

Crime, community penalty and integration with legal formalism in the South Pacific

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Introduction

The influence of introduced legality on prevailing culture, and vice versa, are common concerns for analysis when considering the existence and development of customary law.¹ Much of the limited writing on law and custom prefers to speculate on the impact of introduced law on already present modes of regulation. While recognising these structuralist contexts of influence, often oversimplified as they are represented, this paper prefers to explore the adaptation of legal formalism in contexts of resilient and resonant custom.²

Further, the paper examines instances where despite the fact that custom has modified institutional legality, the latter claims predominance over culture or even denies its existence and legitimacy in certain situations of sanction. The imposition of penalty is a prime context within which this transaction of influence takes place.

Less obvious is the paper's interest in the place of penalty as bridge between profoundly different contexts of sanction. Irrespective of the 'systems' or motivations that support penalty, its sensitivity to culture is emphasised by the susceptibility of penalty to adaptation, within otherwise rigid ideologies and institutions. Of additional interest is the manner in which customary penalties, while appearing equally well to adapt to and represent quite different sanction ideologies, in fact endanger these ideologies when called to operate beyond their original cultural context.

Intersection of custom and legality

Contemporary legislative development in South Pacific jurisdictions evidences significant difficulty in distinguishing 'customary law' from the perspective of what introduced law (and its jurisprudential framework) recognises and allows. For example, the 'individualised rights and responsibilities' focus of both common and civil law traditions does not translate well into the communal social organisation that features in many Pacific cultures. Western Samoa presents just this issue:

. . . at the root of the conflicts and contradictions between the Samoan system of customary and traditional laws, and the 'imported' systems, is this fundamental difference in jurisprudential philosophy. Attempts to introduce into the Samoan system any concept of individual rights separate from those of the clan was, and still is, resisted as being a direct threat to the stability of society'.³

The uneasy presence of particular constitutional rights in the Pacific, such as the right to freedom of movement,⁴ not only demonstrates a divergence in notions of humanity that require protection, but also questions institutional legality where written constitutions are declared to predominate over customary politics.

The difficulties associated with identifying custom and 'customary law' from the context of introduced law have been exacerbated by the inextricable link in recent Pacific history between legal formalism and colonisation. Introduced law and legal institutions have been in the vanguard of political and commercial policies designed to annex and overrule indigenous cultures. Once established, introduced laws and institutions have:

- a) gradually recognised the expansion and wider application of customary laws;⁵ or
- b) re-asserted the importance of customary law, by saying that customary law is to be applied by all courts but only to certain specified matters or within certain specified limits;⁶ or
- c) re-asserted the importance of customary law where the courts are to apply customary law within certain general limits, without these limits being specified.⁷

All of these approaches towards the ‘rehabilitation’ of custom fail to move beyond the structural context of the introduced legal system and its formal legality. The best evidence for this is the recognition of ‘custom’ couched within the statutory definitions of the new legality, and in particular the applicability of custom as dependent on consistency with constitutions, legislation, and introduced notions of public interest, justice and ‘principles of humanity’.⁸

The conceptualisation of ‘customary law’ brings with it some additional claims to the pre-eminence of legal formalism over custom. By the reference to ‘customary law’, custom is circumscribed within the frameworks and expectations for foreign notions of law. Thereby custom becomes distorted into an alien context even through the use of the word ‘law’. But advocates of custom also employ ‘law’, not wishing to see custom diminished below the authority generated by ‘law’ terminology in a competing setting.

In addition, custom as a legitimate instrument of social regulation seems to be distinguished only from the time of the introduction of foreign legal forms and institutions. The ‘colonising’ impact of introduced legal formalism is clear from:

- the attempt to distinguish between ‘law’ and ‘custom’;
- the identification of ‘customary law’;
- the designation of what is ‘fused’ or integrated within, or rejected or denied by legal formalism.

