

5. The relationship between the state and *kastom* systems

This chapter examines the current relationship between the *kastom* system and various state institutions—namely, the courts, police, prisons, Public Prosecutor’s Office, Office of the Public Solicitor and the Malvatumauri. The last is included although it is not part of the criminal justice system because it is the state body that, at least nominally, represents the *kastom* system at a state level. We shall see that adopting this broad ambit generates a far more nuanced account of the relationship between the two systems than has previously been produced by legal scholars who have focused solely on how substantive customary law has been used by the courts. This is because it permits an investigation of the formal and informal institutional relationships between the two systems in all areas of the criminal justice system. In addition, as Keebet and Franz von Benda-Beckman argue, examining ‘the connections between the various co-existing substantive and procedural legal norms, the actors using them, and in particular the political and administrative authorities and decision-making institutions of the respective systems’ is a major aid in understanding change in plural legal constellations.¹

The chapter also considers the current condition of each state institution and the views of stakeholders concerning it. The capacities of these various institutions are related to their empirical and their normative relationships with the *kastom* system: a strong, well-functioning and accessible state institution is likely to have, and to require, a very different relationship with the *kastom* system than one that is under-resourced and strained to breaking point. In addition, the condition of each institution is relevant to issues of legitimacy. As Dinnen argues in relation to Papua New Guinea, ‘the weak performance of PNG’s formal law and justice system, particularly its criminal justice system, is as much an outcome of its lack of legitimacy, as it is a consequence of shortage of resources, “technical” or otherwise.’²

A final theme of this chapter is the discrepancy between the operation of the state legal system in theory and in practice, compared with the *kastom* system, where there is far greater synergy between the two.

The courts

There are four levels of courts in Vanuatu. The highest is the Court of Appeal, comprising judges from neighbouring countries in the South Pacific in addition to Vanuatu Supreme Court justices. The next level is the Supreme Court, comprising four judges, one of whom is based in Santo and the others in Port Vila. Under the Supreme Court come the Magistrates’ Courts. The magistrates are all ni-Vanuatu and most have a law degree.³ The Island Courts, authorised

by the *Island Courts Act* (Cap 167) to be established by the Chief Justice wherever he thinks appropriate, are at the bottom of the court hierarchy and to date seven Island Courts have been established.⁴ In addition to these courts there are Customary Land Tribunals whose establishment and jurisdiction are governed by the *Customary Land Tribunal Act 2001*. Their sole purpose is to resolve disputes based on customary land.

The current condition of the court system

The courts in Vanuatu are widely perceived as being independent and impartial and the judiciary is greatly respected. Due to Vanuatu's particular geography, however, the relative newness of the state system and resource issues, there are a number of fundamental problems with their current operation. The first is that the court system is *physically* inaccessible to many ni-Vanuatu. The Supreme Court has only two registries—one in Vila and one in Santo—and tours the islands on a periodic basis depending on funding arrangements and case loads, often meaning cases must wait for a year or more before they are heard. Even at the Magistrate's Court level, not every province has a registry and, consequently, everyone involved in a case must either travel a long way to the court or wait for many months, if not years, for the court to come to them on tour. Further, in criminal cases where the defendant is transferred from his or her home island to Santo or Vila, the people who have been affected by the crime—the victim and the community—are often completely excluded from the process (for example, when there is a plea of guilty).⁵ As a result, people do not feel part of the process, do not understand what has happened and feel they have not had a chance to give their side of the story. The courts are also generally perceived as *financially* inaccessible, as the court fees, especially in the Supreme Court and Court of Appeal, are out of reach for most ni-Vanuatu.⁶

The second problem is that many ni-Vanuatu see the court system as being a foreign system. The general distrust and lack of ownership of the system are illustrated by the fact that many people refer to the courts as '*kot blong waetman*' (white man's court). The procedures used by the state courts are also foreign for the majority of defendants and witnesses. A legal officer commented that people often did not understand why they had won or lost a case.⁷ A particular problem many ni-Vanuatu face is understanding why the state system deals only with the particular complaint and not the background factors or even crimes preceding it (all highly relevant in a *kastom* meeting, as discussed in Chapter 4), and this can cause a great deal of confusion and anger as people feel that 'their' side of the story has not been told. Further, in the higher courts and even some Magistrate's Courts, the language used is English, which is not understood by the majority of the population, or at least not at the level it is used in the legal context. It was also clear from this study that many ni-Vanuatu, particularly women and youth, did not know their legal rights and saw the courthouse as

frightening and confusing. This results in false pleas of guilty, as discussed in the next chapter, and also raises real doubts as to the capacity of the system to achieve justice.

A third problem is the delays in the system.⁸ Normally, there are delays in hearing cases of between six and 18 months in Vila and Santo. In other places, where the courts visit only when there are sufficient cases, the delays are much greater.⁹ On some occasions, when the court finally does arrive, the cases are dismissed 'for want of prosecution' because a state prosecutor has not come on tour. Further, the number of cases before the courts keeps increasing. One judge stated that the magistrates and judges were 'bogged down with work' but more files kept piling up. Perhaps because of this, the courts are not seen by the wider community to be able to move quickly enough to 'put out the fire' before a dispute gets out of hand. In contrast, the speed with which chiefs can resolve matters is regularly commented on. In a small community, this is often essential, as an unresolved dispute can lead to property damage, arson and even physical retaliation. Additionally, a normalisation in relations is needed to allow the interdependent relationships to mend and for the social capital (especially trust) necessary for development to be restored.

There are also problems with enforcement of court orders, especially in rural areas and with Island Court cases. The previous magistrate on Tanna stated that warrants of execution were very rarely served, even for Magistrate's and Supreme Court cases. In Santo as well, there is very little enforcement of orders so fines are not paid. Some respondents commented that they did not care if cases went to the courts or not because they just did not pay the fines and there was no follow up. Many people involved in the administration of the Island and higher-level courts confirmed this perception.

There are particular problems facing the Island Courts. Perhaps the most significant is that they are not operating in many places due to lack of payment of sitting fees for the judges. For example, the police prosecutor responsible for Island Courts in Santo reported in 2004 that they had to cancel all the sittings for the rest of the year because the justices' sitting fees had not been paid for the past four months. A further problem is that the justices who serve in the courts are often uneducated and left to manage the courts with little or no training. Adding to their difficulties is the fact that the laws they are meant to be administering are written only in English (and complicated 'legal' English at that) and there is not a functioning system of supervision by the Magistrates' Courts. As a result, many of the criticisms made of the Island Courts were the same as those levelled at chiefs: they were accused of favouritism and of involving politics in disputes, leading to an undermining of their authority. The comment was frequently made that if the justices were faced with a defendant who was a bit educated he could easily '*turnturnem olgeta*' (confuse them) and they became

lost.¹⁰ It is to be hoped that recent training programs and strengthening initiatives begun in 2006 improve this current situation.¹¹

The relationship between the courts and the *kastom* system

The relationship between the courts and the *kastom* system will be analysed by distinguishing between the institutional pluralism and the normative pluralism that exist between the two systems.¹² The reason for this approach is to try to tease out the exact nature of the relationship of the two systems, in turn allowing a more satisfactory consideration of what sort of relationship they should and could have.¹³

The relationship between customary law and state law

This section is concerned with the potential for, and the reality of, the use by the state system of substantive norms from the *kastom* system.¹⁴ As this area has been the main focus of previous scholars investigating the relationship between customary law and state law, this discussion is relatively short.¹⁵ The basic position can be summed up very simply: despite the ability at a jurisdictional level to integrate substantive customary law into case law, the courts to date have not done so. This is one illustration of the considerable disjuncture between written law and the practical reality of the state legal system in Vanuatu.¹⁶

At a formal statutory level there is considerable scope for the role of customary law in the state criminal justice system. After independence, introduced laws were retained 'until otherwise provided by parliament',¹⁷ with a clear intent evident in the constitution that these would be gradually supplanted by an indigenous legal system. The constitution provides that introduced laws should be applied 'wherever possible taking due account of custom'.¹⁸ Further, it provides that 'customary law shall continue to have effect as part of the law of the Republic of Vanuatu'.¹⁹ The judiciary is charged by Section 47(1) to 'resolve proceedings according to law' and, if there is no rule directly applicable, to make a decision 'according to substantial justice and wherever possible in conformity with custom'.²⁰ Other relevant legislative provisions are Section 65(2) of the *Judicial Services and Courts Act 2000*, which allows all courts to construe any act or law 'with such alterations and adaptations as may be necessary' for 'the purposes of facilitating the application of custom', and Section 65(3), which gives the courts inherent and incidental powers to apply custom. Finally, the *Law Commission Act (Cap 115)* provides that one function of the commission is to recommend reforms that reflect the 'distinctive concepts of custom' (Section 7[a]).²¹

Although these provisions seem to accord customary law a significant place in the legal system, it is also possible to read into the constitution hints of wariness

about customary law. Section 47(1), for example, suggests that the drafters of the constitution were torn between a desire to embrace customary law and to reject those parts of it not in conformance with the standards of a modern nation-state. The constitution also contains a Bill of Rights outlining the fundamental rights and freedoms enjoyed by all citizens,²² some of which are perceived as limiting the application of customary law.

Further, the constitution does not provide any procedures as to how courts are to inform themselves about the relevant customary law in particular cases, leaving this to Parliament in Article 51. To date, Parliament has failed to address this issue and this omission has contributed to the difficulties the courts have faced in utilising customary law. The constitution did, however, provide two possible mechanisms for the integration of customary law into the state system: Article 51, which allows Parliament to appoint as assessors people 'knowledgeable in custom' to sit on the higher state courts, and Article 52, providing that Parliament is to legislate for the establishment of village courts, in which chiefs should play a role, with jurisdiction over customary and other matters.²³

Pursuant to Article 51, Part VIII of the *Criminal Procedure Code* (Cap 136) provided for assessors to sit in the Supreme and Magistrates' Courts alongside the judiciary to assist in their determination of the guilt of the accused. There was, however, limited opportunity to integrate a customary perspective as the assessors were not required to have any particular knowledge of customary law²⁴ and it was not required for their decision to be followed, although if the judge or magistrate did not wish to follow their decisions they were required to give reasons for this.²⁵ It is unclear to what extent assessors were really used in practice, but they were formally abolished by the *Criminal Procedure (Amendment) Act 1989*. It appears that the reason for their abolition was that the then expatriate Chief Justice considered that they did not serve a useful function and, moreover, the necessity to provide them with proper instructions was too onerous a duty on the judiciary.²⁶

The second potential mechanism in the constitution to integrate the use of customary law is the institution of Island Courts. These courts can be viewed as an example of an attempt at weak legal pluralism, dressed up to look like deep legal pluralism, but in fact not legal pluralism at all. The *Island Courts Act 1983* (Section 1) provides that the Chief Justice may establish Island Courts throughout Vanuatu 'as he sees fit'. The attempts at weak legal pluralism in this act are demonstrated in two ways. First, the courts are required to comprise three justices knowledgeable in the custom of the island, at least one of whom must be a chief (Section 3[1]). This suggests an intention for the Island Court justices to use customary law in making decisions. Second, Section 10 provides that 'an island court shall administer the customary law prevailing within the territorial

jurisdiction of the court' to the extent that it is not inconsistent with any written law or contrary to justice, morality and good order.

The specific jurisdiction of each court is, however, defined in the warrant that establishes it²⁷ and no warrant to date has given any general or specific customary law jurisdiction. Rather, the warrants indicate that the focus of the courts' jurisdiction is minor introduced law matters.²⁸ Thus, as Weisbrot noted in 1989, the Island Courts operated as less formal Magistrates' Courts rather than as officially sanctioned custom courts.²⁹ Rousseau, working more than a decade later, reached the same conclusion, stating that '[i]n the case of the island courts, supposedly designed to bring *kastom* into state law as procedure, the result appears as the imperfect enforcement of existing state legislation'.³⁰ These observations were also confirmed by my fieldwork, with Island Court justices drawing distinctions between the types of law they administered in the courts and the law they administered in the *nakamal*.

