

## 7. A typology of relationships between state and non-state justice systems

We have seen in the past three chapters that there are significant problems with the current relationship between the *kastom* and state systems in Vanuatu. Therefore, the final questions posed by this study concern an inquiry into other types of relationship that might enable the two systems to work together better, and how such a new relationship could be chosen and implemented. As discussed in Chapter 2, however, to date there has not been a serious attempt to create a framework for a comparative study of relationships between state and non-state justice systems. Further, although in much of the relevant literature there are references to the need to 'recognise', 'empower' and 'harmonise' relations between state and non-state systems, as yet there has been limited inquiry into what exactly is meant by these terms. One explanation for this is the connection of this inquiry with sensitive issues concerning state sovereignty. While it is easy to agree in theory with broad statements about the need for recognition of non-state systems, once the real detail is broached, significant levels of disagreement emerge.<sup>1</sup> This could be due to what Blagg calls the 'meticulously embroidered fiction that it is possible to both "empower" communities and not to give up any of one's own' power.<sup>2</sup> Another reason is that issues of normative recognition and institutional recognition have tended to be conflated.<sup>3</sup>

The aim of these final two chapters is therefore to develop a framework that facilitates the investigation of the range of possible relationships between state and non-state systems, the specific details that differentiate one model of relationship from another, the potential advantages and disadvantages of the different models and the situations in which these models are working or not working and why. It does this through a comparative analysis of the literature on non-state justice systems from more than 20 jurisdictions.<sup>4</sup> In addition, it also considers the internal changes each system could make to develop a more collaborative and closer relationship with the other system. The process advocated thus involves a three-pronged approach. The final chapter is concerned with outlining a methodology of how to use the typology and mutual-adaptation suggestions set out in this chapter to go about restructuring and reforming the relationship between state and non-state justice systems.

One of the key questions this chapter is concerned with is whether it is possible to have the state and non-state justice systems working 'side by side' in a situation of mutual respect and recognition as advocated by many indigenous groups and, if so, what such a situation would look like.<sup>5</sup> Other important questions are whether, and if so, how, a non-state justice system can retain its integrity and wholeness while working together with a state system; and to

what extent a state can legitimately empower a non-state justice system to exercise adjudicative power, while respecting the State's constitutional obligations to ensure everyone a fair trial. A strong thread running throughout these two chapters is the emphasis on the need to think less about hierarchy and rules and more about flexible, responsive partnerships and collaborations. In other words, there needs to be both 'bottom-up' and 'top-down' initiatives, as well as continuing dialogue between the two systems about how their relationship can be restructured and renewed to allow each system to support the other in working towards those goals that are common.

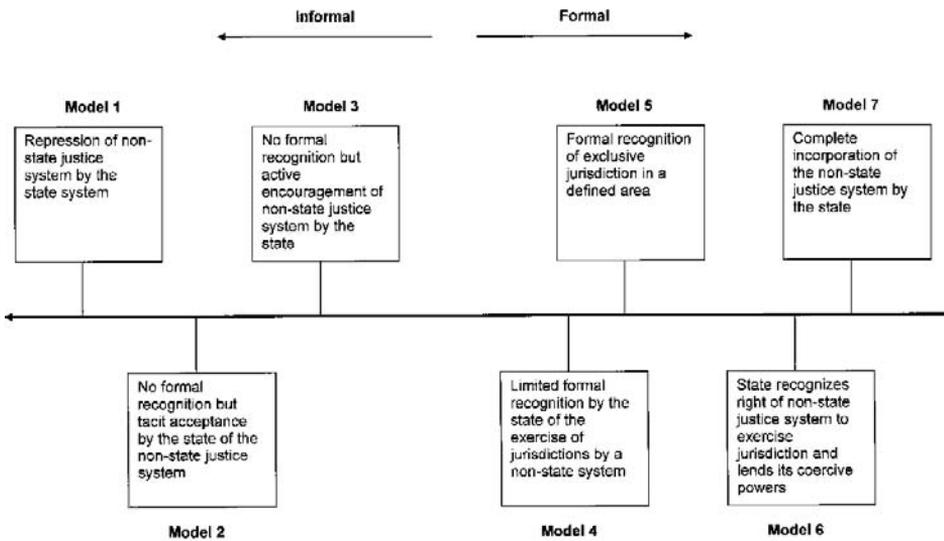
In Vanuatu, and in the majority of countries surveyed for this book, there are only two major legal orders: most commonly, the state and a customary justice system. There are, however, other jurisdictions where there are three, and possibly even more, main legal orders. The most common types of non-state legal systems, in addition to customary law systems, are religious-based legal systems, such as the sharia courts in Nigeria,<sup>6</sup> and it is also increasingly recognised that there are transnational legal systems.<sup>7</sup> Although the focus of these two chapters is on a situation involving two types of system only, the same general approach could be adapted to fit a situation where three or more types of legal systems must be accommodated.<sup>8</sup>

## **A framework for analysing different types of relationship between non-state and state justice systems**

Given the lack of an existing framework to analyse different types of relationship between state and non-state justice systems, I propose a framework that conceptualises various types or models of relationship as existing along a spectrum of increasing state acceptance of the validity of the exercise of adjudicative power by the non-state justice system. At one end of the spectrum, the model of relationship involves the State outlawing and suppressing the non-state justice system, while at the other end the model involves the State incorporating the non-state justice system into the state legal system. The proposed framework can be diagrammatically represented as in Figure 7.1.

There are a number of general points to be made about this framework before a detailed description of the different models included in it is entered into. First, many of the models discussed contain *within themselves* a significant range of relationships. It is for this reason that they should be viewed as existing on a spectrum, where one model gradually fuses into another as the detail of the real operation of the relationship is worked out. That said, there are some places along the spectrum where clear lines *can* be drawn and it is possible to say that a fundamentally different approach has been adopted.

Figure 7.1 Typology of relationships between the different systems



The first of these points is the decision by the State to formally recognise the legitimacy of the exercise of adjudicative power by the non-state justice system. This step changes the relationship from one of informality to one of formality, thus radically altering the nature of the linkages required between the two systems—for example, by introducing questions of supervision and appeal. The importance of this distinction should not, however, be overstated. Bouman argues, ‘It is a mistake to equate recognition with active, explicit national regulations.’ He observes that in Botswana the unwarranted and non-formally recognised customary courts are by no means autonomous but are controlled indirectly by the State.<sup>9</sup> This suggests the necessity to recognise that even an informal relationship might allow the State to exercise a degree of control over a non-state justice system. Further, this regulation could in fact be as effective in supporting/regulating non-state justice systems as formal recognition. This could also work in the opposite direction. Tamanaha notes, ‘The private arbitration tribunals of the *lex mercatoria*, for example, constitute an avoidance of state legal systems, yet state legal systems bolster this putative rival every time judges pay deference to or enforce arbitration decisions.’<sup>10</sup>

A further point where a distinctly different type of relationship arises is where the State lends its coercive powers to the non-state justice system, thus allowing the latter to enforce its decisions by force if necessary and to compel attendance before it. This also has a considerable effect on the relationship as it alters the degree of independence of the two systems from each other, resulting in far more regulation by the State of the non-state justice system and a fundamental change for the non-state justice system of the basis of its authority.

A second general point about the framework is that it considers the response of the State towards the non-state justice system as the defining feature of the relationship, and is thus based on the assumption that there will always be a state system and this will always be important. Of course, there were periods of history (especially before the Treaty of Westphalia in 1648) when this was widely not true, and Chanock argued that even today in many countries state law had a limited role—‘not only in the normative universe, but also in its use as a means of settling disputes’.<sup>11</sup> Because of the way the international system of granting states sovereignty over law making works today, there is, however, no jurisdiction where state law does not have at least *theoretical* capacity to regulate local disputes. As Santos argues, ‘The nation state and the inter-state system are the central political forms of the capitalist world system, and they will probably remain so for the foreseeable future.’<sup>12</sup>

The approach that is taken in the framework could nonetheless be criticised as privileging the state over the non-state justice system, and thus falling into the ideology of legal centralism.<sup>13</sup> As discussed in Chapter 2, however, it is legitimate (and pragmatic) to recognise that state justice systems in general have certain features that non-state justice systems often do not have, such as a monopoly on the legal use of force, access to state funding and resources, a coherent national structure and, in many countries at least, transparency and institutional structures requiring respect for human rights. Many of these structural characteristics give the State a normative advantage in implementing reforms.<sup>14</sup> In contrast, authority is often dispersed in non-state justice systems, making it difficult to obtain leverage for substantial changes, and funding is often extremely limited. It is not, however, legitimate to treat state law differently merely because it is state law, so once the discussion moves away from the typological framework and into a more normative theory discussion in the next chapter, attempts are made to rebalance this state-centred approach by considering creatively how a non-state justice system might recognise and regulate a state system.

The focus of the framework on the State and its relationship with other systems is also based on a presupposition that there is a separation between state and non-state organs. Given the increasingly elastic boundaries between state and non-state institutions, this is a limitation of the framework that it is hoped future work might overcome. In particular, it means that hybrid legal structures, such as the Village Courts in Papua New Guinea or the Island Courts in Vanuatu, do not fit comfortably into the spectrum. They are, however, discussed in this chapter (under ‘Mutual adaptations/innovations by state and non-state systems’), along with a consideration of other adaptations/innovations by both systems.

The third general point to be made about the framework is that it is concerned with what Woodman has termed institutional pluralism, which involves

recognition of the structures, institutions and processes of other legal systems, rather than legal norms.

A fourth observation is that it is possible that there might be two or more different models of relationship in existence in the one country at the same time. For example, in Bangladesh, the *shalish* system of dispute resolution exists in three ways: as traditionally administered by village leaders; as administered by a local government body; and in a modified form introduced and overseen by NGOs.<sup>15</sup> Indeed, the research suggests that it is likely that if a state coopts the non-state justice system in a way that limits, rather than increases, effective access to justice, a non-state-authorized version of the same system will develop and exist simultaneously with the state form. For example, in Nigeria, although there are state customary courts, local people prefer to use the non-state traditional courts as these are seen as being not imposed by the government, as the customary courts are.<sup>16</sup> In situations where there are two different types of non-state justice system in one jurisdiction, such as a customary system and a religious-based system, it is also possible that there will be different relationships between the state and the different non-state justice systems.

Finally, it is not necessary for there to be a uniform relationship between the state and non-state justice systems throughout the jurisdiction, but different relationships can be formed depending on the various needs and resources in particular localities. For example, the Northern Territory Law Reform Commission in its *Report of the Committee of Inquiry into Aboriginal Customary Law* recommended that each Aboriginal community should be assisted to develop its own plan to incorporate traditional law into the community '*in any way the community thinks fit*'. The inquiry's general view is that *each Aboriginal community will define its own problems and solutions*'<sup>17</sup> and draw up a 'law and justice plan' that will appropriately incorporate or recognise Aboriginal customary law as a method of dealing with issues of concern to the community.<sup>18</sup> The Australian Human Rights and Equal Opportunity Commission has also recognised that 'it is reasonable to expect that one size will not fit all and a variety of forms of modelling and agreement-making could be pursued in regard to community justice'.<sup>19</sup>

## **Models of relationship**

This section analyses seven different types of relationship between state and non-state justice systems. The models that involve *informal* state recognition are analysed in terms of the extent of support given by the State to the non-state justice system. The models that involve *formal* recognition of the non-state justice system by the State are analysed in terms of the extent of the recognition of jurisdiction and its degree of exclusivity, the types of regulation or supervision the State exercises over the non-state justice system and the linkages between

the systems in terms of referral and appeals. For all models, examples are given of where they have been used, an assessment is made of the advantages and disadvantages of each model and finally suggestions are made as to the circumstances in which the model should be considered by a particular jurisdiction. It must be noted that these models, and this framework, are very much a beginning rather than a finished product, and are based on data that are often incomplete.

## Model 1: Repression of a non-state justice system by the state system

**Table 7.1**

Significant features	A non-state justice system is actively suppressed by the State—for example, by prosecuting those who administer the system.
Advantages	Ideally ensures a homogenous legal system with no competing systems undermining each other (assuming there are no other non-state justice systems in the country).
Disadvantages	<ul style="list-style-type: none"> <li>• Might not work in practice but merely force non-state justice systems to go underground.<sup>20</sup></li> <li>• Breaches of natural justice and human rights of parties much harder to remedy if the system is operating in secret.</li> <li>• The benefits of non-state justice systems such as speed, local presence and easy accessibility are lost.</li> <li>• May in fact alienate those who wish to use the non-state justice system even further from the state system.</li> </ul>
Circumstances in which the model should be considered	If the non-state justice system(s) were completely dysfunctional, abuses of human rights were pervasive and these problems were so entrenched as to be incapable of being fixed (for example, the Klu Klux Klan's justice system or that of the Mafia or Colombian bandits) <sup>21</sup> while the state system ensured access to justice for everyone.

This model involves the State actively repressing a non-state justice system by making it illegal for it to deal with cases (rather than by merely outlawing the use of coercive force by the non-state justice system). It is not common, but exists formally in Botswana. As discussed below in Model 7, Botswana has attempted to incorporate its customary justice system almost entirely into its state system, and perhaps as a result has tried to ensure that there will be no 'non-state' customary justice system to compete with its 'state' customary justice system. Thus, Section 33 of the *Customary Courts Act* (Chapter 04:05 [Botswana]) provides that any person who attempts to exercise judicial powers within the jurisdiction of a duly constituted customary court or knowingly sits as a member of such a court is guilty of an offence. In reality, Bouman states that unwarranted and not formally recognised chiefly courts are in fact tolerated, or even supported, by the official police forces, although their adjudication activities are in violation of various national laws.<sup>22</sup> This suggests that enforcement of this model might be problematic. Tamanaha also comments on the possibility of a state system suppressing contrary norms and practices, and notes that '[w]hen the competing system is longstanding or deeply entrenched, the official legal system is confronted with a formidable task, which it often falls short of achieving'.<sup>23</sup>

## Model 2: Formal independence between the systems but tacit acceptance by the State of a non-state justice system

In the majority of countries in the world where there is a weak state and a non-state justice system of some sort, there is no formal recognition given to a non-state justice system, but the State turns a 'blind eye' to the fact that the non-state justice system processes the majority of disputes, and state actors often unofficially encourage reliance on the non-state justice system. The literature suggests that this model of relationship exists in: Timor Leste,<sup>24</sup> Lesotho,<sup>25</sup> Malawi,<sup>26</sup> Zambia,<sup>27</sup> Mozambique,<sup>28</sup> Kiribati,<sup>29</sup> Ghana,<sup>30</sup> Nigeria,<sup>31</sup> Solomon Islands<sup>32</sup> and, of course, in Vanuatu. For example, in relation to Timor Leste, Mearns notes:

Police are acting pragmatically at the village level by encouraging some (often most) situations to be resolved through the village chief (*Chefe de Suco*) and a village council. Like it or not, the local justice system is operating and appears to be the preferred system.<sup>33</sup>

In this model, while the State does not actively suppress the non-state justice system, neither does it support it in any way. The advantages and disadvantages of this model in respect of Vanuatu have already been discussed in full in the previous three chapters. Some of these problems have also been noted in the literature discussing the operation of this model in other jurisdictions. For example, the problem of enforcement of orders that is troubling the chiefs in Vanuatu is also apparent in Malawi:

[T]he chiefs lamented that because they function outside the constitutional and legal framework they find it difficult to have their judgements enforced. The chiefs demanded that they be given back their powers, particularly their former powers to order detention and the power to impose community service orders, since people are now often likely to ignore their decisions, advice and directives.<sup>34</sup>

One of the other problems of this model highlighted by this study is the lack of mechanisms for controlling abuses of power and breaches of human rights by non-state justice systems. Such problems also appear to exist in other jurisdictions. For example, Mearns notes that in Timor Leste, 'local patterns of dispute resolution certainly do not always accord with ideas of equality, democracy and international human rights'.<sup>35</sup>

In some countries where this model exists, the State does formally recognise the non-state justice system in a very limited way, such as in Vanuatu, where state courts are required to take into account any customary settlement that has been made when sentencing.<sup>36</sup> The courts are not, however, allowed to dismiss a case on the basis that it has been already dealt with by the non-state justice

system<sup>37</sup> and, in Vanuatu at least, the customary settlement affects only the quantum and not the nature of the sentence given by the State.<sup>38</sup>

**Table 7.2**

Significant features	<ul style="list-style-type: none"> <li>• No formal recognition of right of non-state justice system to exercise adjudicative power.</li> <li>• Allowance by the State of informal relationships between the two systems.</li> </ul>
Advantages	<ul style="list-style-type: none"> <li>• The linkages between the two systems remain flexible and dynamic.</li> <li>• The non-state justice system is able to define its own norms and procedural framework, thus allowing it to meet the changing needs of the community.</li> <li>• It keeps cases out of the state system with minimum cost to the State.</li> <li>• It provides people living in weak states with access to justice they might not have if they rely entirely on the State.</li> <li>• Leaves space for innovation.</li> <li>• It means the non-state justice system must continue to meet community needs and expectations to remain utilised.</li> </ul>
Disadvantages	<ul style="list-style-type: none"> <li>• Temporal ordering problems (see Table 6.1).</li> <li>• Problems flowing from unrestricted forum shopping:             <ul style="list-style-type: none"> <li>• disempowerment</li> <li>• de-legitimation</li> <li>• destabilisation</li> <li>• individual justice (see Table 6.2).</li> </ul> </li> <li>• Could be problems of unregulated bias or discrimination against women and youth in the non-state justice system.</li> <li>• Non-state justice system could face difficulties with enforcement of orders.</li> </ul>
Circumstances in which the model should be considered	If the non-state justice system is very strong with no need of state assistance; its own regulatory processes effectively do or could prevent abuse of human rights; and the informal links with the state system are clear, and do not lead to the undermining of each system and are not subject to abuses of power.

### Model 3: No formal recognition but active encouragement of a non-state justice system by the State

This model involves the State fostering and supporting a non-state justice system at an informal level, but stopping short of endorsing its exercise of adjudicative power. Such a relationship exists in many countries throughout the world, particularly where governments are becoming increasingly aware of the limitations of the state justice system and the value of non-state justice systems to overcome some of these limitations. Vanuatu is in fact drifting closer to this model as the State is beginning to support the training of chiefs in dispute-resolution practices, good governance and human rights.<sup>39</sup>

An example of this model is the Zwelethemba Model of Peace Committees in South Africa.<sup>40</sup> This is a pilot project in a poor black community, the aim of which is to improve security for members of the community by using the ability and knowledge of those members. The program was initiated with the support of the national police and the Ministry of Justice. In essence, the Peace Committees receive complaints and then convene ‘gatherings’ of members of the community who are thought to have the knowledge and capacity to solve the disputes. The Peace Committee members facilitate the process whereby those invited help to outline a plan of action to establish peace. If one of the parties wishes to go to the police then the Peace Committee members facilitate this. No force is used or threatened to ensure compliance. The issue of remuneration for

the Peace Committee members is solved in an ingenious way: committees earn a monetary payment for every successful gathering held.<sup>41</sup>

Initial reviews of this pilot project were promising: it was found that commitments to plans of action took place in more than 90 per cent of gatherings, that the process was fast, that women and young people played a major role in the processes and that the Peace Committees dealt effectively with serious problems such as domestic violence that might not have been dealt with by the police. In discussing the approach of the Zwelethemba Model of Peace Committees, Johnston and Shearing comment that 'it does not subscribe to a neo-liberal strategy whereby the state "steers" and the community "rows". On the contrary, the model is based on a process in which governments provide support to local people who, themselves constitute a significant node in the governance of security.'<sup>42</sup>

In Australia, there are a number of ways in which the State is working informally with various Aboriginal communities that also fit this model. Examples are the Community Justice Groups in Queensland and Law and Justice Committees in the Northern Territory. Neither has any statutory authority, but they enter into various agreements with government and community agencies and work together with courts and police in a variety of ways, including diversion programs, pre-court sentencing and community service orders.<sup>43</sup>

There are a number of advantages with such a relationship. Significantly, this model allows the State to support the non-state justice system and also to exercise a degree of *informal* regulation over it, while permitting it to develop through its own processes. It also develops clearer pathways between the systems, reducing confusion about different roles and also ideally reinforcing each other's legitimacy, as they are perceived as working together rather than in competition with each other. Such initiatives have, however, also been criticised as having significant long-term flaws. For example, an Australian Human Rights and Equal Opportunity Commission report states:

Such community-based processes are generally an add-on to the existing system—tolerated and allowed to operate in tandem with the mainstream system, yet not given the legitimacy or support necessary for them to challenge the fundamental basis of the mainstream system or result in any reconfiguration of relationships and responsibilities. Power is ultimately retained by the relevant authorities within the formal system.<sup>44</sup>

Many of the problems associated with Model 2 also exist in this model, although there is more opportunity for them to be managed by establishing an active dialogue between the two systems.

**Table 7.3**

Significant features	<ul style="list-style-type: none"> <li>• No recognition of right of non-state justice system to exercise adjudicative power.</li> <li>• Active encouragement of the non-state justice system by the State.</li> <li>• Informal partnerships with government agencies.</li> </ul>
Advantages	<ul style="list-style-type: none"> <li>• Allows the non-state justice system to remain as close to existing cultural practices as possible, and to develop organically, while assisting with the gradual process of reform.</li> <li>• Prevents the State from dominating the non-state justice system, thus preserving its integrity.</li> <li>• Leaves space for justice innovations.</li> <li>• Close links with state institutions facilitate mutual learning about the two systems.</li> <li>• The ability to refer cases to the state system might provide an extra degree of legitimacy and power to the non-state justice system.<sup>45</sup></li> </ul>
Disadvantages	<ul style="list-style-type: none"> <li>• Does not provide support for the non-state justice system in terms of enforcement of orders.</li> <li>• Might not provide an effective means of regulating non-state justice systems to prevent possible abuses of power.</li> <li>• Temporal ordering problems and the four categories of problems flowing from unrestricted forum shopping (see Table 7.2) might still exist although these might be able to be negotiated more readily.</li> <li>• Heavily dependent on individuals working in the various systems and therefore susceptible to being short lived.</li> </ul>
Circumstances in which the model should be considered	<p>If the non-state justice system is very strong, effectively self-regulating, with no need of state assistance and all that is needed to ensure compliance with constitutional principles and fundamental human rights is some training and better linkages with the state system.</p>

The sorts of questions states considering such a model would need to think about are:

- What kind of informal relationships should be fostered and with whom—that is, who are the people/institutions with the best potential to act as bridges between systems?
- What level of formality should there be in the regulation of those relationships or linkages—that is, a written policy or left to the discretion of people in the position of ‘gate-keepers’, for example, the police?
- Would people working for the non-state justice system be financed by the State and, if so, how?

### **Model 4: Limited formal recognition by the State of the exercise of jurisdiction by a non-state justice system**

This model involves the State giving limited legislative recognition to a non-state justice system, but no exclusive jurisdiction, no coercive powers and, often, very little in the way of state resources and support. An important feature of this model is that the non-state justice system is also able to make rules or by-laws for the communities it governs, although this might be limited by the requirement that such laws must be in accordance with ‘custom and usage’.<sup>46</sup> This feature is due to the recognition that in many customary governance systems there is no distinction drawn between the exercise of legislative and adjudicative powers. The other significant feature of this model is that the State does not seek to exercise much regulatory power over the non-state justice system. In many

ways, this model resembles the relationship between equity and the common law before the *Judicature Acts* in the late 1800s.<sup>47</sup>

An example of jurisdiction with this model is the Samoan village '*fono*'.<sup>48</sup> The *Village Fono Act* is relatively recent—passed only in 1990, shortly after the Samoan people had voted in favour of universal suffrage (previously only the *matai* or title-holders were eligible to vote). The act, introduced as 'a move to reinforce and strengthen rural self-reliance'<sup>49</sup> and also possibly as a sweetener to the *matai* as compensation for their loss of political monopoly, confirms the authority of the village *fono* (or council) 'to exercise power or authority in accordance with the custom and usage of that village' (Section 3[2]).<sup>50</sup> Section 6 provides that the village *fono* may impose punishment in accordance with the 'custom and usage of its village' and it specifies a number of punishments, including the power to impose fines and work orders. The Samoan Supreme Court recently held that village *fonos* were not entitled to make an order of banishment and may only petition the Land and Titles Court (a state court) to make such an order.<sup>51</sup> The punishments given by the village *fonos* must be taken into account by a court in sentencing if the person is subsequently found guilty of the same matter (Section 8). The act also provides that there may be an appeal from decisions of village *fonos* to the Land and Titles Court, which may allow or dismiss an appeal or refer the matter back to the *fono* for reconsideration. In the last case, there is no further right of appeal. The Supreme Court has jurisdiction to hear appeals from the Land and Titles Court in relation to alleged infringements of fundamental rights under the constitution.<sup>52</sup>

Another example of this model is the proposed Community Justice Groups (CJGs) recommended by the WA Law Reform Commission in its final report into Aboriginal customary law.<sup>53</sup> The proposal allows Aboriginal communities to apply to the minister to be recognised as CJGs. Those communities with identifiable physical boundaries should then be able to set their own community rules and sanctions to apply to everyone in that particular area. In order to avoid the problems of codification, the communities are free to decide for themselves the rules and sanctions and these may include the incorporation of matters that are offences against Australian law and offences against Aboriginal customary law.<sup>54</sup> This 'untethering' of a non-state justice system from being limited to rules based on custom and tradition is a step that should be applauded as it recognises that indigenous communities need to have laws and procedures that change and develop to meet their needs.

In order to be consistent with 'the aim of facilitating the highest degree of autonomy possible', there are no limits on the matters that may be considered by the CJG, other than the constraints of Australian law.<sup>55</sup> The use of physical force by the CJG is prohibited, as is the power to detain someone, but the communities are given the power to refuse to allow someone to remain in the

community for a specified period.<sup>56</sup> An underlying principle of the proposal is that no person may be forced to submit to sanctions imposed by a community. Consequently, the discussion paper noted that enforcement of the orders of the CJG 'will depend primarily on the cultural authority it exerts and the support for the establishment of community rules and sanctions within the community itself'.<sup>57</sup>

In terms of linkages with the state system, the proposal states that it is the responsibility of the CJG to decide whether it should deal with a matter or refer it to the police. It also provides, however, that '[t]he rules set by a community justice group do not replace mainstream law and the police retain full discretion about whether they charge an offender'.<sup>58</sup> In addition, the CJGs are envisaged as playing a crucial role within the state system.<sup>59</sup> The final report stated explicitly that it was for this reason that the commission concluded that it was necessary for CJGs to be formally established.<sup>60</sup>

The only regulation of the CJG is in terms of its composition. It is required to include a representative from each different family, social or skin group within a community and to comprise equal numbers of men and women.<sup>61</sup> In addition, it must be shown that there has been adequate consultation with the members of the community and that a majority of the community members support the establishment of a CJG and its power to set rules and sanctions.<sup>62</sup> There is no appeal from the CJG to the state courts. One way the State is envisaged as supporting CJGs is the establishment of an Aboriginal Justice Advisory Council with the role of providing support and advice to communities who wish to set up a CJG. The State will also provide adequate resources and continuing funding. This type of model is the preferred model for Penal Reform International, which argues that

traditional and informal justice forums should be allowed a wide jurisdiction in terms of both civil and criminal matters save only in cases involving the most serious offences such as murder and rape. The broad jurisdiction must go hand in hand with the absence of physically coercive measures.<sup>63</sup>

This view is, however, based on the premise that such forums have the power of social pressure to secure attendance and compliance with an agreement. This premise is, however, not always well founded, as in Vanuatu, as discussed in Chapter 4.

One problem with this model is that it does not overcome the problem of double jeopardy because a person may be found guilty by the non-state justice system *and* the state system. Another concern is that there are not enough checks on the power of the non-state justice systems. For example, in Samoa, it has been argued that the *Village Fono Act* 'entrenches patriarchal and status based norms

of customary law, and that these powers have been abused by traditional leaders'.<sup>64</sup> There have been a number of cases where the *fonos* have ordered people to be banished and, in the most extreme of cases, village *fonos* have ordered people to be 'roped to large sticks like pigs' and even, on one occasion, killed.<sup>65</sup> In light of such cases, there have been a number of scholars who have forcefully criticised the act. For example, Meleisea argues that the act 'has in fact formalised the power of the *matai* and local hierarchies. The act allows *matai* to force compliance with their dictates through fines or even expulsion from the village. Increasingly rural people see *fa'a Samoa* as another word for oppression.'<sup>66</sup>

Although these excesses are to an extent checked through the appeal process, often by the time the case finally emerges from the court system the consequences for the victim—banishment, destruction of property, bodily injury—are not easily mended. Another problem with the village *fono* system noted by scholars is that the legislation restricts the powers of the *fono* rather than enhancing them.<sup>67</sup> The removal of the traditional power of banishment is a prime example of this. Corrin Care argues:

The possibility of mutual support and cross-fertilization of ideas for culturally appropriate penalties held out by earlier decisions on banishment in the formal courts of Samoa has gradually diminished. In Samoa, ownership has been taken from the indigenous forum on the grounds that only the formal courts guarantee the offender due process; a stance that ignores the cultural context of local sanctions.<sup>68</sup>

Among the questions that states considering such a model would need to think about are:

- Should there be some regulation of the composition of the non-state justice system tribunals or procedures and, if so, what?
- What limitations, if any, should there be on the types of matters the non-state justice system can deal with?
- What limitations, if any, should there be on the types of orders the non-state justice system can make?
- Should the non-state justice system be funded in any way by the State?
- What degree of recognition should the State give to a decision made by a non-state justice system (that is, just a mitigating factor in sentencing or should it allow a state court to dismiss a matter entirely)?
- Should there be appeals, or restricted appeals, to the state courts?
- If so, what powers should an appellate court have?
- What should the geographical boundary of the non-state justice system be?