Such a forced intersection between custom and legality is exposed at the following levels of socialisation, from the perspective of both indigenous and introduced cultures:

- *ideological* where the ‘rule of law’ conflicts with social order;
- *functional* where formal stigmatisation as a consequence of rule violation conflicts with reintegration and restitution at a community level; and
- *structural* where state monopolised prosecution conflicts with customary obligation collectively identified and administered.⁹

The dynamics of custom in its many Pacific variations makes it distinctly incompatible with rigid legal formalism. Custom exists beyond singular identification, written description and unaccountable institutionalisation. Its potential impact is insidious when compared with the expectations of legal formalism. This might go to explain its recent and developing influence in contexts where the sanction processes of introduced law appear ineffectual or out of touch within the context of custom.

Paradoxes of custom and introduced legal formalism in the context of sanction within postcolonial Pacific States

An initial 'grab' for power by colonial administrations in the Pacific was through control of sanctioning processes. This was effected at several levels of colonial influence. For example, Christian missionaries, by introducing a Judeo-Christian moral ethic to dominate indigenous 'moralities', created a compatible climate for the construction and enforcement of individualised justice largely monopolised as it would be by state judicial mechanisms.

This is not to suggest that traditional contexts of sanction were entirely ignored or superseded. Bearing in mind that in many Pacific island countries, where either weak or transitional state structures struggled for varying degrees of ascendancy, it was not likely that resilient customary models would quickly disappear. It appears to be a feature of the colonial period in the South Pacific that while constitutional legality and parliamentary government were promoted as the preferred and paramount framework of governance, the actual impact of introduced law over the socialisation of custom was, and is, problematic.¹⁰

Even so, and perhaps because of the indifferent consequences of western colonisation, the paradoxes between custom and introduced legal formalism remain apparent. For example, the ideology of common law criminal justice relies on features such as individual liability, rational choice justifying penalty, the state's obligation to prosecute and punish on behalf of the community, the limited availability of justification or excuse, and the consideration of extenuation only in mitigation. It is not a form of justice that well manages collective behaviour or communal interests. The potential for paradox where such a notion of justice comes up against customary penalty

with very keen communal and collective investments is clear. For instance, with traditional community shaming the whole village is co-opted into the process and the offender's family may take collective responsibility not only for the harm but also for his 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.

Paradox over liability

In the Solomon Island case of *Loumia v DPP*,¹¹ the conflict between customary obligation and individual responsibility was further complicated by the need to recognise constitutional rights.

While it was expected that introduced notions of criminal liability should, following colonisation, apply to both the native and European populations of the Solomons, 'it was doubtless considered that such standards, beliefs, customs and so forth (of the native population), could and would be taken into consideration by the judge upon the question of proper punishment in each case'.¹² Under this ideological position, therefore, custom never absolved an offender from criminal liability.¹³

In *Loumia's case* there had been trouble between two groups of Kwaio and Agai clansmen over a land dispute that the Kwaio had won in the courts. Following the hearing of the Customary Land Appeal Court two of the Agai had been sent to prison as a consequence of a knife attack on Loumia's brother. Later, during a battle between the two groups involved in the ongoing land dispute, Loumia's brother was killed, and his half brother received severe facial injuries. This occurred in the presence of Loumia and the other accused, on the village football pitch. Further along a nearby beach the corpses of three Agais were later found. All the thirteen (13) Kwaio involved in the fight were charged with the murder of the three Agais. Loumia, who never denied killing the three, was the only one of the accused convicted of murder. On appeal he sought to have the conviction reduced to manslaughter on the grounds that: a) seeing his brother killed and his other brother maimed so provoked him that the reasonable Kwaio pagan villager would have acted as he did in the heat of the moment, and b) that in acting as he did he could avail himself of the extenuation provisions in the Solomon Island Penal Code, in that although he intentionally and unlawfully caused

the death of another, he 'acted in good faith and on reasonable grounds, where he was under a legal duty to cause the death or do the act which he did'.