The reason for arguing that the Island Courts have been 'dressed up' to look like deep legal pluralism comes from some commentary made pertaining to Island Courts, seemingly in response to government announcements concerning them. Larcom, an anthropologist writing shortly after the passage of the *Island Courts Act*, wrote that the act

was a crucial step in the government's attempt to construct and solidify a national cultural identity. The Act was intended to grant decision-making authority over most local jural matters to local institutions. Apparently recognizing the inability of national legal codes to regulate social order in the villages, the government now sought to hand issues of law and justice back to village courts.³¹

This statement suggests that at the time of the passage of the act, the government was intending to convey the message that the act in fact was giving power to manage disputes back to the chiefs, or to at least engage in a relationship with the *kastom* system. A statement made by the Malvatumauri in 1992 confirms this impression:

Although the *Island Courts Act* was passed in 1983, the Island Courts have never achieved this unifying function [that the pre-existing systems of customary justice would become part of the judicial system of the country]. The Island Courts have always been seen as part of the court system and the chiefs have continued to exercise customary justice in the *nakamal* or *nasara*.³²

As can be seen from the current legislative framework for the courts, however, there is no provision made for chiefs to use substantive customary law or procedures inside the Island Courts. The Island Courts have therefore by and large not achieved either deep or weak legal pluralism on even a theoretical

level.³³ As a result, as one respondent observed, the Island Courts presently ‘float *nomo*’ (just float), being neither satisfactory state courts nor *kastom* courts.

A further mechanism that has the potential to facilitate the introduction of customary law into the state system is Section 38 of the *Penal Code (Amendment) Act 2006*.³⁴ This provides that the court may ‘promote reconciliation and encourage and facilitate the settlement in an amicable way, according to custom or otherwise’.³⁵ This provision is potentially quite radical as it allows the courts to use customary norms and procedures to determine the substantive outcome of cases. Further, it envisages the courts applying these principles outside the state system, rather than bringing them into the state system and incorporating them into state normative processes. As such, it comes close to allowing a process of deep legal pluralism, although it is still the state system that determines how the customary law is used. Unfortunately, however, this section and its precedent have rarely, if ever, been used in practice, although judges and lawyers agree that theoretically it is a good idea. The reasons given for the lack of use of the provisions are vague, but it can be surmised that no-one is exactly sure how it should be used. The Chief Justice in fact explicitly commented that there was a need for a clearer mechanism to be included, with more detail and assistance given about exactly how to use the section, and yet this was not done in the recent rewriting of the section into its current form.

Thus, as the former Director of the Vanuatu Cultural Centre has stated, although the constitution leaves the road open for judges and lawyers to use customary law in their decisions and arguments, and for politicians to make laws about how custom can be used, all of these institutions have so far failed to do so.³⁶ There is a great deal of debate as to whose responsibility it is to change this. Politicians argue it is up to the judges, the judges say it is up to the legislature to legislate ways for customary law to be used³⁷ and to the lawyers to make submissions based on customary law,³⁸ and the lawyers say it is up to the judges to encourage the use of customary law.³⁹

Apart from a refusal by any one group to take ownership of the issue of the lack of development of what Narokobi refers to as a ‘Melanesian jurisprudence’, many other reasons are cited for the failure of customary law to play a role in the substantive law of the State.⁴⁰ The first is the place in the legal hierarchy that the constitution has given to customary law. Paterson has observed that the extent to which courts, including Island Courts, in Vanuatu can apply customary law and the relationship between customary law and the common law are ‘shrouded in some obscurity’.⁴¹ As customary law comes after the constitution and legislation, and arguably also after the common law as a source of law, the door is left open for courts to argue that customary law has only a ‘fill-in’ role—in other words, it is only if there is no other law available that the court must look to custom. As Vanuatu still applies the laws of England and the

laws of France as applied to, or made for, the New Hebrides before 1980, to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu, there are not very many areas in which an ancient British law cannot be dredged up.⁴²

A second reason that has been advanced as an explanation is that customary law varies so much from community to community and island to island that it is not possible to apply it as a homogenous body of law at a national level.⁴³ This was the view put forward by Justice Cooke in *Boe & Taga vs Thomas* (1980–94, Van LR 293), in which he noted:

Mr Rissen further submitted that I should consider the custom of the parties in assessing damages. I regret that I cannot accede to this submission of Mr Rissen as custom varies so much in each village throughout Vanuatu that it would be quite impossible to lay down guidelines for those dealing with the matter.

According to this view, if a norm of customary law does not exist throughout Vanuatu, it cannot be recognised as a rule of law, as due to the principles of *stare decisis*, this would result in it becoming a precedent for the whole country.

A third reason is that the legal profession in Vanuatu has been, and still significantly remains, expatriate and trained in the common law tradition. The former Chief Justice, Justice d'Imecourt, observed in *Banga vs Waiwo*:⁴⁴

What Parliament has not done so far, and I venture to say, is unlikely to do, is to do away with the element of British 'Common Law and Equity' that apply [sic] in Vanuatu. After 16 years of Independence, it would be difficult to do so. Further more, it is likely to cause enormous upheaval in the legal system if it sought to do so now. One need only to consider the fact that virtually all the country's lawyers, including the Ni-Vanuatu lawyers are common law trained.

This factor has had a significant impact on the inhibition of the development of a Melanesian jurisprudence. As Bourdieu notes, 'The individual is always, whether he likes it or not, trapped...within the limits of the system of categories he owes to his upbringing and training.'⁴⁵ Consequently, this has meant that lawyers and the judiciary have felt more comfortable in applying the common law than customary law and have, in general, shied away from pushing the boundaries established by the constitution.⁴⁶

Fourth, although Parliament is charged by Article 51 of the constitution to 'provide for the manner of the ascertainment of relevant rules of custom', it has not done so. Consequently, there is confusion about how customary law is to be used as a source of law by the courts, contributing to the judiciary's reluctance to use it in preference to easily accessible introduced laws. Weisbrot states:

There is nothing to provide some guidance as to the integration of custom in the western-style courts on such matters as: (1) the definition of custom; (2) the subject areas in which custom is or is not applicable; (3) the modes of ascertainment and rules of evidence and procedure with respect to adducing custom in the courts; (4) the standards (if any) against which the recognition of custom must first be tested; (5) the regime to be followed in the event of a conflict of customary laws; (6) the method by which a person must establish (or refute) membership in a customary group, and so on. The experience elsewhere in the Pacific suggests that in the absence of strong guidelines and incentives to utilise custom it is very difficult for customary law to develop in a coherent and comprehensive manner.⁴⁷

The question of how customary law is to be proved has been considered by the courts, and although views vary, the general approach seems to be that set down by Chief Justice d'Imecourt in *Banga vs Waiwo*, in which he states, 'Although it is conceivable that there might not be a need for strict rules regarding the obtaining of evidence of a particular custom if and when the need arises to establish a particular custom, evidence must, nevertheless, be obtained and a clear custom must be established'.⁴⁸ Norms of customary law must therefore be proven to the courts in the same way as facts, creating a substantial burden on the party wishing to use the norm.

Finally, there is the view that the natures of common law and customary law are fundamentally different. Customary law is seen to be 'flexible, fluid, capable of being used in different ways at different times'.⁴⁹ As a consequence, it is argued that bringing customary law into the state system would essentially change its nature, crystallising it and making it into an inflexible precedent—thus losing its value and purpose. Ntumy argues that when a legal norm of customary law is sanctioned by the State, either through legislation or the norm-creating activity of the courts, it is instantly converted by state power from customary form to state law. It then ceases to be customary law. Ntumy observes, 'Efforts to legislate customary law by an external political power are, therefore, the antithesis of custom.'⁵⁰

These various reasons go some way to showing the difficulties, theoretical and practical, of using customary law in the state system, and in explaining why judges, lawyers and legislators continue to put the question of the use of customary law into the 'too-hard basket'. In the final two chapters, this thesis argues that these difficulties can be overcome largely by asking broader questions about the institutional and procedural relationships of the two systems and instituting reforms that allow each to feed through into the other system.

The relationship between the kastom system and the court system

This section is concerned with the relationship between the two systems on an institutional level. In other words, to what extent does the state system accept, formally or informally, the *kastom* system's power and right to manage conflicts? On a theoretical level, the inquiry is really the extent to which deep legal pluralism exists in Vanuatu today.

On a formal level, there is only one mechanism for the state system to recognise the operation of the *kastom* system in the area of criminal law: Section 39 of the *Penal Code (Amendment) Act 2006*,⁵¹ which provides that the court must take into account any compensation made or due by the offender under custom. The section thus allows the court to recognise that a defendant might have already been punished by the *kastom* system and to modify the sentence in light of that punishment. A classic example of how this occurs in practice is described in the case of *Waiwo vs Waiwo and Banga*:⁵²

[V]ery often, the Magistrate will not be surprised to see appearing before the Court...next to the Accused, his custom chief. The chief pays respect to the bench and informs the Court that they have already dealt with the matter in custom and the Defendant or Accused is already punished for his wrongdoing...The Court explain[s] to the chief concerned the position within the criminal law, the Accused [i]s dealt with accordingly and the Court then invites the chiefs to explain the custom.

There are, however, still problems with the way courts take *kastom* payments into account as mitigating features.⁵³ First, the court is not permitted to stay or terminate the proceedings in light of the fact that the *kastom* system has already dealt with the matter. Second, there is very little inquiry into whether the parties are satisfied with the settlement or whether or not the payment has been appropriate according to the *kastom* of the relevant area. Further, the Court of Appeal has ruled that a customary payment may affect the quantum of the sentence but may not change the nature of the sentence.⁵⁴ As a result, a customary payment may reduce a fine or prison term, but may not change a prison term into a fine or a suspended sentence. Apart from this restriction, the courts have hitherto been inconsistent in their approach to the value that a customary payment should be given. Some Supreme Court decisions indicated the development of a rule that a customary payment would reduce a sentence by one-third (in the same way that a plea of guilty would), in order to 'formally recognise the role that custom can play in the criminal justice system'.⁵⁵ This half-formulated rule was, however, dismissed by the Court of Appeal in *Public Prosecutor vs Niala* (2004, VUCA 25), in which their honours commented that a 'precise mathematical deduction' was not appropriate.⁵⁶

An important aspect of the relationship between the two systems is the effect that each has on the workload of the other. Thus, it is clear that today the work of the *kastom* system in managing conflicts significantly reduces the burden placed on the state court system. This is recognised by some involved in the state system. For example, a judge commented that he was afraid that respect for chiefs was disappearing and that ‘once that disappears the courts will be swamped with so much the number of judges and magistrates will have to be increased significantly’.⁵⁷ The work of chiefs in resolving matters at a community level also often prevents disputes from getting out of hand and ending up with the involvement of the state system. This was acknowledged by a Supreme Court judge who commented during sentencing that ‘[i]f community leaders deal with the issue at first sight, problems such as this, leading to death could have been avoided’.⁵⁸

Views of stakeholders about the relationship

All the key players involved in the court system interviewed for this study, including lawyers, judicial officers and prosecutors, stated that they considered there was not enough of a relationship between the two systems at present and that there should be more recognition of the *kastom* system by the state system. For example, one judge commented, ‘The [justice] structure has to take into account the local structure and it is currently not taking it into account in a way that allows the community to have access to justice.’⁵⁹ Another judge remarked that for the ordinary person the highest court of the land did not give any weight to *kastom*, but that this was wrong and *kastom* should be given some weight in the system. He further observed, ‘There is good wisdom in terms of mechanisms and methods of both systems. These can be combined.’⁶⁰ Another judicial officer stated that although there should be a natural progression between the decisions of the chiefs and the state courts, in fact there was a ‘void’ between the two systems, meaning that when matters reached the state courts they were dealt with as fresh matters and all that had been done by the chiefs was disregarded.⁶¹ Finally, a senior government lawyer stated that very little recognition was given by the state system to the steps taken by the chiefs to ensure that peace and harmony prevailed.⁶²

Although there is a considerable majority of opinion that the relationship should be more clearly defined than it is at present, there is a great deal of uncertainty about how this can be achieved.⁶³ There was hesitation by many actors in the state system about the idea of legislating for chiefly powers. For example, the Chief Justice stated that defining the chiefs’ role would immediately limit their scope, condemning them to ‘live in a bucket’ and become dependent for their powers. Rather than legislating for chiefly powers, most non-chiefly respondents proposed a wide variety of creative suggestions about how exactly it would be best to ‘marry’ the two systems, some of which are discussed in the final chapters.

