

8. THE INCORPORATION OF CUSTOMARY LAW & PRINCIPLE INTO SENTENCING DECISIONS IN THE SOUTH PACIFIC REGION

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KEY TERMS AND PHRASES

Mitigation

Mitigation is the reduction of the severity or the effect of a wrongful act. A 'plea in mitigation' is the submission of certain facts by an offender in the hope of receiving a more lenient sentence than the court would otherwise impose.

Restitution

Restitution involves making good a loss to a wronged person whether by actual replacement of a lost good or providing recompense in monetary or other terms. Restitution is similar to reparation which involves a wronged person being compensated for loss that has been caused by an offender.

INTRODUCTION

Within the South Pacific region¹ there are fewer instances of having to reconcile customary law and ‘introduced’ law within the realm of criminal law and procedure than is the case in other areas of law such as family law or land law. By this I mean that when we look to the available sources of law in relation to criminal matters, it is evident that this is an area that has been extensively codified, either during the colonial period or since then.² A reading of these codes indicates that reference to issues of customary law and principle occur rarely and are very limited in nature.

Once a matter is reported to the police and the issue is brought within the scope of the ‘introduced’ (or ‘adopted’) criminal justice system, the relevant statutory provisions relating to offences, defences and procedure make very few references to customary concerns. This is despite the fact that within many Pacific island communities there is a great deal of evidence (although it is largely undocumented) that people who feel themselves to have been wronged by another person or group of persons³ seek resolution of this type of dispute by reference to customary law and practice as declared and/or interpreted by chiefs or other community elders. These processes are commenced, conducted and concluded without any recourse to the police, the Office of the Public Prosecutor or the ‘formal’ court system. There is also evidence of some communities refusing to recognise the authority of the police or other agents of the criminal justice system.⁴ In some areas the courts have not attempted to close this gap between statute and social reality. Instead the courts have, in several areas, taken an exclusionary approach to the introduction of issues of custom prior to the sentencing stages of criminal matters. For example, we may refer to the case of *Public Prosecutor v Iata Tangitom*.⁵ This concerned a charge of indecent assault contrary to s 98(2) of the *Penal Code* [Cap 135] (Vanuatu). There was some dispute as to the age of the victim but this was determined to be 13 by Marum J, who then went on to make the following comment:

In mitigation, the counsel submitted that in custom, this is recognized and accepted and further, age is irrelevant. In my view, if there is a conflict between custom and public law, that is criminal law, then the law must prevail and that is provided for under section 11 of the Penal Code Act (*sic*) where it expresses that ignorance is no defense.

When we turn to the particular issue of sentencing, the situation is markedly different. At this stage of the criminal justice process the impact of customary principles, most notably reconciliation and compensation, is much more visible. It is also at the sentencing stage that the potential ideological conflicts between the underlying rationales of customary socio-legal structures and the introduced legal system are highlighted:

The potential for paradox where such a notion of justice⁶ comes up against customary penalty with very keen communal and collective investments is clear. For instance, with traditional community shaming the whole village is co-opted into the process and the offender’s family may take collective responsibility not

only for the harm but also for his (*sic*) rehabilitation. Common law liability, on the other hand, tends to isolate the offender from the community at all stages of the penalty process. While requiring the individual to restore the social balance through his guilt and shame.⁷

This chapter examines the question of how, if at all, the law as enacted and subsequently applied by the courts attempts to reconcile such paradoxes. There are three parts to this chapter. The first part is an examination of the written law to identify what provision is made for the recognition of customary law in relation to sentencing decisions of the courts.⁸ The second is a consideration of some of the sentencing decisions of the courts of the region. The third is a brief overview of law and procedure in other jurisdictions to provide some points of comparison with the situation in the USP region.

THE WRITTEN LAW

Here, we shall examine the written law both in the form of constitutional provisions and in the form of enacted legislation related specifically to sentencing and customary law. In examining the relevant legislation the statutes constituting courts are considered, as it is sometimes the case that courts are given broad powers to take customary matters into account when making decisions.

Constitutional Recognition of Custom and Customary Law

There are many examples in Pacific constitutional documents of statements as to the significance of customary law. These statements are often framed in very broad terms. There are two main types of this sort of statement.

The first is the kind of statement that does not expressly refer to customary law in relation to the particular jurisdiction but instead refers to the concept of ‘existing law’, which could (and possibly should) be interpreted as including customary law. An example of such a statement is Art 71 of the *Constitution* 1974 (Niue) which should be read in conjunction with Art 82 where ‘existing law’:

...means any law in force in Niue immediately before Constitution Day; and includes any enactment passed or made before Constitution Day and coming into force on or after Constitution Day.

However, the *Constitution* of Niue makes no specific reference to the significance of customary law other than in relation to land issues. Similar statements appear in the *Tokelau Act* 1948 (NZ)⁹ and the *Constitution* (Cook Islands).¹⁰

The second form of constitutional statement that is found in the region in relation to the significance of customary law is the type that makes express reference to the status of custom, again in fairly broad terms. An example of this type of provision appears in the Preamble to the *Constitution* [Cap 1] (Tuvalu):

And whereas the people of Tuvalu desire to constitute themselves an Independent State based on Christian principles, the Rule of Law, and Tuvaluan custom and tradition.

