THE IMPACT OF CUSTOM ON CRIMINAL PROCEEDINGS IN PACIFIC ISLAND COUNTRIES

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In Pacific island nations, custom and customary laws still play a significant role, although the extent of this differs from country to country. In most of the jurisdictions, criminal law is governed principally by legislation in the form of penal codes and codes of criminal procedure. The question then arises whether there is a role for custom in the State legal system. This article briefly considers the place of custom in the context of the determining of liability and the establishing of defences. The focus is on the role of customary law in sentencing.

Dans les États insulaires du Pacifique, la coutume et le droit coutumier conservent un rôle important quand bien même leur fonction et leur portée varient d'un pays à l'autre. Par ailleurs on note que dans la plupart de ces juridictions, le droit pénal et la procédure pénale sont régis par des textes codifiés. Dans ce contexte et plus particulièrement en matière pénale, la question se pose alors de savoir quelle est la place et la fonction encore reconnues à la coutume dans les États insulaires du Pacifique. L'auteur porte son analyse sur les conséquences du droit coutumier notamment dans le processus de la détermination de la responsabilité pénale, l'établissement des moyens de défenses soulevés sur le fondement de la coutume et enfin sur son incidence sur la détermination du quantum de la peine prononcée.

I INTRODUCTION

In Pacific island nations, custom and customary laws[1] still play a significant role, although the extent of this differs from country to country. In most of the jurisdictions, criminal law is governed principally by legislation in the form of penal codes and codes of criminal procedure. The question then arises whether there is a

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1 There is no firm distinction between custom and customary laws and this article uses the terms interchangeably. See further Jennifer Corrin and Vergil Narokobi *Introduction to South Pacific Law* (5th ed, Intersentia: Cambridge, 2022) 34.

role for custom in the State legal system. There are three contexts in which custom may be relevant: in determining liability; in establishing a defence; and in deciding on bail or on sentencing.[2]

This article briefly considers the place of custom in the first two contexts but focusses on the role of customary law on sentencing. In particular, it looks at the place of customary reconciliation and compensation in the sentencing process.

In examining whether customary laws have a role in court proceedings, the threshold question is whether custom is recognised as a source of law in criminal matters. This article commences with a response to this question and briefly considers the resulting impact on questions of liability and defences. It then moves on to explain the legislative provisions governing the role of custom in sentencing. It also examines some of the case law on point including some of the decisions that highlight the tensions involved in attempting to accommodate both custom and human rights.

II RECOGNITION OF CUSTOM BY THE STATE

In the Cook Islands, Fiji, Niue and Tonga, custom is not expressly recognised either by the constitution or by legislation as having the status of law in criminal matters. This means that, in those five countries, custom is theoretically irrelevant when courts are considering questions of criminal liability or defences. In Tonga, custom is expressly excluded as a defence to theft of property belonging to a relative.[3] However, that is not to say that custom has no bearing in criminal cases arising in those four countries. It may be applied interstitially when the court is called on to interpret the law or to exercise a discretion. This may be particularly relevant in courts constituted by lay justices, knowledgeable in custom.[4] In particular, and as discussed later in this article, it may be a relevant factor when a court is exercising its discretion in sentencing.[5]

In Kiribati[6] and Tuvalu,[7] legislation provides that 'customary law shall have effect as part of the law of Kiribati, except to the extent that it is inconsistent with an enactment or an applied law'. This general provision is qualified by express

2 Customary law may also be relevant to a decision to prosecute.

3 Criminal Offences Act Cap 4.04, s 147.

4 See, eg Island Courts, which are constituted by three justices knowledgeable in custom: Island Courts Act Cap 167, s 3(1).

5 See, eg *R v Naburogo* [1981] FJSC 25; *R v Vuli* [1981] FJSC 70.

6 Laws of Kiribati Act 1989, s 5, Sch 1, para 3.

7 Laws of Tuvalu Act Cap 1.06, s 5, Sch 1, para 3.

provisions governing the extent of the 'determination and recognition of customary law'.[8] In both jurisdictions, a schedule to the relevant Act provides that:[9]

> [C]ustomary 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
> (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.

