THE NATIONAL UNIVERSITY OF LESOTHO

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CONSTITUTIONALLY FAIR TRIAL, SUMMARY TRIAL BEFORE MILITARY COURTS: PLEA FOR REFORM

SUBMITTED BY

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DEDICATION

To my grandmother ‘Mamosonngoa Katiso for seeing through me at an early age, at primary school, that one day I will be an advocate. I have lived up to that vision and thank you for your inspiration. Get well and rejoice with me.

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First of all, I must thank the only Man that I am near and dear to, God almighty, He said in His word: “for I the Lord thy God will hold thy right hand, saying unto thee, fear not, I will help thee.” (Isaiah 41:13) Now I believe. I have a testimony, His blessings kept me going even when no man had enough words to motivate me. Thank you Father.

Secondly, I must thank my supervisor, Advocate K K Mohau KC, for the time he had for me. He has never been too busy for me. For always being patient with me, for hoping for the best, and only the best from me. Thank you.

To my family, for their encouragement and unwavering support. In particular I want to thank my wife for having to endure all the hardship of raising our two lovely boys in my absence, you are my hero. To my mother, you are the best mother that God could ever give to anyone. I will forever treasure and embrace your words and exhortations, all those gave me strength to carry on with my studies even when it was not easy. Thanks Mom. My brother Maqolo Paul Makoetlane, for your support in all ways even though you are out there and about, there are some of the things I could have not achieved in this academic life had it not been because of your generosity, stay blessed.

Last but not least, to everyone in my life: friends, colleagues, mentors and role-models. You are all very special to me. Though I may not mention you by names, you are all so adorable. Some of you made me feel so special and loved even when I felt that I do not deserve being loved. I have been through a lot with your help, emotionally, academically, financially and otherwise.

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LIST OF ACRONYMS

CAT	Convention Against Torture
CMJ	Court of Military Judge
CO	Commanding Officer
CODH	Court Of Disciplinary Hearing
ICCPR	International Covenant on Civil and Political Rights
LDF	Lesotho Defence Force
DMP	Director of Military Prosecutions
MDC	Military Discipline Code
MDSMA	Military Discipline Supplementary Measures Act
NDA	National Defence Act
PMJ	Principal Military Judge
QR&O	Queens Regulation & Order
SANDF	South African National Defence Force
UDHR	Universal Declaration on Human Rights
UN	United Nations
UPDF	Uganda People Defence Force

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Lesotho Defence Force Act No. 4 of 1996

Lesotho Paramilitary Force Act No. 13 of 1980

The Codes of Good Practice. Legal Notice No. 194 of 2008

REGIONAL INSTRUMENTS

African Charter on Human and Political Rights 1981

National Defence Act of 1950 (NDA)

Uniform Code of Military Justice (UCMJ) 1976

Uganda Peoples Defence Force(UPDF) Act of No. 7 of 2005

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Convention Against Torture 1984

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International Covenant on Civil and Political Rights 1966.

Manual for Courts-Martial 1969

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Queen's Regulation & Order 1884

Universal Declaration of Human Rights 1948

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R. v. MacKay [1980] 2 S.C.R. 370.

R v Généraux [1992] 1 SCR 25

CHAPTER ONE

1.1 INTRODUCTION

The military justice system operates differently from the civilian criminal justice system because the two systems serve different purposes. Whereas the aim and purpose of the civilian criminal system is to punish offenders for the crimes that they have committed, the main aim of the military justice system is to enforce discipline.[1]

A system of military justice can be said to have two purposes: a. "[T]o ensure the discipline of its members in a just manner." In this sense military law is seen as the backbone of military discipline in the armed forces.[2] b. "[T]o provide an instrument of management."[3] It assists the military in acting against offenders, enabling prompt action. According to Anderson, military law promotes organisational goals.[4] Although the military justice system is a separate system from the civilian environment, it should not be so different that it does not comply with acceptable standards of law as practiced in the civilian courts.[5] The military justice system can, to a large extent, be seen as a merging of military traditions and the criminal procedure followed in the civilian courts.[6] The procedures followed during a military trial are similar to those in civilian trials. However, this chapter shows the origin of the military justice system, its aim and operation within the military establishment.

[1] Morris L. J. Military Justice: A Guide to the Issues. Praeger, Santa Barbara (2010) at 3; Ministerial Task Team Report by the Ministerial Task Team on Transformation of Military Legal System (2005) at 32; R v Généraux [1992] 1 SCR 259 (the "purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the
discipline, efficiency and morale of the military….To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and frequently, punished more severely than would be the case if a civilian engaged in such conduct. There is thus a need for separate tribunals to enforce special disciplinary standards in the military").

[2] Anderson G. C. The Legal Classification of Military Tribunals as Courts of Law (1988). unpublished LLM dissertation, University of Pretoria. At 98.

[3] Ibid Anderson at 98.

[4] Ibid Anderson at 99.

[5] Vashakmadze M. Understanding Military Justice. Geneva Centre for the democratic control of Armed Forces. Geneva. 2010. At 21 where the author says that the "military and ordinary civilian systems of justice should apply comparable standards with respect to training, judicial independence and career prospects. The military justice system should not be completely isolated from its civilian counterpart."

[6] Opcit Anderson at 104

1.2 MILITARY JUSTICE SYSTEM

The Lesotho Defence Force (LDF) is established under section 146 of the Constitution.[7] The section requires the LDF to be structured and administered as a disciplined Defence Force. The Constitution therefore allows for a system within the LDF to enforce such discipline.[8] A separate system for soldiers can be justified because of the fact that the military environment, as well as society, have unique expectations of their soldiers, such as expecting soldiers to be willing to risk their lives for their country. It is for this reason that Morris describes military law as "a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."[9] To that end military law is governed by statute. The relevant legislation in this regard is the Lesotho Defence Force Act[10] which largely repealed the Lesotho Paramilitary Force Act.[11] The other instrument is the Lesotho Defence Force Regulations[12] which is an embodiment of procedural rules pertaining to the military judicial system. The LDF ACT provides, inter alia, for military offences and creates the military court system while the regulations as well as the rules of procedure provide for the relevant court procedures.

Discipline is necessary for an effective military force. Even offences traditionally viewed as criminal within the civilian environment ultimately reflect on the discipline of the offender. It is safe to say that throughout the history of the armed services this has been the position.[13] The armed forces possess weapons and are highly trained and it is in the best interests of the state and society if they are highly disciplined. The military demands from its members that they conform to a certain set of rules and regulations.[14] This is an important requirement for discipline amongst

[7] The Constitution of Lesotho of 1993. Section 146 (1) provides that there shall be a Defence Force for the maintenance of internal security and the defence of Lesotho.
[8] Ibid section 146 (2)
[9] Morris, L.J. Military Justice: A Guide to the Issues. Praeger, Santa Barbara. 2010.
[10] Act No. 4 of 1996
[11] LPF Act No. 13 of 1980
[12] Defence Force Regulations Legal notice No. 24 of 1998
[13] Rowe, P. "A New Court to Protect Human Rights in the Armed Forces of the UK: The Summary Appeal Court" 8 Journal of Conflict and Security Law. 2003. At 201-215. Rowe at 80 opines that a "criminal offence committed by a soldier within a military context is no less a breach of discipline than a purely military offence".
[14] Osiel M J, Obeying Orders: Atrocity, Military Discipline and the Law of War. Transaction Publishers, New Brunswick. (2002) at 26-31

the ranks. For a defence force to function properly, discipline is an essential element. It has been said that it is often only discipline that overcomes an individual's inherent fight for self-preservation and allows a soldier to stand and face the enemy, even in the face of death.[15] Smart[16] describes the importance of discipline as follows:

> "A heap of building material is to a house as a mob is to an army. Structured order and discipline elevate the army above the mob... The significance of discipline lies in the fact that it is the practical touchstone which determines whether or not a defence force will be reliable in its conduct, be it in the field of war or vis-à-vis the Constitution of the day".

All soldiers remain subject to all the laws governing the country, but due to the fact that they belong to a particular group certain laws have evolved to tailor to the needs of this group.[17] It is accepted that some acts and conduct are prohibited in the military that are not punishable in a civilian profession.[18] Certain offences may also be regarded as more serious in the military than in the civilian environment. It is for this reason that military law is designed to accommodate the strong emphasis on discipline, often resulting in procedures that would not always be considered fair by a civilian.[19] As Nyane,[20] says:

> The military is, by necessity, among the least democratic institutions in human experience; martial customs and procedures clash by nature with individual freedom and civil liberty, the highest values in democratic societies.[21]

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[15] Brand, C.E. Roman Military Law. University of Texas Press, Austin. 1968. At xii (referring to a saying attributed to Napoleon that "[d]iscipline is the first quality of the soldier; valor is only second")

[16] Smart, D. "The Revision of South African Defence Legislation – A Personal View". African Defence Review 1994. At 29-37

[17] Opcit. Rowe at 8.

[18] Ibid

[19] Opcit Morris at 3; Vashakmadze, M. Understanding Military Justice (2010), Geneva Centre for the Democratic Control of Armed Forces (DCAF), available at http://www.dcaf.ch/Publications/Publication-Detail?lng=en&id=127045 last
accessed on 08/11/2019.