The status of custom is reiterated in s 85, which is concerned with the jurisdiction of the courts:

...provided that in the exercise of their jurisdiction the courts shall, to the extent that circumstances and the justice of any particular case may permit, modify or adapt such rules as to take account of Tuvalu custom and tradition.¹¹

In addition, it is possible to identify constitutional provisions that make reference to issues of punishment. Again, these tend to be framed in very broad terms rather than being detailed as to how the courts should sentence criminal offenders. An example of such a provision is Cl 10 of the *Constitution* (Tonga):

No one shall be imprisoned because of any offence he (*sic*) may have committed until he has been sentenced according to law before a Court having jurisdiction in the case.¹²

It is evident that these provisions, and the constitutional documents of the region more generally, do not make specific reference to the role that customary law should play in relation to sentencing decisions made by the criminal courts. A possible partial exception is s 186 of the *Constitution Amendment Act 1997* (Fiji Islands) which does make specific reference to the recognition of “traditional Fijian processes” within the context of “dispute resolution”. It is therefore necessary to examine the legislation that is relevant within the sphere of criminal law and procedure to ascertain if and how the written law defines the role of customary law and principle at this stage of the criminal justice process.

Legislative Provisions Concerned with Sentencing and Customary Law

In this section, we shall examine some of the legislative provisions that are concerned with the relationship between sentencing decisions of the courts and customary law. More particularly, we will be looking at how the relevant legislation seeks to incorporate issues of reconciliation and compensation into sentencing decisions.

First, it is possible to identify provisions that give guidance as to the applicability of custom and customary law within the whole of the criminal sphere, including the specific issue of sentencing in the criminal courts. One of the most comprehensive examples of such a provision is para 3 of Schedule 1 of the *Laws of Kiribati Act 1989* (Kiribati):¹³

3. Subject to this Act and any other enactment, customary law may be taken into account in a criminal case only for the purpose of:

- (a) ascertaining the existence or otherwise of a state of mind of a person; or
- (b) deciding the reasonableness or otherwise of an act, default or omission by a person; or
- (c) deciding the reasonableness or otherwise of an excuse; or
- (d) deciding, in accordance with any other enactment whether to proceed to the conviction of a guilty party; or
- (e) determining the penalty (if any) to be imposed on a guilty party,

or where the court thinks that by not taking the customary law into account injustice will or may be done to a person.

A provision of this type has the potential to be very wide-ranging in scope and effect. However, it is important to bear in mind that the application of customary law in any or all of the identified circumstances is not mandatory in this provision. This is indicated by the use of the word ‘may’ rather than ‘shall’ in the first line of the paragraph.

In addition to general provisions of this type the different levels of courts may be subject to particular legislative provisions that define or shape the relationship between customary law and principle and sentencing decisions.

Magistrates’ courts and ‘custom’ courts created by statute

In some jurisdictions, courts in these categories¹⁴ are empowered by statute to take custom and customary law into account when dealing with criminal cases. For example, s 10 of the *Island Courts Act* [Cap 167] (Vanuatu) reads as follows:

Subject to the provision of this Act an island court shall administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order.¹⁵

Section 16 of the *Local Courts Act* [Cap 19] (Solomon Islands) bears a close resemblance to this provision. However, in this case the only limiting factor on the application of custom by the local court is that “the same has not been modified by any Act”. Similarly, in Samoa the operation and jurisdiction of the *fono*¹⁶ has been placed on a statutory basis by the *Village Fono Act 1990* (Samoa). The incorporation and application of custom is central to the functions of the *fono* as envisaged by the Act. This is clearly demonstrated in those sections that are concerned with the handing down of sentences in criminal cases. For example, s 6 pertains to “Punishments” and grants the *fono* the power to “impose punishment in accordance with the custom and usage of its village” and deems that such power includes the imposing of the following forms of punishment:

- (a) The power to impose a fine in money, fine mats, animals or food; or partly in one or partly in others of those things;
- (b) The power to order the offender to undertake any work on village land.

It is also interesting to note that s 8 of this Act indicates how these customary punishments or penalties are to be viewed by other courts (such as the district courts¹⁷) when making subsequent sentencing decisions:

Where punishment has been imposed by a Village *Fono* in respect of village misconduct by any person and that person is convicted by a Court of a crime or offence in respect of the same matter the Court shall take into account in mitigation of the sentence the punishment by that Village *Fono*.

Superior courts

In the field of criminal procedure, including sentencing, the primary piece of legislation that governs the courts is a criminal procedure Code or Act. Some examples of this type of legislation are *Criminal Procedure Act* 1980–81 (Cook Islands); *Criminal Procedure Code* [Cap 21] (Fiji Islands); *Criminal Procedure Code* [Cap 17] (Kiribati); *Criminal Procedure Act* 1972 (Samoa); *Criminal Procedure Code* [Cap 7] (Solomon Islands); *Police Act* [Cap 35] (Tonga); and the *Criminal Procedure Code* [Cap 136] (Vanuatu). These are the laws that form the legislative framework within which the courts of the region make sentencing decisions in relation to criminal matters. Of particular interest here is what, if anything, these pieces of legislation say about how the courts should approach customary issues when making these decisions.