This paragraph may be summarised as providing that customary law shall be taken into account in a criminal case for the purpose of ascertaining the state of mind of a person; deciding the reasonableness or otherwise of an act or omission, or of an excuse; deciding whether to proceed to the conviction of a guilty person; or determining the penalty to be imposed on a guilty party; or in any other case where injustice would otherwise occur.[10]

This provision has been construed quite narrowly in Kiribati. The legislation was unsuccessfully raised in *Koru v Tabiteuea Meang Island Council,*[11] where the plaintiff sued for the return of cartons of beers which had been seized by the defendant on the basis of the Unimwane (Island Council's) decision banning the sale of alcohol. The defendant argued that the ban was enforceable as a customary law. The Laws of Kiribati Act defines ccustomary law as comprising 'the customs and usages, existing from time to time, of the natives of Kiribati.'[12] The High Court held that the banning order was not a customary law within this definition and that therefore the ban was not a valid law, and the seizure was illegal. In *Tatireta v*

8 Laws of Kiribati Act 1989 and Laws of Tuvalu Act Cap 1.06, Sch 1 heading.

9 Laws of Kiribati Act 1989, s 5, Sch 1, para 3; Laws of Tuvalu Act Cap 1.06, s 5, Sch 1, para 3.

10 An identical provision is contained in the Customs Recognition Act Cap 19, s 4, of Papua New Guinea, but it would seem that this has been the subject of implied repeal by the Underlying Law Act 2000 (PNG).

11 [2020] KIHC 30.

12 Laws of Tuvalu Act Cap 1.06, s 5(1).

Tong,[13] it was held that custom would 'not be allowed to be used as a cloak for electoral corruption'. In *Kaiuea v The Republic*[14] there was discussion as to whether a trespass and cutting down of a hammock was sufficient in custom to provoke a reasonable person to lose self-control, but no reference was made to the provisions of the Laws of Kiribati Act 1989.

In Nauru the legislation states that the:

> institutions, customs and usages of the Nauruans to the extent that they existed immediately before the commencement of this Act shall, save in so far as they may hereby or hereafter from time to time be expressly, or by necessary implication, abolished, altered or limited by any law enacted by Parliament, be accorded recognition by every Court and have full force and effect of law to regulate the following matters.

The matters that are then specified do not include criminal law but do include 'matters affecting Nauruans only'.[15] This could be interpreted as including criminal law, at least where the offender and any victim are Nauruan. Customary law is rarely raised before Nauruan courts, but there have been two occasions where it has been raised in defence to a criminal charge. In *Director of Public Prosecutions v Namaduk*,[16] the defendant was charged with manslaughter under the Criminal Code of Queensland,[17] which at that time was part of the adopted law of Nauru. It was contended that he had not acted to prevent the death of an elderly relative who was living in an outbuilding at his house. On the appeal against his acquittal it was argued, inter alia, that by Nauruan custom it would have been regarded as improper for the respondent, as a man, to go into the outbuilding occupied by the woman. This was accepted by the court and stated as one of the grounds on which the court dismissed the appeal.

That decision preceded the introduction of the Crimes Act in 2016 in Nauru, which replaced the provisions of the Criminal Code with more specific provisions regarding manslaughter and causing death by criminal negligence.[18] Since then there has only been one case considering the relevance of custom as a defence. In *Republic*

13 [2003] 5 LRC 665.

14 [1997] KICA 21.

15 Custom and Adopted Laws Act 1971, s 3(1) (Nauru).

16 [1969-82] Nauru LR (D) 74.

17 Section 285.

18 Sections 56 and 57.

of Nauru v Buraman,[19] the defendant was charged with common assault under the Crimes Act[20] after he disciplined an eight-year-old relative. In acquitting the accused, the court accepted that the degree of force was reasonable having regard to Nauruan custom and that the common law right of parental discipline was extended by Nauruan custom to certain members of the extended family.

In Samoa, the courts are given the power to recognise custom as law,[21] but this power does not appear to have been exercised in such a way as to create criminal liability outside the legislation, nor to provide defences to criminal offences.

In Solomon Islands, customary law is stated by the Constitution to have effect as part of State law. However, this recognition is limited to customary law that is consistent with the provisions of the Constitution and Acts of Parliament.[22] As criminal law is governed by the Penal Code,[23] any customary law that conflicts with the Code will be inapplicable. Further, the exception in favour of the Constitution prevents the application of any custom that contravenes any human right that it enshrines.[24] For example, a custom that demanded the intentional killing of a person to avenge the killing of a relative was held to be inapplicable to reduce a charge of murder to manslaughter as this conflicted with the right to life and personal liberty.[25]

In Vanuatu, the Constitution also expressly states that 'customary law shall continue to have effect as part of the law of the republic of Vanuatu'.[26] The Constitution does not expressly state that customary law is subject to the other provisions in the Constitution or to legislation, but this has been the approach taken by the courts. In fact, in one recent case custom, has been dismissed as a relevant part of the legal landscape. In *PP v Leo*[27] the defence argued that, as the alleged criminal actions had been taken by the customary court in accordance with

19 [2020] NRDC 19.

20 2016, s 78.

21 Constitution of Samoa, Art 111(1).

22 Constitution of Solomon Islands 1978, Sch 3, para 3. 1978.

23 Cap 26.

24 Constitution of Solomon Islands 1978, Chapter II.

25 *R v Loumia* [1984] SILR 51.

