

6. The problems of the existing relationship between the state and *kastom* systems

The previous chapter characterised the relationship between the state and *kastom* systems as fluid, informal and largely involving the two operating in parallel with each other rather than meaningfully interacting. This chapter examines the problems flowing from such a relationship, elucidating additional imperatives for reform to those identified in Chapter 5. The main focus of the chapter is a case study, *Public Prosecutor vs Agnes Kalo and Peter Obed*,¹ which concerns a conflict in Vila dealt with by both the state and the *kastom* systems. This case illustrates many of the problems within, and most importantly, *between*, the two systems. The approach adopted in this chapter thus highlights the types of conflicts that commonly arise between the two systems, following Shah's advice that 'it is essential to observe conflicts within legal pluralism, the better thereby to highlight and to manage them "wisely", and to address this from the subjective perspective of the recipient of legal pluralism'.²

Before beginning a detailed analysis of the problems of the current relationship between the two systems, its advantages should be acknowledged. There are five main advantages to the situation at present. First, the fluid nature of the current relationship allows it to adapt in response to the needs of each particular situation—a very important feature in Vanuatu where plurality is manifested in every sphere of life, as discussed in Chapter 1. Second, the *kastom* system is able to define its own norms and procedural framework, allowing it to remain a dynamic and legitimate grassroots justice system. Third, as it is based entirely on respect, there is considerable incentive for the chiefs to maintain their integrity and to work hard to gain community support. Fourth, from the standpoint of individuals, the possibility of resort to alternative legal regimes can at times be extremely helpful.³ Finally, the *kastom* system provides access to justice in areas not serviced by the State and keeps a high percentage of cases out of the state system with no cost to the State.

Two features of the current situation in particular stand out as positive features that could be built on in developing a better relationship between the two. First, there is currently a great deal of respect in both systems for the other. Judges and police officers are therefore very positive about the advantages of the *kastom* system, and conversely chiefs are also respectful of state institutions. Second, there are some individuals with an official capacity in both systems, such as judges, lawyers and police officers, who are also chiefs, who facilitate a degree of mutual understanding and movement between the two systems.⁴

The facts of the case study

The second defendant, Agnes, is a forty-eight-year-old widow from North Santo with six children who was employed as a receptionist in a government department before the case. Agnes's deceased husband, a man from East Santo, had an adopted son, the first defendant, Peter, who was also from East Santo. Peter lived with Agnes as his 'mother' although he is forty-two years old, so they did not have the normal age difference between mother and son. Peter is a leader in the Church, a focal point of the East Santo community, and hence an important man. Both defendants currently live in Vila, although not in the same area. Peter and Agnes were charged with, respectively, attempted rape and rape and aiding attempted rape and aiding rape. The victim was Agnes's natural daughter and Peter's step-sister, Mary. She is nineteen years old.

The facts giving rise to the case as set out by the judge in his sentencing judgment were based on an agreed statement of facts made between the defendants and the prosecution. One day in May 2005, Peter came to Agnes's house and picked up Agnes and Mary in his truck and took them to a deserted area a little way out of town. Peter then took Agnes aside and told her to tell Mary that he wanted to have sex with her. Agnes came back to the truck and, crying, told Mary what Peter had said. Mary said no and then Agnes went to the back of the truck and continued to cry. Peter then came into the truck and tried to have sex with Mary in the truck, but after trying for 15 minutes eventually gave up. A week or two later, the same situation occurred, with Peter coming and picking up Agnes and Mary and taking them to a deserted area. This time, Agnes told Mary to get out of the truck and to go to talk with Peter. Mary reluctantly did so and was followed by Agnes, who gave her a cloth as the place was cold and 'because [Peter] had asked for a cloth to wipe blood on'. Peter then forced Mary to have sex with him. In later discussions with the parties, very different versions of the facts were given, as is discussed below.

The two incidents came to light a few months later after Mary had run away to live with her uncle, Paul. She told him what had happened and Paul then told Agnes and Peter that he knew what had happened and gave them two weeks to deal with the matter in *kastom*. In fact, he finally waited for a month and a week for the chiefs and community leaders to approach him and to say to him that they would deal with the case. When no-one came to him, he took Mary to the police to make a complaint. When Peter found out that the complaint had been made, he went to see the North Santo Town Council of Chiefs (NSTCC, the council of chiefs for the community of North Santo in Vila).⁵ There then began a very public argument over the forum that should manage the conflict. Initially, there was a dispute as to whether the NSTCC or the East Santo Town Council of Chiefs had 'jurisdiction', but eventually the NSTCC was chosen. On 24 October, the chiefs of North and East Santo and church leaders wrote to the prosecution

asking them to withdraw the case and to allow the NSTCC to deal with the matter in *kastom*. The letter set out a number of grounds to support their argument, including:

- sending the defendants to jail will not solve the differences that exist in the family
- the court will deal only with the criminal side of the case but the '*kastom* side' will not be dealt with (in other words, the necessary payments to be made to people other than the victim in order to mend relations fractured by the incident)
- if the court punishes the two defendants they will not suffer very much as life inside the prison today is 'an easy life'
- if the defendants are sent to jail, Agnes's other children will be affected as well, especially the ones who are at school (for whom Peter has previously paid school fees) and whom Agnes still needs to look after
- the case and the ensuing dispute have also created a dispute over land in East Santo and therefore the matter should be dealt with in *kastom* because if the court deals with the case it will not deal with the issue of land and '*bambae hemi save stikim wan narafalla trabol bakeken long saed blong kraon, mo ol narafalla isiu bagegen long famili*' (it might create another land dispute and another issue among the families)
- in *kastom* it will be possible to unite Agnes with her children, brother and entire family again
- in *kastom* it will be possible to unite Peter with his children, wife and family again
- if the case is dealt with just in *kastom*, this will make sure that people have respect for *kastom* and show that they can deal with disputes '*witaot kot blong waetman*' (without 'white man's court').

The letter then explained that they wanted to deal with the matter in *kastom* by making the two defendants pay a number of heavy fines in order to '*putum bak olketa samting ia iko bak long road blong kastom blong mifala*' (put everything back onto a straight road again). In particular, it was specified that '*respek*' had to be given back by Peter to the following people: Mary, Agnes, the land, the grave of Agnes's deceased husband, Peter's uncles (Agnes's brothers), Mary's brothers, Peter's wife and their children and Peter's wife's family in West Santo. Agnes had to give back '*respek*' to Mary and to her brother, especially because in their *kastom* brothers do not have the right to hear things or be involved in disputes involving their sisters. The letter concluded by saying that Mary and Paul had agreed that the best forum for the dispute was the NSTCC.

About this time, Mary also went to the prosecution and asked to withdraw the case. The prosecutors who spoke with her reported that she told them that she was caught in the middle between the chiefs who were pressuring her to

withdraw the case and her uncle who urged her to continue. In the event, the legal officers convinced her not to withdraw the case. At that stage, it was still not clear whether or not the two defendants were going to plead guilty. There was therefore a further dispute between the courts, the prosecution and the chiefs as to whether the *kastom* reconciliation that the chiefs wanted to perform could go ahead before the plea date.

Most unusually, this entire dispute over forum was widely publicised through the local newspaper and radio, drawing considerable public comment. In particular, the Vanuatu National Council of Women spoke out strongly against the move by the chiefs to stop the prosecution going ahead and was reported as stating that 'in a situation where chiefs are asked to intervene to stop the law from dealing with a criminal suspect through the courts, they should be careful as they could be seen as "hiding" an alleged criminal in the name of custom'.⁶

In a further attempt to stop the court case from going ahead, and in order to mend relations between the family, a 'preliminary' reconciliation ceremony was held on 26 October, presided over by the NSTCC, in which a pig's tusk and some mats were paid by Peter to Mary and her family and a kava ceremony was held. On 30 October, the NSTCC wrote to the prosecution informing them of what had been done and again asking that the case be withdrawn. The letter stated:

The respondent of the ceremony [Paul] vowed their thanks and agreement to the ceremony and accepted the gifts and made a vow to withdraw the matter from the State Prosecution by sending them a letter of notification...The ceremony ended on a very peaceful manner and a kava ceremony was shared amongst the leaders with the victim's family to seal the agreement.