[20] 'Nyane H, The place of the army in the Constitutional Democracy in Lesotho: Lesotho Law Journal. Vol 22. 2015. Numbers 1 & 2, 61-87 @ 67

[21] Kohn, RH. How Democracies control the military: Journal of Democracy. Vol. 8(4) 1997, 140-153.

In the case of *Sekoati and Others v President of the Court Martial,*[22] it was held that "Lesotho's Constitution creates a particular legal regime for the military in general and courts-martial in particular. The full panoply of fundamental rights is expressly not available to the military. Courts-martial nevertheless must be independent but in the sense and to the degree appropriate to their inherent nature as military, not civilian courts. The provisions in the Act and Rules challenged by appellants, are not unconstitutional. Nor is their own court-martial unconstitutionally convened". This does not however mean that soldiers are not entitled to constitutional protection. Although soldiers' rights may be limited upon joining the armed forces, they do not waive all their rights.[23]

The effectiveness of the military justice system in enforcing discipline can be dependent on the fairness of the system.[24] Morris[25]states that

> "[i]f soldiers perceive that the system, popular or not, essentially produced just results, then it would be an effective tool for leaders to enforce discipline and produce a fighting force that is more cohesive and effective".

The purpose of a defence force is to protect the territorial integrity of the country and to fight, where necessary, in armed conflicts. All training and actions are concentrated on this purpose. It is, therefore, to be expected that an individual's needs and rights may be treated as subservient to this purpose. As a volunteer, it might be expected that he joined with this possibility in mind.

[22] LAC (1995-99) 812,

[23] Constitution of Lesotho 1993. Section 24 (3) provides that in relation to any person who is a member of a disciplined force raised under a law of Lesotho, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of Chapter II – the bill of rights other than sections 5-right to life, 8-freedom from inhuman treatment, and 9-Freedom from slavery and forced labour.

[24] Heinecken, L., Nel, M & Janse van Vuuren, J. "Military Discipline: Where Are We Going Wrong?" 25 Strategic Review for Southern Africa. 2003. At 88-106

[25] Opcit Morris at 3

There are many reasons why a separate military justice system is necessary within this particular environment, but one reason stands out for purposes of punishments in particular. Brand mentions the need for independent self-efficiency of the armed forces where it may become necessary to protect its operations outside the borders of the country where the state does not have territorial jurisdiction.[26] This sentiment is echoed by Smart where he opines that due to the fact that war will be waged wherever service in defence of Lesotho must be rendered, it is imperative that the armed force has the means to retain order and discipline in the field, irrespective of the nature of the war or geographical environment. This can only be done if the defence force is in a position to execute justice quickly and efficiently where the offence is committed. This entails that, where the soldier is deployed outside the borders of the country, military law will be the only justice system with the jurisdiction to do so. This also dictates a need for a variety of very specific military punishments to be executed within the area of deployment.

Military law is, however, not only applied in conflict situations or when on deployment. In Lesotho, it is mostly applied in peace time. Since it is postulated that military law is an important requirement in the process of instilling discipline, one cannot leave the application of military law only to times of conflict. Training is done in peace time so that the armed forces may be ready in times of war. A breakdown of discipline during a conflict situation may have disastrous consequences for all concerned. Discipline is, therefore, instilled in peacetime, supported by military law.

1.3 KEY QUESTIONS TO BE ANSWERED

The study seeks to understand the way in which law is fashioned to deal with the issues of summary trial of service men in Lesotho. The study tries to find out if there is a need to reform the existing provisions both in the Lesotho Constitution of 1993 as amended, The Lesotho

[26] R v Genéréux [1992] 1 SCR 259. Military courts have personal jurisdiction versus the territorial jurisdiction of civilian courts

Defence Force Act[27] and The Lesotho Defence force Regulations[28]. In this regard, some key questions to be answered include: (a) Is a court of summary jurisdiction in the army a court? (b) Are proceedings in the summary trial fair? (c) Does the current legal framework address the problem of the military legal system? (d) If not so, how should it be modified to address the current problems?

1.4 PRINCIPLES THAT THE DISSERTATION WILL BE BASED ON

The dissertation will be based on the principles of a constitutionally fair trial and the principles of natural justice.

1.5 RESEARCH METHODOLOGY

A large part of this study is based on desktop research. It is both historical and comparative in its approach. It traces the historical origins of the summary trial procedure and the basis for the adoption of such a procedure. It gives the comparative and critical analysis of the procedure and then proceed to give recommendations for possible reforms to both the Constitution and the Army code.

1.6 FRAMEWORK AND OUTLINE

This dissertation looks at four main themes: (1) the status of the military judiciary, in particular the summary trial (2) Constitutionally fair trial before military courts (3) Comparative analysis of summary trials with other countries (4) Recommendations for possible reforms in the Lesotho context.

It is important to understand the development of military law over the years, why soldiers have always been treated differently and why this should be so. To evaluate whether the changes are

[27] Act No.4 of 1996
[28] Legal Notice No. 24 of 1998

merely rehashing age-old concerns or effecting actual change and to understand the specific nature of military law and punishment, it is important to peruse the development of military justice over time.[29]

Chapter 2 looks at the status of the summary trial, broadly addressing two aspects: (1) the procedure of trial in summary jurisdiction in line with independence and impartiality, and (2) the fair trial rights of the accused. The independence of the military courts examines the concept of an independent judiciary, both personal and substantive independence, against the background of the rule of law, separation of powers and the meaning of judicial independence and impartiality.

Judicial independence is however not enough. The trial must also be fair and the military courts are evaluated against certain fair trial criteria. Fair trial rights can only attach to an offender where he qualifies as "an accused charged with a criminal offence." To this end the status of the accused is investigated. A selection of fair trial rights are discussed, examining the accused's right to be sufficiently informed of the charges, to have sufficient time and facilities to prepare a defence, a public trial before an ordinary court and the right to choose and be represented by a legal practitioner of his choice.

Chapter 3 examines the summary trial in different jurisdictions. It shall focus on the original inception of the summary trial procedure in the United States, Canada, Uganda and South Africa and share the developments they have since adopted. This chapter serves as a basis for understanding the difference in approach between the different jurisdictions, and possible reforms that our military justice system and the Constitution can adopt to answer to the requirements of the twenty first century.

[29] Hagan W R "Overlooked Textbooks Jettison Some Durable Military Law Legends" 113 Military Law Review 1986. 163 at 164, where he states that there "is another, more practical reason to learn about our military legal heritage. Legal links to history mean that we will better understand our present system and ensure that progress is progress; that is, improvement, not merely change. In the law too, the "new" may have been tried before and discarded."

Chapter 4 addresses the differences identified from different jurisdictions, the conclusions drawn therefrom and recommendations. The discussion is concluded with possible reforms envisaged for the Military code and the procedures applicable.

1.7 CONCLUSION

Military courts must act in conformity with the Constitution.[30] Subsequently the military courts have to comply with fair trial guarantees and international standards as found in the Constitution. The military justice system was challenged inter alia on two important aspects, being (1) the constitutionality of the courts martial system[31] and (2) the existence of the military prosecution counsel.[32] Each military court has its own penal jurisdiction, depending on the status of the court. There are two courts of the first instance, the court of summary jurisdiction and the court martial, as well as a disciplinary forum. Their penal jurisdiction is determined by the LDF ACT. From these courts matters are referred for appeal to Court Martial Appeal Court[33] and review to the High Court. Therefore, it is prudent to have a short overview of the summary trial procedure and determine whether it is in line with the Constitution especially on the principle of fair trial. The next chapter therefore, deals with the procedure of summary trial before a military court.

[30] Section 2 of the Constitution confirms its supremacy. All laws are subject to the Constitution and the Bill of Rights

[31] Freedom of Expression Institute v President, Ordinary Court Martial 1999 (2) SA 471 (C).

[32] Legal Soldier (Pty) Ltd v Minister of Defence 2002 (1) SA 1 (CC)

[33] Section 138 of the LDF ACT No. 4 of 1996.

CHAPTER TWO

2.1 INTRODUCTION

The aim and function of the judiciary is to see that justice is done. The courts and the administration of justice are governed by the Constitution.[34] The independence of the judiciary is guaranteed by the Constitution,[35] which also lists the various courts that constitute the Lesotho judicial system.[36] In addition to the well-known civilian courts it also provides for Court Martial and "such tribunals exercising a judicial function as may be established by Parliament".[37] No person or organ of the state may interfere with the functioning of the courts. This framework clearly emphasises that all courts must function independently to ensure that justice is done. This raises the question whether the military courts would, therefore, be able to function independently to ensure that justice is done in the military context. As discussed in the previous chapter, the aim of the military justice system is different from that of the civilian justice system, it is to enforce discipline. However, in the attainment of discipline justice must also be done. To attain justice two components are of importance, procedural justice and substantive justice.[38] In this context justice not only means that a fair decision must be reached on the facts, but also that the trial must be conducted in accordance with a fair procedure. Procedural justice refers to a fair decision making process and includes the principles of the rule of law, separation of powers and the independence of the judiciary. Fair trial procedures refer to those rights enshrined in section 12 of the Constitution, also known as fair trial rights, including the right to a public hearing before an independent and impartial court established by law. The procedures followed in the military courts are generally similar to those followed in the civilian court. However, merely following the processes of the civilian criminal courts does not automatically qualify a military court as an ordinary criminal court. One would have to evaluate military courts against the criteria set in terms of the common law, the Constitution and other relevant legislation to determine whether it can be classified as a criminal court. It is worth examining the procedures

[34] Section 118 of the Constitution of Lesotho 1993.
[35] Section 118 (2)
[36] Section 118 (1)
[37] Section 118(1) (d)
[38] Mahomed I. "The Role of the Judiciary in a Constitutional State: Address at the First Orientation Course for New Judges" South African Law Journal. 1998. 111 at 115.

in the military summary trial and determine as to whether they comply with the fair trial procedures as enshrined in the bill of rights in the Constitution.