26 Constitution of Vanuatu, Art 95(3).

27 [2018] VUSC 75.

customary laws, they were not justiciable under Vanuatu's written laws. Wiltens J said:[28]

> Of the three bases on which the Court must make a determination, customary considerations are the least significant or compelling. The most compelling basis requires the Court to determine the matter in accordance with law; if no rules of law are in place, then the next basis of determination is substantial justice. If the matter is to be determined on the basis of natural justice, it is only then, if possible, that conformity with custom is to be considered.

More specifically, it has been held in Vanuatu that customary law cannot provide any defence to criminal liability imposed by legislation unless the Constitution or legislation provides otherwise.[29] One occasion where the legislation does expressly provide otherwise is in relation to Island Courts. These courts are expressly authorised by legislation to apply the customary law prevailing within the district of the court, unless inconsistent with any written law or contrary to justice, morality and good order.[30] In reality, however, the Island Courts do not have any significant opportunity to apply customary law because their jurisdiction does not appear to include any customary offences, but is confined to minor statutory criminal offences,[31] where customary law can only be used as a relevant factor in exercising discretion to assess the appropriate sentence.[32]

In countries other than Kiribati and Tuvalu, where the role of custom in criminal proceedings is expressly provided for, and the Cook Islands, Fiji, Niue, and Tonga, where it is not a source of State law, it is relevant to consider how far the criminal law amounts to a code. If the legislation operating within a country amounts to a code, then this would dictate against the application of a customary law by virtue of general recognition, even if such customary law was otherwise compliant with the constitution and legislation. In fact, whilst some countries have 'code' in the title of their criminal legislation, these are not codes in the civil law sense, but simply legislation that attempts to cover the field. In some countries, common law offences are ruled out by the legislation; in others they remain in place. An example of the former can be found in Samoa,[33] where liability for any criminal offence at common

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28 *PP v Leo* [2018] VUSC 75, [31].

29 *Public Prosecutor v Kota* (1993) 2 Van LR 661; *Public Prosecutor v Silas* (1993) 1 Van LR 659.

30 Island Courts Act Cap 167, s 10.

31 Island Courts Act Cap 167, ss 6 and 7; Island Court (Criminal Procedure) Rules 2005,

32 A similar position prevails under the Local Courts Act Cap 19 (Solomon Islands).

33 Crimes Act 2013, s 9 provides that no one shall be convicted of any offence at common law. However, common law defences are preserved: Crimes Act 2013, s 11.

law is expressly excluded. However, all defences available under the common law are preserved. The Crimes Act 2016 of Nauru,[34] excludes common law offences and makes no express provision for saving common law defences.[35] In Solomon Islands,[36] on the other hand, legislation expressly preserves liability for 'an offence against the common law', although in practice courts seem to regard the legislation as exhaustive of criminal liability and defences.[37] Further, it is provided that words in the legislation shall be presumed, unless expressly stated otherwise or inconsistent with the context, to have 'the meaning attaching to them in English criminal law'.[38] In Vanuatu, the general criminal legislation makes no express mention of the common law. In none of these countries is there any express provision evidencing an intention to enact a comprehensive code. Accordingly, there would not appear to be any direct barrier to the application of customary laws.

In summary, the legislation in Kiribati and Tuvalu and, it would seem, Nauru, allows customary law to play a part in criminal decisions on liability and defences. This would also appear to be the case in countries where customary laws are recognised as part of State law, provided that the law in question does not contravene the written law. In other countries of the region there is still scope for customary law to be taken into account interstitially. To date, customary laws have not played a significant role in this area, but this avenue remains open for exploration by defence counsel and the courts.

III THE RELEVANCE OF CUSTOM IN BAIL APPLICATIONS AND IN SENTENCING

Whilst the role of custom in determining criminal liability and as a defence to criminal liability has been fairly insignificant, even in countries where customary law is stated to be part of the State law, it may play a more important role in decisions relating to the grant of bail and on sentencing. Customary reconciliation to settle a disputes or make reparation for wrongdoing is common throughout the Pacific. The purpose of such processes is to restore peace and harmony within the community or,

34 Section 4.

35 See Crimes Act 2009 (Fiji), s 59(4), however, which provides that any 'exception, exemption excuse, qualification or justification need not accompany the description of the offence'.

36 Penal Code Cap 26, s 2.

37 See *Toritelia v R* [1987] SILR 4, 30; *R v Wong Chin Kwee* [1983] SILR 78, 81; and *Bartlett v R* [2011] SBCA 25, [13]-[15].

38 Penal Code Cap 26, s 3.

where the dispute or wrongdoing crosses customary boundaries, amongst different communities.[39] As stated in a report by the Vanuatu Law Reform Commission:[40]

> The term reconciliation in its simplest custom sense means restoring harmony and peace between the members of the community who have been affected by the wrongdoing or dispute.

