

a Fiji Islands

Republic of Fiji Military Forces and Others v
b Qicatabua

Court of Appeal

Byrne, Goundar and Scutt JJA

c 8, 15 February, 12 September 2008

Constitutional law – Fundamental rights – Right to fair trial – Right of appeal against conviction – Right to equality before the law – Freedom from cruel or degrading treatment – Military personnel – Courts-martial convicting and sentencing

- d respondents, former members of the military forces – Offences concerning takeover of Parliament and/or mutiny at army barracks – Statute providing for right of appeal to Court of Appeal ‘against ... conviction’ – No provision for appeal against sentence – Whether denial by military law of right to appeal against sentence infringing fundamental rights – Whether right of appeal to be read in to statute – Relevant considerations – Army Act 1995 (UK) (as amended) – International Covenant on Civil and Political Rights 1966, art 14 – Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment 1984, art 1 – Royal Fiji Military Forces Act (Cap 81) (as amended), ss 2, 30 – Constitution of Fiji 1997, ss 25(1), 28(1)(l), 38(1); (7)(d), 195(2) – (3).
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- f The respondents, all former members of the first appellant, the Royal Fiji Military Forces (‘the RFMF’), were convicted by courts-martial for offences relating to the takeover of Parliament in May 2000 and/or mutiny at an army barracks later that year. They were sentenced to various terms of imprisonment. They appealed against their sentences to the Court of Appeal, which ruled that s 30 of the Royal Fiji Military Forces Act (‘the RFMF Act’) (‘A person convicted by a court-martial may, with the leave of the Court of Appeal, appeal to that court against his conviction ...’) did not permit appeals against sentence. The respondents brought an action for constitutional redress, invoking s 25(1) (‘Freedom from cruel or degrading treatment’), s 28(1)(l) (‘Every person charged with an offence has the right ... (l) if found guilty, to appeal to a higher court’) and s 38(1) (‘Every person has the right to equality before the law’) of the Constitution. The High Court held that s 30 was unconstitutional for omitting any provision for appeals against sentence by soldiers convicted by court-martial but read in the words ‘and sentence’ to render the provision constitutional. (In the High Court the second and third appellants, the Commissioner of Prisons and the Attorney General and Minister for Justice, had supported the respondents’ arguments, submitting that the lacuna in s 30 of the RFMF Act be removed by the court reading in ‘and sentence’.) The RFMF appealed to the Court of Appeal.
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HELD: (Scutt JA dissenting in part) Appeal allowed; High Court judgment set aside. (Scutt JA dissenting) Respondents held to have no right to appeal against sentence. a

Per Byrne and Goundar JJA. Section 30 of the RFMF Act was not unconstitutional. The legislation could not be clearer: there was to be no appeal against sentences given by a general court-martial. Any amendment to the law should be made by Parliament and not by the courts. The appeal was therefore allowed and the High Court judgment set aside (see paras [7], [13]–[16], [24]–[26], [30]–[31], [43], [48]–[51], [58]–[59], below). *Vakadrava v State* (2004 of 2004, unreported), Fiji CA, *Naduanivai v Commander, Republic of Fiji Military Forces* (6 September 2004, Misc Case No HBM 32/2004, unreported) and *Vakacereitai v Commander, Republic of Fiji Military Forces* (28 January 2005, Crim App No AAU004/2005, unreported), Fiji CA, applied. b
Per Goundar JA. Appellate jurisdiction was solely created by statute: there was no inherent jurisdiction (see para [51], below). c

Per curiam. Per Byrne JA. It is not an answer to the problem posed in this case to say that if since 5 December 2006 and for some unknown period into the future there is no Parliament then a court may assume the role of Parliament in attempting to remedy a situation thought by some people to require change (see para [19], below). d

Per Scutt JA (dissenting). (i) In the High Court all the parties had agreed that soldiers should be allowed to appeal against sentence, with the only difference being the route to the remedy, viz whether it should come through Parliament or whether the court could read words in to the legislation. Although s 30, when read to exclude the right of appeal against punishment ('sentence'), infringed ss 25(1), 28(1)(l) and 38 of the Constitution, it was not necessary to read in the words 'and sentence' after 'conviction' to make the provision consistent with the Constitution, since the respondents had a right to appeal against the punishment—'sentence'—imposed upon them by the military tribunal: 'conviction' was to be read as including the concept and reality of punishment or sentence and therefore included punishment ('sentence') without the need for express inclusion of the word 'sentence' in the impugned provision (see paras [83]–[84], [93], [96]–[97], [193], below). e
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(ii) Section 25(1) of the Constitution applied to the respondents' alleged lack of a right to contest their punishment or 'sentence' by reason of the wording of s 30. Suffering arising from lawful sanctions might on occasion be encompassed by the definition of 'torture' in art 1 of the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment 1984. Section 25(1) specifically condemned physical torture, mental torture, emotional torture, cruel punishment, inhumane punishment, degrading punishment, disproportionately severe treatment and disproportionately severe punishment. Arguably 'disproportionately severe punishment' and certainly 'disproportionately severe treatment' was imposed upon persons convicted of crimes but denied the right to appeal against that part of the proceedings relating to punishment or sentence. Arguably, also, a punishment imposed without any right of review through a superior court or tribunal qualified as 'cruel' or 'inhuman'. Section 28(1)(l) of the Constitution extended the right of appeal against a finding of guilt to every person charged g
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- a with an offence. So long as the right of appeal ('review') was accepted as a human or civil right, if that human or civil right was denied, the punishment (or 'sentence') was infected by cruelty, inhumanity or disproportionality. Therefore a reading of s 30 of the RFMF Act that limited 'conviction' so as to rule out an appeal against the punishment inflicted as a part of the conviction was unconstitutional as infringing s 25(1) of the Constitution (see paras [99]–[109], below). *Ex p A-G of Namibia, re Corporal Punishment by Organs of State* [1992] LRC (Const) 515 applied.
- b (iii) Limiting s 30 of the RFMF Act so that those convicted in the military context had no right of appeal against punishment ('sentence') was also inconsistent with the right to equality before the law under s 38(7)(d) of the Constitution. That subsection provided that a law was not inconsistent with the right to equality before the law on the ground that it permitted 'a person who has a discretion to institute or discontinue criminal proceedings to take account in the exercise of that discretion of traditional procedures in the State for the settlement of disputes ... but only to the extent that the law is reasonable and justifiable in a free and democratic society ...' Although
- c accepting the rightful (and necessary) existence of a military justice system, the United Kingdom Parliament and the European Court of Human Rights had determined that it was not reasonable and justifiable in a free and democratic society to maintain a system of military justice that did not incorporate civil and human rights principles and practices expected to apply
- d in the civil justice system. That included the right of review of punishment imposed upon military personnel. The weight of authority, judicial, executive and legislative, supported the proposition that in today's democracies, a military justice system which did not conform to civil and human rights standards expected of the civilian justice system was 'not reasonable and justifiable'. Hence, the lack of access to an appeal in respect of punishment
- e under s 30 of the RFMF Act was unsustainable and could not be supported by recourse to s 38(7)(d) (see paras [110], [121], [127]–[130], [133]–[134], below). *R v Gènéreux* [1992] 1 SCR 259 and *Findlay v United Kingdom* [1997] 24 EHRR 221 considered.
- f (iv) Military personnel had an entitlement to equal protection of the law under s 38(1) of the Constitution concomitant with the entitlement extending to civilians. The authorities showed a pattern of misreading, whereby the assertion that 'the military' was not susceptible to civil law and the jurisdiction of civil courts was not consistent with what many of the cases actually said: military service did not oust equality rights. Section 30 of the RFMF Act therefore breached and was inconsistent with s 38 of the
- g Constitution (see paras [135], [137], [141], [143]–[152], [155], [158], [161], [165]–[171], [179], [191]–[192], below). Dicta of Kirby J in *X v Commonwealth* [1999] HCA 63, [2000] 4 LRC 240 at [166]–[167] applied. *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, *Fraser v Balfour* (1918) 87 LJ KBD 1116, *Gibbons v Duffell* [1932] HCA 26, (1932) 47 CLR 520, *Parker v Commonwealth* (1965) 112 CLR 295 and *Groves v Commonwealth* [1982] HCA 21, (1982) 150 CLR 113 considered.
- h (v) Limiting s 30 of the RFMF Act to 'conviction' and not including a right to appeal in respect of punishment ('sentence') breached the right of every person charged with an offence, if found guilty, to appeal to a higher court
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under s 28(1)(l) of the Constitution. Such a limited interpretation of s 28(1)(l) a
offended against the principle embodied in art 14 of the International
Convention on Civil and Political Rights 1966 that everyone had a right to
review of both 'conviction' and 'sentence'. 'Conviction' in s 30 of the RFMF
Act should be interpreted in accordance with the principle that it
incorporated the ruling on punishment as well as the ruling on guilt.
Section 28(1)(l) therefore encompassed a right of appeal against the finding of
guilt and the punishment imposed (see paras [195], [201], [206], [209],
[213]–[216], [218]–[229], below). *R v Willesden Justices, ex p Utley* [1947] 2 All ER
838, *HM Advocate v Churchill* (1953) SLT 45, *R v Arundel Justices, ex p Jackson*
[1959] 2 All ER 407, *R v Tonks* (1963) VR 121 at 127–128, *R v Jermone* (1964) Qd
R 595, *S (an infant) v Manchester City Recorder* [1969] 3 All ER 1230, *A-G (NSW)* c
v Dawes [1976] 1 NSWLR 242, *Morris v R* (1978) 91 DLR (3d) 161, *R v Hannan,*
ex p Abbott (1986) 41 NTR 37 and *Maxwell v R* [1995] HCA 62, (1996) 184 CLR
501 considered.

(vi) Section 195 of the Constitution provided that '(2) ... (e) all written laws in
force in the State ... continue in force as if enacted or made under or pursuant
to this Constitution ... (3) laws ... are to be construed ... with such d
modifications and qualifications as are necessary to bring them into
conformity with this Constitution'. At the enactment of the Constitution, s 30
of the RFMF was a 'written law in force in the State ...' and so continued in
force 'as if enacted or made under or pursuant to' the Constitution. That
section had, therefore, to be construed as from the date of the Constitution
'with such modifications and qualifications as are necessary' to bring it into e
conformity with the Constitution. If s 30 was inconsistent with various
'rights' provisions of the Constitution then, in accordance with s 195(2)(e) and
(3), to bring it into conformity with the Constitution the 'modification' made
by reading in 'and sentence' after 'conviction' might be contended for as
necessary (see paras [237]–[244], below). f

(vii) Parliament was entitled, as an exercise of its sovereign power, to adopt
the legislation of any other country as its own. Section 2 of the RFMF Act
effectively incorporated the United Kingdom Army Act 1955, and changes
thereto, applying it in total to the military in Fiji. By 1998 the right of appeal
against sentence had been incorporated into the United Kingdom law. g
Parliament had not made any amendment so as to deny the incorporation of
that change into the RFMF Act. Nor had it amended or repealed s 2.
Incorporating the right to appeal against sentence into s 30 of the RFMF Act,
as embodied in the current United Kingdom law, was consistent with s 2 of
the RFMF Act and the Constitution. That made the position of the military
consistent with the situation pertaining in the United Kingdom, Canada, h
Aotearoa/New Zealand and Australia (see paras [251]–[274], below. *Findlay v*
United Kingdom [1997] 24 EHRR 221, *Naduaniwai v Commander, Fiji Military*
Forces (6 September 2004, HBM 32/2004, unreported) and *Barbados Mills v*
State [2005] FJCA 6 considered.

Per curiam. Per Scutt JA. That the court does not agree with 'reading in' in
the provision under scrutiny should not be seen as limiting the scope of i

- a future determinations. The 'reading in' route in other cases on other provisions remains open for a future court to decide (see paras [94]–[95], below).
[Editors' note: Sections 2 and 30 of the Royal Fiji Military Forces Act (Cap 81) are set out at paras [252] and [3], below.
- b Article 14 of the International Covenant on Civil and Political Rights 1966, so far as material, is set out at para [201], below.
Article 1 of the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment 1984 is set out at para [101], below.
Sections 25, 28 and 38 of the Constitution of Fiji 1997, so far as material, are set out at paras [100], [39] and [111], below.
- c Section 195 of the Constitution, so far as material, is set out at paras [237]–[238], below.]

Cases referred to in judgments

- A-G (NSW) v Dawes [1976] 1 NSWLR 242, NSW CA
A-G, Namibia, Ex p, re Corporal Punishment by Organs of State [1992] LRC (Const) 515, Nam SC
- d Ali v State [2001] FJHC 169, Fiji HC
Aviagents Ltd v Balstravest Investments Ltd [1966] 1 All ER 450, [1966] 1 WLR 150, UK CA
Barbados Mills v State [2005] FJCA 6, Fiji CA
- e Bist v London and South Western Railway Co [1907] AC 209, UK HL
British Columbia (Public Service Employee Relations Commission) v BCGSEU [1999] 3 SCR 3, Can SC
Bull v A-G (NSW) [1913] HCA 60, (1913) 17 CLR 370, Aus HC
Burgess v Boetefeur (1844) 7 Man & G 481, 135 ER 193
Canada (A-G) v Thwaites [1994] 3 FC 38, Can Fed Ct
- f Cavubati v State (Crim Appeal No AAU0022/2003S, unreported)
Cheatley v R [1972] HCA 219, (1972) 127 CLR 291, Aus HC
Coal Economising Gas Co, Re, Gover's Case (1875) 1 Ch D 182, 45 LJ Ch 83
Commonwealth v Verwayen (1990) 170 CLR 394, Aus HC
Covington-Thomas v Commonwealth [2000] NSWSC 2, NSWSC
- g Covington-Thomas v Commonwealth [2004] NSWSC 743, NSWSC
Covington-Thomas v Commonwealth [2007] NSWSC 779, NSWSC
Covington-Thomas v Commonwealth (No 2) [2007] NSWSC 1059, NSWSC
Covington-Thomas v Commonwealth (No 3) [2007] NSWSC 1062, NSWSC
Covington-Thomas v Commonwealth (No 4) [2007] NSWSC 1401, NSWSC
- h Daputo v James Wyllie & Co, The Pieve Superiore LR 5 PC 482, UK PC
Dawkins v Lord Paulet (1869) LR 5 QB 94
Dawkins v Lord Rokeby (1866) 4 F&F 806, 176 ER 800
Dawkins v Lord Rokeby (1873) LR 8 QB 255
Decision of the Constitutional Court of Argentina (17 December 1996)
Findlay v United Kingdom [1997] 24 EHRR 221, ECt HR
- i Floyd v Barker (1607) 12 Co Rep 23
Fraser v Balfour (1918) 87 LJ KBD 1116
Fraser v Hamilton (1917) 33 TLR 431

- Frontiero v Richardson* (1973) 411 US 677, US SC a
Gibbons v Duffell [1932] HCA 26, (1932) 47 CLR 520, Aus HC
Grant v Gould (1792) 126 ER 434, [1775–1802] All ER Rep 182
Griffiths v R [1997] HCA 44, (1997) 137 CLR 293, Aus HC
Groves v Commonwealth [1982] HCA 21, (1982) 150 CLR 113, Aus HC
Hart v Gumpach (1872) LR 4 PC 439
Heddon v Evans (1919) 35 TLR 642 b
HM Advocate v Churchill (1953) SLT 45
Hunter v Southam Inc [1984] 2 SCR 145, (1984) 11 DLR (4th) 641, Can SC
Kini v State (Crim App No AAU0041/2002S, unreported), Fiji CA
KN and EG, Re (6 May 2008, FC 0029/2008, unreported)
Mansbergh, Re (1861, unreported) c
Maxwell v R [1995] HCA 62, (1996) 184 CLR 501, Aus HC
Morgan v Virginia (1946) 328 US 373, US SC
Morris v R (1978) 91 DLR (3d) 161, Can SC
Naduanwai v Commander, Fiji Military Forces (6 September 2004, HBM 32/2004, unreported)
National Coalition for Gay and Lesbian Equality v Minister for Home Affairs [2000] d
 4 LRC 292, (2000) 2 SA 1, SA CC
Nuplex Industries Ltd v Auckland Regional Council [1999] 1 NZLR 181, NZ HC
Parker v Commonwealth (1965) 112 CLR 295, Aus HC
Peterson v Commonwealth [2008] VSC 166
Plessy v Ferguson (1896) 163 US 537, US SC e
Police v S [1977] 1 NZLR 1, NZ CA
R v Arundel Justices, ex p Jackson [1959] 2 All ER 407, [1959] 2 QB 89, UK DC
R v Collins [1969] 3 All ER 1562, [1970] 1 QB 710, (1969) 54 Cr App R 19, UK CA
R v Généreux [1992] 1 SCR 259, (1992) 88 DLR (4th) 110, Can SC f
R v Hannan, ex p Abbott (1986) 41 NTR 37, (1986) 83 FLR 177
R v Jeffries [1968] 3 All ER 238, [1969] 1 QB 120, (1968) 52 Cr App R 654, UK CA
R v Jermone (1964) Qd R 595
R v Smith, ex p James (1966) SASR 47
R v Tonks (1963) VR 121 g
R v Willesden Justices, ex p Utley [1947] 2 All ER 838, [1948] 1 KB 397, UK DC
Revis v Smith (1856) 20 JP 453, (1856) 18 CB 126, (1856) 25 LJ (CP) 195
Rogoyawa v State (Crim App No AAU0010/1997S, unreported), Fiji General Court-Martial
Rostker v Goldberg (1981) 453 US 57, US SC
S (an infant) v Manchester City Recorder [1969] 3 All ER 1230, [1971] AC 481, UK HL h
S (children: care plan), Re [2002] UKHL 10, [2002] 2 All ER 192, [2002] 2 AC 291, UK HL
Schacter v Canada [1992] 2 SCR 679, (1992) 97 DLR (4th) 1, Can SC
Shelley v Kraemer (1948) 334 US 1, US SC i
Singline v Commonwealth [2007] NSWSC 900
Singline v Commonwealth of Australia (No 2) [2008] NSWSC 21

- a Sipuel v Board of Regent* (1948) 332 US 631, US SC
- State v Audie Pickering* (30 July 2001, Misc Case No HAM 007 of 2001S, unreported)
- State v Silatolu* [2003] FJHC 239, Fiji HC
- Stubbs, Re* (1947) 47 SR (NSW) 329
- b Sutton v Johnstone* (1787) 1 Bro Parl Cas 76, 1 Term Rep 784, UK HL
- Thomasson v Perry* (1996) 80 F 3d 915
- Tuck v Priester* (1887) 19 QBD 629, UK CA
- United States v Virginia* (1996) 135 L Ed 2d 735, US SC
- Vakacereitai v Commander, Republic of Fiji Military Forces* (28 January 2005, Crim App No AAU004/2005, unreported), Fiji CA
- c Vakadrula v State* (AAU20 of 2004, unreported), Fiji CA
- Watkins v US Army* (1989) 875 F 2d 699
- X v Commonwealth* [1999] HCA 63, [2000] 4 LRC 240, (1999) 200 CLR 177, Aus HC
- Yates v Lansing* (1810) 5 Joh 282; (1811) 9 Joh 395
- d Zietsch, Ex p, Re Craig* (1944) 44 SR (NSW) 360

Legislation referred to in judgments

Australia

- Defence Force Discipline Act 1982
- e* Defence Legislation Amendment Act 2006 (Cth)
- Disability Discrimination Act 1992 (Cth)
- Naval Defence Act 1910–1952 (Cth)

Canada

Canadian Charter of Rights and Freedoms 1982, ss 7, 11

f Fiji Islands

Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990

Constitution of Fiji 1997, ss 2–3, 25(1), 28–29, 34, 37–38, 41(1), (3), (5), 43, 114, 121(1), 195

Court of Appeal Act (Cap 12), s 22

g Criminal Procedure Code, s 262

Fiji Citizenship Act

Fiji Citizenship Decree 1987

Fiji High Court Rules, Ord 1, r 7

Fiji Independence Order 1970

h Industrial Associations Act (Amendment) Decree 1991

Internal Security (Suspension) Decree 1988

Internal Security Decree 1987

Internal Security Decree 1988

Interpretation Act (Cap 7) (as amended), s 2(1)

National Weights and Measures Decree 1989

i Ombudsman Decree 1987

Penal Code, s 50

Protection of the National Economy Decree 1991

Royal Fiji Military Forces Act (Cap 81) (as amended), ss 2, 23(1), (2), 30
 Sugar Industry (Special Protection) (Amendment) (No 3) Decree 1991
 Suppression of Terrorism Decree 1991
 Trade Unions Act (Amendment) Decree 1991