When discussing the case later with me, Paul said that he had never agreed to the case being withdrawn but had rather wanted there to be a *kastom* reconciliation before the court case was held. The prosecution refused to withdraw the case and the plea was finally held on 1 November when the two defendants pleaded guilty. The sentencing date was set for 25 November 2005.

The NSTCC then continued to negotiate with the court and the prosecution to be permitted to 'lay custom charges' against the two defendants without having to wait for the court case to be concluded. The court apparently agreed to this on the basis that the two defendants had pleaded guilty and agreed to take into account any *kastom* punishment ordered when sentencing.⁷ Accordingly, a *kastom* reconciliation ceremony was held on 23 November. This ceremony involved the two defendants paying very heavy *kastom* fines to a wide variety of different people and groups, even extending to the payment of a rooster and a mat to the President of Vanuatu. The fines were paid in *kastom* objects, such as pigs' tusks, mats and kava, but their cash value was stated as amounting to

vt474 000. Of this, only vt115 000 went to the victim.⁸ The President of the NSTCC explained that the fines were so high because the case had been so widely publicised, meaning that more was needed to bring back respect for the defendants and that compensation was also needed because of the damage the case had done generally to the Church and the community. Agnes was of the more pragmatic opinion that the fines were so high so as to reduce the possible sentence the court would impose. Paul said that he had demanded these high fines in order to make sure that Peter really felt punished, and that Peter had agreed partly because Paul was threatening that he would go to the police and lodge complaints against Peter for having committed incest with his daughter as well.

On 25 November, the case came before the court for sentencing. As part of the sentencing process, the defence gave the court a letter from the NSTCC detailing the *kastom* reconciliation performed. The President of the NSTCC was in court but was not called on to speak. In his judgment, the presiding judge referred to the fact that the *kastom* payment had been made and its cash value, stating, 'The Defendant has taken part in a custom settlement to "clean face" and restore a sense of order and peace into the community and appease the victim and those associated as a result of the wrong he has done.' His Honour, however, also made the main consideration underpinning his sentencing decision clear, noting, 'It is of a very serious concern to note that rape has becoming [sic] a common offence in Vanuatu. This is unacceptable. Women and girls must be protected. The courts must set severe punishments to Rape offenders.'

When dealing with Agnes, in addition to the *kastom* payment and the fact that the victim had forgiven her, his Honour noted a number of other mitigating features.⁹ Finally, the court awarded Peter a sentence of imprisonment for three years and Agnes a sentence of imprisonment for three years suspended for two years. Unfortunately, his Honour did not make clear in his judgment the weight he gave to the *kastom* payment, as opposed to other mitigating factors, in arriving at the final sentence. Peter and the President of the NSTCC believe that the sentence was reduced by one-third due to the *kastom* payment, but this is not at all clear from the judgment, which merely sets out the payment as one of many mitigating factors.

A week after the sentence was handed down, some members of Mary's family¹⁰ went to see the President of the NSTCC to ask him to petition the President of the Republic to pardon Peter. The President of the NSTCC stated that this was symptomatic of the general feeling among everyone involved in the case that Peter should not have had to go to prison after having made such a heavy *kastom* payment. Paul, however, disagrees with this and says that his side of the family is very happy that there has been 'double punishment' and that Mary too is pleased that Peter has been sentenced to jail. The president refused to make the

petition and today Peter remains in jail. Although not in prison, Agnes also is suffering from the consequences of the court case. She has been suspended from her job and is awaiting a decision about whether she will be terminated for misconduct. She also receives no money from Peter to support her children any more.

This particular case study had some unusual features, in that the case was very public and the fines paid were very high. The basic facts of how the case went backwards and forwards between the two systems and the problems and conflict this caused, are, however, typical of a significant number of cases in Vila and Santo.

Problems *within* the two systems demonstrated by the case study

In addition to demonstrating a number of difficulties with the present relationship between the state and *kastom* systems, discussed below, the case study also demonstrates problems *within* the two systems themselves, thus expanding on and supporting the findings in Chapters 4 and 5.

Problems within the state system

A significant problem raised by the case study is that some aspects of the current operation of the state system give rise to the risk that people prefer to plead guilty rather than face trial, even if they are innocent, due to shame and the wish to avoid the court process. This problem was raised by Agnes, who claimed that the facts set out in the judgment were not correct. According to her, Peter was known to have a tendency to make sexual overtures to young girls and indeed he had done the same thing to her in the past.¹¹ Agnes said, however, that Peter had said that he wanted to teach Mary how to drive and that was why they went out with him in the truck. On the first occasion, she had no idea what he was doing to Mary and, on the second occasion, she realised—'*hemi click*'—while he was trying to have sex with Mary. The reason that she did not try to stop him after she had realised what was going on was a mixture of shame and fear of his short temper.

This is a very different story to the one presented to the court, in which she is portrayed as actively helping to arrange for Peter to have sex with Mary. In her version of the facts, she did not commit any crime because she had in no way consciously aided Peter; quite the reverse: she was horrified and deeply upset by what he had done. Agnes explained that even though she knew she was innocent she had decided to plead guilty because she did not want to make her children, particularly her son, who would have been a witness, feel shame by having to testify in court.¹² She explained that in her *kastom*, for a brother to have something like that happen to his sister was very shameful. She said that she had not even read the agreed statement of facts because she was too upset

and because of her high blood pressure could not deal with any more stress. It is possible that what Agnes told me was false and that she was just justifying her actions to me, but what she said did ring true. Even if the truth lies somewhere in between, what she said raises a serious concern that innocent defendants do plead guilty due to a desire to protect themselves or others from the shame of having to speak in court.¹³ The Director of Youth and Sport raises a similar point when he states that often when young people go to the courts they are too afraid to speak and they cannot pay for a lawyer, so they are convicted.¹⁴

In contrast, only one respondent said that she felt publicly exposed in a *kastom* court, whereas numerous others reported fear of the courts and gave that as a reason for preferring the *kastom* system. It is interesting to consider why people feel shame in court and not in a *kastom* meeting, which similarly involves public scrutiny and questioning. I suggest the answer is related to the foreignness of the state system and to the fact that in the state system there are many people involved whom the defendants have no personal or familial relationships with, which in turn increases feelings of shame and alienation. In addition, the whole point of the *kastom* system is that it is about overcoming shame and putting back respect. Thus, the parties might start off feeling shame, but at the completion of the process they should feel that they have won back the respect of everyone affected by the conflict and thus become reintegrated back into the community. In contrast, the state system has no such restorative processes at present.

