover similar circumstances through treason:<sup>104</sup>

Every one owing allegiance to Her Majesty the Queen in right of New Zealand commits treason who, within or outside New Zealand,—

(e) Uses force for the purpose of overthrowing the Government of New Zealand; or

(f) Conspires with any person to do anything mentioned in this section.

However, this provision does not create an offence for those who are aware of a conspiracy and choose not to report it. This concern would need to be addressed if such a provision were applied to Fiji. It extends the level of liability beyond those who actually participate in the coup or conspire to carry it out.

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101 Defence Act 1990 (NZ), s 5(b).

102 Ibid, s 5(f).

103 Brij V Lal *Broken Waves: A History of the Fiji Islands in the Twentieth Century* (University of Hawaii Press, Honolulu, 1992), at 166.

104 Crimes Act 1961 (NZ), s 73.

#### 4 *United Kingdom*

In the United Kingdom, there is no provision for an ongoing military force.<sup>105</sup> Instead, a legislative provision requires that Parliament regularly renew the military forces. Parliament must pass a new Act every five years.<sup>106</sup> Budgetary control remains with Parliament.

This process is designed to ensure that a standing army may only exist with legislative consent, providing direct accountability to the electorate. It appears that the five yearly renewals by Parliament are for the purpose of saving time, rather than because of a belief that annual renewals of the forces would be unnecessary. Annual renewals are made by Order in Council, but both Houses of Parliament must see and approve the draft.<sup>107</sup> This shows the importance of this power of oversight. A provision such as this may be useful in ensuring that provision for the military remains with the Parliament as opposed to being defined in the long term within a constitution.

This system of regular renewals was approved by the Fijian Constitutional Review Commission that reviewed the draft 1997 Constitution. It noted concerns that the proposed provisions, stating the FMF would exist, and specifying its responsibilities, could unduly constrain Parliament and limit its control over the forces.<sup>108</sup> This is due to the need for larger majority requirements when voting to amend the Constitution.<sup>109</sup> The fact that such a provision has been considered for Fiji by a Constitutional Review Commission is something that should be considered when future constitutional reviews take place.

#### 5 *Papua New Guinea*

The Papua New Guinea Defence Force has no Commander-in-Chief, as outlined by its Constitution.<sup>110</sup> Instead, accountability for the defence force lies with the National Executive Council, through a responsible Minister.<sup>111</sup> This section, s 201(2), ensures that absolute control at all times lies with the executive. This system is not far removed from Fiji, where the President must act on the advice of the Minister, as part of the executive, when commanding the forces, as dictated

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105 See the provisions against a standing army in the Bill of Rights 1688, above n 59.

106 Army Act 1955 (UK) 3 & 4 Eliz 2 c 18; Air Force Act 1955 (UK) 3 & 4 Eliz 2 ch 19; Naval Discipline Act 1957 (UK) 5 & 6 Eliz 2 c 53. The most recent of these was the Armed Forces Act 2006 (UK). Section 382(1) of the 2006 Act provides that it will expire within a year. This term can be extended by an Order in Council (s 382(3)). There is a five year time limit on such extensions and Orders cannot be made renewing the Acts beyond 2011 (s 382(4)). At that stage Parliament must legislate again.

107 Armed Forces Act 2006 (UK), s 382(5).

108 Reeves Commission, above n 60, at [12.87].

109 1997 Constitution, above n 12, ss 190 to 192.

110 Constitution of the Independent State of Papua New Guinea 1975, above n 93, s 201.

111 *Ibid*, s 201(2).

by the 1997 Constitution. The reality is of course very different under the current military Government.

This provision gives greater control of the military by ensuring that executive power, in the sense of control over the military forces, cannot lie with an individual but instead lies with an elected government as a whole.