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United Kingdom

Armed Forces Act 1996
 Army Act 1955, s 70
 Court of Appeal Act 1907
 Criminal Justice (Scotland) Act 1949, s 21(2)(a)
 Magna Carta

b

United States

Constitution 1787

c

Other sources referred to in judgments

Bennion *Statutory Interpretation* (4th edn, 2002), p 647
 Butterworths *Concise Australian Legal Dictionary*
 Canadian Armed Forces Code of Service Discipline
 Conaboy 'The Federal Judiciary and Sentencing Policy', *Issues of Democracy*,
USIA Electronic Journals, USIS, vol 1, No 18, December 1996
 Convention against Torture and other Cruel, Inhuman, or Degrading
 Treatment or Punishment 1984 (10 December 1984; UN General Assembly
 Resolution 39/46, Doc A/39/51; Cmnd 9593), art 1
 Convention for the Protection of Human Rights and Fundamental Freedoms
 1950 (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969)
 Eskridge and Hunter *Sexuality, Gender and the Law* (1997) pp 372–407
 Gordon 'After Hard-Won Lessons, Army Doctrine Revised' (*New York Times*,
 8 February 2008)
 Hansen 'Changes in Modern Military Codes and the Role of the Military
 Commander: What Should the United States Learn from this Revolution?'
 (2008) 16 *Tulane Journal of International and Comparative Law* 419
 Hirschhorn 'The Separate Community: Military Uniqueness and Servicemen's
 Constitutional Rights' (1984) 62 *NC LR* 177
 International Covenant on Civil and Political Rights 1966 (New York,
 16 December 1966; TS 6 (1977); Cmnd 6702), art 14(1), (5)
 Ivor-Jennings *Maxwell on Interpretation of Statutes* (12th edn, 1969)
 Jowitt's *Dictionary of English Law* (2nd edn), vol 1
 Karst 'The Pursuit of Manhood and the Desegregation of the Armed Forces'
 (1991) 38 *UCLALR* 499
 Kaufman 'Sentencing: The judge's Problem' *Atlantic Monthly* (January 1960)
 Mackenzie *How judges Sentence* (2005)
 McLeary 'Army Outlines Field Manual 3-0'
 Oxford *Advanced Learner's Dictionary*
 Oxford *English Dictionary*
 Pearce and Geddes *Statutory Interpretation in Australia* (6th edn, 2006)
 Pollitt 'A Campaign to Stop Stoning' *The Nation*, 15 February 2008
 Spencer Bower *The Law of Actionable Defamation* (2nd edn, 1923), p 87

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- a Tealdi 'Responses to AIDS in Argentina: Law and Politics' in Frankowski (ed) *Legal Responses to AIDS in Comparative Perspective* (1998) 377 at 390
United States Army Field Manual FM3-0 Army Operations; FM 22-100, Ch 1, para 1-68
United States Army Uniform Code of Military Justice
- b Universal Declaration of Human Rights (Paris, 10 December 1948; UN TS 2 (1949); Cmd 7226)

Appeal

- c The appellants, the Republic of Fiji Military Forces, the Attorney General and the Commissioner of Prisons, appealed against the decision of Singh J in the High Court on 22 May 2007 that the words 'and sentence' be read into s 30 of the RFMF Act. The respondents, Emosi Qicatabua, Vilimoni Tikotani, Kalisito Vuki, Usaia Rokobigi, Lagilagi Vosabeci, Keni Naika, Filmoni Raivalu and Jona Nawaqa, opposed the appeal. The Fiji Human Rights Commission intervened as *amicus curiae*. The facts are set out in the judgment of Scutt JA.
- d K Tuinaosara for the appellants.
F Vosarogo and B Malimali for the respondents.

12 September 2008. The following judgments were delivered.

e BYRNE JA.

- [1] The respondents were convicted and sentenced by courts-martial for offences relating to the takeover of the Fiji Parliament in May 2000 and/or mutiny at Queen Elizabeth Army Barracks in November 2000. They were sentenced to various terms of imprisonment. They appealed against their sentences to the Court of Appeal, which ruled that s 30 of the Royal Fiji Military Forces Act (Cap 81) ('the RFMF Act') did not permit appeal against sentences.
- [2] The respondents then began an action for constitutional redress under s 41 of the Constitution in an attempt to challenge the validity of s 30 of the RFMF Act. Section 41 is part of Chapter 4 of the Constitution, which is entitled 'Bill of Rights'. Subsection (1) states that if a person considers that if any of the provisions of the Chapter has been or is likely to be contravened in relation to him or her, that person may apply to the High Court for redress. The action came before Singh J in the High Court on 27 of April 2007 and he gave judgment on 22 May 2007 holding that the words 'and sentence' must be read into s 30 of the RFMF Act. The judge held that s 30 was unconstitutional in that it did not allow any soldiers convicted by court-martial to appeal their sentences to the Court of Appeal. Although in the papers relating to this appeal the Republic of Fiji Military Forces and the Commissioner of Prisons, and the Attorney General and Minister for Justice are named as appellants, no submissions were received in this court from either the Commissioner of Prisons or the Attorney General and Minister for Justice. In fact in the High Court the Commissioner of Prisons and the Attorney General and Minister for Justice both supported the arguments of the respondents and submitted

that there was a lacuna in s 30 of the RFMF Act and invited the High Court to remove it by reading in the words previously mentioned. a

[3] It is appropriate to set out here s 30, which reads:

'A person convicted by a court-martial may, with the leave of the Court of Appeal, appeal to that court against his conviction: Provided that the leave of the Court of Appeal shall not be required in any case where the person convicted was sentenced by the court-martial to imprisonment for ninety days or more or to detention for ninety days or more.' b

[4] The appellant RFMF has filed six grounds of appeal against the decision of Singh J but these may be conveniently reduced to the following: c

(1) The judge erred in holding that he could read words into s 30 when the present case was one seeking constitutional redress.

(2) He erred in failing to give any or any sufficient weight to the fact that the respondents had been convicted of the most serious military offence the maximum sentence for which is life imprisonment and therefore he should have directed the relevant authorities to make the necessary change or changes. d

(3) He failed to take into account or give due consideration to the fact that a court might not be the best forum to determine appeals from General Courts-Martial because only Parliament was the correct forum to overhaul the military justice system in this country.

(4) The judge erred in failing to consider and take into account: e

(a) Military procedures and customs;

(b) The suitability of the Fiji Court of Appeal to deal with court-martial appeals;

(c) The need to have the matter properly debated and scrutinised by legislators. f

(5) That the Attorney General or his chambers should make a presidential promulgation reflecting the wishes of the court as this is the method adopted by the interim government to make laws.

[5] The judge acknowledged (at [34]) that:

'The real problem lies in deciding where interpretation ends and amendment begins. The line between the two is very thin indeed. The courts in our modern age take a purposive and more liberal attitude towards interpretation which in some cases may be considered as intruding into the realm of the legislature.' g

[6] His Lordship referred to *Schacter v Canada* [1992] 2 SCR 679, where the Supreme Court of Canada held that a court may in appropriate circumstances read words into a statute. This was a paternity case under the Canadian Charter of Rights and Freedoms 1982. h

[7] As will be seen later in this judgment, I do not consider that this is one of those appropriate circumstances to read in the words allowed by Singh J.

[8] Singh J also quoted Lord Nicholls of Birkenhead in *Re S (children: care plan)* [2002] UKHL 10, [2002] 2 All ER 192 at [40], who, in considering the dividing line between interpretation and amendment, stated that— i

- a 'a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate.'
- b [9] As general statements of the law I do not dispute the statements by the Supreme Court of Canada and Lord Nicholls of Birkenhead but I remind myself that in any case a court must consider the factual realities of the case before the court. Both *Schacter* and *Re S* dealt mostly with child care and benefits or welfare scheme issues. They were not concerned, as we are in this case, with issues involving the rights of members of an organisation like the military who have and rely on different sets of rules solely to serve the unique status and operations of the Republic of Fiji Military Forces.
- c [10] In *Schacter* [1992] 2 SCR 679 at 705-706 Lamer CJ, in a very comprehensive judgment dealing with reading in and severance, quoting Dickson J in *Hunter v Southam Inc* [1984] 2 SCR 145 at 169, said:
- d 'While the courts are guardians of the Constitution and of individuals' rights under it, it is the Legislators' responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.'
- e [11] Lamer CJ then concluded (at 707):
- f 'These cases stand for the proposition that the court should not read in in cases where there is no manner of extension which flows with sufficient precision from the requirements of the Constitution. In such cases, to read in would amount to making ad-hoc choices from a variety of options none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the legislature, not the courts.'
- g [12] La Forest J, in agreeing with the Chief Justice, stated (at 728):
- 'The simple fact is, as I noted before, that it is for Parliament and the legislatures to make laws. It is the duty of the courts to see that those laws conform to constitutional norms and declare them invalid if they do not.'
- h Shortly after this the judge said (at 728): 'Reliance should not be placed on the courts to repair invalid laws.'
- i [13] This court has on three occasions ruled that as the legislation stands at this time there is no right of appeal to sentences given by a general court-martial. In *Vakacereitai v Commander Republic of Fiji Military Forces* (28 January 2005, Crim App No AAU004/2005, unreported) a group of soldiers appealed their sentences from a general court-martial. The then President of this court, Ward P, stated, in response to arguments by counsel for the appellants:
- 'He suggests that a finding of guilt results in a conviction and so that word can be implied into the section. From there he suggests that, as a

conviction makes the convicted person liable to be sentenced, that can also be inferred. Ingenious though the argument is, I cannot accept it is correct. Where there is no ambiguity in the wording of a statute, the court must give the words their natural meaning. Parliament must be taken to have intended that meaning and the court has no right to change it. To do so would be to assume a legislative rather than an interpretive role ...'

He then said:

'It is undeniable that the court has, beyond those statutory limits, inherent jurisdiction to control its own proceedings and prevent abuse of process; *Aviagents Ltd v Balstravest Investments Ltd* [1966] 1 All ER 450. Such inherent jurisdiction is necessary to ensure the court can do justice to the parties appearing before it. It does not extend to a power to increase its statutory jurisdiction.'

[14] It has to be said, however, and Singh J noted this, that Ward P also expressed grave misgivings about the availability of appeal against sentence to soldiers convicted and sentenced by court-martial. He said in the penultimate paragraph of his judgment:

'Clearly the establishment of special military laws and courts is a necessary consequence of the special nature of military service and the need for strict and constant discipline means that many offences regarded as minor in civilian society must be treated more seriously in the armed forces. Consequently, the Court of Appeal may not be considered the most suitable body to review the severity, as opposed to the propriety, of sentences passed by courts-martial but, whichever is the appropriate body, it would be in accordance with the spirit of the Constitution to provide a right of appeal to an independent tribunal against sentence in cases tried under the RFMF Act.'

[15] Section 30 was also considered by Scott JA in *Vakadrula v State* (AAU20 of 2004, unreported), who found that non-availability of appeal against sentence was a most unfortunate lacuna in the law. He requested a copy of his judgment to be forwarded to the Solicitor General and the Fiji Human Rights Commission, no doubt in the hope that the legislature would rectify the gap.

[16] Despite the statements of Ward P and Scott JA, Singh J disregarded them and read words into the legislation.

[17] His Lordship noted that the section had remained unamended and considered that there were two possible courses of action open to him, namely either a declaration of incompatibility or to read the words 'and sentence' into the legislation.

DECLARATION OF INCOMPATIBILITY

[18] Singh J considered that he had the power to make a declaration of incompatibility, considering the broad language of s 41(3) of the Constitution, which reads:

'The High Court has original jurisdiction:

- a a) To hear and determine applications under subsection 1;
- b b) To determine questions that are referred to it under subsection 5;
- c c) That subsection concerns references by a subordinate court for the opinion of the High Court.'

b [19] Singh J considered that if he did not grant a declaration there would be a constitutional dead-end. With respect I do not agree. If there would be a constitutional dead-end then in my view it is not for a court to remedy it but for the Parliament after debate to make the necessary amendments. In my judgment it is not an answer to the problem posed in this case to say that if since 5 December 2006 and for some unknown period into the future there is no Parliament then a court may assume the role of Parliament in attempting to remedy a situation thought by some people to require change.

c [20] It is important to remember, as I said earlier, that the respondents have been convicted of one of the most serious offences known to the law, mutiny. Once upon a time conviction by court-martial for this offence resulted in the death penalty, which is an indication of how seriously governments at that time regarded mutiny. It is in one sense the military equivalent of treason and, indeed, it may be both.

d [21] In the end, considering the current political situation in Fiji with no prospect of immediate parliamentary sittings, a declaration of incompatibility would serve no purpose and would be meaningless and so His Lordship opted for the device of reading in. He recognised (at [31]) that this was the bolder route and appears to have accepted, as present counsel for the appellant submitted to him, that this would amount to the court legislating, which, as before Singh J and before us, Mr Tuinaosara says the court should not do.

e [22] In my judgment it is important not to be moved by what I respectfully term emotional arguments, such as, with respect to learned counsel for the respondents, we have received here.

f [23] It must be remembered that the object of military law is two-fold. First, it is to provide for the maintenance of good order and discipline among members of the army and in certain circumstances among others who live or work in a military environment. This it does by supplementing the ordinary criminal law of Fiji and the ordinary judicial system with a special code of discipline and a special system for enforcing it. In my opinion such special provision is necessary in order to maintain in time of peace as well as war, and overseas as well as at home, the operational efficiency of the armed force. It is for this reason that acts or omissions which in civil life may amount to no more than breaches of contract (like failing to attend work) or, indeed, mere incivility (like being offensive to a superior) become in the context of army life punishable offences. The second object of military law is to regulate certain aspects of army administration, mainly in those fields which affect individual rights. Thus, there is provision relating to enlistment and discharge, terms of service, forfeitures of deductions from pay and billeting. Often in practice, however, the term 'military law' is used with regard to its disciplinary provisions rather than its administrative ones.

g h i [24] In *Naduaniwai v Commander, Republic of Fiji Military Forces* (6 September 2004, Misc Case No HBM 32/2004, unreported) Winter J, referring to the

judgment of L'Heureux-Dubé J in *R v Généreux* [1992] 1 SCR 259, said:

'Her Honour focused on the military nature of the tribunal upholding that it was not appropriate to apply civilian criteria to evaluate the validity of a General Court Martial. Her Honour considered that the three essential conditions identified by the majority could not always be applicable to every tribunal. In a strongly worded dissent for a jurist well known as a champion of Human Rights, Her Honour's contextual approach to constitutional interpretation on this issue is one with respect that I adopt as it is particularly relevant to the provision I have just discussed from the Fijian Constitution, She said: "When measuring the General Court-Martial against the requirements of the Charter, certain considerations must be kept in mind. Among those considerations are that the armed forces depend upon the strictest discipline in order to function effectively and that alleged instances of non-adherence to rules of the military need to be tried within the chain of command." These cases arise in a context of military tribunals convened under Fijian law and sufficient weight must be given to that context in deciding whether or not a breach of a given right or freedom might occur. Her Honour observed, and I agree, that a right or freedom may have different meanings in different circumstances. I accept as a principle that the constitutional standards applicable in the civilian system of justice for assessing an independent and impartial tribunal are wholly inapplicable to measuring trial by General Court-Martial.'

[25] In my judgment the remarks of Winter J are very apposite to this case. It would seem with respect that Singh J has ignored the realities of the military disciplinary system by placing too much emphasis on the constitutionality of the section in question. The legislation in my view could not be clearer and the purpose of those who enacted it is also quite clear, that there was to be no appeal against sentence.

[26] It is true that the British, Australian and New Zealand Parliaments have amended their court-martial legislation to make it more in accordance with what are seen to be the human rights desires and aims of which we hear almost every day. Of course, the law should not stand still and thanks to both the common law down the centuries and Parliaments, virtually since Magna Carta, it has not done so but, and I consider that a very important but, in my view this amendment, if it is to be effected, must be made by Parliament. It is also necessary to note that under the system of military discipline the emphasis is on speedy, effective and quick justice. The reality as far as military service is concerned is that cases cannot be allowed to drag on and divert attention from the military mission a unit may be sent on.

[27] We were informed in argument that in England now, a country I might add with a population of over 60 million, there are approximately eight court-martial appeal tribunals consisting of judges of the High Court and the Court of Appeal in England. England's population is not only much higher than that of Fiji but its budget is also far higher than will ever be necessary for Fiji, at least in the foreseeable future.

[28] I note the suggestion of a General Court-Martial Appeals Court here. I

- a do not doubt the sincerity of those who support the establishment of such a court but I say this should not be done without properly scrutinising its suitability for this country and its army. I say that it is wrong to attempt to make the Constitution of this country a panacea for all ills. There is an old Latin maxim 'festina lente', which means 'hasten slowly'. In my view changes of the magnitude sought to be effected to s 30 deserve no less than debate in Parliament. This was certainly done in Britain and New Zealand and Australia and in our view it must be done here.
- b [29] It is no answer to say that because there is presently no Parliament any amendment may be made by promulgation. To do so would be merely an act of expediency for which I can find no justification in the law in the present circumstances.
- c [30] For these reasons I grant the appeal but make no order for costs. There will be orders accordingly.

GOUNDAR JA.

- d [31] I have had the advantage of reading in draft the judgments of my sister Scutt JA and my brother Byrne JA. I agree with the conclusion reached by my brother Byrne JA. I give brief reasons for my decision.
- e [32] The Republic of Fiji Military Forces ('the appellant') is a disciplinary force established by the Republic of Fiji Military Forces Act (Cap 81) ('the RFMF Act') and is recognised in the Constitution by s 114.
- f [33] The respondents are former military officers who were convicted of criminal offences under the RFMF Act and were sentenced to respective terms of imprisonment. By previous decisions of this court, the respondents were restricted to appeal against their sentences. The respondents filed a constitutional redress application in the High Court seeking relief under s 41 of the Constitution. Section 41 provides:
- g (1) If a person considers that any of the provisions of this chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then the person (or the other person) may apply to the High Court for redress.
- h (2) The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.
- i (3) The High Court has original jurisdiction:
- (a) to hear and determine applications under subsection (1); and
- (b) to determine questions that are referred to it under subsection (5); and may make such orders and give such directions as it considers appropriate.
- (4) The High Court may exercise its discretion not to grant relief in relation to an application or referral made to it under this section if it considers that an adequate alternative remedy is available to the person concerned.

[34] On 22 May 2007 the High Court allowed the constitutional redress and read the words 'and sentence' after the word 'conviction' in s 30 of the RFMF Act, thus creating a right of appeal and jurisdiction for the respondents to appeal against their sentences to the Court of Appeal. a

[35] The RFMF appeals against the High Court judgment.

[36] It is not contended by the appellant that the respondents should not have a right of appeal against sentence to a higher court. Nor does the appellant contend that the courts cannot read in words into a statute. What the appellant contends is the creation of a right of appeal to the Court of Appeal by reading words into a statute. b

[37] Section 30 of the RFMF Act provides:

'A person convicted by a court-martial may, with the leave of the Court of Appeal, appeal to that court against his conviction: Provided that the leave of the Court of Appeal shall not be required in any case where the person convicted was sentenced by the court-martial to imprisonment for ninety days or more or to detention for ninety days or more.' c

[38] The High Court found s 30 to be inconsistent with two particular provisions of the Constitution, namely ss 28(1)(l) and 38. d

[39] Section 28(1)(l) provides: 'Every person charged with an offence has the right ... (l) if found guilty, to appeal to a higher court.'

[40] Section 38(1) provides: 'Every person has the right to equality before the law.'

[41] The High Court's justification for the reading in of words to the RFMF Act is constitutional breach of the respondents' rights. Firstly, the High Court held that the respondents had a constitutional right of appeal against sentence pursuant to s 28(1)(l) of the Constitution. The High Court found s 30 of the RFMF Act restricted the respondents' right to appeal against sentence. The High Court found that the restriction violated the equality before the law provision of the Constitution because civilians convicted of an offence have a right of appeal against sentence to a higher court, but not soldiers, primarily because of their profession. e

[42] I accept that the Constitution is the supreme law and any legislation that is inconsistent with it is void to the extent of the inconsistency.