2.2 SUMMARY TRIAL

Military justice in Lesotho is administered at two procedural levels: by summary trial or by court martial. The summary trial is held under the authority of, or presided over by, the accused's Commanding Officer, Officer Commanding, or Superior authority.[39] It is a somewhat informal and expeditious means of dealing with relatively minor offences under the military Discipline. Under the summary trial procedure, the presiding officer, the trier of fact, and the prosecutor are one and the same person. The accused is not entitled to legal counsel[40].

The summary trial is provided for in the LDF Act by section 91 which states that; "A prescribed officer may, subject to such conditions and restrictions as may be prescribed in the regulations try and punish summarily any member whether within or outside Lesotho for an offence in terms of the Lesotho Defence Force Act".[41] The expression "prescribed officer" means superior authority, commanding officer or officer commanding.[42]

The Procedure in the Defence Force (Discipline) Regulations provides that an allegation against a member that he has committed an offence in terms of the Act shall be reported by his unit commander in the form of a charge drafted in the manner prescribed by Court Martial Procedure Rules.[43] A report in terms of sub-regulation (1) shall be made to a superior authority in the case of a member above the rank of major. In the case of a member of or below the rank of major and of or above the rank of Warrant Officer (Class II), the report shall be made to his commanding

[39] LDF Act No. 4 of 1996, section 91 (2)
[40] Regulation 19 of Defence Force (Discipline) Regulations, Legal Notice No. 29 of 1998.
[41] Opcit Section 91 (1)
[42] Ibid 91 (2)
[43] Ibid Regulation 16 (1)

officer. And in the case of a member of or below the rank of Staff Sergeant, to his officer commanding.[44]

2.3 RESTRICTION ON RIGHT TO DEMAND TRIAL BY COURT MARTIAL OR CIVIL COURT

No member has a right to demand trial before a civil court or except in terms of regulation 24[45], to demand trial by court martial.[46]

2.4 REPRESENTATION AT ANY INVESTIGATION, SUMMARY TRIAL OR SUMMARY OF EVIDENCE

Subject to regulation 36[47], no member is entitled to be legally represented by an advocate, attorney or any other person at any summary trial, investigation or proceedings for the taking of a summary of evidence held in terms of the Regulations.[48]

2.5 JURISDICTION OF PRESIDING OFFICERS OVER MEMBERS ON SUMMARY TRIAL

Subject to the Regulations, a superior authority may try summarily any member of or below the rank of major; a commanding office may try summarily any member of or below the rank of Warrant officer; an officer commanding may try summarily any member of or below the rank of

[44] Ibid 16 (2)
[45] Regulation 24 states that (1) Where in terms of regulation 17 (4) (d), a presiding officer remands a charger for summary trial or for direction by higher authority, he shall (d) where a summary of evidence has been prepared on the charge, remand the case for trial by court martial.
[46] Regulation 18
[47] This Regulation provides for the procedure on inquiry which might form subject of charge against a member or affect his character or reputation. In these proceedings, a member is entitled to be to be present throughout the inquiry and shall be given the opportunity to question witnesses and call witnesses. Even if he is not present, everything will carry on but he will be given a written report of what transpired and be expected to make a written representation within 7 days. He cannot be represented by anyone.
[48] Legal Notice No. 29. Defence Force (Discipline) Regulations 1998. Regulation 19

staff sergeant. A charge against an officer above the rank of major shall, unless it is dismissed, be remanded for trial by court martial.[49]

2.6 POWERS OF PUNISHMENT OF PRESIDING OFFICERS OF SUMMARY TRIAL

Where, on a summary trial in terms of Regulation 23 and subject to sub-regulation (10) of that Regulation, a presiding officer has determined that an accused is guilty of a charge, he records a finding of guilty and may, subject to the Regulation and, if appropriate, section 110 of the Act, impose any of the following punishments:[50]

In the case of a superior authority, where the accused is an officer, a fine not exceeding the equivalent of 30 days basic pay or one thousand Maloti whichever is the lesser, forfeiture of seniority, extra duties over a period not exceeding 40 days, a severe reprimand or a reprimand, an admonition, and where the offence has occasioned any expense, loss or damage, stoppage of pay not exceeding M500.[51]

Where the accused is a non-commissioned officer of the rank of sergeant or below, reduction to the ranks or any less reduction in rank, a fine not exceeding the equivalent of 30 days basic pay or four hundred Maloti whichever is the lesser, forfeiture of seniority of rank, extra duties over a period not exceeding 40 days, a severe reprimand or reprimand, an admonition, and where the offence has occasioned any expense, loss or damage, stoppages not exceeding M400.[52]

Where the accused is a soldier, detention for a term not exceeding 80 days, where the offence was committed on active service, field punishment for a term not exceeding 80 days, a fine not

[49] Ibid Regulation 20
[50] Defence Force (Discipline) Regulation 22 (1)
[51] Ibid 22 (1) (a) (i)
[52] Ibid 22 (1) (a) (ii)

exceeding the equivalent of 30 days basic pay or two hundred Maloti whichever is the lesser, extra duties over a period not exceeding 40 days, an admonition, and where the offence has occasioned any expense, loss or damage, stoppage not exceeding M200.[53]

In the case of a commanding officer where the accused is a non-commissioned officer of the rank of corporal or below, reduction to the ranks or any less reduction in rank, a fine not exceeding the equivalent of 15 days basic pay or M200 whichever is the lesser, in the case of an acting or temporary non-commissioned officer, reversion to substantive rank, extra duties over a period not exceeding 20 days, severe reprimand or a reprimand, an admonition, and where the offence has occasioned any expense, loss or damage, stoppages not exceeding M200.[54]

Where the accused is a soldier, detention for a term not exceeding 40 days, where the offence was committed on active service, field punishment for a term not exceeding 40 days, a fine not exceeding the equivalent of 15 days basic pay or M100 whichever is the lesser, extra duties over a period not exceeding 20 days, confinement to barracks for a period not exceeding 20 days, an admonition, and where the offence has occasioned any expense, loss or damage, stoppage not exceeding M100.[55]

In the case of an officer commanding where the accused is a non-commissioned officer, other than a warrant officer, a fine not exceeding the equivalent of 5 days basic pay of M60, whichever is the lesser, extra duties over a period not exceeding 10 days, a reprimand, an admonition, and where the offence has occasioned any expense, loss or damage, stoppages not exceeding M100.[56]

Where the accused is a soldier, a fine not exceeding the equivalent of 5 days basic pay or M30, whichever is the lesser, extra duties over a period not exceeding 10 days, confinement to

[53] Ibid 22 (1) (a) (iii)
[54] Ibid 22 (1) (b) (i)
[55] Ibid 22 (1) (b) (ii)
[56] Ibid 22 (1) (c) (i)

barracks for a period not exceeding 10 days, an admonition, and where the offence has occasioned any expense, loss or damage, stoppages not exceeding M50.[57]

A punishment specified in sub-regulation (1) (a), (b) or (c) shall be deemed to be a lesser form of punishment than the specified in the preceding subparagraph and greater than those in the succeeding paragraphs. Save as is expressly provided to the contrary in sub-regulation (4) a presiding officer shall impose one punishment only in respect of all charges on which an accused is convicted at the same trial.

Subject to his jurisdiction prescribed by the regulation a presiding officer may impose, either in addition to or without any other punishment, stoppages, except where a fine is imposed, and a severe reprimand or an admonition. Either in addition to or without a fine, forfeiture of seniority of rank, or reversion to substantive rank or confinement to barracks, with or without extra duties.[58]

2.7 PROCEDURE ON SUMMARY TRIAL BY PRESIDING OFFICER

During the summary trial of an accused before a presiding officer,[59] subject to the Act, any charge against an accused is heard in his presence. Each charge is read to the accused and explained to him. The accused is called upon to plead to each charge individually. Provided that if the accused refuses to plead to a charge, a plea of not guilty is entered by the presiding officer. If the accused is subsequently arraigned on the same charge for trial by a higher authority or court martial, no evidence as to his plea or any other statement made by him during the summary trial is admissible against him at the subsequent trial.

[57] Ibid 22 (1) (c) (ii)
[58] Ibid 22 (4)
[59] Regulation 23 of Defence Force (Discipline) Regulations Legal Notice No. 29 of 1998.

