THE INCORPORATION OF CUSTOMARY LAW AND PRINCIPLE INTO SENTENCING DECISIONS IN THE SOUTH PACIFIC REGION

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Abstract

This paper considers the means by which principles of custom and customary law have been incorporated into the criminal process at the sentencing stage. Reference is made to constitutional and legislative provisions that create a framework for the recognition and application of such principles. Decisions of the courts of the region (many of which are unreported) are then examined to identify how, if at all, customary principles are recognised and applied in relation to sentencing decisions.

Fundamental questions and issues are highlighted, in particular:

- the possible clash between customary law and practice and fundamental human rights recognised in the constitutions of the region;
- the appropriateness of 'grafting' principles derived from custom or customary law onto a process derived from a Northern/Western system.

Reference is also made to the recognition and/or application of customary laws and principles in larger jurisdictions, namely: Australia, New Zealand & Papua New Guinea (PNG).

Introduction

Within the South Pacific region[1] it is the case that the intersection between customary law and 'introduced' law is perhaps more limited within the realm of criminal law and procedure than is the case in other legal spheres such as those relating to land and family law. A large part of this area of law was codified prior to or at the time of the ending of the colonial period[2] and these Codes form the background of the criminal legislation and rules of procedure throughout the region.[3]

That is not to say that custom and customary law is irrelevant within the criminal sphere, taken more broadly. There is a great deal of anecdotal evidence to indicate that within communities (most of which are rural but some of which may be urban) many disputes involving criminal acts[4] (such as thefts, assaults and some sexual offences) are resolved by reference to customary law as declared and/or interpreted by chiefs or other community elders. These processes are initiated, conducted and completed without there ever being recourse to the police 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 (Brown, 1986; Newton, 1998a; Newton, 1998b). However, once a matter is referred to the police and the issue is brought within the ambit of the 'introduced' criminal justice system, the relevant legislative provisions relating to offences, defences and procedure make very few references to customary concerns. A good example of the selective non-recognition of custom or customary law is provided by the Court of Appeal case of *R. v. Loumia.*[5] This case highlights the potential for

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[1] This is taken to comprise the countries that come within the aegis of the University of the South Pacific: Cook Islands, Fiji Islands, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga and Vanuatu. In addition, in this paper, reference will be made to decisions of the courts of other jurisdictions in the region, namely the Federated States of Micronesia (FSM) and American Samoa.

[2] For example, see the Penal Code (Cap 17) and the Criminal Procedure Code (Cap 21) of Fiji Islands.

[3] For more detail on sources of criminal law in the region, see Newton, 1999b.

[4] It should be noted that within systems of customary law, the distinction between criminal and civil wrongs is not distinct.

[5] [1985/86] SILR 158.

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 under s.197(c) of the Penal Code[6] which states, *inter alia*:

> … that in causing the death he 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 on the basis that it was inconsistent with constitutional protections of the life of the individual.[7] In addition, the Court made the following statement as to the relationship between the customary duty to 'pay back' a killing and s.197(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 Code 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.[8]

A similar approach has been adopted in the Supreme Court of Vanuatu. The case of *Public Prosecutor v. Iata Tangaitom*[9] concerned a case of indecent assault contrary to s.98(2) of the Penal Code Act.[10] 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 where it expresses that ignorance is no defense. Furthermore if there is anything in custom that is to be considered by the Court, then evidence be adduced (sic) in mitigation if not then customs is (sic) not, from the mouth of the lawyer, sufficient at all for any consideration.[11]

In relation to sentencing, the situation is markedly different and the impact of customary principles, most notably reconciliation and compensation, is much more visible at this stage of the criminal justice process. In order to consider the effects of this on the systems of criminal law and procedure more generally, it is necessary to step back and attempt to ascertain the place of customary law and principle in relation to other sources of law that exist in the countries of the region, namely constitutional provisions, legislation and decisions of the courts.[12]

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6 Cap 26.

7 *Per* Connolly J.A. at p.163.