[43] However, I am of the view that s 30 of the RFMF Act is not unconstitutional. In fact, s 30 is constitutionally valid. Section 30 expressly provides a right of appeal against conviction and conforms with s 28(1)(l) of the Constitution. f

[44] The High Court held s 30 was unconstitutional because there was no reference to the word 'sentence' in the provision. g

[45] The High Court has failed to recognise that there exists a presumption of constitutionality in regard to legislation passed by Parliament. The presumption of constitutionality is a strong one and a court must make every effort to find an interpretation of legislation that is consistent with the Constitution. h

[46] Section 30 of the RFMF Act does not expressly prevent an appeal against sentence. Just because the word 'sentence' is not mentioned in s 30 does not mean that the section contravenes the Constitution. Section 30 i

- a creates a right of appeal against conviction to the Court of Appeal. A soldier who is convicted under the RFMF Act has a right of appeal against conviction to the Court of Appeal like any civilian convicted of an offence in the High Court. To that extent there is a right of appeal and equality before the law for soldiers who are convicted under the RFMF Act.
- b [47] The issue of whether a soldier convicted of an offence under the RFMF Act has a right of appeal against sentence to the Court of Appeal first arose in *Rogoyawa v State* (Crim App No AAU0010/1997S, unreported), General Court-Martial. Rogoyawa was convicted of disobeying a lawful command in a court-martial, which is an offence under the RFMF Act. He was discharged from the RFMF. On appeal, this court upheld the conviction and observed the court lacked jurisdiction to alter the sentence because there was no right of appeal against sentence.
- c [48] On the issue of an appeal against sentence from a court-martial to the Court of Appeal, in two subsequent unrelated matters, single justices of this court took a similar view. In *Vakadrula v State* (Crim App No AAU70/2004), unreported, Scott J said 'it seems that there is a most unfortunate lacuna in the law'.
- d [49] In *Vakacereitai v Commander, Republic of Fiji Military Forces* (28 January 2005, Crim App No AAU004/2005, unreported) Ward P (as he was then), in rejecting the constitutional arguments advanced by the appellant, said:
 'The Court of Appeal is created by statute and its powers cannot be extended beyond the terms of the statutes which grant them. Section 121(1) of the Constitution provides: "(1) The Court of Appeal has jurisdiction, subject to this Constitution and to such requirements as the Parliament prescribes, to hear and determine appeals from all judgments of the High Court and has such other jurisdiction as is conferred by law." That jurisdiction is prescribed by Parliament principally in the Court of Appeal Act (Cap 12) but it may also be provided under other acts such as, in this case, the RFMF Act. It is undeniable that the court has, beyond those statutory limits, inherent jurisdiction to control its own proceedings and prevent abuse of process: *Aviagents Ltd v Balstravest Investments Ltd* [1966] 1 All ER 450. Such inherent jurisdiction is necessary to ensure the court can do justice to the parties appearing before it. It does not extend to a power to increase its statutory jurisdiction.'
- e [50] I respectfully endorse the views of Ward P to be the correct position in law.
- f [51] The issue is not just a right of appeal but jurisdictional as well.
- g Appellate jurisdiction is solely created by statute and there is no inherent jurisdiction.
- h [52] In *R v Jefferies* [1968] 3 All ER 238 the English Court of Appeal held that whatever may be the powers of courts exercising a jurisdiction which does not derive from statute, its powers in criminal appeals derived from and were confined to those given by the Court of Appeal Act 1907 and there is no inherent jurisdiction, the appeal itself being the creature of statute.
- i [53] *Jefferies* was applied in *R v Collins* [1969] 3 All ER 1562. It was held that the Court of Appeal (Criminal Division) having the same powers as its

predecessor, the Court of Criminal Appeal, which was created by the Court of Appeal Act 1907, had no statutory jurisdiction to hear an interlocutory appeal and that, since the court was created by statute, it had no powers beyond those conferred on it by Parliament. a

[54] *Jefferies* was also applied in *Kini v State* (Crim App No AAU0041/2002S, unreported). In *Kini* this court, in considering whether it had jurisdiction to hear an appeal from a judgment of the High Court sitting in its appellate jurisdiction when none of the grounds of appeal raised a question of law as required by s 22 of the Court of Appeal Act (Cap 12), said: b

'Parliament has prescribed that s 22(1) of the Court of Appeal Act governs appeals from the High Court in its appellate jurisdiction and that such appeals are to be based on grounds of appeal involving a question of law only.' c

[55] Similarly in *Cavubati v State* (Crim Appeal No AAU0022/2003S, unreported) the court said:

'It is fundamental that a right of appeal is a creature of statute and that that right only exists to the extent created by statute. See *Police v S* [1977] 1 NZLR 1 (CA) and *Nuplex Industries Ltd v Auckland Regional Council* [1999] 1 NZLR 181 at 185. It is not a mere matter of practice or procedure, and neither a superior nor an inferior court, nor both combined can create or take away such a right.' (My emphasis.) d

[56] The Court of Appeal is established by the Court of Appeal Act (Cap 12) and the Constitution recognises the court's jurisdiction. The Constitution allows Parliament to prescribe the jurisdiction of the Court of Appeal. Section 121(1) of the Constitution states: e

'The Court of Appeal has jurisdiction, subject to this Constitution and to such requirements as the Parliament prescribes, to hear and determine appeals from all judgments of the High Court, and has such other jurisdiction as is conferred by law.' f

[57] While I agree that the term 'law' generally includes the Constitution, I am unable to agree that 'conferred by law' under s 121(1) of the Constitution included the same Constitution. I think, the framers of the Constitution meant 'conferred by law by Parliament'. The specific jurisdiction of the Court of Appeal has to be conferred by law by Parliament. I hold that conferring appellate jurisdiction to a court is a legislative function and not judicial. Appellate jurisdiction cannot be created by courts. Only the legislature can create appellate jurisdiction. By reading the words 'and sentence' to s 30 of the RFMF Act, the High Court created jurisdiction for the Court of Appeal and thereby usurped the function of the Parliament. The Constitution does not permit this. g

[58] I am satisfied that the High Court erred in allowing the respondents' application for constitutional redress.

[59] I, therefore, make the following orders: h

1. Appeal is allowed.
2. Judgment of the High Court is set aside. i

- a 3. No order for costs.

SCUTT JA.

BACKGROUND

- b [60] On 22 May 2007 the High Court upheld appeals in Civil Action No HBM 90/2006 and HBM 96/2006. In those actions, constitutional redress applications were made by seven applicants. The respondents in each were identical. The two actions were heard together. The appeals were upheld under s 28(1)(l) and s 38 of the Constitution on the basis that s 30 of the Royal Fiji Military Forces Act (Cap 81) ('the RFMF Act') is, in failing to provide an appeal to the Court of Appeal against sentence, inconsistent with those constitutional provisions.

- c [61] There is no dispute that s 30 of the RFMF Act provides members of the Republic of Fiji Military Forces ('the RFMF') with a right of appeal to the Court of Appeal vis-à-vis conviction. However, that section has hitherto been read as limiting appeal rights against sentence, so that for persons convicted and punished under the RFMF Act there is no recourse to the Court of Appeal on sentence.

[62] Section 30 of the RFMF Act says:

- e 'A person convicted by a court-martial may, with the leave of the Court of Appeal, appeal to that court against his conviction: Provided that the leave of the Court of Appeal shall not be required in any case where the person convicted was sentenced by the court-martial to imprisonment for ninety days or more or to detention for ninety days or more.'

- f [63] The High Court judgment was directed to redressing this by reference to constitutional rights, resting upon a power in the High Court to 'read into' the RFMF Act the words 'and sentence' alongside the word 'conviction'. Hence, said the High Court, effectively s 30 should be amended judicially by recasting it to read:

- g 'A person convicted by a court-martial may, with the leave of the Court of Appeal, appeal to that court against his conviction *and sentence*: Provided that the leave of the Court of Appeal shall not be required in any case where the person convicted was sentenced by the court-martial to imprisonment for ninety days or more or to detention for ninety days or more.' (My emphasis.)

h JUDGMENT UNDER APPEAL

- i [64] The applicants in the High Court were soldiers. All were convicted and sentenced by court-martial for offences relating to what is described in the High Court judgment as a 'takeover of the Fiji Parliament' in May 2000 and/or 'mutiny at Queen Elizabeth Army barracks' in November 2000. All were sentenced to imprisonment, albeit for varying terms. Their initial appeals to the Court of Appeal against their sentences were rejected on the basis that s 30 of the RFMF Act denied them this right.

[65] The applicants then lodged the current actions, claiming inconsistency

of s 30 of the RFMF Act not only with ss 28(1)(l) and 38 of the Constitution, ^a
but also s 25.

[66] Considering in some detail these provisions, their scope, possible application and interpretation by reference to a number of authorities, in the High Court Singh J addressed also the question of human rights provisions generally. He canvassed United Nations pronouncements, most particularly the Universal Declaration of Human Rights 1948 and, in passing, the United States Bill of Rights, along with the interpretation of human rights provisions in Fiji and elsewhere, including South Africa, the United Kingdom and Canada. ^b

[67] Singh J observed that the authorities are consistent in holding that statutory provisions incompatible with human rights provisions can be read down, so that the incompatibility or inconsistency is 'read out' of challenged legislation. He then asked (at [31]) whether it was permissible to 'take the bolder route of reading into the legislation': ^c

'Counsel for [the] applicants have invited me to read into the section "and sentence" after the word conviction in s 30. The second and third respondents [Commissioner of Prisons and Attorney General and Minister for Justice] support such reading in. The first respondent [RFMF], while conceding that soldiers in principle should be allowed to appeal against the sentence, nevertheless is of the view that such amendment should be done by [the] legislature ... [submitting] that the case dealt with the peculiar situation of the military, [that] ... none of the cases relied upon by the applicants concerned military issues [and] it is unwise to import legal principles from other jurisdictions without a detailed knowledge of their social conditions. In short, ... courts ought not to legislate.' ^d

[68] His Lordship concluded by saying (at [38]–[39]): ^e

'[38] Reading in the words "and sentence" will only promote full right of appeal for those sentenced by court-martial; it will impose no additional burden on the State. The soldiers would on appeal be able to submit why they think their sentences are harsh or excessive and the state of course will have [the] opportunity to put its view forward. All the parties agree that soldiers should be allowed to appeal [to the Court of Appeal] against sentence. The only difference is whether it should come through Parliament or whether the court can read into legislation. Given the historical state the Parliament is in at present, leaving the amendment to Parliament is to delay justice to the applicants. In fact the application would become meaningless as by the time [of] the amendment, if it arrives, the applicants will have served their sentences. I conclude therefore that s 30 of the RFMF Act by failing to provide an appeal against sentence [to the Court of Appeal] is inconsistent with s 28(1)(l) and s 38 of the Constitution. ^f

[39] Accordingly, I read the words "and sentence" after the word conviction in s 30 of the RFMF Act ... to come into effect from this moment.' ^g

a GROUND OF APPEAL

[69] The grounds of appeal are of some considerable assistance in adumbrating with clarity the issues now before this court:

- (1) The judge erred in holding that his Lordship could in the present case read words into the legislation, especially when the present case is a redress matter.
- b (2) The judge erred in holding that his Lordship reads in the words "and sentence" after the word "conviction" in s 30 of the RFMF Act.
- c (3) The judge erred in failing to give any or sufficient weight to the fact that the soldiers are convicted of the most serious military offences whose maximum sentence is life imprisonment and therefore should have directed the relevant powers to make the necessary changes.
- d (4) The judge erred in failing to consider and take into account the observations of this honorable court that it might not be the best court to determine appeals from General Courts-Martial and therefore parliamentary decision is the only correct forum to overhaul the military justice system in this country.
- (5) The judge erred in failing to consider and take into account:
 - (a) military procedures and customs;
 - (b) suitability of the Fiji Court of Appeal to deal with court-martial appeals;
 - (c) the need to have the matter properly debated and scrutinised by legislators.
- e (6) The judge ought to have held that:
 - (a) s 30 of the RFMF Act does not allow soldiers to appeal their sentences.
 - (b) any changes to s 30 of the RFMF Act should be made by Parliament
 - (c) the respondent should await the next parliamentary sitting for the law to be changed.
- f (d) the respondent certainly can await the sitting as the maximum sentence for his crime is life and he is serving only about half of the maximum sentence.
- g (e) the Attorney General's chambers should make a presidential promulgation reflecting the wishes of the court as this is the method adopted by the interim government to make laws.
- (f) make a declaration of incompatibility as reading in is beyond his Lordship's jurisdiction. This is the only remedy for the present case as per s 41(3) of the Constitution.
- h [70] Some of these grounds are able to be dealt with in relatively short compass. I do so here, then go to those grounds which may be accepted as more problematic.

g GROUNDS (3), (4) AND (5) DISMISSED

- i [71] Perusal of the High Court judgment confirms that these grounds should be dismissed. His Lordship made explicit reference to the matters canvassed. He addressed the question of military discipline, procedures and customs, along with the seriousness of the offences with which military

personnel can be charged, tried, convicted and sentenced by courts-martial. He addressed the issue of parliamentary amendment and the determination by the Court of Appeal in previous decisions that it was for the legislature to amend the section. He looked at the process and consequences of amendment, and the current political situation in Fiji, alongside the constitutional provisions which he considered required the amendment. He looked extensively at the question of 'reading in' by judicial amendment versus parliamentary amendment.

[72] His Lordship first looked at the issues of military discipline, procedures and customs in the context of s 38 of the Constitution, namely that every person 'has the right to equality before the law'. He addressed in that context also the seriousness of the offences with which military personnel can be charged and tried by courts martial.

[73] His Lordship observed that the right to equal treatment is enshrined in the Constitution so as to outlaw discriminatory provisions or treatment unless the provision is 'based on a reasonable basis'. By this, he said, 'is meant that the classification must be rational and not arbitrary' and based upon an 'intelligible differential which separates those who are grouped together from those who are excluded' with 'a rational explanation for the objective to be achieved by the law under challenge'. His Lordship then said (at [19]):

'Few professions are as dependent on discipline as the army. Though the army consists of a collection of individual soldiers, it is a single entity. The personal interests and concerns of individuals are subservient for the collective good, needs and purpose. Good leadership and discipline underpin the operational effectiveness of the army.'

[74] His Lordship then referred to the RFMF Act, observing that it 'sets out the law regarding recruitment, discipline, trial and punishment of all serving soldiers'. He referred to the judgment of Winter J in *Naduaniwai v Commander, Fiji Military Forces* (6 September 2004, HBM 32/2004, unreported), which looked at the RFMF Act and that upon which it was based, the Army Act 1955 (UK) including its amendments or replacements was which was 'to be taken as the contemporary law for courts martial in Fiji'. He noted (at [20]-[21]) that the Army Act—

'provides that soldiers are liable for criminal offence[s] committed by them—s 70 of the Army Act. In addition they may be dealt with for numerous offences which are unique to the army—like mutiny, desertion etc.'

[75] His Lordship took into account earlier cases wherein the right of appeal against sentence had been dealt with by the Court of Appeal, explicitly with reference to the question whether the Court of Appeal was the best venue for hearing such appeals and whether the legislature alone should 'overhaul [Fiji's] military justice system'. In this regard, he referred to *Vakadraka v State* (AAU20 of 2004, unreported), Fiji CA and *Vakacereitai v Commander, Republic of Fiji Military Forces* (28 January 2005, Crim App No AAU004/2005, unreported), Fiji CA. He cited both Scott J and Ward P respectively.

a [76] As to *Vakadrula*, his Lordship observed (at [25]) that Scott J 'found non-availability of appeal against sentence a "most unfortunate lacuna in the law"', requesting a copy of his judgment to be forwarded to the Solicitor General and Fiji Human Rights Commission 'presumably in his firm belief that they would prompt the legislature to rectify the lacuna' (Scott J's emphasis).

b [77] In regard to *Vakacereitai*, his Lordship quoted (at [25]) extensively from Ward P, who said:

c 'Clearly the establishment of special military laws and courts is a necessary consequence of the special nature of military service and the need for strict and constant discipline means that many offences regarded as minor in civilian society must be treated more seriously in the armed forces. Consequently, the Court of Appeal may not be considered the most suitable body to review the severity, as opposed to the propriety, of sentences passed by courts-martial but, whichever is the appropriate body, it would be in accordance with the spirit of the Constitution to provide a right of appeal to an independent tribunal against sentence in cases tried under the RFMF Act.'

d [78] His Lordship observed (at [25]) that Ward P requested that 'a copy of the judgment ... be forwarded to the Solicitor General with recommendation for amendment'.

e [79] In considering what remedy to provide, his Lordship 'bore in mind the legislative inactivity since Justice Scott's decision, delivered 18 June 2004' (at [28]). He went on to refer to the legislature's failure to 'give consideration to the issue for such along time', taking into account also 'the current political situation in Fiji, with parliamentary sittings in an indefinite limbo' (at [30]).

f [80] He then set out positions taken by the parties on the question in issue, referring to the contention as put by counsel that the case before the High Court dealt with 'the peculiar situation of the military, [that] none of the cases relied upon by the applicants concerned military issues' and 'courts ought not to legislate'.

g [81] In addition, his Lordship took into account (at [37]) the implications that the making of a decision may have in regard to financial matters affecting Fiji, namely:

'One of the limiting policy factors to be considered [in deciding whether to "legislate" judicially] is whether the interpretation taken has serious budgetary considerations for the State.'

h [82] In this regard, he quoted extensively from *National Coalition for Gay and Lesbian Equality v Minister for Home Affairs* [2000] 4 LRC 292 at [36]–[37].

[83] Further as to these grounds (3), (4) and (5), as his Lordship observed, all the parties agreed 'soldiers should be allowed to appeal against sentence', with the 'only difference [being] whether it should come through Parliament or whether the court can read into legislation' (at [38]).

i [84] It may be fairly assumed that the considerations taken into account by his Lordship—as to military procedures and customs, and the soldiers having been 'convicted of the most serious military offences' with a 'maximum

sentence of life imprisonment'—are in fact accepted by the parties as having been dealt with adequately by Singh J, for his Lordship's conclusion that s 30 required change so as to incorporate 'sentence' along with 'conviction' was agreed to by all parties. The difference lay only in the route to remedy. a

[85] It would be surprising if the appellant herein, being one of the respondents before the High Court, would accept the need for change and indeed advocate it without taking into account all those matters the appellant now says the High Court did not take into account or did not do adequately. If the appellant has reached the same conclusion as the High Court, advocating the change and disagreeing only upon whether the High Court should effect the change (his Lordship's position) or Parliament should do so (the appellant's position), the basis of grounds (3), (4) and (5) surely must fall away. his Lordship must be taken to have adequately considered the relevant matters. b
c

[86] This is even more so when considering the appellant submits as a ground of appeal that his Lordship ought, amongst other stipulations, have held the Attorney General's chambers 'should make a presidential promulgation reflecting the wishes of the court' (that is, including 'sentence') because 'this is the method adopted by the interim government to make laws': appellants' ground (6)(d). d

[87] This is an explicit proposition (or at least a fair inference can be drawn) that there should be immediate change without recourse to Parliament. In saying that his Lordship should have taken this route, the implication is that his Lordship (along with the appellant) did consider the matters listed by the appellant. The proposition that there should be a presidential promulgation 'reflecting the wishes of the [High] Court' undercuts the contention that Singh J did not consider or adequately consider or take those matters into account, robbing the contention of any force. e

[88] That his Lordship came to a conclusion different from that of Scott J and Ward P, and different from the appellant herein, namely that he should step in by reading 'and sentence' into s 30 and that rather than again sending a judgment to the Solicitor General for legislative intervention or concluding the remedy should be by promulgation through the Attorney General's chambers, cannot in and of itself mean, and does not mean, he failed to 'consider and take into account the observations of [the Court of Appeal] that it might not be the best court to determine appeals from General Courts Martial', making the Parliament the 'only correct forum to overhaul the military justice system' of Fiji. f
g

[89] Nor can it in and of itself mean, and nor does it mean, that he omitted taking into account, or doing so adequately, military procedures and customs and the seriousness of the military offences and those other matters listed. That his Lordship's conclusion is different from that of his colleagues does not mean he engaged in oversight or failure to consider the matters adverted to. h

[90] On the contrary, his Lordship 'considered and took into account' all the matters stipulated in grounds (3), (4) and (5), concluding after this review that the Court of Appeal was the 'best court to determine appeals from General Courts Martial'. In so doing, he also reflected upon the lack of action by the legislature despite Scott J and Ward P's judgments, the current political i

- a position in Fiji, absent Parliament; the possible financial consequence or ramifications of effecting the change; and the rights accruing to members of the military under the Constitution of Fiji.