I also asked Agnes why she had performed the *kastom* ceremony even though she was not guilty. She said that she did it for two reasons: first, because as a mother she was responsible for her children, and second, because when her family and community got to know about the case they started avoiding her and were cross with her. So she made a *kastom* fine to five different groups of people: her relatives from East Santo, Paul, her husband's brother (for her husband's grave), Mary and finally Peter's wife. After this was done the relations with the families were mended and '*hat blong olgeta igud bakegen*' (everyone's heart was made good again), although relations with Peter's wife were still difficult. This illustrates the difference between the narrow focus of the state system on the complainant and victim to the exclusion of the other people involved in the conflict and the more holistic *kastom* approach that facilitates a mending of relationships. It also demonstrates the difference between agreeing to make a *kastom* payment and admitting guilt in the context of the state system.¹⁵

Problems within the *kastom* system

The case study also identifies some aspects of the present operation of the *kastom* system that are problematic.¹⁶ Apparently, it was well known that Peter had committed similar offences on other girls, including, according to some reports, his own daughter, and the chiefs had tried to call meetings to deal with the issues on a number of occasions, but each time Peter had refused to come to the meeting so the issue was let slide. In the instant case, as mentioned above, once Mary had told Paul about the incidents, Paul waited for a month and a week for the chiefs and community leaders to approach him and to say to him that they would deal with the case before going to the police.¹⁷ They, however, did nothing and it was only once the police had arrested Peter that the chiefs and church leaders came to see Paul. Paul explained that he was very frustrated at the chiefs for not dealing with the matter themselves, but that he also understood that they had no way of compelling defendants to attend meetings and that this was one of the weaknesses of the current situation.

The problem of chiefs not wishing or not being able to deal with matters that then eventually enter the state system has been referred to in other cases that have come before the courts in recent years. For example, in the case of *Public Prosecutor vs Niala* (2004, VUCA 25), involving two brothers killing a man who had been spying on their sister, the court stated: 'the matter had earlier been referred to the Chiefs but unfortunately no meeting was called to discuss and resolve the matter.'

Another problem with the *kastom* system illustrated by this case study is that sometimes the victim is marginalised as so much attention is paid to her family and to the community. For example, in this case study, the victim received only a fraction of the overall fine. As the fine was very large, this still amounted to a substantial payment in her case, but in other cases the necessity to take into account the whole community can make the amount received by the victim quite insubstantial. The focus on achieving community peace and harmony, and the desire not to 'stir up trouble', can result in the rights of victims being neglected by the *kastom* system—in terms of voice and repair.

Problems with the relationship between the two systems

In analysing the problems with the relationship identified through the case study, findings from earlier chapters and other material generated through fieldwork are also identified and discussed.

Uncertainty about where the conflict should be dealt with puts complainants in a vulnerable situation

The first, and perhaps most serious, problem with the current relationship between the two systems demonstrated by the case study is that the present

perception that the forum for managing a particular conflict is open to negotiation puts a great deal of pressure on victims at a vulnerable time. In this case study, Mary faced pressure from her uncle, telling her the police should deal with the matter; from women's groups, telling her that as a woman it was important to use the courts and not allow 'chiefs to obstruct the rightful legal processes to deal with such high risk criminal suspects';¹⁸ from the chiefs, telling her that she was betraying her culture by not withdrawing the case; from her church leaders, urging her to let the case be resolved in *kastom*; and finally from her own mother and step-brother, asking her to let the matter be dealt with in *kastom*. It was no wonder that, as she told the prosecution, she felt caught in the middle and behaved in an inconsistent manner, attempting to withdraw the case and then being persuaded to let it remain on two different occasions.¹⁹

Mary's situation is not unique; it is common for complainants, particularly women and children, to be pressured not to report crimes to the police or to withdraw complaints in order to allow the matters to be dealt with in *kastom*. A prosecutor said that often one of the reasons given for this pressure was that the defendant was a family member and so a 'gap in the family' would be created if the case went to court (the legal officer then said that she told the families who provided these sorts of explanations that the defendant should have thought about the potential gap before he or she engaged in the prohibited conduct). As well as trying to persuade the complainant to withdraw the case, the families might also use other tactics to try to stop her from testifying—for example, by not giving her money to travel to court.

Dispute and confusion over jurisdiction

Another issue raised by the case study is that there is a great deal of confusion and conflict regarding which system should deal with which types of cases. These disputes often involve a political element, as Franz and Keebet von Benda-Beckmann relevantly observe:

As law provides an important legitimation for the exercise of power by social actors or organisations, the question [of] which is the proper law is frequently the object of political struggles. The invocation of the rules or the authorities of one law not only serve to settle a particular problem, but may also be treated as a *pars pro toto* for the relationship between the respective legal orders as a whole.²⁰

As discussed in Chapter 5, the police have a vague and informal policy that encourages chiefs to deal with 'minor' offences, while referring 'serious' offences to the police.²¹ The chiefs, however, expressed a wide range of opinions about the sorts of cases that they believed they could deal with themselves, ranging from petty theft to murder. Even when chiefs agreed that 'serious' cases should go to the police, it was clear that what they considered serious might not be

considered serious in the state context and vice versa. For example, a resident linguist in Epi commented that he had attended many *kastom* meetings but the case that had really stood out in terms of a disproportionately heavy penalty (to him) was where a man had said to one of his relatives that to speed up the process of paying a bride price he should 'set up a brothel and sell his arse'. Such a statement would not even be prosecuted in the state system. There are also a whole variety of crimes in *kastom* that are not recognised as being crimes in the state system, such as women wearing trousers,²² or those concerning correct behaviour towards people in certain types of relation to each other.²³ Conversely, serious crimes such as rape and indecent assault in the state system might be considered minor matters in the *kastom* system, where the issue of consent to sexual intercourse is not a central issue. A complicating factor as well is that in *kastom* a case is often judged serious or not depending on the consequences that flow from it. For example, a boy forcing a girl to have sex might not be considered serious unless it results in the girl getting pregnant.²⁴

The lack of clear guidelines about which cases each system can deal with has caused confusion on the part of the general population and the chiefs. This confusion was demonstrated by the fact that a chairman of a council of chiefs said that a police officer had told the chiefs that now they could deal with cases of rape, although the officer in charge of the relevant police station denied this policy. Similarly, in Ambae, it was reported that there was a problem that people did not know what matters the police should deal with and which the chiefs were responsible for, so people went to the police and were sent back to the chiefs and this caused confusion for everyone. As a result, many chiefs are asking for a clear list to be drawn up of matters they can decide and matters they cannot. The serious/minor policy of the police also creates anger and frustration on behalf of the chiefs, who feel they are being told they cannot deal with matters that they have always dealt with—such as sexual offences and murder—and yet at the same time the State is not providing adequate access to justice, especially for rural communities.

This confusion sometimes leads to confrontation between chiefs and police officers and other state officials. For example, in Vila, the head of the Police Sexual Offences Unit says that she regularly has arguments with chiefs who come to try to 'take out' cases from the police to deal with them in *kastom*. She says that she tries to explain to them that the court must deal with these cases but many do not agree.²⁵ She provided many examples from her files of cases where women and youth had lodged cases involving serious sexual offences, which had then been cancelled after a request from the complainant or the complainant's family to deal with the matter in *kastom*.²⁶ In rural areas as well, chiefs often try to stop the police from becoming involved in matters that they have dealt with before the police investigate.²⁷ Although usually it is the police

who must deal with chiefs claiming their right to deal with a particular case, sometimes this occurs in the Public Prosecutor's Office, and occasionally even in the court itself. A prosecutor commented that on one occasion a chief had come into the courtroom while the case was proceeding and tried to argue that the case should be given to him to handle. She stated, 'I was so mad!'²⁸

A related issue is that there is general confusion about the powers of chiefs to make certain orders, particularly those that are perceived to be in conflict with the constitution. For example, in Santo in 2006, nine area chiefs ordered a family originating from the island of Paama, but residing in Santo, to leave within 72 hours, after allegations that they were behind a series of brawls that occurred during Independence Day celebrations.²⁹ For a number of days, there was a state of tension in Luganville, with residents erecting roadblocks and keeping their children home from school. Despite the fact that the uncertainty over the legality of the chiefly decision considerably heightened the tension, the only statement made by state officials concerning the actions of the chiefs was that 'while the chiefs have the right to make decisions the law also has its place and must be seen to prevail'.³⁰ This failure to clarify the legitimate boundaries of chiefly powers is symptomatic of the general confusion and unease regarding these issues.