The evidence against the accused is given on oath, which oath is administered to each witness by the presiding officer in the form and manner prescribed in the First Schedule to the Court Martial Procedure Rules and the accused is entitled to cross examine such witnesses. After the evidence against him has been heard the accused is given the opportunity of giving evidence on oath, or making an unsworn statement and calling any witness in the defence both on the facts of the charge and in mitigation of punishment.[60]

If the accused elects to give evidence or to call witnesses, the oath is administered in terms of sub-regulation (6)[61] and the presiding officer may question the accused or witnesses on their evidence.[62] Where a summary of evidence on the charge has been prepared the presiding officer may, with the accused's consent, dispense with calling of all or any witnesses, and enter the summary or any part thereof as evidence in the trial.[63]

Where, having heard or perused all the evidence on any charge, the presiding officer determines that, the accused is guilty, and the appropriate punishment for the offence would, in terms of Regulation 23 (2) be greater than extra duties, and the appropriate punishment should summarily be imposed, he does not record any finding or sentence without first giving the accused the opportunity of electing to be tried by court martial.[64]

Where an accused elects in terms of sub-regulation (10) to be tried by court martial and does not withdraw that election within 24 hours, he is remanded accordingly and where no summary of evidence has been taken the procedure therefore is commenced within 7 days of such remand.[65] But where the accused does not elect or withdraw his election to be tried by court martial, the

[60] Ibid 23 (6)
[61] Ibid 23 (7)
[62] Ibid 23 (8)
[63] Ibid 23 (9)
[64] Ibid 23 (10)
[65] Ibid 23 (11)

presiding officer, after convicting and sentencing him, advise him of his rights in terms of Regulations 26[66] and 29.[67]

2.8 REVIEW OF PROCEEDINGS OF SUMMARY TRIAL

The proceedings of any summary trial, other than where the charge was dismissed or the punishment imposed was not greater than extra duties, may within 7 days of the conviction, be reviewed at the instance of the accused or any other person who, in the opinion of the Director of Legal Service, is an interested party.[68] The reviewing authority, where the summary trial was held by the Commander, is the Minister. Where it was held by a superior authority other than the commander, the reviewing authority is the commander. But where it was held by the commanding officer or an officer commanding, it is a superior authority.[69]

2.9 ARE MILITARY COURTS FAIR

A soldier, like any other citizen, is entitled to a fair trial. As is evident, the military administers a separate and integrated system of justice with jurisdiction over service personnel, which distinguishes it from the civil system. It remains to be determined whether or not these distinguishing features deny military personnel the right to a "fair hearing within a reasonable time by an independent and impartial court established by law."[70] Right to 'fair trial' is a basic human right associated with criminal justice.

[66] Regulation 26, powers of review by confirming authority after trial by court martial.
[67] Regulation 29, petition on review of proceedings of court martial or summary trial
[68] Regulation 25 (1)
[69] Ibid 25 (2)
[70] The Constitution of Lesotho 1993. Section 12.

Justice Cruz[71] enumerates the following list of judicial proceedings to fulfil the requirements of procedural due process, which collectively establish the foundation of a fair trial:

a. There must be an impartial court or tribunal clothed with judicial power to hear and determine the matter before it;

b. Jurisdiction must be lawfully acquired over the person;

c. The defendant must be given an opportunity to be heard; and

d. Judgment must be rendered upon lawful hearing.

In judicial proceedings, the following additional elements constitute indispensable features of the concept of due process, and they are guaranteed without reservation or relaxation:[72]

a. The right to hearing, which includes the right to present one's case and submit evidence in support thereof;

b. The tribunal must consider the evidence presented without any bias;

c. The decision must have something to support itself;

d. The evidence must be substantive;

e. The decision must be rendered on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected;

f. The tribunal or body or any of its judges must act of its own or his/her own independent consideration of the law and facts of the controversy and not simply accept the views of a subordinate in arriving at a decision; and

g. The tribunal, in all controversial questions, renders its decision in such a manner that the parties to the proceedings can know the various issues involved, and the reason for the decision rendered.

[71] Ibid page 102.
[72] Sangroula Y. Concepts and evolution of human rights: Nepalese perspective. Kathmandu school of law. Nepal. 2003. At page 268.

These elements provide a set of 'minimum standards' to fulfil before anyone is condemned to sentence. Violation of any of the standards amounts to be a 'violation of the due process rule or principle and as such it renders the trial 'unfair'. Consequently, justice is denied.[73]

In examining the independence and impartiality of a military tribunal, it is important to distinguish between the court martial and the summary trial. The summary trial warrants examination because it is the most common form of military justice.

The court-martial process is much more formal than the summary trial. Therefore, the accused benefits from the procedural protections that are offered and the process is not haunted by the obvious conflicts of interest that confront the Commanding Officer under the summary trial. The accused is represented by a legal practitioner of his own choice. The President of the court martial is always a senior ranking military officer. He or she may or may not have legal training. The court martial sits in open court[74] and is composed entirely of commissioned officers.[75] When a Judge Advocate is appointed to the court martial, his or her role is to advise the court on matters of law, although the advice may be disregarded. Finally, the prosecuting officer is often legally trained. All the key participants in the trial are commissioned officers. This is unlike in the summary trial where the presiding officer, who, in most cases, is not legally trained, is everything and the accused is not represented.

2.10 INTERNATIONAL LEGAL FRAMEWORK OF FAIR TRIAL

To ensure that all the elements of procedural due process are fully observed before somebody is condemned; the international human rights instruments require the following minimum standards to be fully observed:

[73] Ibid at page 269
[74] Section 99 of the Lesotho Defence Force Act No. 4 of 1996
[75] Ibid Section 93.

a. According to Article 11 of Universal Declaration on Human Rights (UDHR), Article 14 (3b, d and g) of International Covenant on Civil and Political Rights (ICCPR) and Article 1 of the United Nation (UN) Basic Principles on Roles of Lawyers, any person under investigation for the commission of an offence shall have the right to be informed of his/her right to remain silent and to have competent and independent counsel preferably of his/her own choice. If the person cannot afford the services of counsel, he/she must be provided with one.[76]

b. According to Article 9 of UDHR and Article 9 (1&3) of ICCPR, no person shall be subjected to arbitrary arrest and detention. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.

c. According to Article 5 of UDHR, Article 7 of ICCPR, Article 7 of Convention Against Torture (CAT)[77] and Article 16 of UN Guidelines on the Roles of Prosecutors, no one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment.

d. According to Article, 11 (1) of UDHR, Article 14 (2) of ICCPR, Article 14 of UN Guidelines on Role of Prosecutors and Article 2, 5, 6 &7 of UN Basic Principles on Roles of Lawyers, the accused, in all criminal prosecutions, shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself/herself.

[76] The Universal Declaration of Human Rights 1948 and International Covenant on Civil and Political Rights 1966.
[77] The Convention Against Torture 1984

e. According to Article 9 (2) of ICCPR, the suspect shall enjoy the right to be informed of the nature and cause of the arrest or accusation against him/her.

f. According to Article 10 of UDHR and Article 9 (3) of ICCPR, the suspect shall enjoy the right to have a speedy, impartial and public trial by an independent tribunal.

These standards are considered as minimum standards which the criminal justice system of every nation should confirm in practice. The legitimacy of the criminal justice system of a given nation is determined by its honest confirmation and practice of these minimum standards. Conviction of a person in any criminal charge without satisfaction of any of these standards amounts to a denial of a fair trial, and as such a violation of human rights.[78]

In Africa, in the African Charter on Human and Political Rights,[79]

a. Article 5 states that every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. And that all forms of exploitation and degradation of man particularly slavery, slave trade, cruel, inhuman of degrading punishment and treatment shall be prohibited.

b. Article 6 provides that every individual shall have the right to liberty and to the security of his person. And that no one may be deprived of his freedom except for reasons and conditions preciously laid down by law. Which are that, no one may be arbitrarily arrested or detained.

[78] Sangroula Y. Concepts and evolution of Human Rights: Nepalese perspective. Kathmandu school of law. Nepal. 2005.
[79] African Charter on Human and Political Rights 1981

c. Article 7 provides that every individual shall have the right to have his cause heard, which comprises of

I. The right to an appeal to competent national organs against acts of violating his fundamental rights a recognised and guaranteed by Conventions, Laws, Regulations and customs in force.

II. The right to be presumed innocent until proved guilty by a competent court or tribunal

III. The right to defence, including the right to be defended by counsel of his choice

IV. The right to be tried within a reasonable time by an impartial court or tribunal.

In the case of *Nonkululeko Zaly v The Prime Minister and Others*,[80] the disciplinary inquiry proceedings were set aside by the High Court of Lesotho because the applicant was not allowed to be represented by a legal practitioner. This was a constitutional application brought against the respondents for a declaratory order that the disciplinary inquiry proceedings conducted against her inclusive of its decision that recommended for her dismissal be reviewed and set aside since her right to legal representation and concomitantly to a fair trial were violated. Section 8(2) of Part III of the Codes of Good Practice,[81] was declared to be inconsistent with S. 12 of the

[80] CASE NO 15/2013) [2014] LSHC 26 (29 July 2014)
[81] The Codes of Good Practice Legal Notice No. 194 of 2008

Constitution[82] to the extent that it does not accommodate the residual discretionary powers of the Chairperson to allow representation by a legal practitioner under deserving circumstances.

