

CONVERGENCE OR CLASH? THE RECOGNITION OF CUSTOMARY LAW AND PRACTICE IN SENTENCING DECISIONS OF THE COURTS OF THE PACIFIC ISLAND REGION

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[Jurisprudential debate in the Pacific Island region is often focused on what the relationship between introduced/adopted law and customary law and practice was, is and should be. Here, the debate is narrowed to a particular area of law and procedure: that of sentencing in the criminal courts. Examination is made of the constitutional and legislative framework within which the courts operate in this sphere and sentencing decisions of the courts are reviewed. From this material a number of fundamental and possibly contentious issues are identified. Ever present is the awareness that for many people in Pacific island societies, the written law and its associated 'formal' processes are of little if any significance. Reference to the laws and approaches of other jurisdictions indicates that such issues are not particular to the jurisdictions of the Pacific Island region, although it remains open to question whether any one approach can ultimately resolve the essential tensions that lie at the heart of this type of debate.]

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I INTRODUCTION

Within the Pacific Island region¹ the intersection between ‘customary’ law and ‘introduced’ law is more limited in the realms of criminal law and procedure than in other areas of law, such as family law or land law. It is an area that has been extensively codified, whether during the colonial period or thereafter.² A reading of these codes indicates that references to issues of customary law and principle occur rarely, and are very limited in nature. Therefore a broader view must be adopted in order to get a more accurate picture of the place of customary law and practice³ in relation to issues of criminal law and procedure.

Within many Pacific Island communities there is evidence that people who feel they have been ‘wronged’ by another person or group of persons seek the resolution of the dispute by reference to customary law and practice, as declared and/or interpreted by chiefs or other community elders.⁴ The term ‘wronged’ is employed deliberately to draw attention to the fact that in customary law and practice, the distinction between civil and criminal wrongs is unclear. These processes are commenced, conducted and concluded without any recourse to the police or the formal court system, although it may be the case that recourse is made to the quasi-formal courts, such as the Island Courts in Vanuatu or the Local Courts in Solomon Islands.⁵ There is also evidence of some communities refusing to recognise the authority of the police or other agents of the criminal justice system.⁶ Yet, once a matter is reported to the police and the issue is brought within the scope of the ‘introduced’ (or ‘adopted’) criminal justice system, the relevant statutory provisions relating to offences, defences and procedure make very few references to customary concerns.

In several areas the courts have taken an exclusionary approach to the introduction of issues of custom prior to the sentencing stages of criminal matters. For example, one may refer to the case of *Public Prosecutor v Iata*

¹ This is taken to comprise the countries that are served by the University of the South Pacific: Cook Islands, Fiji Islands, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga and Vanuatu. In addition, this article will also make reference to other jurisdictions in the region such as Papua New Guinea and the Federated States of Micronesia.

² See Tess Newton, ‘Sources of Criminal Law in the South Pacific Region’ (Occasional Paper No 6, University of the South Pacific, School of Law, 2000).

³ The term ‘customary law and practice’ will be used in this article to cover all aspects of ‘custom’, whether or not they are acknowledged to be ‘customary law’. The question of how one should distinguish between ‘custom’ and ‘customary law’ is not easily resolved. Debate exists as to whether customs that are observed, but to which no penalty is attached, should be considered to be law in the same way as those customs which have penalties for breaches.

⁴ However, this evidence is largely undocumented.

⁵ See David Weisbrot, ‘Custom, Pluralism and Realism in Vanuatu: Legal Development and the Role of Customary Law’ (1989) 13 *Pacific Studies* 65.

⁶ See Kenneth Brown, ‘Criminal Law and Custom in the Solomon Islands’ (1986) 2 *Queensland Institute of Technology Law Journal* 133; Tess Newton, ‘Policing in the South Pacific Islands’ (1998) 71 *Police Journal* 349; Tess Newton, ‘Policing in the South Pacific Region’ (Occasional Paper No 1, University of the South Pacific, School of Law, 2000).

Tangaitom.⁷ This case concerned a charge of indecent assault contrary to s 98(2) of the *Penal Code* [Cap 135] (Vanuatu) in which there was some dispute as to the age of the victim. Upon determining the victim's age as 13, Marum J commented:

In mitigation, the counsel submitted that in custom, this [ie sexual relationships with female members of the family] 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.⁸

Several interesting points may be noted from this judgment. First, 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. The continuing dichotomisation of custom (including customary law) and law is a hangover from the colonial period which has yet to be fully resolved by the independent states of the Pacific region. Whilst the aspiration to develop an integrated jurisprudence was recognised in several of the constitutional documents that were enacted or adopted at the time of independence,⁹ the necessary mechanisms are yet to be established and entrenched in most, if not all, cases. Several factors can be identified that have led to this situation. They include: socio-political preoccupations with issues that are more directly concerned with economic development; a lack of political will to introduce significant legal change; an absence of reform-based initiatives on the part of lawyers; and a perceived ambivalence or reluctance of judges to be creative in bringing about such ends.¹⁰ The continuing contributions of former colonial powers and their somewhat mixed results should not be understated in this regard. Until recently, expatriates from countries such as Australia, New Zealand and the United Kingdom occupied many judicial positions in the superior courts of the region.¹¹ In addition, until relatively recently Pacific Island lawyers studied outside the region, sometimes in Papua New Guinea ('PNG'), but often in Australia and New Zealand. Even today, when many judicial positions are occupied by indigenous persons, and Pacific lawyers can study their own laws and legal systems at the University of the South Pacific, there continues to be

⁷ [1998] (Unreported, Supreme Court of Vanuatu, Marum J, 3 August 1998) <http://www.vanuatu.usp.ac.fj/paclawmat/Vanuatu_cases/Volume_O-Q/PP_v_Tangaitom.html> at 1 May 2001 (copy on file with author).

⁸ *Ibid*.