Finally, there is the problem of cases that neither system wishes to deal with and which each system claims is the responsibility of the other. For example, in domestic violence cases, chiefs often send complainants to the police, saying they are unable to deal with them, and the police often send such cases back to the chiefs, on the basis that they are 'private' matters.³¹ In Ambae, for example, the policy of the police is to send a woman back to the chiefs unless she has been beaten so badly she needs to be hospitalised or the man has done it many times. As a result, the victims are abandoned by both systems. Another situation where this occurs is cases involving 'big-men', such as politicians, where the police do not want to become involved. For example, in April 2007, a politician allegedly assaulted three men, but when they went to lodge a complaint at the police station they were advised to 'solve the matter according to the traditional way'.³²

On some occasions, both systems blame each other for a particular situation and so try to avoid responsibility for fixing it. An example is the situation in South Santo where there is almost a vacuum of authority and increasingly serious law and order issues. The chief of the largest village in this area said that there were large groups of people fighting each other over land issues with weapons such as knives. The village chiefs and the area chiefly council have tried to stop the fights but they have not been able to do so because people do not attend the meetings called or pay the fines that are set. A village chief commented that the chiefs currently did not have much respect as they were seen as being biased. He said that he had asked the police to help support the chiefs but they refused

to come. He commented, '[T]he police say that it is my work to make people pay the fines, but how can I when I have no power?'³³

The police on the other hand state that they are refusing to deal with these cases because the fighting is due to disputes over land, which the chiefs should deal with. A senior police officer states that they tell the chiefs that they must deal with the underlying problem first, and until they do so there is no point in them taking the end situation (the fighting) to court. He commented that these sorts of situations arose when chiefs did not do their work properly, such as sorting out disputes over land. He further commented that a chief should set up a situation in which his community respected him so he could control his community.³⁴ It is clear that circular arguments such as these lead to the situation where the relevant community is unprotected by either system of law and order. Luckily, at present, this type of situation is not widespread, but it does show how there is a need for the state system to recognise that the *kastom* system today is facing serious challenges to and diminution of its abilities to enforce orders that need to be addressed in a more fundamental way than exhorting the community to respect the chiefs.

The problem of which system should deal with a case first

There are many times when the *kastom* system and the state system deal with different aspects of the same case. Even where both systems accept the right of the other system to be involved, however, there is often considerable difficulty about the order in which the *kastom* processes and the court processes should occur.

The problems with the *kastom* system dealing with a matter first

Under *kastom* there is an imperative to deal with a matter quickly—to restore relations between conflicting parties³⁵ and to prevent it leading to further disputes and getting out of hand.³⁶ The holding of a *kastom* ceremony before the court has dealt with a matter can, however, create serious difficulties for the state process. There is the risk that after the ceremony the victim will not want to proceed with the case or will be pressured to withdraw the case, as in fact happened in the case study, making it extremely difficult for the prosecution to go ahead. There is also a substantial risk that the witnesses in the state court case will have their evidence seriously interfered with by the *kastom* process, as the facts of the case will be discussed extensively during the *kastom* ceremony. In addition, in cases that are brought to the court because the defendant has not paid the fine the chief ordered, or the parties are dissatisfied with the chiefs' decision, there will often be a significant time lapse. This time lapse makes it very hard to investigate, especially as it precludes the possibility of getting a medical report.³⁷

Finally, if the defendants plead not guilty, it will be very difficult to keep the judge from being aware that a *kastom* reconciliation has taken place, and this must inevitably have some effect on his or her determination of the guilt of the defendants. This raises the point that there might not be exact parity between a 'crime' in the *kastom* system and a crime in the state system. For example, in the case study, in *kastom* the 'crime' that was committed by Peter was not rape but incest, as he had sex with his 'sister'. It was this that he was atoning for in his *kastom* payment, as well as the consequent disruption he had caused to the community and his family, rather than the charges of rape.³⁸

On a more symbolic level, there are also problems with the court proceeding occurring after a *kastom* payment has been made. These problems have been highlighted in a number of high-profile cases involving the government in recent years. The first case involved four high-ranking police officers who had committed mutiny. A public reconciliation ceremony negotiated by the Deputy Prime Minister and the police force was performed by the four men. After the ceremony, however, the men were prosecuted and subsequently found guilty of mutiny, incitement to mutiny, kidnapping and false imprisonment and were sentenced to imprisonment. An opinion article in the local newspaper argued:

If the ceremony was to settle a quarrel or difference between the Police and Government then I suggest that prosecution should not have been brought in at all. Certainly the crime committed is very serious but if we are serious about custom being the basis of our position as a free people then custom power should also be allowed to prevail to forfeit such a crime with a reconciliation ceremony.³⁹

In another case, the government performed a reconciliation ceremony with the paramount chiefs of Central Pentecost to apologise for the brutality of members of the police force who had been sent to the area to facilitate a peace process between factions in a land dispute. After the ceremony, the police involved were charged with criminal offences. The Secretary-General of the Malvatumauri commented that bringing proceedings after there had been reconciliation 'defeated the purpose for which it [the reconciliation] was organised' and degraded *kastom*. He further explained:

A clear line has to be drawn to clearly state where and when *kastom* comes into play and where and when court comes into play...In *kastom*, when a person kills a pig or accepts one in a reconciliation ceremony, automatically he is saying 'Peace and unity returns. I declare that we forgive [each other] and forget [the suffering caused]'.⁴⁰

For this reason, the Malvatumauri proposed that if there was a traditional reconciliation ceremony, it must take place after the investigations (and presumably the whole state process) were completed.

The knowledge that the state system will deal with the matter after the *kastom* system might even affect the ability of the chiefs to call a meeting in the first place. A youth observed that sometimes the chiefs called a meeting and said that they had passed a complaint to the police but they wanted to deal with the matter '*long level long kastom*' (at the level of *kastom*). He commented that no-one was very interested in this because there was no point if the case was already with the police.⁴¹

The problems with the state system dealing with a matter first

There are also problems with holding a *kastom* meeting after a case has passed through the state system. Significantly, if the *kastom* meeting is not held until after sentencing, the court cannot take any *kastom* payment made into account at all, increasing the problem of double jeopardy, discussed below.⁴² Also, as Paul points out, if a *kastom* meeting is not held until after a person has been punished by the state system, the defendant will be likely to refuse to make a *kastom* payment, arguing that he or she has already been punished once. In such a situation, he opined that the *kastom* payment would never be made and relationships would not be able to be mended. This view is supported by many chiefs, who have commented that it is common for people to say they have already been punished by going to jail and therefore refuse to pay the *kastom faen* that will enable them to be reintegrated back into the community. A prisoner also supported this view, stating that he felt that he did not need to make *kastom* because the law would get him and put him in prison anyway. Some chiefs also mention that they feel they cannot make a party do *kastom* after the court has dealt with a case because there has been '*jastis finis*' (justice done already). This causes big problems because, as they ask, how can the conflicting parties live together in the same village when the case is finished if there is no *kastom* settlement?⁴³

The various disadvantages of each system dealing with a conflict first can be summarised as in Table 6.1.

A possible way of overcoming most of these problems is to hold a *kastom* ceremony after the determination of guilt by the state system, but before sentencing. The problem of having to wait for the slow state processes, however, remains.