8 *Ibid.*

9 Unreported, CR No. 14 of 1998, Supreme Court of Vanuatu, 3/8/98.

10 Cap 135.

11 Other interesting points may be noted although they cannot be explored in depth here. First is that a comment such as this raises significant jurisprudential questions as to whether or not 'custom' should be considered as something that is distinct from 'law' or even 'public law'. Second, is the implication that custom is something about which evidence should be adduced it is to be recognised by the courts. This is an approach that has been observed as prevalent among the judiciary of Papua New Guinea (Fraser, 1999).

12 It is not my intention to explore at length the somewhat vexed question of the relationship between customary law and introduced law other than within the specific context of sentencing decisions. This issue is explored elsewhere both in relation to criminal law (Newton, 1999b) and in relation to law in the South Pacific region more generally (Corrin Care, Newton & Paterson, 1999).

It is also at the sentencing stage that the potential ideological conflicts between the underlying rationales of customary social structures and the introduced legal system are highlighted:

> The potential for paradox where such a notion of justice[13] 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 nor 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. (Findlay, 1997: 148-9).

This paper examines the question of how, if at all, the law as enacted and subsequently applied by the courts attempts to reconcile such paradoxes.

Constitutional recognition of custom and customary law

There are many examples in the constitutional documents of the countries of the region of statements as to the significance of customary law. These statements are often framed in broad terms. There are two main types of this form of statement. The first is the sort 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 Niue Constitution of 1974 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.

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[14] and the 1965 Constitution of Cook Islands.[15]

The second type of constitutional statement that exists in relation to the significance of customary law id the type that makes express reference to the significance of custom, again in fairly broad terms. An example of this type of statement appears in the Preamble to the Constitution of Tuvalu:[16]

> 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.[17]

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[13] *I.e.* the introduced common law notion.

[14] See s.5 of the 1948 Act as amended by the Tokelau Amendment Act 1976. 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.

[15] See Art.77.

[16] Cap 1.

[17] This linking of what are essentially 'introduced' concepts, i.e. the 'Rule of Law' and 'Christian principles', with 'custom and tradition' appears elsewhere in Pacific island constitutions. The adoption of such an intriguing nexus raises many interesting and significant questions which, unfortunately, cannot be explored here.

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 nay particular case may permit, modify or adapt such rules as to take account of Tuvalu custom and tradition.

Similarly, in the Constitution of Solomon Islands, express reference is made to the significance of customary law. Section 75 reads:

> **75.**- (1) Parliament shall make provision for the application of laws, including customary laws.
>
> (2) In making provision under this section, Parliament shall have particular regard to the customs, values and aspirations of the people of Solomon Islands.

Schedule 3 of the Constitution is also significant in its effect on the applicability of customary law. Paragraph 2(1) reads:

> Subject to this paragraph, the principles and rules of the common law ad equity shall have effect as part of the law of Solomon Islands, save in so far as:
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> (a) they are inconsistent with the Constitution or any Act of Parliament;
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> (b) they are inapplicable to or inappropriate in the circumstances of Solomon Islands from time to time;
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> (c) in their application to any particular matter, they are inconsistent with customary law applying in respect of that matter.

There are also constitutional provisions throughout the region that make reference to issues of punishment, again in ver broad terms. An example is Art.10 of the Constitution of Tonga:

> No one shall be imprisoned or punished because of any offence he may have committed until he has been sentenced according to law before a Court having jurisdiction in the case.[18]

The most recent constitutional provision relating to the recognition of custom and customary law is contained in the Constitution Amendment Act 1997 of Fiji Islands which came into force in July of 1998. Section 186 of the Act reads as follows:

> (1) The Parliament must make provision for the application of customary laws and for dispute resolution in accordance with traditional Fijian processes.
>
> (2) In doing so, the Parliament must have regard to the customs, traditions, usages, values and aspirations of the Fijian and Rotuman people.

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 the s.186 of the Constitution of Fiji Islands which does make specific reference to the recognition of '*traditional Fijian processes*' within the context of '*dispute resolution*'. It is necessary to examine the legislation that is relevant within the sphere of criminal law and procedure in order to ascertain if and how the law envisages the role of custom at this stage of the criminal justice process.

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[18] See, also, Art. 5(2)(g) of the Constitution of 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 of Solomon Islands (which is framed in terms of a custodial sentence being an exception to the right to personal liberty).