Loumia further argued that the words 'legal duty' include a legal duty in custom, and evidence was adduced by a local chief that if a close relative is killed Kwaio custom dictates the killing in turn of the person responsible, even if the person under the duty exposes himself to death.

The trial judge's rejection of provocation and the impact of customary duty, due to the inconsistency with the constitutional protection of human life,¹⁴ was upheld by the appeal court. 'The learned judges approached the question of the inconsistency of the alleged customary "legal" duty with the Constitution, and the Penal Code on a policy footing rather than looking at what the Constitution was seeking to achieve'.¹⁵ The fact that the court saw the customary duty for 'payback' as a defence, rather than either an issue of extenuation or a modification of how liability should be conceptualised, made it easier for them to reject. In addition, by denying the status of customary duty here as a legal duty, the court prevented its consideration within the formal structures of the law as an issue of extenuation. If it was not 'legal' then it could not claim the invitation offered in the schedule to the Penal Code to inclusion within the law. Further, by denying its status as 'law', the court refused to recognise the legal significance of customary duty that underpins the custom/law connection.

Paradox over justification and excuse

The significance of customary obligation as a justification or excuse for what would otherwise be criminal was further considered in the Fiji case of *Sosiveta and Others v R*.¹⁶ Here twenty-nine appellants appealed against sentences ranging from 18 to 30 months for arson, following their burning of the house of a fellow villager. The Supreme Court of Fiji heard evidence that the appellants—all men of good character—acted following the orders of another villager who was not only a customary leader (*Ratu*) but was also regarded as being 'possessed of a special divine authority'. As a result it was claimed that the appellants 'would have been willing to do, quite literally anything he commands them to do'.

It was not argued that the appellants' acts were lawful or perhaps even justified in the circumstances. However, the Supreme Court was invited to review the original prison sentences bearing in mind the excuse that the

appellants, particularly the younger ones, felt obliged to carry out the orders of the *Ratu*. In law the justification or excuse of customary obligation, if it could be treated in the same manner as the defences of duress, coercion or superior orders, should provide an answer to the charges. However, the court here merely recognised the obligation in the context of mitigation and reduced the sentences to fines and bonds.

Paradox with extenuation and mitigation

The courts in the Pacific jurisdictions have, in recent years, demonstrated a recognition of customary sanction when imposing penalties provided for under criminal codes. While the customary sanctioning process and the penalties that result may not be endorsed by statute, or exercised by the courts, the latter have deemed them to be worthy of notice as part of setting formal legal penalties. This becomes all the more interesting when the forms some such customary penalties assume may themselves represent the elements of a criminal offence as defined by state laws.

In the Fiji case of *R v Waisea Naburogo and others*,¹⁷ the respondents were convicted on their own pleas of shopbreaking, entering and larceny. Having broken into a co-operative store the accused stole 2 tins of corned beef, 21 tubs of ice cream, and \$20 in cash, to the total value of \$25. On review the court accepted that these were first offenders, that the sum of \$25 had been repaid to the co-operative store by the third respondent's father, and that the respondents had each received six strokes of corporal punishment from the village elders for the same incident. The original court sentences of imprisonment and care orders were subsequently reduced to bonds. This was justified by the argument that if the initial magistrate had been apprised of the facts on restitution and customary penalty then less harsh sentences would have been handed down.

Another review of sentence in consideration of customary sanction occurred in *R v Vodu Vuli*.¹⁸ Here the respondent, a school teacher, was initially sentenced to several significant terms of imprisonment over convictions for acts of gross indecency with four school boys. The facts involved the respondent forcing the young boys through fear to indulge with him in gross acts of indecency. The trial court described the crimes as 'revolting and repugnant, and constituted a grave breach of trust by the respondent in regard to the welfare of the boys concerned'. Such offences, it was said, were serious and called for deterrent sentences.