**Table 7.4**

Significant features	<ul style="list-style-type: none"> <li>• State recognises validity of exercise of adjudicative power by non-state justice system.</li> <li>• State leaves enforcement to the non-state justice system.</li> <li>• No exclusive jurisdiction given to the non-state justice system.</li> <li>• Very limited regulation of non-state justice system.</li> <li>• Non-state justice system has power to implement its own procedures and substantive laws.</li> </ul>
Advantages	<ul style="list-style-type: none"> <li>• Non-state justice system retains a high degree of autonomy.</li> <li>• Helps to build pride and respect for non-state justice system.</li> <li>• Non-state justice system is not an expense for the State as it operates independently on the basis of voluntary work (note the WA model proposes payment for non-state justice system).</li> <li>• Non-state justice system not subject to challenges to the legitimacy of their exercise of power by the State or the community.</li> <li>• Legal pluralism is formally embraced by the State, which increases the likelihood that the State will work together with the non-state justice system.</li> <li>• Possibility of appeal (if it exists) provides an extra safeguard for ensuring respect for human rights and fair process by the non-state justice system.</li> <li>• Enhances the cultural authority of traditional leaders.</li> <li>• Greater clarity in the jurisdiction of each system and the pathways between the two systems.</li> </ul>
Disadvantages	<ul style="list-style-type: none"> <li>• Does not deal with problem of double jeopardy.</li> <li>• Does not assist the non-state justice system with enforcement or resources.</li> <li>• Can lead to abuse of human rights and natural justice in the name of 'tradition'.</li> <li>• Appeals might not always be an option in small communities where people might fear upsetting powerful traditional authorities.</li> <li>• There could still be unregulated 'forum shopping' and related problems.</li> </ul>
Circumstances in which the model should be considered	<p>If the non-state justice system is very strong with no need of state assistance, but its own regulatory processes need some state regulation in order to ensure human rights are protected.</p>

### Model 5: Formal recognition of exclusive jurisdiction in a defined area

This model involves the State recognising the legitimacy of the non-state system exercising *exclusive* jurisdiction within a defined area. This area might be either a specific geographical location, such as a village or a reserve, or a specific type of subject matter, such as family law or minor criminal matters. It could also involve a separate system for members of a particular ethnic group, even where there is no discrete geographical boundary for that group. What is crucial in this model is that the non-state justice system makes the final decision in a particular case. In many ways, this model is similar to that which exists in federations where each state or province has limited exclusive jurisdiction over certain matters occurring within its geographical boundaries.<sup>69</sup> In this model, each system exists separately from the other and exclusive jurisdiction over particular cases is determined through an agreement that might take the form of legislation or of contract. This model has also been described as involving 'parallel justice systems'.<sup>70</sup>

An example of a situation where jurisdiction is shared on the basis of subject matter is Nigeria, where cases involving Islamic personal law are dealt with in the sharia court system.<sup>71</sup> This is also common in other countries with a large minority Muslim population.<sup>72</sup> An example of a situation where jurisdiction is

shared on the basis of geography is Panama, where the Kuna Indians live in internally regulated administrative territories, although this is under the jurisdiction of the national government.<sup>73</sup> Another example is the Tribal Courts in the United States, which have coercive powers and are highly autonomous,<sup>74</sup> although often they are patterned on non-indigenous courts and so can be said to be more hybrid structures than indigenous institutions. Finally, an example of where jurisdiction is based on ethnicity is the situation in many Latin American countries where a significant number of constitutions have recently been amended to recognise the right of indigenous peoples to apply their own customary laws.<sup>75</sup> For example, Article 246 of the *Constitution* of Colombia provides that:

The authorities of the indigenous peoples may exercise jurisdictional functions within their territories in accordance with their norms and procedures, provided they are not inconsistent with the Constitution and the laws of the Republic. The law shall regulate the way this special jurisdiction will relate to the national judicial system.<sup>76</sup>

It appears, however, that in many states these constitutional provisions have not yet been implemented in practice.<sup>77</sup> Faundez explains:

Courts in Latin America, however, have a unique problem because, although most constitutions today recognise multiculturalism and legal pluralism, legislatures have failed to address the crucial question as to how indigenous or other non-state forms of law are related to state law. As a consequence, courts have no substantive legislative guidelines on how to respond to their activities or decisions of non-state justice systems. Not surprisingly, in the case of Peru, the response of the courts to the non-state justice system has generally been hostile.<sup>78</sup>

A slightly different picture in relation to Colombia is presented by Assies, who observes that it has taken two important steps to progress the constitutional provisions.<sup>79</sup> The first is the commissioning of a study of indigenous legal systems and the second is the creation of a new constitutional court. He states that this court appears in some cases to have extended 'a large degree of autonomy to a relatively acculturated community'.<sup>80</sup> He concludes, 'An outstanding feature of the Constitutional Court verdicts is that they seek to promote intercultural dialogue rather than to resolve all conflicts of jurisdiction through the usual means of state intervention based on the unilateral imposition of a unified body of positive law.'<sup>81</sup>

In the absence of more detailed information about the real workings of these systems, it is impossible to determine whether they fit exactly into this model or whether the State in fact remains the final arbiter, thus bringing them closer to the previous model.<sup>82</sup> In most countries, it would seem that the State keeps

at least a small degree of control over the non-state justice systems, thus making this model more of an ideal than a reality experienced in any jurisdiction.<sup>83</sup>

The principal advantage of such a system is that it allows non-state systems to function without interference from the state system, which might distort them, undermine their effectiveness or interfere with their integrity. For example, Webber argues that such a system might be required in Canada because a measure of separation is needed if distinctively aboriginal approaches and procedures are to be re-established. He states that this approach 'allow[s] the administration of justice in Aboriginal communities to take into account the experience of Aboriginal peoples...rather than baldly imposing the language and forms of non-Aboriginal traditions'.<sup>84</sup> A second advantage is that this model stops forum shopping and its associated problems, as matters will be able to be dealt with in only one system. Dewhurst therefore argues, also in the context of advocating such a model for aborigines in Canada, that '[i]f Aboriginal systems are considered to be alternative, preliminary, of lower authority, or unofficial, their opponents will resort to the more "final" or "official" adversarial system...Instead, Aboriginal justice systems must be designed as authoritative and parallel models of justice'.<sup>85</sup>

Further, as Oba argues in the Nigerian context, having appeals from a non-state system to a state system could in fact create injustice, as the state system might be ill equipped to deal with the law and procedures of the non-state system. He therefore argues that '[i]t is definitely unacceptable to Muslims that someone who is not subject to Islamic law, who may be totally bereft of any knowledge of Islamic law and may even have an aversion to it be engaged in its administration'.<sup>86</sup> He concludes that a parallel series of courts is the most feasible option for Nigeria.<sup>87</sup>

There are, however, a number of problems with such a system. First, separation on the basis of geography brings up very visibly problems of equality before the law. These arguments have been dealt with exhaustively by Webber, and for reasons of space his arguments will not be repeated here.<sup>88</sup> He concludes that 'when one thinks more carefully about freedom, equality, and the relevance of culture for law, there are circumstances in which parallel systems of Aboriginal justice are both acceptable and appropriate'.<sup>89</sup> Dewhurst suggests that such concerns can be overcome by allowing all accused, aboriginal and non-aboriginal alike, to elect the system under which they will be tried. Second, the absence of any degree of regulation by the state system means there is the possibility that there will be abuses of power that will go unchecked, particularly in sensitive areas such as cases involving women and children. Webber suggests that such concerns raise the more general issue of trust in non-state institutions, observing that overcoming this might require that these institutions are 'reinvented' in a way that allows for a system of checks such as did not exist,

or existed in a different form, before the imposition of non-indigenous institutions.<sup>90</sup> Horton raises a third concern, arguing that indigenous territorial and political autonomy might be used to justify state neglect and abandonment.<sup>91</sup>

Among the questions that states considering such a model would need to think about are:

- Would parties be required to elect at the outset which system to use? What would happen if they disagreed?
- What should a system do if a case comes before it that has already been adjudicated by another system?
- Should the division in jurisdiction be on the basis of subject matter, territorial reach<sup>92</sup> or ethnicity of parties?
- Should the State have control over any procedural elements of the non-state justice system (for example, to reduce the likelihood of bias or abuses of power, and so on) as an initial prerequisite for recognition?<sup>93</sup>
- If there are constitutional guarantees about justice, how can these be accommodated and which system will adjudicate on potential breaches?

**Table 7.5**

Significant features	<ul style="list-style-type: none"> <li>• Non-state justice system is given exclusive jurisdiction that is limited on the basis of territorial reach, subject matter or ethnicity of users.</li> <li>• State does not provide enforcement mechanisms or regulate non-state justice system.</li> </ul>
Advantages	<ul style="list-style-type: none"> <li>• Non-state justice systems allowed to function independently and autonomously.</li> <li>• No forum shopping allowed.</li> <li>• Non-state justice system recognised as being fully equal with state system (consequently empowers and legitimises customary justice system).</li> <li>• Only administrators skilled in the system have the right to make decisions concerning the implementation of its norms.</li> <li>• Helps to build pride and respect for non-state justice systems that might have been historically marginalised.</li> </ul>
Disadvantages	<ul style="list-style-type: none"> <li>• No facilitation of cross-fertilisation between the two systems.</li> <li>• No ability for the State to control abuses of power, bias, discrimination against women, and so on.</li> <li>• Non-state justice system not supported by state resources or coercive powers.</li> <li>• State might be able to justify abandonment and neglect of areas regulated by non-state justice system.</li> <li>• Concerns about equality before the law.</li> </ul>
Circumstances in which the model should be considered	Where there are discrete groups of people within a state with very different justice needs that can be met completely by a non-state justice system and are not being met by the state justice system.

## Model 6: Formal recognition and the giving of state coercive powers to a non-state justice system

In this model, the State recognises the right of a non-state justice system to exercise jurisdiction and also provides support in terms of using its coercive powers to enforce decisions made by a non-state justice system. The exercise of jurisdiction is exclusive in that a person who has been dealt with by one system cannot go afresh to the other system. It is not, however, exclusive in that a person may appeal from the non-state justice system to the State. It responds to

the situation where there are a number of competing requirements: state support for a non-state justice system in terms of resources and enforcement; the need for a non-state justice system to operate within the values underlying the constitutional framework of the State; and the desire to maintain a non-state justice system in a form that is as unchanged as possible so as to preserve its advantages in terms of accessibility, legitimacy, speed, simplicity, informality, holistic approach and cultural relevance. The continuing challenge with a model such as this is to provide sufficient support to a non-state justice system while resisting the temptation (and political pressure) to overregulate and modify it.

An example that fits this model and comes close to successfully managing all of these criteria is the South African Traditional Courts. These courts are based on a proposal developed by the South African Law Commission (SALC) and the South African Department of Justice and Constitutional Development.<sup>94</sup> The general approach adopted was to regulate non-state justice systems rather than incorporate them and to generate clear and easy links between state and non-state systems while ensuring that they operated within the law.<sup>95</sup> Based on a long and extensive discussion process, the SALC produced a *Report on traditional courts and the judicial function of traditional leaders* (2003) and also a draft Customary Courts Bill (2003). The bill was finally introduced, after modifications, into Parliament in May 2008 as the Traditional Courts Bill.<sup>96</sup>

The preamble to the bill explains that its purpose is to 'provide for the structure and functioning of Traditional Courts in line with constitutional imperatives and values'. The courts are recognised by the State through the minister designating a senior tribal leader as presiding officer of a traditional court for his or her area of jurisdiction.

The courts are given jurisdiction over civil disputes arising out of customary law and custom, although there is a list of matters the courts do not have jurisdiction over. The courts are also given jurisdiction over a limited range of minor criminal offences, including theft, malicious damage to property, assault and *crimen injuria* (Sections 5 and 6 and Schedule 1).

The courts are specifically enjoined to resolve disputes in accordance with custom and to follow customary procedures (Sections 7, 8). There are, however, also very detailed provisions requiring the courts to resolve disputes 'in accordance with the norms and standards reflected in the Constitution' and also to ensure that the Bill of Rights is followed during hearings (Sections 7, 9). There is no acknowledgment, in the legislation at least, that there might be a conflict between resolving a dispute in a customary manner and applying constitutional norms. This could lead to some difficulties for traditional leaders when dealing with such conflicts.

The bill gives fairly significant powers to the Traditional Courts, providing that a Magistrate's Court must enforce a decision made by a customary court if the

decision is not followed within the time specified (Section 11). The courts have powers to fine people, make orders of compensation, make orders to give an apology, make an order directing a matter be submitted to national prosecuting authorities and to order a person to do community service (Section 10).

There are a number of ways in which the State regulates the Traditional Courts. It requires that all fines are to be paid into a special account, that the courts are to keep written records of certain basic information concerning the cases they deal with and there is a system of appeals to the state courts (from orders to pay fines and compensation and an order that deprives a person of benefits accruing under customary law only) (Section 13), as well as procedural review by Magistrates' Courts.<sup>97</sup> A proposal from the SALC that did not make it into the final bill was to have a registrar for the courts whose general role was to guide and supervise the courts and to transfer cases to the state system where it was appropriate. The report explains that:

The preponderant view was that keeping the supervision and monitoring of customary courts away from magistrates courts and leaving the process to a dedicated office would insulate customary law and adjudicatory procedures from encroachment by the common law through too much association with magistrates' courts.<sup>98</sup>

A further type of control over the courts is the section that penalises members of the court who are incompetent or engage in misconduct (Section 16).

The relationship between the two systems is very clearly regulated in this model. In addition to the appeal procedures, there are detailed provisions relating to the transfer of cases between the different systems (Section 19). The SALC proposal provides that in all criminal cases the accused person has the right to demand that the case be transferred to another court of competent jurisdiction, but this has not been included in the final bill.

Another example of this model, in an economic context, is where the state legal system recognises and encourages parties to reach private arbitration decisions and then enforces them.<sup>99</sup>

One of the issues of such a model is how to ensure that constitutional guarantees of natural justice and human rights are protected by the non-state justice system. The rules of natural justice, which underpin the right to a fair hearing that is included in many constitutions and is embodied in Article 14 of the *International Covenant on Civil and Political Rights*, require that people exercising judicial power should be seen to be impartial and without a personal interest in the outcome, and also that a person is present at the hearing of the matter. Some features of some non-state justice systems can compromise these principles—for example, by having as judges people who are related in some way to the parties.

Such concerns can, however, be managed. First of all, there should be an inquiry into what sort of constitutional breaches are likely to occur, based on empirical evidence rather than non-factually based assumptions, and then mechanisms developed that can manage these in the least intrusive way possible. Thus, the Australian Law Reform Commission has said: 'It cannot be argued that the establishment of local "traditional courts" or similar mechanisms will necessarily involve breach of the Convention [*International Covenant on Civil and Political Rights*] standards, provided appropriate procedural safeguards are established.'<sup>100</sup>

One procedural mechanism that can be used, and has been used in the South African Traditional Courts and also in the Samoan village *fonos*, is that of appeal. The European Court of Human Rights has held that procedural or other defects at first instance can be cured on appeal.<sup>101</sup> This approach has also been suggested by the New Zealand Law Reform Commission, which argues, 'The principles of natural justice may be maintained, however, through adequate appeal rights, in the case of those community justice bodies now provided for by statute.'<sup>102</sup> When considering the types of appeals possible, it suggests that the courts could adopt a policy of not overturning non-state justice system outcomes without good reason, and where these exist the court may go further and suggest guidelines to prevent further prejudice in future. The courts may also consider referring the matter back to the non-state justice system for reconsideration.<sup>103</sup> It in fact concludes that '[u]ltimately, the recognition of community justice bodies may best advance the constitutional objectives of respecting both human rights and the inherited wisdom of the Pacific'.<sup>104</sup>

Among the questions states considering such a model would need to think about are:

- Will the State enforce the orders of the non-state justice system in terms of punishments and in terms of orders to attend hearings? If so, how? By state authorities? Or will it give immunity to officials of the non-state justice system in the usage of reasonable force? Or assist in establishing a special police force for the non-state justice system?<sup>105</sup> Or should the parties have to sign an agreement that they will abide by the decision of the chiefs at the end of the meeting?
- How many layers of non-state justice system courts should there be?
- Should there be a non-state justice court of appeal or should a state court be the appeal court? On what grounds could there be an appeal?
- To what extent should the composition of non-state justice system courts be regulated by the State?
- Should the State mandate that women also serve judicial roles in the non-state justice system courts?
- When a party is outside the non-state justice system (for example, from a different custom area), what procedures should apply?