L**egislative provisions relating to sentencing and customary principles**

In this section, I shall examine the scope of legislative provisions that are concerned with the relationship between sentencing decisions made by the courts and customary law and principle.

First, reference should be made to 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 decisions. One of the most comprehensive examples of this type of provision is para.3 of Schedule 1 of the Laws of Kiribati Act 1989:[19]

> 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 –
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> (a) ascertaining the existence or otherwise of a state of mind of a person; or
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> (b) deciding the reasonableness or otherwise of an act, default or omission by a person; or
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> *(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*
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> *(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.*

In addition to these general provisions, the different levels of the court hierarchies may be subject to particular legislative provisions that delineate the relationship between customary law and principle and sentencing decisions.

Lower subordinate courts

In some jurisdictions, the lower subordinate courts[20] are empowered by statute to take custom and customary law into account when dealing with criminal cases. An example of this type of provision is s.10 of the Island Courts Act 1983 of Vanuatu:[21]

> Subject to the provisions 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.[22]

Similarly, in Samoa the operation and jurisdiction of the *fono*[23] has been placed on a statutory footing by the operation of the Village *Fono* Act 1990. The incorporation or application of custom is central to the functions of the *fono* as envisaged by the Act, which has the effect of codifying the pre-existing systems of community administration. Of particular significance to this discussion are those sections pertaining to sentencing in relation to criminal cases.

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[19] Para.3 of Schedule 1 of the Laws of Tuvalu Act 1987 is almost identical to this provision.

[20] For more detail on the structure and jurisdiction of the courts of the region, see chapter 11 of Corrin Care, Newton & Paterson (1999).

[21] It should be noted that the Island Courts of Vanuatu are not, at present, operational. For more information on these courts, see Jowitt, 1999.

[22] Section 10 of the Local Courts Act, Cap 46 of 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*'.

[23] Village assembly or council.

Section 6 of the Act is concerned with '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 following powers 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.

Of particular significance is s.8 of the Act which gives an indication of how customary punishments or penalties are to be viewed by the courts 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 sentence the punishment by that Village Fono.

In Fiji Islands, the Fijian courts have been inactive since 1967, having previously been in operation since 1944 (Beattie, 1994: 161). However, their existence, jurisdiction and function was envisaged in the 1990 Constitution.[24] In its submissions to the recent Commission of Inquiry (Beattie, 1994) the Fijian Affairs Ministry presented a set of draft regulations for the Fijian court system. The jurisdiction of such courts was drafted with the intention that their use, *inter alia*: '*may facilitate reconciliation through the operation of customs and traditions*' (Beattie, 1994; 165). Further, in relation to sentencing the following was proposed:

> In addition to other provisions of the law, provision is to be made under the Extra Mural Punishment Regulations to accommodate Community based sentences, e.g. periodic detention, community service and community care and supervision.

However, the 'new' Constitution of Fiji Islands[25] which came into force in 1998, does not make any reference to the establishment of Fijian courts; the lowest level of court is the magistrates' court.

Subordinate and superior courts

In relation to issues of criminal procedure, including sentencing, the primary piece of legislation that governs the courts of a jurisdiction in the region is a criminal procedure Code or Act.[26] It is to these pieces of legislation that we must turn in order to identify the legislative framework within which the courts of the region make sentencing decisions. In particular, it is necessary to identify what these pieces legislation say, if anything, about the role the courts should adopt towards customary issues when making determinations of sentence.

The relevant provisions of the Vanuatu legislation[27] provide a good starting point for this consideration. Section 118 is concerned with the promotion of reconciliation. It reads as follows:

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[24] See s.122.
[25] Constitution Amendment Act 1997.
[26] *E.g.* Criminal Procedure Code, Cap. 136 of Vanuatu.
[27] Criminal Procedure Code, Cap 136, ss. 118 & 119.

> 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 and 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 this term 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. However, it is true to say within South Pacific jurisdictions, acts and behaviours (*e.g.* homosexuality, abortion and suicide) that are considered 'private' in Northern/Western legal systems continue to be the subject of 'public' criminal law provisions. On a procedural level, the legislative provisions do not make reference to any timescale for the envisaged reconciliation processes and neither is it stipulated 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 even concluded prior to the case coming before a court.