The process differs from place to place but usually involves expressions of remorse, forgiveness, and ceremonies, which may be presided over by chiefs, traditional leaders or heads of families. Compensation is usually paid or exchanged in the form of gifts of custom goods and, increasingly, in cash.[41]

In granting bail in *Timo v R*,[42] Chief Justice Palmer of Solomon Islands emphasised the cultural significance of reconciliation ceremonies, stating that—

> reconciliation ceremonies are entrenched in our culture but also within the context of civil society … It looks to the future so that even after an accused had been punished by the courts under the law, it enables that accused to be able to re-settle back into a community after serving his/her time in prison.

In some countries, courts are specifically directed to consider any customary settlement or reconciliation at the sentencing stage.[43] In the absence of such provision, this may still be taken into account, as the culture and circumstances of the defendant are relevant to character and past history, which the court must consider in determining the appropriate penalty.[44]

An example of a provision empowering the court to promote reconciliation can be found in Fiji. The provision only applies to offences of assault, criminal trespass or damage to property and in cases of a personal or private nature which are not

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39 *Public Prosecutor v Tovor* [2011] VUSC 230 [6].

40 Vanuatu Law Commission, Penal Code: Sexual Offences & Customary Reconciliation – Legislative Review 2014, No 5/14 5.

41 Vanuatu Law Commission, Penal Code: Sexual Offences & Customary Reconciliation – Legislative Review 2014, No 5/14 5.

42 [2004] SBHC 44.

43 See, eg Penal Code Cap 135 (Vanuatu), s 38.

44 See, eg *R v Lati* [1982] FJSC 4.

aggravated in degree.[45] A similar provision empowers Magistrates' Courts in Kiribati, Solomon Islands and Tuvalu to—[46]

> promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any offence of a personal or private nature not amounting to felony and not aggravated in degree, on terms of payment of compensation or other terms approved by such Court, and may thereupon order the proceedings to be stayed or terminated.

A like provision applies in Samoa.[47] However, in both Fiji and Samoa, a number of safeguards are in place, which are discussed further below.

In Vanuatu, the provision applies more broadly, stating that—[48]

> Notwithstanding the provisions in this Act or any other Act, a court may in criminal proceedings, promote reconciliation and encourage and facilitate the settlement according to custom or otherwise, for an offence, on terms of payment of compensation or other terms approved by the court. … Nothing in this section limits the court's power to impose a penalty it deems appropriate for the relevant offence.

The court is also mandated to consider compensation or reparation when considering the appropriate penalty to impose on conviction of an offender, both under the Penal Code[49] and the Family Protection Act 2008.[50] Section 39 of the Penal Code states—

> When sentencing an offender, the court must, in assessing the 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 satisfied that it will not cause undue delay, postpone sentence for such purpose.

This provision replaced s 119 of the Criminal Procedure Code,[51] which was worded a little differently and mandated taking account of compensation, 'in

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45 Criminal Procedure Act 2009 (Fiji), s 154 (1). The provision does not mention 'custom' but is framed in more general terms.

46 Magistrates Court Ordinance Cap 52 (Kiribati), s 35(1); Magistrates Court Act Cap 20 (SI), s 35(1); Magistrates Court Act Cap 7.36 (Tuvalu), s 32(1).

47 Alternative Dispute Resolution Act 2007 (Samoa), s 15.

48 Penal Code Cap 135, s 38, as amended by the Penal Code (Amendment) Act 2006, s 1 and sch. See also Island Courts (Criminal Procedure) Rules 2005; R 5 (Van).

49 Penal Code Cap 135, s 39, as amended by the Penal Code (Amendment) Act 2006, s 1 and sch.

50 Family Protection Act 2008 (Vanuatu), s 10(5).

51 Cap 136. Sections 118 and 119 were repealed by the Criminal Procedure Code (Amendment) Act 2006.

assessing the quantum of penalty to be imposed'. This was interpreted by the Court of Appeal to mean that compensation was only relevant to the quantum of the sentence and not its nature.[52] More particularly, the court held that:

> It can influence the length of a sentence of imprisonment or the amount of a fine, but not its fundamental nature. In other words the Section cannot alter what is otherwise an appropriate immediate custodial sentence into a non-custodial one as occurred in this case.

Given that the court must now consider compensation 'in assessing the penalty to be imposed' 'rather than 'in assessing the quantum of penalty', it is arguable that the provision now mandates consideration of compensation or reparation when a court is exercising its discretion as to the nature of the punishment.

