

## 2. The possibilities and limitations of legal pluralism

The existence of normative legal systems operating independently or semi-independently from the State, such as the *kastom* system in Vanuatu, is an empirical reality in almost every decolonised country in the world.<sup>1</sup> Despite their prevalent nature,<sup>2</sup> however, and the growing official and academic recognition of their existence, there is currently no widely accepted theoretical position for analysing the relationships between such legal systems, or between such systems and the State. This chapter discusses three possible theoretical approaches—legal positivism, legal anthropology and legal pluralism—and the possibilities and limitations of each for answering the questions posed in this study. It argues that although a legal pluralist approach is the most useful in analysing empirical questions about the operation of non-state legal systems, neither it nor the other two approaches is of much assistance in answering the normative questions this study poses about improving the relationship between the *kastom* and state systems in Vanuatu.<sup>3</sup> The last two chapters take this analysis further by proposing a new methodology to fill the theoretical lacuna identified in this chapter.

There is a terminological issue that needs to be dealt with initially as there is no agreed terminology in this field. There have been numerous suggestions about what to call normative orders existing outside the State, including customary law, non-state justice systems, non-state legal fields, dispute-resolution systems, rule systems, folk law, informal justice, collective justice, popular justice and vigilantism. The difficulty arises from the fact that the terminology employed directly raises some of the central dilemmas in the field: are we just talking about a set of substantive norms or of processes as well? (The use of the terms ‘customary law’ and ‘folk law’, for example, can be taken as referring uniquely to legal norms.) Are these normative orders or fields really ‘law’? Is a legal order broader than the mere resolution of disputes? These questions are discussed further below, but for present purposes the term ‘non-state justice systems’ is used. Although the focus of this study is conflict management in the context of law and order, rather than ‘justice’ as a whole, many of the other authors referred to do not limit their discussion to conflict management. The term non-state justice systems is also the one that is used most widely in the aid and development literature dealing with these issues, and is wide enough to cover non-state institutions as well as substantive norms.

## The positivist approach

### General principles

Questions of how to deal with a plurality of legal systems first came to the fore during the time of European imperialist expansion and colonialism. The British policy of indigenous sovereignty, often referred to as ‘indirect rule’, required colonisers to consider issues about what law was applicable to govern indigenous peoples, as well as which law would govern the relations between indigenous people and colonisers.<sup>4</sup> At the time these questions arose, the dominant legal theory was legal positivism, or analytical positivism. The central tenet of this theory, as expounded by one of its main nineteenth-century authors, John Austin, was that all law was the command of the sovereign. From this central principle, a number of consequences flowed, the most important of which in the context of non-state justice systems was that lawyers should confine themselves to the study of law and if societies did not have rules laid down by a sovereign or political superior then it followed that they did not have law.

Twentieth-century positivists modified the strict nineteenth-century approach in some respects, making special provision for systems of customary law. For example, Hart posited a dual system of rules: primary rules constituted the normative order in simple societies; secondary rules, characteristic of more advanced societies, specified the manner in which the primary rules could be ascertained, changed and applied. While Hart conceded that a society might exist that had only primary rules, he believed that these alone did not constitute a legal system and would need to be supplemented by secondary rules to take ‘the step from the “pre-legal” into the legal world’.<sup>5</sup>

### Positivism in Melanesia

Melanesia is a region where issues relating to non-state justice systems have always been on the agenda—during the colonial period and after independence of the countries of the region—although, significantly, such terminology has not previously been used to describe the issue. Rather, the debate has been couched in terms of the ‘recognition’ and ‘integration’ of ‘customary law’, putting the emphasis on customary norms rather than processes and on the appropriate action of the State towards customary law. Given such a choice of terminology, it is no surprise that the approach that has been adopted in the body of Pacific jurisprudence concerned with the relationship between introduced and customary law has been one of ‘weak’ legal pluralism, where the State recognises customary norms but not customary institutions. As discussed below (under ‘Theoretical issues’), in many ways such an approach belongs in the legal positivism tradition rather than legal pluralism.<sup>6</sup>

The positivist approach taken by the colonial administrators and later by legislators of the independent states is shown clearly in the structures of the

legal systems developed during these two periods. During colonisation, customary law was seen as being transient and the pluralist legal system a temporary state of affairs that would eventually be moulded into a universal national legal system. At independence, this goal was often incorporated in the new leaders' plans for the State.<sup>7</sup> Thus, new constitutions such as that of Vanuatu were drafted on the basis of a single, rather than a plural, system of law, with customary law incorporated to the extent that it did not conflict with other sources of law.<sup>8</sup> Vaai, summarising the situation in the South Pacific, states that '[i]ndependence, however, saw the establishment of new constitutional systems that were inevitably in accordance with Western ideologies and law'.<sup>9</sup> In fact, Westermarck comments that, since the advent of independence, the external imposition of legal systems has in some ways increased, as 'the new nations frequently stress legal uniformity as a key to nation-building'.<sup>10</sup>

From an academic perspective, there has been a significant body of work generated by what Narokobi terms 'the search for a Melanesian Jurisprudence'.<sup>11</sup> The irony of the fact that since independence the legal systems of the region continue to follow the path laid down by the imperialist government has understandably generated a lot of questioning and thought on the part of lawyers, and occasionally anthropologists, working within the legal system. The majority of the legal academic literature on this issue has, however, been concerned with describing the legislative framework for the incorporation of customary law in countries in the South Pacific region and then analysing the various reasons why in fact there has been so little incorporation of customary law into the state system.<sup>12</sup> Stewart states:

[T]he task of contemporary legal scholars is seen as interpreting the customary law which evolved in the colonial state courts in the light of contemporary legislation and supreme court practice. It is not concerned with understanding the contemporary social context despite the fact that the people's customs and practices are constantly evolving outside the framework of court decisions and interpretations.<sup>13</sup>

In other words, the approach adopted is essentially positivist, because it seeks to find ways for the state system to 'recognise' or 'integrate' customary law. Such an approach proceeds from the standpoint that it is only once the state legal system has accepted customary law that it can be considered 'law'. This is demonstrated by Zorn and Corrin Care's comment that '[t]he ultimate irony of customary law is that although state law must recognise and apply custom in order to make itself a part of the culture, state law cannot use custom without turning it into something else'.<sup>14</sup> As a result, there has been little consideration of institutions that are not officially constituted or recognised by state law.<sup>15</sup>

Even those such as Aleck who advocate 'new' approaches in fact still remain inside a state-centralist conception of law. Aleck argues that there are any number

of factors to explain the current failure of Pacific courts and legislatures ‘to bring about the development of “a new, culturally sensitive...jurisprudence which blend[s] customary law and institutions with modern Western law and institutions in an appropriate mix”’.<sup>16</sup> He suggests that the answer is for judges, lawyers and legal educators to recognise and act on the fact that ‘the common law tradition itself is best understood, employed and developed when it is regarded fundamentally as a system of customary law’.<sup>17</sup> Such an analysis again belabours the idea that it is up to the state institutions to incorporate customary law and that this can be done through the State’s own processes—an essentially positivist approach.

The adoption of this approach in Melanesia has had a number of consequences. First, it cannot really be said that the issue of non-state justice systems has in fact been addressed, because in order to address such issues there first needs to be some recognition that non-state justice systems exist, and such recognition as we have seen is not possible within a positivist paradigm. For example, at the beginning of this study not a single legal work referred in more than a passing way to the operation of the *kastom* system in Vanuatu. Second, the focus of most legal scholars dealing with customary law in the South Pacific has been on customary norms because, as Sack points out, ‘positive law has no difficulty in dealing with even the most exotic forms of substantive foreign law’, whereas ‘foreign legal institutions, methods, processes and values are a different matter’.<sup>18</sup> The main focus of law reform in this area has therefore been to develop ‘choice of law’ rules to assist the courts to determine whether customary or ‘formal’ law should be recognised and applied in a given case.<sup>19</sup>

## The legal anthropological approach

Anthropological jurisprudence, which first developed as a specialised discipline in the nineteenth century, has challenged many of the paradigms of the positivist view of law and, most relevantly for this study, has produced the various theories of legal pluralism, discussed separately below under ‘The legal pluralist approach’. This section discusses its other major contributions to the study of non-state justice systems and also highlights its current limitations.

Initially, the evolutionist school dominated legal anthropology.<sup>20</sup> It was believed widely that all societies passed through clear and inescapable stages of development, distinguished by increasing complexity, and this was extended to include stages of legal development. Various legal systems were studied and compared with the aim of charting a general evolutionary direction, from a primitive to a civilised state.<sup>21</sup> The ethnocentric bias was such that Western European states represented the highest stage of development—a belief that was very convenient for the imperialistic policies of the European powers.<sup>22</sup>

Since the late nineteenth and twentieth centuries, there have been three separate periods in the development of the field of legal anthropology.<sup>23</sup> The first was the publication of the major empirical monographs before the 1960s that were mainly ahistorical, ethnographic descriptions of a single ethnic group and were concerned with seeking to understand whether all societies had law or its equivalent. A small number of monographs, including Maine's *Ancient Law* (1861), Malinowski's *Crime and Custom in a Savage Society* (1967) and Llewelyn and Hoebel's *The Cheyenne Way* (1941), provided the baseline for the discipline.<sup>24</sup> These monographs set the general framework for the methods of research that continue to be employed. Malinowski's work led the movement 'out of the armchair into the village', insisting that some legal phenomena could be understood by direct observation in the field. Before him, most scholars had relied for their material on the accounts of travellers, missionaries and colonial administrators.<sup>25</sup> Malinowski looked at the 'sociological realities' and the 'cultural mechanisms' acting to enforce law and demonstrated the variety of different forces that operated to maintain peace in the Trobriand Islands, including factors such as the cohesive force of relationships of reciprocal obligation.<sup>26</sup> He stated:

In looking for 'law' and legal forces, we shall try merely to discover and analyse all the rules conceived and acted upon as binding forces, and to classify the rules according to the manner in which they are made valid. We shall see that by an inductive examination of facts, carried out without any preconceived idea or ready-made definition, we shall be enabled to arrive at a satisfactory classification of the norms and rules of a primitive community, at a clear distinction of primitive law from other forms of custom, and at a new, dynamic conception of the social organisation of savages.<sup>27</sup>

Following such works, the ethnocentric notion of evolutionism was criticised and writers turned their attention to the diversity of legal systems rather than their unity and to analysing them within their own terms rather than with reference to a notional universal standard.