A further significant point regarding this provision is one that arises in relation to similar provisions in other jurisdictions of the region.[28] It is that this provision does not make any reference to offences that would qualify for settlement by way of reconciliation in terms of the nature of the offence and/or the sentence it attracts but which should be excluded from the ambit of such a provision by virtue of their social significance. Alternatively, if they are to be included they should be subject to careful consideration and supervision by the courts or another appropriate agency. The most obvious of this type of offence is that of assaults that are committed within the domestic arena. Whilst incidents of 'domestic violence' may qualify under the law as an example of the sort of offence that may be resolved by reconciliation, it may be that to follow such a route is tantamount to there being no meaningful sanction:

> …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, rather than a penalty. For instance, where a complainant withdraws her allegation of assault as a result of a reconciliation, this may be the consequence of threats from the husband[29] to throw the 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. (Findlay, 1997: 157).

[28] *E.g.* Fiji Islands' Criminal Procedure Code, Cap 21, s.163.

[29] 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.

Returning to the Vanuatu legislation, s.119 of the Criminal Procedure Code[30] is concerned specifically with sentencing issues:

> 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 problematic. The provision is framed in mandatory terms to the extent that the court must take customary '*compensation or reparation*' into account although there is no guidance as to what principles should guide the court in so doing. There is nothing in this provision that stipulates that the effect of having already fulfilled or undertaken to fulfil in the future some form of customary settlement should be to mitigate the sentence. However, as is evident from the judgments of the courts,[31] such settlements are raised and considered within the realm 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 this regard, it is significant to note Art. 49 of the Constitution:

> Parliament may provide for the manner of the ascertainment of custom, and may in particular provide for persons knowledgeable in custom to sit with the judges of the Supreme Court or the Court of Appeal and take part in its proceedings.

But there is no guidance contained in the Criminal Procedure Code[32] (or anywhere else) as to how custom should be ascertained in this context or what should be done in the event that the customs that are recognised and followed by the victim differ from those that are recognised and followed by the offender. Although the Constitution makes provision for assessors to sit with the Court to advise on matters of custom, this does not happen in practice.

Whilst it is useful to scrutinise legislative provisions in this way, in terms of social impact it is necessary to examine the sentencing decisions of the courts to ascertain whether these ambiguities or problems are recognised and considered. The next section of this paper attempts to do just that.

Sentencing decisions of the courts with reference to the incorporation of customary law and/or principles

It is reasonable to surmise that the decisions of subordinate and lower subordinate courts are more likely to refer to issues of custom than would be the case in the 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.* village courts or local courts), not least because in many cases the judgments of these courts are not 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. It is accepted that this provides only a partial picture of this area of criminal law and procedure. However, it does illustrate some significant issues and questions that are pertinent to this aspect of decision making throughout court structures at all levels and whether those structures are characterised as formal or informal.

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30 Cap 136.

31 See below for further discussion.

32 Cap 136.

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 the courts of 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, although the order in which they appear does not necessarily reflect their significance.

The first issue is that in most 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. Thus, it is predominantly the case that the issue of the customary settlement is raised within the context of a plea of mitigation. Further to this, it is evident from some 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*.[33] However, the situation may arise where a court passes sentence on a convicted person on the basis that a customary resolution will be undertaken at some point subsequent to the conclusion of the proceedings. This raises the problem of what should happen in the event that a promise 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*.[34] In this case the appellant had been initially sentenced to imprisonment (partly suspended) and to pay restitution. The restitution was not paid within the time that had been 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/her family was obliged in custom to do so. The Supreme Court of FSM held that:

> If the defendant is incapable himself 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 considered to have been mitigated by virtue of the accompanying order to pay restitution. It may be 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 a time as is considered reasonable for the resolution to have been achieved.

Second, it is evident that the courts are anxious to ensure that the scope of the effect of customary settlement is limited to mitigation. In the Solomon Islands case of *R. v Nelson Funifaika and others*,[35] Palmer J made the following statement as to the effect of payment of customary compensation by offenders and their relatives to victims and their communities:

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[33] [1992] Tonga LR 7.

[34] Unreported, FSM Appeal case No. P4-1988, Supreme Court of Federated States of Micronesia (Appellate Division), November 1st 1989.