In summary, therefore, the two systems operate very much independently of each other, despite the belief of the overwhelming majority of the stakeholders that they should work together in some way. This, combined with the fact that the court system is currently over-stretched, inaccessible to a sizeable percentage of the population and still largely viewed as foreign, suggests that there is plenty of scope to strengthen the relationship so as to ease the workload of the state system and to help it to attain a degree of legitimacy in the eyes of the population.

The Vanuatu Police Force

The police force has two wings: the Vanuatu Police Force (VPF) and the paramilitary wing, the Vanuatu Mobile Force (VMF).⁶⁴ There are 547 police officers organised into two main police commands: one in Port Vila and one in Luganville. Within these there are four main police stations⁶⁵ and eight police posts.⁶⁶ This means that there are many islands with no police presence and many parts of islands where getting to a police post can take several days.

The condition of the police today

The VPF today suffers from a negative public image and a negative self-image. In regard to the latter, a report into the state of the VPF in 2003 finds that the police 'do not generally feel positive about the job that the force is doing' and are concerned that they 'do not receive sufficient training, that resources were not managed appropriately and that they were being underpaid and their general welfare neglected'.⁶⁷ An analysis by Penama Province paints a typical picture of the situation of police outside the two urban centres:

Penama Police service is severely affected by budgetary constraints and low moral[e]. This constraint seems to be exacerbated by an ineffective system of administration, which affects proper distribution of resources allocated to the Provincial Police Services. Resources budgeted for the Penama police services do not seem to be appropriated to the Provincial police station at Saratamata but rather used up elsewhere by other provinces or municipalities.⁶⁸

During this study, police regularly complained that they were unsupported by the government and hampered in carrying out their duties. In rural areas in particular, the lack of resources such as vehicles or boats means that the police are significantly hindered in carrying out investigations and arresting and summoning people to attend court.⁶⁹ For example, the sole police officer on the island of Ambrym discussed a murder investigation he was conducting, complaining that not only did he not have a vehicle to travel to the murder scene and to interview witnesses, he did not even have a notebook, and was required to pay for phone cards out of his own salary to call headquarters in Port Vila to try to obtain more funding. A statement made by the Acting Commander of the

Central Investigation Unit in the local newspaper illustrates the feeling of frustration with the system: 'We are helpless. We can't even detect and apprehend the suspects which is our mandate. We are helpless in managing the crime trend because we lack vital resources in terms of transport facilities, proper telecommunication systems and manpower and human resources.'⁷⁰

It must also be noted, however, that a lot of people are cynical about police claims that they do not have sufficient manpower or resources, especially in urban areas, commenting that police officers are often seen just hanging around and that police trucks are often seen in front of kava bars.⁷¹ The negative self-image of the VMF leads to problems of discipline, to low morale and to a generally lax attitude towards the work of policing. Lawyers and other actors in the state system therefore complain about the lack of proper investigation of cases and care in drafting charges.⁷²

The police force's low self-image is also reflected in its public image. Newton Cain found that '[t]here are generally very low levels of [public] confidence in the capacity of the police to address issues that are important to groups within the community' and that '[t]here is a growing belief within the community that there is very little point in seeking recourse to the police, as their response is either non-existent or inadequate'.⁷³ The two biggest complaints made about the police are that they will not assist when requested and that they have a culture of employing unnecessary violence. Complaints about the police not going to assist victims of crime are legendary throughout Vanuatu. When I asked a group of young people what happened if you went to make a complaint with the police, the reaction was instantaneous: half of them made a gesture of tearing up paper and throwing it away, explaining that the police threw the complaint away as soon as the complainant left the room. In rural areas, people complain that the police are so remote they cannot contact them, and when they do, the police ask them to pay for them to come, as they cannot afford the cost of fuel. In 2007, the *Vanuatu Daily Post* reported, 'There is a general perception of the Luganville Police that they will rarely do anything'.⁷⁴ Despite these negative views, people are generally of the view that the police are needed in all areas of Vanuatu and that their presence does help to control crime.

Police brutality has been widely documented.⁷⁵ Rousseau comments that '[t]he level of violence employed by the police seems to be an "open secret" in Vanuatu—known, but infrequently acted upon'.⁷⁶ One senior bureaucrat stated that in urban areas police brutality was common, with the police regularly forcing people to confess by punching and slapping them.⁷⁷ In many cases, the victims of this violence accept it,⁷⁸ but increasingly there have been complaints and demands for compensation. The most public of these arose from *Operesen Klinim-Not* (Operation Clean-Up the North) in Santo, which resulted in a number of court cases relating to police brutality. In one, the parties complained that

they had been 'subjected to verbal abuses, physical assaults extending from undressing in an open field, dancing naked in pairs, pinching of private parts with pliers, kicking with boots, hitting with rifle butts and truncheons, licking boots and toilet brush'.⁷⁹

There are mixed views regarding the way the police deal with women. Some women perceived the police to be more powerful than the chiefs in dealing with problems such as domestic violence, incest, teenage pregnancies and underage sex. There is, however, a culture of domestic violence in the VPF itself, which undermines the confidence of victims in the police.⁸⁰ For example, one woman who was married to a police officer told me that he regularly beat her so the women in her area knew that there was no point complaining to him about domestic violence. A study conducted by the legal officer at the Vanuatu Women's Centre between 1995 and 1996 found that '[g]enerally speaking domestic assault is treated [by the state criminal justice system] as a matter less likely to require outside intervention, and when intervention is undertaken, the punishment tends to be less severe than if it had not been domestic violence'.

It further found that 'when women seek the intervention of the legal system the statistics show a significant failure on the part of the police to impose bail conditions to protect them from further assault and pressure to withdraw their complaint'.⁸¹ The study concluded that, although the formal legal system in Vanuatu offered some significant protection to women and had a constitutional guarantee of their equal status with men, it often failed to enforce women's rights.⁸² The amendments to the law since this study, primarily the development of Domestic Violence Protection Orders⁸³ by the Supreme Court, have alleviated this situation to an extent, allowing women to apply directly to the court for an order of protection. Women are, however, still dependent on the police for the enforcement of these orders and sometimes police tell them that it is not their work, that it is the woman's fault or that the woman must serve the order herself. Many police take the view that violence against women is a private matter and they will not interfere. This attitude was illustrated by a senior police officer, who commented that cases that were 'merely domestic issues'—for example, where a husband hit his wife because she had been with another man—were sent back to the chiefs.⁸⁴ Police also often send women complainants to the Vanuatu Women's Centre instead of taking their statement and prosecuting the offender. The physical inaccessibility of police posts, especially in rural areas, also means that police are not an option for many women in dealing with criminal activities.⁸⁵

The relationship between the police and the *kastom* system

The relationship between the police and the *kastom* system is complex and varies considerably throughout the country. The official VPF policy since 2000 has

been that chiefs should be encouraged to work with the police and to manage 'minor' offences themselves, leaving the police to the work of resolving the 'serious' crimes. This policy has not been reduced to written form in any detail and is very much a pragmatic one; the police rely on the chiefs to keep law and order to a great extent in practice, and officially recognising this fact might be seen as an attempt to control the nature of that reliance. A senior police officer summed up the situation by stating that the police and the chiefs worked together, but there was no continuous link between them—no 'hotline'—so at times they worked together and at other times they did their own thing.⁸⁶

There is enormous variation in the implementation of this policy throughout the country. To an extent, these differences are created by the different individuals involved in each system, but also by variations such as the size of the community compared with the number of police officers servicing the area, the resources of the particular police post⁸⁷ and the strength or weakness of the *kastom* system in the area. An example of an area where the police and the *kastom* system have a very close relationship is Tanna. The officer in charge of the police station on Tanna spoke in glowing terms about the fact that in *kastom* '*dei afta tomorrow tufala save fren*' (the next day the two are friends), whereas in the state system '*wan mas lose and wan mas win*' (one has to lose and one has to win). He said that because his officers were fed up with people lodging complaints and then withdrawing them after the matter had been resolved in *kastom*, he made it a rule that people had to discuss the matter with their chief first. If they still want to lodge a complaint they have to come with their chief or with an elder certifying it has passed through the chief's hands first. If they do not, they are sent to read a notice, which provides that if they lodge a complaint and then wish to withdraw it, they have to pay a fee of vt1000 (about half a term's school fees). Apparently, since this new rule came into effect no-one has lodged a complaint with the police.⁸⁸ In contrast, in Erromango, there is no police post and the police come only a few times a year, if that. The chiefs are very dismissive of the work of the police, saying they come and take statements but then do nothing and the cases just 'go to sleep'. A third level of relationship occurs in Ambrym, where there is only one police officer. That police officer said that sometimes when he had completed his investigations into minor cases it was too hard to send the files back to Vila or Santo so he called the chiefs together and presented them with the findings of his investigations and told them to 'judge the case in *kastom*'.⁸⁹ A final situation is Santo, where there is quite an antagonistic relationship between the chiefs and the police. The chiefs complain that the police do not help them, but the police say they do not assist the chiefs because there is no law to allow them to do so.

Ways the police assist the *kastom* system

The police assist with the *kastom* system in a variety of ways. On occasions, chiefs ask the police to come to *kastom* meetings to 'keep the peace'. Generally, police will be requested to do this only when the meetings involve people from different communities, as this is when tensions are highest, or else very serious cases, such as those concerning allegations of black magic. An example of this was a meeting held in Vila in 2005 to deal with disputes between people from different parts of Tanna. The *Vanuatu Daily Post* reported:

Police and VMF quickly calmed a raging fire by cooling down the dreaded fury of approximately 400 Tannese from attacking Chief Koro's men as soon as the opening prayer ended with an 'amen'. Scores of young men fuelled by instinct for revenge surged forward only to be stopped by the Police and VMF.⁹⁰

Occasionally, police are also asked to bring people to meetings. At times, this merely involves bringing people who would be willing to come anyway but do not have transport or else are not aware of the meeting. It may, however, also involve bringing people who do not wish to attend the meeting. Generally, the police do not use force, relying on their position as authority figures to convince people to go with them. On occasions, however, police do forcibly pick up people, as occurred in *Public Prosecutor vs Kota and Others* (1989–94, 2 VLR 661):

The police were consulted at the Police Station, and 2 police in a police truck, together with Mathias Teku, went to the house where Marie Kota was living, and forced Marie to go to the meeting. I find it most astonishing and abhorrent that Vanuatu Police had anything to do with this matter. And had it not been for the fact that they were firstly requested, and secondly agreed to go, this matter would not be where it is today. The Vanuatu Police had no authority in the legislation of this country to act as they did in this case, to bully and force a person to attend a meeting, and I propose to take this matter up to the Chief Commissioner of Police.

The police are sometimes also involved in the enforcement of orders made by the *kastom* system. In most instances, this simply involves the police going to people who have refused to make their *kastom* payments and telling them that they should pay. At other times, the police write letters directing people to pay. It appears that for the most part force is not used to compel people to pay fines, although I was told reasonably often by the chiefs that sometimes they requested the police to take an offender to the police holding cell and to beat him or detain him for the night as punishment.⁹¹ It is difficult to assess how much this really occurs in practice, and how much it is merely the unfulfilled desire of the chiefs, as only a few police officers admit to doing it. The cases in which the police are

most often said to use force involve the enforcement of decisions by the chiefs to send people living in the urban areas back to their home islands. Despite the case of *Kota*,⁹² it appears that some police continue to assist chiefs, generally those from their community, in forcibly putting people onto boats to send them back to their home islands.