With the exception of Malinowski, the other works during this period considered law primarily as a framework rather than as a process. Humphreys observes that '[t]hrough the influence of Durkheim on Radcliffe-Brown, it became a fundamental tenet of...anthropology from the 1920s to the 1950s that the anthropologist's task was to discover the "rules" governing the structure of the society' under study.<sup>28</sup> The influence of such beliefs is so strong that even today what Moore describes as the 'venerable debate' on the topic of the complex place of norms in customary systems continues.<sup>29</sup> Generally, however, later lawyers and anthropologists disagreed with such a focus on norms, stressing that law in traditional societies consisted of processes as well as norms. For example, Sack

argues that 'Melanesian law does not express itself in obligatory norms but in the actual social organisation of the people'.<sup>30</sup> Narokobi similarly pointed out that in classical Melanesia, law was not a specialist discipline, but rather 'an integral part of the way in which people went about various tasks in a community'.<sup>31</sup> He comments that the emphasis 'was not on the law or the rule or the norm but on how to settle the conflict'.<sup>32</sup> In the African context as well, Moore writes that '[i]t is fairly well agreed that in many (most) African settings there was much that operated in the "resolution" of disputes other than a system of norms'.<sup>33</sup>

These early ethnographies were critical in establishing methodological approaches to the study of non-state justice systems. *The Cheyenne Way*<sup>34</sup> was 'the first systematic anthropological attempt to study law by a careful analysis of "trouble-cases"'<sup>35</sup> —namely, looking at disputes and inquiring into 'what the trouble was and what was done about it'. The data produced by this method were found to have been the most revealing in exposing the nature of law in Cheyenne society. The 'case method' approach has continued to be a standard method of research and is used in this study, particularly in Chapter 6. Max Gluckman,<sup>36</sup> Philip Gulliver<sup>37</sup> and Paul Bohannan<sup>38</sup> produced important studies during this era. Such studies were essentially critical ethnographic descriptions of non-European societies.

In the mid-1960s, there was then a shift towards the study of dispute settlement and of law as a process, in which the study of substantive rules and concepts was subordinated to the analysis of procedures, strategies and processes. Malinowski, who was already questioning the assumption that 'savages' invariably followed the 'rules', had foreshadowed this shift.<sup>39</sup> Malinowski's work thus gave rise to a new epistemological base in legal anthropology—namely, 'processual analysis', which studied the processes involved in the settlement of disputes. This contrasted with the prevailing idea of normative analysis that was based on the idea that law consisted, in essence, of a number of written and explicit norms and was often presented in codified form.<sup>40</sup> Humphreys identifies two ideas behind this shift: the first is 'that social change and areas of potential instability can be best understood and identified by focussing on disputes for evidence of changing norms, areas of ambiguity in social relationships and attempts to control change'.<sup>41</sup> The other idea is demonstrating that the basic principles used to investigate and adjudicate disputes in developed and less developed societies are similar.<sup>42</sup> Snyder observed that the studies in this period were limited because they did not acknowledge the profound social and economic changes that were occurring as a result of the colonisation process.<sup>43</sup>

The third period is the move since the mid-1970s towards the gradual elaboration of a plurality of approaches and more explicit concern with theory and attention to the role of the State. In the 1980s, anthropologists came to feel that 'the

ethnographic case-study methodology of dispute processes was too narrow a canvas of analysis'.<sup>44</sup> It was argued that local disputes needed to be analysed within their socioeconomic and historical context.<sup>45</sup> Further, the case method was also criticised by some postmodernists, who claimed that 'the choice of the case as the unit of analysis shifts attention away from routine compliance with law and toward deviant and otherwise extraordinary behaviour, away from concord and to conflict'.<sup>46</sup> There were two responses to this. First, as discussed below, under the term 'legal pluralism', a debate arose as to how to conceptualise local processes and norms within the wider context of state laws and domination. The second response involved a 'critique of the atemporal quality of case studies of dispute processes and their Durkheimian understanding of dispute settlement as "social control"'.<sup>47</sup>

The preceding discussion demonstrates that legal anthropology has made a number of useful contributions to answering the specific questions this study is concerned with: first in research methods and second in emphasising certain aspects of the legal system that legal scholars tend to overlook, including the numerous modes of conflict management outside the courts and the general social context of the law.<sup>48</sup> At present, however, legal anthropology is limited in a number of respects. First, as Zorn points out, during the period legal anthropology has developed, 'law and anthropology have proceeded from different premises and have embraced different goals'.<sup>49</sup> She further explains that '[a]nthropology's primary aim is accurate description; the pre-eminent aim of law...is prescription'.<sup>50</sup> As a result, there is little general comparative work or theorising about the universal basis of norms or legal institutions in contemporary legal anthropology.<sup>51</sup> For example, Franz von Benda-Beckmann argues that it is rare in legal anthropology to have systematic comparisons of legal systems.<sup>52</sup> Second, with the significant exception of the development of the theory of legal pluralism, discussed below, legal anthropology has been in a period of stagnation and largely devoid of theoretical innovation in the past 20 years.<sup>53</sup> Riles therefore commented that in the 1980s legal anthropologists suffered a 'crisis of identity' and saw a waning of interest in their methods and subject matter.<sup>54</sup> She explains that

practitioners of legal anthropology now pessimistically perceive the possibilities of their discipline. Likewise, although it is now increasingly fashionable for lawyers to turn outside their discipline for grand insights, they do so with increasing wariness. The image of what anthropology might have to offer, the totally new insight, the epistemology-bursting perspective, never seems fulfilled.<sup>55</sup>

In addition, legal anthropologists seem currently to be turning their attention away from their traditional focus of analysing the intersections between

indigenous and European law, to analysing non-colonised societies such as Europe,<sup>56</sup> and also the United States.<sup>57</sup>

## The legal pluralist approach

### General principles

While definitions of legal pluralism abound, most would generally agree with Rouland's definition that it is the multiplicity of forms of law present within any social field.<sup>58</sup> Griffiths, one of the key developers of the theory, defines a situation of legal pluralism as

one in which law and legal institutions are not all subsumable within one 'system' but have their sources in the self-regulatory activities which may support, complement, ignore or frustrate one another, so that the 'law' which is actually effective on the 'ground floor' of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism and the like.<sup>59</sup>

One of the central arguments of the legal pluralists is that there exists a state of legal pluralism in virtually every society.<sup>60</sup> Sack takes this one step further, arguing that legal pluralism implies an ideological stance: that it sees the 'plurality as a positive force to be utilised—and controlled—rather than eliminated'.<sup>61</sup> Santos, however, argues that 'there is nothing inherently good, progressive, or emancipatory about "legal pluralism"'.<sup>62</sup>

Legal pluralism thus starts from the rejection of what Griffiths calls 'the ideology of legal centralism', by which he means the positivist notion that law necessarily is the law of the State, is uniform and exclusive and is administered by state institutions.<sup>63</sup> Legal pluralists have criticised the model of legal centralism on three main bases: the concept of 'law as universal across time and space'; its monopolistic claim to 'state power over the recognition, legitimacy and validity of law'; and the State's 'claims to integrity, coherence and uniformity'.<sup>64</sup>

The most widely used conception of plural legal systems is Moore's notion of the semi-autonomous social field.<sup>65</sup> Moore defines the semi-autonomous social field as one that 'has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance'.<sup>66</sup> The boundaries of the field are defined by a processual characteristic: 'the fact that it can generate rules and coerce or induce compliance to them.'<sup>67</sup> Moore's concept of semi-autonomous social fields is an important development in the theory of legal pluralism because, in emphasising the lack of autonomy, it draws attention to the fact that different legal orders exist in relation to each other and hence affect the way that each is able to

operate. Moore also demonstrates that studying the operation of semi-autonomous social fields assists in understanding how legal change is really effected, rather than, for example, merely relying on assumptions that a particular piece of legislation will have a desired effect.<sup>68</sup> The concept of semi-autonomous social fields also permits us to develop hypotheses concerning the relationships between the different spheres. Merry notes:

Research in the 1980s emphasizes the way state law penetrates and restructures other normative orders through symbols and through direct coercion and, at the same time, the way non-state normative orders resist and circumvent penetration or even capture and use the symbolic capital of state law.<sup>69</sup>

Westermarck expands on Moore's concept of semi-autonomous social fields by explaining that it can be analysed as an 'interactional approach' towards viewing the relationship between state law and indigenous law.<sup>70</sup> Such an approach, while recognising that in some instances 'imposed law extinguishes all local autonomy', also stresses that 'we cannot assume subjugation and exploitation as inevitable consequences'.<sup>71</sup> Applying such an approach to the village courts in Agarabi, Papua New Guinea, he demonstrates how they have generated their own set of rules and procedures, as have other village courts. He therefore stresses that while we must be aware of the potential domination of national legal institutions operating at the local level, we must not be blind to what Levi-Strauss describes as *bricolage*: 'people's capacity to select bits and pieces of the systems intellectuals build and recombine them for their own purposes in their own way.'<sup>72</sup>

While the concept of semi-autonomous social fields has been widely accepted, it has also been subject to some criticism. Woodman argues that in virtually all writings about legal pluralism it is assumed that the constituent elements of the legally plural world—the 'legal orders', 'legal systems' or 'social fields'—are 'reasonably well identified by their own visible characteristics'.<sup>73</sup> Woodman denies, however, the possibility that a map of legally pluralistic situations can be drawn because it is not clear who belongs to every social field and who does not, or even which law will be applied in which situation.<sup>74</sup> He also rejects Vanderlinden's argument that legal pluralism must be seen from the viewpoint of the individual subject of law, stating that the 'flight to the individual perhaps goes too far'.<sup>75</sup> Woodman proposes instead that we look at laws in terms of a 'population' and refer to the 'legal mechanisms' involved.<sup>76</sup> While Woodman's main argument—that the edges of each plural order are bound to be fuzzy and to have a merging tendency—is certainly valid and important to bear in mind, it is difficult to see how these problems with the concept of semi-autonomous social fields are overcome by replacing the words 'field' or 'system' or 'order' with 'population'.

There is some debate about the extent to which legal pluralism as a doctrine is well accepted. Riles talks about the 'universal fact' of legal pluralism that 'is so commonly accepted that it can be assumed'<sup>77</sup> and Griffiths claims that the ideology of legal centralism has been defeated and legal pluralism is now generally accepted as being 'the new paradigm'.<sup>78</sup> Woodman<sup>79</sup> and Harris,<sup>80</sup> however, query this claim. Hughes notes that 'within so-called Western societies, legal pluralism has not developed much beyond a marginal critique'<sup>81</sup> and Franz von Benda-Beckmann also comments that the majority of legal academics certainly do not really use the concept, and even among legal sociologists 'its use is rather the exception than the rule'.<sup>82</sup> A more nuanced view is provided by Roberts, who comments that while some of the general tenets of the legal pluralists are widely accepted—such as the heterogeneity of the normative domain and the criticism of the State's monopolistic claims to systemic qualities—beyond this, 'consensus is more difficult'.<sup>83</sup> A possible reason for this is the current disagreement about a number of theoretical issues, to which we now turn.