Whilst the aims of bringing peace within a local community appear to be a worthy objective, there are problems with taking customary reconciliation and compensation payments into account. These include the fact that it may be seen as paying one's way out. This was discussed in the Solomon Islands case of *R v Asuana*,[53] where the lower court had been influenced by a customary settlement to impose only a fine for unlawful wounding. The High Court substituted a sentence of two and a half years imprisonment, stating:

> The custom settlement was $750 and 2 red money which is clearly substantial compensation. It should always be remembered that compensation is an important means of restoring peace and harmony in the communities. Thus the courts should always give some credit for such payment and encourage it in an appropriate case. Thus, any custom compensation must be considered by the court in assessing sentence as a mitigating factor but it is limited in its value. The court must avoid attaching such weight to it that it appears to be a means of subsequently buying yourself out of trouble. The true value of such payments in terms of mitigation is that it may show genuine contrition and the scale of payment may give some indication of the degree of contrition. In this case there was little evidence of contrition. Indeed, the claim before the magistrate of self defence suggests the very opposite. I feel the learned magistrate attached too much importance to this payment. It should have reduced sentence but this was a nasty and serious attack with a dangerous weapon on a man to whom he was related in custom and to some extent whilst that man was walking away.

52 *Public Prosecutor v Gideon* [2002] VUCA 7. See contra *Public Prosecutor v Avock* [2003] VUSC 124.

53 [1990] SBHC 52.

Further, in Vanuatu the provision allowing the postponement of sentence in order for a customary arrangement to be finalised has caused significant delays.[54]

There is also the danger that reconciliation may not deliver justice for the victim.[55] Compensation payments are often made to a village chief, or a male relative of the victim.[56] In *Public Prosecutor v Avock,*[57] the reconciliation ceremonies that had occurred were taken into account by the court in the sentencing of three men for sexual assault of a young girl. In considering the appropriate discount the court commented that the victim's interest had been taken into account by the ceremonies which had taken place. However, it was also apparent from the judgment that those ceremonies involved the victim's family and not the victim herself. In Fiji, there is a provision to guard against this, and the court must be satisfied that it is in the interest of the victim to promote reconciliation and that there has been no pressure exerted.[58] Further, the process does not apply in cases of domestic violence.[59] In Samoa, the legislation goes further in safeguarding the victim; the court must be convinced not only that the process is in the victim's interest, but must also obtain the consent of the complainant to the promotion of reconciliation.[60] Unlike Fiji, the process may go ahead in domestic violence cases, but only if the court ensures that the victim does not submit to this due to exertion of pressure.[61] In Tuvalu, it is provided that payment of compensation or reparation to the complainant or the complainant's family is not a defence to a charge of domestic violence,[62] but this does not prevent such payment being taken into account in mitigation.

In Samoa, the legislation makes some attempt to govern the terms of reconciliation or conciliation, providing that the arrangement—[63]

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54 This is in spite of the fact that, in Vanuatu, the legislation provides that sentence should only be postponed if this will not cause undue delay: Penal Code Cap 135 (Vanuatu) s 39.

55 Kim Weinert "Mats and Restorative Justice in Vanuatu" (2019) 1 Journal of the Oxford Centre for Socio-Legal Studies 45.

56 Emily Christie, Hansdeep Singh and Jaspreet Singh, *An Analysis of Judicial Sentencing Practices in Sexual & Gender-Based Violence (SGBV) Cases in the Pacific Island Region*, International Center for Advocates Against Discrimination, 2016, [2.11].

57 [2003] VUSC 124.

58 Criminal Procedure Act 2009 (Fiji), s 154 (2).

59 Criminal Procedure Act 2009 (Fiji), s 154 (6).

60 Alternative Dispute Resolution Act 2007 (Samoa), s 15(1) and (3).

61 Alternative Dispute Resolution Act 2007 (Samoa), s 15(3).

62 Family Protection and Domestic Violence Act 2014 (Tuvalu), S 28(3).

63 Alternative Dispute Resolution Act 2007 (Samoa), s 15(2).

may be on terms of payment of compensation or on other terms approved by the court, which may involve:

(a) the giving of an apology in an appropriate manner; or

(b) the giving of a promise or undertaking not to re-offend, or to respect the rights and interests of any victim; or

(c) mandatory attendance at any counselling or other program aimed at rehabilitation; or

(d) a promise or undertaking to alter any habits or conduct, such as the consumption of alcohol or the use of drugs.

The Samoan legislation also requires a 'record of every aspect of the outcome of the proceedings … to be made on the court files and in the records of an accused person whose case has been dealt with under [these] procedures'.[64]

None of the statutes empowering the court to promote reconciliation or take compensation into account specifies the criteria for the assessment of the customary reconciliation or settlement.[65] The way in which these factors are considered is inconsistent, both within and between Pacific island countries.[66] Is the value of the compensation a relevant factor? The High Court of Solomon Islands in *R v Asuana*[67] obviously thought so, but this adds substance to the argument that this is a form of paying one's way out, a factor noted by the Chief Justice in that case. Is acceptance of any compensation by the victim, the community and the chiefs or traditional leaders a pivotal factor? In most instances, the courts seem to take this into account.[68] But, in this case, what safeguards exist outside Fiji and Samoa to prevent undue pressure on a victim or their families to accept the settlement?