⁹ *The Constitution of the Solomon Islands 1978* sch 3; *Constitution of the Republic of Vanuatu 1980* art 51; *The Constitution of the Independent State of Western Samoa 1920* art 111.

¹⁰ Johnathan Aleck, 'Beyond Recognition: Contemporary Jurisprudence in the Pacific Islands and the Common Law Tradition' (1991) 7 *Queensland University of Technology Law Journal* 137; David Weisbrot, 'Papua New Guinea's Indigenous Jurisprudence and the Legacy of Colonialism' (1988) 10 *University of Hawaii Law Review* 1.

¹¹ Indeed, this continues to be the case in several countries, including Tonga, Vanuatu and the Fiji Islands.

reliance on technical legal assistance provided almost entirely by countries such as the United Kingdom, Australia and New Zealand.

Further, it is implied in this statement that customary law and practice is something about which evidence should be adduced if it is to be recognised by the courts. This is an approach that has been observed to be prevalent among the judiciary of PNG.¹² Indeed, it is recognised as the general approach taken by the courts of the region towards the introduction of matters of customary law and practice as evidence in court proceedings, whether criminal or civil in nature. This approach is exemplified in the case of *Sasango v Beliga*¹³ in which the magistrate noted, 'I can only give a decision on the basis of customary law if that law is proved by evidence of the relevant custom. Such evidence should be impartial and unbiased.'¹⁴

However, an alternative argument is that those customs that have the status of customary law are a source of law and should be recognised by the courts as such, without evidence having to be adduced. This method of introducing customary law matters into the courts has been expressly provided for in the legislation of Tuvalu¹⁵ and Kiribati.¹⁶

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

The potential for paradox where such a notion of justice [the introduced or adopted common law notion] comes up against [a] customary penalty with very keen communal and collective investments is clear. For instance, with traditional community shaming the whole village is co-opted into the process and the offender's family may take collective responsibility not only for the harm but also for his 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.¹⁷

This article examines the question of how, if at all, the law as enacted, and subsequently applied by the Pacific Island courts, attempts to reconcile these issues and paradoxes. There are three parts to this article. The first is an

¹² Ian Fraser, 'Legal Theory in Melanesia: Pluralism? Dualism? Pluralism Long Dualism' (1999) 3 *Journal of South Pacific Law* 3 <http://www.vanuatu.usp.ac.fj/journal_splaw/articles/Fraser1.htm> at 1 May 2000 (copy on file with author).

¹³ [1987] Solomon Islands Law Reports 103.

¹⁴ *Ibid* 106.

¹⁵ *Laws of Tuvalu Act 1987* (Tuvalu) sch 1, para 1. See also Jennifer Corrin Care, Tess Newton and Don Paterson, *Introduction to South Pacific Law* (1999) 37–8.

¹⁶ *Laws of Kiribati Act 1989* (Kiribati) sch 1, para 1. See also Corrin Care, Newton and Paterson, above n 15.

¹⁷ Mark Findlay, 'Crime, Community Penalty and Integration with Legal Formalism in the South Pacific' (1997) *Journal of Pacific Studies* 145, 148–9.

examination of the written law to identify what provisions are made for the recognition of customary law in relation to sentencing decisions of the courts. It is not my intention to explore the relationship between customary law and practice and introduced law, other than within the specific context of sentencing decisions; this issue has been explored elsewhere.¹⁸ The second part of the article is a consideration of some of the sentencing decisions of the courts of the region. The third section is a brief overview of law, policy and procedure in other jurisdictions to provide some points of comparison with the situation in the Pacific Island region.

II CONSTITUTIONAL AND LEGISLATIVE PROVISIONS CONCERNED WITH PUNISHMENT, SENTENCING AND CUSTOM

There are many examples in Pacific constitutional documents of statements as to the significance of customary law. These statements are often framed in very broad terms and can be divided into two main types.

The first kind of statement is one 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 and practice. An example of such a statement is s 71 of the *Niue Constitution Act 1974* (which should be read in conjunction with s 82) where 'existing law' means 'any law in force in Niue immediately before Constitution Day; and includes any enactment passed or made before Constitution Day and coming into force on or after Constitution Day.'

However, the *Niue Constitution Act 1974* makes no specific reference to the significance of customary law and practice other than in relation to land issues.¹⁹ Similar statements appear in s 5 of the *Tokelau Act 1948* (NZ)²⁰ and art 77 of the *Constitution of the Cook Islands 1965*.

The second form of constitutional statement found in the region that relates to the significance of customary law and practice is one that makes express reference to the status of 'custom', again in fairly broad terms. An example of this type of provision appears in the *Constitution of Tuvalu* [Cap 1] (Tuvalu) preamble: '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.'²¹

Such a linking of what are essentially 'introduced' concepts, such as the 'Rule of Law' and 'Christian principles' with 'custom and tradition', appears

¹⁸ See Corrin Care, Newton and Paterson, above n 15, ch 3.

¹⁹ *Niue Constitution Act 1974* art 71.

²⁰ As amended by the *Tokelau Amendment Act 1976* (NZ). It is recognised that this Act is not a constitution. However, it contains many 'constitution type' provisions and thus resembles other constitutional documents that exist in the region.