## Theoretical issues

Legal pluralists have devoted recent decades to intense debates about a number of related issues: whether or not there is anything that differentiates a 'legal' system from a non-legal form of normative ordering; whether setting a meaning of 'law' is a useful exercise; whether there is a fundamental difference between state and non-state normative orders; and whether or not it is possible to have a situation of legal pluralism within a state system.<sup>84</sup> Franz von Benda-Beckmann therefore notes that '[b]eyond the threshold of the yes or no to legal pluralism, there is little uniformity in the conceptualisation of law, or legal pluralism, about the relations between such plurality and social organisation and interaction'.<sup>85</sup> These debates will be discussed together with their relevance to the application of the theory of legal pluralism to answering the specific questions with which this study is concerned.

### What's in a name?<sup>86</sup>

Defining the boundary between non-state law and similar non-legal social phenomena has been a continuing problem for legal pluralists.<sup>87</sup> von Benda-Beckmann goes so far as to argue that the attempt to arrive at a definition of law for anthropological purposes 'still resembles a battlefield'.<sup>88</sup> Moreover, not only has no consensus emerged on what, if anything, differentiates a 'legal' system from a non-legal form of normative ordering, there is a division of opinion as to whether or not attempting to formulate such a definition is possible or even useful.

Under a positivist approach to law, the question 'What is law?' is answered in terms that take some centralised state organisation for granted and consider the presence of rules, courts or sanctions as essential.<sup>89</sup> For example, Roberts has

recently argued that '[o]verall, I am left with the sense that it is very difficult to specify in a convincing way a secure grounding for "law" if we try to shake it free from particular forms historically associated with the state'.<sup>90</sup> Legal pluralists, however, claim that non-state legal structures exist, raising the problem of how to distinguish law from other forms of social ordering. The question then becomes whether or not all forms of social control are law or whether there are some other criteria that can be pointed to that distinguish the legal from the non-legal. One of the reasons why this is such a contentious issue is the legitimising power of the label of 'law'. As Tamanaha observes, today, 'law has an almost unmatched symbolic prestige, rivalled in influence only by science. It carries connotations of right, certainty and power.'<sup>91</sup>

In order to define law as a specific type of social control, most earlier legal anthropologists focused on the sanctions following deviance from the norm. In such a model, legal norms are only those whose violation results in a sanction enforced by an institution with authority over the parties involved.<sup>92</sup> Hoebel therefore contends that '[a] social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or possessing the socially recognised privilege of so acting'.<sup>93</sup>

Such definitions have, however, been criticised on the basis that '[t]hrough the formal legal institutions may enjoy a near monopoly on the legitimate use of force, they cannot be said to have a monopoly of any kind on the other various forms of effective coercion or effective inducement'.<sup>94</sup> Recent attempts to amend Hoebel's definition have tried to grapple with this problem. For example, Frame and Benton propose the following definition: '[a] social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force or the imposition of serious social disadvantage by an individual or group or agency possessing the socially recognised privilege of so acting'.<sup>95</sup>

Another definition is proposed by Griffiths, who employs Moore's concept of semi-autonomous social fields and defines law as 'the self-regulation of a "semi-autonomous social field"'.<sup>96</sup> He acknowledges that such regulation can be regarded as 'more or less "legal" according to the degree to which it is differentiated from the rest of the activities in the field and delegated to specialized functionaries'.<sup>97</sup> Unfortunately, he fails to explain *why* this should be the case, and his argument that these factors cause something to be 'more legal' seems to undermine his entire argument that state law is no more 'law' than other forms of normative ordering. Other definitions of law abound<sup>98</sup>—some so broad they are criticised as running 'the risk of including all forms of social control'.<sup>99</sup> Consequently, as Merry notes, 'The literature in this field has not yet clearly demarcated a boundary between normative orders that can and cannot be called law.'<sup>100</sup>

The failure of legal pluralists to agree on a definition of law has led to two reactions. The first, advocated by Tamanaha, who launched the most significant attack on what he referred to as the 'precociously successful doctrine' of legal pluralism in 1993, was that such a failure was fatal to the concept of legal pluralism.<sup>101</sup> He argued that although legal pluralism was one of the dominant concepts in the field of legal anthropology, it was 'constructed upon an unstable analytical foundation which will ultimately lead to its demise'.<sup>102</sup> He contends that the concept of law should be reserved for state law, as there is an empirical distinction between state law and other forms of social ordering. Further, calling normative orders other than state law 'law' is ethnocentric and obscures the fundamental differences in form, structure and effective sanctioning between state law and other normative orders.<sup>103</sup> Later, he modified this position, although he still contended that 'having this unresolved issue at its very core places the notion of legal pluralism on a tenuous footing'.<sup>104</sup> Woodman, who has been one of the few to deal with Tamanaha's arguments, criticises this approach, noting that 'the distinction between state law as doctrine and non-state law as social ordering is no more than a distinction of relative emphasis in the sources of information most readily available, not an ontological divide'.<sup>105</sup>

The second approach to the failure of legal pluralists to agree on a definition of law is to argue that in fact such a definition is not essential to the concept of legal pluralism.<sup>106</sup> Woodman's response to the issue of how to define law is therefore that we must accept that all social control is part of the subject matter of legal pluralism and that 'law covers a continuum which runs from the clearest forms of state law through to the vaguest form of informal social control'.<sup>107</sup> Merry similarly argues that '[d]efining the essence of law or custom is less valuable than situating these concepts in particular sets of relations between particular legal orders in particular historical contexts'.<sup>108</sup> Humphreys comments:

[W]e cannot draw precise definitional lines round 'law' but are dealing with a complex of ideas and institutions in which demarcation lines vary over time and between one group and another...and that rules of law and legal arguments are formulated, approved and cited in specific historical circumstances.<sup>109</sup>

Santos also refers to the fact that the debate has become 'increasingly perceived as sterile'.<sup>110</sup> Sack takes this approach to the furthest extreme, arguing that 'the main responsibility of law, including legal theory, is not analytical clarity and consistency but the performance of practical social tasks'.<sup>111</sup> Not all legal pluralists, however, are content to leave the definition of law undefined in this way. von Benda-Beckmann, for example, argues that more conceptual clarity is desirable.<sup>112</sup>

One way around this problem that has been proposed, ironically, by von Benda-Beckmann and Tamanaha is to recognise that there might be many different definitions of law depending on who is asking the question and why they are asking it. Franz von Benda-Beckmann<sup>113</sup> therefore advocates asking the more fundamental, theoretical questions 'What is it we want to compare and why do we want to compare it?' before focusing on the potential terminological problems.<sup>114</sup> Twining has most recently also adopted this approach, suggesting that we make 'the context and purposes of the inquiry supply criteria for distinguishing "legal" from other normative orders'.<sup>115</sup> Tamanaha argues that it is not necessary to 'construct a social scientific conception of law' before we can use legal pluralism.<sup>116</sup> Rather, we should treat as law what people in various social groups treat as law.<sup>117</sup>

In relation to the present study, the suggestion of these three authors can be followed, obviating the need to formulate a universal definition of 'law'. The problem this book investigates is the relationship between two mechanisms that are used within a country to manage conflicts. This therefore becomes the focus and the question as to whether such a mechanism is 'legal' or merely normative is not crucial to the analysis.

### Is state law fundamentally different to non-state law?

The second major, and related, issue in legal pluralism is whether there is a fundamental difference between state law and non-state law. As Fitzpatrick observes, the relationship of legal pluralism to the State and to state law has been highly ambivalent. Some of its adherents attribute the State no special pre-eminence, leaving 'an unstructured and promiscuous plurality', while others 'reduce or subordinate plurality to some putative totality, usually the state or state law'.<sup>118</sup> Sack comments that this problem arises from the fact that legal pluralism makes sense only if it is assumed that one form of law is not objectively superior to all others in every respect.<sup>119</sup> He also observes,<sup>120</sup> however, that we cannot assume all forms of law to be equally valuable either, concluding that 'it is easy to see that a legal pluralist must also be some kind of relativist; it is more difficult to establish what this implies'.<sup>121</sup>

The idea that there is a fundamental difference between state law and non-state law has been termed a centralist approach.<sup>122</sup> Proponents of such a view often maintain that the empirical reality of the extensive power and influence of the State should not be ignored. For example, Zorn argues that legal pluralism's 'refusal to recognize that the state does have powers unavailable to other institutions...makes history impenetrable and denies the importance of power relationships. The reduction of society to chaos makes everything accidental and removes the ability to extract meaning from social events'.<sup>123</sup>

Merry similarly argues that state law should be seen as fundamentally different 'in that it exercises the coercive power of the state and monopolizes the symbolic power associated with state authorities'.<sup>124</sup> She also acknowledges that the State impacts ideologically on other legal orders because it acts as a framework for their practice.<sup>125</sup> In the context of grappling with the classification of global law as 'law', Roberts has recently argued that 'the growth of law and an ideology of legalism is most plausibly linked to the understandings and practices associated with the processes of centralisation that led ultimately to the formation and proliferation of the nation state'.<sup>126</sup>

The competing approach, termed the diffusive approach, is that law does not need the State to function, nor does it enjoy any particular relationship with the State. Proponents of this view, such as Griffiths<sup>127</sup> and von Benda-Beckmann, criticise the centralist approach as using the ideology of legal centralism. von Benda-Beckmann argues, therefore, in relation to Merry's comments, that she 'does not really move away from legal centralism because the predisposition to think of all legal ordering as rooted in state law is based on this fundamental difference'.<sup>128</sup> Fitzpatrick observes that legal pluralist scholars have tended to assume the ultimate domination of the State.<sup>129</sup> He notes, however, that the problem with the diffusive view is that it does not accord state law 'the original efficacy that, on occasion, it manifestly has'.<sup>130</sup> Further, he observes that treating all legal orders equally does not take into account the possibility of conflict between legal orders or the consequent overarching status state law might assume.<sup>131</sup>

Fitzpatrick argues that in fact both approaches are not inherently opposed, but rather reflect mutual elements of a wider process. He contends that state law does take identity by deriving support from other social forms and would thus appear to be one form among many, but that 'in the constitution and maintenance of its identity, state law stands in opposition to and in asserted domination over social forms that support it'.<sup>132</sup>

The solution to resolving this question for the purposes of the present study is similar to the solution proposed for the answer to the question of 'What is law?'. Whether or not there is a difference between state and non-state normative orders, and whether such a question is important, must be resolved in the context in which the question is being asked. If the question is whether state and non-state normative orders are equally legitimate, the question can be answered in one way. If, however, the question is whether state and non-state normative orders have the same resources available to them, the question can be answered in a very different way. When comparing two different normative orders, it is essential to draw distinctions between them in terms of their respective strengths, weaknesses, fields of influence and susceptibility to change. This applies whether or not one of the normative orders is the State. As Rouland notes, '[W]hether

one applauds or bemoans the fact, states exist and are unlikely to disappear: the nature and importance of the state will not emerge from an over-critical attitude.<sup>133</sup> For the purposes of this study, the approach adopted is to acknowledge the importance of the state system without privileging it over a non-state system unless there is a valid contextual reason to do so.<sup>134</sup>