**Table 7.6**

Significant features	<ul style="list-style-type: none"> <li>• State formally recognises validity of the exercise of jurisdiction by non-state justice system.</li> <li>• State lends its coercive powers to the non-state justice system.</li> <li>• Clear linkages and pathways for the transfer of cases between systems.</li> <li>• Non-state justice system free to apply its own norms and procedures.</li> </ul>
Advantages	<ul style="list-style-type: none"> <li>• Balances state support for the non-state justice system in terms of resources and enforcement; the need for the non-state justice system to operate within the values underlying the constitutional framework of the State; and the desire to maintain the non-state justice system in as unchanged a form as possible so as to preserve their various advantages.</li> <li>• Pathways can be instituted to avoid double jeopardy and duplication/waste of resources.</li> <li>• Forum shopping is limited.</li> </ul>
Disadvantages	<ul style="list-style-type: none"> <li>• The non-state justice system aligns itself very closely with the State and thus fundamentally alters the basis on which it gains its power and legitimacy.</li> <li>• As the chiefs are no longer dependent on the community for support, they might be less inclined to look after their community and thus become less accountable at a local level than if they need to continually maintain their community's support.</li> <li>• The State would have to expend resources on the non-state justice system.</li> <li>• Might require traditional leaders to administer state laws, which they might not be equipped to do.</li> <li>• Limits space for innovation for the non-state justice system.</li> <li>• There might be a lack of political will to introduce such a model.</li> </ul>
Circumstances in which the model should be considered	Where the non-state justice system requires assistance from the State in terms of enforcement of orders and where some degree of regulation from the State would better ensure human rights are not being breached, and limits can be placed on the power of the State in its regulation of the non-state justice system.

- What should be the jurisdiction of the non-state justice system? How should it be determined? By agreement between parties? By limits set by regulations? Should one or either party be able to opt out of the jurisdiction of the non-state justice system?
- Should the non-state justice system be given jurisdiction over state crimes as well as customary offences?
- If criminal jurisdiction is given, what should be the rules about which non-state justice system court has jurisdiction (that is, should it be where the crime is committed)?
- Should any particular procedural requirements be mandated by the State—for example, the right of women and youth to have a voice?
- What rules, if any, should there be about the making of notes of proceedings and the keeping of such records?
- Should legal or other representation be allowed?
- Should there be any limitations on the types of orders that can be made?
- Should there be fixed fees the non-state justice system can charge? If so, should there be rules about what can happen to these funds?
- Should the members of the courts be paid?
- What safeguards should be created to guard against abuse of power in the non-state justice system?
- Should there be supervision of the non-state justice system? If so, by whom—magistrates or a special body?

- Should there be a special office, such as a secretariat, created to manage the non-state justice system and its relationship with the state system?

## Model 7: Complete incorporation of the non-state justice system by the State

The last model involves incorporating the non-state justice system entirely into the state system by ‘bureaucratising and “civilising” [it and] embracing [it] as the lowest tier into the family of courts under the Constitution’.<sup>106</sup> This model has been adopted in some African countries—for example, Botswana<sup>107</sup> and Nigeria.<sup>108</sup> It is also very similar to the chiefs’ courts or customary courts in countries where the policy of indirect rule was used during colonial times.<sup>109</sup> This model is in many ways very close to the ‘hybrid’ structures of Village Courts discussed below, but is different in principle, even if not in practice, because the idea is to draw the non-state justice system into the state system, rather than to create a new hybrid system from the start.<sup>110</sup> Of course, the various regulations the State may impose on a non-state justice system as part of the incorporation might mean that in practice it ends up looking just as much a hybrid system as one that has been crafted as such initially. It is also similar to Model 6, but differs from it in that the non-state justice system is conceived as part of the state system, uses state norms and procedures and has little room to develop itself organically. This demonstrates that the intention and philosophy behind a reform agenda can often be just as important as the substantive content.

In Botswana, the two highest levels of customary courts were incorporated into the state system during the colonial period through a long process that began in 1934.<sup>111</sup> Today, the relationship between the two systems is governed by the *Customary Courts Act*, which allows a chief to submit to the minister a recommendation for the recognition, establishment or variation in jurisdiction of customary courts within his area (Section 7[1]). The minister may then recognise or establish the court and define its jurisdiction, prescribe the constitution of the court and the powers of the members of the court (Sections 7[2], 8). Through the act and the rules made under the act, the customary courts are very significantly controlled by the State. The courts are required to use state law rather than customary law in the area of criminal law, as Section 12(6) provides that ‘no person shall be charged with a criminal offence unless such offence is created by the Penal Code or some other law’. An example of the consequences of this is the case of *Bimbo vs State*, in which the accused was convicted of adultery by a customary court, however, the High Court quashed the conviction on the grounds that adultery was not an offence created by the Penal Code or other written law.<sup>112</sup> Further, customary courts are required to follow the provisions of the *Customary Courts (Procedure) Rules* in criminal cases, meaning that even their procedural flexibility is curtailed (Section 21). The courts are, however, given considerable power, including the power to compel

attendance (Section 29), to imprison and even to impose corporal punishment (Section 18).

The relationship between the two systems on an institutional level is very close. The act provides for appeals to the state courts from the customary courts (Section 42) as well as supervisory provisions (by chiefs) (Section 40) and 'revisory' provisions by magistrates (Section 39). There are also complex transferral procedures between the two different sorts of courts (Section 37). Griffiths comments that the closeness of the two courts is not merely determined by these institutional links, however, but that '[t]he personnel themselves view their role and that of their institution as part of a larger whole, an overall system in which these institutions have their place'.<sup>113</sup> There is even some suggestion of a real change of personnel within the two systems. For example, Schärf reports that although the Customary Court of Appeal is in theory staffed by chiefs, in practice, it is sometimes staffed by non-chiefly bureaucrats.<sup>114</sup>

The significant advantage of this model is that it allows, indeed fosters, a cross-fertilisation of ideas and procedures between the two systems. Schärf notes that 'the literature reveals an active dialogue between customary courts and magistrates' courts and equally that in this situation neither legal system remains pure.<sup>115</sup> In other words customary law is increasingly incorporating aspects of general law and vice-versa.' Griffiths similarly finds that it is no longer possible in Botswana to see the customary system as 'representing something "other" than state justice, as more egalitarian and from which considerations of power and status [are] absent', but also that neither can the Magistrate's Court be seen as 'representing an inaccessible and inflexible rule based system of justice'.<sup>116</sup> (A negative consequence of this, as Griffiths points out, is that women might not be able to rely on the state system for equality and neutrality, but might find that there, too, 'gender cuts across social and economic divisions...to place women generally at a disadvantage when it comes to negotiating their status with men'.)<sup>117</sup> Some of the other advantages of this model are that it brings non-state justice systems into conformity with state constitutions, it provides enforcement mechanisms for the non-state justice system, it makes non-state justice system officials more accountable and it prevents there being two or more conflicting systems of justice in operation. Schärf concludes that '[b]oth warranting and recognizing customary courts appears to have reduced the worst excesses of such courts'.<sup>118</sup>

There are, however, also a number of disadvantages with the model. First, it has been argued that the dominance of the State undermines the non-state justice system. Otlhogile states that '[a]lthough the relationship between these two legal regimes could have been mutually enriching, the inevitable precedence of general law over customary law has served to undercut the legal and moral authority of both institutions'.<sup>119</sup> Schärf similarly comments that the magistrates can and

do overturn the judgment of chiefs and thereby undermine the influence of chiefs and headmen.<sup>120</sup> Elechi states that in Nigeria the Customary Courts

are accused of being unnecessarily formal and rigid, employing a coercive rather than a persuasive approach. Even though the Customary Courts are staffed by indigenous people, they are employed by and are accountable to the central government. The delivery of justice in the customary courts is hampered by a bureaucratic structure and corruption.<sup>121</sup>

Penal Reform International similarly argues that the experience of many African countries in incorporating existing non-state justice systems into the state system has tended to undermine the positive attributes of the informal system, noting:

The voluntary nature of the process is undermined by the presence of state coercion. As a result, the courts no longer rely on social sanctions and public participation loses its primary importance. At the same time, decisions which do not conform to procedural requirements, or which deviate from the strict law in the interests of reconciliation may be reviewed and overturned on appeal to the higher courts. Procedural requirements invariably become greater and public participation is curtailed.<sup>122</sup>

A more optimistic picture is provided by Fombad, who argues that '[a]lthough process-wise and even rule-wise, today's customary law may not always correspond exactly with that of the pre-colonial past...value-wise, it has retained its distinctive communal nature'.<sup>123</sup>

Boko discusses another problem with this model.<sup>124</sup> He points out that although judges in the customary courts are untrained, and some are barely literate, they are nevertheless expected to interpret and apply provisions of written penal laws, none of which has been translated into the vernacular. These courts can sentence people to custodial sentences of more than five years. He argues:

The only feature of the customary courts which endears them to the government is that they dispose of their cases quickly and swiftly. But the quality of the justice they dispense is highly questionable. Perhaps it is time note was taken that justice rushed may also be justice denied.<sup>125</sup>

This is of significant concern, especially given Fombad's observation that in some towns almost 75 per cent of those in prison are serving sentences handed down in customary courts.<sup>126</sup>

A final problem is that in the context of existing local power struggles, such as between traditional elites and commoners, state incorporation of traditional chiefly tribunals might give a considerable advantage to one side.<sup>127</sup>

The sorts of questions that a state considering such a model would need to consider are similar to the ones discussed for Model 6 above. If this model were considered in a three-systems jurisdiction, the State could either incorporate both non-state justice systems, on similar or different bases, or incorporate one and develop a different relationship with the other. In the former case, there would be additional questions concerning pathways between the two non-state justice systems. In the latter case, the non-state justice system that had been incorporated would need to develop a relationship with the other non-state justice system in line with the relationship the State had adopted, as it would be almost entirely under the control of the State.

**Table 7.7**

Significant features	<ul style="list-style-type: none"> <li>• Incorporation of non-state justice system into state system.</li> <li>• Non-state justice system follows state procedural and substantive laws.</li> </ul>
Advantages	<ul style="list-style-type: none"> <li>• Fosters a cross-fertilisation of ideas and procedures between the two systems.</li> <li>• It brings the non-state justice systems into conformity with state constitutions.</li> <li>• It provides enforcement mechanisms for the non-state justice system.</li> <li>• It makes the non-state justice system officials more accountable.</li> <li>• It prevents there being two conflicting systems of justice in operation, which alleviates the problems of undermining, double jeopardy and forum shopping.</li> </ul>
Disadvantages	<ul style="list-style-type: none"> <li>• State has to invest considerable resources.</li> <li>• Untrained judicial officers are required to administer state legislation.</li> <li>• Traditional leaders might feel they are being dominated by the state system and refuse to cooperate.</li> <li>• Many of the advantages, such as informality and flexibility, of the non-state justice system would be reduced.</li> <li>• Changes the basis on which the non-state justice system wins its legitimacy and support.</li> <li>• Payment of people involved in the non-state justice system could lead to jealousy, division and corruption in the non-state justice system.</li> <li>• Could stifle the dynamism of the non-state justice system.</li> <li>• Problem of 'creeping procedural formalism'.</li> <li>• Could make the non-state justice system less accessible to the public.</li> <li>• There could still be 'non-state' non-state justice systems competing with and undermining the 'state' non-state justice systems.</li> <li>• The basic principles of decision making of the non-state justice system are likely to be substantially modified.</li> </ul>
Circumstances in which the model should be considered	Where the non-state justice system has already adopted many features of the state system and has lost its traditional basis of legitimacy (for example, by being used by colonial governments in a system of native rule such as in many African countries) <sup>128</sup> and there is a need for more grassroots courts.

## Mutual adaptations/innovations by state and non-state systems

This section examines a number of reforms that can be made to state and non-state systems to help to strengthen the links between them and to enable them to work in a more supportive relationship with one another. In addition, these changes could also improve each system, as each would be learning from, and adapting, positive aspects of the other system(s).<sup>129</sup> This kind of two-way dynamic process might be one of the best ways of allowing the systems to deal more successfully with new and existing challenges. Most of these changes could be made within any of the models of relationships, although a few are not so flexible.

The changes discussed in this section are considered in the context of a state and a non-state customary justice system. If the non-state justice system under consideration is not a customary justice system but another type of legal order (for example, one based on religion), different adaptations/innovations might be necessary. The general approach proposed, however—to mirror the changes made by each so that they grow towards each other and learn from each other—remains applicable.

**Table 7.8: Summary of mutual adaptation possibilities by state and customary justice systems**

Areas of mutual adaptation	State	Customary justice system
Mutual learning	Learn about the customary justice system’s institutions, principles and procedures.	Learn about the state justice system’s institutions, principles and procedures.
Sharing of procedures	Use of more customary procedures in state courts—for example, by creating hybrid institutions such as Village Courts in Papua New Guinea.	Consideration of the utility of introducing good management initiatives from the state system.
	Adoption of a less adversarial approach.	Awareness programs about different types of decision-making procedures, especially in areas where there is domination by traditional leaders.
	Reform the laws of evidence to make them less complex and more culturally relevant.	Learn about the State’s rules of evidence that might be useful.
Sharing of substantive laws/principles	Use of substantive customary law in state courts—for example, mandating its use, as in Papua New Guinea.	Use of human rights principles from the state system.
Use of key players/institutions from the other system(s)	Use of chiefs/traditional leaders in state courts.	Use of state officials by the customary justice system.
	Referral of issues/cases to the customary justice system.	Referral of cases to the state system.
	Involve traditional leaders in judicial appointments committees (might not exist in some/all state systems—for example, where the appointments are the prerogative of the Executive).	Involve a member of the state judiciary in highest levels of the customary system, either by involvement in appointments or as a member.

One of the major challenges in this area is identifying *how* change can be brought about in customary justice systems, especially in those with a decentralised administration and limited resources. Woodman has highlighted this issue, noting that ‘[a]lmost every set of development proposals and even general discussions of development assume that the type of activity that potentially can assist development is action by or within the institutions of the state’.<sup>130</sup> Given the practical realities surrounding most customary justice systems, apart from programs generated within the customary justice system itself (that are likely to be restricted in scope due to funding and organisational limitations), it is likely the State will be involved to an extent in any reform program.<sup>131</sup> The challenge is therefore to limit the opportunity for the State to dominate the reform agenda. One possible way to achieve this is to establish an office with specific responsibility for assisting customary justice systems with reform

initiatives, with as much control as possible over the office given to the customary justice system. Such an office might also ensure that much of the empowerment of the customary justice system occurs at local levels outside the State, with local leaders given control over the priorities and directions of reform.