²¹ *Constitution of Tuvalu* [Cap 1] (Tuvalu) preamble.

elsewhere in Pacific Island constitutions.²² As is the case in Tuvalu, it is not always made clear whether such provisions are concerned with the relatively narrow concept of customary law or something that is wider in nature. The status of custom in Tuvalu is reiterated in s 85 of the *Constitution of Tuvalu* [Cap 1] (Tuvalu), which confers jurisdiction upon the courts

provided that in the exercise of their jurisdiction the courts shall, to the extent that circumstances and the justice of any particular case may permit, modify or adapt such rules as to take account of Tuvalu custom and tradition.²³

In addition, it is possible to identify constitutional provisions that make reference to issues of punishment. Again, these provisions tend to be framed in very broad terms rather than being detailed as to how the courts should sentence criminal offenders. An example of such a provision is clause 10 of the *Constitution of Tonga 1988* which states that '[n]o one shall be imprisoned because of any offence he may have committed until he has been sentenced according to law before a Court having jurisdiction in the case.'²⁴

It is evident that these provisions, and the constitutional documents of the region more generally, do not make specific reference to the role that customary law should play in relation to sentencing decisions made by the criminal courts. A partial exception is s 186 of the *Constitution Amendment Act 1997* (Fiji Islands), which does make specific reference to the recognition of 'traditional Fijian processes within the context of dispute resolution.'²⁵ It is therefore necessary to examine the legislation that is relevant within the sphere of criminal law and procedure, to ascertain if and how the law envisages the role of customary law and principle at this stage of the criminal justice process.

Here I shall examine some of the legislative provisions that concern the relationship between sentencing decisions of the courts and customary law and principle. More particularly, I will be looking at how the relevant legislation seeks to incorporate issues of reconciliation and compensation into sentencing decisions.

It is possible to identify provisions that give guidance as to the applicability of customary law and practice within the whole of the criminal sphere, including the specific issue of sentencing in the criminal courts. One of the most comprehensive examples of such a provision can be found in the *Laws of Kiribati Act 1989* (Kiribati):

²² *The Constitution of Nauru 1965* preamble; *Constitution of the Republic of Vanuatu 1980* ch 1; *The Constitution of Solomon Islands 1978* preamble.

²³ For a further example of this type of constitutional provision, see *The Constitution of Solomon Islands 1978* sch 3, s 75(2)(1).

²⁴ See also *Constitution of the Republic of Vanuatu 1980* art 5(2)(g) which states that persons cannot be punished with a greater penalty than that which existed at the time the offence in question was committed. See also *The Constitution of Solomon Islands 1978* s 5(1)(b) which is framed in terms of a custodial sentence being an exception to the right to personal liberty.

²⁵ At the time of writing, the Fiji Islands *Constitution Amendment Act 1997* has, after a period of uncertainty, been ruled to still be in force: *Prasad v Republic of Fiji* [2001] New Zealand Administrative Reports 21.

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

- a) ascertaining the existence or otherwise of a state of mind of a person; or
- b) deciding the reasonableness or otherwise of an act, default or omission by a person; or
- c) deciding the reasonableness or otherwise of an excuse; or
- d) deciding, in accordance with any other enactment, whether to proceed to the conviction of a guilty party; or
- e) *determining the penalty (if any) to be imposed on a guilty party;*
or where the court thinks that by not taking the customary law into account injustice will or may be done to a person.²⁶

A provision of this type has the potential to be very wide ranging in scope and effect. However, it is important to bear in mind that the application of customary law in any or all of the identified circumstances is not mandated by this provision as indicated by the use of the word ‘may’ in the first line of the paragraph. Perhaps, more significantly, a provision of this type represents an abstraction of customary law. It is in an attempt to meld it with the legislative form without any real appreciation of the practical difficulties that might arise in seeking to apply it. Reference has already been made to the problematic issue of adducing evidence of custom in such a circumstance. Further problems may arise if customary concerns appear to be in conflict with other concerns, particularly where such concerns form part of the spirit of the law rather than the letter of the law. What is considered reasonable by the articulators of customary law and practice (chiefs or other community elders) may not be considered reasonable elsewhere in the community, including in the courts.

The jurisdiction of Vanuatu recently provided a striking illustration of just such a tension. The chiefs of Paama island have recently decreed that women from that island who live in Port Vila (the capital of Vanuatu) are not to wear shorts or long trousers because these clothes are too revealing, and lead men to thoughts of rape and adultery.²⁷ It is very unlikely that this pronouncement will be challenged in the courts, although the Vanuatu National Council of Women has described it as ‘discriminatory’.²⁸

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

²⁶ *Laws of Kiribati Act 1989* (Kiribati) sch 1, para 3 (emphasis added); this was adapted from the *Customs Recognition Act 1962* (PNG) s 4. The *Laws of Tuvalu Act 1987* (Tuvalu) sch 1, para 3 is almost identical to this provision.

²⁷ ‘Chief Ban on Trousers Backfires’, *Vanuatu Trading Post* (Port Vila, Vanuatu), 21 March 2001, 5.

²⁸ *Ibid.*

A Lower Subordinate Courts

In some jurisdictions, the lower subordinate courts are empowered and/or required by statute to take customary law and practice into account when dealing with criminal cases. For example, the *Island Courts Act* [Cap 167] (Vanuatu) s 10 reads:

Subject to the provision of this Act an island court shall administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order.²⁹

Section 16 of the *Local Courts Act* [Cap 19] (Solomon Islands) bears a close resemblance to this provision. However, the only limiting factor on the application of custom by the local court is that ‘the same has not been modified by any Act’.³⁰

Similarly, in Samoa the operation and jurisdiction of the *Fono*³¹ has been given statutory force by the *Village Fono Act 1990* (Samoa). The incorporation and application of custom is central to the functions of the *Fono* as envisaged by the Act, which has the effect of placing on a legislative footing pre-existing systems of community administration and governance. Section 6 pertains to ‘punishments’ and grants the *Fono* the power to ‘impose punishment in accordance with the custom and usage of its village’, and deems that such power includes the imposing of the following forms of punishment:

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

It is also interesting to note that the *Village Fono Act 1990* (Samoa) indicates how these customary punishments or penalties are to be viewed by other courts (such as the District 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 the sentence the punishment by that Village Fono.³²

In the jurisdiction of Fiji Islands, the formal Fijian Courts have been inactive since 1967, having previously been in operation from 1944 to 1967.³³ However, their existence, jurisdiction and function was envisaged by the *Constitution Act*

²⁹ The island courts of Vanuatu have a particular structure and specialised functions: see further Anita Jowitt, ‘Island Courts in Vanuatu’ (Occasional Paper No 2, University of the South Pacific, School of Law, 2000).