Ways the *kastom* system assists the police

There are also a number of ways in which the *kastom* system assists the state system. First, the chiefs help the police with locating defendants and witnesses. For example, a senior police officer stated that when the police went to look for a suspect in a village they must first see the chief of the village and he would then tell them where to find the suspect.⁹³ As the concept of an address is relatively foreign in Vanuatu, such assistance is invaluable. For example, in a recent murder case in Ambrym, a chief was sent to the village of the suspects to ask them to voluntarily surrender.⁹⁴ The chiefs also assist by maintaining peace in their communities and dealing with conflicts ‘on the level of *kastom*’ before the police arrive, thereby often stopping situations from getting out of hand. This is particularly important in communities that can take the police several days to reach. The *kastom* system also relieves the burden on the police to an enormous extent by dealing with a large percentage of criminal cases—minor and serious. It is clear that if the *kastom* system stopped operating, the VPF, stretched as it already is, could not possibly meet the law and order needs of the community.

On a number of occasions since independence there have been riots of one kind or another and the police have relied heavily on the chiefs to restore law and order. For example, during the 1998 riots, sparked by political instability and concerns over the management of the Vanuatu National Provident Fund, order was restored only with the assistance of the chiefs. The Commissioner of Police at the time stated that ‘[d]evelopments in recent days have proved that the traditional ways of maintaining our society and people is [sic] still very much alive’.⁹⁵ Similarly, in 2002, the chiefs also assisted the police to restore calm in the tensions arising from the appointment of a new police commissioner. In contrast with those earlier occasions, two recent breakdowns in law and order—one in Santo at the end of 2006 and the other in Vila in March 2007—involved failure on behalf of the police and the chiefs to manage group violence.⁹⁶ These two situations illustrate the weak state of both systems of law and order and also point to failures in the relationship between them, as will be discussed in the next chapter.

View of stakeholders about the relationship

The views of the chiefs concerning the police vary considerably. The general view is that the police perform a valuable function, but that they should be more

responsive to the needs of the chiefs. This point was made prominently during the March riots in 2007, when the police had allegedly been informed by chiefs before the violence that trouble was brewing and their help was needed, but the police refused to provide any assistance, even after the riots started and people were killed and houses burnt down.⁹⁷

The police and others involved in the enforcement of law and order in a government capacity are for the most part extremely complimentary about the *kastom* system, pointing out its many benefits and explaining how it does a lot of the work of maintaining peace in the communities. For example, a state official commented that in reality it was not the police that solved problems, it was the chiefs.⁹⁸ The police legal advisor similarly stated, '[W]hen we have a problem then we look at police work but also look at traditional way, because once a fire is lit then it is necessary to use *kastom* to *kilim daon fia* [put out the fire].'⁹⁹ The former Commissioner of Police, Robert Deniro, stated that their partnership with the chiefs up to now had been informal, but very effective and fruitful. Another important finding concerning the relationship between the police and the *kastom* system was that all the actors were concerned that the relationship between the two systems should be clearer to avoid disputes over which cases each should deal with and to clarify what demands the chiefs could legitimately make of the police.¹⁰⁰ For example, the police legal advisor suggested that there should be some legal framework to give recognition to the role played by chiefs and police, and if the chiefs and police could work together as part of a restorative justice system this would reduce disputes.¹⁰¹

The police are also often outspoken about their belief that the chiefs have a *responsibility* to maintain law and order in their communities, and often blame the chiefs for 'not doing their work properly' when situations of conflict arise. For example, in 2004, the Police Chief of Staff called on the Port Vila Town Council of Chiefs to send their unemployed young people back to their islands. He is reported to have said: 'There is no need [for] the chiefs to wait for a law to order the unemployed to go home because...common sense dictates that people without jobs in Port Vila immediately become a burden on their friends and relatives and the state.'¹⁰²

The problems generated by such disagreements between the police and the chiefs over the responsibility to deal with certain situations are discussed further in the next chapter.

A final point emerging from the research is the difference between the views of the chiefs and the police about which party should control the relationship. The police are clearly of the view that *they* should be the ones telling the chiefs what matters to resolve and when they will give them assistance, whereas the chiefs generally view the police as being primarily there to assist them, and hence become frustrated when they fail to do so.

The prisons

At present, there are two prisons for male prisoners and one for female prisoners in Port Vila, a prison at Luganville in Santo¹⁰³ and also one at Lakatoro in Malekula.¹⁰⁴ In addition, on islands where there are police posts there is often a room that is used as the police holding cell. In 2006, the management of the prisons was transferred from the police to the civilian Department of Correctional Services (*Correctional Services Act 2006*).

The condition of the prisons today

The poor conditions of Vanuatu's prisons have been highlighted by Amnesty International, which referred to the cruel and inhumane conditions in the 'decaying, overcrowded former colonial prison[s]',¹⁰⁵ and also by the Vanuatu Ombudsman.¹⁰⁶ The local newspapers and various reports by aid donors also regularly comment on them.¹⁰⁷ The research for this study found structural problems with prison buildings rendering them dangerous during earthquakes and cyclones; prisoners' lack of protection from the elements as a result of large holes in the roofs, resulting in prisoners sleeping in sodden clothes and bedding; blocked showers and toilets; overcrowding;¹⁰⁸ lack of any sort of rehabilitation activities apart from sporadic visits by local church groups; lack of separation of violent criminals and defendants on remand; lack of facilities for juvenile¹⁰⁹ and female prisoners (except in Vila);¹¹⁰ lack of cooking facilities and a lack of security.¹¹¹ In 2005, the Chief Inspector of Prisons stated that the police could do nothing much about the security of the prisoners because of the poor condition of the prisons, commenting that '[w]e only counsel them about not running away from jail'.¹¹² All the people involved in the administration of the prisons are very critical of them. The former Assistant Superintendent of Prisons stated, '[I]f we continue the way we are it is a losing battle. We are not winning anything.'¹¹³

In 2006, the prisoners staged a break-out in protest over the conditions they faced, complaining about 'poor diet, disgusting toilets, dilapidated building, no exercise, no visitation from family and no access to telephone calls or medical treatment'.¹¹⁴ High-risk prisoners also complained of being shackled in chains with other prisoners at all times, even for bathing and going to the toilet, for up to eight months at a time.¹¹⁵ The response by the police to the prisoners' claims was ambiguous: in the same breath that they said the claims were exaggerated and unfounded, they justified their treatment for a number of reasons, including the prisoners' ability to 'escape in a blink of an eye'.¹¹⁶

It is to be hoped that the transfer of authority from the police to the Department of Correctional Services (which occurred in 2006) improves the condition of prisoners in Vanuatu. Transparency International has, however, cast some doubt on whether the proposed reforms will in fact solve the deep-seated problems in

the prisons, commenting that 'the new bills [do] not adequately ensure that prisoners are kept in safe conditions and that minimum international standards for prisoners' and prison conditions are met'. Since the change in authority, there have been regular letters of complaint in the newspapers, alleging that prisoners are allowed to get drunk in prison, are allowed to freely wander around town and that they have used the prison house as a repository for stolen goods.¹¹⁷

On a more theoretical level, there are debates in Vanuatu about the concept of imprisonment per se. A substantial percentage of the population, especially chiefs, is critical of imprisonment for a variety of reasons. One is that imprisonment alienates people from their communities. For example, the head of the Vanuatu Council of Churches stated that in the traditional systems when people were punished they were still a member of the community, they still participated. In prison, however, there is isolation from the community and this remains even after they have come out of prison. Also, because the prisoners have been removed from their community, they tend to remain in town and do not go back to their island community after they have served their sentence.¹¹⁸

Another criticism is that merely imprisoning an offender does not allow for the relationships between him/her and the victim and the community to be mended. A respondent stated:

In law when you put a man in jail then he will come out still cross and it will not finish. If he sees you on the road somewhere he will think about the fight you had. But if all the chiefs sit down with the two parties and fix it in *kastom* then at the same time we can drink kava and forget...it is finished.¹¹⁹

A prisoner made a comment along the same lines, despairing that when a person went to prison even for a long time, the problem was still there when they came out and it never finished. A chief identified a further problem, commenting that the problem with prisons was that when the prisoner was released he assaulted the person who put him there.

Many respondents also noted that sending people to prison harmed their dependants. This is often the justification used by chiefs attempting to remove cases from the state system. For example, in *Public Prosecutor vs Munrel*,¹²⁰ the court referred to the fact that there had been letters from the local chiefs setting out the difficulties that imprisonment would cause and even a letter from the victim asking the court to return the defendant to look after her children. The former President of the Malvatumauri stated:

[I]f you put someone in jail for an example who is married, has got...[a] wife and children back at home, once you put that person into jail we say in custom that it looks like you've put more burden on the whole family now because he should be at home to look after the kids, the

woman cannot look after the children by herself. So we say in custom, putting people in jail you put more burdens on the whole family.¹²¹

Finally, some officials in the state system are of the view that imprisonment does not really work as an effective deterrent. A legal officer in the Public Prosecutor's Office stated that although some people learned from being prosecuted and did not repeat their mistake, there were a lot of people who were prosecuted who went to jail and then when released continued with the same behaviour.¹²² A judicial officer similarly commented that people came out of jail and repeated what they had previously done.

Despite these criticisms, it appears that the majority of the population accepts that prisons are necessary as a last option for dealing with persistent '*strongheds*'. A significant percentage of the population also believes that prison sentences are currently too lenient and not imposed in enough cases, particularly in relation to sexual offences.

The relationship between the prisons and the *kastom* system

Until 2006, it would have been accurate to state that there was no relationship at all between the *kastom* system and the prisons. In 2006, however, two developments initiated a relationship of sorts between the two systems. The first was the Correctional Services Project, which was funded by NZAID and started in 2005. The project was initiated by the Amnesty International report discussed above, and an initial feasibility study concluded that 'the demand for correctional services was likely to increase in coming years, and that urgent action was required to update the management and operations of these services in Vanuatu'.¹²³

The project devised a number of reform proposals that 'create opportunities for linkages between *Kastomary* processes and the Courts'.¹²⁴ A central proposal was the establishment of a Community Probation Service, which adopted a 'Community Justice Process'. This process is said to build on and strengthen the Vanuatu tradition of community participation in the justice process and to preserve and enhance the existing practice of chiefs resolving disputes in a traditional context. The process is based on the idea that at a number of points there are opportunities for matters to be referred back to community leaders for resolution and reconciliation. This proposal is quite general and does not address many of the difficult questions arising from the interaction of the two systems.¹²⁵

Perhaps because of these unresolved issues, although the general policy documents generated by the task force engage in a direct way with the relationship between *kastom* and the state system, the real legislative provisions that have emerged from the process¹²⁶ focus almost entirely on the state system.¹²⁷ The changes relating to *kastom* are relatively minor: a broadening

of the court's ability to take a customary payment into account in sentencing;¹²⁸ the ability of the court to order compensation to be paid to a victim as part of criminal proceedings;¹²⁹ the creation of community work options; and the establishment of a probation service.¹³⁰ Of these, the last development has the most potential, as probation officers will liaise between the two systems, thereby creating better linkages between them and bringing issues in their relationship to the fore.