[35] Unreported, Crim case No. 33 of 1996, High Court of Solomon Islands, June 6th 1997 (sentencing).

> The significance of compensation in custom however should not be over-emphasised. It does have its part of play in the community 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 (sic). 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.

Such an approach is demonstrated elsewhere in the reluctance of the courts to accept customary obligations or beliefs as defences to criminal offences (Newton, 1999b). Whilst the legislative provisions previously discussed do not preclude the taking into account of custom to lead the court to impose a heavier sentence, it is the case that where the courts are prepared to accept the significance of custom this results in the sentence being reduced. A similar trend has been identified in the neighbouring jurisdiction of Papua New Guinea (Banks, 1998).

Third, it is evident 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. This is illustrated in the contrasting decisions of the Supreme Court of Fiji in two cases dating from 1977. In *Erenale Cagilaba v. R.*[36] the court, on receiving evidence that the appellant was reconciled with the complainant, quashed the original sentence of 2 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.[37] However, the sum stolen was $7 and the victim and offender were cousins. In *Suliasi Nalanilawa v. R.*[38] the appellant had again been sentenced to imprisonment for two years. In this instance, the offence was that of assault with intent to commit rape. The court refused to reduce the sentence on the grounds that 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 discussed previously. However, it is evident that the exercise of discretion by the courts allows judges to differentiate between different situations in accordance with broader policy issues.

In other jurisdictions, such as Vanuatu, reference to customary settlement 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 seems to be 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 mitigating factor in cases of serious violence, especially where death results. In the case of *Public Prosecutor v. Peter Thomas*,[39] Marum J identified that the 'normal' penalty he would impose in such a case was one of nine years' imprisonment. He then made the following comment:

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[36] Unreported, Criminal Appeal No. 30 of 1977, Supreme Court of Fiji (Appellate Jurisdiction), May 13th 1977.
[37] Cap 17.
[38] Unreported, Criminal Appeal No. 60 of 1977, Supreme Court of Fiji (Appellate Jurisdiction), June 30th 1977.
[39] Unreported, CR No.4 of 1998, Supreme Court of Vanuatu, 22/3/99

> In addition to mitigating factors, there were some customary settlements between respectable people of Vanuatu and Solomon people and community living in Vanuatu, which took place at the Chief Nakamal. The ceremonial settlement was basically taken as a form of peace settlement in which they stated that peace within the Solomon people and people of Vanuatu over the death of the deceased, who is a Solomon Islander. A that time, Vera, on behalf of the Solomon community in Vila killed a pig of which Steward Ewo and Mr. Patterson Runikera made speeches and they gave two ring shells money to Chief Maria Sua Noel, President of National Council of Chief (sic.)
>
> In response the Vanuatu community performed their customs to the Solomon Islander with giving of 4 pigs, two heads kava, three red mats, twelve feather mats, 85 mats, 10 water taro, 2 bundle banana, 85 plain mats (sic.), 1 tamtam, 1 roll Solomon Shell money.
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> The Court under Section 119 of the CPC 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 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.[40]

This type of comment illustrates some of the essential ambiguities that are always present at the intersection of customary dispute resolution and the introduced law whether in the criminal sphere or some other. In Papua New Guinea where the law in this area has been codified in the Criminal Law (Compensation) Act 1991 (see below), the courts have also indicated that in some cases the imposition of a compensation order is not appropriate (Banks, 1998).

However as Banks has commented (1998;309) to adopt such an approach may result in the focus slipping away from a collective, group basis in which the concern is with restoring relationships between families, clans or tribes and instead becoming individualistic in the mould of the introduced legal system. Banks refers to the case of *State v. William Muma*[41] and makes the following criticism of the judge's comment that a compensation order would not be appropriate in a case of unlawful carnal knowledge on the basis that the victim who was aged between four and six years was not mature enough to understand or appreciate the effect of compensation:

> The judge seems to have followed an individualistic non-customary approach in this case by empahsizing the lack of benefit to the victim rather than the benefit gained by the victim's group (lain) which one might argue would also benefit her as a member of that group…In so far as the Act is intended to reflect the cultural practice of paying compensation, the judge's approach is unusual and seemingly at variance with the notion that compensation is not paid as a benefit to an individual but for the benefit of the group (1998;309).