[91] For all the reasons aforesaid, grounds (3), (4) and (5) are without merit and are dismissed.

b

PRELIMINARY ASSESSMENT OF GROUNDS (1) AND (2)

[92] Grounds (1) and (2) provide:

'(1) The judge erred in holding that his Lordship could in the present case read words into the legislation, especially when the present case is a redress matter.

c

(2) The judge erred in holding that his Lordship reads in the words "and sentence" after the word "conviction" in s 30 of the RFMF Act.'

d

[93] I am not persuaded it was or is necessary to 'read words into' the RFMF Act to make s 30 consistent with the constitutional provisions relied upon by his Lordship: ss 28(1)(l) and 38, and put forward by the applicants (the respondents herein): ss 25(1), 28(1)(l) and 38. My explicit disagreement is explained later.

[94] At the same time, I do not accede to ground (1) insofar as it may assert denial of a right to 'read in' where other statutes or legislative provisions are before this court in future proceedings.

e

[95] Whilst not agreeing with his Lordship's 'reading in', I do not agree that the court erred in 'reading in' because this is a redress matter. The foundation upon which his Lordship based his judgment is not without cogency. That this court does not agree with 'reading in' in the provision here under scrutiny should not be seen as limiting the scope of future determinations. The 'reading in' route in other cases on other provisions remains open for the court as constituted at that time to decide. My judgment is specific to s 30 of the RFMF Act.

f

[96] As to s 30, I agree with his Lordship that when read to exclude the right of appeal against punishment ('sentence'), the section infringes the Constitution of Fiji. I agree that such a reading and application is inconsistent with ss 28(1)(l) and 38 of the Constitution. Contrary to his Lordship's determination, it is also inconsistent with s 25(1).

g

[97] With grounds of appeal (1) and (2), in my view it is unnecessary to include the words 'and sentence' after the word 'conviction' in s 30 of RFMF Act. At the same time, I consider the respondents have a right, through constitutional remedy and consistent with their constitutional rights, to appeal against the punishment—'sentence'—imposed upon them by the military tribunal. In accordance with the authorities, in my view 'conviction' must be read as including the concept and reality of punishment or, in other words, sentence. 'Conviction' includes punishment ('sentence') without the need for express inclusion of the word 'sentence'.

h

i

[98] To illustrate and explain this conclusion, I first refer to and analyse the scope and application of ss 25(1), 28(1)(l) and 38 of the Constitution to s 30 of the RFMF Act.

CONSTITUTIONAL PROVISIONS INFRINGED: S 25(1)

[99] His Lordship held that s 25(1) of the Constitution has no application to the dilemma raised by the applicants/respondents in their alleged lack of a right to contest their punishment or 'sentence' by reason of the wording of s 30. I disagree. a

[100] Section 25(1) appears in the Constitution as follows: b

'Freedom from cruel or degrading treatment

25(1) Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment.'

[101] In ruling out application of this section to the applicants/respondents' case, his Lordship held (at [8]) that suffering arising from lawful sanctions is 'not generally encompassed by' the definition of 'torture' contained in art 1 of the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment 1984, namely— c

'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him ... a confession, punishing him for an act ... or intimidating or coercing him ... or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.' d

[102] On more than one count, I respectfully disagree. First, punishments such as stoning—'lawful' punishments in a number of jurisdictions—would, I consider, come within the definition of torture or at least 'cruel, inhuman or degrading' treatment or punishment. In jurisdictions where stoning is a punishment (and capital penalty), it can be imposed upon women and men differently ('discrimination of any kind'). A woman subjected to rape will be classed as having consented unless a high level of countermanding proof, including multiple witnesses, is available. In 'consenting' she will have engaged in adultery (if married) or fornication (if unmarried), with stoning the penalty. The man, if subjected to stoning, will have committed a crime. The woman, a victim/survivor of the crime, is subjected to a criminal penalty. (See for example Katha Pollitt 'A Campaign to Stop Stoning' *The Nation*, 15 February 2008. 'The Secretary General of Iran's Human Rights Committee was reported on 10 September 2007 as stating that stoning 'is neither torture nor an incongruous punishment ...' However, stoning has been suspended at various times, or in relation to particular cases, by the Chief Justice of Iran.) e

[103] Secondly, an emphasis upon 'torture' limits the scope of s 25(1). As his Lordship acknowledged earlier in his judgment, and consistent with *Ex p A-G of Namibia, re Corporal Punishment by Organs of State* [1992] LRC (Const) 515, followed by *Ali v State* [2001] FJHC 169, provisions prohibiting torture and cruel and inhumane treatment, etc 'seek to protect citizens from seven different conditions': (a) torture, (b) cruel treatment, (c) cruel punishment, (d) f

- a inhuman treatment, (e) inhuman punishment, (f) degrading treatment and (g) degrading punishment
[104] Further:

... even if the moderation counselled or contemplated in some of the impugned legislation or practice succeeds in avoiding "torture" or "cruel" treatment or punishment it would still be unlawful if what it authorises is "inhuman treatment or punishment" or "degrading treatment" or "punishment". (See [1992] LRC (Const) 515 at 527.)

- b
[105] The words of s 25(1) (for an extensive review of this provision and cases relating to proportionality, etc see *State v Audie Pickering* (30 July 2001, Misc Case No HAM 007 of 2001S, unreported)) specifically condemn:

- c
- physical torture
 - mental torture
 - emotional torture
 - cruel punishment
 - inhumane punishment
- d
- degrading punishment
 - disproportionately severe treatment
 - disproportionately severe punishment

[106] In my view, arguably 'disproportionately severe punishment' and certainly 'disproportionately severe treatment' is imposed upon persons convicted of crimes—whether within the military system or outside it—and denied the right to appeal against that part of the proceedings relating to punishment or sentence. Arguably, also, a punishment which is imposed without any right of review through a superior court or tribunal qualifies as 'cruel' or 'inhumane': the cruelty and/or inhumanity lie in the condemned person's inability to secure a review of it and to make out their arguments, to be accepted or not by the superior court or tribunal. That the superior court may not accept their arguments, so that ultimately the punishment (or 'sentence') is upheld, does not affect the 'cruelty' or 'inhumanity' inherent in the punishment (or 'sentence') so long as it is not able to be reviewed upon appeal. Nor does the fact that it may, if appeal were possible or review were permitted, ultimately be upheld affect the 'disproportionate severity' of punishment or treatment if it stands without the possibility of appeal or review.

[107] The Constitution of Fiji extends the right of appeal against a finding of guilty upon every person charged with an offence: s 28(1)(l).

- h [108] So long as the right of appeal ('review') is accepted as a human or civil right, then so long as that human or civil right is denied, the punishment (or 'sentence') is infected by cruelty, inhumanity or disproportionality. As observed, the cruelty, inhumanity, disproportionate severity or disproportionate treatment lies in the lack of a right of review: that is, the lack of right of appeal.

- i [109] Taking that and all the aforesaid matters into account, a reading of s 30 of the RFMF Act that limits 'conviction' so as to rule out an appeal against the punishment inflicted as a part of the conviction is unconstitutional as breaching s 25(1).

CONSTITUTIONAL PROVISIONS INFRINGED: S 38

[110] His Lordship held that limiting s 30 of the RFMF Act so that those convicted in the military context have no right of appeal against punishment ('sentence') is inconsistent with s 38 of the Constitution. I agree.

[111] The Constitution provides:

'Equality'

38(1) Every person has the right to equality before the law.

(2) A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her:

(a) actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability; or

(b) opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others;

or on any other ground prohibited by this Constitution.

(3) Accordingly, neither a law nor an administrative action taken under a law may directly or indirectly impose a disability or restriction on any person on a prohibited ground.

(4) Every person has the right of access, without discrimination on a prohibited ground, to shops, hotels, lodging-houses, public restaurants, places of public entertainment, public transport services, taxis and public places.

(5) The proprietor of a place or service referred to in subsection (4) must facilitate reasonable access for disabled persons to the extent prescribed by law ...

(7) A law is not inconsistent with subsections (1), (2) or (3) on the ground that it:

(a) appropriates revenues or other moneys for particular purposes;

(b) imposes a retirement age on a person who is the holder of a public office;

(c) imposes on persons who are not citizens a disability or restriction, or confers on them a privilege or advantage, not imposed or conferred on citizens

(d) permits a person who has a discretion to institute or discontinue criminal proceedings to take account in the exercise of that discretion of traditional procedures in the State for the settlement of disputes; or

(e) makes provision with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters as the personal law of any person or the members of any group;

but only to the extent that the law is reasonable and justifiable in a free and democratic society ...

(a) Section 38(7)(d)

[112] In applying s 38, his Lordship said amongst other matters that the Fiji Constitution 'envisages ... [the] right to equal treatment in similar circumstances unless a discriminatory provision is based on a reasonable

- a* basis'. However, under the Constitution some forms of discrimination outlawed by s 38 are incapable of being substantiated by a 'reasonable basis'. That is, there are some forms of discrimination that are in and of themselves unreasonable and without redemption. This is why the Constitution refers to 'direct' and 'indirect' discrimination. 'Direct' discrimination can never be 'reasonable' under the Constitution. The 'strict scrutiny' standard applies because the rights against discrimination for the stipulated categories, identities, attributes or statuses listed in the equality provision are explicitly protected as fundamental. Discrimination in relation to them is presumptively impermissible.

- c* [113] However, s 38(7) explicitly singles out certain situations, categories of law or statuses where albeit the discrimination is 'direct', the law can nonetheless stand 'but only to the extent that the law is reasonable and justifiable in a free and democratic society'. That is, it is only where a distinction is made by reference to:

- the appropriation of revenue or other moneys for a particular purpose;
- the imposition of a retirement age on a person who is the holder of a public office;
- the imposition on persons who are not citizens of a disability or restriction, or the conferring upon them of a privilege or advantage, not imposed or conferred on citizens;
- the permitting of a person who has a discretion to institute or discontinue criminal proceedings to take account in the exercise of that discretion of traditional procedures in the state for the settlement of disputes;
- the making of provision with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters as the personal law of any person or the members of any group;

- f* that this distinction can be lawful—although 'only to the extent that the law is reasonable and justifiable in a free and democratic society'. (The Constitution clearly makes this distinction—between some rights that are 'fundamental' or 'inalienable' and in relation to which discrimination presumptively impermissible, and those that are in the category where lawfulness of discrimination can be sustained on a 'reasonable and justifiable' test. Section 38(7) is not the only case in point. Section 37 is similarly drafted:

- g* '(1) Every person has the right to personal privacy, including the right to privacy of personal communities. (2) The right set out in sub-s (1) may be made subject to such limitations prescribed by law as are reasonable and justifiable in a free and democratic society.' So too s 34, dealing with freedom of movement, where s 34(7) provides that a law 'may limit, or may authorise the limitation of, the right of a person to freedom of movement: (a) in the interests of national security, public safety, public order, public morality or public health; (b) for the purpose of protecting the economy of a particular area of the ecology or distinctive culture of the area; (c) for the purpose of imposing a restriction on the person that is reasonably required to secure the fulfillment of an obligation imposed on the person by law; or (d) for the purpose of imposing reasonable restrictions on the holders of public offices as part of the terms and conditions of their employment, but only to the extent that the limitation is reasonable and justifiable in a free and democratic society.' (My

emphasis.)) Even then, it is presumptively lawful only.

[114] Ultimately, it can be found lawful 'only to the extent that the law is reasonable and justifiable in a free and democratic society'. If it is not 'reasonable and justifiable in a free and democratic society' it will be unlawful. Any part which cannot be so characterised will be unlawful. This is the import of the inclusion of sub-s (7) in s 38.

[115] Insofar as s 30 of the RFMF Act is in issue, it may be said that s 38(7)(d) has application. However, s 38(7)(d) appears to have been included in the Constitution to apply to traditional procedures founded in culture related to race, ethnic origin or place of origin. In the Republic of Fiji traditional procedures for dispute resolution have existed within racial and ethnic groups, and it is this that s 38(7)(d) seeks to preserve.

[116] Nonetheless, it may be argued that s 38(7)(d) does include within 'traditional procedures for dispute resolution' those applicable to the military.

[117] The Constitution itself explicitly accepts the existence of a military justice system, meaning that the existence of the military justice system in itself is not in question. Thus, s 28(1)(k) says:

'28(1) Every person charged with an offence has the right ...

(k) not to be tried again for an offence of which he or she has previously been convicted or acquitted ...'

[118] Section 28(3) goes on to say:

'A law is not inconsistent with paragraph (1)(k) to the extent that it:

(a) authorises a court to try a member of a disciplined Force for a criminal offence despite his or her trial and conviction or acquittal under a disciplinary law; and

(b) requires the court, in passing sentence, to take into account any punishment awarded against the member under the disciplinary law.'

[119] Section 29, dealing with access to courts or tribunals, says:

'... (4) The hearings of courts (other than military courts) and tribunals established by law must be open to the public.'

[120] If 'military justice' does come within 'traditional procedures for dispute resolution', then s 30 of the RFMF could be lawful, per s 38(7)(d), in excluding the right of military personnel to appeal against punishment ('sentence') only if that reading is 'reasonable and justifiable in a free and democratic society'.

[121] Whilst accepting the rightful (and necessary) existence of a military justice system, the United Kingdom Parliament and the European Court of Human Rights have determined it is not 'reasonable and justifiable in a free and democratic society' to maintain a system of military justice that does not incorporate civil and human rights principles and practices expected to apply in the civil justice system: for example, unbiased tribunals/decision-makers, judicial independence and so on. This includes the right of review of punishment imposed upon military personnel. The Armed Forces Act 1996 (UK) extensively revised the procedures for trial of military personnel. These changes were consequent upon an appeal by Mr Alexander Findlay, a serving

a member of the military at the time of his trial, who:

b 'On 29 July 1990, after a heaving drinking session, ... held members of his own unit at pistol point and threatened to kill himself and some of his colleagues. He fired two shots, which were not aimed at anyone and hit a television set, and subsequently surrendered the pistol. He was then arrested. [Subsequently], the decision was taken to charge Mr Findlay with a number of offences arising out of the incident ... On 11 November 1991, Mr Findlay appeared before the general court-martial, at Regent's Park Barracks in London. He was represented by a solicitor. He pleaded guilty to three charges of common assault (a civilian offence), two charges of conduct to the prejudice of good order and military discipline (a military offence) and two charges of threatening to kill (a civilian offence) ... Having heard the evidence and speeches, the court-martial sentenced [him] to two years' imprisonment, reduction to the rank of guardsman and dismissal from the army (which caused him to suffer a reduction in his pension entitlement). No reasons were given for the sentence ...' (See *Findlay v United Kingdom* [1997] 24 EHRR 221 at [10]-[11], [19], [23].)

c [122] The European Court of Human Rights observed (at [51]) that insofar as the law was interpreted in the United Kingdom at that time, until the amendments introduced by the 1996 Act (scheduled to come into effect in April 1997, that is, after the decision of the European Court of Human Rights):

e 'A Court-Martial Appeal Court (made up of civilian judges) could hear appeals against conviction from a court-martial, but there was no provision for such an appeal against sentence when the accused pleaded guilty.'

f [123] The United Kingdom government 'asked the court to take note in its judgment of the changes to be effected in the court-martial system by the Armed Forces Act 1996'. In response it was said (at [67]):

g 'The Court recalls that this new statute does not come into force until April 1997, and thus did not apply at the time of Mr Findlay's court-martial. It is not the court's task to rule on ... the compatibility of the provisions of the new legislation with the Convention ... Nonetheless, it notes with satisfaction that the United Kingdom authorities have made changes to the court-martial system with a view to ensuring the observance of their Convention commitments.'

h (The Convention referred to is the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms 1950).

i [124] The nature and role of the military is presently undergoing a marked change. In February 2008 the United States Army released a new operations manual (Field Manual FM3-0 Army Operations), which sets on an equal footing the 'mission' of the military in stabilising war-torn nations and that of defeating the enemy on the battlefield. The first revision since 2001 of the Field Manual and doctrine followed and applied, it 'finally takes the step of

elevating stabilization operations to the level of offensive and defensive ops': a

'In a nod to the new emphasis on cultural awareness in contemporary war fighting, particularly in combating insurgencies, [central to the change is the formation of ... the "Theater Military Advisory Assistance Group" (TMAG) ... described as a group of experts [who] will assist commanders on the ground to better understand the local culture in the theater in which they're deployed.'

(See Paul McLeary 'Army Outlines Field Manual 3-0' and Michael R Gordon 'After Hard-Won Lessons, Army Doctrine Revised' in *New York Times*, 8 February 2008.)

[125] Commander of the Combined Arms Center, LTG William Caldwell IV, is reported as acknowledging that the current composition of the Theater Military Advisory Assistance Group is 106 uniformed military personnel 'but the ultimate goal is ... to bring civilian experts in'. c

[126] Changes are evident in military operations around the world, with 'peace keeping' featuring predominantly in foreign theatres, whilst domestic tasks are undertaken on the home front as well, with military being deployed to build houses and roads in remote areas to serve the needs of deprived domestic populations (as in the Australian Northern Territory, in the case of the Australian Defence Forces (ADF), particularly army personnel). In these circumstances, it may be expected that methods of maintaining discipline will see changes also. In *X v Commonwealth* [1999] HCA 63, [2000] 4 LRC 240 Kirby J referred to the changes implemented in the military over time, and the oft-strong resistance to changes prior to their introduction. He averred that eventually, changes are introduced and implemented—without the dire consequences foreshadowed during the 'resistance to change' period. On this, see later. The RFMF Act itself recognises the change factor: the Army Act 1955 (UK), which is its origin, was introduced after the 1939–45 war, just as in the United States in that period a critique of what had occurred during wartime led to the introduction of the Uniform Code of Military Justice ('UCMJ') in 1951. (See Victor Hansen 'Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?' (2008) 16 *Tulane Journal of International and Comparative Law* 419.) d

[127] Nonetheless, there remains no quibble insofar as the authorities are concerned (*Findlay v United Kingdom* [1997] 24 EHRR 221 and *R v Gêneux* [1992] 1 SCR 259, for example) that a military justice system can or, more, should exist by reason of the need for discipline in accordance with the conditions, requirements and circumstances governing the military and military operations. Equally, however, this does not mean that that system is free from an obligation to match up to civil and human rights standards applicable in the civil justice system. e

[128] Earlier in the 1990s the Canadian Supreme Court and then the Canadian Parliament recognised this. It was not 'reasonable and justifiable in a free and democratic society' for a system of military justice to ignore civil and human rights obligations and entitlements when prosecuting members of the military in respect of disciplinary offences or civil or military crimes. This f

- a included review and appeal of sentences imposed upon military personnel.
[129] Following *R v Généreux* [1992] 1 SCR 259, the Canadian government introduced legislation reconstituting significantly the Canadian military justice system. The majority in *Généreux* [1992] 1 SCR 259 at [1] recognised:
- b 'An accused who is charged with offences under the Code of Service Discipline and subject to the jurisdiction of a General Court-Martial may invoke the protection of s 11 of the [Canadian] Charter [of Rights and Freedoms]. Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it also serves a public function by punishing specific conduct which threatens public order and welfare, including any act or omission punishable under the *Criminal Code* or any other Act of Parliament. In any event, since the accused faced a possible penalty of imprisonment in this case, even if the matter dealt with was not of a public nature, s 11 would nonetheless apply by virtue of the potential imposition of true penal consequences.'
- c
- d [130] Both *Généreux* and *Findlay* were explicitly concerned with the impartiality or otherwise of military tribunals as constituted at the time the respective appellants were charged and prosecuted, tried, found guilty and punished. Section 11 of the Canadian Charter says:
- e 'PROCEEDINGS IN CRIMINAL AND PENAL MATTERS.
11. Any person charged with an offence has the right
(a) to be informed without unreasonable delay of the specific offence;
(b) to be tried within a reasonable time;
(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
(e) not to be denied reasonable bail without just cause;
(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.'
- f
- g
- h
- i [131] The consequence was, as noted, that in each case the legislature stepped in to reconstitute and recast so as to bring military justice into accord with civil and human rights precepts and principles governing the

prosecution, trial and appellate process. (The Canadian Charter does not provide for a right of appeal against a conviction or 'punishment' or 'sentence' or a finding of guilt. It is to be presumed that within s 11, the concept of a right to appeal is embodied or considered to be embodied, consistent with 'principles of fundamental justice': s 7 'Life, Liberty and Security of Person. 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.') a

[132] Similarly, with Australia and Aotearoa/New Zealand. By the Defence Legislation Amendment Act 2006 (Cth), Australia amended the Defence Force Discipline Act 1982 (Cth) substantially overhauling the Defence Forces system of justice, including as regards reviews and appeals. The Australian Parliament thus can be taken as not considering the system previously existing as 'reasonable and justifiable in a democratic society'. b

[133] In the present proceeding, the parties of course cannot set the standards or pre-empt the outcome. However, it is not insignificant that all the parties in the present appeal—including the RFMF—are in agreement that the purported lack of an appeal on sentence is not 'reasonable and justifiable in a democratic society'. Albeit, as noted, they may disagree upon the method of achieving the change, they are at one on the issue of the need for the change. (For a view advocating caution in adopting the changes embraced in the United Kingdom, Canada and elsewhere, see Victor Hansen 'Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?' (2008) 16 *Tulane Journal of International and Comparative Law* 419.) c

[134] The weight of authority, judicial, executive and legislative, supports the proposition that in today's democracies, a military justice system which does not conform to civil and human rights standards expected of the civilian justice system is 'not reasonable and justifiable'. Hence, the lack of access to an appeal in respect of punishment under s 30 of the RFMF Act is unsustainable and cannot be supported by recourse to s 38(7)(d). d

(b) Section 38

[135] Approaching s 38 from the simple 'equality' point of view '(1) Every person has the right to equality before the law', the question is whether military personnel have an entitlement to equal protection of the law concomitant with the entitlement extending to civilians. Are military personnel deprived of equal protection through a comprehensive appeal system simply by reason of their profession or work-status? e

[136] The contention that military personnel are 'outside the law', having no rights in or protection of civilian law has a long history. So does its corollary—the contention by military personnel that they are not legally responsible (as they would be in civilian life) for harm they cause to their military colleagues, or that military authorities are not responsible for such harm (contrary to the legal responsibility lying with civilian institutions or authorities). f

[137] It is worth traversing in some detail the reported cases, for they show a clear pattern of advancing from a position where those serving in the g

- a military had (or were alleged to have) no entitlements to sue, simply because they were 'military', to the substantial changes in contemporary times. This is instructive in addressing the question of equality and arguments seeking to substantiate 'different treatment'. The authorities also show a pattern of misreading, whereby the assertion that 'the military' is not susceptible to civil law and the jurisdiction of civil courts is not consistent with what many of the cases actually say.

b [138] In *Parker v Commonwealth* (1965) 112 CLR 295 at 302 Windeyer J of the High Court of Australia said:

c "The courts in England have for nearly two hundred years said, and rightly in my opinion, that to allow a member of the forces to bring an action against another member for an act done in the course of duty would be destructive of the morale, discipline and efficiency of the service, and that for that reason the common laws does not give a remedy even if the conduct complained of were malicious."