³⁰ *Local Courts Act* [Cap 19] (Solomon Islands) s 16.

³¹ A *Fono* is a village assembly or council.

³² *Village Fono Act 1990* (Samoa) s 8.

³³ See Sir David Beattie, *Commission of Inquiry on the Courts* (1998) 161.

1990 (Fiji Islands).³⁴ In its submissions to a recent Commission of Inquiry, the Fijian Affairs Ministry presented a set of draft regulations for the formal Fijian Court system.³⁵ The jurisdiction of such courts was drafted in such a way that, inter alia, the use of the courts 'may facilitate reconciliation through the operation of customs and traditions'.³⁶ However, the *Constitution Amendment Act 1997* (Fiji Islands), which brought into force the 'new' constitution of Fiji Islands in 1998, does not make any reference to the establishment of a formal system of Courts: the lowest level of court (within the 'formal' justice system) is the Magistrates' Court.

B *Subordinate and Superior Courts*

In the field of criminal procedure, including sentencing, the primary piece of legislation that governs the courts of a jurisdiction is a criminal procedure code or act. It is to these pieces of legislation that one must turn in order to identify the statutory framework within which the courts of the Pacific Island region make decisions as to sentencing in criminal cases. In particular, it is necessary to identify what these laws say, if anything, about the role or approach that the courts should adopt towards issues of customary law and principle when making such decisions.

The relevant provisions of the *Criminal Procedure Code* [Cap 136] (Vanuatu) provide a good starting point for this consideration. Section 118 is concerned with the promotion of reconciliation. Although it is not, at first sight, directly concerned with issues of sentencing, it merits consideration here because, in terms of traditional approaches to dispute resolution, the concepts of punishment and reconciliation appear to be interwoven. The focus on dispute resolution within the realm of customary law and practice is considerably more group oriented than is the case in introduced/adopted concepts of punishment, which are essentially individualistic in nature. The rationale for dispute resolution mechanisms such as formal apologies, reconciliation ceremonies and payment of compensation is that of repairing relationships in order to ensure the continuing survival of the societal group. Therefore these processes can be examined alongside more northern/western approaches to resolving disputes such as sentences by the courts. The *Criminal Procedure Code* [Cap 136] (Vanuatu) states:

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

³⁴ *Constitution Act 1990* (Fiji Islands) s 122.

³⁵ Beattie, above n 33.

³⁶ *Ibid* 165.

terms of payment of compensation or other terms approved by such Court, and may thereupon order the proceedings to be stayed or terminated.³⁷

This provision leaves several issues unclear. Words and phrases such as ‘reconciliation’ and ‘amicable way’ remain undefined. Therefore it is difficult to know how they should be applied in practical terms. Similarly, this section offers no guidance as to the meaning of ‘offences of a personal or private nature’. In addition, the use of such a phrase seems to be in conflict with the notion that criminal offences have an inherently public nature as reflected elsewhere in the criminal law. Admittedly, it can be argued that this public conceptualisation of the criminal law is itself an introduced/adopted concept.

A further significant point regarding this provision is one that arises in relation to similar provisions in other jurisdictions of the region, such as the *Criminal Procedure Code* [Cap 21] (Fiji Islands) s 63:

Where these provisions exist, they do not make any references to offences that would qualify for settlement by way of reconciliation in terms of the nature of the offences and/or the sentences they attract but which should be excluded from the ambit of such provisions by virtue of their social significance. Incidents of ‘domestic violence’ are very clearly in this category.³⁸

Incidents of ‘domestic violence’ may qualify under a provision such as *Criminal Procedure Code* [Cap 136] (Vanuatu) s 118, as examples of the sort of offence that may be resolved through reconciliation. However, it may be that to do so can lead to an absence of a meaningful sanction for this type of offence:

[B]ecause of the unequal power positions of persons negotiating domestic reconciliations, the private nature of their terms, and the application of expectations that may go well beyond the immediate issue of the assault or future threats of violence, reconciliation may become more of an avoidance of penalty. For instance, where a complainant withdraws her allegation of assault as a result of reconciliation, this may be the consequence of threats from the husband to throw a wife out into the street if she does not ‘reconcile’, rather than any genuine rapprochement. The court would not become aware of this by simply seeking an assurance of reconciliation from the accused and the complainant may not be examined by the court in this regard. The community, the traditional witness and enforcer of reconciliation, also has no voice in the court hearing.³⁹

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

³⁷ *Criminal Procedure Code* [Cap 136] (Vanuatu) s 118 (emphases added).

³⁸ Tess Newton, ‘The Differential Impact of Criminal Law on Males and Females in Pacific Island Jurisdictions’ (2000) 51 *Development Bulletin* 13, 15.

³⁹ Findlay, above n 17, 157. The withdrawal of an allegation of assault as a result of reconciliation may 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.

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

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

Again, a provision such as this may be ambiguous or even problematic. The use of the word 'shall' in the first line indicates that it is mandatory that the court take customary 'compensation or reparation' into account. However, there is no guidance as to what principles the court should follow. There is nothing in this provision that stipulates that the effect of having already complied with, or having undertaken to comply with in the future, some form of customary settlement should be to mitigate the sentence.

However, as is evident from the judgments of the courts, such settlements are considered within the context of reducing a sentence rather than increasing it. This is illustrated in the discussion of decisions of the courts that appears below.⁴⁰ In relation to issues of procedure, these provisions do not make reference to any time scale for the envisaged reconciliation processes. Neither does the legislation indicate what should happen in the event that the relevant parties agree to undertake some form of reconciliation when they are before the court, but subsequently fail to go ahead with it. However, it is recognised that in many cases customary reconciliation may have been initiated and, indeed, concluded before the case ever comes before the court. These issues and others are discussed further in the next part of this article.