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[40] See also *Public Prosecutor v. Lissy Kalip*, Unreported, CR No.54 of 1997, Supreme Court of Vanuatu, 6/10/98.
[41] [1995] PNGLR 16.

It is certainly the case that the judge's concern that an infant victim may not understand the imposing of a compensation order appears somewhat illogical in light of the fact that exactly the same lack of understanding would pertain to the imposition of a 'western' penalty such as a period of incarceration. And this, in fact, is probably a more pertinent indicator of why the courts may be reluctant to allow the payment of compensation to operate as a mitigating factor in such cases; as a means of voicing societal disapproval of such behaviour. Furthermore, the fact that the courts may decide to refrain from imposing a compensation order under an Act such as the one that operates in PNG does not preclude the affected members of the relevant community or communities undertaking to offer and accept customary compensation in any case. Whilst the two systems may acknowledge each other's presence at significant intersections, it would be naïve to expound the position that they are interdependent.

Some fundamental issues and questions

This examination of the incorporation of customary law and principles into sentencing decisions of the courts throws into relief some of the fundamental issues and questions that arise in relation to the place of customary law in the socio-legal environment of the South Pacific region. Whilst custom is generally not very significant in the sphere of criminal law (Newton, 1999b), it does have a more prominent status within the particular area of sentencing.

Perhaps the most obvious question that this consideration raises is twofold:

(a) is it possible to 'graft' customary law principles onto the 'introduced' legal system?

(b) ***should*** such a 'grafting' be attempted?

It is evident from the preceding discussion of sentencing decisions that such a 'grafting' can be done although it remains open to question as to how 'successful' this is.[42] The question of the appropriateness of such a 'grafting' process is perhaps more interesting. It is one that has been considered elsewhere, in relation to criminal justice in the South Pacific region more generally. Dinnen has considered two alternative critiques of criminal justice in relation to Papua New Guinea more particularly:

> Critiques of criminal justice in Papua New Guinea today can be broadly divided into those that accept the institutional character of the prevailing system and seek to alleviate particular shortcomings, on the one hand, and more fundamentalist critiques that question the social foundations of the system on the other. Revisionist critiques explain the low impact of criminal justice in terms of inadequate resources, training and coordination. Proposed remedies include the provision of better trained and equipped police, prosecutorial and correctional services. Fundamentalist critiques draw attention to the social inappropriateness and 'Western' orientation of the criminal justice system. From the latter perspective, an effective regulatory system needs to be more closely adapted to the social specificities of the Papua New Guinea environment. This position is most clearly expressed in the Clifford Report's advocacy of official recognition of informal (non-state) regulatory mechanisms. (1998; 255).

[42] Of course, the question of the 'success' of any form of sentencing is one that is vexed. However, that particular vexed question is not one that can be considered here.

It may be argued that the piecemeal approach to the incorporation of customary law and principle into sentencing decisions of the courts as identified in the USP region is an aspect of the 'revisionist' critique identified here. Although the introduction of legislation such as the Criminal Law (Compensation) Act 1991 of PNG appears to be a more 'fundamentalist' approach, it cannot ever fully be considered as such whilst it is concerned with the mitigation of 'Western' sentences rather than referring the whole of the sentencing procedure and associated processes to traditional forms of resolution. This brings with it significant problems that are discussed further below.

In Vanuatu the council of Chiefs (*malvatumauri*) proposed the establishment of 'customary courts' and, in 1995, approached the Attorney-General with a view to drafting a Bill to establish such a system. The proposal has not gone any further. However, from the draft document submitted to the Attorney-General, by the *malvatumauri* several points of interest can be ascertained. First, is that the chiefs envisaged that the '*chiefly system of justice*' should be fully integrated into the introduced court system:

> 6. As it [the 'chiefly system of justice] is a working system which is acknowledged by all, it is wrong to treat is as some type of alternative system of justice. It should be brought fully into the judicial system. (Malvatumauri, 1995; 1)

It is not clear why such integration should be considered necessary, particularly if it is '*acknowledged by all*'. It would seem to be the case that the integration of the chiefly system of justice, by way of a customary court, into the introduced court system will serve only to give chiefly justice some credibility in the eyes of those who do **not** acknowledge it already.