On review the court felt that the quantum of sentence should be determined 'in the light of whatever mitigating features that may be present'. Among other more traditional matters in mitigation such as the age and previous good conduct of the accused, the trial court had apparently not been aware that 'the respondent had apologised to the boys' parents and made his peace with them in the traditional Fijian way by presenting a whale's tooth to them, and as far as the respondent knew the matter ended there'. The Chief justice halved the original sentences and made them run concurrently.

These cases take on another level of interest when one considers the sentencing principles that motivate the state courts in their use of penalty, when contrasted with the motivation behind custom resolutions. In *Vuli* in particular, the eventual sentences could only be explained in conventional terms as having removed the retributive component of the lower court sentences.

Reconstructing penalty within foreign contexts of sanction

There is more in the influence of customary penalty over the sanctioning process of formalised legality than recognition through mitigation, or acceptance through judicial notice. Throughout the Pacific the penalties that now emerge from the state-centred judicial system often incorporate features of customary penalty. Considering the penalty of banishment, and the process of reconciliation and restitution, I will speculate on the development of 'hybrid' and culturally sensitive penalties in terms of their ownership, object and purpose. In so doing, Garland's¹⁹ emphasis on the cultural essence of penalty is confirmed.

Banishment

The history of banishment as penalty in Western Samoa was interestingly reviewed in the recent decision of *Italia Taamale and Taamale Toelau v Attorney General of Western Samoa*.²⁰ This was an appeal from a decision of the Land and Titles Court, a court in the state judicial hierarchy, ordering the appellants and their children to leave their village by a nominated date. The appellants argued on appeal that they could not be in contempt of the original court order through non-compliance because the penalty itself

contravened Article 13 1) d) and 4) of the Constitution. In addition it was clear from earlier decisions of the Supreme Court that the penalty of banishment was not to be recognised by the courts of Western Samoa. The tenor of this argument was that ‘ownership’ of the penalty remained within customary tribunals, directed against traditional relationships and for the purpose of enforcing customary obligations. None of these therefore should be legitimated at the level of the state through its legal formalism. The appeal court has now come to a position against such submissions.

Banishment was historically rooted, as the court saw it:

there is no doubt that banishment from the village has long been an established custom in Western Samoa.

In 1822 the German Administration of Western Samoa passed an Ordinance *to Control Certain Samoan Customs*. The Ordinance prevented Samoans of any station from ‘expelling any person from his village or district, under penalty of imprisonment . . .’ The penalty of banishment was then reserved to the Administrator.

With the introduction of constitutional legality, the status of banishment as a penalty became ambiguous in terms of ownership and objective. The appeal court drew from earlier decisions of the Supreme Court the view that:

undoubtedly the customs and usages of Samoa in the past acknowledged the rights of village councils and the court to make banishment orders, but that custom ceased on 28 October 1960 when the Constitution was adopted.

Several judgments of the Supreme Court in the 1970s and 1980s endorsed appeal points that such banishment orders were in violation of the constitutional rights of freedom of movement and residence.

In *Taamale* the appeal court acknowledged that today for many village councils in Western Samoa, banishment was the ‘most important sanction vested by custom in the village council’. It was usually employed when other forms of customary penalty such as fines and ostracism from village affairs had failed. But a further argument in favour of the continued significance of banishment was that as an effective threat at a village level it did not usually necessitate the employment of state-centred crime control resources such as the police to back up the enforcement of customary orders.

The Land and Titles Court is the only judicial 'site' from where banishment as a penalty may emerge:

While upholding the jurisdiction of the Land and Titles Court to order banishment we do so on the express basis that the jurisdiction can only lawfully be exercised in accordance with the principles and safeguards identified in the present judgement.

The purpose of the penalty is limited to 'the interests of public order—meaning to prevent disturbances, violence or the commission of offences against the law'. Now the Land and Titles Court has taken the responsibility for the banishment penalty (as a formal court order) from the village council, to which it leaves only the ultimate penalty of ostracising a person within the village. The Court's assumption of this penalty and this sanction as within its jurisdiction was endorsed by the appeal court.