The relevant provisions of the legislation of Vanuatu¹⁸ provide a good starting point for this consideration. This is because they make explicit reference to customary forms of dispute resolution, namely reconciliation and compensation. Section 118 is concerned with the promotion of reconciliation. It reads as follows:

Notwithstanding the provisions of the Code or of any other law, the Supreme Court and the Magistrate's Court may in criminal causes promote reconciliation and encourage and facilitate the settlement in an amicable way, *according to custom* or otherwise, of any proceedings for an offence of a *personal and private nature* punishable by imprisonment for less than 7 years or by a fine only, on terms of payment of compensation or other terms approved by such Court, and may thereupon order the proceedings to be stayed or terminated. (Emphasis added).

This provision leaves several things unclear. Words and phrases such as “reconciliation” and “amicable way” are not defined. Therefore, it is difficult to know how they should be applied in practical terms. Similarly, no guidance is provided as to the meaning of “offences of a personal or private nature”. In addition, the use of a phrase such as this seems to be in conflict with the notion that criminal offences have an inherently *public* nature or aspect as reflected elsewhere in the criminal law.

A further significant point regarding this provision is one that arises in relation to similar provisions in other jurisdictions of the region:¹⁹

...where these provisions exist, they do not make any references to offences that would qualify for settlement by way of reconciliation in terms of the nature of the offences and/or the sentences they attract but which should be excluded from the ambit of such provisions by virtue of their social significance. Incidents of ‘domestic violence’ are very clearly in this category.²⁰

Whilst incidents of “domestic violence” may qualify under a provision such as s 118 referred to above as examples of the sort of offence that may be resolved through reconciliation, it may be that to do so leads to an absence of a meaningful sanction for this type of offence:

...because of the unequal power positions of persons negotiating domestic reconciliations, the private nature of their terms, and the application of expectations that may go well beyond the immediate issue of the assault or future threats of violence, reconciliation may become more of an avoidance of penalty. For instance, where a complainant withdraws her allegation of assault as a result of reconciliation, this may be the consequence of threats from the husband²¹ to throw a wife out into the street if she does not ‘reconcile’, rather than any genuine rapprochement. The court would not become aware of this by simply seeking an assurance of reconciliation from the accused and the complainant may not be examined by the court in this regard. The community, the traditional witness and enforcer of reconciliation, also has no voice in the court hearing.²²

Concerns of this nature indicate that in some situations the promotion of reconciliation requires very careful consideration by the courts. It may also require that the reconciliation process is supervised and monitored either by the courts or by some other appropriate agency.

To return to the provisions that apply in Vanuatu, s 119 of the *Criminal Procedure Code* [Cap 136] (Vanuatu) is concerned specifically with issues that relate to sentencing decisions. This provision of the Code states:

Upon the conviction of any person for a criminal offence, the court shall, in assessing the quantum of penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom and if such has not yet been determined, may if he (*sic*) is satisfied that undue delay is unlikely to be thereby occasioned, postpone for such purpose.

Again, a provision such as this one may be ambiguous or even problematic. The use of the word “shall” in the first line indicates that it is mandatory that the court take customary “compensation or reparation” into account. However, there is no guidance as to what principles the courts should follow in so doing. There is nothing in this provision that stipulates that the effect of having already complied with or undertaken to comply in the future with some form of customary settlement should be to mitigate the sentence. However, as is evident from the judgments of the courts,²³ such settlements are considered within the context of reducing a sentence rather than increasing it. Of particular significance within a jurisdiction such as Vanuatu is the absence of any guidance as to which (or whose) custom should apply in determining practical issues such as the means by which reparation should be made or the amount or type of compensation that is due.

In relation to issues of procedure, these provisions do not make reference to any timescale for the envisaged reconciliation processes. Neither does the legislation indicate what should happen in the event that the relevant parties agree to undertake some form of reconciliation when they are before the court but subsequently fail to go ahead with it. However, it is recognised that in many cases customary reconciliation may have been initiated and, indeed, concluded before the case ever comes before the court. Elsewhere in the region similar issues arise as it is generally

the case that where such legislative provisions appear the processes for implementing them are not clearly defined.

AN EXAMINATION OF SENTENCING DECISIONS OF THE COURTS WITH REFERENCE TO THE INCORPORATION OF CUSTOMARY LAW AND/OR PRINCIPLES.

It is reasonable to assume that the decisions of the subordinate and lower subordinate courts are more likely to refer to issues of custom than would be the case in the sentencing decisions of the superior courts. However, it is extremely difficult to get access to the decisions of the magistrates' courts and courts that operate at the lower subordinate level (e.g. island courts or local courts). In many cases the judgments of these courts are not fully transcribed unless they are requested by one of the parties. Therefore, in this section I will focus on examples of how sentencing decisions of the superior courts take account of custom and customary law. This will provide only a partial picture of this area of criminal law and procedure. However, it will illustrate some significant issues and questions that are important to this type of decision-making throughout court structures at all levels, whether those structures are 'formal' or 'informal' in nature.