There is also the associated question of the appropriate discount to be given to the base sentence. In Samoa, the choices for the court following reconciliation, are to stay or dismiss the proceedings.[69] In other countries, there are no guidelines

64 Alternative Dispute Resolution Act 2007 (Samoa), s 15(5).

65 See further Don Paterson and Anita Jowitt "More on Customary Reconciliation Ceremonies in Sentencing for Criminal Offences" (2008) 12(2) Journal of South Pacific Law.

66 Emily Christie, Hansdeep Singh and Jaspreet Singh, An Analysis of Judicial Sentencing Practices in Sexual & Gender-Based Violence (SGBV) Cases in the Pacific Island Region, International Center for Advocates Against Discrimination, 2016, [8.5].

67 Above, n 53.

68 See, eg Public Prosecutor v Gideon [2002] VUCA 7.

69 Alternative Dispute Resolution Act 2007 (Samoa), s 15(4).

provided and a survey of cases reveals that there is no consistent approach on this.[70] In the Vanuatu case of *Public Prosecutor v Naio,*[71] the court reduced the base sentence of 30 months for causing death by dangerous driving to 21 months, regarding the reconciliation ceremony as the most significant factor in terms of mitigation.[72] In Solomon Islands, *R v Rama*[73] a 25% discount was considered appropriate. In *R v Sare*[74] the evidence revealed that the victim's attitude to the reconciliation was ambivalent. The Magistrate stated that:

> There was a reconciliation settlement conducted between the accused person and his wife (victim) on 11th of July 2019, by which a compensation of $500 was given to the victim. … I acknowledge that the letter submitted per reconciliation had made it clear that his wife had decided to forgive him, however, she has left and did not return

Notwithstanding that, the court deducted three months from a base sentence of 20 months imprisonment.

IV COMPENSATION AND HUMAN RIGHTS

There have been a number of cases in the region where the form of the compensation involves a contravention of human rights. In particular, there have been instances where the compensation itself has constituted an assault on the right to equality and the right to freedom of movement, rights which are constitutionally guaranteed in all regional constitutions other than that of Niue. This situation was graphically illustrated in the case of *Re Willingal,*[75] which arose in Papua New Guinea. This case has been extensively traversed elsewhere,[76] but suffice it to say that as part of a customary settlement, compensation of 25 pigs, 20,000 kina and two women was agreed upon. One of those women applied to the court for the agreement to be set side. Injia J concluded that the custom of requesting women as part of 'head pay' was contrary to the guarantee of freedom in s 32 and the guarantee of equality

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70 See Don Paterson "Customary Reconciliation in Sentencing for Sexual Offences: A Review of Public Prosecutor v Ben and Others and Public Prosecutor v Tarilingi and Gamma" (2006) 10(1) Journal of South Pacific Law; Don Paterson and Anita Jowitt "More on Customary Reconciliation Ceremonies in Sentencing for Criminal Offences" (2008) 12(2) Journal of South Pacific Law.

71 [2018] VUSC 79.

72 Ibid [21].

73 [2019] SBMC 33.

74 [2020] SBMC 6.

75 [1997] PNGLR 119.

76 See, eg Jennifer Corrin Care "Negotiating the Constitutional Conundrum: Balancing Cultural Identity with Principles of Gender Equality in Postcolonial South Pacific Societies" (2006) 5 Indigenous Law Journal 52, 64.

in s 55 and therefore unconstitutional. One further comment is merited with regard to this case: the compensation payment in this case was for a death arising in the context of tribal warfare. This intergroup fighting was of such concern in Papua New Guinea that in 1980 the Papua New Guinea Law Reform Commission drafted the Customary Compensation Bill aimed 'at facilitating the concept of compensatory justice through the medium of payment of wealth'. The draft Bill attempted to prevent abuses of the institution of compensation by outlawing the payment of compensation for a death which is caused as a result of payback or revenge, tribal warfare or intergroup fighting.[77] This draft Bill does not appear to have progressed further.

An example which is more relevant to the current discussion arose in the context of sentencing in *Public Prosecutor v Nawia.*[78] On sentencing for reckless driving causing death, the Supreme Court of Vanuatu was asked to take into account a customary reconciliation ceremony that the defendant had performed to the chiefs and relatives of the deceased. The list of goods presented, set out in full in the judgment, was as follows:

(1) 15 stampa kava VT79,000
(2) 17 bundle banana VT4,400
(3) 60 bundle taro VT24,000
(4) 3 basket kumala VT1,300
(5) 3 buluk VT120,000
(6) 5 pigs VT62,000
(7) 15 mats VT11,500
(8) 6 baskets VT1,800
(9) 216 yard calico VT41,040
(10) 1 linen bedsheet VT510
(11) 5 x 18kg rice VT18,000
(12) 2 x 25kg bag salt VT6,000
(13) 1 young girl ...?
(14) Cash money VT2,000,000

On the basis of this customary reconciliation, which had been accepted by the chiefs and the relatives of the deceased, the court decided not to award further compensation. However, the court went on to express 'the gravest concern' about the

77 Papua New Guinea Law Reform Commission, Draft Customary Compensation Bill 1980 (PNG), cl 3(2), Customary Compensation, Report 11, 1980.