Further, some of the aspects of the proposed Customary Courts Act indicate that the concept of 'grafting' customary law and principles onto the introduced legal system is one that has become endemic. So, for example, the proposed legislation envisages that:

> Everyone charged with an offence shall be allowed a fair hearing and be allowed to consult and hire a lawyer if the offence charged is a serious one.

A provision such as this one highlights extremely well the ambiguities and complexities that are attendant on this type of exercise. If the *malvatumauri* had taken the approach that there was to be no place for lawyers within the customary courts' system, their proposed legislation would fail on the basis of being unconstitutional.[43] However, even the contemplation of introducing lawyers into a customary environment seems to have a diluting rather than a strengthening effect. Such a move would no doubt herald concern as to the competence of lawyers to contribute to customary proceedings and the need for special training in matters of customary law for lawyers and judges.[44] Such considerations bring a proposal such as this out of the 'fundamentalist' sphere and locate it very much in the 'revisionist' sphere.

These issues are not ones that are peculiar to the South Pacific region. In a recent discussion paper, the South African Law Commission has recommended, *inter alia*:

- Para-legals should be trained and appointed by the Ministry of Justice to assist traditional courts. These clerks should be trained in customary law and have a basic understanding of the Bill of Rights.
- Traditional courts should be regarded as courts of law and given the status and respect of courts of law. (South African Law Commission, 1999; viii).

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[43] Constitution of Vanuatu, Art. 5(2)(a). The Constitution also limits the right to legal representation to situations where a person has been charged with a 'serious offence' (Newton, 1999a)

[44] The proposal of the *malvatumauri* includes the need to train chiefs to be customary justices of the peace.

One of the most complicated aspects of incorporating customary law and principles into sentencing procedures, or any other area, is how conflicts between customary law and other sources of law should be resolved. The issues that arose in the case of *Loumia* discussed previously are somewhat clear cut in this regard. However, other considerations are more complex and ambiguous. A pertinent example is 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 couched in language 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* (South African Law Commission, 1999; 17. Emphasis added).

The draft document prepared by the *malvatumauri* of Vanuatu in 1995 makes no reference to this issue, although the proposed structure of the customary courts in Vanuatu does not expressly refer to the type of popular participation envisaged in the structure suggested by the South African Law Commission.

Other issues arise when considering the establishment of such a system of courts. Of particular significance in Melanesian countries such as Vanuatu and Solomon Islands is how conflicts of custom should be resolved. Vanuatu has more than 100 local languages in addition to 3 official languages. As a broad rule of thumb, for each local language, there is a set of customs and the term 'the custom of Vanuatu' is meaningless. Thus, customary courts may have to deal with the complexities of deciding which customs should apply where the victim recognises one set of customs and the offender recognises another. With increasing modernisation, it is not impossible to envisage that a situation may arise in which one party does not recognise customary laws or principles as having any part to play in the resolution of disputes whether in the criminal sphere or otherwise. It is possible to criticise the current provisions contained in the Criminal Procedure Code as inadequate in failing to address such issues. However, an alternative view is that such a broad formulation allows judges and magistrates to exercise their discretion in determining to what extent the payment of customary compensation should be taken into account when sentencing offenders in the criminal courts. As has already been mentioned, the Constitution of Vanuatu provides for assessors to sit with the Court to assist in determining matters of custom. It may be that activating this type of assistance to the courts would be somewhat easier to achieve than instigating a whole new court structure.

Underlying all of these issues, there is a basic and fundamental question that has yet to be meaningfully addressed: is it appropriate to merge customary law and principle with the Northern/Western legal structures that underpin the formal courts system? It is only if this question can be answered in the affirmative that the complexities of how such a merger should be achieved can be considered. It may be that to attempt such a merger is to undermine the legitimacy and credibility of both systems. A more rational approach may be to determine areas of dispute resolution (whether criminal or otherwise) that are determined only and wholly in custom and other areas that are determined only and wholly by 'courts of law'. Whether this is something that is easier or harder to achieve than a successful 'grafting' of one system on to another remains to be seen.

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