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 of interest to note art 49 of the *Constitution of the Republic of Vanuatu 1980* which states:

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 Court of Appeal and take part in its proceedings.

Whilst such a provision appears to be straightforward, there is nothing in the *Criminal Procedure Code* [Cap 136] (Vanuatu) or any other enactment to give guidance as to how custom is to be ascertained appropriately 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

⁴⁰ See below pt III.

Court to advise on matters of custom, it is rare that this happens in practice, and where it does occur it is usually in matters connected with land.

III A REVIEW OF SENTENCING DECISIONS WITH REFERENCE TO THE INCORPORATION OF CUSTOMARY LAW AND/OR PRINCIPLES

It is reasonable to assume that the decisions of the subordinate and lower subordinate courts are more likely to refer to issues of custom than would be the case in the sentencing decisions of the superior courts. However, it is extremely difficult to get access to the decisions of the magistrates' courts and courts that operate at the lower subordinate level (eg village courts or local courts). In many cases, the judgments of these courts are not fully transcribed unless they are requested by one of the parties. Decisions of this nature are made within the informal justice sector (that is courts or tribunals that have not been brought within the formal justice sector either under the terms of the constitution or by means of some other legislative enactment). For example, decisions of the village courts of Vanuatu are unlikely to be recorded at all. Therefore in this section I will focus on examples of how sentencing decisions of the superior courts take account of customary law and practice. This will provide only a partial picture of this area of criminal law and procedure. However, it will illustrate some significant issues and questions that are important to this type of decision making throughout court structures at all levels, whether those structures are 'formal' or 'informal' in nature.

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

The first issue is that in many cases the customary settlement, whether by means of formal apology, payment of compensation or some other process, occurs prior to the case coming before the court for sentencing purposes. Thus it is predominantly the case that the issue of the customary settlement is raised within the context of a plea in mitigation. Further to this, it is evident from some of the judgments that the perception of the victims and offenders is that the customary settlement 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*.⁴¹ In this case, part of the appeal was based on the fact that the trial judge had given insufficient weight to the fact that the offender had helped the victim's family financially and had made his peace with them, and that there was

⁴¹ [1992] Tonga Law Reports 7.

reason to believe that the family 'did not wish the case to go to a hearing'.⁴² The court gave no indication that such a wish on the part of the victim's family was a relevant consideration.

A situation may arise in which the court hands down a sentence that has been reduced on the basis that there will be some form of customary settlement process at some point subsequent to the conclusion of the proceedings. This raises the problem of what should happen in the event that an undertaking to pay compensation or undertake some other form of customary settlement is not fulfilled. A very similar issue to this was considered in the appellate case of *Gilmete v Federated States of Micronesia*.⁴³ In this case the appellant was initially sentenced to imprisonment (partly suspended) and to pay restitution. The restitution was not paid within the time that the court had prescribed, and the appellant was sentenced to a further one year of imprisonment. He appealed against the modified sentence. The modified sentencing order had been made on the basis that where a convicted person was unable to pay restitution, his or her family was obliged in custom to do so. The court held:

[I]f 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.⁴⁴

It is not clear from the judgment in this case whether the original sentence was one that had been mitigated or reduced by virtue of the accompanying order to pay restitution. It may be preferable that where the plea in mitigation is based on an undertaking to go through a customary form of settlement, rather than evidence that such settlement has already been reached, the court should defer final sentencing until such time as is considered reasonable for the customary resolution to have been achieved.

The second issue is that a reading of the cases makes it clear that the courts' approach is one of limiting the scope of the effect of customary settlement on mitigation. In the Solomon Islands case of *R v Funifaika*,⁴⁵ Palmer J made the following statement as to the effect of payment of customary compensation by the offenders and their relatives to the victims and their communities:

The significance of compensation in custom however should not be over-emphasized. It does have its part to play in the communities where the parties reside, in particular it makes way or allows the accused to re-enter society without fear of reprisals from the victims [sic] relatives. Also it should curb any ill feelings that any other members of their families might have against them or even

⁴² Ibid 8.

⁴³ [1989] (Unreported, Supreme Court of Federated States of Micronesia (Appellate Division), Benson AJ, 1 November 1989) <http://www.vanuatu.usp.ac.fj/paclawmat/Micronesia_cases/Volume_G-N/Gilmete_v_FSM.html> at 1 May 2001 (copy on file with author).

⁴⁴ Ibid.

⁴⁵ [1997] (Unreported, High Court of Solomon Islands, Palmer J, 6 June 1997) <http://www.vanuatu.usp.ac.fj/paclawmat/Solomon_Islands_cases/Volume_R-Z/R_v_Funifaika.html> at 1 May 2001 (copy on file with author).

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.*⁴⁶

This limiting approach has been demonstrated elsewhere in the reluctance of the courts to accept customary obligations or beliefs as defences to serious criminal offences. Reference has already been made to the Vanuatu case of *Public Prosecutor v Tangaitom*.⁴⁷ Another striking example is the Solomon Islands Court of Appeal case of *R v Loumia*.⁴⁸ This case highlights the potential for conflicts between customary law and constitutional principles, and between customary law and primary legislation. The appellant sought to persuade the Court that the customary requirement to ‘pay back’ a killing should afford him a defence to a charge of murder (and a reduced charge of manslaughter) under the *Penal Code* [Cap 26] (Solomon Islands), which states ‘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.’⁴⁹ The defence was not recognised by the court on the basis that it was inconsistent with constitutional protections of the life of the individual.