- d [139] Accepted wisdom (in recourse to the authorities to which Windeyer J referred) was that simply because they were members of the armed forces, military were denied common law rights, even if malice were proven, including the right to sue for negligence where injured by a fellow member of the military; the right of a widow of a serviceperson to sue where the death of her husband was caused by the negligence of a military colleague; the right to sue for wrongful compulsory retirement; the right to sue for malicious prosecution and false imprisonment by a superior officer; the right to sue for libel in respect of allegedly defamatory statements by a superior officer in military reports or courts-martial; the right to sue for assault and false imprisonment by fellow members of the volunteer corps; the right to sue for recovery of alleged underpayment of retirement pay. (See for example *Sutton v Johnstone* (1786) 1 TR 493 (malicious prosecution against commander in chief by captain of warship taken before a court-martial for disobedience); *Dawkins v Lord Rokeby* (1866) 4 F&F 806; *Dawkins v Lord Rokeby* (1873) LR 8 QB 255; *Dawkins v Lord Paulet* (1869) LR 5 QB 94 (false imprisonment, malicious prosecution and conspiracy in respect of removal from the army by commanding officer; defamatory statements in a report and in a military inquiry); *Fraser v Hamilton* (1917) 33 TLR 431 (wrongfully and maliciously causing retirement from the Navy) and *Heddon v Evans* (1919) 35 TLR 642 (slander, false imprisonment and malicious prosecution by former soldier against former commanding officer). On these cases, see further later—they do not necessarily stand for the proposition adopted by Windeyer J in *Parker*.
- g scrutiny indicates that the contention that each of them confirms the military is not covered by civil law or able to be sued in civil courts is erroneous.
- h [140] In 1965 in *Parker* the High Court of Australia did not accept that a widow of a sailor, a naval rating who had advanced to the post of Chief Electrician at the rank of Chief Petty Officer, was not entitled to sue in negligence for damages consequent upon his death. Horace Stanley Parker and eighty-one others died when the ship on which he was serving, the HMAS Voyager, collided at sea with the HMAS Melbourne. Not insignificantly in light of the decision and the contention as to military

'quarantining' from civil law and civil courts, the HMAS Melbourne and the HMAS Voyager were engaged in military exercises off the New South Wales coast. a

[141] In that case, however, the right to sue was accepted by the High Court upon the classification of Parker as a 'civilian'. Albeit he was employed at Williamstown dockyard by virtue of the Naval Defence Act 1910–1952 (Cth), his employment was in a civil capacity 'in connexion with the Naval Forces or in connexion with any services auxiliary to the Naval Defence or any works or establishments in connexion with Naval Defence' ((1965) 112 CLR 295 at 304–305). He was subject to Naval Establishment Regulations under the Naval Defence Act. Nonetheless, the court said that although he was subject at sea to the general discipline of the ship upon which he was serving—or employed—he 'was in the Voyager in a purely civil capacity and thus [was] not himself disqualified from bringing an action for negligence': ((1965) 112 CLR 295 at 305). The High Court sought to distinguish Parker's position from that of those cited in the United Kingdom cases on the basis that the Imperial Naval Discipline Act 'makes various persons, not regular members of the Royal Navy, subject to the disciplinary code it enacts': ((1965) 112 CLR 295 at 305). b c d

[142] In reading the case, and being familiar with the circumstances of the (famed) Voyager incident which are readily ascertained from its hugely lengthy history through the courts—cases arising out of the Voyager collision were still before Australian courts in 2008. See for example *Peterson v Commonwealth* [2008] VSC 166: damages claim by naval rating based on post-traumatic stress disorder said to have arisen from the HMAS Voyager-HMAS Melbourne collision denied: not on any basis of military immunity (whether in peace or in consequence of engagement in naval exercises), but because he had engaged in activity such as drinking (predating the collision) and service in the Vietnam war, so that his health problems were held to be unrelated to the disaster. In *Covington-Thomas v Commonwealth* [2000] NSWSC 2; *Covington-Thomas v Commonwealth* [2004] NSWSC 743; *Covington-Thomas v Commonwealth* [2007] NSWSC 779; *Covington-Thomas v Commonwealth* (No 2) [2007] NSWSC 1059; *Covington-Thomas v Commonwealth* (No 3) [2007] NSWSC 1062; *Covington-Thomas v Commonwealth* (No 4) [2007] NSWSC 1401 Peter Covington-Thomas was awarded what was seen as a 'record payout' of \$2.2m against the Australian government in respect of injuries caused by the collision: post-traumatic stress disorder was said by the NSW Supreme Court to have 'derailed his career' in the Royal Australian Navy ('RAN'). Mr Covington-Thomas was an Able-Seaman serving on the HMAS Melbourne in 1964. See also, for example, *Singline v Commonwealth* [2007] NSWSC 900 and *Singline v Commonwealth of Australia* (No 2) [2008] NSWSC 21. Geoffrey Singline won \$1.24m damages for injuries arising out of his career with the RAN in consequence of his being aboard the HMAS Melbourne on 10 February 1964 (date of the collision) serving as a Naval Airman Class II. See also *Commonwealth v Verwayen* (1990) 170 CLR 394—it seems apparent that the High Court was concerned to ensure that Australian law, at least insofar as Mr Parker's widow was concerned, would not be bound by the United Kingdom precedents so as to deprive her of 'the widow's mite'. e f g h i

a She and her daughter were awarded damages of £12,500. In the upshot, however, putting Mr Parker into the civilian category was unnecessary: subsequently (and albeit much later), those serving on the HMAS Melbourne and the HMAS Voyager as members of the RAN had their damages claims upheld, despite their military status and despite the ships being involved in military manoeuvres.

b [143] A further advance came in *Groves v Commonwealth* [1982] HCA 21, (1982) 150 CLR 113. There, the Australian High Court was faced squarely with the problem it had avoided in *Parker*. This time it had to determine whether a serving member of the forces was entitled to sue in negligence another serving member and/or the Commonwealth in respect of injury caused 'on the job'. Mr Groves was an enlisted airman in the Royal Australian Air Force ('RAAF') and member of the crew of an aircraft stationary on the ground at Mt Isa airport. He was injured when climbing down a folding ladder to the ground. The locking pins were not fitted, as other crew had known when they earlier used it by manually restraining it from collapsing under their weight. Unknowing and uninformed of the fault and practice adopted by the others, Mr Groves fell when the ladder folded under him. He alleged negligence of the crew members and sought damages from the Commonwealth.

c [144] In *Groves* the Commonwealth defended against the action by the very same authorities it had cited in *Parker*, and which had been dispensed with there by holding that Mr Parker was a civilian covered by civilian law and not subject to any derogations from legal entitlements by reason of being 'military'. Mr Groves could not be classed 'civil'. He was unequivocally 'military'. The court in *Groves* therefore dealt with the problem by distinguishing Mr Groves' position from that which would have pertained, had the injury occurred in the theatre of war or during wartime or 'in the course of actual engagement': (1982) 150 CLR 113 at 119 per Gibbs J, albeit at the same time, the court was careful not to pre-empt any future case arising in those circumstances.

f [145] Responding to the Commonwealth's contention, Gibbs J said ((1982) 150 CLR 113 at 119):

g 'The short answer to the argument of the Commonwealth seems to me to be that there is no principle, and no reason of policy, that would exclude the operation of the ordinary rules of the common law of negligence simply because the plaintiff and the defendant both happen to be members of the armed forces and the act complained of occurred in the course of military, naval or air force service. The question whether the position will be different if the injuries occurred during activities of a purely military character—e.g., weapons training or a tactical exercise—may be left until it arises.'

h [146] Stephen, Mason, Aickin and Wilson JJ jointly addressed the distinction sought to be made by Windeyer J in *Parker*, namely that had Mr Parker been unable to be classified 'civilian' his widow, Mrs Parker, and their daughter Frances Evelyn Parker, would have been left without recourse:

'As we understand [the cases relied upon by Windeyer J, namely] *Fraser v Balfour*, and for that matter *Gibbons v Duffell* (1932) 47 CLR 520, what their Lordships were not prepared to affirm on the material before them and what this court did not affirm was the very proposition described by Windeyer J. as having been the law of England for nearly two hundred years. That was the proposition which the court of Exchequer Chamber had stated in *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 at 271, when it confined to military tribunals all 'questions of military discipline and military duty alone, the proposition from which the House of Lords withheld its imprimatur, describing it as involving "constitutional questions of the utmost gravity" (1918) 87 LJKB 1116 at 1118. It is significant that their Lordships acted as they did in a case which in its facts was narrowly confined to matters of military discipline, just as had been the line of cases culminating in *Dawkins v Lord Rokeby*. If on facts in pari materia those cases were not to be regarded as setting the law, still less should they be so regarded in the very different circumstances of this case. In other words, if the areas of malicious injury and defamation were said by their Lordships to be still open for definitive decision the position must be a fortiori in regard to the wider area concerning which Windeyer J. made his observations in *Parker's case* and which is the concern of the present case.' (See (1982) 150 CLR 113 at 129.)

[147] Stephen, Mason, Aickin and Wilson JJ went on to point out that even though the cases where civilian law was deemed inapplicable related to military justice, there remained dissent within the line of authorities as to the notion that civil courts had no role at all in that field:

'... *Heddon v Evans* [(1919) 35 TLR 642], to which Windeyer J referred, ... [also] was a case in which the plaintiff's alleged injuries were "exclusively associated with the purported administration of military discipline by the defendant" ... McCardie J disposed of the defendant's submission that the civil courts "could not inquire at all into the exercise of military discipline" by concluding that it went too far to say that by becoming a serviceman a man had "lost any right whatever to appeal to the civil courts in respect of any wrongs arising in the course of military discipline". A serviceman must accept the Army Act and Rules and Regulations and Orders and all that they involved but "save to that extent, neither his liberty nor his person or property might be lawfully infringed" ... Army discipline would not suffer in consequence. This decision, albeit restricted to the narrow field of military discipline, shows a clear refusal wholly to exclude even that field from the reach of the courts of law.' (See (1982) 150 CLR 113 at 133.) (My emphasis.)

[148] Their Honours concluded that what emerged from all the cases, 'whatever authority they may be thought to have in the light of *Fraser v Balfour* (1918) 87 LJ KBD 1116 and *Gibbons v Duffell* (1932) 47 CLR 520', is that they were concerned exclusively 'with matters of military organization and discipline'. (*Fraser v Balfour* (1918) 87 LJ KBD 1116 and *Gibbons v Duffell* [1932] HCA 26, (1932) 47 CLR 520; see further later.) Further:

- a 'There having been created an elaborate system of military law and military discipline, the courts of law have been unwilling to entertain actions by members of the armed forces who find themselves aggrieved by what has occurred within that system.' (See (1982) 150 CLR 113 at 133.)
- b [149] Upon that basis their Honours concluded that line of cases had 'nothing to say about the general liability of the Crown to servicemen for the acts of fellow servicemen' so constituted no authority in respect of Mr Groves claim.
- c [150] However, even this is a misreading of the cases. For example, in *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 at 263 the reasoning behind the refusal of the court to entertain a claim in defamation was not because it was a matter of military discipline, but because:
- d 'The authorities are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law.'
- e [151] Kelly CB observed that this principle 'which pervades and governs the numberless decision to that effect' was established by *Floyd v Barker* (1607) 12 Co Rep 23 and many earlier authorities. Here, he cited statutes of Edward III, Henry IV and Edward IV and 'down to the time of Lord Coke', cited in *Yates v Lansing* (1810) 5 Joh 282; (1811) 9 Joh 395 and *Revis v Smith* (1856) 20 JP 453. That is, it was principles of civil justice that ruled in the case, not a principle of 'military justice exclusivity' at all. What was argued by the plaintiff was that the military tribunal was not a 'proper' court and hence the principle should not apply. The court held that the military tribunal should be governed by the principles apply to civil courts—that is, insofar as judges are not able to be sued for 'words written or spoken in the ordinary course' of a proceeding.
- f [152] In *Fraser v Balfour* (1918) 87 LJ KBD 1116 the English House of Lords did not exclude serving naval officers from having access to civil courts.
- g There, a naval officer brought an action against the First Lord of the Admiralty claiming damages for false imprisonment and for maliciously causing his wrongful retirement from the Royal Navy. Upon Mr Fraser's having acknowledged that Balfour, First Lord of the Admiralty, had no personal knowledge of the false imprisonment, Mr Fraser was given leave to amend his pleadings. The judgment makes clear the misapprehension that the military traditionally and 'for two hundred years' (per *Parker*) have been exempt from civil law and not subject to civil courts. First, on the issue of false imprisonment, the judgment pointed out that the impediment was unrelated to military service or 'the military' as a 'special' category outside the jurisdiction of civil courts. Rather:
- i '... it is quite clear and settled law that no action lies against the head of a Government Department for any wrong committed by a subordinate

officer. The relation of master and servant does not exist between them. Both are in the service of the Crown.' (See (1918) 87 LJ KBD 1116 at 1118-1119.) a

[153] However, the claim was not dismissed but struck out.

[154] Insofar as the claim of maliciously causing Mr Fraser's retirement was in issue, the judgment once again confirms the 'rush to judgment' that has occurred in the assertion that it has for long been established that civilian courts have no jurisdiction over military: b

'In the reasons for the judgment delivered by the Court of Appeal, their Lordships the Lords Justices dealt first with the claim for maliciously causing the plaintiff's retirement, and held that the matter was concluded against the plaintiff by the judgment of the Court of Appeal in the previous action in respect of the same matter against Admiral Hamilton ... In that case the Court of Appeal held that the action of the naval authorities in retiring the plaintiff could not be reviewed in any civil court. Both members of the court ... referred to the case of *Dawkins v Rokeby* (Lord) ... which was decided on a bill of exceptions. Lord Justice Scrutton said: "In that case a decision affirmed by the House of Lords, the court of Exchequer Chamber, consisting of ten judges, said this: 'With reference, therefore, to such questions which are purely of a military character, the reasons of Lord Mansfield and the other judges in *Sutton v Johnstone* (1787) 1 Bro Parl Cas 76 ... and the cases *Mansbergh, In re* [1861] ... and *Grant v Gould* (1792) 126 ER 434 ... are all authorities to shew that a case involving questions of military discipline and military duty alone are cognizable only by a military tribunal, and not by a court of law.' That judgment was affirmed in the House of Lords." It is quite true that the decision was affirmed in the House of Lords, but a reference to the report of the case in this House shows that the decision proceeded solely on the privilege of witnesses and did not affirm the other and wider proposition laid down in the Exchequer Chamber that such questions are not cognizable in a court of law. That question is, therefore, still open, at all events in this House. It involves constitutional questions of the utmost gravity, and a decision upon it should be given only when the facts are before the House in a complete and satisfactory form. Their Lordships cannot affirm the decision of the Court of Appeal dismissing the action, so far as this part of the case is concerned, without deciding this most important question, which the decision of this House in *Dawkins v Rokeby* (Lord) ... left open. Such a question cannot be decided on the materials now before their Lordships ...' (See (1918) 87 LJ KBD 1116 at 1118.) (My emphasis.) c
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[155] Hence, care must be taken in asserting the notion of 'military exclusivity' and 'civil courts ouster' in respect of the military generally, and military discipline in particular, and upon the basis of cases which, despite being relied upon for the assertion, in fact do not confirm the proposition at all. i

[156] In *Groves* their Honours also addressed the question of policy. They referred to the reliance Windeyer J in *Parker* had placed upon 'certain policy

a considerations' which were also 'urged in [Groves]' in a reference to the effect upon 'the morale, discipline and efficiency of the service' were service personnel free to sue fellow members for acts done in the course of duty.

[157] Their Honours said ((1982) 150 CLR 113 at 133-134:

b '... we see no policy considerations which require that this court by its decision should deprive this serviceman of the rights at common law which protect all other members of the community. Unlikely as it may be that knowledge of the remote possibility of civil liability may operate as a stimulus to greater care, so much the better for the efficient functioning of the armed forces if it does. The consciousness of the obligation to take care will scarcely be likely to deter servicemen from acting with all due dispatch and decisiveness in the performance of their duty ...'

c [158] Their Honours did go on to observe that the case before them did not require them to consider the position of those engaged in combatant activities in time of war or in training for such activities, holding it would be unwise to deal with this issue in the abstract. However, the importance of
d *Groves* is that it shows the too ready assumption that the authorities are disposed towards a confirmed and irrebuttable demarcation between 'military justice' and 'civil justice'; that cases have been misread and misapplied as (wrongly) confirming that distinction; and that being in the military does not mean that individuals are to be deprived of rights in civil courts simply because they are service personnel.

e [159] Whilst not addressing the question of war and its directly associated field, in *Groves* (1982) 150 CLR 113 at 137 Murphy J made clear the position with regard to equality and service in the military: service does not oust equal rights:

f 'Leaving aside warlike operations (including training and manoeuvres) the reasons for recognising a rule of vicarious liability on the part of the Commonwealth for injury to one serviceperson by negligence of another outweigh those against. Servicepersons are not outlaws. Unless military necessity dictates otherwise, they should be entitled to the same rights as other persons. The suggestion that military discipline would be adversely affected by the adoption of such a rule is unpersuasive. If providing a
g remedy for negligence in unwarlike operations (at least apart from compliance with a specific order) would tend to create dissension undermining morale and efficiency, this can be met by the Commonwealth indemnifying negligent servicepersons ...'

h [160] Murphy J focused on the inequality inherent in the notion that servicepersons should be treated differently from civilians, observing effectively that if the distinction sought to be drawn by Windeyer J in *Parker* were followed, then this would lead to the absurdity that a non-serviceperson could sue for the negligence of a serviceperson, yet a serviceperson could not do likewise, even if both were injured simultaneously by the same negligent
i conduct. This would create an invidious distinction between non-servicepersons and servicepersons and a legal distinction which no court should support: (1982) 150 CLR 113 at 137

[161] The entitlement by members of the military to the equality principle was again raised in *X v Commonwealth* [1999] HCA 63, [2000] 4 LRC 240. Another Australian case, this involved a claim of discrimination under the Disability Discrimination Act 1992 (Cth). 'X' claimed discrimination on the basis of his having been discharged under an Australian Defence Force (ADF) policy whereby recruits had to agree that if they were diagnosed HIV/AIDS positive, then they should at once resign. With a 'positive' diagnosis, 'X' refused to resign. When he won his case of disability discrimination in the Human Rights and Equal Opportunity Commission ('HREOC') and again in the Federal court, the Commonwealth appealed to the High Court. In dissent against the majority view that 'X' had not been discriminated against because the ADF had to ensure that all within its workplace could 'bleed safely', Kirby J said (at [166]-[167]):

[166] This appeal does not stand alone in the modern dialogue between the military and the courts. The military, including the ADF in Australia, have frequently enforced universal and discriminatory policies asserting that they are absolutely essential to the discharge of their mission. In many countries, there is nothing that those affected or the courts can do to question or disturb such policies (For the position in Argentina, see Tealdi 'Responses to AIDS in Argentina: Law and Politics' in Frankowski (ed) *Legal Responses to AIDS in Comparative Perspective* (1998) 377 at 390; citing the decision of the Constitutional Court of Argentina, 17 December 1996). However, in other countries where the military is subject to civil power, constitutional norms or applicable principles of human rights enable and oblige the courts to scrutinise such decisions strictly and, when authorised by law, to decline to give them effect.