78 [2010] VUSC 52. See also, *Public Prosecutor v Kuao* [2010] VUSC 8.

inclusion of the young girl as part of the compensation. Fatiaki J, a judge from Fiji sitting in Vanuatu, considered that—

> this is somewhat like child trafficking. In this instance, a young girl was offered as part of the presentation of gifts in a custom ceremony of reconciliation. Even accepting that there was the loss of two lives in the accident and that the presentation of a young girl might be seen as a form of reparation and replacement for the loss, such a practice in this day and age objectifies and devalues the women of Tanna and denies them their fundamental rights to humane and equal treatment, to life, liberty and security of the person. Young girls must not be treated as mere objects or commodities that can be swapped or exchanged under any circumstances and for whatever reason, and a customary practice that treats them in that abject manner is inhuman and cannot be founded on Christian principles. Such practices should not be sanctioned by the law which exists for the protection of all.

It was ordered that the girl be returned forthwith to her parents.

More recently, in *Public Prosecutor v Nase,*[79] the defendant was convicted of murder of a young child. The judge adopted a starting point of 8 years imprisonment, but took into account a custom reconciliation ceremony, which included the following being presented to the victim's family by the defendant's father—[80]

- 1 buluk [a bullock] - VT 36,000
- 3 basket kumala @ VT 700 each - VT 2,100
- 3 basket manioc @ VT 700 each - VT 2,100
- 4 bags rice @ VT 3,350 each - VT 13, 400
- 1 kava stumb - VT 12,000
- 6 blankets @ VT1,000 each - VT 6,000
- 5 mats @ VT 2,000 each - VT 10,000
- 2 bundle calico (40 yards) @ VT 2,000 each - VT 4,000.

On the basis of the reconciliation, the court deducted one year and three months from the starting sentence.[81] In addition, the defendant's father was intending to perform a further reconciliation process in accordance with Tannese custom,

79 [2016] VUSC 84.

80 [9].

81 The sentence was also discounted by a third for an early guilty plea.

involving the exchange of one of his daughters for the life of the deceased.[82] The court did not go so far as to ban this proposal, but stated:[83]

> Dealing with your intention to perform the Tannese custom of swapping a young girl for the life of the deceased it needs to be recorded that this practice must be discouraged as it ignores the rights of children protected by the Convention on the rights of the Child which Vanuatu has ratified. Children are human beings not material goods that can be traded or exchanged. … The mother of the deceased has told your probation officer quite correctly that she is reluctant to accept the swap with another girl but would accept a plot of land in exchange. That is what you should consider.

As discussed above, one of the concerns in allowing reconciliation ceremonies and compensation payments to be taken into account on sentencing is that the interests of female victims may not be adequately represented. These cases bring into focus an additional context in which females may be adversely affected. Further, there is a paradox in that the settlement terms themselves involve a contravention of the law. It is evident from the cases discussed above that, whilst the courts in Papua New Guinea have stated clearly that such illegality will not be countenanced, the courts in Vanuatu have recently taken a more cautious approach.[84]

V THE FUTURE

Reconciliation and compensation play a significant role in resolution of customary disputes outside the State sphere. The legislative provisions outlined above allow room for those processes within the court system, as does the discretionary nature of sentencing. The customary and State processes share common goals of maintaining social order, deterrence and rehabilitation. Customary compensation also provides some reparation for the loss suffered due to the criminal act, something which State legislation in many countries also provides for.[85]

However, caution is required as there are tensions at play when the court promotes these processes. The endorsement of reconciliation and compensation payments becomes particularly problematic when these processes contravene State laws or

82 [10].

83 [12].

84 See also, *Public Prosecutor v Kuao* [2010] VUSC 8, where Lunabek CJ commented on this custom, but again did not outlaw it, saying, '[t]he time will come when the courts will say something on the customary societal rational of such a practice of swapping of female child and in particular in the light of the fundamental rights contained under Article 5 of the Constitution and the Convention on rights of the children (CRC) to which Vanuatu had ratified.'