2.11 CONCLUSION

The process under military law has been structured in such a way that it cannot possibly exclude subtleties of command influence and higher military values such as the need for discipline. There can be no assurance that military trials will be fair, as long as it is possible for commanders to influence the courts.

The LDF Act lists a total of forty four (44) Military offences. The summary trial has the power to try thirty three (33) offences which in most cases are considered as minor offences, while the Court Martial has the power to try eleven (11) offences that are considered to be major offences. Looking closely at all the eleven offences, they attract punishment by various terms of imprisonment ranging in severity from 10 years to 20 years, and even the death penalty. The thirty three offences triable by summary trial, attract an imprisonment of a term not exceeding 5 years and downwards, with other punishments like demotion as the case may be. In most cases, besides imprisonment, other punishments by both summary trial and Court Martial are the same. They both can fine, imprison, demote or dismiss a member from service. However, the accused before summary trial is prohibited from being represented by a lawyer while before Court Martial the accused may be represented by a lawyer.

The impact of Summary trial on most officers and soldiers in Lesotho has been very negative. Some of the punishments have been so severe so much that one may belief that the presiding officers exercised powers beyond their jurisdiction. This is precipitated by an obvious reason that the presiding officers lack legal training and the accused is not represented by a lawyer to fight for the accused's rights. Besides correcting the issues of discipline, some officers and soldiers even decided to leave the army due to the prejudice they suffered under summary trial. People of

[82] The Constitution of Lesotho 1993

great value like a medical doctor left the army as a result of injustice suffered during summary trial, because the process is not fair. Some officers who were earlier demoted have been reinstated to their previous ranks by the current command which one would applaud for addressing that issue. However, it frustrates to see that nothing has been done to the Act and Regulations or in a form of standing order to address the issue so that it does not happen again.

CHAPTER THREE

3.1 INTRODUCTION

Before one can venture into reforms, it is prudent that one evaluate the system as against the same in other jurisdictions so as to see where there are some elements that need to be improved for the betterment and benefit of the nation. The previous chapter, dealt with the summary trial in Lesotho. Before thinking of reforms, it is very important to consider how other countries deal with summary trial so as to compare and contrast and make necessary recommendations. Therefore, in this chapter summary trials in countries like Canada, United States of America, Republic South Africa and Uganda shall be dealt with.

3.2 SUMMARY TRIAL IN THE CANADIAN DEFENCE FORCE

In Canada, the National Defence Act of 1950 offers two main avenues: Court Martial and summary trial.[83] In commenting on the *raison d'être* of both service tribunals, the Supreme Court of Canada affirmed that both serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct .[84] Summary trials are thus in place to provide a means to punish breaches of military law.

3.2.1 Dual Role and Importance of Commanding Officers

Due to the special and distinct character of the profession in arms, commanding officers are required to fulfill a dual function as leaders of their unit. First and foremost, commanding officers are responsible for ensuring military discipline in order to carry out efficient and successful military operations. In this last regard, in the light of the distinct character of military discipline, the positive moral leadership of commanding officers, rather than the threat or fear of legal punishment, is recognized as the most effective means of ensuring and maintaining military

[83] National Defence Act of 1950 (NDA)
[84] R. v Genereux [1992] 1 S.C.R. 259.

discipline and efficiency of operations.[85]In addition, commanding officers are also in the best position to administer a summary form of military justice within their units, most notably during combat. Indeed, while commanding officers are not required to have formal legal training,[86] the experience they enjoy within the military profession, the close identification they maintain with members of their unit, and their first-hand knowledge of military operations on the field of combat, place commanding officers in the best position to administer a summary form of military justice tailored to operations.[87] One can conceive of a hypothetical scenario where, for instance, an accused Canadian service member possessing unique characteristics, skills, and knowledge is immediately required on the field of operations to further a vital military objective. In that particular sense, commanding officers are in the best position to administer a summary justice tailored to military necessities. However, while commanding officers fulfill a dual function, it is important to underline that both adjudicative and leadership functions are separate and distinct. Commanding officers are not conferred adjudicative functions in order to ensure military discipline but rather to punish breaches of military law. Concluding otherwise would be confusing military and civilian discipline, the latter meaning, the enforcement of laws, standards, and mores in a corrective and, at times, punitive way.[88]

3.2.2 Limited Right to Legal Representation, No Formal Right of Appeal

There is a limited right to legal representation, and the absence of a formal right of appeal following a summary conviction. With regard to the first element, there exists no requirement for a commanding officer to possess formal legal training.[89] While an accused may request legal representation at his or her own expense,[90] this right is ultimately subject to the discretionary approval of a commanding officer. In this last regard, it should also be noted that only a percentage of accused service members will make such a request. Where such a request is made,

[85] Hans Born, Ian Leigh. Handbook on Human Rights and Fundamental Rights of Armed Personnel, online: http://www.dcaf.ch/odihr/HRAF_factsheet.pdf., at PDF 115, 127, 212. Accessed on 28th Jan 2020.
[86] R v MacKay [1980] 2 S.C.R. 370, at 399.
[87] Government of Canada, Minister of Public Works and Government Services Canada , Report of the Somalia Inquiry (1997) vol. 1, Introduction, online: http://www.forces.gc.ca/somalia/vol1/. [Hereinafter —Report of the Somalia Inquiry]
[88] ibid
[89] Military Justice at the Summary Trial Level, supra note 8
[90] QR & O, Volume II, Chapter 108, section 1, article 108.03

legal representation is only granted by the commanding officer from time to time. While the procedural rules do provide for a designated officer to assist an accused in the preparation and presentation of his case before a commanding officer, and to inform the accused of his rights throughout the process, the designated officer is appointed by the commanding officer, within the military command control chain.[91]In addition, as the assisting officer is not a lawyer, no solicitor-client privilege exists between an accused and assisting officer, implying that an assisting officer may be required to disclose any information given to him by the accused.[92]

3.2.3 Election Right

An election process offered to an accused prior to the commencement of a trial by commanding officer is said to operate a safety valve to the palpable derogation by summary trials of Charter s. 11 (d) procedural safeguards.[93] An election refers to the process by which an accused who is triable by summary trial in respect of a service offence, but has the right to be tried by court martial, decides whether to be so tried.[94]Save limited circumstances where specified punishments would not be warranted and an offence does not fall within one of five minor offences,[95] an accused will have a right to elect either trial by Court Martial or summary trial. In other circumstances where the risks of either detention, retro gradation, or a fine are not likely consequences, an accused will not have a choice: summary proceedings will be the automatic choice.[96] For other specific charges, summary proceedings will be the automatic choice.[97] In all other circumstances, the choice may be offered by a competent officer. Where an election right is offered, refusal by an accused to elect will result in the matter being referred for trial by court

[91] QR & R. Volume II, Chapter 108, Section 1, art. 108.14 (1).
[92] Wigmore on Evidence , vol. 8, at 633-635, cited in Military Justice at the Summary Trial Level, supra note 8
[93] Summary Trial Working Group Report, 2 March 1994, at 25
[94] Ibid
[95] Unless detention, reduction in rank or a fine in excess of 25 percent of monthly basic pay are likely outcomes of a summary proceeding, or where a commanding officer decides to refer a matter to the Court Martial, an accused will not have an automatic right of election if the offence falls within one of the following five offences: NDA Section 85 (Insubordinate behavior), NDA Section 86 (Quarrels and Disturbances), NDA Section 90 (Absence Without Leave), NDA Section 97 (Drunkenness), NDA Section 129 (Conduct to the Prejudice of Good Order and Discipline but only where the offence relates to military training, maintenance of personal equipment, quarters or work space, or dress and deportment. QR & O 108.17 (1) (a).
[96] NDA Section 85 (insubordination), Section 86 (Quarrel or disorder), Section 90 (Absence without leave), 97 (Drunkenness), Section 129 (Conduct to the prejudice of good order and discipline).
[97] QR & O, Section 108.17.

martial.[98]In making his decision, the accused must be offered a reasonable opportunity to retain legal advice as to the appropriate choice. In short, the two tier structure of the Canadian military justice operates a trade-off between procedural safe-guards and powers of punishment.

3.2.4 Powers of Punishment

Among the various formal legal means available to commanding officers to punish breaches of military law, the most important one is unquestionably that of detention for a period not exceeding 30 days.[99]Other powers in the hands of commanding officers include reduction in rank and fines not exceeding 60% of monthly basic pay, to other minor punishments. Despite a lowering in the total number of days of detention from 90 to 30 days to match the situation in the United Kingdom,[100] detention remains a vital tool to a commanding officer to punish breaches of military law.