[167] Recorded experience shows that the military usually resist such actions in the courts. However, when obliged to do so by court orders, they commonly review their discriminatory policies. They often find that they were needlessly inflexible, unnecessary and wrong-headed. Generally speaking, the courts in the United States and Canada (*Canada (A-G) v Thwaites* [1994] 3 FC 38) have been consistent and principled in recent years in their insistence that the civil norms of non-discrimination reach into the military and must be obeyed by them. This is certainly what happened when challenges were mounted in the courts against unjustifiable and universal exclusions expressed in terms of race (decisions such as *Morgan v Virginia* (1946) 328 US 373, *Sipuel v Board of Regent* (1948) 332 US 631 and *Shelley v Kraemer* (1948) 334 US 1 heralded President Truman's Executive Order No 9981 terminating segregation in the United States military forces. They ultimately led to the overruling of *Plessy v Ferguson* (1896) 163 US 537 with its "equal, but separate" doctrine, cf Karst "The Pursuit of Manhood and the Desegregation of the Armed Forces" (1991) 38 UCLALR 499, the exclusion of women from military institutions or from combat duties (*Frontiero v Richardson* (1973) 411 US 677, *Rostker v Goldberg* (1981) 453 US 57, *United States v Virginia* (1996) 135 L Ed 2d 735, cf *British Columbia (Public Service Employee Relations*

- a *Commission) v BCGSEU* [1999] 3 SCR 3 (women in the fire fighting service)) and the automatic discharge of military personnel on grounds of their sexuality (*Watkins v US Army* (1989) 875 F 2d 699, *Thomasson v Perry* (1996) 80 F 3d 915 and *Eskridge and Hunter Sexuality, Gender and the Law* (1997) pp 372–407). None of these exclusions now operates in the ADF' (My emphasis.)

b [162] Consistent with Kirby J's noting the changes wrought over time in respect of the organisation and coverage by civil courts and the extension of civil and human rights into the military, claims of immunity by other services have been addressed by courts, with changes coming over time so that these services are wholly subject to civil courts and civilian laws.

c [163] In addressing the position of the military and the changes over time, courts should not be unmindful that services classed as 'emergency' or 'military'—such as the police force, fire service, security service and so on—have at one time and another claimed absolute immunity from civil courts in the same way as the military services or defence forces sought to do. Bureaucracies, having their own organisational origins in the organisation of the military, also set themselves up with specific disciplinary systems—for the public service, a system of public service discipline still exists. This does not mean, however, that all these services can claim, or any longer claim, exemption from civil law and the coverage of civil courts. Historical changes in the way immunity is perceived and the role it should play need to be borne in mind when addressing the position of the military, too.

e [164] This issue—of other services claiming immunity—arose vis-à-vis the police in *Gibbons v Duffell* [1932] HCA 26, (1932) 47 CLR 520, referred to in *Groves*.

f [165] In *Duffell*, *Dawkins* was again referred to, the point being made (as outlined above) that immunity there rested not upon any connection with or 'right' of military immunity from civil action, but in the right that lies with civil courts for conduct in the course of duty ((1932) 47 CLR 520 at 526):

g 'In *Hart v Gumpach* [(1872) LR 4 PC 439, at 464, 465] Sir Montague Smith speaks of "the immunity accorded to judges, counsel, and others engaged in the administration of justice, against actions for statements made in the course of duty, and the recent case of *Dawkins v Lord Paulet*, in which the same protection was extended to reports made by a military officer for the information of the Commander-in-Chief ... The immunity in these cases rests upon grounds of public policy and convenience: the object being to secure the free and fearless discharge of high public duty in the administration of justice, and the maintenance of military discipline, on which the welfare and the safety of the State depend."

i [166] In *Duffell* the High Court of Australia recognised that the issue was not that the military or emergency or similar services had any special privilege or right to exclusion from civil action, but that the right or privilege being applied was that which derived from civil courts and encompasses other institutions of the executive and legislature ((1932) 47 CLR 520 at 525):

'Freedom of utterance has always been considered indispensable to the administration of justice, and, therefore, persons acting judicially, advocates and witnesses alike receive absolute protection for what they say. The privilege is an incident of the proceedings of military tribunals as well as of courts of Justice ... The same absolute privilege attends the proceedings of the Legislature. In the executive department of government, communications between Ministers and the Crown, or among Ministers themselves, clearly have complete immunity ...'

[167] Evatt J addressed the line of authority said to exist whereby military were immune from civil action, pointing out the error in considering this to, in fact, be a 'line of authority'. He observed that the decision in *Dawkins v Lord Paulet* (1869) LR 5 QB 94 did not have the status sought to be given to it:

'*Dawkins v Paulet* is an anomalous case, and the judgments of the majority (Mellor and Lush JJ) are undoubtedly wrong, and the dissentient judgment of Cockburn, CJ right ... The majority of the court considered it to be a case of absolute protection, on the ground that military affairs ought not to be canvassed in a court of law at all, but the weighty opinion of Cockburn, CJ, who thought that the projection might be defeated by proof of malice, has since met with such marked judicial approval that it must be accepted as good law ...' (See (1932) 47 CLR 520 at 534, citing Spencer Bower *The Law of Actionable Defamation* (2nd edn, 1923), p 87, note (j).)

[168] In *Duffell* the defendant was a New South Wales police officer who was alleged to have in the course of his duty as an inspector made a report to his superior office, the Metropolitan Superintendent of Police, containing statements reflecting upon the plaintiff, another and a subordinate police officer. The question was whether an absolute immunity or privilege attached to the publication of the report. In separate judgments and a joint judgment of Rich and Dixon JJ the High Court of Australia held unanimously that no absolute immunity extended to police officers so as to eliminate the possibility of an officer taking an action for libel through the civil courts. Albeit in that case, a distinction was drawn between the police force—engaged in domestic security, and the military—engaged in external security, the reference to it in *Groves* indicates that change in the way in which security forces are regarded occurs. Furthermore, the changing role and position of the military as aforesaid—in its increasing role in peace-keeping and actions in the domestic sphere—bring it into closer parallel with other security forces, such as police.

[169] Returning to s 30 of the RFMF Act, upon all the foregoing, the notion that 'every person has the right to equality before the law' does not apply to those in the military and can deny them the right of appeal not only against a finding of 'guilt' but also the punishment consequent upon that finding is remote from constitutional principle.

[170] Nonetheless, the proposition might be put that extending to military a right of appeal against the finding of guilt only ('conviction'), and not in respect of punishment ('sentence') extends sufficient equality to members of

- a* the armed forces. Here, it may be said, the sustainable reason for the apparent distinction between 'conviction' and 'sentence' (and further on this see later) in the entitlement of a serviceperson to appeal lies in the military being more attuned to 'knowing' what is an appropriate penalty for military crimes. This, however, has no force, because military personnel can be prosecuted for civilian offences too—offences tried and appealed against in civil courts when
- b* non-servicepersons commit them or are charged with them. In any event, if that is the distinction (that only military 'know' and can deal with military offences) then there could be no problem with military personnel convicted by military courts of civilian offences appealing through civil courts. Just as it is difficult to see any proper foundation for the contention that military
- c* personnel cannot sue for negligence when injured 'on the job' (setting wartime to one side) (but not manoeuvres or training: see earlier cases referred to vis-à-vis the HMAS Voyager and HMAS Melbourne collision), yet a civilian working alongside, on a military ship, could sue, it is difficult to see any proper foundation for a contention that a member of the military should not be able to appeal against sentence imposed by a military court for a civil
- d* offence.

[171] Ultimately, both are founded in the same proposition: namely, that 'discipline' is dependent upon denying recourse by military personnel to civilian courts. Its now being recognised that providing a route into civilian courts in the instance of negligence has not led to or overturned military discipline, it is difficult to sustain the argument that discipline will be

e overturned by recognising the right of military personnel to appeal against punishment or sentence.

[172] The idea that civil courts are incapable of assessing sentence in respect of military offences is equally unsustainable. After all, it has been civil courts and civil judges who have been assiduous in asserting 'difference' between

f military conditions in war, or during war manoeuvres or training, and civilian conditions. In making these judgments, they must be taken as referring to *something* they know or comprehend. Otherwise, how could they assert as they do? Judges and civil courts deal daily with situations and circumstances of which they have no personal knowledge and in which they have never had any personal involvement. Yet this is not seen as thereby disqualifying them

g from judging those very cases where these situations and circumstances arise. Not inconsequentially, (civilian) judges, in fact, sit as or on military tribunals.

[173] Another contention is that the military maintains its authority and hence effective discipline by a military commander being 'in charge' or in control of the military justice process in respect of 'his men'. Yet this rests

h upon a false assumption that military commanders alone deal with military offences and offences committed by servicepersons under their command. As Hansen says:

i 'Much is ... made of the need for the commander to maintain control of the forces under his command to ensure a disciplined fighting force. It is a well accepted axiom that a commander conducting combat operations needs to have control over the military justice system so that system can be used as a means of enforcing and maintaining discipline

over his forces. In reality the practice is often quite different. There are many situations where the combat commander has in fact given up control over cases to another military authority outside the theater of combat. The practice of moving service members out of the theater of combat during a criminal investigation and subsequent court-martial is quite common. When the combat commander elects to do this he gives up any military justice authority he may have had over that service member.

[174] In any event, if authority is relinquished over the finding of guilt or 'conviction' (per s 30 of the RFMF Act as read narrowly—see later), then should that not have led to a breakdown in discipline within the military? If civil courts are incapable of reviewing sentence because they are not military courts, how can they be capable of reviewing 'conviction' (confined to the finding of guilt)? Surely, ultimately, it is the finding of guilt that requires military knowledge or sensitivity to the military context and community, or military discipline, if 'sentencing' does? If that follows, why the right of appeal against conviction insofar as it is conceded that this means the finding of guilt alone can be reviewed by a civilian court?

[175] Hansen makes the point that a system 'that lacks fundamental fairness and a respect for individual rights can be counter-productive'. In this, he is quoting directly from the United States Army Field Manual FM 22-100, Ch 1, para 1-68, where it is observed that this is 'one of the lessons the United States military learned during WWII'.

[176] Loyalty to superiors and subordinates is, Hansen goes on to add, 'an essential part of the military ethos':

'This reflects that soldiers must be loyal to their superiors and willing to support the unit's mission and in turn the senior leaders owe a measure of loyalty to the soldiers they command. A justice system that is seen—particularly by the enlisted ranks—as arbitrary and unfair detracts from that loyalty. In such a system soldiers may become resentful of superiors. This resentment can lead to lack of trust and confidence and ultimately to a weakening of discipline.'

[177] There is also the need for *the community*—that is, those outside the military—to have confidence in the system that governs the military, particularly in relation to offences alleged to have been committed by military personnel:

'... in a democracy, support for the military by broader society is essential. This support is not only critical in general terms but more directly, those who join the military and those who send their family members into the military must have confidence that they will be cared for and treated fairly. A justice system that is seen as unfair and arbitrary undermines the support of the public which the military serves and from whose population its ranks are filled.'

[178] Hansen concludes that a critical aspect of 'a military justice system that is effective and seen to be so' is one that shows respect for individual

- a rights and is perceived by members of the force and by the broader public as fair':

'A military justice system that creates and maintains loyalty within the ranks by showing respect for individual rights serves to support the internal sense of discipline that a military seeks to develop amongst its members.'

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(See also James M Hirschorn 'The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights' (1984) 62 NC LR 177.)

c

[179] Finally, the notion that the military and the military alone can or should determine and govern sentence or punishment runs directly against cardinal principles of sentencing. Civil courts apply sentencing principles which have a universal acceptance—including the notion that there should be parity of sentence: see *State v Audie Pickering* (30 July 2001, Misc Case No HAM 007 of 2001S, unreported).

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[180] If, say, military sentences for crimes were not in synchronicity with sentences for the same or similar crimes outside, should there not be a system where this can be reviewed? The conclusion could be that the circumstances were sufficiently different to justify the disparity. It has been suggested that the commission of a civilian offence by a member of the military has a different 'quality' than the commission of a civilian offence by a civilian, simply by reason of the member of the military being a member of the military:

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'It should be emphasised that the right of the military to have its own system of justice and to try military personnel, both for strictly military offences (such as mutiny) and also for crimes under civilian law is undeniable. Such crimes committed in a military context could have more serious effects than in a civilian context. This court shares that view.' (See *Barbados Mills v State* [2005] FJCA 6 at [71].)

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[181] The Court of Appeal in *Barbados Mills* was in that paragraph addressing the issue of *trial*—'its own system of justice and to try military personnel' (my emphasis). That competency and context are required for *trial* does not rule out competency and capacity in terms of appeal or review. In any event, limiting review of sentences imposed for civilian offences by military personnel so that there can be no appeal, as is contended for in a restrictive interpretation of 'conviction' in s 30 of the RFMF Act, begs the question as to an entitlement to equality under the law and offends directly against s 38 of the Constitution.

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[182] In any event, absent a system enabling such review, both as to the contention that 'such crimes committed in a military context *could* have more serious effects than in a civilian context' (my emphasis) and the need for parity in sentencing, there would never be an affirmation in such a way as to provide the necessary confidence in the system and assurance that military personnel are being governed by their constitutional right to equality.

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[183] Sentencing generally is recognised as a difficult task. (Screeds have been written on this subject by judges, criminologists, penologists, sociologists and the academy generally. It is an abiding topic of discussion in

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the judiciary, at judges' conferences, lawyers' conferences and conferences, workshops and seminars catering to other disciplines. See, for example, Geraldine Mackenzie *How judges Sentence* (2005) and Richard P Conaboy 'The Federal Judiciary and Sentencing Policy' *Issues of Democracy, USIA Electronic Journals, USIS*, vol 1, No 18, December 1996 (Richard P Conaboy wrote as Chairman, US Sentencing Commission) and Judge Irving R Kaufman 'Sentencing: The judge's Problem' *Atlantic Monthly* (January 1960.) Judges are accustomed to taking into account all manner of factors in relation to offences and the individuals found guilty of committing them. This is the nature of sentencing and the task undertaken by judges in that context. Issues are put forward in mitigation. Issues are put forward as aggravating factors. judges grapple with these matters and come to conclusions upon them. Their determinations are subject to review. Courts of appeal grapple with these issues. Determinations are made, seeking to ensure that accused persons are treated fairly, the rights of victims/survivors and, particularly where they do not survive, their families are honoured, and the rights of the community are effectively and properly recognised. If courts are competent to deal with these matters, difficult as they are in the general context, surely the experience and expertise they bring is capable of considering an additional factor, namely the military context.

[184] 'Parity in sentencing' would be assured through a right of appeal, for at this stage judges would apply sentencing principles, taking into account context and circumstances, mitigating factors and aggravating factors. If civilian crimes committed by military personnel are 'more serious' or 'could be more serious' than civilian crimes committed by non-servicepersons, then judges dealing with both would be well-positioned to make this assessment.

[185] Even the proposition that civil courts should be able to review a sentence imposed for an offence that would be a crime had a civilian committed it (so as to abide by parity of sentencing and the right to equality under s 38), whereas military courts should have exclusive jurisdiction for sentence over military offences, allows of the notion that civil courts do have a capacity to deal with the military context of criminal commission. And, as noted, not to allow for appeal against punishments imposed for offences that are crimes in a civilian setting clearly offends against principles of parity of sentence and the right to equality under the Constitution.

[186] Looking at sentencing as a whole, that is, in relation to 'military' offences and 'civilian' offences, what if an illegal sentence were imposed? There must be a means of review: bluntly, an illegal sentence cannot stand in any civilised society, upon whomsoever it is imposed and in whatever context.

[187] Would the member of the military upon whom an illegal sentence is imposed have to have recourse to a prerogative writ because there is no avenue of 'ordinary' appeal against sentence? What if the illegality of the sentence is not immediately clear? If there were a recognised right of appeal against sentence, this would obviate the problem.

[188] Action through prerogative writ should not be the only means of correction and redress and, in any event, as arguably that process could be used, this again tends to undercut the proposition that no right of appeal

- a exists and none should, because the 'special' circumstances of the military require it.

[189] What if capital punishment were determined upon as the sentence, albeit Fiji has outlawed capital punishment? What if flogging or caning were ordered, when this has been ruled unconstitutional: *Ali v State* [2001] FJHC 169. (Although on capital punishment, contra (in ruling crimes mandated in the Penal Code unconstitutional), see *State v Audie Pickering* (30 July 2001, Misc Case No HAM 007 of 2001S, unreported.) Arguably, again, the prerogative writ route could be taken. Yet, again—why this as the recourse, when a right of appeal is the generally accepted course as a recognised entitlement under the Constitution: s 28(1)(l).

- b [190] In any event, requiring military personnel to 'appeal' against sentence by way of prerogative writ when all other members of the Fiji community have a right of appeal in the ordinary course does not overcome the breach of s 38 and the right to equality.

c [191] I can see no basis for not extending the right to equality as enshrined in s 38 of the Constitution to military personnel—simply because they are military personnel. I can see no basis for denying members of the military an inclusion, along with 'everyone' else, within the terms of s 38 'the right to equality before the law'—meaning, amongst other matters, the right of appeal not only against a finding of guilty, but against any punishment imposed in consequence of that finding.

- d [192] It is a fundamental principle that no one is above the law. It is equally fundamental that no one is outside the law or denied the law. The objective requirement that all citizens be treated equally under the Constitution means that the equality principle applies to all, including military personnel.

e [193] Section 30 of the RFMF Act breaches and is inconsistent with s 38 of the Constitution.

f CONSTITUTIONAL PROVISIONS INFRINGED: S 28(1)(L)

[194] Section 28(1)(l) of the Constitution says:

'Rights of charged persons

28(1) Every person charged with an offence has the right ...

- g (l) if found guilty, to appeal to a higher court.'

[195] His Lordship held that a limitation in s 30 of the RFMF Act to 'conviction' and not including a right to appeal in respect of punishment ('sentence') breaches s 28(1)(l) of the Constitution. I agree.

- h [196] Taking into account all the foregoing matters relating to 'every person's right to equality before the law', there is no reason to exclude military personnel from the right 'if found guilty, to appeal to a higher court'.

[197] This brings into sharp focus, however, the terminology of s 28(1)(l). Precisely what is it against which 'every person' has a right of appeal?

- i [198] Section 28(1)(l) employs the term 'guilty'—'if found guilty'—without reference to 'conviction', 'punishment' or 'sentence'. The provision has been sought to be interpreted so as to extend to 'every person charged with an offence' (at least in civilian courts) a right of appeal not only against a finding of guilt, but the determination as to what punishment is imposed upon them:

Barbados Mills v State [2005] FJCA 6 at [120].

[199] In *Vakacereitai v Commander, Republic of Fiji Military Forces* (28 January 2005, Crim App No AAU004/2005, unreported), Fiji CA, Ward P held that s 28(1)(l) is limited to a right to appeal against a finding of guilt only and does not extend to sentence. His Lordship made this finding by reference to the proposition:

'Where there is no ambiguity in the wording of a statute, the court must give the words their natural meaning. Parliament must be taken to have intended that meaning and the court has no right to change it. To do so would be to assume a legislative rather than an interpretive role.'