A justification as to why banishment moved from the 'ownership' of the village council, to that of a Court is:

that the imposition of a banishment order is made fair and reasonable and according to law . . . An individual who is dissatisfied with a decision given at the first instance level of the Land and Titles Court also has further (formal) avenues for seeking redress . . . as the Land and Titles Court can make a banishment order, so that court can cancel it.

The process of 'ownership' is 'that a village council minded towards banishment from the village would be well advised to petition that [the Land and Titles] Court for an order rather than take an extreme course on their own responsibility'. Further, because serious offences²¹ such as murder and rape are grounds for banishment 'it is necessary to say that the punishment of (such) offences is a matter for the criminal courts. Serious crime is properly dealt with in the Supreme Court'. This appears to be both a further constraint on the object and purpose of banishment and a limitation over its ownership.

The court concluded:

Banishment from a village is, at the present time, a reasonable restriction imposed by existing law, in the interests of public order, on the exercise of the rights of freedom of movement and residence affirmed (in the Constitution).

Interestingly, the court recognised the dynamic and culture-bound nature of this penalty; ‘as Western Samoan society continues to develop the time may come when banishment will no longer be justifiable’.

Reconciliation

Section 163 of the *Criminal Procedure Code* (1978) of Fiji provides that where charges for criminal trespass, common assault, assault occasioning actual bodily harm, or malicious damage to property are brought under the *Penal Code*:

. . . the court may in such cases which are substantially of a person(al) or private nature and which are not aggravated in degree, promote reconciliation and encourage and facilitate the settlement in an amicable way, on terms of payment of compensation or on other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.

While having regard to the court’s role as a ‘facilitator’ in the reconciliation processes, this section operates on the understanding that this sanction is in the hands of the accused. To that extent the court dispossesses itself of ‘ownership’ of the penalty beyond its role in promoting settlements of this form.

The state constrains the use of such penalty, or at least limits the situations in which reconciliation may be recognised by the court, by designating the offences to which it may relate. This is important in terms of a purpose for reconciliation; that being the staying or termination of other penalty options.

Reconciliation has long existed as a feature of the restitution and compensation dimension of customary punishments in the Pacific. Even so its punitive potential is recognised in section 163 through the reference to ‘payment of compensation or any other terms approved by the court’.

Further, by providing for an avoidance of any further state-based penalty by achieving reconciliation, the institutions of legal formalism have incorporated this penalty within their own sentencing options.

The operation of reconciliation under the sponsorship of the state courts differs from the 'self help' penalties identified in the case of *R v Lati*.²² Here the defendants, five young Fijian villagers, assaulted a young man from another village. The people from the defendants' village responded by administering corporal punishment to the defendants and offering a ceremonial apology to the Chief of the victim's village. The defendants were then brought to trial and received prison sentences. On appeal these sentences were overturned as being too severe. The appeal court recognised the penalties meted out by the village, and the exchange of apologies:

It must be acknowledged that the Makadru (defendants) villagers had taken great pains, in the absence of any police presence in the island, to settle the problem in the only way known to them which is by their own established customs and traditions. Though these have no legal force as such they are nevertheless entitled, in a suitable case, to recognition by the courts in such a manner so as to uphold their sanctity and moral force within the Fijian society . . . All the respondents had been dealt with appropriately in the Fijian customary way and whatever potential strife might have resulted between the two villages because of the incident had also been taken care of appropriately in the Fijian customary way. One could not wish for a more civilised way of sorting out a potentially explosive situation.²³

Lati was another case where the appeal courts recognised customary penalty and gave ex post facto legitimacy to such penalty. The reconciliation 'law' differs from the customary context of reconciliation in that although there may be a similar emphasis on methods such as the formal apology to restore peace and good order, the reconciliation process is either activated or overseen as a feature of legal formalism. The purpose of reconciliation remains the same whether it emerges from custom or the state courts, and the objects of the restored relationship are consistent in both penalty forms. It is the nature of the state sponsorship, rather than shared 'ownership' of the penalty that marks out state-sponsored reconciliation from the customary

practice. Even where the state ideologises reconciliation through civil restitution, the state is the sponsor and arbiter of the process.