### Is it possible to have a situation of legal pluralism within a state system?

The final continuing theoretical issue among legal pluralists is whether legal pluralism can exist within the state system. There is a distinction commonly drawn by legal pluralists between ‘weak’ or ‘state’ or ‘juridical’ legal pluralism and ‘deep’, ‘strong’ or ‘new’ legal pluralism. While different definitions of the two exist, it can be said that deep legal pluralism involves the coexistence of legal orders with different sources of authority, whereas in weak legal pluralism there are two or more bodies of norms that have the same source of authority.<sup>135</sup>

Today there is a live debate as to whether or not ‘weak’ pluralism is also legal pluralism. The main protagonist in this debate is Griffiths, who argues that only deep pluralism is ‘real’ legal pluralism.<sup>136</sup> In criticising previous legal pluralist theories for their tendency towards legal centralism or statism, Griffiths argues that weak legal pluralism is only a facade, as it in fact serves the interests of the State. This is because the State determines the role these semi-autonomous bodies will play and also because it delegates to them only a subordinate role. For this reason, Griffiths argues that the recognition of customary law by the State is weak legal pluralism and in fact supports the ideology of legal centralism.<sup>137</sup> Woodman disagrees with Griffiths’ argument, saying that weak (or, as he calls it, ‘state’) legal pluralism *is* a form of legal pluralism, although he acknowledges it can be distinguished from deep legal pluralism.<sup>138</sup>

These different approaches are discussed further below. For the purposes of this study, the question of whether weak pluralism is a pluralist or a positivist doctrine is not crucial.<sup>139</sup> What is important is recognising the distinction between the two approaches—one being concerned with institutions and processes and the other with substantive norms—as this has significant repercussions for answering the questions posed in this study. As Griffiths observes, ‘[T]hese two perspectives give rise to different strategies for dealing with customary law in a transnational world, namely whether to work for recognition of customary law within the state national legal system, or whether to claim recognition for it outside this system.’<sup>140</sup>

The framing of the research questions and the methodology chosen to answer them are therefore based on a deep legal pluralist approach, whereas previous studies in this area have adopted a weak or state pluralist approach. In the event, the final two chapters of this study demonstrate that once we start asking specific

questions about the nature of the relationship between legal systems, and the pathways that should exist between them, the distinctions between deep and weak legal pluralism in practice become less clear.<sup>141</sup>

## The possibilities and limitations of legal pluralism for Melanesia

It is clear from the above discussion that the theory of legal pluralism has enormous potential relevance to the study of the *kastom* system and non-state justice systems in general. This section first discusses the possibilities that it opens up, and the lessons that can be drawn from the existing literature, for the present study, and then turns to discussing the current limitations of the theory. Finally, a way forward is foreshadowed and subsequently developed in Chapters 7 and 8.

### The possibilities of legal pluralism

The major contribution of legal pluralism to this book is that it facilitates the investigation of non-state justice systems by establishing them as a legitimate field of study and by providing many of the tools and terminology to do so. It therefore has considerable heuristic value in describing and analysing complex empirical situations such as are addressed in this study.<sup>142</sup> Legal pluralism offers a radically different approach to the positivist orientation adopted by scholars in Melanesia for addressing issues arising from the introduction of Western legal systems into a social field in which indigenous legal orders persist. As discussed above, previous approaches have focused on the way the state legal system could integrate customary norms within its existing framework. Not only has such an approach failed to date to produce the development of a 'Melanesian jurisprudence' by the state courts, it significantly limits the inquiry in sustaining the State as the sole repository of power.

Second, the literature also demonstrates that the focus of issues concerning legal pluralism should be structural in nature. Fitzpatrick is one of the first authors to suggest a focus on structure, observing:

If legal pluralism is ever to transcend the perpetual surprise at this own re-discovery, it must confront structuring elements of unity, or at least cohesion, beyond the diversity it reflects. Yet it has to do this without, as is so often done, subordinating diversity to some abrupt totality—usually conceived in the literature as a formal or functional dominance of the state.<sup>143</sup>

Unfortunately, he does not develop this idea further, although his implied warning about avoiding the dominance of the State is an important one.<sup>144</sup> Similarly, Greenhouse argues that although current studies continue to treat dispute settlement in general as an internal group function, a group's *external*

relationships are crucial to an understanding of its ability to resolve disputes. She analyses a number of anthropological studies and demonstrates that a mediator's effectiveness is enhanced by gestures towards other available forms of authority, his or her relationship to them and his or her ability to mobilise them rhetorically.<sup>145</sup> She notes:

In situations where courts are available (accessible), disputants' invocations of explicit norms in effect assert that their arguments will have validity 'higher up' the judicial ladder; they are a claim to future success in an escalated conflict. Mediators' invocations of explicit norms carry the dual message of their own authority via their identification with the sources of power in society and an implicit threat to abandon the case to the courts if the disputants fail to come to terms.<sup>146</sup>

Greenhouse argues that 'the way in which a jural community perceives its access to wider systems of authority has, potentially, a profound impact on the efficacy of mediators in containing and resolving disputes'.<sup>147</sup> These comments suggest that seeking to understand the nature of the links between one semi-autonomous social field and another and their position in relation to each other is of the utmost importance—an important lesson for this study.<sup>148</sup>

The third important contribution of legal pluralism to this study is the recent emphasis that has been given to the importance of observing adaptation and transformation of plural legal orders, and particularly the influence that they have on each other.<sup>149</sup> Keebet and Franz von Benda-Beckman argue that '[u]nder conditions of legal pluralism elements of one legal order may change under the influence of another legal order, and new, hybrid, or syncretic legal forms may emerge and become institutionalised, replacing or modifying earlier legal forms'.<sup>150</sup>

They contend that 'such transformation processes are an integral part of legal pluralism' and point out that '[t]he trends are not uni-directional'. Svesson describes such processes of continuous interaction as '*interlegality*', arguing that 'it is the continual flow of legal perceptions, the dynamic force of pluralistic arrangement, that reshapes state law to better accommodate the cultural distinctiveness of indigenous people'.<sup>151</sup> Santos similarly draws attention to the 'porous' nature of the boundaries between different legal orders with 'dense' interactions, arguing that in such conditions 'each one loses its "pure", "autonomous" identity and can only be defined in relation to the legal constellation of which it is a part'.<sup>152</sup> A related point is made by Webber, who argues that the normative relationship between the colonists and aboriginal peoples in Canada was the result of mutual adaptation and that the structure of the relationship 'was formed as much from compromises on the ground as from abstract principles of justice'.<sup>153</sup> He also draws attention to the importance of not minimising the 'relations of power' when considering the development of

normative regimes between different legal systems.<sup>154</sup> In addition, it has recently been suggested that external influences, such as globalisation and political change, affect power relationships and local constellations of legal ordering, as well as the legal understandings of former periods, be those colonial, socialist or other.<sup>155</sup>

### The current limitations of legal pluralism

Legal pluralism has therefore been shown to be potentially very helpful in addressing cognitive-type questions about how plural legal systems operate in practice in any given jurisdiction. It does not, however, currently have a great deal to offer in relation to answering normative questions about how plural legal systems could best relate to each other<sup>156</sup> or other issues involving what Woodman calls 'planned pluralism'.<sup>157</sup> This type of inquiry involves asking such questions as 'How can we try to ensure that the different legal orders that exist in any particular jurisdiction operate in a way that maximises their ability to cross-fertilise, support and enrich each other, rather than to undermine and conflict with each other?' The fact that legal pluralism does not currently greatly assist in addressing such questions is possibly one reason why to date it has been largely overlooked by development agencies such as the World Bank and the United Kingdom's Department for International Development, which have recently started to become involved in the development and reform of non-state systems.<sup>158</sup>

There are three factors that have contributed to inhibiting the development of legal pluralism into a useful theory in the context of practical law reform. First, in the past decade or so, despite having made such large advances early on, legal pluralism has fallen into a theoretical morass out of which it appears unable to drag itself. Rather than moving the theory forward to develop clearer analytical and comparative frameworks for studying concrete non-state justice systems and their relationships, it has become embroiled in the sorts of internal theoretical debates discussed above, thus reducing its practical relevance. Consequently, as Twining argues:

[D]iscussions of this broader 'new legal pluralism' became bogged down in obsessive and largely unproductive debates about the definition of 'law'... This is an increasingly important area in which theory has so far provided very little help to detailed research... Although it has produced some excellent specific studies, it continues to struggle with the problem of constructing an adequate theoretical framework.<sup>159</sup>

In this regard, it is noteworthy that a number of legal pluralists state explicitly that the theory ends up advocating immobility. Merry notes therefore that 'pluralism, just as deconstruction, ultimately ends in immobilisation, since if everything is complex and variable, just as if everything is a matter of

interpretation, how can one say anything'.<sup>160</sup> Griffiths' assertion that legal pluralism involves 'an unsystematic collage of inconsistent and overlapping parts' and his frequent portrayal of anyone who suggests introducing some order into such a system by considering what attitude the State should take towards non-state legal systems as a 'statist' or 'legal centralist' is also not conducive to the idea of law reform.<sup>161</sup> Rouland argues that Griffiths' theory causes one to wonder 'whether in forcing the state and law further and further apart, we will not be driven up a theoretical blind alley'.<sup>162</sup> Even Sack, who approaches the question of legal pluralism as a lawyer, rather than an anthropologist, despite arguing that 'the aim of legal pluralism is...a situation where different forms of law cooperate, each performing the task or tasks for which it is best suited and in a way which maximises its potential',<sup>163</sup> ultimately also fails to provide any pragmatic solutions, concluding that 'the legal pluralist can, *qua* pluralist, do almost nothing constructive'.<sup>164</sup> Hughes similarly observes that legal pluralism appears to be an incomplete theory that offers a critique of the State but does not advance an alternative approach.<sup>165</sup>

The second factor limiting legal pluralism's relevance to law reform is its political nature. It is clear that the relationship between the State and other legal systems is at the heart of the debates about legal pluralism.<sup>166</sup> This is because law making and enforcing are two of the core functions of a State, arising from what certain political theorists term the 'social contract' between members of society and the State.<sup>167</sup> Hughes makes this relationship explicit, noting that '[l]egal pluralist argument...seems fundamentally to challenge our thinking about the state, if also its relationship to law, so it is a branch of political theory'.<sup>168</sup> He observes that in traditional societies themselves—once the heartland of legal pluralist research—there has been a strengthening of legal positivism, rather than a move towards a legal pluralist paradigm. This is seen to be due to new governing elites seeking out rapid development, international financing, structural reform and rapid assimilation to the liberal capitalist model of the State.<sup>169</sup> Rouland also draws attention to the fact that acting on legal pluralism is likely to encroach on state power, which is problematic because 'not all states are totalitarian, but they all contain the seeds of totalitarianism, since it is part of the underlying logic of the state to try to weaken, or even do away with, any authority that rivals its own'.<sup>170</sup> Ottley and Zorn argue that one reason why the legal system has failed to incorporate customary law in Papua New Guinea is the belief by state institutions that a customary legal system constitutes a threat to them and to the system of legislation and case law that reinforces the authority and legitimacy of the State.<sup>171</sup> They explain that