[200] Yet the principles of constitutional interpretation set out in s 3 must be applied:

'Section 3. Interpretation of Constitution

In the interpretation of a provision of this Constitution:

(a) a construction that would promote the purpose or object underlying the provision, taking into account the spirit of this Constitution as a whole, is to be preferred to a construction that would not promote that purpose or object; and

(b) regard must be had to the context in which this Constitution was drafted and to the intention that constitutional interpretation take into account social and cultural developments, especially:

(i) developments in the understanding of the content of particular human rights; and

(ii) developments in the promotion of particular human rights.'

[201] With respect to his Lordship, an interpretation of s 28(1)(l) so as to limit appeals to the determination of guilt and to deny 'every person' an entitlement to appeal also against punishment offends against the principle embodied in the International Convention on Civil and Political Rights 1966, that everyone has a right to review of both 'conviction' and 'sentence':

'Article 14

1. All persons shall be equal before the courts and tribunals ...

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law ...'

[202] Such an interpretation also overlooks s 43 of the Constitution, explicitly to be taken into account in interpreting Bill of Rights provisions:

'(2) In interpreting the provisions of this Chapter, the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter.'

[203] Not inconsiderable discussion has occurred in cases coming before the courts of Fiji as to punishment and sentencing in the context of constitutional interpretation: for example, *State v Silatolu* [2003] FJHC 239. It appears, nonetheless, that consistent with the International Covenant on Civil and Political Rights 1966 by which, as noted, this court is bound to interpret

- a relevant provisions of the Constitution, no argument has been employed to assert that 'every person' has a right to an appeal against a finding of guilt alone, and not against the punishment imposed in consequence of that finding. Apart from *Vakacereitai*, cases which assert this, or seek to draw a distinction through the use of the words 'found guilty' to that finding alone and not so as to extend to punishment, are elusive.
- b [204] In *Barbados Mills v State* [2005] FJCA 6 at [118]–[120] it was said:
- [118] The appellants suggest a right of appeal against sentence can be read from section 28(1)(l) of the Constitution: "28—(1) Every person charged with an offence has the right ... (l) if found guilty, to appeal to a higher court."
- c [119] This ground raises an important question of whether the Constitution gives a right, denied under the RFMF Act, of appeal against sentence. We note that there are two decisions by a single Judge of the Court of Appeal on the right of appeal against sentence imposed by a court-martial. In *Vakadrula v State* (AAU20 of 2004, unreported), Fiji CA, Scott JA while accepting that there was no right of appeal against sentence under the RFMF Act, left open the possibility that appeal against sentence may be conferred by other provisions of the law. In *Vakacereitai v Commander, Republic of Fiji Military Forces* (28 January 2005, Crim App No AAU004/2005, unreported), Fiji CA, Ward P considered the issue and ruled (adopting a literal interpretation) that the right of appeal under section 28(1)(l) of the Constitution is confined to appeal against conviction only and not against sentence.
- e [120] Counsel for the Appellants argue that section 28(1)(l) should be given a wider or a liberal meaning to include an appeal against sentence. These arguments may have some merit and should be given proper consideration in an appropriate case in the future. However, in view of our ruling to quash the convictions and sentences on the basis of contravention of human rights, this issue does not arise for consideration.' (My emphasis.)
- f [205] This is that case.
- g [206] Consistent with the court's view in *Barbados Mills* that the arguments 'may have some merit and should be given proper consideration', his Lordship found, after extensive review, that the arguments did indeed 'have some merit'. Having given them proper consideration, Singh J effectively found that the restrictive interpretation applied in *Vakacereitai* offends against international instruments the courts of Fiji are bound to apply to constitutional interpretation and provisions. His Lordship's determination is that s 28(1)(l), consistent with the International Covenant on Civil and Political Rights 1966, provides 'every person charged with an offence' with the right of appeal against both a finding of guilt and consequent punishment. On this, I agree with his Lordship.
- h [207] Yet 'guilt' and 'guilty' are synonymous with 'culpable', 'responsible', 'blameworthy', 'accountable', 'at fault', 'in the wrong' or 'on the wrong side of the law'. 'Punishment' or 'sentence' is not listed as synonyms for 'guilt' or 'guilty'.
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[208] The *Oxford Advanced Learner's Dictionary* defines 'guilt' as 'the fact that someone has done something illegal'; 'blame or responsibility for doing something wrong or for something bad that has happened', whilst 'guilty' is 'having done something illegal; being responsible for something [unlawful] ...'. Despite this restrictiveness of definition, s 28(1)(l) has not been so limited. a

[209] Despite this, s 28(1)(l) must be interpreted to encompass a right of appeal against the finding of guilt and the punishment imposed. Hence, returning to s 30 of the RFMF Act, s 28(1)(l) provides guidance on the way 'conviction' is to be interpreted and raises squarely the question of its interpretation in s 30 of the RFMF Act. b

MEANING OF 'CONVICTION' IN S 30 OF THE RFMF ACT

[210] 'A finding of guilty' does not in strict terms import the notion of 'punishment' or 'sentence' whereas 'conviction' does, or at least can (see cases cited below). Yet there is no equivocation about interpreting and applying 'a finding of guilty' in s 28(1)(l) to mandate the right of every person to appeal against both a finding of guilt and punishment following that finding. It is thus pertinent to ask why 'conviction' should be interpreted as limited to the finding of guilt alone and not to punishment or 'sentence'. c

[211] Indeed, such an interpretation runs counter to the authorities. d

[212] *Butterworths Concise Australian Legal Dictionary* provides:

'Conviction 1. The complete orders made by a court after finding an accused person guilty of an offence including both the finding of guilt and the sentence passed as a consequence: *Re Stubbs* (1947) 47 SR (NSW) 329; *Attorney General (NSW) v Dawes* [1976] 1 NSWLR 242; *R v Hannan, ex p Abbott* (1986) 41 NTR 37; (1986) 83 FLR 177; *Maxwell* (1996) 87 A Crim R 180, at 183. 2. Finding an accused person guilty of the offence charged. 3. The recording of the finding of guilt by a court ...' e

(The definition of 'sentence' can also be seen as supporting the proposition that 'conviction' embraces the 'complete orders'—that is, finding of guilt plus punishment: *Butterworths Concise Australian Legal Dictionary* defines 'sentence' as: '1. To impose punishment on a person who has been found guilty of, or pleaded guilty to, committing a criminal offence. 2. An order relating to punishment made by a court after a person has been found guilty of, or has pleaded guilty to, a criminal offence.' That is, the emphasis is upon 'finding of guilt', consistent with the definition of 'conviction' which sees 'finding of guilt' and 'punishment' as bound up in the whole meaning of 'conviction'.) f

[213] In *R v Hannan, ex p Abbott* (1986) 41 NTR 37 the court said: g

"The word "conviction" is ambiguous. It is sometimes used in the narrow sense as indicating merely that an accused has been made the subject of a finding of guilt. Sometimes it is used in the wider sense of the finding of guilt combined with the sentence of the court. I consider that the primary meaning of "conviction" is as set out in *S (an infant) v Manchester City Recorder* [1969] 3 All ER 1230 at 1246 per Lord Upjohn: "... the judicial determination of a case; it is a judgment which involves two matters, a finding of guilt or the acceptance of a plea of guilty followed by sentence. Until there is such a judicial determination the case is not ..."

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- a concluded, the court is not functus officio and a plea of autrefois convict cannot be entertained. This has been the law from the earliest times.”

[214] The court went on to say:

- b “The question then is whether the whole of the conviction, in the sense of both the finding of guilt and the penalty, should be quashed; or whether only that part of the conviction which involves the penalty should be quashed; see for example, *R v Smith, ex p James* (1966) SASR 47. It is clear from *Cheatley v The Queen* [1972] 127 CLR 291, a case arising in this jurisdiction, that certiorari may issue to quash a penalty only, leaving a finding of guilt to stand. I consider that *Ex parte Utley and Dawes* ...
- c indicate the approach which should be adopted in the present type of case; that is to say, where the penalty imposed ... is one not permitted by law, in general the whole conviction ...—in the combined sense of the finding that the charge was proved and the penalty imposed—should be quashed.”

- d [215] Accordingly, the court in *Hannan* quashed the finding that the charge was proven, this order being in addition to that made earlier which quashed the detention order (punishment) only.

- e [216] That the issue in that case was one of a penalty not permitted by law does not detract from what is being said about ‘conviction’—as in ‘the whole conviction’ meaning ‘guilt’ and ‘punishment’ or ‘sentence’ or ‘penalty’. In *Hannan*, the court did draw a possible distinction in the way cases should be dealt with, observing that where it ‘can fairly be said that the invalid part of the conviction is distinct and severable from the rest, certiorari may issue to quash that part only’. However, even in that case, the point was not that ‘conviction’ and ‘punishment’ or ‘sentence’ were not parts of a whole. Rather,
- f part of the punishment was severable, but the conviction still incorporated the ‘finding of guilt’ and ‘punishment’. Sentence and conviction were not separate and distinct. In this, the court gave the example of *R v Arundel Justices, ex p Jackson* [1959] 2 All ER 407, where—

- g ‘the Divisional Court treated a period of disqualification from holding a driving licence as supplemental to the conviction and severable from it, but noted—“the fine of £20.0.0 and the conviction are not severable and if the fine of £20.0.0 had been in excess of the justices’ jurisdiction, then the whole order, including the conviction, would have to be quashed.”’

- h [217] If ‘conviction’ is not interpreted as being a ‘whole’—incorporating the finding of guilt and punishment, then a court or tribunal would be precluded from making a determination that encompasses the distinction made by Kearney J. That is, the court or tribunal would not be able to ‘get to first base’ in determining whether or not the punishment (‘sentence’) was within or without jurisdiction.

- i [218] In *A-G (NSW) v Dawes* [1976] 1 NSWLR 242 the wholeness of ‘conviction’ was affirmed. There, on appeal the District Court imposed a sentence for more than the maximum term allowed. In certiorari proceedings the conviction was quashed, with the NSW Court of Appeal observing that,

as the proceedings were nullified, the District Court would exercise its jurisdiction to rehear the appeal. Moffitt P concluded that 'conviction' refers to the whole of the proceeding in a criminal court—that is, the finding of 'guilt' and the sentence or punishment. He first addressed the question—

'whether the excess of jurisdiction which occurred should result in the quashing of the conviction, namely, the complete order made, being the finding of guilt, the dismissal of the appeal, the confirmation of the conviction and the imposition of the sentence of three and a half years, so that the appeal to the District Court must be reheard, involving a rehearing of the issue raised by the plea of not guilty ...'

[219] This Moffitt P answered by saying that the whole of the proceeding must be reheard, relying upon *R v Willesden Justices, ex p Utley* [1947] 2 All ER 838. There, an order for certiorari was made and the conviction quashed, where justices had convicted a driver of a traffic offence, imposing a monetary penalty above the maximum allowed by law. Lord Goddard CJ, in whose judgment Atkinson and Hilbery JJ concurred, said ([1947] 2 All ER 838 at 839):

'... if a court imposes a sentence which is not authorised by law for the offence for which the defendant is convicted, the conviction is bad on its face and can be brought up here to be quashed. That is because this court has no power, and has never had any power, on certiorari to amend the conviction. If such a power existed, it would enable the court to sit as a court of appeal on justices, and we have no such jurisdiction. The only appellate jurisdiction we have over justices is when they state a Case for our opinion. This is a question whether or not a conviction is good in law, and, to determine that, we must look at the conviction as it stands. If a man has had a penalty imposed on him which the law does not permit him to suffer, the conviction is bad.'

[220] In *Maxwell v R* [1995] HCA 62, (1996) 184 CLR 501 the High Court canvassed the meaning of 'conviction'. Dawson and McHugh JJ said (at 507):

'The question of what amounts to a conviction admits of no single, comprehensive answer. Indeed, the answer to the question rather depends upon the context in which it is asked ... On the one hand, a verdict of guilty by a jury or a plea of guilty upon arraignment has been said to amount to a conviction. On the other hand, it has been said that there can be no conviction until there is a judgment of the court, ordinarily in the form of a sentence, following upon the verdict or plea. Thus Tindal CJ said in *Burgess v Boetefeur* (1844) 7 Man & G 481, at 504; 135 ER 193 at 202: "The word 'conviction' is undoubtedly verbum aequivocum. It is sometimes used as meaning the verdict of a jury, and at other times, in its more strictly legal sense. For the sentence of the court." The context in which the question arises for present purposes is that of autrefois acquit and in the context it would seem clear that a verdict or plea of guilty is insufficient of itself to constitute a conviction.'

- a That accords with the principle lying behind the plea of *autrefois convict* which is that a person should not be punished more than once for the same matter ...

[221] Their Honours went on to refer to *R v Tonks* (1963) VR 121 at 127–128, where the Full Court of the Supreme Court of Victoria said:

- b 'The review of the authorities which we have made satisfies us that a plea of guilty does not of its own force constitute a conviction. In our opinion it amounts to no more than a solemn confession of the ingredients of the crime alleged. A conviction is a determination of guilt, and a determination of guilt must be the act of the court or the arm of the court charged with deciding the guilt of the accused. It may be that even a determination of guilt will not in all cases amount to a "conviction", for the latter term may be used in a particular context as meaning not merely conviction by verdict where not judgment is given, but conviction by judgment ...'

- d [222] The meaning of 'conviction' as incorporating punishment was affirmed in *R v Jermone* (1964) Qd R 595 at 604, where Gibbs J said:

- e In the present case the court has done nothing upon the plea of guilty to indicate a determination of the question of guilt. The court might do that by imposing a punishment, by discharging a prisoner on his own recognizance, by releasing him upon parole, or even perhaps by adjourning the proceedings to enable information relevant only to the question of sentence to be obtained. Nothing of that kind occurred in the present case. The pleas of guilty, it is true, were said to be accepted, but they were never acted upon in such a way that the court finally determined the guilt of the accused persons.'

- f [223] In *Maxwell v R* (1996) 184 CLR 501 at 509–510 Dawson and McHugh JJ adverted to this passage, and particularly to Gibbs J's reference to adjournment for sentence, making even more clear the compound nature of 'conviction' in its incorporation of punishment (or 'sentence'):

- g 'It is the disposal of the case which results in the judgment of the court embodying a determination of guilt. For that reason, it seems to us that the hesitancy displayed by Gibbs, J., when he said ... that a determination of guilt may "even perhaps" be made "by adjourning the proceedings to enable information relevant only to the question of sentence to be obtained", was justified. A matter may be disposed of otherwise than by sentence, but an adjournment of proceedings or the remand of a prisoner for sentence does not ordinarily amount to the disposal of a matter. It is difficult to envisage when either of those courses would constitute a final determination and so amount to a conviction, save in unusual circumstances such as occurred in *Griffiths v The Queen* (1997) 137 CLR 293, where the accused, who pleaded guilty, was remanded for sentence in twelve months on condition that he entered into a good behaviour bond for that period.'

- i [224] The discussion in *Maxwell* revolved around what could be considered

to be a 'conviction' in the context of *autrefois acquit* and *autrefois convict*. This again does not detract from the question what constitutes conviction generally, and at minimum the ambiguous nature of the term. a

[225] Further authority can be found elsewhere, including United Kingdom and Canadian cases. In *Morris v R* (1978) 91 DLR (3d) 161 the Supreme Court of Canada recognised a general usage of 'convict' or 'conviction'. As attaching to the finding of 'guilt', it recognised also its meaning as 'guilt and punishment' and that its meaning can be as to the former only, or to the former and latter combined. There, it was said: b

"The word "conviction" is not a term of art that is applicable only to Criminal Code offences punishable in the manner provide in the Code. When used in a statute, its meaning varies depending on the context in which it is found; it may or may not include the imposition of a penalty. Generally, however, a "conviction is where a person is found guilty of an offence" (*Jowitt's Dictionary of English Law*, 2nd edn., vol. 1, "conviction"). The verb "to convict" is defined in the *Oxford English Dictionary* as follows: "To prove (a person) guilty of an offence which makes him liable to legal punishment". (See (1978) 91 DLR (3d) 161 at 186 per Pratte J.) c

[226] In Scotland, on 'conviction', *HM Advocate v Churchill* (1953) SLT 45 at 46 (per Lord Justice-General Cooper) said: d

"The question whether in sub-s (2)(a) [of s 21] of the Criminal Justice (Scotland) Act 1949] the word "convicted" is used in the narrow sense as indicating merely that the accused has been made the subject of a finding of guilty ... or whether on the other hand the word "convicted" is used in what is recognised as the wider connotation as including not merely a finding of guilt but the executive action that follows thereon ... unless the word "convict" in sub-s 2(a) has the wider meaning, it seems to me inevitable that a number of not merely inconvenient, but almost disastrous, consequences would ensue." e

[227] Referring to *primary* meaning, the English House of Lords in *S (an infant) v Manchester City Recorder* [1969] 3 All ER 1230 at 1246-1247 per Lord Upjohn held: f

"The primary meaning of the word "conviction" denotes the judicial determination of a case; it is a judgment which involves two matters, a finding of guilt or the acceptance of a plea of guilty followed by sentence. Until there is such a judicial determination the case is not concluded, the court is not *functus officio* and a plea of *autrefois convict* cannot be entertained ... But the word "conviction" is used also in a secondary sense, that is, to express a verdict of guilty or acceptance of a plea of guilty before the adjudication which is only completed by sentence. Not only is the word used frequently in this sense in many judgments but also in many places in statutes dealing with these matters. As Tindal CJ said in *Burgess's case* (1844) 7 Man & G 481 at 504: "The word 'conviction' is undoubtedly *verbum aequivocum*. It is sometimes used as meaning the verdict of a jury, and at other times, in its more strictly legal sense, for the sentence of the court." g

- a [228] In accordance with accepted principles of legislative interpretation, therefore, a determination that favours the respondents in the present case is indicated. 'Conviction' in s 30 of the RFMF Act should be interpreted in accordance with the principle that it incorporates the ruling on punishment as well as the ruling on guilt.
- b [229] This is further supported by the principles of legislative interpretation, to which I now turn.

INTERPRETATION OF LEGISLATION

- c [230] The Interpretation Act (Cap 7) (including subsequent amendments) does not appear to include provisions extending guidance to the courts on principles of interpretation going to statutory purpose and objects, etc. However, the Constitution does make reference to principles of interpretation. Before going to those principles, however, I go to the general principles of legislative interpretation which are applicable to Fiji laws generally, and to s 30 of the RFMF Act in particular. (See generally W Ivor-Jennings *Maxwell on Interpretation of Statutes* (12th edn, 1969) and DC Pearce and RS Geddes *Statutory Interpretation in Australia* (6th edn, 2006).).

- d [231] A general principle is that penal statutes are read restrictively, so that the scope of the law or provision is narrower rather than wider in terms of those whom it 'captures' or the circumstances that are seen to impose a penalty or adverse consequence. (See *Tuck v Priester* (1887) 19 QBD 629 at 638 per Lord Esher MR and *Ex p Zietsch; Re Craig* (1944) 44 SR (NSW) 360 at 365 per Jordan CJ.) A second general principle is that beneficial legislation is interpreted broadly, so that its scope enables all who may come within it to benefit and the words to benefit more persons rather than fewer, or to apply to a broader set of circumstance rather than a narrower one. (See *Bist v London and South Western Railway Co* [1907] AC 209 at 211 per Lord Loreburn LC, *Giovanni Daputo v James Wyllie & Co, The Pieve Superiore* LR 5 PC 482 at 492 and *Coal Economising Gas Co, Re, Gover's Case* (1875) 1 Ch D 182.)

- e [232] As a civil or human right recognised in the Constitution and in international instruments such as the International Covenant on Civil and Political Rights 1966, the right of appeal must qualify as 'beneficial'. The words of s 30 of the RFMF Act should be interpreted broadly in favour of those seeking to avail themselves of the right embodied in that provision. As was said in *Bull v A-G (NSW)* [1913] HCA 60, (1913) 17 CLR 370 at 384 by Isaacs J:

- g 'In the first place, this is a remedial Act, and therefore, if any ambiguity existed, like all such Acts should be construed beneficially ... This means, of course, not that the true signification of the provision should be strained or exceeded, but that it should be construed so as to give the fullest relief which the fair meaning of its language will allow.'