The second relationship between the prisons and the *kastom* system was an incident in 2006 in which 20 prisoners escaped from a prison in Vila and sent a letter to the Malvatumauri, asking that it publicise their concerns about the conditions they faced in prison.¹³¹ The Malvatumauri took the case on board, stating, 'It is the role of chiefs to maintain peace in the community and when someone is in trouble and enters our *nakamal*, we take him back peacefully.'¹³² The chiefs organised a peaceful walk through town with the prisoners and officers from the Prime Minister's Office, performed a custom ceremony, obtained an assurance from the government that the prisoners' concerns would be taken up and handed the prisoners back to the authorities. It remains to be seen whether or not this incident precipitates a closer relationship between the prisoners and the chiefs, as it has given rise to much public debate. For example, a letter in the *Vanuatu Daily Post* stated: 'maybe let's put the chiefs in front of the Rehabilitation program of the correctional service institute because the so-called prisoners have expressed that in reality, they have confidence in the chiefs—maybe from there we can move on.'¹³³

The Public Prosecutor and the Public Solicitor

The Public Prosecutor has an office in Vila and one in Santo.¹³⁴ The Public Solicitor's Office was established under Article 56 of the constitution and its role is to provide legal assistance to needy people or to any person on being directed to do so by the Supreme Court.¹³⁵

The condition of the prosecution and Public Solicitor

The prosecution and the Public Solicitor have been besieged with problems in recent years. There is an extremely high staff turnover in both offices, with a pattern of new lawyers being employed but leaving as soon as they can find work in the more profitable private sector, resulting in there being very few lawyers with much experience working in the office at any one time.¹³⁶ The lack of lawyers and lack of experience mean that cases are regularly mishandled, overlooked and, in the case of the prosecution, dismissed by the court 'for want of prosecution'.¹³⁷

A further problem is the centralisation of the two offices in Vila. Due to budgetary constraints, it is difficult for the lawyers to tour the islands to prosecute and

defend, meaning that cases must wait for long periods before they can be heard. This has clear ramifications for the ability of prosecutors to secure convictions as during this time evidence is often lost, witnesses disappear and memories fade. For example, the local newspaper reported that in August 2005 seven criminal cases were adjourned in Santo following the absence of representatives from the prosecution and Public Solicitor.¹³⁸ The situation is even worse in the islands. In 2004, the court visited Gaua and dealt with cases concerning intentional assault and destruction of property going back to 2001 due to lack of police prosecutors.¹³⁹ As the Public Solicitor has no office even in Luganville, there is growing dissatisfaction with the situation and criticism that the government is not meeting its constitutional obligations to afford a lawyer to everyone charged with a serious offence.¹⁴⁰

A final major problem for the prosecution is the service of summonses to defendants and witnesses. There is a continuing dispute between the police and the prosecution over responsibility for the service of summonses—a time-consuming job that requires the use of a vehicle, and these are in short supply. As a result, summonses are frequently not served and, again, the courts regularly dismiss huge numbers of cases ‘for want of prosecution’.¹⁴¹

The relationship between the prosecution and the Public Solicitor with the *kastom* system

The relationship between the prosecution and the *kastom* system is informal and centres mostly on negotiation with chiefs about the appropriate forum for particular cases to be settled in. Chiefs will therefore often approach the prosecution and ask for cases to be dropped as they have either been, or will be, dealt with in *kastom*. There is no official policy for legal officers in the prosecution on how to deal with these kinds of situations, and as a result there is a great deal of variation in the approaches of the individual prosecutors. A recent Court of Appeal decision, *Public Prosecutor vs Gideon*,¹⁴² clearly sets out what the correct ‘legal’ response to a request to drop a case after a *kastom* payment should be:

Customary settlement in this case was initiated by a letter from the village Chief to the respondent demanding the payment of a fine of VT30,000, a pig and mats by a specified date, failing which criminal charges would be laid against him. The demands of the letter were duly met but that did not prevent the criminal charge being laid against the respondent who might well entertain some sense of grievance... We are concerned... at the suggestion in the letter that performance of customary settlement could somehow influence the laying of criminal charges in this case. We desire to dispel any notion that customary settlement can have such an

effect in an offence as serious as occurred in this case where the public interest dictates that criminal charges must be laid.

These statements, however, reflect an idealised view of the prosecution process rather than the reality, as a significant number of cases *are* dropped after representations from complainants and chiefs.¹⁴³ The problems that these sorts of negotiations over forum raise are discussed further in the next chapter. Conversely, a legal officer said that a lot of people came after a chief had already dealt with a case and said they were not happy with the way the chief had decided the case.

The Public Solicitor relates with the *kastom* system largely by getting information about customary payments that have been performed in order to use this as a mitigating factor in sentencing submissions.

The Malvatumauri

The closest thing to state recognition of the *kastom* system is the establishment of the Malvatumauri.¹⁴⁴ The Malvatumauri comprises chiefs who are elected every four years from every region in Vanuatu and it meets only twice a year.¹⁴⁵ The role given to the Malvatumauri by the constitution is limited. It has 'a general competence to discuss all matters relating to custom and tradition' and also it 'may make recommendations for the preservation and promotion of ni-Vanuatu culture and languages'.¹⁴⁶ It is not, however, mandatory for any legislation to be given to it for discussion or approval. As a result, very few pieces of legislation are ever submitted to it and to date it has not played a very significant role.

In recent years, however, the Malvatumauri has become more active in establishing structures for chiefly councils and attempting to establish procedures for registering chiefly title. It has also become more vocal in expressing dissatisfaction with the powers of chiefs in general, arguing that the State should legislate for chiefly powers in relation to conflict management. As early as 1983, the Malvatumauri produced its 'Custom Policy', which set out a codified set of customary laws purportedly applicable to the entire country and covering many of the same issues as the *Penal Code Act*, such as murder and damage to property.¹⁴⁷ In 1990, the chiefs told the Constitutional Review Committee that 'although they currently have a role to play in villages and island courts, they still face problems since the *Constitution* does not give them enough power to straighten out all problems'.¹⁴⁸ Then in 1992, the Malvatumauri proposed to the government that it should establish 'customary courts'. It is clear from this proposal that the chiefs envisage that the 'chiefly system of justice' should become part of the state court system rather than operating outside and parallel to it.¹⁴⁹ The memorandum that accompanied the custom courts proposal notes that:

- the chiefly system of justice remains important in most areas of Vanuatu, particularly those in which there is little police presence or control
- as it is a working system, which is acknowledged by all, it is wrong to treat it as some type of alternative system of justice; it should be brought fully into the judicial system
- at the same time, it is open to abuse; conflicts of interest may not be acknowledged, unwritten rules may be altered and decisions may be unfair with no realistic right of appeal.¹⁵⁰

It appears that little was done in response to this proposal until the establishment of the Chiefs' Legislation Project in 2000. The government established this project, presumably as the result of pressure from the Malvatumauri. The aim of the project was to 'examine the chiefly institution in its traditional and cultural context with the view to translate it to accommodate any potential threats to internal peace and stability' and thus to 'legalise the roles and functions of chiefs throughout the country, in a way that would be adaptable to contemporary Vanuatu so as to assist, facilitate and generally be conducive to nation building'.¹⁵¹ The project approached the issue of the lack of customary law in the state system from an almost polar opposite direction to that adopted by the legal academics discussed above. Right from the start, the focus was on how the *kastom* system was operating and the problems it was facing, rather than any examination of the written laws and the state courts.

The first step in the project was the commissioning of a study into the chiefly systems and various roles of chiefs in Vanuatu today and into the views of relevant key stakeholders in order to 'assess and advise upon the scope for the legislation of the chiefly systems and their roles and examining compatible avenues of adapting these systems with the government and judicial systems'.¹⁵² The study was undertaken in 2001 and a report was produced, which set out a number of findings about the operation of the *kastom* system and its relationship with the State. The findings of this report are broadly consistent with those of the present study, although in a much simplified form.¹⁵³

The report recommended that two pieces of legislation be drafted: a Chiefs' Bill, which 'must acknowledge and empower the chief in his roles and functions both as an individual chief and collectively with other chiefs in courts and other areas where the chief has a role';¹⁵⁴ and a Village Courts Bill, which 'will give recognition and official status to the custom courts and shall provide for their developments and improved administrations'.¹⁵⁵ As the report was mostly a sociological survey rather than draft legislation, it was given to an experienced law professor to turn into legislative form. Due to a number of difficulties, the work on the legislation did not begin until 2005. The draft was given to the Malvatumauri, who then edited it considerably, removing many of the safeguards concerned with the appointment and dismissal of chiefs.¹⁵⁶

The Bill for the National Council of Chiefs Act (2006) that emerged from this process moves away from the balanced approach advocated in the 1992 proposal. Although most of the bill is concerned with the organisation of the Malvatumauri and the establishment of councils of customary chiefs on the islands and in urban areas, there was an attempt to give chiefs the unlimited power to ‘resolve disputes according to local customs’ (Sections 13[1][a] and 14[1]) and to make ‘by-laws’ (Sections 14[2] and [3], 15 and 16). The bill also provided that chiefly councils could require the assistance of the police to enforce their penalties and that police officers ‘must provide such assistance’—again, with no limitations on this power (Section 16[3]).¹⁵⁷ These provisions, however, were removed even before the bill went before Parliament¹⁵⁸ and the act that was passed was concerned solely with the organisation of various chiefly councils (*National Council of Chiefs Act 2006*). The Secretary of the Malvatumauri commented at the Judiciary Conference in 2006 that the act that had finally been passed through Parliament was like a dog that had had all its teeth removed and yet the dog was still expected to hunt pigs.¹⁵⁹

Conclusion

The previous three chapters have used a legal-pluralist perspective to provide a window into the complex operation of conflict management in Vanuatu. We have seen how focusing on institutions, processes and principles rather than purely on substantive norms has allowed a more holistic picture to emerge than has previously been possible. Further, exploring the points of interaction of the two systems has generated rich data concerning the dynamics of legal pluralism and the characteristics of the linkages between the two systems. These data lead to a number of tentative conclusions about the nature of legal pluralism in Vanuatu today.

Since colonisation, ni-Vanuatu have been faced with at least two systems of law that they can and do draw on, depending on particular circumstances (such as the accessibility and strength of the systems and the nature of the conflict) as well as personal preferences (such as support for or mistrust of *kastom* chiefs/the State or colonial powers, and belief about which system will lead to a more advantageous outcome). The legitimate scope of the two systems has never been formalised; instead, the unofficial division of jurisdiction has been left to individual institutions and administrators to negotiate, and the results of this process have and do vary considerably over time and place.

Overall, the current linkages between the systems are largely informal, dynamic and subject to continuous negotiation. We have also seen that, ironically, there is less real engagement between the two systems in practice in those few areas where legal pluralism is legislatively provided for¹⁶⁰ than other places where

unofficial relationships and allocations of responsibility between the two systems have been created by the individuals involved.

Svesson draws a distinction between a situation of *legal pluralism*, where legal systems operate in parallel, and *inter-legality*, where there is 'continuous interaction in the main between different legal perceptions, thereby influencing and shaping new normative orders adapted to considering cultural diversity'.¹⁶¹ Generally in Vanuatu, we have seen little evidence of inter-legality in this sense, as the development of the state system has not been influenced perceptibly by the *kastom* system. More importantly, and perhaps symptomatically, there has also been little active dialogue between the two systems or interchange of different legal views. This is due in part to the lack of centralisation of the *kastom* system, endemic political instability and the difficulties of communication in Vanuatu generally, but also to the lack of institutional spaces for such dialogue to occur.¹⁶² During the Condominium, district agents and assessors were formally charged with liaising between the two systems and found themselves confronted with particular situations requiring them to reconcile procedural and substantive differences between the two systems. Since independence, such roles have disappeared and there is very limited opportunity for conflicts between the systems on the level of legal principle to arise and be articulated in this way.

At present, however, the lack of real engagement between the two systems means that the main 'hotspots'¹⁶³ between them, rather than operating at the level of contested legal principles, involve disputes over jurisdiction, particularly in relation to cases involving women and youth. This issue is complicated by the fact that *kastom* is often used as a vehicle for chiefs and others to express concern about, and try to regain control over, the societal changes being precipitated by the growing engagement with globalisation. The problems caused by such disputes are discussed at length in the next chapter.