The four areas of adaptation that should be considered are set out in Table 7.8. It must be highlighted that what is presented are merely suggestions and their main use is in exposing the range of possibilities available. Depending on the particular situation of the customary justice system, some might not be helpful.

## Mutual learning

One of the easiest, but most important steps for the two systems to work together well is for each to have a sound understanding of the other. Such an approach was supported by an Australian Law Reform Commission report in 1986 that recommended that judges, lawyers and others involved in criminal justice all needed better information and education about Aboriginal customary laws, noting that '[m]uch can be achieved towards the recognition of Aboriginal customary laws and satisfying Aboriginal demands in this regard by simple administrative measures of this kind'.<sup>132</sup> Similar comments were made at a workshop conducted by the New Zealand Law Reform Commission on Custom and Human Rights in the Pacific, at which some participants observed that rather than having more *supervision* of community justice mechanisms by formal courts and central government, what was needed was greater *respect, understanding and collaboration* between the different systems.<sup>133</sup>

Just as there is an obligation on the State to understand more about the customary justice system, it is important for those in the customary justice system to understand the approach and procedures of the state system. At the Vanuatu Judiciary Conference in 2006, one of the important points to emerge was that many chiefs were not aware of the mechanisms that currently existed for the two systems to work together, such as the power given to courts to take into account customary compensation when sentencing.<sup>134</sup> Many were pleased to discover that this procedure existed, as it made them feel that the *kastom* system was given more importance by the State than they had previously thought. Following from this, one of the major ways identified to move the relationship between the two systems forward was thus that the Malvatumauri should 'ensure that the chiefs are provided with more training and awareness about the existing state legal structure and laws'.<sup>135</sup> This learning could be facilitated through workshops, conferences and training programs and also through indirect means such as through the use of assessors, as discussed below. It might also be a useful idea to have certain people trained as 'justice advocates' who can act as resources for their fellow community members about the state system.

## Sharing of procedures

### Changes the state system could make to its procedures

#### Creation of hybrid institutions

The first reform that the state system can make on a procedural level to bridge the gap between it and the customary justice system is to create a lower level of courts or dispute-resolution scheme modelled to a degree on the customary justice system. These schemes have the potential to deliver many of the same benefits of a customary justice system, as they are based on tradition, are far less costly than the state courts and generally much quicker as well. They also tend to be more informal than higher courts, are staffed by judicial officers with no formal training in law, may exclude lawyers and employ a less-adversarial approach. Importantly, however, these schemes are really state institutions as they are created by statute and have their parameters set by statute. Examples of such schemes are the Village Courts in Papua New Guinea, local courts in Solomon Islands, the Island Courts and Customary Land Tribunals in Vanuatu and the Barangay Justice System in the Philippines.<sup>136</sup>

There are two main areas of concern with the workings of such hybrid schemes. The first is that they are susceptible to domination by local 'big-men' and can in fact perpetuate power imbalances, such as those between women, youth and men. For example, Dinnen argues that the PNG Village Courts 'reinforce the subordination of women by condoning "domestic" violence and other abuses, and regularly exceed their powers'.<sup>137</sup> He concludes:

The broader policy challenge is how to avoid the capture of such institutions by sectional interests [or indeed domination by power inequalities] while allowing them to remain responsive to local circumstances. Part of the institutional solution in the case of the village courts is to ensure effective supervision as provided for under their enabling legislation.<sup>138</sup>

It should be noted that the view that women are not given a voice in PNG Village Courts has recently been challenged by Goddard, who argues that the literature that espouses this view is not based on rigorous research 'but by an *a priori* position that the male-dominated courts necessarily impose indigenous patriarchal forms of social control'.<sup>139</sup> He states that he 'remain[s] unconvinced that women are not generally confident and reasonably successful users of the village courts'.<sup>140</sup>

A second problem is that there is often a 'creeping formalism' in such courts. For example, Goddard notes that although the court magistrates in Papua New Guinea are elected based on their status as customary experts, in fact they rigidly apply, and are constrained by, state law as well as procedures.<sup>141</sup> It is also often

the case that, although such courts are mandated to apply customary law and employ customary processes, in reality they may choose not to do so or, as with the Island Courts in Vanuatu, might not be able to due to the limits of their warrant.<sup>142</sup> Concerns such as these led the Law Reform Commission of Western Australia to consciously reject the creation of hybrid institutions. It concluded that 'an attempt to create an Aboriginal-controlled court which is partly based on Aboriginal customary law and partly based on general legal principles is fraught with difficulty'.<sup>143</sup>

A variation on village courts has been proposed recently to the Fijian Law Reform Commission. The proposal is essentially to allow villages to make their own by-laws and for these to be administered by magistrates who will sit frequently in the provinces. These courts would be conducted in local languages and the magistrates would have flexibility in dispensing justice, particularly with regard to alternatives to custodial sentences.<sup>144</sup> A similar scheme exists in Western Australia under the *Aboriginal Communities Act 1979* (WA), whereby certain approved Aboriginal communities can make by-laws controlling behaviour on their community lands that are enforced by the police and Magistrates' Courts.

There are, however, some concerns about the viability of such by-law schemes. In its review of the WA scheme, the Law Reform Commission of Western Australia found many problems, including issues with enforcement (police had the responsibility for enforcing the by-laws but were often not present in the communities), the fact that the by-laws did not reflect Aboriginal customary law and the fact that they were not necessarily controlled by traditional authority structures. It concluded that '[t]he by-law scheme...has done little to improve the justice-related outcomes for Aboriginal people or to allow Aboriginal people to practice customary law'.<sup>145</sup> It also noted that 'what commenced as a consultation process with consideration to the application and process of traditional law within the communities, resulted in a process, application and interpretation of rules and regulations based entirely on [the state] laws and legal system'.<sup>146</sup>

### **Adoption of a less adversarial approach**

Many aspects of customary justice systems are far closer to the procedures and approaches of the inquisitorial system used in many civil law countries than the adversarial approach used in common law countries. The key characteristic of such an approach is that the judge or magistrate has far greater control over the course of the proceedings and does not rely on the parties to bring arguments and evidence before them. It could therefore be helpful for state systems in common law countries to move towards the adoption of some aspects of the inquisitorial approach, such as greater judicial control, less emphasis on the role of lawyers and less complicated procedural rules. While a complete reform of the state system is probably unrealistic, an incremental approach could be

adopted, whereby when a particular aspect of the state system needs to be changed (for example, new rules of civil or criminal procedure need to be drafted) then consideration can be given to how a more inquisitorial approach can be adopted.<sup>147</sup>

### **Reform the laws of evidence**

A third change that could be considered is to reform the laws of evidence to make them less complex and more culturally relevant. The laws of evidence are confusing and frustrating even for those trained in the common law, and for those participants used to a customary justice system they often appear to be arbitrary and unfair. In Vanuatu, the rules that seem to cause the most concern are those preventing the court from looking at material that is not relevant (compared with the holistic approach taken in most customary justice systems) and the rules requiring corroboration. In many of the hybrid courts discussed above, there are provisions allowing for the rules of evidence to be largely overlooked.<sup>148</sup> Again, it is not suggested that the entire system of evidence needs to be reformed, but that consideration is given to which rules of evidence really serve a relevant purpose in today's courts, rather than merely being a historical relic. For example, in Vanuatu, the common law rules of evidence that were developed largely in the English context of trial by jury still apply even though there are no juries in Vanuatu. This reform also involves learning from the simpler approaches to the laws of evidence from civil law jurisdictions.

## **Changes the customary justice system could make to its procedures**

### **Introduction of good management initiatives**

There are a number of good management initiatives that customary justice systems can consider adopting, including the introduction of record and account keeping, training in the management of meetings and the writing down of oral laws.<sup>149</sup>

The benefits of record keeping for a customary justice system are that it helps to ensure consistency of decisions and also might be needed during appeals or reviews by overseeing courts in jurisdictions where there is partial or complete integration. In designing a record-keeping system, one donor organisation advises that it is important 'to identify what the recorded information will be used for, how the system will be maintained and what linkages with the formal system are envisaged'.<sup>150</sup> The benefits of record keeping are shown by the situation in Bangladesh, where some NGOs have started working with the traditional customary justice system, known as *shalish*, to facilitate its use, but also to modify some aspects. The research has shown that the introduction of basic record keeping so that agreements and other key proceedings are documented, together with other factors,<sup>151</sup> have made this the most effective form of *shalish*

in delivering a degree of justice and alleviating poverty.<sup>152</sup> An associated reform is training in account keeping, especially for customary justice systems that use monetary penalties and charge fees to hear cases.

In regard to meeting-management training, it has been noted that many of the benefits of the customary justice system stem from its holistic approach and ability to include the entire community in the process. One of the challenges that customary justice systems might face in the future, however, is a lessening of the tolerance of community members for long, drawn-out and repetitive cases or meetings. This is likely to be especially the case in peri-urban and urban areas where community members have work or other commitments they also need to attend to. This suggests that if customary justice systems wish to remain relevant and respected by their communities they might need to consider training in more effective means of time management and keeping cases 'on track'. Such reforms will also be useful in developing linkages with the state system as the State will be more likely to enter into relations with systems that use time and resources efficiently. The challenge, of course, will be to find a balance between these aims and the need to keep the courts open to community participation and holistic in nature.

A final reform to be considered is the recording of substantive customary laws. This is a controversial reform, which was pursued by many colonial governments, but more recently has been criticised on the basis that codifying custom effectively 'freezes' it, thus losing its dynamism and flexibility.<sup>153</sup> Such moves also risk customary law starting to be used more as state law, rather than as principles that are applied in regard to the context of a particular situation. As discussed in Chapter 4, however, in Vanuatu, it is the chiefs themselves who are leading the movement to write down their laws in an attempt to give them greater legitimacy and permanency in response to the challenges of educated youth and the threats of an increasingly mobile and disparate community. This suggests that the recording of customary laws might be a useful exercise in itself, especially for communities in which their customary law is under threat from the state system, as it will promote community discussion and involvement in the customary justice system. Further, the problems of 'freezing' customary law by writing it down are not as great as first appear: first, it is largely the customary justice system that will be using it, and not the courts, so it is not likely to be used in as rigid a way as it would by those who come from a state law background; and second, there is no reason why written customary law cannot be amended when necessary just as written state law is. The New Zealand Law Reform Commission offers another way around this potential problem with its suggestion of codifying customary *values* rather than customary *law*.<sup>154</sup>

### **Awareness programs about different types of decision-making procedures**

Another possibility is awareness raising for leaders of customary justice systems about different types of decision-making procedures, with particular focus on those involving a more participatory and conciliatory approach. This could involve learning about approaches developed by the state system, such as mediation and arbitration, but also could involve learning about the ways that other customary justice systems, or parts thereof, make decisions. For example, in those areas of Vanuatu where the decision-making style is very chief dominated, such as in North Pentecost, there could be a program whereby chiefs from more southern areas (where there is a more mediation-style of decision making) come to provide information and training.

### **Learn about the rules of evidence**

While it is noted above that many rules of evidence might be due to historical factors and do not serve an important purpose in the court systems today, it is also true that many rules are useful. It is likely that, as has happened in Vanuatu, the influence of the state system has meant that many customary justice systems are starting to face pressure from communities to incorporate concepts such as proof in their determination of cases. In countries where this occurs, it might be useful for customary justice systems to learn about the basic rules of evidence that might be helpful, such as the rules against leading questions and hearsay.

## **Sharing of substantive laws/principles**

### **Use of substantive customary law by state courts**

The focus of this study has been largely on institutions and processes rather than substantive law, but this should not be taken to mean that substantive law is not important as well. Many countries recognise that it is important for state courts to use substantive customary laws in their decision making, but the implementation of this has proven to be difficult in practice. Some countries such as Vanuatu and Solomon Islands have provisions in their constitutions stating that customary law is a source of law. There has, however, not been consideration of how the courts are to go about treating customary law and, as a result, it is not often used.<sup>155</sup> A number of countries have gone further than this and attempted to deal with this question through legislation, such as: the PNG *Customs Recognition Act 1963*,<sup>156</sup> the PNG *Underlying Law Act 2000* (which imposes on legal counsel an obligation to plead custom where it is relevant),<sup>157</sup> the Solomon Islands *Customs Recognition Act*<sup>158</sup> and the Australian draft *Aboriginal Customary Laws (Recognition) Act 1986* (which has never been implemented).<sup>159</sup>

It does not appear that any of these pieces of legislation have been particularly successful, although some developments in the *Underlying Law Act*, such as

treating custom as law instead of fact—allowing courts to declare customary law by judicial notice and providing guidelines for choosing which customary law to apply to particular proceedings—have been favourably commented on.<sup>160</sup> The most significant problem, as pointed out by Corrin Care and Zorn is that the *Underlying Law Act* still leaves the recognition of custom essentially to counsel and the courts, which, given the common law bias of the judiciary, could mean that the mandate to use custom remains unfulfilled.<sup>161</sup>

These reflections suggest that, in addition to such legislation, the knowledge and the will of all the judges and lawyers involved with the system are needed to bring such ideals into practice. Combining some of the methods suggested in this section might be a way of creating such knowledge and will. A final suggestion, made by the New Zealand Law Reform Commission, is for a country to ‘develop non-prescriptive custom law commentaries to give judges, officials and others insight into the nature of the custom law(s) operating in its territory’.<sup>162</sup>

## Use of human rights principles

Human rights law is an area where the customary justice system could learn a great deal from the state system, in particular in relation to principles of natural justice. Although there has been a considerable literature written on the supposed ‘conflict’ between human rights and custom,<sup>163</sup> a recent study by the New Zealand Law Reform Commission has found that this conflict has been exaggerated, stating:

[T]he human rights framework’s focus on individual rights is said to be in conflict with the customary focus on the individual’s duties to the group. However, human rights are also concerned with groups. In addition, with every right there is a duty and with every duty a right. Whether more stress is given to one or the other depends on the problem in question.<sup>164</sup>

It recommends that a harmonising approach be adopted when dealing with human rights and custom. Such an approach draws on the values of custom *and* human rights to enhance custom and advance the application of human rights. This harmonising approach could usefully be adopted in areas where there is likely to be some disparity between the approaches of the customary justice system and the state system, such as issues concerned with:

- tensions between individual rights and community interests—for example, freedom of religion and freedom of movement
- fair process and bias, partiality and conflict of interest
- punishment—for example, banishment
- women, young people and other vulnerable groups.