Table 6.1 Temporal ordering problems

| <i>Kastom</i> system first | State system first |
|--|--|
| <ul style="list-style-type: none"> • The victim might not want to continue with the prosecution or might have pressure imposed to withdraw charges. • Evidence of witnesses potentially contaminated by <i>kastom</i> processes. • Time delay impedes police investigation. • Difficulties for judge if aware that defendant has made a <i>kastom</i> payment but pleaded not guilty. • State proceedings might undermine the benefits achieved by the <i>kastom</i> processes and make the <i>kastom</i> system look irrelevant. | <ul style="list-style-type: none"> • The court cannot take <i>kastom</i> payment into account when sentencing. • Offender might refuse to make a <i>kastom</i> payment meaning that relationships are not restored. • The conflict is not able to be resolved quickly, potentially leading to continuing avoidance (meaning ties of interdependence are fractured) and the risk of precipitating further conflicts. |

The problem of ‘double jeopardy’

A further problem raised by the case study is that of ‘double jeopardy’, meaning in this context that the defendant is seen to be punished twice for the same conduct—once by the chiefs and then by the courts. This issue was specifically raised by a number of people involved in the case study and by many other respondents as well. Thus, Agnes said that the punishment of her and Peter was a ‘double judgment’ that went ‘over’ the punishment required. She said that when Peter got out of prison, she and her family would have to pay *kastom* to him again to make up for the imbalance created by the jail sentence. The uncle, Paul, also referred to ‘double punishment’, but he insisted that he was not sorry for having gone to the police and told the relatives who were cross with him that at least he had accepted the *kastom* payment, thus reducing the prison sentence considerably.

The Chief Justice explains that the ordinary person does not see that their *kastom* payment is taken into account by the courts. He comments that every day people say ‘*be mi mekem long kastom finis!*’. He explained that this was because ‘in their own mind they are clean, they have paid out, and they do not understand why they are being punished again’.⁴⁴ A prisoner also expressed this view, explaining bitterly that although he had paid a high *kastom* fine he was still sent to prison, meaning in his understanding that the fine had not been taken into account. Even many respondents from the state sector commented that personally they believed that it was double jeopardy for the State to punish someone after they had sorted matters out in *kastom* and made *kastom* payments. For example, a judicial officer gave an example of a recent case he had dealt with in which a man had killed another man but had acknowledged his guilt by making a big *kastom* payment of 10 pigs and vt500 000 compensation to the widow as well as paying for the school fees of the deceased’s children. This man was also the sole breadwinner in his family, with three children of his own to support. The judicial officer stated that at the moment there was no alternative but to send such a man to prison, but he asked what this would achieve. He observed that he would like to have some leeway in dealing with such cases.⁴⁵

The operation of the state system creates feelings of disempowerment among the chiefs

Many chiefs state that they believe that the value of *kastom* is being undermined by the existence of the state system, leading to them feeling disempowered and demoralised. Often chiefs express frustration that they are not left to deal with matters themselves. Thus, the President of the NSTCC, who was involved in the case study, said that there was always the feeling of ‘another superpower coming behind us’. He expressed disappointment that the court had not left the NSTCC to deal with the matter, stating that it was a ‘waste’ of *kastom* ‘because at the end of the day the court rules’. Further, even if the sentence was reduced due to the *kastom* compensation, he said that it still ‘undermines the value of what we believe in...[*kastom*] should be the final [word]’.⁴⁶ The secretary of an island council of chiefs similarly commented that the knowledge that chiefly decisions could be challenged in court was demoralising for chiefs, noting that if one of their decisions was challenged this undermined their decisions in the other 90 per cent of cases that were not challenged.⁴⁷

The state system hinders the operation of the *kastom* system

It is common to blame the weaknesses of the *kastom* system on the personal failures of chiefs and on the youth of today for ‘lack of respect’. The findings of this study, however, show clearly that the state system *itself* hinders the operation of the *kastom* system—directly and also indirectly by undermining its authority and enforcement capacity. First, we consider direct, and then indirect, hindering of the state system.

Direct hindering of the *kastom* system by the state system

On some occasions the state system directly hinders the operation of the *kastom* system. The first way it does this is by making orders contrary to chiefly decisions. Unfortunately, the lack of adequate records means that it is very difficult to determine what percentage of cases come to the courts because the parties are dissatisfied with the decision of the *kastom* system. All that can confidently be said is that this happens with some degree of regularity in communities with adequate access to state courts. It is also not possible to determine in what percentage of such cases the courts make decisions that contradict those of the chiefs. It can be assumed, however, that this occurs frequently, as the courts consider cases with no regard to how the *kastom* system might previously have dealt with the case and they are likely to approach the issues in a different way to the *kastom* system.

This has two consequences: first, it is clear from many respondents that the knowledge that the courts can change a chief’s decision affects their view of chiefs. One respondent gave an example of where the chief had ordered that

someone should go back to the island and then the court had said the man should not go, and they commented that this '*mekem oli luk daon long ol jif nao*' (makes people look down on chiefs now).⁴⁸ Other people made comments such as that 'people tend to drift away from chiefs when they see their decisions are overturned by the courts'.⁴⁹

Second, it means that the work the chiefs have put into restoring peace in their community might be wasted and friction created again, making their work more difficult. For example, recently in North Pentecost, a fight between two men ended in one assaulting and killing the other with a piece of iron. The man paid compensation two times, each time with 10 pigs with rounded tusks, and there was harmony again in the community. Two to three weeks later, however, the victim's eldest brother reported the incident to the police⁵⁰ and the whole matter was stirred up again. The chief involved was extremely frustrated because there was nothing he could do to stop the police from becoming involved, but the effect of it was to undermine all of his work in trying to ensure peace in his community. The Secretary of the Malvatumauri summed up this problem by stating that 'when the hair of the pig has been smoothed down, it should not be rubbed up the wrong way again'.⁵¹

An interesting issue that has arisen in a number of cases is whether or not a claimant can petition the courts for remedies in situations where the *kastom* system has breached their constitutional rights. The constitution provides in Article 6(1) that 'anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may...apply to the Supreme Court to enforce that right'. This provision does not specify whether or not the rights can be enforced horizontally—that is, against private bodies and individuals, including chiefs and chiefly councils—or just vertically against the State. On three occasions when the courts have considered this matter, they have found that there is horizontal enforcement, but a recent case held that there is only vertical enforcement.⁵² Thus, there is an unresolved issue about whether or not the courts can in fact overturn decisions made by the *kastom* system on the basis that they have breached the constitutional rights of the parties, although the weight of authority seems in favour of the fact that they can.⁵³

The state system also directly hinders the *kastom* system when the courts make orders that interfere with the ability of the chiefs to resolve conflicts. One example is the refusal of bail, which can in fact prevent a *kastom* payment being made before the courts deal with the case. For example, in the case of *Public Prosecutor vs Munrel*, the court stated in its sentencing decision, 'You wanted to undertake a custom settlement but your custodial arrangements have precluded that.'⁵⁴ Another very common example is a Domestic Violence Protection Order that prevents a person from going within a certain distance of a family member

with whom they have had a disagreement. For example, the Acting Chief Registrar stated that a group of chiefs had visited him and expressed concern that the courts were making orders that were having an effect on their ability to hold *kastom* meetings. They explained that if there was an order that stopped someone from moving around or from coming into contact with other people then they felt paralysed and unable to do their work.⁵⁵

Finally, the state system hinders the *kastom* system because in some instances the courts have found chiefs criminally liable for executing or authorising the execution of their decisions. The most famous example of this is the case of *Public Prosecutor vs Kota* (1989–94, 2 VLR 661), in which the court held that the chiefs' decision for a woman to be returned to her island was unlawful and the chiefs were guilty of inciting to commit kidnapping. In another case, several chiefs were reportedly put in jail for contempt of court when they went ahead with ordaining a chief contrary to a court decision.⁵⁶ Another example was recalled by a chief, who said that he had to spend two years in prison as a result of being found guilty of unlawful assembly as a consequence of holding a meeting to try to resolve a dispute over chiefly title in his community. He then commented:

Before when the *kastom* court made a decision that people were wrong they just surrendered. But today it is not the same because the trouble-makers can put the chiefs in court together with their council. Respect has been lost. Lawyers can defend the trouble-makers. This sort of thing has weakened or damaged the energy of all *kastom* chiefs.⁵⁷

Many other comments made by chiefs showed that there was a real fear, and also frustration, that they risked breaking state law by carrying out their chiefly duties.