The modern consequences of reconciliation as a penalty option within the formal courts are interesting. In its customary context reconciliation is governed by three factors:

- the public nature of its settlement;
- the collective nature of its terms; and
- the relative expectations of the parties involved.

In its contemporary context within legal formalism it would appear that reconciliation has been removed from an open, accountable and relative penalty²⁴ within which the community has an investment, into a far more private and localised settlement. In Fiji today it is common, when domestic violence comes before the court, to see reconciliation promoted as an appropriate penalty. However, because of the unequal power positions of persons negotiating domestic reconciliations, the private nature of their terms, and the application of expectations that may go well beyond the immediate issue of the assault or future threats of violence, reconciliation may become more of an avoidance of penalty, rather than a penalty. For instance, where a complainant withdraws her allegation of assault as a result of a reconciliation, this may be the consequence of threats from the husband to throw the wife out into the street if she does not ‘reconcile’, rather than any genuine rapprochement. The court would not become aware of this by simply seeking an assurance of reconciliation from the accused, and the complainant may not be examined by the court in this regard. The community, the traditional witness and enforcer of reconciliation, also has no voice in the court hearing.

Adaptations of penalty against conflicts in the context of sanction

The interaction between custom and introduced legal formalism at the level of sanctions is more than a contest over ownership of penalties. The manner in which certain forms of penalty have been incorporated into introduced

legal formalism indicates the resilience of penalties that remain close and viable within their original cultural context. However, it is simplistic to expect, despite similar aspirations for penalty in both custom and introduced law, that by sharing or reproducing penalty the results (sanctions) will be, or even should be the same. As reconciliation demonstrates, the partial removal of penalty from its cultural and customary context may transform its impact as well as undermining its viability in the original form.

A key to the problem of 're-culturising' penalty is the realisation that the state is not the community, and therefore legal formalism as a feature of the state may not be supportive of customary penalty. Those features of custom penalty that seem appealing when compared with the formalised penalty structures of introduced law (such as openness and accountability) are often compromised or corrupted within state-centred environments. Further, the essential sanction impact of custom penalties may be lost as they are required to address new aspirations for the sanction process.

Also, the different ideologies of justice prevailing in legal formalism, and custom, may bring about very different consequences for the object and purpose of penalty. For instance, on the one hand the object might be the offender/victim relationship and the purpose may be deterrence or retribution. On the other the object is the community and the purpose, restitution and social cohesion.

The obligations created by penalty within the context of custom or legal formalism also require consideration if the outcome of any reconstructed penalty is to be assumed.²⁵ These obligations endorse the integration of penalty within custom, whereas it stands at the end (or even outside) state-centred sanctions in formalised criminal justice.

The integration of penalty and custom has been misunderstood in efforts to incorporate customary penalty within introduced legal formalism. This misunderstanding demonstrates as much about the tendency to isolate through formalised criminal sanctioning, as it does about the essential re-integrative spirit of custom penalty in a community context such as that prevailing in South Pacific tradition.