3.3 SUMMARY TRIAL IN THE UNITED STATES ARMY

The summary court-martial is one of the tribunals established by Congress to administer military law. Four of these tribunals, including the summary court-martial, form a continuum of sentencing power and procedural formality. At the top is the general court martial, which is authorized to impose the most severe sanctions, including death, but which also offers the most procedural protections.[101]The other procedures are special court-martial,[102] summary court-martial,[103] and non-judicial punishment under articles 15 and 25 that are empowered to impose less severe punishments, but concede more to military necessity by providing fewer procedural

[98] Ibid
[99] Ibid Section 108.24.
[100] The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the Provisions and operation of Bill C-25, An Act to Amend the National Defence Act and to make Consequential Amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c. 25, Report Submitted to the Minister of National Defence, September 3, 2003.
[101] Uniform Code of Military Justice (UCMJ) 1976, art. 18
[102] UCMJ art. 19
[103] Ibid art. 20

protections.[104] Outside this continuum, there is a fifth procedure, administrative discharge, which can impose a relatively severe sanction, undesirable discharge, but provides few due process protection.

The Uniform Code provides certain procedural safeguards that protect all servicemen facing general, special, or summary court-martial. These include the right to avoid self-incrimination,[105]the right to compel the attendance of and question witnesses,[106] the right to introduce evidence, the right to cross examine adverse witnesses, and the protection of the rules of evidence. The right to counsel, however, is not uniformly provided. While there is a statutory or regulatory requirement of independent counsel at general and special courts-martial, there is no such requirement for summary courts-martial.[107]

The summary court-martial provides few procedural safeguards beyond those guaranteed to all servicemen facing court martial.[108] The defendant does have the right to refuse summary court-martial and face trial by a special court martial instead.[109] Unlike other courts-martial, one person the summary court officer-acts as judge, jury, prosecutor, and defense counsel.[110] The summary court is also unique because it lacks authority over officers.[111] The summary court martial record need not disclose any thing of the factual or legal basis of the finding. There is no direct appeal to either a court of military review or the Court of Military Appeals; instead, the only direct appeal is to the officer who convened the summary court.[112] Although the summary court martial can adjudge a sentence no more severe than thirty days' imprisonment,[113] a summary court

[104] Ibid art. 15
[105] Ibid art. 31
[106] Ibid art. 46
[107] Ibid arts. 27, 38(b)
[108] Ibid art. 31
[109] Ibid art. 20
[110] MANUAL FOR COURTS-MARTIAL 1969, 79d. In practice, the armed forces allow a defendant to hire paid civilian counsel, Middendorf v. Henry, 425 U.S. 25, 65 (1976) (Marshall, J., dissenting), or often provide free military counsel, United States v. Alderman, 22 C.M.A. 298, 303, 46 C.M.R. 298, 303 (1973) (Duncan, J., concurring in part and dissenting in part).
[111] Opcit art. 20
[112] Manual no. 88
[113] Opcit art. 20

conviction can be used to aggravate the sentence imposed at a later special or general court martial under paragraph 127c. Article 15 punishment, the fourth procedure authorized by the Uniform Code, is not considered a court-martial at all. The punishment may be imposed without any formal hearing, although the offender must be informed of the charge and allowed to present a defence.[114] The rules of evidence need not be observed and the accused has no compulsory process available for obtaining favorable witnesses. The maximum penalty under article 15 is thirty days' correctional custody. The sentence can be appealed only to the next highest officer. With few exceptions, a serviceman offered article 15 punishment may refuse it and face a summary court martial instead.[115] Of the four Uniform Code procedures, article 15 is by far the most widely used. Unlike court martial convictions, article 15 punishments cannot be used by a later special or general court martial to impose a bad conduct discharge under the sentence aggravation rules.[116] Like court martial convictions, however, article 15 punishments can be used by later courts martial to characterize the defendant's service record for the purpose of increasing the length or severity of a sentence. The administrative discharge system operates outside the Uniform Code and offers relatively few procedural safeguards. A general discharge can be issued without any pre-discharge hearing. An undesirable discharge can only be issued after a hearing. At that hearing, which can be waived by the serviceman, there is no compulsory process for witnesses, no strict rules of evidence, no allocation of the burden of proof to the armed service, and no protection against command influence, since the authority who feels a discharge may be appropriate chooses the Administrative Discharge Board. The serviceman does have the right to counsel, to remain silent, to provide witnesses, and to cross examine adverse witnesses.[117]

3.4 SUMMARY TRIAL IN SOUTH AFRICAN NATIONAL DEFENCE FORCE

To set the standards for military discipline, the South African legislature enacted the Defence Act, 2002, read with the provisions of the Defence Act, 1957, which establishes the Military Discipline Code (MDC).[118] All members of the South African National Defence Force (SANDF)

[114] Opcit no. 133b
[115] UCMJ art. 15(a)
[116] They are not "convictions adjudged by a court" under MANUAL art. 127c
[117] Ibid art. 128
[118] Section 104(1). The Military Discipline Code was established by the Defence Act, 44 of 1957, and is

are subject to the MDC.[119] It builds on the constitutional demand for a disciplined military force. A breach of the MDC constitutes a criminal offence and penalties for its breach include a sentence of imprisonment. The criminalisation of breaches of the MDC as well as the sentence of imprisonment that a guilty verdict carries, illustrates the importance that the legislature attaches to the MDC as an instrument to maintain military discipline.

The legislature has enacted the Military Discipline Supplementary Measures Act (MDSMA), which provides a mechanism for the enforcement of the MDC. Its declared purpose is to "provide for a new system of military courts with a view to improved enforcement of military discipline".[120] The objectives of the MDSMA are to (a) "provide for the continued proper administration of military justice and the maintenance of discipline;"[121] (b) "create military courts in order to maintain military discipline;"[122] and (c) ensure that the accused have a fair trial and access to the High Court.[123]In terms of section 3(1)(a) members of the SANDF are subject to the MDC.

The disciplinary hearing is ideally suited for promoting military discipline in that it is a summary hearing, able to enforce swift justice in instances of relatively minor military disciplinary transgressions, imposing relatively light sentences.[124]

Of the courts listed, the Court Of Disciplinary Hearing (CODH) has the lowest jurisdiction. The court is presided over by a commanding officer[125] or a subordinate of at least field rank.[126] The

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contained in the First Schedule of that statute. The Defence Act, 2002, preserved sections 104, 105, 106, 108, 109, 111 and 112 of the Defence Act, 1957.

[119] Ibid Section 104(5)(a).

[120] Preamble to the Military Discipline Supplementary Measures Act (MDSMA) 16 of 1999.

[121] Ibid Section 2(a)

[122] Ibid Section 2(b)

[123] Ibid Section 2(c)

[124] Rant J W. Courts-Martial Handbook, Practice and Procedure. John Wiley & Sons, Chichester. 1998. At 6 and 80.

[125] Section 1 of the MDC describes officer commanding as "an officer who has been appointed to command any unit or formation of the South African National Defence Force and also an officer subordinate in rank to and authorised by such commanding officer to conduct disciplinary hearings".

[126] In this context a subordinate officer is any officer subordinate in rank to the commanding officer of the unit, as long as such subordinate officer holds at least the rank of major.

commanding officer does not need a written appointment or delegation since he derives his authority directly from the MDSMA, except in the case of a subordinate officer, who will necessarily require a written appointment.[127] There is also no appointment as judicial officer by the Minister as is the case with the other levels of military courts. It is not a requirement that an accused can only be tried by a commanding officer of his own unit as long as that presiding officer is a commanding officer or has been duly appointed as a trial officer by the commanding officer.[128] It may happen, for example, that an accused is on deployment and will then fall under the command and control of the officer commanding of that particular deployment.

The commanding officer has jurisdiction over any person, except officers and warrant officers, as long as the accused is of or below the rank of staff sergeant and has elected to be tried by a CODH.[129] The choice to be tried by CODH is done by means of an election certificate. The election certificate must be witnessed by an officer, other than the commanding officer who is to preside over the trial. This is done in order to prevent undue influence by the commanding officer acting as presiding officer at the trial. The accused also has the right to seek legal advice before exercising his choice.[130] The accused must indicate on the election certificate whether he had in fact taken legal advice or whether he has waived his right to legal representation prior to making his choice. The commanding officer will therefore only have jurisdiction over an accused if: the accused is of the rank below that of a warrant officer; the accused pleads "guilty"; and the accused waives his right to legal representation during the trial. The final decision on whether the accused will be tried at that particular forum is dependent on the military prosecution counsel. Certain offences have been removed from the jurisdiction of the CODH in terms of policy decisions even though it may be allowed in terms of the Act and the accused will have to appear before a Court of Military Judge (CMJ). These offences include:

The contravention of section 24(1)(a) of the MDC, which entails the negligent loss of fire-arms or ammunition. Section 25 of the MDC, the willful or negligent damage or destruction of public property. The contravention of section 26 of the MDC, which entails deficiencies in stores. The

[127] Section 11(1) of the MDSMA
[128] Section 11(2) of the MDSMA
[129] Ibid
[130] Section 29(6) of the MDSMA

contravention of section 27 of the MDC, which usually entails the unauthorised use of military vehicles or equipment. The contravention of section 28 of the MDC, which includes negligent driving of military vehicles and driving under the influence of alcohol, as well as reckless flying of an aircraft. All cases of inappropriate sexual conduct in the work place or sexual harassment, and Cases of intimidation.[131]

Where the accused has multiple previous convictions of the same or similar nature, the prosecution counsel may foresee the imposition of a sentence of more than R600, thereby falling outside the jurisdiction of the CODH. In this case the matter will be referred to the CMJ from the outset. This will also be the case where the accused has a suspended sentence for the same offence and there may be a possibility that the suspended sentence may be imposed. Where the accused elects to plead guilty but wants to make use of legal representation, the matter will also be referred to the CMJ. Since the presiding officer at the CODH is not in possession of a legal degree it would be unfair towards the accused and the presiding officer if he had to preside over a matter where he or she had to decide complicated legal issues raised by defence counsel. In the interest of justice and a fair trial such matters are to be referred to the CMJ.