Although these types of orders might not be made very often, the message they send out to chiefs and the community has far wider repercussions than the particular case in question. Effectively, the state courts are telling the chiefs that, whatever they do, they are at risk of having the state system contradict them, and in some instances perhaps imprison them. Given the chiefs' limited understanding of the legal system, and what must appear to them to be at times very arbitrary decisions, this understandably causes a great deal of unease and a consequent weakening of their confidence in their own powers and abilities—qualities that are needed in the role of community leader.⁵⁸

Indirect hindering of the *kastom* system by the state system

The state system also hinders the *kastom* system indirectly, by undermining the authority of the chiefs and hence their enforcement capacity. One way it does this is through providing dissatisfied parties with a way of avoiding compliance, as they are able to say that they will 'appeal' to the state system. Numerous examples of this were given during the course of the fieldwork. For example,

in one case, a man hit an old man with a piece of wood he was carrying and the old man fell over and was seriously injured. The old man was given a choice of whether to file a complaint with the police or lodge the case with the council of chiefs. He decided to give it to the council as the court would take a long time and he would have to go to Vila to attend court. The council ordered the man to pay a fine of five pigs. The man refused to pay the fine, however, justifying his actions by saying that he wanted to appeal to the court. Another example occurred in Vila, where the Port Vila Town Council of Chiefs fined a police officer for his role in a fight. He was reported in the newspaper stating that he would not pay but would 'use his constitutional right to challenge the decision in the court'.⁵⁹ This problem was also highlighted in a recent report by the Foundation of the Peoples of the South Pacific, which found that individuals felt free to decide which system to choose and often when unsatisfied by the decision of one to revert to the other. It further found that 'freedom to move [from the *kastom* system] into the formal system serves to undermine the authority and enforcement capacity of Chiefs'.⁶⁰

Another way the *kastom* system is indirectly hindered by the state system is that people regularly challenge the chiefs on the basis either that they do not have power or that they are breaching the constitution. This also makes it difficult for chiefs to enforce their orders and wield authority effectively. For example, the chiefs might want to send a '*stronghed*' in Vila who has been punished two or three times already by the chiefs but still continues to cause trouble back to their home island. Often, however, people say to them, 'We have freedom of movement, you can't do this to us.' Even in remote islands such as Erromango, it is common for chiefs to complain that young people challenge their authority by saying that chiefs do not have the right to tell them what to do and that only the police have that authority.⁶¹ They say that this is even more frustrating because of the fact that the police seldom come to the island.

In addition, sometimes people criticise the chiefs by comparing what they do with the state system. For example, people complain that the chiefs do not deal with the cases 'properly', as they do not use proof in the way the courts do, without realising the different basis on which the chiefly system works. As shown in Chapter 4, chiefs have started to try to adapt their system to meet these criticisms—for example, by writing laws and calling witnesses—but often these adapted procedures are difficult to implement in practice.

The fact that people are aware of the state system, but do not understand it properly, also leads to dissatisfaction with the *kastom* system, as people feel that they might have been able get a 'better' outcome in the state system. For example, a chief from Malekula explained that the big gap between *kastom* penalties and those imposed by the court was creating problems. He gave the example of a person who raped a woman, who would be made to pay a fine of a pig, kava

and a mat in *kastom* but in the court would be sentenced to 12–13 years in jail.⁶² He commented:

People know about the system the court is exercising, like so much number years in jail [sic], and people will have the feeling that that punishment is bigger than this one, stronger...The woman's family will continue to have [a] bad feeling [if the matter is dealt with just in *kastom*] because they know the heavy penalty [in court].⁶³

Due to the impression, however unfounded, that the complainant might have received a better deal if the state courts had dealt with the matter, one or both of the parties might feel resentment towards the other, thus undermining one of the main aims and benefits of the *kastom* system—that of reconciling the two parties. The same chief commented that the bad feeling this created could last a 'whole lifetime'.

Finally, the existence of the state system and the knowledge that the making of a *kastom* payment will reduce a criminal sentence have led some members of the community to adopt a cynical attitude towards such payments. There is a reasonably widespread concern that in some cases people just pay 'a mat and a few chickens' in order to lessen their criminal liability before the state system, when there is no accompanying true remorse or restoration of the relationship. This is especially a problem in Vila, where much of the cultural context of the *kastom* system, such as full community participation, is missing. For example, in the case of *Public Prosecutor vs Niala*, the court commented: 'In this case the compensation by custom was carried out expeditiously and genuinely...This is not a case where the compensation by custom took place near to the sentencing date in order to influence the result of such sentencing.'⁶⁴

The existence of the *kastom* system hinders the operation of the state system

The undermining of one system by another works in both directions: the existence of the *kastom* system also undermines the state system, although not as significantly. There are a number of ways this occurs. First, because many people go first to the *kastom* system, complainants often bring their cases late to the state system. This makes it hard for the police to collect evidence and impossible to get evidence such as medical certificates that are often crucial in criminal trials.⁶⁵ Second, when people go to the state system first, they might subsequently withdraw their case after it has been settled in *kastom*, thus wasting the time and money that have been spent on investigations or prosecutions. This is reportedly very common—a prosecutor reports that this happens 'almost all the time, especially in rural areas'⁶⁶—and police officers and legal officers in the prosecution office have reported high feelings of frustration about the fact that they put work into a case that then goes nowhere. The Commissioner of

Police stated that this had a demoralising effect on his officers and was a strong disincentive to work hard on a prosecution or investigation.

The existence of the *kastom* system also contributes to lessening the legitimacy of the state system, as people do not see it as ‘belonging’ to them, but rather as being foreign and imposed, regardless of the fact that the laws have been passed by the Parliament they elected. This is shown in the way people refer to the state system as ‘*loa blong waetman*’ (white man’s law) and the continual criticism that the state system does nothing to heal breaches of relationships in the community and that in the state system ‘*wan iwin, wan ilus*’ (one wins and one loses).⁶⁷ For example, the police discovered an entire village in Malekula was growing marijuana and many people were arrested and brought to Vila. The leader of the operation (Pais) was reported to have asked ‘whether the *nakamals/nasara* and their chiefs have any authority over their people at all’ or whether it is ‘foreign laws that have authority’.⁶⁸ This example shows how people try to manipulate public sentiment by arguing that the state laws are foreign and therefore not legitimate.

In addition, as for the *kastom* system, in the other system, the possibility of being treated better or getting a different outcome is a significant destabilising factor. For example, a former prime minister who was found guilty of forgery was able to undermine the strength of the judgment against him by claiming that he had not been found guilty by the chiefs. It was possibly this factor that led to him being pardoned (after serving only four months of his three-year prison term) and being elected back into Parliament. In a newspaper report, he is cited as saying, ‘The public didn’t agree. The President didn’t agree, and the chiefs didn’t agree either.’⁶⁹

Conclusion

This chapter has demonstrated that in Vanuatu it is common for people to engage in ‘forum shopping’ and ‘forum negotiation’ at all stages of the process of managing a particular conflict. We have therefore seen that:

- complainants and their families pressure chiefs to deal with cases by threatening to lodge a complaint with the police if they do not
- chiefs pressure defendants to attend meetings and make *kastom* payments by threatening to go to the police if their orders are not obeyed
- complainants and chiefs attempt to withdraw cases from the state system at all stages of the criminal justice process
- there are negotiations over the temporal ordering of the processes of both systems when both systems deal with the same case.