The questions of when and to what extent customary settlement and/or punishment should be taken into account by the courts when passing sentences in criminal cases has been considered in many of the jurisdictions of the region. There are first instance decisions and appellate decisions that are relevant to this consideration. An examination of judgments from a number of jurisdictions of the region reveals a number of issues. They are identified and discussed here. The order in which the issues are discussed does not necessarily reflect their order of importance.

The first issue is that in many cases the customary settlement, whether by means of formal apology, payment of compensation or some other process, occurs prior to the case coming before the court for sentencing purposes. This means that it is the most likely scenario that the issue of the customary settlement is raised within the context of a plea in mitigation. Further to this, it is evident from some of the judgments that the perception of the victims and offenders is that it is the customary settlement that is the final resolution of the situation with the court case being considered superfluous and, sometimes, unwelcome. This type of perception is referred to in the judgment of the Court of Appeal of Tonga in *Hala v R*.²⁴ In this case, part of the appeal was based on the fact that the trial judge had given insufficient weight to the fact that the offender had helped the victim's family financially, had made his peace with them and that there was reason to believe that the family "did not wish the case to go to a hearing".

However, a situation may arise in which the court hands down a sentence that has been reduced on the basis that there will be some form of customary settlement process at some point subsequent to the conclusion of the proceedings. This raises the problem of what should happen in the event that an undertaking to pay

compensation or undertake some other form of customary settlement is not fulfilled. A very similar issue to this was considered in the appellate case of *Rainer Gilmete v Federated States of Micronesia*.²⁵ In this case the appellant was initially sentenced to imprisonment (partly suspended) and to pay restitution. The restitution was not paid within the time that the Court had prescribed and the appellant was sentenced to a further year's imprisonment. He appealed against the modified sentence. The modified sentencing order had been made on the basis that where a convicted person was unable to pay restitution, his or her family was obliged in custom to do so. The Supreme Court of FSM held that:

If the defendant is incapable himself (*sic*) of paying restitution and he has made a request for assistance to his family, the family's bad faith in not paying cannot be imputed to the defendant and result in increased imprisonment (*per* Benson AJ)

It is not clear from the judgment in this case whether the original sentence was one that had been mitigated or reduced by virtue of the accompanying order to pay restitution. It may be preferable that where the plea in mitigation is based on an undertaking to go through a customary form of settlement rather than evidence that such settlement has already been reached, that the court should defer final sentencing until such time as is considered reasonable for the resolution to have been achieved. However, a reading of a number of cases from the region concerning this issue indicates that, in practice, it is usual that customary reconciliation and/or compensation has already been undertaken before the sentencing stage of the 'formal' proceedings is reached. This can be seen from explicit and implicit comments that appear in many of the cases that are considered in this chapter.

Second, a reading of the cases makes it clear that the courts' approach is one of limiting the scope of the effect of customary settlement to mitigation. In the Solomon Islands case of *R. v Nelson Funifaika and others*²⁶ Palmer J made the following statement as to the effect of payment of customary compensation by the offenders and their relatives to the victims and their communities:

The significance of compensation in custom however should not be over-emphasized. It does have its part to play in the communities where the parties reside, in particular it makes way or allows the accused to re-enter society without fear of reprisals from the victims (*sic*) relatives. Also it should curb any ill-feelings that any other members of their families might have against them or even between the two communities to which the parties come from. *The payment of compensation or settlements in custom do not extinguish or obliterate the offence. They only go to mitigation. The accused still must be punished and expiate their crime.* (Emphasis added).

This limiting approach has been demonstrated elsewhere in the reluctance of the courts to accept customary obligations or beliefs as defences to serious criminal offences. Reference has already been made to the Vanuatu case of *Public Prosecutor v Iata Tangaitom*. Another striking example is the Solomon Islands Court of Appeal case of *R. v Loumia*.²⁷ This case highlighted the potential for conflicts between

customary law and constitutional principles and between customary law and primary legislation. The appellant sought to persuade the Court that the customary requirement to ‘pay back’ a killing should afford him a defence to a charge of murder (and a reduced charge of manslaughter) under s 204(c) of the *Penal Code* [Cap 26] (Solomon Islands) which states that a defence exists if the accused:

...in causing the death... acted in the belief in good faith and on reasonable grounds that he was under a legal duty to cause the death or do the act which he did.

The defence was not recognised by the Court on the basis that it was inconsistent with constitutional protections of the life of the individual.²⁸ In addition, the Court made the following statement as to the relationship between the customary duty to ‘pay back’ a killing and s 204(c) of the *Penal Code*:

The matters of extenuation which will reduce the offence from murder to manslaughter are set out in ss.196, 197 and 199 of the Code²⁹ and it is sufficient to say that the desire to avenge the death of another or exact retribution are not matters of defence or extenuation either under the Code or at Common Law. Clearly therefore, in my judgement, custom which calls for action which is a criminal offence by the statute law of Solomon Islands is inconsistent with statute.³⁰

The legislative provisions discussed in the previous section do not preclude the court imposing a heavier sentence as a result of taking custom into account than might otherwise be the case. However, the cases demonstrate that the usual result of reference to customary settlement between victim and offender (and their respective family or community groups) is that of a reduced sentence. A similar trend has been identified in the neighbouring jurisdiction of Papua New Guinea.³¹