- h [233] In the present case, the RFMF Act was introduced as a remedial Act in consequence of changes perceived as necessary after the 1939-45 war. This was the case in the United Kingdom and the United States, where extensive revisions were made of military laws in consequence of concerns and

criticisms raised in light of the application of military law during wartime. ^a
 (See Victor Hansen 'Changes in Modern Military Codes and the Role of the
 Military Commander: What Should the United States Learn from this
 Revolution?' (2008) 16 *Tulane Journal of International and Comparative Law*
 419; also James M. Hirschorn 'The Separate Community: Military Uniqueness
 and Servicemen's Constitutional Rights' (1984) 62 *NC LR* 177.) In any event,
 s 30 is clearly a remedial provision and governed by principles of legislative ^b
 interpretation accordingly.

[234] 'Conviction' is at least ambiguous—as indicated in the earlier cited ^c
 authorities (for example, *Burgess v Boetefeur* (1844) 7 *Man & G* 481 at 504). In
 accordance with standard principles of statutory interpretation, it must be
 interpreted beneficially. Therefore, it must be interpreted so as to recognise
 that it covers both the finding of guilt and punishment—that is, in and of ^c
 itself it must include 'sentence'. There is no need, therefore, in accordance
 with and applying standard rules of statutory interpretation, to add the words
 'and sentence' to s 30: 'conviction' itself must be read as incorporating that
 concept.

[235] Turning then to interpretation by reference to the Constitution, s 3 of ^d
 the Constitution says:

'Interpretation of Constitution

3. In the interpretation of a provision of this Constitution:

(a) a construction that would promote the purpose or object ^e
 underlying the provision, taking into account the spirit of this
 Constitution as a whole, is to be preferred to a construction that would
 not promote that purpose or object; and

(b) regard must be had to the context in which this Constitution was
 drafted and to the intention that constitutional interpretation take into
 account social and cultural developments, especially:

- (i) developments in the understanding of the content of particular ^f
 human rights; and
- (ii) developments in the promotion of particular human rights.'

[236] In my opinion, the principles that govern interpretation of the ^g
 Constitution must also be taken as governing interpretation of legislation
 generally; see *Re KN and EG* (6 May 2008, FC 0029/2008, unreported)
 at [7.35]–[7.36]. Further, the Constitution itself makes it apparent that this is
 the principle to be applied.

[237] Chapter 16 of the Constitution deals with 'Commencement,
 Interpretation and Repeals'. Section 195 says, amongst other matters:

'... (3) Subject to section 2, written laws referred to in paragraph (2)(e) ^h
 or (f) are to be construed, on and from the commencement of this
 Constitution, with such modifications and qualifications as are necessary to
 bring them into conformity with this Constitution.' (My emphasis.)

[238] Section 195(2) provides: ⁱ

'Despite the repeal of the Constitution of the Sovereign Democratic
 Republic of Fiji (Promulgation) Decree 1990 ...

- a (e) all written laws in force in the State (other than the laws referred to in subsection (1)) continue in force as if enacted or made under or pursuant to this Constitution and all other law in the State continues in operation;
- b (f) all written laws that had been enacted or made but had not come into force before that repeal may be brought into force in accordance with their terms and apply as if enacted or made under or pursuant to this Constitution.

(Section 195(1) sets out a number of Acts that are repealed by the Constitution, including: Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990; Suppression of Terrorism Decree 1991; Ombudsman Decree 1987; Fiji Citizenship Act; Fiji Citizenship Decree 1987; Internal Security Decree 1987; Internal Security Decree 1988; Internal Security (Suspension) Decree 1988; Industrial Associations Act (Amendment) Decree 1991; Trade Unions Act (Amendment) Decree 1991; Sugar Industry (Special Protection) (Amendment) (No 3) Decree 1991; Protection of the National Economy Decree 1991.)

[239] At the enactment of the Constitution, s 30 of the RFMF was a 'written law in force in the State ...' and so continued in force 'as if enacted or made under or pursuant to' the Constitution. That section had, therefore, to be construed as from the date of the Constitution 'with such modifications and qualifications as are necessary' to bring it into conformity with the Constitution (my emphasis).

[240] This aspect was not, it appears, touched upon in the High Court. However, it can support his Lordship's approach. That is, if (as his Lordship said and I agree) s 30 is inconsistent with various 'rights' provisions of the Constitution, then in accordance with s 195(2)(e) and (3), to bring it into conformity with the Constitution the 'modification' made by reading in 'and sentence' after 'conviction' might be contended for as necessary. Indeed, his Lordship effectively considered it was.

[241] Section 195(2)(e) and (3) in our opinion is an answer to the contention that his Lordship engaged in judicial law-making inconsistent with the separation of powers. (For an exposition of this proposition in another context, see *State v Silatolu and Nata* [2003] FJHC 239.) Most assuredly, it is axiomatic that the judiciary, the legislature and the executive each have their own realm of operation and power, and that encroachment by the one upon the other is unconstitutional. A considerable jurisprudence has constructed itself in relation to this matter, and particularly in the realm of sentencing.

There, questions have arisen as to whether Parliament has the power to fetter judicial discretion in sentencing and whether courts have the power to circumscribe the punishments Parliament has put in place. This arose, for example, in *Ali v State* [2001] FJHC 169, where the High Court struck down laws allowing for or prescribing caning or flogging as a punishment, by holding that caning was unconstitutional. Contrarily, in *State v Silatolu and Nata* [2003] FJHC 239 the High Court held that there was no power in the courts to hold capital punishment to be unconstitutional so long as it remained on the statute books of Fiji.

[242] Judicial limitations by reference to the separation of powers is a given. ^a
However, where a constitutional provision explicitly provides for judicial interpretation which *does* envisage 'modification' of laws to ensure that they conform to the provisions and principles of the Constitution, this court is obliged to abide by that provision. It is my respectful view that to ignore it by reference to the stricture against 'judicial law-making' would be to ignore the responsibilities of this court and the courts generally, as set out in s 195(2)(e) ^b and (3) of the Constitution which the courts are bound, along with all the other provisions of the Constitution, to uphold. It is also to ignore the role of the courts in interpreting the laws made by the Parliament, which is fundamental to the orderly operation and application of those laws and hence to the proper functioning of the separation of powers. ^c

[243] Be that as it may, having arrived at the same conclusion as his Lordship as to the need to ensure that s 30 conforms to constitutional requirements of equality, non-discrimination and access to justice rights spelled out in the Bill of Rights—the rights and freedoms set out in Chapter 4—but without adopting his approach of 'reading in', no reliance need be placed upon s 195 of the Constitution for 'reading in'. ^d

[244] However, if (which I do not accept) further support for accepting 'conviction' in the RFMF Act as meaning 'finding of guilt' and 'punishment' ('sentence') is necessary, it lies in s 195(2)(e) and (3) of the Constitution. Howsoever far that might be considered necessary, it may be relied upon. ^e

[245] Further support lies in the principles embodied in s 3 of the Constitution, which I apply accordingly to the interpretation of s 30 of the RFMF Act. ^e

[246] Social and cultural developments, especially developments in the understanding of particular human rights and developments in the promotion of particular human rights, must be given regard by the courts in interpreting legislation and, in this case, the RFMF Act and, in particular, s 30. ^f

[247] Consistent with the Constitution of Fiji, art 14 of the International Convention on Civil and Political Rights 1996 says:

- '(1) All persons shall be equal before the courts and tribunals ...
(5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.' ^g

[248] This provision is applicable to Fiji. It is applicable to the reading of the Constitution and generally in accordance with the interpretation principles embodied in the Constitution and in particular by reference to ss 3 and 195(2)(e) and (3), s 30 of the RFMF Act is appropriately read so that conviction embraces 'finding of guilt' and 'punishment'. ^h

[249] I do not 'read in' 'and sentence' to s 30. There is no need to do so.

[250] In accordance with the authorities cited, 'conviction' is interpreted in accordance with the principles of legislative and constitutional interpretation as herein referred to. Under s 30 of the RFMF Act as written, the respondents have a right of appeal against punishment imposed after a determination of guilt. In other words, in accordance with s 30 of the RFMF Act they have a right of appeal against 'sentence'. ⁱ

a FURTHER MATTER—APPLICATION OF ARMY ACT PER S (2)

[251] The RFMF Act has what may be considered to be a curious position in the laws of Fiji, albeit there are other examples. (*Naduanivai v Commander, Fiji Military Forces* (6 September 2004, HBM 32/2004, unreported).) Effectively, the RFMF Act incorporates the law of the United Kingdom: Fiji adopted the Army Act 1955 (UK), applying it in total to the military of this country. The legislative history is set out in *Naduanivai v Commander, Fiji Military Forces* (6 September 2004, HBM 32/2004, unreported).

b [252] As pointed out by the High Court in *Naduanivai*, the Royal Fiji Military Forces Act was enacted in 1949. The Army Act 1955 (UK) was enacted by the United Kingdom Parliament. The UK Army Act is explicitly referred to in s 2 of the RFMF Act, this by s 2 of the Fiji Military Forces (Amendment) Ordinance 1961 which, by including this reference, incorporated the Army Act 1955 (UK) as part of the laws of Fiji. Section 2 of the RFMF Act reads, and since passage of the Fiji Independence Order 1970 has read:

c d “Army Act” means the Army Act, 1955 of the United Kingdom and includes all Acts amending, repealing or read in conjunction with the same and all rules, regulations and Articles of War made thereunder.

[253] Winter J in *Naduanivai* went on to observe that after independence in 1970:

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

[254] This was and is consistent with legislative and judicial principle:

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

g (See Bennion *Statutory Interpretation* (4th edn, 2002), p 647, cited in *Naduanivai*.)

[255] His Lordship went on to point out that no statutory law, procedural law or adjectival law in Fiji can contravene the current Constitution; nor, since the 1970 Constitution and commencement of the Republic of the Fiji Islands, does the United Kingdom Parliament retain any power to legislate for Fiji as a colony. However, the Parliament of Fiji is entitled, as an exercise of its sovereign power, to adopt the legislation of any other country as its own. This can be done expressly or impliedly. (In *Naduanivai* the High Court refers to a number of examples of the exercise of the Fiji Parliament’s sovereign power in this way: 1. Penal Code, s 50—provision for the offence of treason; 2. English Civil Practice and Procedure adopted in the Fiji High Court where no express provision exists: Order 1, r 7, Fiji High Court Rules; 3. Criminal

Procedure Code, s 262: the practice of criminal jurisdiction 'shall be assimilated as nearly as circumstances will admit' to the practice of Her Majesty's High Court of Justice in its criminal jurisdictions of courts of Oyer and Terminer and General Jail Delivery in England in procedures in trials before the High Court; 4. Adoption of the National Weights and Measures Decree 1989; 5. Reference to 'applied Acts' that are recognised in s 2(1) Interpretation Act (Cap 7) as amended by Decree No. 35 of 1989 and Act 6 of 1998, where it provides: "applied Act' means any act of the Imperial Parliament for the time being applied to Fiji by virtue of the provisions of any Act'.)

[256] His Lordship concluded:

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

[257] Section 2 of the RFMF Act and its continued existence in the Act without modification, albeit the RFMF Act has been amended by the Parliament at various times, must be taken to mean that in 2008 as in previous years the RFMF Act incorporates contemporary United Kingdom military laws embodied in the Army Act 1955 (UK) and its successors. If this were not Parliament's intention, then it would (a) not have included s 2 in the RFMF Act at all; and/or would have repealed s 2 had it determined at any time since its inclusion to dispense with the statutory incorporation into Fiji law, through s 2, of United Kingdom military provisions.

[258] In *Naduaniwai* this was his Lordship's position when he said:

'The intention of the Fijian Legislation was to enact a shorthand reference to the United Kingdom Law so that any improvements by amendment in the UK Law also became part of Fijian Law as long as they were not inconsistent with Fijian Law and our Constitution. In this application it can therefore be argued that the Army Act 1955 and its amendments or replacements are in force as Fijian Law but have to be seen through the prism of the Fiji Constitution and RFMF Military Law to gauge their applicability ... This approach does not subvert Fijian sovereignty: on the contrary, it is simply Fijian Legislation that has borrowed from the United Kingdom, a body of ambulatory law.'

[259] The force of this exposition cannot be denied. As observed, if the Parliament no longer wished to incorporate into the RFMF Act contemporary provisions of the Army Act 1955 (UK) and its successors, the Parliament would have said so. It has not. Section 2 remains.

[260] The Court of Appeal did give some attention to this issue in *Barbados Mills v State* [2005] FJCA 6, where the Full Court (Ward P, Barker and Kapi JJ) said:

'[13] It was agreed by counsel, at the hearing of these appeals, that the UK Army Act, in whatever may be its current form, is incorporated by

a reference into the current law of Fiji for courts martial of officers and soldiers. This was the view of Winter J in the High Court in *Peni Naduanwai v The Commander and The State* (6 September 2004, HBN 32 of 2004), an application for constitutional redress. We agree with Winter J's discussion on this point ...

b [14] The only restrictions on the wholesale incorporation of the current UK provisions are (a) the paramountcy of any provisions of the RFMF Act over the UK legislation under s 23(1) of the RFMF Act and (b) any modifications of the UK law permitted by s 23(2)(c) of the RFMF Act.'

c [261] In its expression of concern about the scale of change that may be required in conducting courts martial, this court in *Barbados Mills* accepted that what s 2 of the RFMF Act means is that United Kingdom law is incorporated into the RFMF Act:

d '[34] It cannot be sensible to require Fiji, with a defence Force of some 3,000 members and few senior officers, to adopt a structure for courts-martial appropriate for a country with a huge population and a large defence force comprising various constituent services. Yet, that must be the consequence of a wholesale incorporation of the current UK legislation, as is required by the RFMF Act, unless the RFMF Act itself permits any deviation.

e [35] The only ameliorations that Fiji can make to this elaborate structure have to be measured by any specific provisions of the RFMF Act and Regulations. Notably s 23(2)(c) of that Act which allows "such other modifications consistent with this Act as may be necessary".

f [36] Section 23(2)(c) must be interpreted to permit some realistic modifications of the current English model to suit Fiji standards, whilst still preserving both the basic thrust of the new English Act, namely, to make court-martial procedures and establishment more attuned to human rights law and the statutory instruction in s 25(2) to follow UK practice for appointment and modes of procedure.'

g [262] Their Lordships went on to conclude that it would be preferable for Fiji to 'adopt its own legislation regarding courts martial, which might well still incorporate much of the UK legislation'. They added that the Fiji legislation should not necessarily change 'with every vicissitude of the UK Act'.

h [263] Such legislation could take account of the realities of Fiji's situation and not impose too elaborate a structure whilst at the same time taking into account the human rights of military personnel which are preserved in the Constitution (at [38]).

[264] Finally, the Court of Appeal in *Barbados Mills* made clear again the incorporation of United Kingdom law into that of Fiji, insofar as the RFMF Act is in issue (at [39]):

i 'What must also follow from the applicability of the current UK Act to this court-martial is that the judge Advocate (were he properly appointed) should have deliberated with and voted with the members of the court when considering sentencing. He did not do so.'

[265] In *Barbados Mills* the import of the United Kingdom position post-*Findlay* and the right of appeal against sentence written into United Kingdom law was not alluded to. In *Barbados Mills* their Lordships simply referred to s 30 of the RFMF Act and said: 'If a court-martial has jurisdiction to enforce or to grant redress where there has been a contravention of the Bill of Rights, the Court of Appeal has jurisdiction to review such decisions insofar as they relate to questions of conviction (at [58]–[59]).'

[266] Again (at [117]):

'It is clear from s 30 of the RFMF Act that the right of appeal relates to conviction only and not to sentence.'

[267] Nonetheless, the Court of Appeal earlier said (at [71]):

'It should be emphasised that the right of the military to have its own system of justice and to try military personnel, both for strictly military offences (such as mutiny) and also for crimes under civilian law is undeniable. Such crimes committed in a military context could have more serious effects than in a civilian context. This court shares that view. However, as the cases disclose, military justice has to recognise the changes wrought to it in recent years by an emphasis on the human rights of the individual. It is not always easy to reconcile those sentiments with the necessary military emphasis on solidarity and obedience. The new UK law represents the best efforts to date to achieve this reconciliation.' (My emphasis.)

[268] Furthermore, the reiteration that s 30 includes a right of appeal exclusive of any reference to or right to appeal against punishment does not embrace the court's earlier stated position, namely that the RFMF Act incorporates United Kingdom law and its changes. The court is not in my view entitled to say what changes are incorporated into Fiji law and which are not: Parliament has already spoken by the inclusion of s 2 of the RFMF Act. So long as it remains, then changes to the United Kingdom law are incorporated.

[269] As his Lordship in *Naduaniwai* pointed out and their Lordships in *Barbados Mills* agreed:

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

[270] Indeed, in 1998 the Parliament was faced with the opportunity to repudiate United Kingdom law, or to put an end to the incorporation into Fiji law of military law as contained within the Army Act 1955 (UK) and its successors. The changes made by the RFMF (Amendment) No 16 of 1998 were principally to ensure that the RFMF Act conformed to the Constitution (having become law in 1997). By 1998, the right of appeal against sentence had been incorporated into the United Kingdom law in consequence of *Findlay*. The Parliament did not make any amendment so as to deny the

- a incorporation of that change into the RFMF Act. Nor did it amend or repeal s 2.

[271] Hence, the 1996 *Findlay* amendments will apply in Fiji, so long as the Parliament does not say No and so long as they conform to the Constitution. Section 30 of the RFMF Act, so long as 'conviction' is not interpreted in its full meaning of 'finding of guilty' and 'punishment' (or sentence), is unconstitutional. It breaches ss 25(1), 28(1)(l) and 38. Incorporating into it the right to appeal against sentence as now embodied in the current United Kingdom law is consistent with s 2 of the RFMF Act and the Constitution.

- b [272] The importance of Parliament in making the laws is fundamental. It is incumbent upon this court to recognise that Parliament has already spoken through its inclusion of s 2 in the RFMF Act. Should the Parliament of Fiji no longer wish the RFMF Act to follow developments in United Kingdom military law, then it will need to say so.

- c [273] Therefore, if I am wrong in interpreting 'conviction' by reference to both the finding of guilt and the determination of punishment, the respondents herein remain entitled to appeal against sentence through incorporation of the United Kingdom changes by s 2 of the RFMF Act. This will make the position of the military consistent with the situation pertaining not only in the United Kingdom, but in Canada, Aotearoa/New Zealand and Australia. No reports of a collapse of military discipline in those countries having been received nor adverted to in the course of this case, it may be expected that the same outcome should flow in Fiji.

- d [274] In its accepting that military personnel should have access to appeal against sentence, albeit through parliamentary amendment or promulgation, it is apparent that the appellant the RFMF itself is confident of a continued capacity to maintain the required safe, secure, proper and expected levels of discipline within the RFMF.

f GROUND OF APPEAL 6

[275] Insofar as ground of appeal 6 is in issue, by reference to all the foregoing, the following applies:

'(6) The judge ought to have held that:

- g (a) s 30 of the RFMF Act does not allow soldiers to appeal their sentences.

Determination

- h Section 30 by its reference to "conviction" must be taken, in accordance with statutory interpretation, the authorities as to the meaning of "conviction" and the provisions of the Constitution as meaning both "finding of guilt" and "punishment". Section 30 does allow for soldiers to appeal their sentences.

(b) any changes to s 30 of the RFMF Act should be made by Parliament.

Determination

- i As "conviction" includes both "finding of guilt" and "punishment" there is no need for Parliament to change s 30. In any event, by incorporating into the RFMF Act s 2 which provides for the incorporation of United Kingdom law into the RFMF Act, Parliament has already provided for appeal against "sentence" by soldiers.

(c) the respondent should await the next parliamentary sitting for the law to be changed. a

Determination

See response to (a) and (b), above.

(d) the respondent certainly can await the sitting as the maximum sentence for his crime is life and he is serving only about half of the maximum sentence. b

Determination

The respondents have a constitutional entitlement to appeal against sentence as recognised by this court by reference to (a) and (b), above.

(e) the Attorney General's chambers should make a presidential promulgation reflecting the wishes of the court as this is the method adopted by the interim government to make laws. c

Determination

See response to (a), (b) and (d), above.

(f) make a declaration of incompatibility as reading in is beyond his Lordship's jurisdiction. This is the only remedy for the present case as per s 41(3) of the Constitution. d

Determination

See response to (a), (b) and (c), above.'

ORDERS

'1. The appeal is upheld insofar as the decision of the High Court "reads in" the words "and sentence" to s 30 of the RFMF Act. e

2. The appeal is dismissed insofar as the respondents have a right to appeal against sentence by reason of "conviction", including both the finding of guilt and determination of punishment.

3. No order as to costs. f

Solicitors:

Directorate Army Legal Services for the appellants.

Legal Aid Commission (Suva) for the respondents.