One consideration that is important to bear in mind when dealing with constitutional comparisons is that many countries have never had periods of civilian rule interrupted by military rule. Therefore their protective means within the law may in fact not be particularly robust as they have never been tested, and there has been no subsequent need for amendment or review. It has been suggested that, for this reason, many countries are protected from coups "by lack of inclination rather than lack of [military] capacity".<sup>112</sup>

### ***B Options for Decreasing Military Power Within Fiji***

The next step in the analysis is to look at the appropriate way to apply different provisions in Fiji, given its legal and political history, in order to better mediate the relationship between the FMF and civilian governments by reducing FMF power. The differing relationships between civilian governments and military forces in each of the states discussed illustrates that there is no settled view on how a military force should be constituted and what governmental constraints are appropriate or necessary to impose.<sup>113</sup>

There are a number of ways that the law can impose limitations on the FMF's ability to carry out a coup. Some of these have been discussed already as part of the examination of Fiji's legal history to date, but many have been ineffective in maintaining military subservience to civilian government.

The first way to impose such limitations would be to reduce the membership of the force. Measures to effect this could include a division between regular forces and those in the reserves. For example, if a model similar to the United Kingdom was adopted, every five years Parliament would approve the numbers by legislation. Members of the military forces themselves could make submissions to Parliament on the basis of what they anticipate their need for forces to be and why, and this could take into account the needs of the FMF to serve as peacekeepers.

Although the need for regular appropriations maintains some accountability to Parliament, the FMF has used other means to raise funds to supplement its activities. While these have not appeared to be funding the forces themselves, the opportunity for the FMF to gain funding from other sources should not be overlooked. Five yearly revisions would add another level of scrutiny not existing under the current system. The additional funds were never quantified or audited so it is uncertain

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112 Charles Sampford "Coups D'état and Law", above n 99, at 261.

113 This paper will not look at removal of the military, due to its political implications.

what ability the FMF would have to keep funding its own operations if its external finances were cut. Additional funding from countries like the United States has ceased since the coup, thus substantially reducing the operating budget of the forces and their potential to expand their capacities in terms of numbers and equipment.<sup>114</sup>

A numerical limit would keep the force to a size where its ability to overthrow the government would be limited, and maintain sustainable expenses. It would also keep the military accountable to both the legislature and, indirectly, to the citizens of Fiji on a more regular basis than exists under the present legal system. The 1949 Act expressly gives the Minister power to make regulations providing for the *numerical establishment* of the forces,<sup>115</sup> and there is precedent for this within Fiji. The 1954 regulations specified the FMF to be composed of the following:<sup>116</sup>

S5: The numerical establishment of the Regular Force shall be not more than 65 officers on the Active List and 1,430 soldiers ...

S6: The numerical establishment of the Territorial Force shall be not more than 100 officers on the Active List and 2,000 soldiers ...

This kind of provision should be continued within legislation, not regulations, and there should be regular reviews of the figures, with the long term aim of a reduction in the size of the force. One way to clarify this within a statute could be:

- (a) The numerical establishment of the Regular Force shall be not more than 1430 soldiers, and 2000 soldiers on the reserve list.
- (b) Enlistment of further soldiers may still be carried out under the following conditions:
  - (i) The person enlisting soldiers must be authorised in writing by both the Commander and the President to do so; and
  - (ii) The President may set any restrictions on enlistment numbers as they see fit in the circumstances.

Another possibility could be to enact new offences of knowledge of conspiracies to commit coups d'état. This would hold liable anyone who knew of a planned coup but failed to report it. This could be a particularly important provision if a coup was orchestrated by someone in the FMF other than the Commander, thereby suggesting an inherent element of secrecy within its planning. By creating several requirements for reporting of coup attempts, it will also ensure that, no matter who

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114 "United States views on Democracy and Fiji" (2009) Embassy of the United States in Suva <[www.suva.usembassy.gov](http://www.suva.usembassy.gov)>.