Third, it can be seen that the courts adopt different approaches to the significance of customary reconciliation and/or compensation depending on the circumstances of the case. The most significant factor appears to be the seriousness of the offence in question. This is illustrated in the contrasting decisions of the Supreme Court of Fiji in two cases dating from 1977.³² In *Eernale Cagiliba v R.*³³ the Court, on receiving evidence that the appellant was reconciled with the complainant, quashed the original sentence of two years’ imprisonment and substituted one of 12 months’ imprisonment. The offence in question was that of robbery with violence contrary to s 326(1)(b) of the *Penal Code* [Cap 17] (Fiji Islands). However, the sum stolen was \$7 and the victim and offender were cousins. In *Suliasi Nalanilawa v R.*³⁴ the appellant had once again been sentenced to two years’ imprisonment. In this instance, the offence was that of assault with intent to commit rape. The Court refused to accept an argument that the sentence should be reduced because the complainant’s family had forgiven the appellant “in accordance with Fijian custom”. It would seem that both of these cases could come within the scope of the Fiji Islands’ legislative provisions relating to the promotion of reconciliation that were discussed previously. However, it is evident that the exercise of discretion by the courts allows judges to differentiate between situations in accordance with broader policy issues.

In other jurisdictions, such as Vanuatu, reference to the role of customary settlement in sentencing is not restricted by reference to the nature or seriousness of the offence involved. However, it remains the case that the courts do make differentiation between when reconciliation and/or payment of compensation should and should not operate to mitigate sentence. Again, the seriousness of the offence is a significant factor in this regard. Recent comments made by the Supreme Court of Vanuatu indicate a marked reluctance to accept customary settlement as a significant mitigating factor in cases of serious violence, especially where death results. In the case of *Public Prosecutor v Peter Thomas*,³⁵ Marum J identified that the “normal” penalty he would impose in such a case was one of nine years’ imprisonment. He then made, *inter alia*, the following comment:

The Court under Section 119 of the CPC³⁶ is also to take into consideration any customary settlement into determining what is an appropriate penalty. I have stated earlier in some of my sentencing on violence causing death that compensation in compensating the life of a dead person is totally useless to the dead person, because it cannot compensate him (*sic*) by putting him back to life, and that is why I say that compensation is useless, when death occurs. However, the Court does take into consideration compensation but of less significant (*sic*).

After consideration of everything in this matter I consider that the appropriate penalty to impose by the Court on the Defendant is to sentence him of 7 years and 6 months.³⁷

LAW AND POLICY ELSEWHERE.

The issues and questions that have been identified here in relation to USP jurisdictions have also arisen and been considered elsewhere in the world. Here, we shall briefly examine some of the approaches that have been advocated and/or adopted in Papua New Guinea, South Africa and Australia. It is intended that this brief overview will identify questions and concerns that currently require or will require consideration by legislators and judges of the countries of the USP region as this area of criminal law and procedure develops.

Papua New Guinea

In Papua New Guinea, issues of customary compensation have been ‘elevated’ to a statutory basis in the *Criminal Law (Compensation) Act 1991* (PNG), as amended. It is a significant piece of legislation in the Pacific as it provides a legislative framework outlining the detail of judicial and magisterial powers and duties when making compensation orders. This Act operates on the basis of the courts imposing orders to pay compensation “in addition to any other punishments imposed”.³⁸ Section 3 of the Act identifies those factors that are to be taken into account when making compensation orders. The section makes specific reference to “custom” as a factor that may affect compensation orders in s 3(1)(d). These customs include:

any relevant custom regarding compensation, including but not limited to:

- (i) any custom regarding the nature, the amount, the method of payment and the appropriate person or persons to be paid the compensation; and
- (ii) any custom which relates the amount of compensation to the age or life expectancy of the person suffering injury or loss;

Thus, this legislation recognises that compensation may be in something other than monetary form and that recognition of the dictates of custom in relation to compensation may lead to *compensation* being paid to a person or persons other than the victim of the crime in question. This makes this statutory framework quite distinct from those that govern the imposing of compensation orders in jurisdictions such as the United Kingdom.³⁹ The PNG Act is silent on how the courts should deal with cases where customary compensation is negotiated between the relevant individuals and/or groups outside the formal court process prior to the making of any orders as to sentence, including orders that may be made under this legislation. In subsequent commentary, it has been argued that “any compensation payments outside of the prevailing criminal compensation regime must be disregarded and discounted in sentencing.”⁴⁰ Just as was noted previously, the courts in this jurisdiction have sometimes indicated that the imposition of a compensation order may not be appropriate.⁴¹

South Africa

In a recent publication,⁴² the Law Commission of South Africa has raised several issues of significance in this area. Of particular interest are the comments and recommendations that were made highlighting the possible areas of conflict between the rationale, structure and operation of ‘traditional courts’ and the supreme law of constitutional provisions. One of the most complicated aspects of attempting to incorporate customary law and principle into sentencing procedures (or indeed into any other aspect of law) is how conflicts between customary law and other sources of law should be resolved, if indeed they can be. The issues and resolutions that arose in the case of *Loumia* discussed previously are relatively clear cut in this regard. However, other considerations are more complex and ambiguous. A pertinent example is that of the place of women in customary systems of dispute resolution whether as victims, offenders or adjudicators. The South African Law Commission has made the following recommendation; its careful wording is indicative of the potential problems in this area:

- 5.6 The traditional element of popular participation whereby every adult was allowed to question litigants and give his (*sic*) opinion on the case should be maintained and encouraged as this boosts the legitimacy of the court. However, to comply with s.9 of the Constitution, *consideration should be given to the full participation of women members of the community.*⁴³

Similarly, the Commission also considered the question of corporal punishment, which is another issue with constitutional implications. The Commission’s report notes that previously a chiefs’ court could administer corporal punishment on “unmarried males under the apparent age of 30.”⁴⁴ This, however, was determined to

be in breach of s 12(1)(e) of the *Constitution* by the Constitutional Court in the case of *S. v Williams*.⁴⁵ Further to this decision, the *Abolition of Corporal Punishment Act* 1997 (South Africa) was passed. Thus the Commission has recommended that:

6.7.3 The traditional courts therefore need to be alerted that a sentence of corporal punishment is contrary to the law.⁴⁶

This type of consideration provides a very good illustration of the difficulty of attempting to ‘blend’ introduced or adopted legal and democratic concepts such as gender equality and constitutional individual rights with the longstanding beliefs and values of traditional societies.

Australia

Many significant questions and concerns regarding the place of customary law in relation to sentencing decisions of the criminal courts have been debated in Australia with particular reference to how the criminal justice system does or should impact upon members of the Aboriginal and Torres Strait Islander communities.

The legislative framework for sentencing of Aboriginal offenders and the attendant recognition of Aboriginal customary law differs between the Australian States and Territories. In Victoria, the 1988 Sentencing Committee concluded that “[A]borigines should not be given preferential treatment in sentencing; *that customary laws not be recognised*; and that no special sentencing options be developed for Aboriginal offenders.”⁴⁷ In other parts of the country, where there are larger rural Aboriginal populations and less assimilation of Aborigines with the non-Aboriginal community,⁴⁸ the courts have adopted a somewhat different approach.

One of the most problematic aspects of giving recognition to Aboriginal customary law in sentencing decisions stems from the fact that in many instances, a system of ritualised physical punishment (such as being speared in the leg) is used by the community group.⁴⁹ It would be very surprising to find the courts expressly recommending or condoning a form of customary punishment that constitutes a criminal offence (assault or wounding). Indeed, the courts have had to tread a very careful path in this area. In the 1992 case of *R. v Minor*⁵⁰ the Court of Criminal Appeal of the Northern Territory held that where tribal payback punishment had already been carried out or was to be carried out in the future, the Court should have regard to this fact when passing sentence:

As I understand it, payback, in certain cases, which must be carefully delineated and clearly understood, can be a healing process... It would be a serious and impermissible abrogation of the court’s duty to reduce a sentence on any person of whatever race or creed because of assurances that friends or relatives of the victim were preparing their own vengeance for the assailant. If payback is no more than this it is nothing to the sentencing process. If, however, it transcends vengeance and can be shown to be of positive benefit to the peace and welfare of a particular community it may be taken into account; though even then I do not believe the court could countenance any really serious bodily harm.⁵¹

Elsewhere in that judgment, the following points were made about the nature and purpose of payback in the Aboriginal communities of the Northern Territory. It is significant to note the highlighting of the relationship between this form of customary resolution and the written law of the Territory:

...there was no evidence upon which his Honour could have concluded that the form of punishment proposed was unlawful. An assault is not unlawful if authorised by the ‘victim’ unless the person committing the assault intends to kill or to cause grievous harm: *Criminal Code* (NT), s.26(3). ‘Grievous harm’ is defined to mean ‘any physical or mental injury of such a nature as to endanger life or to cause or be likely to cause permanent injury to health’: Code, s.1... In my opinion... there was no evidence that the injury caused by the proposed spearing must or even was likely to cause grievous bodily harm... However that may be, I wish to make it clear that it is one thing for a court to take into account the likelihood of future retribution to be visited upon the accused, whether lawful or unlawful; it is yet another for a court to actually facilitate the imposition of an unlawful punishment.⁵²

CONCLUSION

In this chapter, we have examined constitutional, statutory and case law relating to the recognition of customary law and principle within the context of sentencing decisions handed down by the criminal courts. It has been demonstrated that the rather scant provisions of the written law can raise ambiguities and complexities when the courts seek to give practical effect to them. A brief examination of other jurisdictions has demonstrated further issues that the jurisdictions of the South Pacific region may have to consider if this area of law and procedure is to develop in a coherent and principled fashion.

Increasingly in the region an interest is growing in the use of ‘restorative justice’ techniques in the field of criminal justice generally and, more particularly, to deal with juvenile crime. In the context of this debate tensions may arise between traditional dispute resolution principles and practice and ideas, such as constitutional rights, that are associated with introduced or adopted laws. Some of these tensions have been identified in this chapter, particularly in relation to crimes that occur within relationships that are characterised by an imbalance of power, whether perceived or actual.