Ibhawoh similarly advocates giving cultural communities within the state some latitude over how to put human rights into practice.<sup>165</sup> She suggests that one approach that has worked in some African countries to help achieve this congruence is to involve the community in advocacy, information, education, legislation and policy formation.<sup>166</sup> She also argues that the dialogue about human rights should be a two-way process, because ‘a complementarity if not an absolute congruence of state laws and cultural norms is required if national human rights regimes are to gain grassroots acceptance’.<sup>167</sup> Faundez also observes:

It is not necessary to adhere to any form of moral relativism to realise that it is often impossible, unwise and even counter-productive to attempt to remedy at once all the human rights shortcomings of the non-state justice systems. It must also be borne in mind that many non-state justice systems come into existence precisely because the official legal system tramples or ignores the rights of members of remote or marginal communities.<sup>168</sup>

Bringing these ideas together, it is suggested that customary justice systems investigate developing a dialogue with the State over human rights standards and develop training programs in human rights that draw on customary principles, and also take into account *why* customary justice systems operate in certain ways, given cultural, political, institutional, economic or security constraints.<sup>169</sup> It must be acknowledged, of course, that it might be difficult to identify who exactly will be the actors to do this and how it can be done given the problems in some societies of determining who is entitled to speak on behalf of customary systems. A national customary organisation—for example, the Malvatumauri in Vanuatu—is one such institution that could be used to coordinate such a dialogue.

Another way for customary justice systems to develop human rights is through the creation and dissemination of handbooks for customary justice system officials that clearly state what types of standards should be applied. For example, the PNG *Village Courts Handbook* contains information for Village Court officials such as, ‘[i]t is the new custom of all people in Papua New Guinea that women have the same rights as men. No one can argue with this’ and ‘[w]hen dealing with disputes involving children such as a custody matter, custom cannot be applied if the result will not be [in] the best interests of the child’.<sup>170</sup>

A final way to improve the compliance with human rights standards for customary justice systems is to introduce positive measures to ensure greater participation by women in the customary justice system, as decision makers and, where appropriate, as lay advocates or customary law advisers.<sup>171</sup>

## Use of key players/institutions from the other system

### Use by the state system

#### Use of chiefs/traditional leaders in state courts

A further measure to strengthen the linkages between the two systems is the adoption of a system of assessors in the state courts. The role of assessors would be to sit with state court judges and assist them to reach a decision on the facts in the cases that come before them, or else to help the judge in accessing and understanding customary law.<sup>172</sup> The assessors could be leaders of the customary justice system and would thus be able to act as an important bridge between the two systems as they would pass knowledge about the substance and processes of each system back and forth. For example, the position of assessors was included in the new judicial system of Bougainville in order to assist formal courts to understand *kastom* and customary practices.<sup>173</sup> Assessors could be used just for sentencing or for a determination of guilt in criminal cases. Other areas of law where they would be particularly useful are family law and land cases. Consideration would need to be given to what sorts of powers the assessors have (advisory only or with a power of veto)<sup>174</sup> and who should be the assessors for particular cases. This latter question is particularly vexed in countries where there is a great deal of diversity in custom throughout the jurisdiction. Decisions need to be made about where the balance should be found between ensuring the assessors are familiar with the relevant customary practices and ensuring that there is not a problem of perceived bias or conflict of interest.

Another adaptation that would use traditional leaders is the development by state courts of restorative justice initiatives, such as circle sentencing programs, which draw on customary ideas of reconciliation rather than retribution.<sup>175</sup> These courts might include members of indigenous groups to advise magistrates on sentencing options, and the aims might include involving the community as much as possible in the court process and using the courts as the gateway to treatment for the offender.<sup>176</sup> For example, in Australia, various states and territories have introduced their own 'Aboriginal courts', although it should be noted that these courts 'operate within the boundaries of the Australian legal system and in no case does an Aboriginal Elder have authority in the Australian legal system to decide a case or impose punishment'.<sup>177</sup> Examples are the Koori Court in Victoria, the Murri Court in Brisbane, the Nunga Court in South Australia, Circle Sentencing in New South Wales,<sup>178</sup> the Ngambra Court in the Australian Capital Territory and the Darwin Community Court in the Northern Territory.<sup>179</sup> The key features of these courts are that they use informal procedures and communication, involve Aboriginal elders in the sentencing process (although only in Queensland are magistrates obliged to consider what these elders have to say)<sup>180</sup> and they allow all parties to speak about the crime

and approach the issue of sentencing, taking a holistic account of the offender's circumstances. Appraising the effectiveness of these courts, the Law Reform Commission of Western Australia states: 'While it is still too early to judge the success of Aboriginal courts, especially in terms of recidivism, there are positive signs that these courts have achieved significant gains in terms of justice outcomes for Aboriginal people.'<sup>181</sup>

A review of the NSW Circle Sentencing program found that it had considerable advantages, including breaking the cycle of recidivism, promoting healing and reconciliation and reducing the barriers between the courts and Aboriginal communities.<sup>182</sup>

Finally, other ways such key players could be used are as expert witnesses who would come to court to provide evidence about customary law or by customary institutions providing *amicus curiae* briefs to the court.<sup>183</sup>

#### Referral of issues/cases to customary justice systems

It might be possible to explore avenues for referring cases or parts of cases to the customary justice system for matters such as mediation and conciliation, for advice on a point of customary law<sup>184</sup> or even for diversion before a case gets to court.<sup>185</sup> Such proposals could be considered along with the adoption of a policy of 'judicial deference' proposed by the New Zealand Law Reform Commission.<sup>186</sup> This involves state judges respecting and deferring to the specialist skills and local knowledge of customary justice systems. In many respects, such involvement is likely to be far less controversial and political than the relinquishing of absolute control over judicial power. The Australian Law Reform Commission has noted that proposals that 'focus on mediation and conciliation and a greater voice for Aborigines in the existing criminal justice system pose fewer problems of implementation than proposals for "Aboriginal courts"'.<sup>187</sup>

#### Involve traditional leaders in judicial appointment committees

The idea of involving traditional leaders in judicial appointment committees comes from Bougainville, where the new constitution provides that a traditional chief or other leader should be included in the membership of such a committee.<sup>188</sup> In addition, it provides that one consideration the committee should have when making appointments is the 'extent of a person's knowledge of the Bougainville situation and of Bougainville *Kastom*'.<sup>189</sup> The *Report on the Bougainville Constitution* notes that these provisions 'ensure that the importance of *kastom*, in particular, and its roles in the law and justice system must be kept well and truly in mind when all judicial appointments are being made'.<sup>190</sup>

## Use of key players by the customary justice system

### Use of state assessors, kiaps or state police

During the period of colonialism in Vanuatu and Papua New Guinea, there was a system of assessors and *kiaps*, respectively. The role of these institutions was roughly similar: they involved investing state officials with power in a range of matters, including local dispute resolution, and sending them on regular patrols of rural communities.<sup>191</sup> The *kiap*, for example, could 'link dispute resolution to the provision or withdrawal of various "government" services and facilities. He could persuade and reward, as well as punish. He could address remedies to either individuals or groups.'<sup>192</sup> In relation to the *kiap* system, Dinnen comments that '[i]n practice, if not necessarily by design, kiap justice allowed for a high degree of articulation between formal and informal fields of justice'.<sup>193</sup>

Consideration could be given to developing a similar mechanism today, whereby a person with access to state resources is used by the customary justice system as a bridging point and also a support. Such a person could be in the form of a 'justice advocate', mentioned earlier under 'Mutual learning', a probation officer or even a police officer.

Another way to use state officials is to establish a 'dial-a-judge' (or retired judge) service to assist the administrators of the customary justice system to have a better understanding of how the state system would really operate in a particular case. The rationale for this is that if they were able to have regard to what decision a state court would make when faced with similar facts, they might make decisions that are less disparate than they would without such information. This might in turn reduce the likelihood of forum shopping and the associated problems such a practice creates.<sup>194</sup> If a customary justice system decides to make a decision that is very different to what a state court would decide, it would be better for this to be discussed openly, and the reasons for the decision justified, rather than people speculating about it on the basis of what is likely to be inaccurate information.

### Referral of cases to the state system

The customary justice system (as a whole or in different parts) could develop a policy concerning the types of cases it considers the state system should handle and inform the relevant community about the policy and refer such cases to the state courts when they arise. This could be done in conjunction with the relevant officials from the state system. Such a measure would build linkages with the state system, reduce any potential conflicts over the exercise of jurisdiction and assist in dispelling community confusion about which system to put which cases before.

### **Involve a member of the state judiciary in the customary justice system**

The final proposal is to involve a member of the state judiciary in the top levels of the customary system, either as a decision maker (for example, as a special member who could be brought in to deal with certain important cases) or by involvement in decisions regarding the composition of this highest level. For example, in Vanuatu, a member of the judiciary (one with a track record of a respectful dialogue with *kastom*) could be involved at island or provincial levels of the *kastom* system at various times. This would be important on a symbolic level and also would provide considerable opportunity for cross-fertilisation of ideas in the context of specific situations.<sup>195</sup>

### **Conclusion**

The aim of this chapter was to unpick terms such as ‘recognise’ and ‘harmonise’ by exploring in detail as many different types of relationship state and non-state justice systems could have with each other as possible. These were conceptualised as existing along a spectrum of increasing state recognition of the non-state justice system and specific features of their relationship were highlighted. The dimensions of variation that underpin the typology are as follows:

- the extent of repression of a non-state justice system by the State
- the extent of informal support and regulation of a non-state justice system by the State
- the existence and operation of informal relationships between stakeholders in the two systems
- whether there is constitutional recognition of non-state justice systems
- the extent of formal recognition of the exercise of adjudicative power by a non-state justice system, and the exclusivity or otherwise of that jurisdiction
- the extent of formal regulation of a non-state justice system by the State (appeals and supervision)
- the extent to which a non-state justice system is free to follow its own procedures and substantive laws
- the extent to which a state funds a non-state justice system
- the extent to which a state enforces decisions made by a non-state justice system
- the availability and type of appeals from a non-state justice system to the State.

In addition, this chapter developed a range of mutual-adaptation options for states and customary justice systems to assist them to work together in more supportive ways. The main areas identified were:

- mutual learning about the other system’s or systems’ principles, institutions and procedures

- adoption of procedures from the other system(s) to facilitate pathways between the two systems that might offer improvements to the other system(s)
- more use of substantive laws and principles from the other system(s) to improve each system and to lessen any substantive differences between them
- use of key players and institutions from the other system(s) to facilitate mutual learning, aid cross-fertilisation of ideas in the context of specific cases and for symbolic purposes to demonstrate the closeness of the relationship between the two systems.

It has been shown that what is important in this exercise is for both systems to make changes so that the bridge starts to be built on both sides of the river.

Through surveying literature from many different jurisdictions, we found that in the majority of jurisdictions relationships between state and non-state justice systems were not mutually supportive, and even the more 'successful' examples had problems that we identified. These findings suggest that for many jurisdictions what is required is reform of the relationship between the state and non-state justice systems to maximise the chances of the systems cooperating with each other, performing to their fullest potential the tasks for which they are best suited and covering each other's weaknesses with their own strengths. The final chapter of this study proposes a method for a jurisdiction wishing to undertake such reforms, using the typology and mutual-adaptation suggestions developed in this chapter.

## ENDNOTES

<sup>1</sup> For example, Fitzgerald argues that '[t]here is a significant body of literature in Australia around the well-recognised imperative to recognise customary law, and significant disagreement as to what this term means in practice.' Fitzgerald, *The Cape York Justice Study Report*, p. 112.

<sup>2</sup> Blagg, *A New Way of Doing Business?*, p. 340.

<sup>3</sup> Woodman coined these terms, as discussed in Chapter 2 under 'The possibilities and limitations of legal pluralism for Melanesia'.

<sup>4</sup> These countries were: Australia, New Zealand, Samoa, Kiribati, Timor Leste, Vanuatu, Fiji, Papua New Guinea, Solomon Islands, Tuvalu, Tokelau, South Africa, Malawi, Nigeria, Zambia, Mozambique, Lesotho, Botswana, Bangladesh, Philippines, Peru and Colombia.

<sup>5</sup> Blagg reports that this is what many Australian Aboriginal elders reportedly wish to see, and such comments have resonance with those expressed during this study about the wish to 'marry' the two systems. Blagg, *A New Way of Doing Business?*, p. 319.

<sup>6</sup> Oba, Abdulmumini 2004, 'Lawyers, legal education and the Shari'ah courts in Nigeria', *Journal of Legal Pluralism*, vol. 49, p. 113. Another example is in Western Sumatra, where there are *adat* courts, Islamic courts and state courts. See von Benda-Beckmann and von Benda-Beckmann, 'Changing one is changing all'.

<sup>7</sup> Such as international law, EC law and *lex mercatoria*. See, for example, Twining, 'A post-Westphalian conception of law', p. 199; Santos, 'The heterogeneous state and legal pluralism in Mozambique', pp. 50–1. Santos argues elsewhere (*Toward a New Legal Common Sense*, p. 92) that we are now entering the third phase of legal pluralism that is concerned with 'suprastate, global legal orders coexisting in the world system with both state and infrastate legal orders'. See also Tamanaha, *Understanding legal pluralism*, p. 39.

<sup>8</sup> Although during the time of the Condominium in Vanuatu there were two *state* systems—the English and the French—this situation was so particular that no consideration will be given to the possibility of two state systems existing in a particular jurisdiction.

- <sup>9</sup> Bouman, 'A note on chiefly and national policing in Botswana', p. 289.
- <sup>10</sup> Tamanaha, *Understanding legal pluralism*, p. 52.
- <sup>11</sup> Chanock, 'Customary law, sustainable development and the failing state', p. 366.
- <sup>12</sup> Santos, *Toward a New Legal Common Sense*, p. 94.
- <sup>13</sup> See the discussion concerning this issue in Chapter 2 under 'Theoretical issues'.
- <sup>14</sup> Tamanaha (*Understanding legal pluralism*, p. 62) argues, '[O]fficial state legal systems, at least those that function well, have a distinctive instrumental capacity that enables them to be utilized to engage in a broad (potentially unlimited) range of possible activities.'
- <sup>15</sup> Golub, Stephen 2003, Non-state justice systems in Bangladesh and the Philippines, Paper presented at the Workshop on Working with Non-State Justice Systems, UK Department for International Development, 6–7 March 2003. The position is perhaps even more complicated in Botswana where there are warranted customary courts, unwarranted recognised customary courts (that are permitted to engage in reconciliation) and unwarranted, not formally recognised courts and unwarranted, not recognised courts. See Bouman, Marlies 1987, 'A note on chiefly and national policing in Botswana', *Journal of Legal Pluralism*, vols 25–6, p. 279.
- <sup>16</sup> Elechi, Ogbonnaya Oko 1996, 'Doing justice without the State: the Afikpo (Ehugbo) Nigeria model of conflict resolution', *International Journal of Comparative and Applied Criminal Justice*, vol. 20, no. 2, p. 344.
- <sup>17</sup> Northern Territory Law Reform Commission 2003, *Report of the Committee of Inquiry into Aboriginal customary law*, Report No. 8, p. 6.
- <sup>18</sup> The report did not provide any detail about how this general system would be established, other than noting that it would need to be carefully designed, developed and adequately resourced.
- <sup>19</sup> Human Rights and Equal Opportunity Commission 2003, Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory, Aboriginal and Torres Strait Social Justice Commissioner of the Human Rights and Equal Opportunity Commission, p. 29.
- <sup>20</sup> For example, in relation to Timor Leste, Mearns states: 'It was put to me in several different contexts that the local systems of resolving disputes and punishing crimes will go underground and act as a clandestine and preferred alternative to the formal system unless they are given recognition and [are] regulated.' Mearns, David 2002, *Looking Both Ways: Models for justice in East Timor*, Australian Legal Resources International, p. 54.
- <sup>21</sup> *Toward a New Legal Common Sense*, pp. 92–3.
- <sup>22</sup> Bouman, 'A note on chiefly and national policing in Botswana', p. 291.
- <sup>23</sup> Tamanaha, *Understanding legal pluralism*, p. 50.
- <sup>24</sup> Mearns, *Looking Both Ways*, p. 26.
- <sup>25</sup> Schärf, Wilfried 2003, Non-state justice systems in southern Africa: how should governments respond?, Paper presented at the Workshop on Working with Non-State Justice Systems, UK Department for International Development, 6–7 March 2003, p. 18.
- <sup>26</sup> Schärf, Wilfried et al. 2003, *Access to Justice for the Poor of Malawi? An appraisal of access to justice provided to the poor of Malawi by the lower subordinate courts and the customary justice forums*, Malawi Law Commission.
- <sup>27</sup> Schärf, Non-state justice systems in southern Africa, p. 50.
- <sup>28</sup> *Ibid.*, p. 59.
- <sup>29</sup> My knowledge of the situation in Kiribati comes from unpublished research papers written about the customary legal system there by some of my students.
- <sup>30</sup> Government of South Africa 2008, *Policy Framework on the Traditional Justice System Under the Constitution*, Department of Justice and Constitutional Development, South Africa, p. 16.
- <sup>31</sup> Elechi, 'Doing justice without the State'.
- <sup>32</sup> Corrin Care, Jennifer 2002, 'Off the peg', *Alternative Law Journal*, vol. 27, no. 5, p. 210.
- <sup>33</sup> Mearns, *Looking Both Ways*, p. 26.
- <sup>34</sup> Schärf, Non-state justice systems in southern Africa, p. 39.
- <sup>35</sup> Mearns, *Looking Both Ways*, p. 54.
- <sup>36</sup> Section 39 of the *Penal Code (Amendment) Act 2006* (Vanuatu). It is also a common law requirement in Solomon Islands.