The legislative provisions discussed in the previous section do not preclude the court from imposing a heavier sentence as a result of taking custom into account than might otherwise be the case. However, the cases demonstrate that the usual result of reference to customary settlement between victim and offender (and their respective family or community groups) is that of a reduced sentence. A similar trend has been identified in the neighbouring jurisdiction of PNG.⁵⁰

The third issue is that the courts adopt different approaches to the significance of customary reconciliation and/or compensation depending on the circumstances of the case. The most significant factor appears to be the seriousness of the offence in question. This is illustrated in two contrasting decisions of the Supreme Court of Fiji dating from 1977.⁵¹ In *Cagilaba v The Queen*⁵² the Court, on receiving evidence that the appellant was reconciled with the complainant, quashed the original sentence of two years imprisonment and substituted one of 12 months imprisonment. The offence in question was that of

⁴⁶ Ibid (emphasis added).

⁴⁷ *Public Prosecutor v Iata Tangaitom* [1998] (Unreported, Supreme Court of Vanuatu, Marum J, 3 August 1998) <http://www.vanuatu.usp.ac.fj/paclawmat/Vanuatu_cases/Volume_O-Q/PP_v_Tangaitom.html> at 1 May 2001 (copy on file with author).

⁴⁸ [1985/86] Solomon Islands Law Reports 158.

⁴⁹ *Penal Code* [Cap 26] (Solomon Islands) s 204(c).

⁵⁰ See generally Cyndi Banks, ‘Custom in the Courts: *Criminal Law (Compensation) Act of Papua New Guinea*’, (1998) 38 *British Journal of Criminology* 299.

⁵¹ In Fiji in 1977 the Supreme Court fulfilled the role that the High Court now performs.

⁵² [1977] (Unreported, Supreme Court of Fiji (Appellate Jurisdiction), Grant CJ, 13 May 1977) <http://www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_A-C/Cagilaba_v_R%20.html> at 1 May 2001 (copy on file with author).

robbery with violence contrary to s 326(1)(b) of the *Penal Code* [Cap 17] (Fiji Islands). However, the sum stolen was FJ\$7 and the victim and offender were cousins.

In *Nalanilawa v The Queen*⁵³ the appellant had also been sentenced to two years imprisonment. In this instance, the offence was that of assault with intention to commit rape. The court refused to accept an argument that the sentence should be reduced because the complainant's family had forgiven the appellant 'in accordance with the Fijian custom'.⁵⁴ 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. However, it is evident that the exercise of discretion by the courts allows judges to differentiate between situations in accordance with broader policy issues.

In other jurisdictions, such as Vanuatu, reference to the role of customary settlement in sentencing is not formally restricted by reference to the nature or seriousness of the offence involved.⁵⁵ However, it remains the case that the courts differentiate between situations where reconciliation and/or payment of compensation should and should not operate to mitigate sentence. Again, the seriousness of the offence is a significant factor in this regard. Recent comments made by the Supreme Court of Vanuatu indicate a marked reluctance to accept customary settlement as a significant mitigating factor in cases of serious violence, especially where death results. In the case of *Public Prosecutor v Thomas*⁵⁶ Marum J identified that the 'normal' penalty he would impose in such a case was one of nine years imprisonment. He then made, inter alia, the following comment: 'The court under section 119 of the CPC [*Criminal Procedure Code* [Cap 136] (Vanuatu)] is also to take into consideration any customary settlement in determining what is an appropriate penalty.'⁵⁷ This remark illustrates some of the ambiguities that are ever present at the intersection of customary dispute resolution and the introduced/adopted law, whether in the criminal or some other sphere.

In PNG, where customary methods of compensation have been given legislative recognition by virtue of the *Criminal Law (Compensation) Act 1991* (PNG), the courts have also indicated that in some cases the imposition of a compensation order is not appropriate.⁵⁸ However, it is far from easy to

⁵³ [1977] (Unreported, Supreme Court of Fiji (Appellate Jurisdiction), Mishra J, 30 June 1977) <http://www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_M-P/Nalanilawa_v_R.html> at 1 May 2001 (copy on file with author).

⁵⁴ Ibid.

⁵⁵ *Public Prosecutor v Thomas* [1998] (Unreported, Supreme Court of Vanuatu, Marum J, 22 March 1998 <http://www.vanuatu.usp.ac.fj/paclawmat/Vanuatu_cases/Volume_O-Q/PP_v_Thomas.html> at 1 May 2001 (copy on file with author).

⁵⁶ Ibid.

⁵⁷ Ibid 2. See also *Public Prosecutor v Kalip* [1998] (Unreported, Supreme Court of Vanuatu, Marum J, 6 October 1998) <<http://www.austlii.edu.au/vu/cases/VUC/1998/16.html>> at 1 May 2001 (copy on file with author).

⁵⁸ See also Banks, above n 50. For a discussion of the approach in PNG, see below pt IV(A).

determine the circumstances in which it is or is not appropriate to take account of compensation. For example, one could argue that the governing factor should be the seriousness of the offence. Whilst reference to the penal legislation of a jurisdiction may seem an obvious and appropriate method of determining whether or not an offence is 'serious', such an approach can be more culturally problematic than it first appears. This is clearly illustrated by reference to the fact that in some Pacific Island societies rape is not considered serious enough to merit referral to the police. Rather, it is considered something that can and should be dealt with by the community without reference to the legislation of a particular jurisdiction. The practical effect of such an approach is that the 'resolution' is likely to be one that involves reconciliation and/or compensation rather than incarceration. It is significant to note that the practicalities of customary reconciliation and compensation structures can, and often do, include the payment of some form of compensation by the 'victim' to the 'offender' as a means of bringing the process to a conclusion. This can create a perception that rape and other sexual 'attacks' are tolerated and possibly condoned in these societies. This is probably too simplistic a view. However, the perceptions and language of sexual assault in some societies is highly indicative of the fundamental divide between customary law and practice, and introduced/adopted concepts such as personal integrity and gender equality.⁵⁹

IV LAW AND POLICY ELSEWHERE

The issues and questions that have been identified in the preceding section have also arisen and been considered in other jurisdictions. Here, I shall briefly examine some of the approaches that have been advocated and/or adopted in PNG and Australia. It is intended that this brief overview will identify questions and concerns that currently require, or will require, consideration by legislators and judges of the countries of the Pacific Island region as this area of criminal law and procedure develops.