3.5 SUMMARY TRIAL IN UGANDA PEOPLES DEFENCE FORCE

From a structural point of view, Uganda's military courts comprise a summary trial authority, unit disciplinary committees and courts martial.[132] Under courts martial, the Uganda Peoples' Defence Forces Act (UPDF Act) provides for a four-tier military court system, that is, field courts martial; division courts martial; the general court martial; and the court martial appeal court.[133] In terms of section 191 of the UPDF Act, a commanding officer or an officer commanding may try an accused person by summary trial. An accused may be tried by a commanding officer or an officer commanding only if the accused is either a junior officer or a militant, if the offence is one that the commanding officer or officer commanding is authorized

[131] Department of Defence Instruction 1/2000
[132] Section 2 of the UPDF Act (n 2 above) defines 'military court' to mean a summary trial authority, a unit disciplinary committee or a court martial.
[133] The definition of 'court martial' in section 2 of the UPDF Act.

to try, if the commanding officer or officer commanding considers that his or her powers of punishment are adequate, and if he or she is not precluded from trying the accused person by reason of his or her election to be tried by court martial.

A commanding officer or officer commanding at a summary trial may pass a sentence in which any one or more of the following punishments may be included, detention for a period not exceeding six months, forfeiture of seniority, severe reprimand, reprimand, a fine not exceeding basic pay for one month, and minor punishments as may be prescribed.[134]

An accused officer or militant to be tried by summary trial shall be afforded a proper opportunity to prepare himself or herself for the trial and in particular, he or she shall as soon as possible, and in any case not less than twenty four hours before the trial, be informed of the charges brought against him or her, the fact that he or she is to be subjected to summary trial, and his or her tight to elect to be tried by court martial and he or she shall be informed about the implications of either choice and in particular that where he or she opts for summary trial it means he or she is opting for trial without having counsel of his or her own choice.[135] The accused officer or militant at a summary trial shall not be represented by counsel and there shall be no legal officer at such a trial but both the accused and the summary trial authority may seek legal advice out of court.[136]

The decision of a summary trial may be appealed to the immediate superior in command of the summary trial authority, and an appeal from a decision of a superior authority in exercise of original jurisdiction shall lie to the Commander in Chief.[137]

[134] Ibid Section 191 (3)
[135] Ibid Section 205 (1)
[136] Ibid Section 205 (2)
[137] Ibid Section 207

3.6 CONCLUSION

It is evident from the review of the evolution of summary trial proceedings in the 19th century that they were developed to fulfill a two-fold purpose. First, summary trials met the traditional need for a responsive and administratively simple means of dealing with disciplinary offences. Secondly, summary trials were designed to be a fair proceeding, particularly in terms of the level of punishments imposed on an offender.

It is evident from the countries reviewed above that there is a need to balance the maintenance of discipline in the army and the constitutionally fair trial right of the accused. In those countries where the accused did not have a right to legal representation at summary trial, it has now been reformed to give the accused a choice whether to have counsel or not. Even where that right is limited like in Canada, the procedural rules provide for a designated officer to assist an accused in the preparation and presentation of his case before the commanding officer. In Canada, United States, and South Africa, the maximum imprisonment for summary trial is 30 days while in Uganda can go up to 6 months. This calls for the reform of the period in Uganda as that is too much where the accused is not represented.

As a matter of reform in South Africa, some offences have been removed in the jurisdiction of summary trial and a fine reduced to the maximum of R600. The accused has a right of choice to a legal representative. When he or she chooses to be represented, the matter has to be referred to the Court of Military Judge in the interest of justice and fair trial.

In Lesotho, there has never been reforms to the summary trial procedure since its inception in the army. There is a need therefore, to review the procedure so that it conforms to the operational requirements of the twenty first century. The next chapter therefore focuses on the conclusions and proposed reforms for the Lesotho Defence Force summary trial procedure.

CHAPTER FOUR – CONCLUSIONS AND RECOMMENDATIONS

4.1 INTRODUCTION

Throughout history, military law has been viewed as a compromise between justice and necessity.[138] Although servicemen are entitled to some degree of constitutional protection,[139] the nature of the military's mission requires a level of order and discipline far higher than that required within civilian society. The United States armed forces foster and maintain this level of discipline in part through an elaborate system of military justice.[140] Necessity requires that this system fulfill its tasks without diverting undue time, money, and effort from the military's mission. Of all military justice procedures, the summary court-martial most clearly reflects this tension between protecting the rights of servicemen and providing an efficient procedure for the maintenance of discipline. Although summary court-martial convictions can be used in later proceedings to authorize a punitive discharge, the summary court-martial defendant has no statutory right to counsel in Lesotho.

In the United States of America, the Court of Military Appeals and the Supreme Court have disagreed in recent years over whether the Constitution nevertheless requires that military defendants facing summary court-martial be provided with counsel. In 1973, the Court of Military Appeals decided that servicemen did have such a right.[141] The Supreme Court, expressly over ruling the Court of Military Appeals,[142] declared that the Constitution did not require that summary court martial defendants be provided with counsel. In *United States v. Booker*,[143] the Court of Military Appeals attempted to reconcile its position with that of the Supreme Court. It concluded that, although servicemen could be sentenced by summary courts martial that did not

[138] THUCYDIDES, THE PELOPONNESIAN WAR, bk. 5, 330-37 (Modern Library ed. 1951) (Melian Debate). Athenian envoys told the inhabitants of Melos that they must submit to Athens, since tolerating Melian independence would be seen by other islands as a sign of Athenian weakness and an invitation to defy Athens. Thus, military necessity ruled out in dependence, even though the Athenians admitted the alternative was arguably.
[139] Warren. The Bill of Rights and the Military, 37 N.Y.U.L. REV. 181 (1962).
[140] RIVKIN R. GI RIGHTS AND ARMY JUSTICE 338 (1970).
[141] United States v Alderman, 22 C.M.A. 298, 46 C.M.R. 298 (1973).
[142] Middendorf v Henry, 425 U.S. 25, 43 (1976).
[143] 5 M.J. 238 (C.M.A. 1977) (Booker I), rev'd in part, 5 M.J. 246 (C.M.A. 1978) (Booker II).

provide counsel, convictions obtained through such uncounselled procedures could not be used by military courts to aggravate sentences for subsequent offenses. Despite the partial retreat from its earlier position, the Court of Military Appeals in Booker nevertheless seemed willing to evaluate the constitutional restraints on military justice independently of the Supreme Court's pronouncements on the subject.

The Booker decisions have provided servicemen facing article 15 punishment or summary court martial with some new procedural protections. Article 15 punishments or summary court convictions cannot be used in any way in future court martial proceedings unless the defendant was given the opportunity to confer with counsel before choosing between the offered procedure and a more formal one. Although a serviceman who elects trial by summary court martial is not entitled to defense counsel, a conviction by a summary court that did not provide trial counsel cannot be used by a later court martial to authorize the issuance of a punitive discharge under the sentence aggravation provisions. Thus, Booker creates two types of summary court martial: an uncounselled procedure used for imposition of immediate punishment but with diminished stigmatizing effect, and a counseled procedure whose convictions can be used by later tribunals to impose a stigmatizing discharge.

4.2 REFORMS

Military justice systems are reformed to improve their effectiveness, the quality of justice delivered by military courts, and to adapt to the changing domestic legislation, to international standards or specific needs of the military institution. The reform can aim to enhance the independence of military judges and prosecutors and to ensure a better application of human rights and fair trial guarantees within the system. Concerns regarding the compatibility of military justice systems with human rights standards induce States to review their systems of military justice and to implement important reforms. This is the case in Europe, where the European Convention of Human Rights of 1950 has had an impact on national military law. In Australia, New Zealand and South Africa, reforms are carried out to improve the effectiveness of military justice. Changes in domestic law may also be a reason to modify the system. In Canada,

the domestic human rights legislation had an impact on the efforts to reform military justice.[144] Military justice systems may be re-organised in a post conflict situation, such as in the Democratic Republic of Congo. This re-organisation can also take place within a state building process, like in Afghanistan, or during a post authoritarian transition, like in Indonesia.[145]

There are significant differences between the systems based on common law and civil law. The common law systems are based on ad hoc military tribunals that convene on a case by case basis, whereas standing military courts operate in civil law systems. However, common law countries are increasingly moving towards a system of standing military courts. One of the main reasons for this is to improve the flexibility of the system of military justice. For example, the UK revokes the need to obtain a convening warrant for each trial, and more than one Court Martials are able to operate at any time.[146] Purely military justice systems, which mainly prevail in common law countries, are based on the exclusive jurisdiction of military courts over offences committed by military personnel. In some continental European countries, civilian courts have jurisdiction over military cases. For example, in Germany, there are no peacetime standing military courts. Administrative (disciplinary) tribunals deal with service offences, while civilian courts concentrate on crimes. Some eastern and central European countries have abolished standing military courts in peacetime, but their Constitutions still allow for the creation of such a system in wartime.