<sup>37</sup> In *Regina vs Funifaka* (1997, SBHC 31), Palmer, J held: 'The payment of compensation or settlements in custom do not extinguish or obliterate the offence. They only go to mitigation. The accused still must be punished and expiate their crime.'

<sup>38</sup> *Public Prosecutor vs Gideon*, 2002, VUCA 7, <<http://www.paclii.org.vu>>

<sup>39</sup> For example, the Chiefs' Capacity Building project currently being run by AusAID, the Malvatumauri and the Australian Centre for Peace and Conflict Studies at the University of Queensland.

<sup>40</sup> Johnston, Les and Shearing, Clifford 2003, *Governing Security: Explorations in policing and justice*, p. 151. A similar, although less developed, program is the Restorative Justice Peace Mediation process used by the Saraga Peace, Good Order and Community Development Association in some urban parts of Papua New Guinea. See Wai, Isaac and Maia, Paul 2005, 'What we do in Saraga: building community peace and harmony', *Development Bulletin*, vol. 67, pp. 53–5.

<sup>41</sup> Success is defined as meaning that a particular case has conformed with the principles and procedures to which the committee members have subscribed. Sixty per cent of this money goes into a community fund for local development projects, 10 per cent supports the administrative expenses of the committee and 30 per cent goes to the committee members who were involved in facilitating the gathering.

<sup>42</sup> Johnston and Shearing, *Governing Security*, p. 157.

<sup>43</sup> Human Rights and Equal Opportunity Commission, Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory, pp. 31–50.

<sup>44</sup> *Ibid.*, p. 28.

<sup>45</sup> For example, Bouman ('A note on chiefly and national policing in Botswana', p. 291) explains that in Botswana one reason why local people hold the unwarranted customary courts in awe is because of their informal links with the state courts that allow them to refer cases to the state system and threaten the offenders with punishments. See also Greenhouse's comments about the importance of external relationships discussed in Chapter 2 under 'General principles'.

<sup>46</sup> Chanock argued that in Africa the imperial view of custom requiring it to be static and fixed in order for it to have legal force came from the beliefs that African societies were static in nature 'because of a cultural judgment that was made about African societies, which were seen as having failed to be "progressive"'. Chanock, Martin 2005, 'Customary law, sustainable development and the failing state', in Peter Orebech et al. (eds), *The Role of Customary Law in Sustainable Development*, pp. 342–3. Unfortunately, such beliefs seem to have transcended the end of colonialism and have been perpetuated by independent states such as Samoa.

<sup>47</sup> Dewhurst, Dale 2004, 'Parallel justice systems, or a tale of two spiders', in Catherine Bell and David Kahane (eds), *Intercultural Dispute Resolution in Aboriginal Contexts*, p. 225. Under the *Judicature Acts*, where any conflict exists between common law and equity the principles of equity prevail.

<sup>48</sup> Other examples are the Tuvaluan *falekaupule* (see the *Falekaupule Act 1997*) and the Tokelauan *taupulega* (see the *Taupulega Act 1986*).

<sup>49</sup> Meleisea, M. 2000, 'Governance, development and leadership in Polynesia', in E. Huffer and A. So'o (eds), *Governance in Samoa*, p. 197.

<sup>50</sup> Lawson, Stephanie 1996, *Tradition Versus Democracy in the South Pacific: Fiji, Tonga and Western Samoa*, p. 156.

<sup>51</sup> *Leituala vs Mauga*, 2004, WSSC 9, <http://www.paclii.org.vu>

<sup>52</sup> *Sefo vs Attorney-General*, 2000, WSSC 18, <http://www.paclii.org.vu>

<sup>53</sup> Law Reform Commission of Western Australia 2006, *Aboriginal customary laws*, Report Project No. 94, p. 97.

<sup>54</sup> *Ibid.*, p. 105.

<sup>55</sup> *Ibid.*, p. 104.

<sup>56</sup> There are some conditions attached to this; see *ibid.*, p. 109. This allowance of banishment, however, is an interesting contrast to the position taken in Samoa with regard to the village *fonos*, and could perhaps come from the fact that Australia, unlike Samoa, does not have a list of fundamental rights and freedoms in its constitution.

<sup>57</sup> Law Reform Commission of Western Australia, *Aboriginal customary laws*, Discussion Paper Project No. 94, p. 136.

<sup>58</sup> Law Reform Commission of Western Australia, *Aboriginal customary laws*, Report Project No. 94, p. 106. This makes it clear the jurisdiction given to CJGs is not exclusive.

<sup>59</sup> By providing information about customary law and culture to the courts, presenting information about offenders at sentencing and bail hearings, participating in diversionary programs and in the supervision of offenders who are subject to court orders.

<sup>60</sup> Law Reform Commission of Western Australia, *Aboriginal customary laws*, Report Project No. 94, p. 97.

<sup>61</sup> *Ibid.*, p. 104.

<sup>62</sup> *Ibid.*, p. 105.

<sup>63</sup> Penal Reform International, *Access to Justice in Sub-Saharan Africa*, p. 139.

<sup>64</sup> Corrin Care, Jennifer 2006, 'A green stick or a fresh stick?: locating customary penalties in the post-colonial era', *Oxford University Commonwealth Law Journal*, vol. 6, no. 1, p. 32.

<sup>65</sup> Unfortunately, many of these decisions are not readily available. They are, however, discussed in Va'a, U. 2000, 'Local government in Samoa and the search for balance', in Elise Huffer and A. So'o (eds), *Governance in Samoa*, pp. 156–60. An initial decision in the murder case is available; see *Police vs Afoa*, 1994, WSSC 3, <http://www.paclii.org.vu>. See also Forsyth, Miranda 2004a, 'Banishment and freedom of movement in Samoa', *Journal of South Pacific Law*, vol. 8, no. 2, <<http://paclii.org.vu/journals/fJSPL/index.shtml>>

<sup>66</sup> Meleisea, 'Governance, development and leadership in Polynesia', p. 198.

<sup>67</sup> Corrin Care, 'A green stick or a fresh stick?', p. 32.

<sup>68</sup> *Ibid.*, pp. 58–9.

<sup>69</sup> Webber argues, 'The very existence of federalism is premised on the idea that variation in law from one part of the country to another is legitimate. This variation even affects the criminal law, though indirectly, through provincial control over policing, prosecution, the establishment of courts, some elements of the corrections system, and such other associated measures.' Webber, Jeremy 1993, 'Individuality, equality and difference: justifications for a parallel system of Aboriginal justice', in Royal Commission on Aboriginal Peoples (ed.), *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues*, p. 152.

<sup>70</sup> Dewhurst, 'Parallel justice systems, or a tale of two spiders'; Webber, 'Individuality, equality and difference'.

<sup>71</sup> Oba, 'Lawyers, legal education and the Shari'ah courts in Nigeria', p. 130. Also in Medieval Europe, including England, it used to be the case that certain matters, such as marriage and inheritance (other than land subject to feudal relations), were left to ecclesiastical courts.

<sup>72</sup> Berman, 'Global legal pluralism', p. 1206.

<sup>73</sup> Horton, Lynn 2006, 'Contesting state multiculturalisms: indigenous land struggles in Eastern Panama', *Journal of Latin American Studies*, vol. 38, p. 830. Raja Roy notes that among notable examples of autonomy arrangements in formally unitary states are South Tyrole (Italy), Catalonia (Spain), Isle of Man (United Kingdom) and Northern Ireland (United Kingdom). Among the highest forms of autonomy exercised in indigenous peoples' territories are Greenland (Denmark), Mizoram and Nagaland (India) and Kuna Yala (Panama). Roy, Raja 2004, 'Challenges for juridical pluralism and customary laws of indigenous peoples: the case of Chittagong hill tracts, Bangladesh', *Arizona Journal of International & Comparative Law*, vol. 21, no. 1, p. 124.

<sup>74</sup> Berman ('Global legal pluralism', p. 1206) notes that the US Supreme Court has at times deferred to these courts (*Santa Clara Pueblo vs Martinez* [1978, 436 US 49]).

<sup>75</sup> The reason for the introduction of such constitutional provisions can most likely be found in the International Labour Organisation Convention 169 concerning indigenous and tribal peoples, which provides: 'Article 8(2): These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental human rights defined by the national legal system and with internationally recognised human rights.'

'Article 9(1): To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practiced by the peoples concerned for dealing with offences committed by their members shall be respected.'

<sup>76</sup> Article 149 of the Peruvian *Constitution* contains a similar provision.

<sup>77</sup> Faundez, Julio 2003, Non-state justice systems in Latin America—case studies: Peru and Colombia, Paper presented at the Workshop on Working with Non-State Justice Systems, UK Department for International Development, 6–7 March 2003, p. 9.

<sup>78</sup> *Ibid.*, p. 57.

- <sup>79</sup> Assies, Willem 1999, 'Multi-ethnicity, the State and the law in Latin America', *Journal of Legal Pluralism*, vol. 43, p. 145.
- <sup>80</sup> *Ibid.*, p. 154.
- <sup>81</sup> *Ibid.*, p. 157.
- <sup>82</sup> My research in this area has been hampered by my lack of Spanish.
- <sup>83</sup> A parallel system of justice for the Maori in New Zealand was also proposed in Jackson, Moana n.d., *The Maori and the criminal justice system He Whaipaanga Hou—a new perspective. Part 2*, Study Series 18, Department of Justice, New Zealand. This report and the responses it has provoked raise many of the issues involved in such a system, as well as demonstrating the sensitivity of the political issues involved.
- <sup>84</sup> Webber, 'Individuality, equality and difference', p. 138.
- <sup>85</sup> Dewhurst, 'Parallel justice systems, or a tale of two spiders', p. 213.
- <sup>86</sup> Oba, Abdulmumini 2004, 'The Shariah court of appeal in Northern Nigeria: the continuing crisis of jurisdiction', *American Journal of Comparative Law*, vol. 52, p. 899.
- <sup>87</sup> *Ibid.*, p. 900.
- <sup>88</sup> Webber, 'Individuality, equality and difference', pp. 147–55. These issues are also discussed in the conclusion to Chapter 8.
- <sup>89</sup> *Ibid.*, p. 134. See also Crawford, James, Hennesy, Peter and Fisher, Mary 1988, 'Aboriginal customary laws: proposals for recognition', in Bradford Morse and Gordon Woodman (eds), *Indigenous Law and the State*, pp. 40–3. Steiner points out the paradox that 'autonomy regimes, or some forms thereof, find indirect but significant support in several prominent norms of the human rights movement. Moreover, they can be understood to reinforce some underlying ideals of that movement as a whole. On the other hand, these regimes can undermine other powerful human rights ideals, and to that extent embody a morally problematic counter-ideal.' Steiner, Henry 1991, 'Ideals and counter-ideals in the struggle over autonomy regimes for minorities', *Notre Dame Law Review*, vol. 66, p. 1539.
- <sup>90</sup> Webber, 'Individuality, equality and difference', p. 147.
- <sup>91</sup> Horton, 'Contesting state multiculturalisms', p. 835.
- <sup>92</sup> Conflict-of-laws rules could be useful in working out the specific details of such an arrangement.
- <sup>93</sup> Webber ('Individuality, equality and difference', p. 147) comments that '[a]cceptance of the general principle may depend upon the detailed justification of very specific institutional arrangements'.
- <sup>94</sup> Government of South Africa, *Policy Framework on the Traditional Justice System Under the Constitution*.
- <sup>95</sup> Schärf, Non-state justice systems in southern Africa, p. 35.
- <sup>96</sup> It looks unlikely to be finalised before the end of the parliamentary session and has a start date of December 2009 (Email from Michael Palumbo, Deputy Chief State Law Adviser, Law Reform, South Africa, 14 November 2008).
- <sup>97</sup> See a discussion of the issues involved in determining the appeal structure in Chapter 8 of South African Law Commission, *Report on traditional courts and the judicial function of traditional leaders*.
- <sup>98</sup> *Ibid.*, p. 30.
- <sup>99</sup> Tamanaha, *Understanding legal pluralism*, p. 50. See also the controversy over the *Arbitration Act* (Ontario) that for a time permitted its structure for private arbitration, including the enforcement of arbitration awards, to be used for the arbitration of family disputes by religious authorities under religious law. An extensive report on this issue argued that '[u]se of the Arbitration Act by minority communities is a way of engaging with the broader community by formalizing a method of decision-making which currently occurs in an informal manner'. Boyd, Marion 2004, *Dispute Resolution in Family Law: Protecting choice, promoting inclusion*, Ministry of the Attorney-General, Ontario, Canada, p. 1. That report's recommendations were not accepted by the Ontario legislature, however, and the Act was amended in order to restrict the use of the regime for the adjudication of family matters.
- <sup>100</sup> Australian Law Reform Commission, *The recognition of Aboriginal customary laws*, p. 74.
- <sup>101</sup> *Adolf vs Austria*, 1982, ECHR, Ser. A, vol. 49, cited in *ibid.*
- <sup>102</sup> New Zealand Law Reform Commission, *Report of Proceedings*, p. 160.
- <sup>103</sup> *Ibid.*, p. 165.
- <sup>104</sup> *Ibid.*
- <sup>105</sup> For example, in Botswana, the duties of the Local Police (an unofficial police force) are 'to assist the Chief in the exercise of his lawful duties, preserve the public peace, prevent the commission of offences,

apprehend offenders, execute orders (in particular administering corporal punishment) and warrants, and act as a messenger in Customary Court matters'. Bouman, 'A note on chiefly and national policing in Botswana', p. 284.