A *Papua New Guinea*

In PNG there has been, at least at the formal level, a greater degree of integration of customary law and practice with state law. This stems initially from the *Constitution of the Independent State of Papua New Guinea 1975*, which recognises custom as part of the 'underlying' law of the country. The general position of custom as a source of law was already in place by virtue of the *Customs Recognition Act 1963* (PNG). In particular, s 4(e) provides for the courts (where they deem it to be fit) to take into account issues of custom when determining sentence, subject to the conditions that custom is relevant and can be adequately proved. More particularly, issues of customary compensation have

⁵⁹ Cyndi Banks, 'Contextualising Sexual Violence: Rape and Carnal Knowledge in Papua New Guinea' in Sinclair Dinnen and Allison Ley (eds), *Reflections on Violence in Melanesia* (2000), 83, 83–104.

been 'elevated' to a statutory basis in the *Criminal Law (Compensation) Act 1991* (PNG) ('*Criminal Compensation Act*'). It is a significant piece of legislation in the Pacific Island region as it provides a legislative framework outlining the detail of judicial and magisterial powers and duties when making compensation orders. Section 2(1) of the *Criminal Compensation Act* provides that the courts may impose orders to pay compensation, 'in addition to any other punishments imposed'. Section 3 of the *Criminal Compensation Act* identifies those factors that are to be taken into account when making compensation orders. Section 3(1)(d) makes specific reference to 'custom', which includes:

- [A]ny relevant custom regarding compensation, including but not limited to –
- (i) any custom regarding the nature, the amount, the method of payment and the appropriate person or persons to be paid the compensation; and
 - (ii) any custom which relates the amount of compensation to the age or life expectancy of the person suffering injury or loss[.]

This legislation recognises that compensation may be in something other than monetary form, and that recognition of the dictates of custom may lead to compensation being paid to a person or persons other than the victim of the crime in question. Yet, the *Criminal Compensation Act* is silent on how the courts should deal with cases where customary compensation is negotiated between the relevant individuals and/or groups without the formal court process prior to the making of any orders as to sentence, including orders that may be made under this legislation. In subsequent commentary it has been argued that 'any compensation payments outside of the prevailing criminal compensation regime must be disregarded and discounted in sentencing'.⁶⁰ As noted previously, the courts in this jurisdiction have sometimes indicated that the imposition of a compensation order may not be appropriate.⁶¹ However, adopting such an approach may result in the focus shifting from a collective, group basis, in which the concern is to restore relationships between families, clans or tribes, to an individualistic one in the mould of the introduced/adopted legal system.⁶² Regarding the case of *State v Muna*,⁶³ Cyndi Banks makes the following criticism of the judge's comment that a compensation order would not be appropriate 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 emphasizing 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

⁶⁰ Lawrence Kalinoe and Tiffany Twivey, 'Compensation Payment outside Court by Perpetrators of Crime' (1996) 24 *Melanesian Law Journal* 117.

⁶¹ See Banks, above n 50.

⁶² *Ibid* 309.

⁶³ [1995] Papua and New Guinea Law Reports 16.

at variance with the notion that compensation is not paid as a benefit to an individual but for the benefit of the group.⁶⁴

Certainly, the judge's concern that an infant victim may not understand the imposition 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 'northern/western' penalty such as a period of incarceration. This in fact may be a more pertinent indicator of why the courts appear reluctant to explicitly or implicitly accept the payment of compensation to influence (mitigate) the sentencing decision: it is a means of voicing societal disapproval of such behaviour. Furthermore, the decision of the courts to refrain from imposing a compensation order under the *Criminal Compensation Act* does not preclude the affected members of the community or communities taking part in some form of customary dispute resolution process or ceremony of their own volition. Indeed, this is and would be true of any system.

B *Australia*

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

The legislative framework for the sentencing of indigenous offenders and the attendant recognition of Aboriginal customary law differs between the Australian states and territories. In Victoria the 1988 Sentencing Committee concluded that '[A]borigines should not be given preferential treatment in sentencing; *that customary laws not be recognised; and that no special sentencing options be developed for Aboriginal offenders*'.⁶⁵ In other parts of the country, where there are larger rural Aboriginal populations and less integration of Aborigines with the non-Aboriginal community (Northern Territory, Queensland and Western Australia), the courts have adopted a somewhat different approach, including a wider recognition of the role of customary law.

One of the most problematic aspects of giving recognition to Aboriginal customary law in sentencing decisions stems from the fact that, in many instances, a system of ritualised physical punishment is used by the community group, for example the spearing of the offender's leg. It would therefore be surprising to find the courts expressly recommending or condoning a form of customary punishment that itself constitutes a criminal offence (assault or wounding). Indeed, the courts have had to tread a very careful path in this area.

⁶⁴ Banks, above n 50, 309.

⁶⁵ Attorney-General's Department, State of Victoria, *Sentencing: Report of the Victorian Sentencing Committee* (1988) vol 1 385 (emphasis added). See also John Tomaino, 'Punishment Practice' in Rick Sarre and John Anthony Tomaino (eds), *Exploring Criminal Justice: Contemporary Australian Themes* (1999) 213.