[b]y monopolizing the law and its processes, the state reifies itself. Customary law, then, is viewed by the government, whether or not correctly, as a direct attack upon the legitimacy of the state. The

government and the propertied classes that the state protects believe that by taking force into their own hands and solving disputes using their own methods, clans are, in effect, communicating to the state that it is not needed and that its monopolies over basic areas of social control are not needed.<sup>172</sup>

Finally, and most relevantly for our purposes, the theory has had limited relevance for law reform because the material produced has tended to be largely descriptive rather than normative,<sup>173</sup> and limited to one site of study,<sup>174</sup> meaning that it has not been comparative, thus inhibiting the development of overarching theories that could be used in a law reform context.<sup>175</sup> As Snyder comments:

Partly as a consequence of its relative unconcern for law and its emphasis on disputes and process, much recent legal anthropological writing would appear incapable of arriving at a theoretical view of the apparent autonomy of law, or of considering abstractly the relationships between plural legal forms, including those of the state, in different countries.<sup>176</sup>

Franz and Keebet von Benda-Beckmann similarly observe that although the literature on legal pluralism is extensive, 'it mainly consists of case studies, on the one hand, or of very general summary statements simply reproducing the official, state-law version of legal pluralism on the other'.<sup>177</sup> They in fact even go so far as to deny that it is an explanatory theory at all, merely referring to legal pluralism as a 'sensitising concept'.<sup>178</sup> Therefore, due at least in part to these three factors, currently there is a very limited theoretical foundation for addressing the sorts of questions this study asks about improving the relationship between the *kastom* and state legal systems in Vanuatu. The next section discusses the material that makes up this limited foundation, then Chapters 7 and 8 build from this basis a new framework and methodology for analysing and reforming relationships between plural legal orders.

### Using legal pluralism as a normative tool

The principal contributors to the development of a legal pluralist approach to law reform to date have been Morse and Woodman.<sup>179</sup> In the late 1980s, they developed a number of broad categories for the main formal legal measures the State could take regarding customary law.<sup>180</sup>

The first category is negative measures, including prohibition of conduct either required or permitted by customary law and denial of validity of the legal consequences that would otherwise be conferred by a customary norm.<sup>181</sup> The second category is positive measures, and this contains three subsets. The first is admittance as fact, which can be viewed as not amounting to an acceptance of the legal nature of customary law. The second is incorporation of law, by

which the state law admits into its own body of norms a customary law norm or portion of that norm. They point out, however, that this is problematic particularly when it comes to procedural norms, as particular procedures are often inseparable in practice from the social institutions within which they operate and so their incorporation is likely to be narrowly limited unless there is a profound reform of state institutions. It should be noted that all the approaches suggested so far fit within the weak pluralist approach. The third subset of approaches, however, moves beyond a state-centralist approach. Morse and Woodman refer to them as ‘measures of acknowledgment’ and define them as ‘measures by which state law expressly or impliedly provides that state institutions do not have an exclusive capacity to perform certain functions to do with law, which customary law is competent to perform’.<sup>182</sup> For example, through a measure of acknowledgment, state law accepts the capacity of customary law to constitute an institution with legal powers, such as a traditional assembly with power to enact law or to adjudicate in disputes.

Morse and Woodman set out three ways of classifying the measures of acknowledgment. The first is the type of power, which can be either a legislative acknowledgment or a measure of norm-applying acknowledgment, such as adjudication. The second way of classifying the measures of acknowledgment is according to the State’s characterisation of each. The State may assert either that it has conferred the power itself on the customary institution or that it is recognising existing, legitimate powers. The latter approach implies abandonment of any dogma of a state monopoly of legitimate authority and will not allow the State to circumscribe the powers or to abrogate them as could be done in the former instance. Morse and Woodman note that the latter approach is unlikely to be accepted by a state due to its challenge to the State’s monopolistic powers. The third way of classifying the measure of acknowledgment is whether the state law confers on a state institution powers concurrent with those granted or recognised as held by the customary institution or whether it provides that the customary institution is the sole holder of the powers of the type designed. In the former case, a difficulty will arise as to how to resolve conflicts between the two institutions given that the State necessarily concedes its lack of competence to determine the scope of the powers of the customary institution. Morse and Woodman suggest that this can be solved only by some overriding law, based, for example, on the notion of the binding force of agreement between the populations of the two constituencies.

Morse and Woodman’s analysis of different measures of acknowledgment is an important start to the development of an analytical framework. They demonstrate that when discussing deep legal pluralism, the foremost issues are processual rather than normative and that the questions that arise are what can be termed structural in nature. The second point to emerge from their discussion is that a measure of acknowledgment must be between the State and a mechanism that

exists independently of the State—in other words, that has not been constituted by state laws. The analysis, however, is also very limited, particularly in regard to the lack of concrete examples that Morse and Woodman can point to of such measures of acknowledgment in reality.<sup>183</sup> It is therefore not possible to tell from their analysis under what circumstances the various measures of acknowledgment could be effective. Morse and Woodman themselves acknowledge that they are merely trying to initiate the development of such a theory, rather than to present a finished framework, and consequently they do not move in any detail beyond the broad description just outlined.

More recently, Woodman has drawn a distinction between institutional recognition, 'where a law accepts the existence of institutions of another law, and provides that the activities of these institutions or some of them to produce legally valid effects',<sup>184</sup> and normative recognition that 'consists of the recognising law providing that in certain cases the norms of the other law will be applied by the institutions of the recognising law instead of its own norms'.<sup>185</sup> The former type of recognition is associated with deep legal pluralism and the latter with state legal pluralism. This distinction is useful as it clearly illustrates the different responses legal systems are required to make depending on the type of legal pluralism involved. This point is developed further in Chapter 7, which seeks to explore all the different potential types of institutional recognition possible in a given jurisdiction.

A further contribution in this area is von Benda-Beckman's suggestion that one way to analyse the differential use of indigenous, neo-traditional and state institutions in former colonial countries is to look at the variations in the politico-legal structure of the overall system.<sup>186</sup> He suggests that rather than asking, as is usually done, whether or not folk institutions have been recognised by being incorporated into the official/colonial/national system, it is more fruitful to ask whether or not state/neo-traditional institutions have been placed within or outside the indigenous political system and the socio-spatial jurisdictions of its institutions.<sup>187</sup> Although he acknowledges that limited data make such analysis difficult, he conducts a comparison of the differential use of such institutions in a number of former British African colonies and West Sumatra. His findings are that state courts are used more frequently if they are located below or at the top level of the non-state justice system and less frequently if placed outside indigenous political structures.<sup>188</sup> He concludes that the structural location of 'folk institutions' is more important in terms of their containment rates and use than other factors such as their degree of Westernisation.<sup>189</sup>

von Benda-Beckman's hypothesis seems to be backed up by Westermarck's study of village courts in Agarabi, Papua New Guinea. Westermarck notes that

the presence of the administration fostered the creation of unofficial courts by village officials, providing forums that were perceived both

to be linked to the official system and to operate in a way generally acceptable to the community. Such a combination of an ostensibly official status and acceptable style led to an active use of the courts by community members.<sup>190</sup>

Another useful suggestion arising from Westermarck's work comes from his disagreement with Abel's assertion, made in relation to Africa, that pre-capitalist informal legal institutions cannot be used as a model for institutionalising informal forums under capitalism.<sup>191</sup> He argues that the village courts in Papua New Guinea have generally been successful as they have emerged from the cultural and historical variability of the country and, importantly, 'because the links between the national and local level were not drawn taut in the development of the courts, each court area was free to express this variability'.<sup>192</sup> This idea of not drawing the links 'taut', while anathema to a traditionally legalistic approach, is also an extremely valuable insight, even if the view of village courts, while not totally false, might have been somewhat prematurely rosy.<sup>193</sup>

In recent years, there also has been increasing interest in normative questions concerning state and non-state justice systems from a different interest group—namely, law reform and development agencies, many of whom have realised the importance of traditional and informal systems as complements to the formal system, especially in post-conflict situations, and also that these systems might need reform in order to become fairer and more effective.<sup>194</sup> The UK Department for International Development has been particularly active in this respect and has generated a number of studies of non-state justice systems, mostly in Africa and South America.<sup>195</sup> Law reform commissions in various countries, including Australia,<sup>196</sup> New Zealand,<sup>197</sup> Malawi, Fiji<sup>198</sup> and, perhaps to the greatest extent, South Africa,<sup>199</sup> have also produced a number of reports and studies. Finally, there has been some interest in the area by NGOs, such as Penal Reform International,<sup>200</sup> the US Institute of Peace<sup>201</sup> and the United Nations.<sup>202</sup> Blagg comments that the emerging practices in relation to issues surrounding non-state justice systems by these organisations involve a "synthesis and synergy" approach to law reform, involving a gradual convergence of Indigenous and non-Indigenous values, beliefs and practices'.<sup>203</sup> There is a broad acceptance that to have any chance of success the approach must be far more sophisticated than, for example, merely integrating customary law into the state system. For example, Fitzgerald argues:

There needs to be institutional space or spaces created for the accommodation of Aboriginal law within the broader Australian legal system. There must be institutional design for the administration of a local order by Aboriginal communities. There must be 'pods of justice' distinct in form and function, autonomous but contributing to a federal whole.<sup>204</sup>

## Conclusion

The preceding discussion has demonstrated that, although no comprehensive framework has yet been proposed by legal pluralist scholars or law reform or donor agencies,<sup>205</sup> the makings of such a tool are present. These include: the growing number of empirical studies, generated by legal anthropologists and donor organisations,<sup>206</sup> into how non-state justice systems are really operating in many countries; the recognition of the centrality of structural relationships between plural legal orders; the importance of avoiding a state-centralist approach to issues of law reform; the conceptual distinctions between normative and institutional pluralism; and the need to consider the nature of the links between plural legal orders. These ideas are developed further in Chapter 7, which proposes a typology of models of relationship between state and non-state justice systems based on a comparative study of the treatment of non-state justice systems across various jurisdictions. This in turn allows an investigation into the possibilities of relationships in which state and non-state justice systems continue to work within their own normative and processual frameworks, in ways that are mutually supportive and, in the best case, constitutive of justice.