Notes

1 See B Ottley and J Zorn, 'Criminal law in Papua New Guinea: Code, custom and courts in conflict', (1983) 31 *American Journal of Comparative Law* 251–300; J Zorn, 'Making law in Papua New Guinea: The influence of customary law on common law', (1991) 14/4 *Pacific Studies* 1–34; P Fitzpatrick, 'Traditionalism and traditional law', (1984) 28/1&2 *Journal of Anthropology and Law* 20–27; J Zorn, 'Common law jurisprudence and customary law', in *Legal Issues in Developing Society*, R James and I Fraser (eds), Faculty of Law, UPNG, Port Moresby, 1992, 103–127

2 Custom is regarded here as more than an alternative system of law or social regulation. Custom is ways of doing things and ways of explaining how and why they are done, or are required to be done. It precedes law and claims its legitimacy from richer and deeper sources than the authority of the state or the ideology of a system. Custom is the epitome of lifestyles and patterns of community.

When translated into legal discourse, custom loses its active as well as its metaphysical dimensions. For instance, the interpretation given to custom in schedule 1 of the Interpretation Act (Cap 132) of Vanuatu is that 'custom means the customs and traditional practices of the indigenous people of Vanuatu'. Schedule 1.2 of the Constitution of Papua New Guinea expands on this: 'Custom means the custom and usages of indigenous inhabitants of the country existing in relation to the matter in question at the time when and in the place in relation to which the matter arises regardless of whether or not the custom has existed from time immemorial'.

3 A Epati, 'Traditional authority in the contemporary Pacific', (1990) *Commonwealth Law Conference Papers* 582.

4 Note the conflict that arose between a banishment order imposed by a *fono* (clan council) in Western Samoa, and the claim to the protection of Article 13 1) (d) of the Western Samoan Constitution, which guarantees an individual citizen's right 'to move freely throughout Western Samoa and to reside in any part thereof', see *Tuivaiti (Tariu) v Sila (Faamalaga) and Others* [1980–1993] WSLR 19. In this case, despite the fact that the plaintiff was found by the court to have been wrongfully banished from his home and business by village elders, and awarded damages for the loss that ensued, he was unable to receive sufficient police protection to remain safe in the village. Fellow villagers were brutally punished if they travelled on his bus or supported his business, and the damages associated with the original banishment remained unclaimed.

5 Such as through the enactment of the *Native Customs (Recognition) Ordinance 1963* during the transition towards independence in Papua New Guinea.

6 The model chosen in Kiribati, Nauru and Tuvalu.

7 Adopted in Fiji, Solomon Islands, Vanuatu and Western Samoa (see D Paterson, *LA100 Legal Systems I*, UE, USP, Suva, 1995).

8 See Article 100 (3) of the *Constitution of the Republic of Fiji 1990*.

- 9 It should be remembered that in most custom settings the distinction between criminal and civil law and processes is not drawn. In fact the concept of crime and criminality may be very alien to custom resolutions where the parties remain responsible for harm and its restitution.
- 10 See Zorn, 'Common law jurisprudence in customary law'.
- 11 [1986]SILR 158.
- 12 *R v Womeni Nanagano* [1963] PNGLR 75, per Ollerenshaw J.
- 13 See K Brown, 'Criminal law and custom in the Solomon Islands', (1986) *QUT Law Journ* 133.
- 14 Article 4 of the Solomon Islands Constitution.
- 15 Brown, 'Criminal law and custom in the Solomon Islands', p.137.
- 16 (1967) 13 FLR 59.
- 17 Review 2/1981.
- 18 Review 6/1981.
- 19 D Garland, *Punishment and Modern Society*, Oxford University Press, Oxford, 1990.
- 20 Court of Appeal C.A. 2/95B.
- 21 Obviously the measure of offence (or harm) seriousness is as culturally relevant as the imposition of an appropriate and consequential penalty.
- 22 Review 1/1982.
- 23 Unreported judgment p.2.
- 24 It should be remembered that there are consequences, particularly in civil dispute resolution, where reconciliation is not represented as a penalty. What we are dealing with here, however, might arguably be conceived of as a penalty substitute.
- 25 Also, once any penalty is so 'reconstructed' it might be inappropriate to continue referring to it as penalty. By so doing one might be criticised for taking sides and favouring the discourse of legal formalism, within which penalty rather than resolution predominates.
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