In *R v Minor*⁶⁶ the Court of Criminal Appeal of the Northern Territory held that where tribal payback punishment had already been carried out or was to be carried out in the future, courts should have regard to this fact when determining sentence:

As I understand it, payback, in certain cases, which must be carefully delineated and clearly understood, can be a healing process ... It would be a serious and impermissible abrogation of the court's duty to reduce a sentence on any person of whatever race or creed because of assurances that friends or relatives of the victim were preparing their own vengeance for the assailant. If payback is no more than this it is nothing to the sentencing process. If, however, it transcends vengeance and can be shown to be of positive benefit to the peace and welfare of a particular community it may be taken into account; though even then I do not believe the court could countenance any really serious bodily harm.⁶⁷

This statement is limited in its assistance, largely because of the use of a vague term such as 'any really serious bodily harm'.⁶⁸ Elsewhere in the judgment, the following points were made about the nature and purpose of payback in the Aboriginal communities of the Northern Territory. It is significant to note the highlighting of the relationship between this form of customary resolution and the written law of the Territory:

[T]here was no evidence upon which his Honour could have concluded that the form of punishment proposed was unlawful. An assault is not unlawful if authorised by the 'victim' unless the person committing the assault intends to kill or to cause grievous harm: *Criminal Code* s 26(3). 'Grievous harm' is defined to mean 'any physical or mental injury of such a nature as to endanger life or to cause or be likely to cause permanent injury to health': *Code*, s 1. ... In my opinion ... there was no evidence that the injury caused by the proposed spearing must or even was likely to cause grievous bodily harm. ... However that may be, I wish to make it clear that it is one thing for a court to take into account the likelihood of future retribution to be visited upon the accused, whether lawful or unlawful; it is yet another for a court to actually facilitate the imposition of an unlawful punishment.⁶⁹

C *Comparison between the Pacific Island Region, Papua New Guinea and Australia*

The Australian approach most closely resembles the current state of play in the Pacific Island region, as indicated in the previous section of this article. However, the focus on reconciliation and compensation in Pacific Island societies makes comparison with the Australian model somewhat unwieldy.

⁶⁶ (1992) 2 NTR 183.

⁶⁷ *Ibid* 184–5 (Asche CJ).

⁶⁸ *Ibid*.

⁶⁹ *Ibid* 195–6 (Mildren J).

The material on PNG provides the basis for consideration of further development or reform in this area of law within the region. To date there is no legislation that attempts to incorporate customary issues of compensation or reconciliation as methods of dispute resolution into the 'formal' system of criminal justice, to the extent that the *Criminal Law (Compensation) Act 1991* (PNG) has done in our larger Pacific neighbour. In Vanuatu the *Malvatumauri* (National Council of Chiefs) proposed the establishment of 'customary courts'. In 1995 they approached the Attorney-General with a view to drafting a bill to establish such a system.⁷⁰ To date this proposal has not gone any further. However, the draft document submitted to the Attorney-General by the *Malvatumauri* raises several points of interest. First, the chiefs envisaged that the 'chiefly system of justice' should be fully integrated into the introduced/adopted court system rather than operating outside it and in parallel to it:

As [the 'chiefly system of justice'] is a working system which is acknowledged by all, it is wrong to treat it as some type of alternative system of justice. It should be brought fully into the judicial system.⁷¹

It is not clear why such integration is considered necessary, particularly if the system of justice administered by the Chiefs is indeed 'acknowledged by all'.⁷² 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/adopted court system would possibly 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 a concept of 'grafting' customary law and principles onto the introduced/adopted legal system is one that is very widespread in this field. For example, the proposed legislation envisages that '[e]veryone 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.'⁷³

A provision such as this highlights the ambiguities and complexities that are attendant on an exercise of this nature. If the *Malvatumauri* had advocated that there was to be no place for lawyers within a system of customary courts, the proposed legislation would fail on the grounds of being unconstitutional as the right to legal representation, although limited, is enshrined in the *Constitution of the Republic of Vanuatu 1980* art 5(2)(a). However, even the contemplation of introducing lawyers into a customary environment seems to have a diluting, rather than a strengthening, effect. Such a development 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. Indeed, this perceived need for training was identified by the *Malvatumauri* when they made this proposal. It is this type of consideration that

⁷⁰ Minister of Justice, Republic of Vanuatu, *Customary Courts*, Draft Discussion Paper (1995).

⁷¹ *Ibid* 1.

⁷² *Ibid*.

⁷³ *Ibid*, Annex A, 'Malvatumauri Customary Courts Act' [3].

renders what is apparently a 'fundamentalist' approach to reform essentially 'revisionist' in nature and effect.⁷⁴

V CONCLUSION

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

With the growing interest in restorative justice in Pacific Island jurisdictions,⁷⁵ legal systems will need to take more account of how disputes are resolved or managed traditionally. Continuing dissatisfaction with the abilities of the police, prosecutors and courts to deal effectively with 'rising crime' in the Pacific⁷⁶ is likely to contribute to an increasing interest in structures and processes that are more traditional in nature. However, as has been indicated in the preceding discussion, a wholesale (re)acceptance of customary norms and methods of dispute resolution is likely to bring with it ambiguities and concerns that reflect the impact of colonialism, and subsequent modernising influences on the communities of the Pacific Islands. At the present time, it is not possible to ascertain with certainty what the position of the community might be in relation to this issue. Do the people of Vanuatu, or any of the other Pacific Island states, or the region as a whole, want the issue of punishment for criminal offences to be determined according to the principles of custom, the principles of introduced/adopted laws, or some combination of the two? This question has not been subject to rigorous research here or elsewhere. It is likely that in this socio-legal environment, as in most others, that the answer would be a variant of 'it depends'.

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

⁷⁴ Sinclair Dinnen, 'Criminal Justice Reform in Papua New Guinea' in Peter Larmour (ed), *Governance and Reform in the Pacific Islands* (1998) 255.

⁷⁵ Regardless of their relation to criminal justice or other areas (such as political conflict or disputes over ownership of and access to land and other resources).

⁷⁶ See Newton, 'Policing in the South Pacific Region', above n 6.