## ENDNOTES

<sup>1</sup> Franz von Benda-Beckman observes that such normative orders generally owe their existence and normative validity to the pre-colonial political and legal system, irrespective of what the official legal system says about them. It is important to distinguish them from hybrid institutions that are officially recognised or fully constituted by colonial/national law but based on pre-existing indigenous institutions. von Benda-Beckmann, Franz 1985, 'Some comparative generalizations about the differential use of state and folk institutions of dispute settlement', in Anthony Allott and Gordon R. Woodman (eds), *People's Law and State Law: The Bellagio papers*, p. 188. Moore observes in the African context that, on gaining independence, each African country had to ask itself the same questions: to what extent should there be a unitary system and to what extent should a multiplicity of local legal systems continue to operate? Can national centralisation of control and some degree of local autonomy in these matters be reconciled? Moore, Sally Falk 1992, 'Treating law and knowledge: telling colonial officers what to say to Africans about running "their own" native courts', *Law and Society Review*, vol. 26, p. 26.

<sup>2</sup> In fact, it is increasingly being recognised that legal pluralism exists even in Western societies and this state of affairs is contributed to by the growth of transnational laws and the presence of large groups of migrants who bring their own systems and observances of law with them to their adopted countries. See, for example, Shah (*Legal Pluralism in Conflict*), who discusses legal pluralism in the United Kingdom. Tamanaha says simply, 'Legal Pluralism is everywhere.' Tamanaha, Brian 2007, *Understanding legal pluralism: past to present, local to global*, St John's University School of Law Legal Studies Research Paper Series, no. 07-0080, p. 1.

<sup>3</sup> Morse and Woodman note that 'little work has been done to date to build a comparative theory for state policies towards customary laws'. Morse, Bradford and Woodman, Gordon (eds) 1988, *Indigenous Law and the State*, p. 5.

<sup>4</sup> Woodman argues that indirect rule is 'an institutional device, involving a form of legal pluralism'. Woodman, Gordon 1996, 'Legal pluralism and the search for justice', *Journal of African Law*, vol. 40, p. 152. He later expands on this in Woodman, Gordon 2007, 'The possibilities of co-existence of religious laws with other laws', in Erik Sand et al. (eds), *Religion and Law in Multicultural Societies*, p. 9. See also Tamanaha, *Understanding legal pluralism*, p. 13.

<sup>5</sup> Hart, H. L. A. 1961, *The Concept of Law*, 2<sup>nd</sup> edn, p. 170.

<sup>6</sup> Hughes supports this, arguing that '[t]he body of Pacific jurisprudence concerned with the relationship between introduced customary law fits largely within the tradition of classical legal positivism'. Hughes,

Robert 2003, 'Legal pluralism and the problem of identity', in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change*, p. 332.

<sup>7</sup> MacLachlan, Campbell 1988, 'The recognition of Aboriginal customary law: pluralism beyond the colonial paradigm—a review article', *International and Comparative Law Quarterly*, vol. 37, no. 2, p. 382.

<sup>8</sup> See Chapter 5 under 'The relationship between the courts and the *kastom* system' for a description of the place of customary law in Vanuatu's state legal framework.

<sup>9</sup> Vaai, The rule of law and the Faamatai, p. 31.

<sup>10</sup> Westermark, George 1981, Legal pluralism and village courts in Agarabi, PhD thesis, The University of Washington, p. 4.

<sup>11</sup> Narokobi, Bernard 1986, 'In search of a Melanesian jurisprudence', in Peter Sack and E. Minchin (eds), *Legal Pluralism: Proceedings of the Canberra Law Workshop VII*, p. 215.

<sup>12</sup> See, for example, Scaglione, R. 1983, *Customary Law in Papua New Guinea: A Melanesian view*, Law Reform Commission of Papua New Guinea; Powles, Guy 1997, 'The common law at bay? The scope and status of customary law regimes in the Pacific', *Journal of Pacific Studies*, vol. 21, p. 61; Ottley, Brian and Zorn, Jean 1983, 'Criminal law in Papua New Guinea: code, custom and courts in conflict', *American Journal of Comparative Law*, p. 251; Findlay, Mark 1997, 'Crime, community penalty and integration with legal formalism in the South Pacific', *The Journal of Pacific Studies*, vol. 21, p. 145; Ntumu, M. 1995, 'The dream of a Melanesian jurisprudence: the purpose and limits of law reform', in Jonathan Aleck and Jackson Rannels (eds), *Custom at the Crossroads*, p. 7; Corrin Care, Jennifer 2001, 'Customary law in conflict: the status of customary law and introduced law in post-colonial Solomon Islands', *University of Queensland Law Journal*, vol. 21, no. 2, p. 167; Brown, Ken 1986, 'Criminal law and custom in Solomon Islands', *Queensland Institute of Technology Law Journal*, vol. 2, p. 135; Corrin Care, Jennifer and Zorn, Jean 2001, 'Legislating pluralism: statutory "developments" in Melanesian customary law', *Journal of Legal Pluralism*, vol. 46, p. 49.

<sup>13</sup> Stewart, A. 2000, 'The contribution of feminist legal scholarship', in A. Stewart (ed.), *Gender Law and Social Justice*, p. 11, cited in Griffiths, Anne 2004, Customary law in a transnational world: legal pluralism revisited, Paper presented at the Customary Law in Polynesia Conference, Auckland, 12 October 2004, p. 18.

<sup>14</sup> Zorn, Jean and Corrin Care, Jennifer 2002, "'Barava tru": judicial approaches to the pleading and proof of custom in the South Pacific', *The International and Comparative Law Quarterly*, vol. 51, no. 3, p. 635.

<sup>15</sup> The approach taken by legal scholars in regard to Vanuatu is discussed in further detail in Chapter 5 under 'The relationship between the courts and the *kastom* system'.

<sup>16</sup> Aleck, Jonathan 1997, 'Beyond recognition: contemporary jurisprudence in the Pacific islands and the common law tradition', *Queensland University of Technology Law Journal*, vol. 7, p. 139.

<sup>17</sup> *Ibid.*, p. 143.

<sup>18</sup> Sack, Peter and Minchin, Elizabeth (eds) 1986, *Legal Pluralism: Proceedings of the Canberra Law Workshop VII*, p. 6.

<sup>19</sup> See, for example, the *Underlying Law Act 2000* of Papua New Guinea and the *Customs Recognition Act 2000* (no. 7) of Solomon Islands. For an extensive commentary and comparison of these two pieces of legislation, see Corrin Care, Jennifer and Zorn, Jean 2001, 'Legislating pluralism: statutory "developments" in Melanesian customary law', *Journal of Legal Pluralism*, vol. 46, p. 49.

<sup>20</sup> Roberts, *Order and Dispute*, p. 13; Moore, Sally Falk 1978, *Law as Process: An anthropological approach*, pp. 85–8.

<sup>21</sup> For a summary of the jurists' traditional view of law in non-Western societies in the eighteenth century and early nineteenth century, see Vaai, Saleimoa 1995, The rule of law and the Faamatai: legal pluralism in Western Samoa, PhD thesis, The Australian National University, pp. 10–19.

<sup>22</sup> For a discussion of this in the African context, see Moore, 'Treating law and knowledge'.

<sup>23</sup> Snyder identified these periods. Snyder, Francis 1981, 'Anthropology, dispute processes and law: a critical introduction', *British Journal of Law & Society*, vol. 8, no. 2, p. 144.

<sup>24</sup> For an overview of the other major monographs, see *ibid.* (pp. 142–3).

<sup>25</sup> Roberts recounts the story of Sir James Frazer being asked whether he had ever met any of the people he wrote about, replying 'God forbid!'. Roberts, Simon 1979, *Order and Dispute: An introduction to legal anthropology*, p. 189.

<sup>26</sup> Malinowski, Bronislaw 1967, *Crime and Custom in Savage Society*, pp. 15–16.

- <sup>27</sup> Ibid., pp. 15–16.
- <sup>28</sup> Humphreys, Sally 1985, 'Law as discourse', in Sally Humphreys (ed), *The Discourse of Law: History and anthropology*, p. 242.
- <sup>29</sup> Moore, 'Treating law and knowledge', p. 22.
- <sup>30</sup> Sack, Peter 1985, 'Bobotoi and Pulu Melanesian law: normative order or way of life?', *Journal de la Societe des Oceanistes*, vol. 41, p. 16.
- <sup>31</sup> Narokobi, Bernard 1989, 'Law and custom in Melanesia', *Pacific Perspectives*, vol. 14, no. 1, p. 17.
- <sup>32</sup> Ibid.
- <sup>33</sup> Moore, 'Treating law and knowledge', pp. 22–3.
- <sup>34</sup> Hoebel, Adamson and Llewellyn, K. 1941, *The Cheyenne Way: Conflict and case law in primitive jurisprudence*.
- <sup>35</sup> Snyder, 'Anthropology, dispute processes and law', p. 67.
- <sup>36</sup> Gluckman, Max 1955, *The Judicial Process Amongst the Barotse of Northern Rhodesia (Zambia)*.
- <sup>37</sup> Gulliver, Paul 1963, *Social Control in an African Society*.
- <sup>38</sup> Bohannan, Paul 1957, *Justice and Judgment among the Tiv*.
- <sup>39</sup> Humphreys, 'Law as discourse', p. 243.
- <sup>40</sup> Rouland, Norbert 1994, *Legal Anthropology*, p. 37.
- <sup>41</sup> Humphreys, 'Law as discourse', p. 244.
- <sup>42</sup> Ibid., p. 244.
- <sup>43</sup> Snyder, 'Anthropology, dispute processes and law', p. 67.
- <sup>44</sup> Mundy, Martha and Kelly, Tobias 2002, 'Introduction', in Martha Mundy (ed.), *Law and Anthropology*, p. xvi.
- <sup>45</sup> Ibid., pp. xvi–xvii.
- <sup>46</sup> Conley, M. and O'Barr, W. 1993, 'Legal anthropology comes home: a brief history of the ethnographic study of law', *Loyola of Los Angeles Law Review*, vol. 27, p. 49.
- <sup>47</sup> Mundy and Kelly, 'Introduction', p. xvii.
- <sup>48</sup> Snyder, 'Anthropology, dispute processes and law', p. 160.
- <sup>49</sup> Zorn, Jean 1990, 'Lawyers, anthropologists and the study of law: encounters in the New Guinea Highlands', *Law and Social Inquiry*, p. 274.
- <sup>50</sup> Ibid., p. 275.
- <sup>51</sup> Mundy and Kelly, 'Introduction', p. xviii.
- <sup>52</sup> von Benda-Beckmann, 'Some comparative generalizations about the differential use of state and folk institutions of dispute settlement', p. 187.
- <sup>53</sup> Riles argues that 'anthropologists interested in law and lawyers working on questions of culture lately have experienced their enterprise as professionally marginalized, devoid of theoretical innovation, and even uninteresting'. Riles, Annelise 1994, 'Representing in-between: law, anthropology, and the rhetoric of interdisciplinarity', *University of Illinois Law Review*, no. 3, pp. 597–8.
- <sup>54</sup> Ibid., p. 605.
- <sup>55</sup> Ibid., p. 643.
- <sup>56</sup> See, for example, Shah, *Legal Pluralism in Conflict*.
- <sup>57</sup> Mundy asserts that today work in this field is geographically 'very much a North American speciality'. Mundy and Kelly, 'Introduction'.
- <sup>58</sup> Rouland, *Legal Anthropology*, p. 51.
- <sup>59</sup> Griffiths, 'What is legal pluralism?', p. 39.
- <sup>60</sup> Tamanaha, *Understanding legal pluralism*, p. 1.
- <sup>61</sup> Sack, Peter and Minchin, Elizabeth (eds) 1986, *Legal Pluralism: Proceedings of the Canberra Law Workshop VII*, p. 1. Compare this with Woodman, who comments that this is 'strictly speaking, without sense'. Woodman, Gordon 1998, 'Ideological combat and social observation: recent debate about legal pluralism', *Journal of Legal Pluralism*, vol. 42, p. 48.
- <sup>62</sup> Santos, *Toward a New Legal Common Sense*, pp. 89, 91.
- <sup>63</sup> Griffiths, 'What is legal pluralism?', p. 3.
- <sup>64</sup> Griffiths, Customary law in a transnational world, pp. 8–13.