85 See, eg Criminal Law Compensation Act 1991 (PNG).

ignore individual rights.[86] There is certainly an argument for limiting the scope of reconciliation and compensation to certain cases, as has been done in Fiji[87] Kiribati, Samoa, Solomon Islands and Tuvalu.[88] The appropriate ambit of any such restriction is itself a complex question and may depend not only on the nature of the offence but also the relationship of all the parties involved. This was a question raised in *State v Dusava,* a recent case in Papua New Guinea, where the practice of compensation as a mitigating factor was critically examined by the National Court.[89] Wawun-Kuvi, AJ commented:[90]

> I would say that it depends on the location of the offence and relationships of the parties to each other. Where the offence is in the village or where the parties are family members or neighbors, compensation may be appropriate. That is why the Supreme Court in the decisions I have cited pertaining to suspension saw it in their wisdom to say that sentencing is a community response to crime and the views of the community must be attained.

There is a particularly convincing argument for excluding reconciliation as a mitigating factor in sexual offence cases. The Pacific Islands Forum Secretariat has taken this view and has drafted model sexual offences legislation which excludes consideration of customary reconciliation in mitigation on sentencing for sexual offences.[91] Whilst consultations and recommendations from the Law Reform Commission in Vanuatu support such limitation, at least where the sexual offence is committed other than by a first time offender,[92] this has not been acted upon. In Fiji, the legislation shields domestic violence cases from the reconciliation provisions but falls short of applying this to all sexual offence cases.[93] In Tuvalu, reconciliation is

86 Pacific island constitutions, other than that of Niue, include Bills of Rights.

87 Criminal Procedure Act 2009 (Fiji), s 154 (1).

88 Criminal Procedure Act 2009 (Fiji), s 154 (1); Magistrates Court Ordinance Cap 52 (Kiribati), s 35(1). Alternative Dispute Resolution Act 2007 (Samoa), s 15(1); Magistrates Court Act Cap 20 (SI), s 35(1) Magistrates Court Act Cap 7.36 (Tuvalu), s 32(1).

89 [2021] PGNC 281.

90 [2021] PGNC 281 [47].

91 Pacific Islands Forum Secretariat, *Sex Offences Model Provisions*, November 2005, cl 85.

92 Vanuatu Law Reform Commission, Penal Code: Sexual Offences and Customary Reconciliation – Legislative Review No05/14, 2014, 9 and 16. See also New Zealand Law Reform Commission, Converging Currents: Custom and Human Rights in the Pacific Study Paper 17 (2006) [12.62], which does not support total exclusion, but recommends caution.

93 Criminal Procedure Act 2009 (Fiji), s 154 (6).

excluded only from constituting a defence in domestic violence cases, but not from consideration as a mitigation factor at the sentencing stage.[94]

Currently, apart from provision as to the terms of reconciliation and their recording in Samoa,[95] there is little guidance on the process of assessing settlements or the applicable discount. The legislation in Fiji and Samoa includes express safeguards against pressure on victims to settlements that are not in their interests,[96] which might be used as part of a model in other jurisdictions. The legislation in both countries also allows for regulations to be made in relation to any aspect of procedures aimed at reconciliation, including the prescription of guidelines to be applied by the court in such proceedings.[97] No such regulations have been made, but, again, this might be a step for all Pacific island jurisdictions to consider. This is not to suggest that the customary settlement processes themselves should be subject to regulation by the State, but only the processes undertaken by the court.

In *State v Dusava*, referred to above, the court went on to say—[98]

> I should add here that whilst it is the Melanesian way to pay compensation, an individual cannot appreciate the consequences of his or her actions when the community and the family continue to meet the burden of paying for the wrong. The term Melanesian way is so easily thrown around these days without any concept of what it truly entails. It appears to be associated more with compensation for criminal wrongdoing rather than the embodiment of Melanesian patriotism. …
>
> The question, I ask myself is, in a melting pot of cultures influenced by modernization, is Papua New Guinea today, still the same as Narokobi's[99] Papua New Guinea in the 1980s. Do we the next generation of Papua New Guinea truly grasp the concept of what the Melanesian way is.

94 Family Protection and Domestic Violence Act 2014 (Tuvalu), S 28(3).

95 Alternative Dispute Resolution Act 2007 (Samoa), s 15(2) and (5).

96 Criminal Procedure Act 2009 (Fiji), s 154 (2).

97 Criminal Procedure Act 2009 (Fiji), s 154 (7); Alternative Dispute Resolution Act 2007 (Samoa), s 15(7).

98 [2021] PGNC 281 [44] and [47].

99 The late Bernard Narokobi was the author of *The Melanesian Way* (Institute of Papua New Guinea Studies: Boroko, 1980) which brings together a series of articles first published in the *Post Courier*, in which the author sets out various ideological principles which contributed to the development of a distinct post-colonial jurisprudence in Papua New Guinea.

These considerations can be adapted to and appear relevant for other Pacific island countries. An extensive review of law and practice in both the customary and State spheres is long overdue.