Although some scholars argue that ‘people should be allowed to shop for justice’,⁷⁰ the data generated by this study suggest that the current freedom to

do so is destructive as it generates a variety of problems. These problems can be classified into four groups: disempowerment problems, de-legitimation problems, destabilisation problems and individual justice problems. Disempowerment problems involve each system experiencing a loss of exercise of control over what it considers to be its legitimate work because of the actions of the other system. De-legitimation problems arise from each system undermining the authority and legitimacy of the other. Destabilisation problems include all the negative effects on society as a whole that flow from the tensions between the two systems and from the fact that they are not working well together. Finally, individual justice problems are those that particular individuals face as a result of the current relationship between the two systems. The various examples of these four classes of problems, which overlap to a certain extent, can be seen in Table 6.2.

We can see therefore that currently not only is each system missing out on the opportunity to be enriched by, and learn from, the other, each is actively competing with and undermining the other. These findings support Tamanaha's contention that:

People and groups in social arenas with coexisting, conflicting normative systems will, in the pursuit of their objectives, play these competing systems against one another. Sometimes these clashes can be reconciled. Sometimes they can be ignored. Sometimes they operate in a complementary fashion. But very often they will remain in conflict, with serious social and political ramifications.⁷¹

Recognition of this is crucial in moving towards a better relationship between the two systems, as it involves acknowledgment that strengthening the *kastom* system cannot be done in isolation from a consideration of how it is affected by the state system, and vice versa.⁷² As such, the current response to calls for assistance to shore up chiefly power of putting responsibility solely onto the chiefs is misguided.⁷³ Rather, what is required is a reform of the relationship between the two systems to encourage greater synergy between them, and it is the various possible models for this that is the concern of the next two chapters.

Table 6.2 Four classes of problems flowing from unrestricted forum shopping

| | |
|------------------------------------|--|
| Disempowerment problems | <p>Chiefs feel disempowered because:</p> <ul style="list-style-type: none"> • the State prohibits them from using coercive powers to enforce their orders • there is concern that their orders breach the constitution • the State makes orders that stop them from being able to hold <i>kastom</i> meetings (for example, custodial arrangements, protection orders) • defendants can refuse to make <i>kastom</i> payments by arguing they have already been dealt with by the state system • the State sometimes overrules chiefly orders • their authority and therefore enforcement capacity are affected by the de-legitimation problems. <p>State system officials feel disempowered because:</p> <ul style="list-style-type: none"> • complainants withdraw cases after they have already been actioned • complainants come to the state system too late for the best evidence to be collected. |
| De-legitimation problems | <p>The <i>kastom</i> system is undermined because:</p> <ul style="list-style-type: none"> • people challenge the authority of chiefs on the basis that their power is unconstitutional and their laws are not written 'in black and white' • chiefly orders are overridden by the State and prosecutions are made after <i>kastom</i> reconciliations, suggesting <i>kastom</i> processes do not 'really' count • people refuse to make <i>kastom</i> payments by claiming they will 'appeal' to the state system • people adopt a cynical attitude towards <i>kastom</i> payments, suggesting that people make them just to get a lesser sentence in the state system. <p>The state system is undermined because:</p> <ul style="list-style-type: none"> • people claim that the state system is foreign and that therefore its judgments do not 'really' count. |
| Destabilisation problems | <ul style="list-style-type: none"> • People emerge from prison resentful, creating tension in the community. • The feeling that a complainant could have received a better outcome with the 'other' system undermines reconciliation processes. • Neither system adequately supports the other, meaning that civil disturbances are not managed effectively (for example, the Vila riots discussed in Chapter 1 and the Santo tensions discussed above). • Community confusion and misinformation about which system is responsible for what undermine public confidence in using the two systems. • Both systems avoid taking responsibility for certain types of cases—for example, domestic violence cases—by claiming it is the responsibility of the other system. • State resources are wasted in processing cases that are later withdrawn, meaning less can be spent on effective law and order processes. |
| Individual justice problems | <ul style="list-style-type: none"> • Double jeopardy. • Complainants are susceptible to pressure from others to use a particular justice forum. |

ENDNOTES

¹ This is a real case but the names of the parties and places have been changed to protect confidentiality. In addition, the identifying parts of newspaper article references have been deleted.

² Shah, *Legal Pluralism in Conflict*, p. 9.

³ This point was made by Tamanaha, *Understanding legal pluralism*, p. 17.

⁴ This was identified as a positive feature by the participants at the Vanuatu Judiciary Conference in 2006. See Forsyth, *Report on the Vanuatu Judiciary Conference 2006*.

⁵ The real name of the council has been changed to this fictitious name.

⁶ Garae, Len 2005, 'Ligo cautions Ambae chiefs not to interfere in alleged rape case', *Vanuatu Daily Post* (Port Vila), 27 October 2005, p. 3.

⁷ Garae, Len 2005, 'Lakalakabulu allowed to punish Ambaeans', *Vanuatu Daily Post* (Port Vila), 21 November 2005, p. 2.

⁸ The relative value of this payment is shown by the fact that both of the defendants' monthly incomes were approximately vt50 000.

⁹ These were that at the time of the offences Agnes had been unwell as a result of diabetes and high blood pressure. Further, over a period of years, she had received considerable financial support from

Peter and his wife, which allowed her to pay for water, lighting, food and school fees for her children. The court found that as a result of her feelings of gratitude and obligation to Peter and his wife, she could not properly deal with the problem of Peter's feelings towards her daughter.

¹⁰ One respondent said that Mary herself went as well, but another denied this. As I could not speak with her directly, I could not find out definitively.

¹¹ Another respondent had also stated that there was some type of sexual history between Peter and Agnes, which tended to confirm this part of the story.

¹² The concept of shame has very important cultural meanings in Vanuatu. See the discussion of this in Chapter 4 under 'The restorative nature of the *kastom* system'.

¹³ This is related to the idea that people's identities are relational (to family and relatives) just as much (or more so) as individual. Strathern terms this notion of Melanesian personhood 'dividuality', emphasising that '[f]ar from being regarded as unique entities, Melanesian persons are as dividually as they are individually conceived. They contain a generalized society within. Indeed, persons are frequently constructed as the plural and composite site of the relationships that produce them.' Strathern, Marilyn 1988, *The Gender of the Gift*, p. 13. Hess (Person and place on Vanua Lava, Vanuatu, p. 76) discusses the fact that in Vanua Lava the blood of a person is seen not as an individual's property, but as belonging to the whole matrilineal group, and explains that therefore when it is spilt the person who did so must pay a small fine to the group.

¹⁴ Interview with the Director of Youth and Sports (Port Vila, 11 June 2004).

¹⁵ Discussed further under 'Dispute and confusion over jurisdiction'.

¹⁶ See further Chapter 4 under 'Challenges for the *kastom* system today'.

¹⁷ He said that he waited for them to come to see him, rather than approaching them himself, because in the *kastom* of East Santo a brother should not be involved in affairs concerning his sister and that they should have known this and come to take the matter off his hands.

¹⁸ Garae, Len 2005, 'Court proceeds with rape case despite chief's appeal', *Vanuatu Daily Post* (Port Vila), 2 November 2005, p. 1.

¹⁹ I did not speak to Mary as I was told that she did not want to speak about it and was not a communicative type of woman.

²⁰ von Benda-Beckmann and von Benda-Beckmann, 'The dynamics of change and continuity in plural legal orders', p. 25. Santos also argues, in the context of discussing traditional authorities in Mozambique, that '[w]hat is at stake is, once again, the relationship between the political control and the administrative control of populations and their territories, and particularly the question of the legitimacy of the power needed to secure either form of control'. Santos, 'The heterogeneous state and legal pluralism in Mozambique', p. 68.

²¹ See Chapter 5 under 'The relationship between the police and the *kastom* system'.