- <sup>65</sup> The other conceptions that have been advanced have been Pospisil's notion of legal levels, Smith's structural conception of pluralism based on corporate groups and Ehrlich's theory of the 'living law'. These are all summarised in Griffiths, John 1986, 'What is legal pluralism?', *Journal of Legal Pluralism*, vol. 24, pp. 15–29. More recently, Chiba proposed the three-level structure of law, which consisted of official law, unofficial law and legal postulates. Chiba, Masaji (ed.) 1986, *Asian Indigenous Law: In interaction with received law*. He refined this theory to the three dichotomies of law in pluralism—namely, official versus unofficial law, legal rules versus legal postulates and indigenous law versus transplanted law. Chiba, Masaji 1989, *Legal Pluralism: Towards a general theory through Japanese legal culture*, ch. 12.
- <sup>66</sup> Moore, Sally Falk 1978, 'Law and social change: the semi-autonomous social field as an appropriate subject of study', *Law as Process: An anthropological approach*, p. 56.
- <sup>67</sup> *Ibid.*, p. 57.
- <sup>68</sup> *Ibid.*, p. 58.
- <sup>69</sup> Merry, Sally 1988, 'Legal pluralism', *Law & Society*, vol. 22, no. 5, p. 881.
- <sup>70</sup> Westermarck, George 1986, 'Court is an arrow: legal pluralism in Papua New Guinea', *Ethnology*, vol. 25, no. 2, p. 131.
- <sup>71</sup> *Ibid.*
- <sup>72</sup> *Ibid.*
- <sup>73</sup> Woodman, 'Why there can be no map of law', p. 384.
- <sup>74</sup> *Ibid.*, p. 385.
- <sup>75</sup> *Ibid.*, p. 390.
- <sup>76</sup> *Ibid.*
- <sup>77</sup> Riles, 'Representing in-between', p. 641.
- <sup>78</sup> Griffiths, John 1995, 'Legal pluralism and the theory of legislation—with special reference to the regulation of euthanasia', in Hanne Petersen and Henrik Zahle (eds), *Legal Polycentricity: Consequences of pluralism in law*, p. 210, cited in Woodman, 'Why there can be no map of law', p. 383.
- <sup>79</sup> Woodman, 'Why there can be no map of law', p. 383, and Woodman, 'Ideological combat and social observation', p. 22.
- <sup>80</sup> Harris, Olivia (ed.) 1996, *Inside and Outside the Law: Anthropological studies of authority and ambiguity*, p. 7.
- <sup>81</sup> Hughes, 'Legal pluralism and the problem of identity', p. 336.
- <sup>82</sup> von Benda-Beckmann, Franz 2002, 'Who's afraid of legal pluralism?', in *Legal Pluralism and Unofficial Law in Social, Economic and Political Development: Papers of the XIIIth International Congress of the Commission on Folk Law and Legal Pluralism, 7–10 April, 2002, Chiangmai, Thailand*, p. 293.
- <sup>83</sup> Roberts, 'After government?', p. 12.
- <sup>84</sup> von Benda-Beckmann, Franz 1988, 'Comment on Merry', *Law and Society Review*, vol. 22, no. 5, p. 897; Snyder, 'Anthropology, dispute processes and law', p. 156.
- <sup>85</sup> von Benda-Beckmann, 'Who's afraid of legal pluralism?', p. 292.
- <sup>86</sup> Tamanaha poses this question and says that for legal pluralism the answer is very much 'the coherence and development of an important conceptual insight'. Tamanaha, Brian 1993, 'The folly of the "social scientific" concept of legal pluralism', *Journal of Law and Society*, vol. 20, p. 212.
- <sup>87</sup> This issue arose at the first conference of Folk Law and Legal Pluralism and has continued as a controversy. For a report of the conference, see Allott, Anthony and Woodman, Gordon (eds) 1985, *People's Law and State Law: The Bellagio papers*.
- <sup>88</sup> von Benda-Beckmann, Franz 1986, 'Anthropology and comparative law', in Keebet von Benda-Beckmann and Fons Strijbosch (eds), *Anthropology of Law in the Netherlands: Essays on legal pluralism*, p. 92.
- <sup>89</sup> Roberts (*Order and Dispute*, p. 23) commented that, for example, Hobbes depicted law as rules 'commanded' on the subject by the sovereign.
- <sup>90</sup> Roberts, 'After government?', p. 24.
- <sup>91</sup> Tamanaha, 'The folly of the "social scientific" concept of legal pluralism', p. 205.
- <sup>92</sup> von Benda-Beckmann, 'Anthropology and comparative law', p. 92.
- <sup>93</sup> Hoebel, Adamson 1954, *The Law of Primitive Man*, p. 28.
- <sup>94</sup> Moore, 'Law and social change', p. 56.

- <sup>95</sup> Benton, Richard 2004, Lexicography, law and the transformation of New Zealand jurisprudence, Paper presented at the Symposium on Concepts in Polynesian Customary Law, Auckland, 2004, pp. 1–2.
- <sup>96</sup> Griffiths, 'What is legal pluralism?', p. 38.
- <sup>97</sup> Ibid.
- <sup>98</sup> A very elaborate one was recently suggested by Franz and Keebet von Benda-Beckman (2006, 'The dynamics of change and continuity in plural legal orders', *Journal of Legal Pluralism*, vols 53–4, pp. 12–14).
- <sup>99</sup> Merry, 'Legal pluralism', p. 871. See also Franz and Keebet von Benda-Beckman's response to this. Ibid., pp. 15–17.
- <sup>100</sup> Merry, 'Legal pluralism', p. 879.
- <sup>101</sup> Tamanaha, 'The folly of the "social scientific" concept of legal pluralism', p. 192.
- <sup>102</sup> Ibid. It should be noted that Tamanaha has recently taken a different view of legal pluralism to that expressed earlier. Tamanaha, Brian 2001, *A General Jurisprudence of Law and Society*.
- <sup>103</sup> See Franz von Benda-Beckman ('Who's afraid of legal pluralism?') for a comprehensive rebuttal of these arguments.
- <sup>104</sup> Tamanaha, *Understanding legal pluralism*, p. 29.
- <sup>105</sup> Woodman, 'Ideological combat and social observation', p. 43.
- <sup>106</sup> Roberts suggests that '[i]t is perhaps tempting to conclude that this story [about the difficulties of defining law] vindicates the view adopted by Karl Llewellyn that it is best to avoid becoming embroiled in general efforts at definition at all'. Roberts, Simon 2005, 'After government? On representing law without the State', *The Modern Law Review*, vol. 68, no. 1, p. 22.
- <sup>107</sup> Woodman, 'Ideological combat and social observation', p. 45.
- <sup>108</sup> Merry, 'Legal pluralism', p. 889.
- <sup>109</sup> Humphreys, 'Law as discourse', p. 251.
- <sup>110</sup> Santos, *Toward a New Legal Common Sense*, p. 93.
- <sup>111</sup> Sack and Minchin, *Legal Pluralism*, p. 10.
- <sup>112</sup> von Benda-Beckmann, 'Comment on Merry', p. 898.
- <sup>113</sup> von Benda-Beckmann, 'Anthropology and comparative law', pp. 92–3. See also von Benda-Beckmann and von Benda-Beckmann, 'The dynamics of change and continuity in plural legal orders', pp. 13–14.
- <sup>114</sup> He expands on these ideas in later work. von Benda-Beckmann, 'Who's afraid of legal pluralism?', p. 278.
- <sup>115</sup> Twining, William 2003, 'A post-Westphalian conception of law', *Law and Society Review*, vol. 37, p. 250.
- <sup>116</sup> Tamanaha, *Understanding legal pluralism*, p. 35.
- <sup>117</sup> See also Berman, 'Global legal pluralism', p. 1178.
- <sup>118</sup> Fitzpatrick, Peter 1984, 'Law and societies', *Osgoode Hall Law Journal*, vol. 22, no. 1, p. 116.
- <sup>119</sup> Sack and Minchin, *Legal Pluralism*, p. 3.
- <sup>120</sup> Ibid., p. 4.
- <sup>121</sup> Ibid., p. 3.
- <sup>122</sup> Griffiths, 'What is legal pluralism?', p. 3.
- <sup>123</sup> Zorn, 'Lawyers, anthropologists and the study of law', p. 293.
- <sup>124</sup> Merry, 'Legal pluralism', p. 879.
- <sup>125</sup> Ibid.
- <sup>126</sup> Roberts, 'After government?', p. 18.
- <sup>127</sup> Griffiths, 'What is legal pluralism?', p. 3.
- <sup>128</sup> von Benda-Beckmann, 'Comment on Merry', p. 900.
- <sup>129</sup> Fitzpatrick, 'Law and societies', p. 117.
- <sup>130</sup> Ibid.
- <sup>131</sup> Ibid.
- <sup>132</sup> Ibid., p. 116.
- <sup>133</sup> Rouland, *Legal Anthropology*, p. 58.