If communities continue to feel dissatisfied with the ‘formal’ mechanisms for dealing with ‘rising crime’ (the police, prosecuting agencies and courts)⁵³ then we are likely to see increasing interest in a (re)turn to structures and processes that are more ‘traditional’ in nature. However, as the discussion in this chapter has indicated, a complete (re)acceptance of customary norms and practices can lead to ambiguities and concerns that are reflections of the impacts of colonial and post-colonial modernisation in the South Pacific region. At present, it is not possible to accurately gauge the thoughts and views of ‘the community’ on these issues. Do the people of the region want the issue of punishment for criminal offences to be determined

according to the principles of custom, the principles of introduced or adopted law or some combination of the two? This question has not been subject to rigorous research here or elsewhere. It is likely that in this socio-legal environment, as in most others, that the answer would be a version of 'it depends'.

The questions and concerns that have been raised here illustrate wider political issues that are associated with the continuing place of custom in the legal systems of the region, whether as part of the criminal law or any other part of the law. The tensions associated with the reconciliation of modern living and the role of customary law and practice in sub-national, national and regional identities are ones that will continue to be played out in this area as in many others in the years ahead.

ENDNOTES

- 1 This is taken to comprise the countries that are served by the University of the South Pacific: Cook Islands, Fiji Islands, Kiribati, Marshall Islands, Nauru, Niue, Samoa (formerly Western Samoa), Solomon Islands, Tokelau, Tonga and Vanuatu. In addition in this chapter I will also make reference to other jurisdictions in the region such as Papua New Guinea, Federated States of Micronesia (FSM) and American Samoa.
- 2 For example, see the *Penal Code* [Cap 17] (Fiji Islands) and the *Criminal Procedure Code* [Cap 21] (Fiji Islands). The Fiji legislation is largely indicative of the colonial legislation that has been continued in force in many of the countries of the region. Examples of post-colonial legislation include the *Electable Offences Decree* 1998 (Fiji Islands) and the *Probation of Offenders Act* [Cap 28] (Solomon Islands).
- 3 It should be borne in mind that within customary systems of law, the distinction between criminal and civil wrongs is not distinct.
- 4 See Brown, K. 1986. Criminal Law and Custom in Solomon Islands. *Queensland Institute of Technology Law Journal* 2: 133–139; Newton, T. 1998. Policing in the South Pacific Islands. *Police Journal* LXXI (4): 349–352; Newton, T. 2000. Policing in the South Pacific Region. *Occasional Paper No. 1* School of Law, USP.
- 5 Unreported, Supreme Court of the Republic of Vanuatu, CR No. 14 of 1998, 3rd August 1998 (http://www.vanuatu.usp.ac.fj/paclawmat/Vanuatu_cases/Volume_O-Q/PP_v_Tangaitom.html Accessed 19/9/02).
- 6 Here 'justice' is used to refer to the 'introduced' common law notion.
- 7 Findlay, M. 1997. Crime, community penalty and integration with legal formalism in the South Pacific. *Journal of Pacific Studies* 21: 145–160 at pp 148–9.
- 8 It is not my intention to explore at length the question of the relationship between customary law and 'introduced' law other than within the specific context of sentencing decisions. This issue has been explored elsewhere. See, for example, Corrin Care, J., Newton, T. & Paterson, D. 1999. *Introduction to South Pacific Law*. London: Cavendish, at chap. 3.
- 9 See s 5 as amended by the *Tokelau Amendment Act* 1976 (NZ). It is recognised that this Act is not a constitution. However, it contains many 'constitution type' provisions and thus resembles other constitutional documents that exist in the region.