A cause of increasing tension between the two systems is also the State's heavy reliance on the *kastom* system, especially in rural areas, coupled with its reluctance to contribute any resources or recognition in return. It was perhaps inevitable that the chiefs have become tired of being treated as the unpaid and unacknowledged assistants of the state system and are increasingly vocalising demands for legislative recognition of chiefly powers. In the past, the state system has been able to brush off such demands by trotting out platitudes about the authority and power of the chiefs resting in community respect, but it is unlikely that this response will be tenable for much longer, especially given evidence of the partial unravelling of respect shown in the previous chapter.

A further important finding to emerge from the discussion is that today the state system is failing to meet many of the challenges it is confronted with in terms of capacity and human rights standards. The major problems within the state system identified in this chapter can be summarised (Table 5.1).

Table 5.1 Problems with the state system

- The state courts lack legitimacy and are viewed by many as an alien system in which people feel unable to properly tell their story ('*kot blong waetman*').
- Women and children in particular find the state system confusing and frightening and their justice needs are often not satisfied by it.
- The state system is inaccessible to a large proportion of the rural population due to its limited geographical reach.
- The state system is very slow, especially in remote areas where the courts tour only sporadically.
- The state courts often exclude community participation due to the practice of court sittings taking place in the urban centres rather than the communities in which the crime occurred.
- The state courts are pushed to breaking point with their workload.
- State court orders are often not enforced, especially in the lower levels of the courts.
- The police are under-resourced, under-trained and affected by low morale.
- There is a culture of police brutality, which causes juveniles particularly to regard police officers with fear rather than as a source of assistance.
- The prison buildings are decrepit and prisoners are held in circumstances that breach their human rights.
- Many in the community see imprisonment as a punishment serving no real benefit and causing significant hardship to the family and community of the offender.
- The prosecution and the Public Solicitor are under-resourced and understaffed and have little reach outside Port Vila.

Thus, any discussion of the relationship between the *kastom* system and constitutional rights and freedoms should take place in a context that acknowledges that the state system itself currently breaches a number of fundamental rights, in particular freedom from inhumane treatment (the treatment of prisoners), equal treatment under the law (the treatment of women by the police) and the right to a fair hearing within a reasonable time (the failure by the courts to deal with cases in a timely manner). In addition, we have seen that generally the *kastom* system is far more consistent than the state system in meeting the expectations and demands of its users. These findings suggest a continued need for the *kastom* system in Vanuatu, as the state system cannot meet the current needs of the population by itself and is unlikely to be able to

do so in the near or even distant future given the additional factors of population explosion and urban drift.

Finally, there was a strongly held belief by the majority of respondents that the current gap between the two systems should be bridged in some way, but there was a lack of consensus about how best to achieve this. The lack of progress on this issue since independence, despite considerable will and legislative scope to do so, suggests that more than a new legal framework is needed. How much more is discussed in Chapter 8.

ENDNOTES

¹ von Benda-Beckman and von Benda-Beckman, 'The dynamics of change and continuity in plural legal orders', p. 32.

² Dinnen, Sinclair 2002, *Building bridges: law and justice reform in Papua New Guinea*, Discussion Paper 2002/2, State Society and Governance in Melanesia Research Paper Series, The Australian National University, viewed 31 May 2007, <<http://rspas.anu.edu.au/melanesia/discussion.php>>, p. 14.

³ There are currently resident magistrates in Port Vila, Luganville and Malekula, who go on tour to neighbouring islands subject to funding and case loads, and there is also a registry of the Magistrate's Court in Vanua Lava.

⁴ In Vanua Lava, Santo, Malekula, Efate, Ambae, Tanna and Pentecost.

⁵ Many times, the difficulties of communication are such that even the complainant is not notified of the result of the proceedings.

⁶ Except in the case of applications for Domestic Violence Protection Orders in the Supreme Court, for which the court fee is quite low and no lawyer is necessary. Although there is a Public Solicitor, the office is overworked and has only one office, in Vila (see below under 'The Public Prosecutor and the Public Solicitor'). As a result, people often feel compelled to pay for a lawyer or to be unrepresented, and lawyers' fees are notoriously high.

⁷ Interview with a government legal officer (Santo, 15 November 2004).

⁸ At the opening of the court in 2007, the Chief Justice announced that there were 1171 cases lodged with the Supreme Court the previous year and only 205 completed, 2325 cases lodged with the Magistrate's Court and only 1749 completed and the Island Courts received 764 and completed 388. See Garae, Len 2007, 'Chief Justice opens courts', *Vanuatu Daily Post* (Port Vila), 10 February 2007, p. 1.

⁹ Paterson, Don 2004, *Report on Customary Law Research Project*, AusAID, p. 37.

¹⁰ Interview with a state police prosecutor (Santo, 18 November 2004).

¹¹ The Chief Justice announced at the opening of the court in 2007 that the Pacific Judicial Development Program had trained 225 Island Court justices and that a senior administrator for the Island Courts had been appointed. See Garae, Len 2007, 'Chief Justice makes new appointments', *Vanuatu Daily Post* (Port Vila), 14 February 2007, p. 2.

¹² These terms were coined by Woodman: see Chapter 2 (under 'The possibilities and limitations of legal pluralism for Melanesia') for a discussion concerning them.

¹³ Previous analysis of the role of customary law in Vanuatu, and indeed elsewhere throughout the region, either has not taken account of the institutional side at all or has conflated it with the consideration of substantive customary law. There are, however, enormous differences between the state courts using customary law in their decisions on the one hand, and the state courts recognising decisions made by other institutions administering those norms on the other.

¹⁴ The previous chapter discussed how the *kastom* system used substantive norms from the state system.

¹⁵ See, for example, Weisbrot, David 1988, 'Law and native custom in Vanuatu', *Law and Anthropology*, vol. 3, p. 103; Weisbrot, David 1989, 'Custom, pluralism and realism in Vanuatu: legal development and the role of customary law', *Pacific Studies*, vol. 13, no. 1, p. 65; de Deckker, Paul and Faberon, Jean-Yves 2001, *Custom and the Law*; 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; Powles, Guy 2004, 'Some thoughts on the future of customary law in Pacific island states', Paper presented at the Australasian Law Teachers Association Conference, Darwin, July 2004; Ottley, B. 1992, 'Custom and introduced

criminal justice', in R. James and I. Fraser (eds), *Legal Issues in Developing Society*, p. 128; Ottley, Brian 2002, 'Reconciling modernity and tradition: PNG's underlying law act', *Reform*, vol. 80, p. 22; Ottley and Zorn, 'Criminal law in Papua New Guinea'; Corrin Care, Jennifer 1999, 'Customary law and human rights in Solomon Islands: a commentary on *Remisio Pusi v James Leni and Others* (cc 218/1995, unreported [High Ct., Solom. Is.])', *Journal of Legal Pluralism and Unofficial Law*, vol. 43, p. 135; 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; Corrin Care, Jennifer 2002, 'Wisdom and worthy customs: customary law in the South Pacific', *Reform*, vol. 80, p. 31; Corrin Care and Zorn, 'Legislating pluralism'; Zorn, 'Lawyers, anthropologists and the study of law'; Zorn and Corrin Care, "'Barava tru'"; Scaglione, *Customary Law in Papua New Guinea*; Fraser, Ian 1999, 'Legal theory in Melanesia: pluralism? Dualism? Pluralism long dualism?', *Journal of South Pacific Law*, vol. 3, <<http://paclii.org.vu/journals/fJSPL/index.shtml>>; Dinnen, Sinclair 1995, 'Custom, community and criminal justice in Papua New Guinea', in Jonathan Aleck and Jackson Rannells (eds), *Custom at the Crossroads*, p. 148; Narokobi, 'Law and custom in Melanesia', and *Lo Blong Yumi Yet*; Paterson, Don 1995, 'South Pacific customary law and common law: their interrelationship', *Commonwealth Law Bulletin*, vol. 21, no. 2, p. 660; Paterson, *Report on Customary Law Research Project*; Ntumu, 'The dream of a Melanesian jurisprudence'; Newton Cain, Tess 2001, 'Convergence or clash? The recognition of customary law and practice in sentencing decisions of the courts of the Pacific island region', *Melbourne Journal of International Law*, vol. 2, no. 1; Vaai, Saleimoa 1997, 'The idea of law: a Pacific perspective', *The Journal of Pacific Studies*, vol. 21, p. 225; Jowitt, 'Indigenous land grievances, customary land disputes and restorative justice'; Hughes, 'Legal pluralism and the problem of identity'; James, R. 1992, 'A comparative view of the underlying law', in R. James and I. Fraser (eds), *Legal Issues in Developing Society*, p. 146; Aleck, 'Beyond recognition'; Aleck, Jonathan and Rannells, Jackson 1995, *Custom at the Crossroads*.

¹⁶ This is not to deny that this is not the case in other jurisdictions as well.

¹⁷ Government of Vanuatu n.d., *Constitution of the Republic of Vanuatu*, Article 95(2).

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid., Article 47(1).

²¹ In fact, the Law Commission has never been established.

²² Government of Vanuatu n.d., *Constitution of the Republic of Vanuatu*, Article 5.

²³ Ibid., Article 52.

²⁴ *Criminal Procedure Code* (Cap 136, Section 153), repealed by the *Criminal Procedure Code (Amendment) Act 1989*.

²⁵ *Criminal Procedure Code* (Cap 136, Section 185) (this section does not appear to have been repealed but it makes no sense without the sections that have been repealed).

²⁶ Interview with Professor Paterson (Port Vila, 12 October 2005).

²⁷ Section 1 provides that the Chief Justice may define the jurisdiction of each court 'as he shall see fit'.

²⁸ Jowitt, Anita 1999, 'Island courts in Vanuatu', *Journal of South Pacific Law*, vol. 3, <<http://paclii.org.vu/journals/fJSPL/index.shtml>> The warrants of appointment for the Island Courts that exist authorise them to determine certain minor criminal offences specified in the *Penal Code* (Cap 135) and other legislation, civil claims relating to contracts and torts not exceeding vt100 000 and claims for maintenance of legitimate family and also illegitimate children.

²⁹ Weisbrot, 'Custom, pluralism and realism in Vanuatu', p. 115.

³⁰ Rousseau, *The achievement of simultaneity*, p. 171.

³¹ Larcom, 'Custom by decree', p. 176.

³² Malvatumauri, 'Kastom polisi blong Malvatumauri'.

³³ For a thorough critique of the Island Courts, see Jowitt, 'Island courts in Vanuatu'.

³⁴ This replaces, and somewhat expands, the repealed Section 118 of the *Criminal Procedure Code* (Cap 136).

³⁵ The previous section provided that after doing this the court may 'thereupon order the proceedings to be stayed or terminated', but this phrase is not present in the new section, although the court has a general power to discharge a matter.