The presence of civilian judges in military tribunals would reinforce the impartiality and independence of such tribunals, since they are not part of the military hierarchy. Those who oppose a bigger role for civilian judges in the military judiciary argue that the armed forces require judges who are familiar with the unique nature of military life. These judges should understand military culture and have experience in practicing military criminal law. However, it

[144] Op.cit note 108
[145] Vashakmadze M. Understanding Military Justice. Geneva Centre for the democratic control of Armed Forces(DCAF). Geneva. 2010.
[146] Armed Forces Bill Team, UK Ministry of Defence, An Overview of the Service Justice System and the Armed Forces Act 2006 (UK: Armed Forces Bill Team, 2006), http://www. mod.uk/NR/rdonlyres/5833E2F0-B21C-4073-BE13-BE63 506119CD/0/20091006AnoverviewoftheSJSandAFA06 u_2_.pdf.

can also be argued that civilian judges who are not subjected to the army hierarchy can be adequately trained to qualify.

In many military justice systems, the legislation establishes civil Appellate Courts and sometimes defers to the civil Supreme Court as its highest appellate authority. For example, in the United States, the military justice system is overseen by Purely the Court of Military Appeals, which is composed of civilian judges serving for a fixed term of 15 years. In Canada, the civilian Supreme Court is the last instance after the Court Martial Appeal Court.

Several countries recently started limiting the scope of military jurisdiction. Two major trends can be identified. The first trend is to transfer judicial competences to civilian courts. The second one is to limit the military courts' jurisdiction over civilians.[147] Both the United Nations (UN) Special Rapporteur on the Independence of the Judiciary and the Working Group on Arbitrary Detention recommends limiting of military jurisdiction. Their view is based on the current development of international law which is towards the prohibition of military tribunals trying civilians as it is the case in some countries like Uganda.[148] The Paris Minimum Standards of Human Rights Norms in a State of Emergency of the International Law Association (1984) also indicate that "civil courts shall have and retain jurisdiction over all trials of civilians for security and related offences; initiation of any such proceedings before their transfer to a military court or tribunal shall be prohibited".[149] Similar prohibitions are included in the Basic Principles on the Independence of the Judiciary approved by the UN General Assembly.[150] One of the main challenges in military justice is to find ways to increase the independence of military courts. Many countries are modifying their military justice systems to include civilian elements that should ensure a higher degree of judicial independence. Public Prosecutors, instead of military

[147] Federico Andreu-Guzman. Military Jurisdiction and International Law, Part II (Geneva: International Commission of Jurists, 2004), 161.
[148] Uganda Peoples Defence Force Act NO. 7 of 2005. Section 119 (1) (g)
[149] Op.cit
[150] UN General Assembly Resolution 40/32 (29 November 7. 1985) and 40/146 (3 December 1985), Article 5: "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals."

legal advisors, are increasingly prosecuting soldiers. In some countries, military courts are still dealing with grave human rights violations committed by the military institution or by security forces.[151] This has led national and international actors to question the impartiality of military courts while dealing with such cases.[152] Their criticisms imply that the human rights jurisdiction should be transferred from military to civilian courts. International Human Rights instruments affect national military jurisdictions, especially in the case of the European Convention on Human Rights.

4.3 SUMMARY TRIAL REFORM IN CANADA IN THE 1990s

The summary trial process came under increasing scrutiny at the beginning of the 1990s. This interest in summary trial proceedings was a direct result of concern over the constitutionality of the summary trial process as a result of the Charter. A Summary Trial Working Group was tasked with conducting an extensive review of the constitutionality of the summary trial system. The report approved by Armed Forces' Council in May 1994 made fifty-nine recommendations. The broad ranging recommendations included restricting presiding officers' jurisdiction over service offences, refining the punishments available at summary trial, expanding the right to elect court martial and improving compliance with the requirements of procedural fairness.[153]

Prior to the implementation of the recommendations contained in the Working Group report a number of disciplinary incidents arising from military operations prompted the appointment of a Special Advisory Group to, "…assess the Code of Service Discipline, not only in light of its

[151] In the United States of America The Memorandum Of Understanding between the Department of Justice and the Department of Defense was finalized in August 1984 and provides for prosecution of soldiers by public prosecutors in certain offenses.

[152] The High Court in South Africa in the cases of Minister of Defence v Potsane CCT/14/01 and Minister of Defence v Legal Soldier CCT/29/01 declared sections 13(1)(b), 14(1)(a) and 22 of the Military Discipline Supplementary Measures Act 16 of 1999 as unconstitutional as they allowed only military prosecutors to prosecute soldiers even on non-military offences.

[153] The Summary Trial Working Group Report was based in large part on a 1990 LLM thesis by LCol K.W. Watkin entitled "Canadian Military Justice: Summary Proceedings and the Charter".

underlying purpose, but also the requirement for portable service tribunals capable, with prompt but fair processes, of operating in time of conflict or peace, in Canada or abroad".[154]

Notwithstanding the imperative for discipline in military organizations, Canada is founded upon the supremacy of the Rule of Law, especially characterized by the Charter, which must be fully respected in the application of disciplinary measures within the military justice system and in recent years the application of military discipline is said to have been overly cautious and inconsistent because of concerns by Commanding Officer's about the uncertainties over the effect of the Charter.[155]

A particular concern for the Special Advisory Group was the need for additional training for presiding officers, to ensure that those officers properly fulfilled their duties and to provide confidence to accused's persons that presiding officers are familiar with the rights of accused members. The Special Advisory Group consequently recommended increased training and education for presiding officers to ensure that they are knowledgeable about their roles in the military justice system and competent to perform them and such officers should be certified to preside at summary trials.

In addition to the Special Advisory Group Report, the Report of the Somalia Commission of Inquiry[156] and other reports and studies[157] have led to a review of the National Defence Act and Queens Regulations & Orders. The resulting amendments to that legislation incorporated the recommendations contained in the Special Advisory Group Report and responded to the recommendations of the Somalia Commission.

[154] Report of the Special Advisory Group on Military Justice and Military Police Investigation Services, March 14, 1997, at 1.
[155] Report of the Special Advisory Group on Military Justice and Military Police Investigation Services, March 14, 1997, at preamble.
[156] Dishonoured Legacy: The Lessons Learned of the Somalia Affair. Minister of Public Works and Government Services. 1997.
[157] M.L. Friedland. Controlling Misconduct in the Military (Minister of Public Works and Government Services. 1997.

4.4 RECOMMENDATIONS

To address Lesotho's military courts' institutional problematic issues, it is proposed that Lesotho establishes the office of an independent (not attached to any unit) Principal Military Judge (PMJ). The power to appoint judge advocates to the different military tribunals should vest in this office. To safeguard the independence of the office of the PMJ, the PMJ should enjoy sufficient security of tenure and should be insulated against the military chain of command. The PMJ could be appointed for a fixed term of ten years and should only be removable from office on the same conditions and following the same procedure governing the removal of a High Court judge.[158] During his or her tenure, the PMJ should not be eligible for promotion and should not be subject to army performance related reports. Appointment as PMJ should be the last posting in one's military career. He should at least hold a rank of Brigadier or Major General.

It is also recommended that Lesotho's military system should establish the office of an independent Director of Military Prosecutions (DMP) along the lines of the Director of Public Prosecutions (DPP). It is this office that should have the power to appoint prosecutors to the different military tribunals and undertake decision making in respect of the prosecution of criminal and quasi-criminal matters in the military justice system. The DMP should enjoy sufficient security of tenure and should be insulated against the military chain of command, as has been proposed in respect of the PMJ. If successfully undertaken, these recommendations can go a long way to addressing the unfortunate situation where the High Command (which is a representative of the executive) appoints the prosecutors, judge advocates and members of military courts. A number of countries, including the United Kingdom, Ireland, Canada and South Africa, have undertaken similar reforms to secure the institutional independence of their military tribunals.

[158] In terms of section 121 of the Constitution of Lesotho 1993.

On the issue of legal representation, the right should be capable of being waved and the following safeguards should be built into the election process; the implications of the election must be explained to the accused by his or her defending officer, the accused must be given a reasonable time and not less than 24 hours to consider his or her decision, if he or she so wishes it, the accused must be given the opportunity to consult a lawyer in respect of the right of election if it is reasonably practicable to do so, and the decision of the accused must be recorded in writing.

In sum, there is an urgent need to reform Lesotho's military justice system to ensure that the people standing trial in the country's military courts enjoy their internationally and constitutionally protected right to an independent and impartial tribunal.

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