115 Military Act, above n 2, s 67(a).

116 Fiji Military Forces Regulations 1954, reg 5; continued in force by the Fiji Independence Order 1970 (UK), above n 41, ss 2(1) and 5(1).

in the FMF is involved in the plan, there will still be someone external to such a plan to whom this information could be given. Such a provision could be drafted as follows:

- (a) Any member of the Fiji Military Forces commits an offence who, knowing that a coup d'état is being planned, fails to report it to either:
  - (i) Their commanding officer; or
  - (ii) The Commander of the FMF; or
  - (iii) The Chief of the Fiji Police Forces;
 in a timely manner.
- (b) This offence is committed whether or not the planned coup d'état takes place.

Fiji's three independence constitutions have differently defined the purposes for military deployment. The broadest of these was the 1990 Constitution, which specified that the military had an overall responsibility "to ensure at all times the security, defence and wellbeing of Fiji and its peoples".<sup>117</sup> Such a broad provision could lead to a huge number of deployments, including in situations which would ordinarily fall within the scope of the Police Forces' powers. The first element of this which needs limitation is that deployment should not be able to be at the initiative of military itself, but only with the command of the President. This was exactly how it was provided for in the 1997 Constitution, where the President had the role of Commander-in-Chief.<sup>118</sup> This clear chain of command needs to emphasise subservience to civilian government, whether it is within the constitution or statute. Allowing military interventions at the military's own initiative will greatly increase the risk of a coup taking place, because the FMF could claim an implied right to intervene based on the Constitution.

It is also important to bear in mind that the FMF Act continued in force throughout the coups, and its provisions still apply to the military. However, as an ordinary piece of legislation it would be much easier to amend when compared with any of the constitutions.

Finally, the interaction between the military and the police force should be outlined. The ambit of the two should not overlap. This way the laws will ensure clarity of which institution is more appropriate to deal with a situation and will prevent jurisdictional disputes that hamper the efficacy of each institution. The 1997 Constitution establishes the office of the Commissioner of Police,<sup>119</sup> who has command of the entire police force.<sup>120</sup> The Commissioner of the Police is responsible for

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<sup>117</sup> 1990 Constitution, above n 52, s 94(3).

<sup>118</sup> 1997 Constitution, above n 12, s 87.

<sup>119</sup> *Ibid*, s 111(2).

<sup>120</sup> *Ibid*, s 111(3).

deployment of the force, and such deployment does not require the consent of the legislature or of the President.

The Police Force need not require authorisation for deployment in the same way as the FMF. It deals with emergencies and its deployments are more frequent, so it would be impossible to seek governmental consent for every deployment. Military forces exert a different kind of power, and a more greater amount of power than the Police Force. The primary function of most military forces relates to protection from external threats, not internal ones, and thus the actions of the military can impact significantly upon a state's international relations. That same capacity does not exist within the day to day operations of an ordinary police force. The weaponry of a military force also tends to be greater than a police force, given the distinct activities that both institutions carry out.

There does not seem to be significant concern with the operations of the Police Force within Fiji. What does need clarification is the relationship between the Fiji Police Force and the FMF. The existence of a provision expressly delineating the relationship and powers of the two institutions may be useful where the division has blurred in the past. For example, a clarification provision should set out that the FMF has no authority to intervene in situations ordinarily dealt with under the mandate of the Fiji Police Force without express authorisation from the President. This would be in addition to the usual provisions regarding presidential authority for deployment. The provision could be drafted as follows:

- (a) The Fiji Military Forces may not act in any situation within the ambit of the Fiji Police Force, without prior express written authorisation by the President.
- (b) In the circumstances described in paragraph (a), the main function of the Fiji Military Forces will be to assist the Police Force as requested by its Chief.
- (c) The Fiji Military Force would act only in such a way as has been authorised by the Chief of the Fiji Police Force.

A crucial part of this provision is the need for *prior* written authorisation. This would preclude the military from granting retrospective authorisation for its own actions by means of a military decree, as has been done in the past. The need for prospective authorisation for such actions makes it more difficult for the FMF to constitutionally justify its actions in overthrowing elected governments.