- 10 See Art 77.
- 11 For further examples of this type of constitutional provision, see s 75 and para 2(1) of Schedule 3 of the *Constitution* (Solomon Islands).
- 12 See, also, Art 5(2)(g) of the *Constitution* (Vanuatu) which states that persons cannot be punished with a greater penalty than that which existed at the time the offence in question was committed and s 5(1)(b) of the *Constitution* (Solomon Islands) which is framed in terms of a custodial sentence being an exception to the right to personal liberty.
- 13 Para 3 of Schedule 1 of the *Laws of Tuvalu Act* 1987 (Tuvalu) is almost identical to this provision.
- 14 For more detail on the structure and jurisdiction of the courts of the region, see above, n 8 at chapter 11.
- 15 For more detail on the structure and functions of the island courts of Vanuatu see Jowitt, A. 2000. *Island Courts in Vanuatu. Occasional Paper No. 2* School of Law, USP.
- 16 Village assembly or council.
- 17 District courts were created under the *District Courts Act* 1969 (Samoa). However, in this piece of legislation, as elsewhere, the courts are sometimes referred to as magistrates' courts.
- 18 *Criminal Procedure Code* [Cap 136] (Vanuatu), ss 118 & 119.
- 19 *E.g. Criminal Procedure Code* [Cap 21] (Fiji Islands), s 163.
- 20 Newton, T. 2000. The differential impact of criminal law on males and females in Pacific Island jurisdictions. *Development Bulletin* 51: 13–16 at p 15.
- 21 It could also be as a result of pressure applied by the husband's family or the family of the wife. Such pressure may well include expressed or implied disapproval of the wife's complaints about the husband's behaviour.
- 22 Findlay, M. 1997. Above, n 7 at p 157.
- 23 See below for further discussion.
- 24 [1992] Tonga LR 7.
- 25 Unreported, Supreme Court of the Federated States of Micronesia (Appellate Division), FSM Appeal Case No. P4–1988, 1st November 1989. (http://www.vanuatu.usp.ac.fj/paclawmat/Micronesia_cases/Volume_G–N/Gilmete_v_FSM.html Accessed 19/9/02).
- 26 Unreported, High Court of Solomon Islands, Crim. Case No. 33, of 1996, 6th June 1997(sentencing) (http://www.vanuatu.usp.ac.fj/paclawmat/Solomon_Islands_cases/Volume_R–Z/R_v_Funifaka.html Accessed 19/9/02).
- 27 [1985/86] SILR 158.
- 28 *Per* Connolly J.A. at p 163.
- 29 The section numbers are revised in the 1996 consolidation of the legislation of Solomon Islands.
- 30 Above, n 27.
- 31 See Banks, C. 1998. Custom in the Courts: Criminal Law (Compensation) Act of Papua New Guinea. *British Journal of Criminology* 38(2): 299–316.
- 32 In 1977, the 'Supreme Court' fulfilled the role of today's High Court.

- 33 Unreported, Supreme Court of Fiji Islands (Appellate Jurisdiction), Criminal Appeal No 30 of 1977, 13th May 1977.
- 34 Unreported, Supreme Court of Fiji Islands (Appellate Division), Criminal appeal No. 30 of 1977, 13th May 1977.
- 35 Unreported, Supreme Court of the Republic of Vanuatu, CR No. 4 of 1998, 22nd March 1999 (http://www.vanuatu.usp.ac.fj/paclawmat/Vanuatu_cases/Volume_O-Q/PP_v_Thomas.html Accessed 19/9/02).
- 36 *Criminal Procedure Code* [Cap 136] (Vanuatu).
- 37 See also *Public Prosecutor v Lissy Kalip*, Unreported, Supreme Court of the Republic of Vanuatu, CR No. 54 of 1997, 6th October 1998 ([http://www.vanuatu.usp.ac.fj/paclawmat/Vanuatu_cases/Volume_O-Q/PP_v_Kalip%20\(Sentence\).html](http://www.vanuatu.usp.ac.fj/paclawmat/Vanuatu_cases/Volume_O-Q/PP_v_Kalip%20(Sentence).html) Accessed 19/9/02).
- 38 Section 2(1).
- 39 See ss 35–38 of the *Powers of Criminal Courts Act* 1973 (UK) as amended.
- 40 Kalinoe, L. and Twivey, T. 1996. Compensation Payment Outside Court By Perpetrators of Crime: *The State v. William Muma*. *Melanesian Law Journal* 24: 117–121 at p 121.
- 41 Banks, C. 1998. Above, n 31.
- 42 South African Law Commission. 1999. *The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders*. Discussion Paper 82.
- 43 South African Law Reform Commission. 1999. Above, n 42, at p 17. Emphasis added.
- 44 South African Law Reform Commission. 1999. Above, n 42, at p 31. Emphasis added.
- 45 (1995) 7 BCLR 861.
- 46 South African Law Reform Commission. 1999. Above, n 42, at p 31. Emphasis added.
- 47 Tomaino, T. 1999. Punishment practice. In Sarre, R. & Tomaino, J. (eds). *Exploring Criminal Justice: Contemporary Australian Themes*. Adelaide: South Australian Institute of Justice Studies Inc., at p 213. Emphasis added.
- 48 These states are Northern Territory, Queensland and Western Australia.
- 49 However, it should be remembered that it is not possible to make sweeping generalisations about Aboriginal customary law and practice. As in the South Pacific region, different communities have different customs.
- 50 (1992) 79 NTR 1.
- 51 *Per* Asche CJ.
- 52 *Per* Mildren J.
- 53 For examples of expressed dissatisfaction with the (in)activities of police forces in the region see Newton, T. 2000. Above, n 4.

Review Questions

1. Of all the differences between state law and customary law, which do you think are the most significant and why?
2. Do you think that customary law and introduced law can co-exist in a single legal system? Why/why not?
3. What policies or principles should the courts follow when incorporating customary issues (such as reconciliation and compensation) into sentencing decisions? Can these policies and principles be applied to other areas of law?
4. What would be the advantages and disadvantages of establishing ‘custom criminal courts’ in the countries of the region? Could such courts be usefully used in other areas of law?
5. Do you think that custom discriminates against women? If so, how? Do you think that introduced law can usefully be used to correct any discrimination?

Further readings

Allen, M. (ed) 1981. *Vanuatu: Politics, Economics and Ritual in Island Melanesia*. Sydney: Academic Press.

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Zorn, J.G. & Corrin Care, J. 2002. *Proving Customary Law in the Common Law Courts of the South Pacific*. London: British Institute of International and Comparative Law.