²² Hess, Person and place on Vanua Lava, Vanuatu, p. 73.

²³ For example, in some areas, it is a very serious breach of *kastom* for a brother to speak about his sister's personal life, as discussed in the case study.

²⁴ See a further discussion of this in Chapter 4 under '*Kastom* procedures and *kastom* law'.

²⁵ Interview with Head of Sexual Offences Unit (Port Vila, 23 May 2003).

²⁶ Copies of police reports on file with the author.

²⁷ I describe one instance of this that I witnessed in the Prologue.

²⁸ Interview with a legal officer, Public Prosecutor's Office, Santo (Santo, 17 November 2004).

²⁹ Binihi, 'Family Ulas prepared to leave Luganville'.

³⁰ This statement was made by the First Political Advisor in the Ministry of Home Affairs. See Garae, 'Police arrest five in tense Luganville'.

³¹ The Church also often becomes involved in such cases, mostly in terms of 'witnessing' and 'counselling' families, offenders and victims before or instead of them ever reaching a *kastom* or state stage.

³² 'Three VRP members assaulted by UMP leaders', *Vanuatu Daily Post* (Port Vila), 21 April 2007, p. 8.

³³ Interview with a chief (Santo, 17 November 2004) (my translation from Bislama).

³⁴ Interview with a senior police officer (Santo, 18 November 2004).

³⁵ In particular, it is important that the ties of interdependence can continue (for example, in the case study, many of Agnes's children and even Mary were dependent on the support of the first defendant and his family).

³⁶ For example, in the case study, there was the threat that disputes over land in East Santo would flare up and create further divisions.

³⁷ Interview with the Head of the Sexual Offences Unit, Vanuatu Police Force (Port Vila, 23 May 2003).

³⁸ According to the President of the NSTCC, the sex had not in fact been forced; rather, Mary had agreed to it in exchange for money. Whether these facts are true or the ones set out in the judgment are true is not clear, but certainly in the president's mind, and most likely in the minds of many of the participants, the *kastom* payment is not concerned with the question of rape. See also below under 'Problems within the *kastom* system'.

³⁹ Garae, Len 2003, 'Where custom seems to lack value', *Trading Post* (Port Vila), 15 May 2003, p. 4.

⁴⁰ Garae, Len 2003, 'Chiefs urge investigation before reconciliation', *Vanuatu Daily Post* (Port Vila), 20 August 2003, p. 4.

⁴¹ Interview with members of Wan Smol Bag Theatre Group (Port Vila, 15 April 2004).

⁴² Although Section 39 of the *Penal Code (Amendment) Act 2006* does permit a court to postpone sentencing to allow a *kastom* payment to be made 'if satisfied that it will not cause undue delay'.

⁴³ Interview with chairman of an island council of chiefs (Santo, 18 November 2004).

⁴⁴ Interview with Chief Justice Lunabek (Port Vila, 5 September 2003).

⁴⁵ Anonymous interview.

⁴⁶ Interview with a chief (Port Vila, 28 February 2005).

⁴⁷ Interview with a chief (Port Vila, 31 March 2004).

⁴⁸ Interview with Port Vila Town Council of Chiefs (Port Vila, 26 May 2004).

⁴⁹ Interview with Legal Officer, Sanma Provincial Council (Santo, 15 November 2004).

⁵⁰ The respondent did not know why the brother did this.

⁵¹ Selwyn Garu, Secretary of the Malvatumauri (Author's notes from the Vanuatu Judiciary Conference, University of the South Pacific, Emalus Campus, Port Vila, Vanuatu, 26 August 2006).

⁵² For an in-depth discussion of these cases, see Forsyth, Miranda 2005, 'Is there horizontal or vertical enforcement of constitutional rights in Vanuatu? *Family Kalontano v Duruaki Council of Chiefs*', *Journal of South Pacific Law*, vol. 9, no. 2, <<http://paclii.org.vu/journals/fJSPL/index.shtml>> See also New Zealand Law Commission, *Converging currents*, pp. 212–16, for a discussion of the approach taken in other countries in the region. The New Zealand Law Reform Commission, *Report of Proceedings*, p. 216, concludes that '[c]ustom and human rights can be better synthesised by constitutional or statutory provisions for the horizontal application of human rights, so that they come to apply between individuals, including between customary leaders and their people'.

⁵³ In any event, the issue is largely a technical one because, as already discussed, the decisions made by the *kastom* system are unenforceable and so the complainant can just refuse to comply with the order. If the order is enforced through force then criminal proceedings can be brought, as occurred in the case of *Public Prosecutor vs Kota and Others* (1989–94, 2 VLR 661). It would become more of an issue if the *kastom* system had formal recognition by the State, although then it might be possible to argue that in fact the *kastom* system is part of the state system for these purposes anyway.

⁵⁴ *Public Prosecutor vs Munrel*, 2005, VUSC 75, <http://www.paclii.org.vu>

⁵⁵ Interview with Acting Chief Registrar (Port Vila, 5 April 2004).

⁵⁶ Garae, Len 2005, 'North Efate chiefs in prison after losing court case', *Vanuatu Daily Post* (Port Vila), 9 May 2005, p. 6.

⁵⁷ Interview with a chief (Port Vila, 22 September 2004).

⁵⁸ The level of concern about this is shown by the fact that in one of the earlier drafts of the Bill for the National Council of Chiefs (Organisation) Act, the following provision was included: 'Immunity of members of Councils of Customary Chiefs. No member of any councils [sic] of customary chiefs may be arrested, detained, prosecuted or proceeded against in respect of opinions given, or votes cast, or decisions taken by him in the customary council in the exercise of his office.' This provision was not present in the bill that was in fact presented to Parliament on 14 June 2006, presumably due to the advice of the State Law Office.

⁵⁹ 'No faen i go long PVTCC—kot i mas harem Apil: bong i talem', *The Independent* (Port Vila), 14 August 2005, p. 4.

⁶⁰ Kalontano et al., *Assessing Community Perspectives on Governance in Vanuatu*, p. 121.

⁶¹ Interview with chief's son (Erromango, 18 May 2004).

⁶² Actually this is much higher than the usual rape sentence, which averages about seven years.

⁶³ Interview with a chief (Port Vila, 14 April 2004).

⁶⁴ *Public Prosecutor vs Niala*, 2004, VUCA 25, <<http://paclii.org.vu>>

⁶⁵ Especially because the corroboration rule still exists in Vanuatu for sexual offences. See, for example, *Public Prosecutor vs Mereka* (1992, VUSC 10, <http://www.paclii.org.vu>).

⁶⁶ Interview with a legal officer in the Public Prosecutor's Office (Port Vila, 11 May 2004).

⁶⁷ In other words, it is not a win-win situation, such as the *kastom* system is widely perceived as being.

⁶⁸ Garae, Len 2006, 'Pais hits out at police over arrests', *Vanuatu Daily Post* (Port Vila), 26 October 2006, p. 3. Interestingly, apparently the chief of the village had said himself that he had no control in the village and that no-one listened to him, and the reply given by Pais was that this was because the chief adhered to foreign authority.

⁶⁹ Bohane, Ben 2002, 'The boxer: Barak Sope, ex Prime Minister and political maverick', *Pacific Weekly Review*, 25 November – 1 December 2002, p. 6.

⁷⁰ Penal Reform International, *Access to Justice in Sub-Saharan Africa*, p. 169.

⁷¹ Tamanaha, *Understanding legal pluralism*, p. 60.

⁷² Such an argument is also made in a development context in Boege et al., *States emerging from hybrid political orders*.

⁷³ This response was illustrated by the recent refusal of Parliament to legislate for chiefly jurisdiction over conflict management when the Bill for the National Council of Chiefs Act (2006) was presented to Parliament. See Chapter 5 under 'The Malvatumaauri'.