In terms of auditing, FMF legislation should also clarify the institutional relationship with the Auditor-General, and this should also be clarified in any subsequent Audit Acts. What is needed is an express provision granting broad powers of oversight to the Auditor-General. Such a provision will ensure that another arm of the government is able to review and monitor the use of FMF funding. In turn, this should limit the ability of the FMF to perhaps stock resources or equipment for a coup, or to administer its funds in a way inconsistent with appropriate uses for public funding more generally. The provision could be drafted as follows:

- (a) The Auditor-General has the authority to annually audit any funds administered by the Fiji Military Forces.
- (b) These funds include both funds from public sources and those from non-public sources, including those sourced from any of the following:
  - (i) Voluntary salary deductions;
  - (ii) Fundraising; and
  - (iii) Donations.
- (c) Nothing in this provision limits the ability of the FMF to administer funds from additional sources beyond those appropriated for it by Parliament.

Finally, the question arises as to where the appropriate place in which to locate provisions relating to the military forces. Should they be within statutes or constitutions? Given the ongoing issues with the FMF rejecting the primacy of civil power, it may be appropriate to have the existence and role of the military subject to ongoing Parliamentary review, much in the same way that the United Kingdom system operates. Placement of such provisions in constitutions subjects them to more stringent voting requirements for amendments and this reduces Parliament's responsiveness when dealing with military-related concerns.

These are some of the ways that Fiji could use from both its own constitutional and legislative history, and the constitutional history of other states worldwide. Mediating the relationship between the institutions of a military, police force and civilian government is essential to maintaining a functioning, stable state in the long term.

## ***V CONCLUSION***

Fiji's Government and the FMF have shared a turbulent history. Originally developed as an institution to protect the government of one chief, the FMF has evolved to the point where it now employs one in every one hundred Fijians, and has intervened four times to overthrow democratically elected governments.

Colonial and post-independence constitutions have defined the military in different ways, and its definitions and powers at any given point in time can be linked to the historical context of their creation. The 1990 Constitution, created in the wake of the 1987 coups, was most generous in terms of the power it granted to the FMF, including granting the force power to act without executive or legislative authorisation.

There are states where the military is held more directly accountable to civilian government, through a need for regular authorisation by the Parliament for its existence, or by direct accountability to an elected government rather than indirectly through a Commander-in-Chief acting



on government advice. Fiji can learn from the experience of other states to improve its own legislation and ensure greater checks on military power and activities.

Above all there exists an overwhelming need for care and precision when drafting statutory provisions dealing with the military forces. It needs to be clear in any circumstance whether or not the military has been authorised to act, and who retains the supreme command of the forces. Such provisions should clarify if and how the military is subject to review by the courts, the Auditor-General, to the government itself, and indirectly to the citizens who elect that government. When dealing with a military force of such a size and capacity as that which exists in Fiji, its permissible use of powers should be limited in such a way as to curb the scope of the FMF to carry out a coup if it wished to do so.

The benefits of having such certainty in the law are obvious. By more clearly delineating the areas of responsibility dealt with by different branches of the government, the law can help maintain the separation of powers and promote long term governmental stability. Each branch of government will be more aware of their powers, and less able to dispute matters of jurisdiction. In a broader sense, this certainty also makes the law much easier for all relevant parties to adhere to, and thus promotes compliance with it. In cases where the FMF may choose not to act in the ways that it should, such as through disallowing the Auditor-General access to some of its funding, there needs to be scope for that power to be checked by the courts as a backup to resolve disputes.

The key question here is whether or not Fiji can ever be moved on from what is known as its "coup culture". The answer, in a practical sense, is that the law can never protect from coups with absolute certainty. The FMF, in the same way as many other military forces, has the resources to overtake a civilian government if it wishes to do so. The key to using legal means to prevent coups relates to encouraging the reporting of planned coups, or decreasing the size of the military, among other methods. The inability to prevent a coup with certainty, through legislative means, should not detract from the importance of drafting the relevant provisions with the utmost care and precision in order to minimise the risk of coups and promote a long term tradition of more stable relations between the FMF and the Government of Fiji. With these kinds of restrictions in place, Fiji's next thirty years may look very different from recent history.