- <sup>134</sup> See further in Chapters 7 and 8.
- <sup>135</sup> Woodman, 'The possibilities of co-existence of religious laws with other laws', pp. 3–4.
- <sup>136</sup> Griffiths, 'What is legal pluralism?', p. 8.
- <sup>137</sup> Ibid.
- <sup>138</sup> Woodman, 'Legal pluralism and the search for justice', p. 158.
- <sup>139</sup> Although it is classified positivist below in the section 'Positivism in Melanesia'.
- <sup>140</sup> Griffiths, Customary law in a transnational world, p. 5.
- <sup>141</sup> Woodman has also commented that 'since it will not present distinct, coherent or easily recognizable legal orders, the distinction between pluralism within an order (legal pluralism in the weak sense) and that between different orders (legal pluralism in the strong sense) will disappear'. Woodman, Gordon 2002, 'Why there can be no map of law', *Legal Pluralism and Unofficial Law in Social, Economic and Political Development: Papers of the XIIIth International Congress of the Commission on Folk Law and Legal Pluralism, 7–10 April, 2002, Chiangmai, Thailand*, p. 391.
- <sup>142</sup> von Benda-Beckman, 'Who's afraid of legal pluralism?', p. 275.
- <sup>143</sup> Fitzpatrick, Peter 1985, 'Underdevelopment and the plurality of law', in Anthony Allott and Gordon R. Woodman (eds), *People's Law and State Law: The Bellagio papers*, p. 249.
- <sup>144</sup> It is easy to see how as soon as one begins discussing structure, a state-centralist approach can start to creep in as a consequence of the (lawyerish) desire to regulate clearly the relationships between the different legal orders. This is taken up in Chapters 7 and 8.
- <sup>145</sup> Greenhouse, Carol 1985, 'Mediation: a comparative approach', *Man (N.S.)*, vol. 20, p. 93.
- <sup>146</sup> Ibid., p. 108.
- <sup>147</sup> Ibid., pp. 96–7.
- <sup>148</sup> Franz von Benda-Beckman also argues that the structure of indigenous and state institutions is particularly important, as discussed below in the section 'The possibilities and limitations of legal pluralism for Melanesia'.
- <sup>149</sup> For example, volumes 53 and 54 of the *Journal of Legal Pluralism* are dedicated to the dynamics of change and continuity in plural legal orders.
- <sup>150</sup> von Benda-Beckman and von Benda-Beckman, 'The dynamics of change and continuity in plural legal orders', p. 19.
- <sup>151</sup> Svesson, Tom 2005, 'Interlegality, a process for strengthening indigenous peoples' autonomy: the case of the Sami in Norway', *Journal of Legal Pluralism*, vol. 51, p. 74. It should be noted that Santos (*Toward a New Legal Common Sense*, p. 437) proposes a slightly different definition of inter-legality that, while stressing its dynamic nature, does not contain a normative component.
- <sup>152</sup> Santos, Boaventura de Sousa 2006, 'The heterogeneous state and legal pluralism in Mozambique', *Law and Society Review*, vol. 40, p. 46.
- <sup>153</sup> Webber, Jeremy 1995, 'Relations of force and relations of justice: the emergence of normative community between colonists and aboriginal peoples', *Osgoode Hall Law Journal*, vol. 33, p. 627.
- <sup>154</sup> Ibid., p. 629.
- <sup>155</sup> von Benda-Beckmann and von Benda-Beckmann, 'The dynamics of change and continuity in plural legal orders', p. 7.
- <sup>156</sup> Berman also argues that '[p]luralism is...principally a descriptive, not a normative, framework. It observes that various actors pursue norms and it studies the interplay, but it does not propose a hierarchy of substantive norms and values.' Berman, Paul 2007, 'Global legal pluralism', *Southern California Law Review*, vol. 80, p. 1166.
- <sup>157</sup> Woodman, Gordon 1999, 'Legal theory, anthropology and planned legal pluralism', in Keebet von Benda-Beckmann and Harald Finkler (eds), *Papers of the XIth International Congress Folk Law and Legal Pluralism: Societies in transformation*, p. 30.
- <sup>158</sup> See, for example, Government of the United Kingdom 2003, *Safety, Security and Access to Justice*, GRC Exchange, Department for International Development, viewed 2 February 2005, <[http://www.grc-exchange.org./g\\_themes/ssaj\\_workshop0303.html](http://www.grc-exchange.org./g_themes/ssaj_workshop0303.html)>
- <sup>159</sup> Twining, 'A post-Westphalian conception of law', pp. 248–9. See also von Benda-Beckmann and von Benda-Beckmann, 'The dynamics of change and continuity in plural legal orders', p. 17.
- <sup>160</sup> Merry, 'Legal pluralism', p. 885.
- <sup>161</sup> Griffiths, 'What is legal pluralism?', p. 4.

- 162 Rouland, *Legal Anthropology*, p. 58.
- 163 Sack and Minchin, *Legal Pluralism*, p. 3.
- 164 *Ibid.*, p. 14.
- 165 Hughes, 'Legal pluralism and the problem of identity', p. 330.
- 166 Santos (*Toward a New Legal Common Sense*, p. 90) argues that to date, however, the political claims of legal pluralism have not been clearly articulated and separated from its analytical claims, but that '[t]he paradigmatic debate of modern law requires that such an acknowledgment be fully made and indeed conceived as one of the premises of the debate'.
- 167 *Ibid.*, p. 30.
- 168 Hughes, 'Legal pluralism and the problem of identity', p. 334.
- 169 *Ibid.*, p. 336.
- 170 Rouland, *Legal Anthropology*, p. 52.
- 171 Ottley and Zorn, 'Criminal law in Papua New Guinea', p. 254.
- 172 *Ibid.*, p. 299.
- 173 For example, Griffiths ('What is legal pluralism?', p. 1) explicitly stated that his aim was to 'establish a descriptive conception of legal pluralism'.
- 174 Both of these factors are due to the fact that anthropologists rather than lawyers have generated much of the material. In addition, anthropologists are traditionally wary of 'venturing outside the bounds of academic investigation'. Westermarck, *Legal pluralism and village courts in Agarabi*, p. 296. Franz von Benda-Beckman ('Some comparative generalizations about the differential use of state and folk institutions of dispute settlement', p. 191) notes that anthropological discussions of dispute management that take account of pluralistic situations at all have usually been concerned with the analysis of the factors determining the choice of (one type of) an institution and with the style of dispute management within institutions.
- 175 Snyder, 'Anthropology, dispute processes and law', p. 163.
- 176 *Ibid.*, p. 163.
- 177 von Benda-Beckmann and von Benda-Beckmann, 'The dynamics of change and continuity in plural legal orders', p. 1.
- 178 *Ibid.*, p. 14.
- 179 Berman (in 'Global legal pluralism') has also recently developed a series of nine 'procedural mechanisms, institutional designs and discursive practices for managing hybridity'. His focus, however, is primarily on relations between different state systems in the international context, rather than non-state systems.
- 180 Morse and Woodman, *Indigenous Law and the State*.
- 181 *Ibid.*, p. 7.
- 182 *Ibid.*, p. 17.
- 183 *Ibid.*
- 184 Woodman, 'The possibilities of co-existence of religious laws with other laws', p. 8.
- 185 *Ibid.*, p. 9.
- 186 von Benda-Beckman, 'Some comparative generalizations about the differential use of state and folk institutions of dispute settlement', p. 190.
- 187 *Ibid.*, pp. 190–1.
- 188 *Ibid.*, p. 197.
- 189 von Benda-Beckman, 'Anthropology and comparative law', p. 197.
- 190 Westermarck, *Legal pluralism and village courts in Agarabi*, p. 22. In an earlier report, he observes that while village courts are officially structured as the lowest level in the national judicial system, the village court officials perceive another forum beneath them, which Westermarck calls the 'outside court'. The officials who participate in the outside court do not dissociate themselves from the village court, but rather make explicit appeals to its coercive powers in their handling of disputes. Thus, from the perspective of those who manage them, the two forums do not stand in opposition as official and unofficial courts, but rather serve to support each other. Westermarck, George 1978, 'Village courts in question: the nature of court procedure', *Melanesian Law Journal*, vol. 6, nos 1–2, pp. 87–8.
- 191 Westermarck, 'Court is an arrow', p. 147.
- 192 *Ibid.*, p. 147.

- <sup>193</sup> See Chapter 7 (under ‘Sharing of procedures’) for a more detailed description of the PNG village courts.
- <sup>194</sup> Government of the United Kingdom, *Non-State Justice and Security Systems*, p. 1.
- <sup>195</sup> See <<http://www.gsdr.org/>>
- <sup>196</sup> Australian Law Reform Commission 1986, *The recognition of Aboriginal customary laws*, Report no. 31.
- <sup>197</sup> New Zealand Law Commission 2006, *Converging currents: Custom and human rights in the Pacific*, Study Paper 17.
- <sup>198</sup> Filimone, Ratu Ralogaivau 2005, *Problem Solving—Community Based Courts Across the Fiji Islands*, Fiji Law Reform Commission.
- <sup>199</sup> South African Law Commission (SALC) 2003, *Report on traditional courts and the judicial function of traditional leaders*, Project No. 90.
- <sup>200</sup> Penal Reform International 2000, *Access to Justice in Sub-Saharan Africa: The role of traditional and informal justice systems*.
- <sup>201</sup> See, for example, Hohe, Tanja and Nixon, Rod 2003, *Reconciling Justice: “Traditional” law and state judiciary in East Timor*, United States Institute of Peace.
- <sup>202</sup> For example, the UN Commission on Human Rights held an Expert Seminar on Indigenous Peoples and Administration of Justice in Madrid in 2003. See also Stavenhagen, Rodolfo 2004, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, United Nations Commission on Human Rights.
- <sup>203</sup> Blagg, Harry 2005, *A New Way of Doing Business? Community Justice Mechanisms and Sustainable Governance in Western Australia*, Law Reform Commission of Western Australia, Project no. 94, p. 319. See also International Centre for Criminal Law Reform and Criminal Justice Policy, School of Criminology and Simon Fraser University 1995, *Putting Aboriginal Justice Devolution into Practice: The Canadian and international experience*, Workshop report, viewed 16 November 2006, <<http://www.icclr.law.ubc.ca/Publications/Reports/Aboriginal.PDF>>
- <sup>204</sup> Fitzgerald, T. 2001, *The Cape York Justice Study Report*, Government of Queensland, p. 113.
- <sup>205</sup> Schärf, the New Zealand Law Reform Commission and the UK Department for International Development have set out various different models in their publications, but have not attempted to propose any sort of general analytical framework for them. Schärf, Wilfried 2001, ‘Policy options on community justice’, in Wilfried Schärf and Daniel Nina (eds), *The Other Law: Non-state ordering in South Africa*; New Zealand Law Reform Commission 2006, *Report of Proceedings*, New Zealand Law Commission Workshop on Custom and Human Rights in the Pacific, Nadi, Fiji, 2006; Government of the United Kingdom 2004, *Non-State Justice and Security Systems*, Department for International Development, United Kingdom.
- <sup>206</sup> Although it should be noted that the literature covers only a limited number of countries and often only small parts of those countries. It also often is frustratingly general in the real mechanics of the operation of both systems and their relationships, such as, for example, not distinguishing clearly between concepts of appeal and re-hearings.