- ³⁶ Ralph Reganvanu, Director of the Vanuatu Cultural Centre (Author's notes from the Conference on *Kastom* and the Constitution, University of the South Pacific, Emalus Campus, Port Vila, Vanuatu, 4 October 2004).
- ³⁷ When I asked one judge why he did not encourage lawyers to make submissions on the basis of customary law he said that the problem lay with the legislature, who had a duty to further develop the principles about custom being part of the law 'set down boldly in the constitution' (Interview with a judge, Port Vila, 20 August 2004).
- ³⁸ Interview with a judge (Port Vila, 5 September 2003).
- ³⁹ For example, one lawyer said that he did not feel there would ever be any point raising issues of *kastom* in his arguments, except for mitigation because '*kastom* is not written and so in that respect it is not recognised' (Interview with a lawyer, Port Vila, 10 September 2003).
- ⁴⁰ Narokobi, 'In search of a Melanesian jurisprudence'.
- ⁴¹ Paterson, 'South Pacific customary law and common law'.
- ⁴² This is demonstrated by the case of *Boe & Taqa vs Thomas* (1980–94, Van LR 293), in which the court was considering the question of compensation for the death of a child. Justice Cooke justified ignoring *kastom* by finding that two old English acts—namely, the *Fatal Accidents Act 1846* and the *Law Reform (Miscellaneous Provisions) Act 1934*—applied and that he was therefore not compelled to turn to *kastom*. Further, in all the courts, customary law can be applied only if it is 'not in conflict with any written law and is not contrary to justice, morality and good order' (*Island Courts Act*, Cap 167, Section 10). If a higher court trained in the common law tradition determines the ideas of justice, morality and good order, this also has the potential to severely limit its use.
- ⁴³ See, for example, Corrin Care, 'Customary law in conflict', p. 174.
- ⁴⁴ *Banga vs Waiwo*, 1996, VUSC 5, <<http://www.paclii.org.vu>>
- ⁴⁵ Bourdieu, Pierre and Wacquant, Loic 1992, *An Invitation to Reflexive Sociology*, p. 126.
- ⁴⁶ See, for example, Forsyth, Miranda 2006b, 'Sorcery and the criminal law in Vanuatu', *LawAsia*, p. 1, in which I discuss the difficulties state law has had in dealing with sorcery in Vanuatu.
- ⁴⁷ Weisbrot, 'Law and native custom in Vanuatu', p. 115.
- ⁴⁸ *Banga vs Waiwo*, 1996, VUSC 5, <http://www.paclii.org.vu>
- ⁴⁹ Zorn, Jean 1991, 'Making law in Papua New Guinea: the influence of customary law on common law', *Journal of Pacific Studies*, vol. 14, no. 4, p. 24.
- ⁵⁰ Ntummy, 'The dream of a Melanesian jurisprudence', p. 10.
- ⁵¹ This provision replaces the repealed Section 119 of the *Criminal Procedure Code* (Cap 136), which provided much the same, although it used the word 'may' instead of 'must'.
- ⁵² *Waiwo vs Waiwo and Banga*, 1996, VUMC 1, <<http://www.paclii.org.vu>>
- ⁵³ For an interesting discussion of how other courts in the region have dealt with the issue of taking into account customary remedies. See New Zealand Law Commission, *Converging currents*, pp. 180–4.
- ⁵⁴ *Public Prosecutor vs Gideon*, 2002, VUCA 7, <<http://www.paclii.org.vu>>
- ⁵⁵ Interview with a judge.
- ⁵⁶ For a further discussion, see Paterson, Don 2006, 'Customary reconciliation in sentencing for sexual offences: a review of *Public Prosecutor v Ben and Others* and *Public Prosecutor v Tarilingi and Gamma*', *Journal of South Pacific Law*, vol. 10, no. 1, <<http://paclii.org.vu/journals/fJSPL/index.shtml>>
- ⁵⁷ Interview with a judge (Port Vila, 20 August 2004).
- ⁵⁸ Tinning, Esther 2004, 'Court sentences brothers and sister for assault', *Vanuatu Daily Post* (Port Vila), 11 September 2004, p. 8.
- ⁵⁹ Interview with a judge (Port Vila, 20 August 2004).
- ⁶⁰ Interview with a judge (Port Vila, 5 September 2003).
- ⁶¹ Interview with a judicial officer (Port Vila, 5 April 2004).
- ⁶² Interview with a senior government lawyer (Port Vila, 10 September 2003).
- ⁶³ See a report of detailed discussion about this at the Vanuatu Judiciary Conference in 2006. Forsyth, Miranda 2006a, *Report on the Vanuatu Judiciary Conference 2006: The relationship between the kastom and state justice systems*, University of the South Pacific, <http://paclii.org.vu/vu/2006_jud_conf_report.html>

⁶⁴ There have been considerable tensions between the two wings that have been played out in the saga involving the appointment of a new Commissioner of Police in 2002, resulting in the arrest of the Police Services Commission, including the Attorney-General, the Secretary to the President and the Ombudsman.

⁶⁵ In Port Vila, Luganville, Malekula and Tanna.

⁶⁶ One in Sola, two in Ambae, one in Pentecost (which is not currently operational), one in Aneitym, one in south Malekula, one in Epi and one in Tongoa.

⁶⁷ Newton Cain, Tess 2003, *Final Report Base Line Survey Organisational Climate Survey*, AusAID.

⁶⁸ Penama Province 1994, *Penama Social Development Plan*.

⁶⁹ The Secretary-General of Torba Province further explained that this lack of resources placed significant limits on the ability of the police to deal effectively with crime because if an officer wanted to go to another island he must apply for an impress from headquarters and this could take a month. Consequently, if there is an emergency the police cannot react quickly.

⁷⁰ Joy, Shirley 2003, 'Police plead for government support to fight crime', *Vanuatu Daily Post* (Port Vila), 22 October 2003.

⁷¹ In fact, most recently, when I hailed a police truck for assistance, the two people driving told me that they were not, in fact, police officers, but that they could drive me to the police station if I wanted them to!

⁷² Interview with a lawyer (Santo, 18 November 2004). I experienced this also during my year as a prosecutor.

⁷³ Newton Cain, *Final Report Base Line Survey Organisational Climate Survey*.

⁷⁴ Lini, 'Law and order situation in Luganville questioned'.

⁷⁵ See Super, *A Needs Assessment of Juvenile Justice Issues in Fiji and Vanuatu*; Mitchell, *Young People Speak*; Morgan, *Conference Report of the Governance for the Future*; Rousseau, *The Report of the Juvenile Justice Project*; Ombudsman of Vanuatu 2002, *Public report on the unlawful arrest and detention of Mrs Aspin Jack*, VUOM 11, <http://www.paclii.org.vu>; Ombudsman of Vanuatu 2003b, *Public report on police brutality during operation on Central Pentecost*, VUOM 16, <<http://www.paclii.org.vu>>

⁷⁶ Rousseau, *The achievement of simultaneity*, p. 202.

⁷⁷ Interview with the Director of Youth and Sports (Port Vila, 11 June 2004).

⁷⁸ A youth representative in a rural community reported that the police often gave very severe beatings, sometimes requiring hospitalisation, but the youth believed it was the policeman's right to do this if the person did not surrender.

⁷⁹ *Working Group for Justice vs Government of the Republic of Vanuatu*, 2002, VUSC 55, <http://www.paclii.org.vu>

⁸⁰ Mason, Merrin 2000, 'Domestic violence in Vanuatu', in Sinclair Dinnen and Ley Allison (eds), *Reflections on Violence in Melanesia*, p. 119.

⁸¹ *Ibid.*, p. 128.

⁸² *Ibid.*

⁸³ *Civil Procedure Rules* (2002, Part 16, Division 4).

⁸⁴ Interview with a senior police officer (Port Vila, 29 July 2003).

⁸⁵ Interview with the Director of the Vanuatu Women's Centre (Port Vila, 7 May 2004).

⁸⁶ Interview with a senior police officer (Port Vila, 6 April 2004).

⁸⁷ For example, a police post without a vehicle or Magistrate's Court will rely more heavily on the chiefs than one with these resources.

⁸⁸ I was there only three weeks after the new policy.

⁸⁹ Interview with a police officer (Port Vila, 8 November 2004).

⁹⁰ Garae, Len 2005, 'Chiefs diffuse Tanna fight', *Vanuatu Daily Post* (Port Vila), 8 August 2005, p. 1.

⁹¹ See also Rousseau, *The achievement of simultaneity*, pp. 207–8.

⁹² *Public Prosecutor vs Kota and Others* (1989–94, 2 VLR 661).

⁹³ Interview with a senior police officer (Port Vila, 29 July 2003). Examples of the benefits of the chiefs and police working together are regularly reported in the local newspapers. For example, in 2004, the police launched an operation in Malekula to deal with outstanding criminal cases dating back to 1999 that had not been dealt with due to a shortage of manpower at the police post. The police worked closely with the chiefs, who delivered the suspects to the police station and the police then decided which

cases to put before the court and which to refer back to the chiefs to solve. See Walter, Matthew 2004b, 'Forty suspects netted in Malekula operation', *Vanuatu Daily Post* (Port Vila), 26 November 2004, p. 2.

⁹⁴ Garae, Len 2005, 'Tension high after Ambrym killing', *Vanuatu Daily Post* (Port Vila), 11 October 2005, p. 3. After the 3 March riots in 2007, the *Vanuatu Daily Post* also reported the Minister of Internal Affairs saying, '[T]he chiefs of the two communities of Tanna and Ambrym have already been informed to get those that are involved in the problem to surrender by sunset yesterday afternoon' ('Two confirmed dead in Ambrym and Tanna clash', *Vanuatu Daily Post* [Port Vila], 5 March 2007, p. 1).

⁹⁵ Wittersheim, Eric 2005, *Melanesian elites and modern politics in New Caledonia and Vanuatu*, Discussion Paper 1998/3, State Society and Governance in Melanesia Discussion Paper Series, The Australian National University, <<http://rspas.anu.edu.au/melanesia/discussion.php>> See also Amnesty International 1998, *No Safe Place for Prisoners*.

⁹⁶ These two incidents are discussed in further detail in Chapter 4 under 'Chiefly misbehaviour' and Chapter 6 under 'Dispute and confusion over jurisdiction'.

⁹⁷ 'Two confirmed dead in Ambrym and Tanna clash', *Vanuatu Daily Post* (Port Vila), 5 March 2007, p. 1; 'West Ambrym chiefs willing to supply local food to victims', *Vanuatu Daily Post* (Port Vila), 10 March 2007, p. 3; 'The roots of the man Tanna/man Ambrym row', *The Independent* (Port Vila), 11 March 2007, p. 3; Regenvanu, State of emergency.

⁹⁸ Interview with a secretary-general (Ambae, 3 October 2003).

⁹⁹ Interview with a police officer (Port Vila, 14 April 2004).

¹⁰⁰ See also the discussion on this issue at the Vanuatu Judiciary Conference in 2006. Forsyth, *Report on the Vanuatu Judiciary Conference 2006*.

¹⁰¹ Interview with police legal advisor (Port Vila, 14 April 2004).

¹⁰² Garae, Len 2004, 'Police want unemployed sent home', *Vanuatu Daily Post* (Port Vila), 25 November 2004, p. 3.

¹⁰³ It was recently reported that there were 162 inmates in Port Vila and Luganville and that prison authorities spent more than vt500 000 each month on inmates' food. See Willie, Royson 2005, 'Inmates remind president of deteriorating prisons', *Vanuatu Daily Post* (Port Vila), 29 October 2005, p. 2.

¹⁰⁴ There was a prison at Isangel, Tanna, which was destroyed by a cyclone in 2003.

¹⁰⁵ Amnesty International, *No Safe Place for Prisoners*. Amnesty reported the major problems as being 'prison buildings made unsafe by earthquakes and water seepage, insufficient food for prisoners and a lack of safe accommodation for female prisoners. In August 1998, a female prisoner was held for a month in a prison evacuated by all male prisoners because the building was considered "too dangerous"'.¹⁰⁶

¹⁰⁶ Ombudsman of Vanuatu 1999, *Public report on prison conditions and mismanagement of the prison budget*, VUOM 15, <http://www.paclii.org.vu> The Ombudsman's report found that 'food rations, the type of bedding, the level of hygiene, the need for segregation of prisoners, the lack of exercise, rehabilitation and library all resulted in conditions far below the desired standards'. Further, it revealed that there were problems with the funding of the prisons as only a fraction of the funds earmarked for the prisons really went to them, the rest being spent on police requirements.

¹⁰⁷ There have been proposals to build new prisons since as early as 1987 (see Amnesty International, *No Safe Place for Prisoners*), but to date little has been done. Recently, however, NZAID has committed itself to the Correctional Services Project, which involves the building of new prisons in the near future.

¹⁰⁸ Overcrowding is such a major problem that some judicial officers are reluctant to sentence people to imprisonment because the jails are too full. The only way the issue of the overcrowding of prisons has been 'addressed' has been for the President and the minister responsible for prisons to regularly release prisoners well before they have served their full sentence—traditionally in bulk on Independence Day or periodically throughout the year (Article 38 of the constitution provides that '[t]he President of the Republic may pardon, commute or reduce a sentence imposed on a person convicted of an offence. Parliament may provide for a committee to advise the President in the exercise of this function.' The minister is given the power under Section 30 of the *Prisons [Administration] Act* [Cap 30]). This issue was discussed by the Vanuatu Court of Appeal in the decision of *Public Prosecutor vs Atis Willie* (2004, VUCA 4, <http://www.paclii.org.vu>), which found that powers of presidential pardon 'are being used very extensively' and that 'the need for a consistent and transparent approach in any mechanism which would have the effect of reducing the actual times spent in prison is overwhelming'. The court concluded: 'On the data which is [sic] currently available it is difficult to be confident that there are not major variations in the treatment of prisoners because of the way in which these two powers are presently being exercised. This has the potential to totally undermine the Court in its duty of delivering justice equally to all citizens as they are duty bound to provide, when there are subsequent mechanisms where

the exercise is not grounded in those same fundamental policies.’ Possibly as a result of this judgment and also as a consequence of the appointment of a new president, who was formerly a lawyer and a judge, it appears that this practice has been substantially halted. See Willie, ‘Inmates remind president of deteriorating prisons’.

¹⁰⁹ As a consequence, juvenile prisoners are sentenced to imprisonment in the same facilities as mature criminals. For example, in the case of *Public Prosecutor vs Ben and others* (2005, VUSC 108, <http://www.paclii.org.vu>), three fifteen-year-olds were sentenced to five years’ imprisonment. See also Super, *A Needs Assessment of Juvenile Justice Issues in Fiji and Vanuatu*.

¹¹⁰ As a consequence, in some cases, women prisoners are not sentenced to imprisonment, despite the fact that this might be the most appropriate sentence. For example, in a recent case, the Court of Appeal gave a female defendant a suspended sentence, stating, ‘Nor can we ignore the absence of a female prison in Santo so that if she were now imprisoned, she would be physically removed from her children and her island in being transported to Port Vila for incarceration’ (*Public Prosecutor vs Niala*, 2004, VUCA 25, <http://www.paclii.org.vu>).

¹¹¹ Each prison I visited often left the front gate wide open and, not surprisingly, the newspaper often reported incidents of escaping prisoners. Recently at my work, we received an email from the head of the Police Intelligence Analysis Unit notifying us that ‘49 prisoners at the Ex French Center escaped from lawful custody last night’ and that ‘[s]ome of this escapees are very high risk and are known for Unlawful entry and likely to commit other offences [sic]’ (Frazer Tambe, <ftambe@vanuatu.gov.vu>, 30 May 2007). The next day the newspaper reported that in fact the 49 prisoners (of 62 detainees) had just *walked out* of prison in protest over the food. See Garae, Len and Jerety, *Johnety* 2007, ‘Walkout offenders to be prosecuted’, *Vanuatu Daily Post* (Port Vila), 31 May 2007, p. 1.

¹¹² Binihi, Ricky 2005, ‘All runaway prisoners behind bars’, *Vanuatu Daily Post* (Port Vila), 4 August 2005, p. 5.

¹¹³ Interview with a police officer (Port Vila, 6 April 2004).

¹¹⁴ ‘Twenty escape from inhuman treatment’, *The Independent* (Port Vila), 14 May 2006, p. 3.

¹¹⁵ *Ibid.*

¹¹⁶ ‘Protest over human rights of prisoners’, *Vanuatu Daily Post* (Port Vila), 16 May 2006, p. 4.

¹¹⁷ See, for example, Police Concern Officer 2007, ‘Complaint against Correctional Services Management’, *Your Letters, Vanuatu Daily Post* (Port Vila), 20 April 2007, p. 5; Repeated Theft Victim 2007, ‘Have you been offered a “great deal” for electronics?’, *Your Letters, Vanuatu Daily Post* (Port Vila), 3 March 2007, p. 7; Kaloran, Morris 2007, ‘Correctional services ensure rehabilitation and reintegration’, *Vanuatu Daily Post* (Port Vila), 14 March 2007, p. 4.

¹¹⁸ Interview with a pastor (Port Vila, 7 June 2004).

¹¹⁹ Interview with a fieldworker from Tanna (Port Vila, 22 September 2004).

¹²⁰ *Public Prosecutor vs Munrel*, 2005, VUSC 75, <http://www.paclii.org.vu>

¹²¹ Australian Broadcasting Corporation (ABC) 2007, ‘Time to talk’, *ABC Radio Australia*, viewed 27 April 2007,

<http://www.abc.net.au/timetotalk/english/radio/stories/TimeToTalkTranscript_418691.htm>

¹²² Interview with a legal officer in the Public Prosecutor’s Office (Santo, 17 November 2004).

¹²³ NZAID 2005, *Proposed Vanuatu Community Probation Service: Summary report*, p. 1.

¹²⁴ The project established a task force of senior ni-Vanuatu employed in the state justice system and the Malvatumauri and held ‘extensive consultations... with a number of stakeholders and interest groups in five of the six provinces’. See NZAID, *Proposed Vanuatu Community Probation Service*, p. 34.

¹²⁵ Such as: what offences, if any, should never go to *kastom* first? What happens if one party goes to *kastom* and the other to the police? What happens if the chiefs make a decision and it isn’t followed by the parties? What happens if the chief’s decision involves a breach of the constitution or is unfair? Can there be an appeal from a chief’s decision to the court?

¹²⁶ The *Penal Code (Amendment) Act 2006*, the *Criminal Procedure Code (Amendment) Act 2006*, the *Island Courts (Amendment) Act 2006* and the *Correctional Services Act 2006*.

¹²⁷ The major changes are the establishment of a new Department of Correctional Services, removing the responsibility for prisons from the police, the establishment of a probation service, the abolition of the early release provisions, the establishment of a community parole board and the building of new prisons, which will house prisoners according to their classification of risk and provide rehabilitation programs. The proposals for a diversion program have not been accepted by Parliament but will reportedly be resubmitted at a later date.

¹²⁸ The new Section 39 of the *Penal Code (Amendment) Act 2006*, replacing Section 119 of the *Criminal Procedure Code* (Cap 136), as discussed above under 'The relationship between the courts and the *kastom* system'.

¹²⁹ *Penal Code (Amendment) Act 2006* (Section 40).

¹³⁰ *Correctional Services Act 2006* (Part 5).

¹³¹ Lini, Lora 2006, 'Escapees seek chiefs' help', *Vanuatu Daily Post* (Port Vila), 8 May 2006, p. 1.

¹³² 'Police breakout: chiefs maintain peace', *The Independent* (Port Vila), 14 May 2006, p. 2.

¹³³ 'Re: protest over human rights of prisoners', *Vanuatu Daily Post* (Port Vila), 22 May 2006, p. 7.

¹³⁴ Currently, there are four ni-Vanuatu lawyers working in the Vila office and none at the Santo office. There are also a number of police who have been trained as state prosecutors who prosecute in the lower courts.

¹³⁵ Section 5(1) of the *Public Solicitor's Act* (Cap 177). The Public Solicitor's Office currently has four ni-Vanuatu lawyers and an Australian adviser working in the Port Vila office and no other offices around the country.

¹³⁶ During my time working in the prosecution, I was often the only lawyer in the office and was given cases far beyond my level simply because there was no-one else. For example, despite the fact that I had never worked in the field of criminal law before, my first Supreme Court case was a triple homicide.

¹³⁷ Interview with a lawyer (Santo, 18 November 2004). This was also confirmed by my experiences working for a year in the Public Prosecutor's Office and by newspaper reports.

¹³⁸ Walter, Matthew 2005, 'Financial difficulties delay hearing of criminal cases', *Vanuatu Daily Post* (Port Vila), 3 August 2005, p. 4.

¹³⁹ Walter, Matthew 2004, 'Luganville judiciary team to visit Gaua', *Vanuatu Daily Post* (Port Vila), 22 September 2004, p. 6.

¹⁴⁰ Recently, the *Vanuatu Daily Post* reported that an officer from the Public Solicitor's Office had to meet clients outside the motel he was staying in due to the lack of an office, and an NGO was quoted as stating that 'the Vanuatu *Constitution* guarantees the protection of the law for every citizen and that they should not be discriminated against on the grounds of wealth, but the sad reality is that most times only people who have money can get good private lawyers'. See Binihi, Ricky 2006a, 'NGO wants government to inject more funds into Public Solicitor's Office', *Vanuatu Daily Post* (Port Vila), 13 June 2006, p. 6.

¹⁴¹ Toa, Evelyn 2005, 'Hundreds of summons stranded with Public Prosecutor', *The Independent* (Port Vila), 8 March 2005, <<http://www.news.vu/en/news/judicial/050308-summons-stranded.shtml>>

¹⁴² *Public Prosecutor vs Gideon*, 2002, VUCA 7, <<http://www.paclii.org.vu>>

¹⁴³ Informally, some officers in the prosecution have a 'no drop' policy, especially in relation to sexual offences, in that two legal officers told me that when someone tries to withdraw a case, they call her in and talk with her and try to persuade her to go ahead with the case.

¹⁴⁴ For general background, see Chapter 3 under 'Leadership structures in Vanuatu today'.

¹⁴⁵ *National Council of Chiefs (Organisation) Act* (Cap 183).

¹⁴⁶ Government of Vanuatu n.d., *Criminal Procedure Code*, Cap 136, Article 30(1).

¹⁴⁷ Malvatumauri, 'Kastom polisi blong Malvatumauri'.

¹⁴⁸ Lindstrom, 'Chiefs in Vanuatu today', p. 224.

¹⁴⁹ On file with author.

¹⁵⁰ On file with author.

¹⁵¹ Garu and Yaken, *Chiefs' Legislation Project Report*, p. 9.

¹⁵² *Ibid.*, p. 7.

¹⁵³ For example, the report stated that 'the operations of customary dispute resolution mechanisms or custom courts are strong in rural Vanuatu. These custom courts are actively working, and this is due to two basic factors. First and foremost, is because the courts carry out their duties in a way that the people prefer it to the official justice system. Secondly the official courts are either not accessible, too difficult to access, too expensive to afford or simply too slow to act. In many communities only serious offences are referred to official courts. Even then custom courts continue to face a lot of challenges and chiefs who preside over the custom courts strongly request the government to give legal recognition to their roles and functions'. Garu and Yaken, *Chiefs' Legislation Project Report*, p. 14.

¹⁵⁴ *Ibid.*, p. 22.

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¹⁵⁵ Ibid., p. 29.

¹⁵⁶ Interview with Emeritus Professor Paterson, University of the South Pacific (Port Vila, 1 November 2005).

¹⁵⁷ Earlier drafts of this bill provided even more powers, including the immunity of members of councils of customary chiefs from prosecution for any decisions taken in the exercise of his office and the exclusion of jurisdiction of courts over appointment or disciplining of a chief and chiefly title disputes (Draft Bill for the National Council of Chiefs [Organisation] Act, copy on file with author).

¹⁵⁸ Bill for the National Council of Chiefs Act of 2006, Parliamentary Amendment, Section 2.

¹⁵⁹ Forsyth, *Report on the Vanuatu Judiciary Conference 2006*.

¹⁶⁰ For example, Sections 38 and 39 of the *Penal Code [Amendment] Act 2006*. Previously, Sections 118 and 119 of the *Criminal Procedure Code* (Cap 136).

¹⁶¹ Svesson, 'Interlegality, a process for strengthening indigenous peoples' autonomy', pp. 51–2.

¹⁶² Although there have been recent signs of more interest in engaging in such a dialogue. Thus, in the past five years, the Chiefs' Legislation Project, the Vanuatu Judiciary Conference on *Kastom* and the Law, the AusAID Malvatumauri Governance Project and the NZAID Corrections Project have all precipitated discussion between the two systems.

¹⁶³ von Benda-Beckmann and von Benda-Beckmann, 'The dynamics of change and continuity in plural legal orders', p. 241.