<sup>106</sup> Schärf, 'Policy options on community justice'.

<sup>107</sup> Bouman, 'A note on chiefly and national policing in Botswana'.

<sup>108</sup> Elechi, 'Doing justice without the State'.

<sup>109</sup> Government of South Africa, *Policy Framework on the Traditional Justice System Under the Constitution*, pp. 10–11.

<sup>110</sup> For example, Galanter and Krishan argue that the Lok Adalats in India 'are distinct from traditional panchayats in virtually every respect: they operate in the shadow of the official courts; they are staffed by official appointees rather than communal leaders; they apply some diluted version of state law rather than local or caste custom; they arrange compromises instead of imposing fines and penances backed up by the sanction of excommunication'. Galanter, Marc and Krishnan, Jayanth 2004, "'Bread for the poor": access to justice and the rights of the needy in India', *Hastings Law Journal*, vol. 55, p. 789.

<sup>111</sup> Roberts, Simon 1972, 'The survival of the traditional Tswana courts in the national legal system of Botswana', *Journal of African Law*, vol. 16, p. 106.

<sup>112</sup> This case is discussed in Otlhogile, Bojosi 1993, 'Criminal justice and the problems of a dual legal system in Botswana', *Criminal Law Forum*, vol. 4, p. 532.

<sup>113</sup> Griffiths, Anne 1996, 'Between paradigms: differing perspectives on justice in Molepolole Botswana', *Journal of Legal Pluralism and Unofficial Law*, vol. 36, p. 203.

<sup>114</sup> Schärf, Non-state justice systems in southern Africa, p. 63.

<sup>115</sup> *Ibid.*, p. 66.

<sup>116</sup> Griffiths, 'Between paradigms', p. 212.

<sup>117</sup> Griffiths, Anne 1998, 'Legal pluralism in Botswana: women's access to law', *Journal of Legal Pluralism and Unofficial Law*, vol. 42, p. 136.

<sup>118</sup> Schärf, Non-state justice systems in southern Africa, p. 68.

<sup>119</sup> Otlhogile, 'Criminal justice and the problems of a dual legal system in Botswana', p. 532.

<sup>120</sup> Schärf, Non-state justice systems in southern Africa, p. 66.

<sup>121</sup> Elechi, 'Doing justice without the State', p. 344.

<sup>122</sup> Penal Reform International, *Access to Justice in Sub-Saharan Africa*, p. 129.

<sup>123</sup> Fombad, Charles 2004, 'Customary courts and traditional justice in Botswana: present challenges and future perspectives', *Stellenbosch Law Review*, vol. 15, no. 1, p. 191.

<sup>124</sup> Boko, Gideon 2000, 'Fair trial and the customary courts in Botswana: questions on legal representation', *Criminal Law Forum*, vol. 11, no. 4, p. 445.

<sup>125</sup> *Ibid.*, p. 460.

<sup>126</sup> Fombad, 'Customary courts and traditional justice in Botswana', p. 181.

<sup>127</sup> I am grateful to Gordon Woodman for this point (Email from Gordon Woodman, <G.R.Woodman@bham.ac.uk>, 25 May 2007). Franz von Benda-Beckmann has similarly commented that '[s]tudies critically examining local traditional laws, focussing on class, caste, gender and age differences, have shown that "folk law" often turns out to be the law of local elites and/or the senior male population...Recourse to state law and its "non-traditional" values can be an important resource in the struggle for emancipation.' von Benda-Beckmann, Franz 2001, 'Legal pluralism and social justice in economic and political development', *IDS Bulletin*, vol. 32, no. 1, p. 50.

<sup>128</sup> Santos ('The heterogeneous state and legal pluralism in Mozambique', p. 64) refers to the fact that after independence in Mozambique, traditional authorities were '[s]een as obscurantist remnants of colonialism'.

<sup>129</sup> The importance of considering such changes in conjunction with the adoption of a model of relationship between a non-state justice system and a state system has recently been highlighted by the Law Reform Commission of Western Australia, which recommends the establishment of Community Justice Groups (discussed in Model 4) and Aboriginal sentencing courts (within the state system), commenting that these two proposals 'although capable of operating independently from one another, together offer a system where the Aboriginal people of this state can practise their own customary laws with as little interference as possible, while at the same time providing a more meaningful and effective criminal justice system'. Law Reform Commission of Western Australia 2006b, *Aboriginal customary laws*, Discussion Paper Project No. 94, p. 157.

- <sup>130</sup> Woodman, Gordon 2001, 'Customary law in common law systems', *IDS Bulletin*, vol. 32, no. 1, p. 32.
- <sup>131</sup> As Woodman points out (ibid.), even NGOs are required to work through governments to secure the conditions necessary for them to operate.
- <sup>132</sup> Australian Law Reform Commission, *The recognition of Aboriginal customary laws*, p. 89.
- <sup>133</sup> New Zealand Law Reform Commission, *Report of Proceedings*, p. 11.
- <sup>134</sup> Forsyth, *Report on the Vanuatu Judiciary Conference 2006*.
- <sup>135</sup> Ibid.
- <sup>136</sup> Golub, Non-state justice systems in Bangladesh and the Philippines, p. 13.
- <sup>137</sup> Dinnen, Sinclair 1999, 'Violence and governance in Melanesia', *Pacific Economic Bulletin*, vol. 14, no. 1, p. 71.
- <sup>138</sup> Ibid. See also Dinnen, *Building bridges*.
- <sup>139</sup> Goddard, Michael 2004, *Women in Papua New Guinea's village courts*, Discussion Paper 2004/3, 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. 6. Goddard's arguments, however, have in turn been criticised by Slatter, who argues that none of the cases analysed by Goddard relates to sexual abuse, rape or other offences for which village courts have gained notoriety for discriminatorily penalising or shaming women. She argues that his research does not 'invalidate the analyses of other (mainly women) researchers and activists whose highlighting of "worst practice" cases of gender-discrimination have put village courts on notice'. Slatter, Claire 2007, *Gender and custom in the South Pacific*, Paper presented at the Tuhonohono Symposium: State and Custom, Waikato Endowed College, New Zealand, pp. 10–11.
- <sup>140</sup> Goddard, *Women in Papua New Guinea's village courts*, p. 6.
- <sup>141</sup> Ibid., p. 3.
- <sup>142</sup> See Chapter 5 under 'The relationship between the courts and the *kastom* system'.
- <sup>143</sup> Law Reform Commission of Western Australia, *Aboriginal customary laws*, Discussion Paper Project No. 94, p. 145.
- <sup>144</sup> Filimone, *Problem Solving*, p. 7.
- <sup>145</sup> Law Reform Commission of Western Australia, *Aboriginal customary laws*, Discussion Paper Project No. 94, p. 120.
- <sup>146</sup> Ibid., p. 120. In its final report, the Law Reform Commission of Western Australia also criticised the scheme, although it finally did not recommend its abolition as it had originally done in its discussion paper. It commented that it had received a number of responses from Aboriginal communities in response to its proposal to abolish the scheme who 'have a strong sense of "ownership" of their by-laws and believe that they are an effective way to control behavior in their communities' (p. 115).
- <sup>147</sup> A similar suggestion was recently made by the New Zealand Law Reform Commission (*Report of Proceedings*, p. 195), which observed that the adversarial system tended to break down in situations where parties did not have equal opportunity to present their case.
- <sup>148</sup> For example, Section 25 of the *Island Courts Act* (Cap 167 [Vanuatu]) states that '[i]n any proceedings before it, an island court shall not apply technical rules of evidence but shall admit and consider such information as is available'.
- <sup>149</sup> These suggestions might be of use only for a limited number of customary justice systems as they carry with them a considerable amount of work and the risk that they will cut into some of the advantages of the systems such as speed and lack of formality.
- <sup>150</sup> Government of the United Kingdom, *Non-State Justice and Security Systems*, p. 14.
- <sup>151</sup> Including participation of women as *shalish* panel members and as disputants who speak up during sessions, and training panel members in mediation.
- <sup>152</sup> Golub, Non-state justice systems in Bangladesh and the Philippines, pp. 10–11.
- <sup>153</sup> See discussion in Forsyth, Miranda 2004b, 'Beyond case law: *kastom* and courts in Vanuatu', *Victoria University of Wellington Law Review*, vol. 35, no. 2, p. 427. Gordon and Meggitt (*Law and Order in the New Guinea Highlands*, p. 204) argue that 'we must be acutely conscious of the possibility of customary law being transformed into a neocolonial fraud in the centers of government and then imposed upon the village periphery with the aid of the administrative petty bourgeoisie'.
- <sup>154</sup> See the discussion in New Zealand Law Commission, *Converging currents*, pp. 190–6. See also Note 148 above.

<sup>155</sup> This issue is discussed in detail in New Zealand Law Commission, *Converging currents*, in relation to Vanuatu in Chapter 6, Section 1.2.1, and in the context of the Pacific generally in Chapter 13.

<sup>156</sup> Although Roebuck was sanguine about the application of custom by the state courts of Papua New Guinea, later writers painted a more muted picture. Roebuck, D. 1985, 'Custom, common law and constructive judicial lawmaking', in R. De Vere, D. Colqhoun-Kerr and J. Kaburise, *Essays on the Constitution of Papua New Guinea*, Tenth Anniversary Advisory Committee, Port Moresby, pp. 127–45. See also Jessep, O. and Reagan, A. 2001, 'Developing a coherent underlying law—interpreting custom and common law', *Twenty Years of the Papua New Guinea Constitution*, pp. 114–58; Kwa, E. L. 2001, *Constitutional Law of Papua New Guinea*, pp. 44–52.

<sup>157</sup> Whether that act has made any significant change to the extent to which state courts rely on custom is at this stage too early to judge.

<sup>158</sup> This act is basically a copy of the *Customs Recognition Act* enacted in Papua New Guinea in 1963. As observed above, this seemed to have little effect in the application of custom by the state courts in Papua New Guinea, and doubts have been expressed about the likelihood of it being any more effective in Solomon Islands in facilitating the application of customary law by the state courts. Perhaps because of such concerns, the act has not in fact come into force yet. See Corrin Care, 'Customary law in conflict'.

<sup>159</sup> In New Zealand, there are some pieces of legislation, such as the *Resource Management Act 1991*, that aim to bring Maori principles into the law in general. See, for examples, Sections 6(e), 7(a) and 8 of that act. See further Joseph, Robert 2007, The interface between Maori custom and state regulatory systems—Tikanga Maori consultation under the *Resource Management Act 1991*, Paper presented at the Tuhonohono Symposium: State and Custom, Waikato Endowed College, New Zealand. In Hawai'i as well, the concept of 'aloha' has been introduced into state legislation. See MacKenzie, Melody 2007, Hawaiian values in state legislation, Paper presented at the Tuhonohono Symposium: State and Custom, Waikato Endowed College, New Zealand.

<sup>160</sup> Corrin Care and Zorn, 'Legislating pluralism'.

<sup>161</sup> *Ibid.*, p. 97.

<sup>162</sup> New Zealand Law Commission, *Converging currents*, p. 193. Te Matahauriki Research Institute 2007, *Te Matapunenga: A compendium of references to the concepts and institutions of Maori customary law*, Te Matahauriki Research Institute, University of Waikato, New Zealand, is an excellent example of how this can be done.

<sup>163</sup> Brown, Ken and Corrin Care, Jennifer 1998, 'Conflict in Melanesia: customary law and the rights of women', *Commonwealth Law Bulletin*, p. 1334; Corrin Care, 'Customary law and human rights in Solomon Islands'; Corrin Care, Jennifer 2003, 'Reconciling customary law and human rights in Melanesia', *Hiberian Law Journal*, vol. 4, p. 53; Farran, Sue 1997, 'Custom and constitutionally protected fundamental rights in the South Pacific region—the approach of the courts to potential conflicts', *The Journal of Pacific Studies*, vol. 21, p. 103; Elechi, Oke 2004, Human rights and the African indigenous justice system, Paper presented at the Eighteenth International Conference of the International Society for the Reform of Criminal Law, Montreal, Quebec, Canada, 2004.

<sup>164</sup> New Zealand Law Commission, *Converging currents*, p. 76.

<sup>165</sup> Ibhawoh, Bonny 2001, 'Cultural tradition and national human rights standards in conflict', in K. Hastrup (ed.), *Legal Cultures and Human Rights: The challenges of diversity*, p. 99.

<sup>166</sup> *Ibid.*, p. 99.

<sup>167</sup> *Ibid.*, p. 86.

<sup>168</sup> Faundez, Non-state justice systems in Latin America, p. 61.

<sup>169</sup> NGOs or other donors could provide funding for such a program.

<sup>170</sup> New Zealand Law Commission, *Converging currents*, p. 151.

<sup>171</sup> See further *ibid.*, p. 164.

<sup>172</sup> For a discussion of this type of assessor, see *ibid.*, pp. 198–9.

<sup>173</sup> Bougainville Constitutional Commission 2004, *Report on the Third and Final Draft of the Bougainville Constitution*, p. 198.

<sup>174</sup> In terms of powers, two different approaches are shown in Fiji and Samoa. In Fiji, the role of the assessors is advisory in nature only, but where the decision of the judge is contrary to the majority opinion of the assessors, the judge is required to give his/her reasons for disagreeing (*Criminal Procedure Code* [Fiji], Section 299). In Samoa, in contrast, no person can be convicted of any offence unless the conviction is concurred in by not less than three of the assessors where there are four, and by not less than four of the assessors where there are five assessors (*Criminal Procedure Act* [Samoa], Section 99).

- <sup>175</sup> See Braithwaite, John 1999, 'Restorative justice: assessing optimistic and pessimistic accounts', *Crime and Justice*, vol. 25, p. 1 ; Crnkovich, Mary 1996, 'A sentencing circle', *Journal of Legal Pluralism*, vol. 36, p. 159.
- <sup>176</sup> Tomaino, John 2006, *Aboriginal (Nunga) courts*, Information Bulletin No. 39, Government of South Australia, viewed 20 July 2006, <[http://www.ocsar.sa.gov.au/docs/information\\_bulletins/IB39.pdf](http://www.ocsar.sa.gov.au/docs/information_bulletins/IB39.pdf)>
- <sup>177</sup> Law Reform Commission of Western Australia, *Aboriginal customary laws*, Discussion Paper Project No. 94, p. 142.
- <sup>178</sup> Potas, Ivan et al. 2003, 'Circle sentencing in New South Wales: a review and evaluation', *Australian Indigenous Law Reporter*, vol. 2004, p. 16, <<http://www.austlii.edu.au/au/journals/AILR/2004/16.html>>
- <sup>179</sup> Law Reform Commission of Western Australia, *Aboriginal customary laws*, Discussion Paper Project No. 94, pp. 146–52.
- <sup>180</sup> *Ibid.*, p. 149.
- <sup>181</sup> *Ibid.*, p. 155.
- <sup>182</sup> Potas, 'Circle sentencing in New South Wales'.
- <sup>183</sup> New Zealand Law Commission, *Converging currents*, pp. 199–201.
- <sup>184</sup> The Vanuatu Supreme Court has done this occasionally in relation to determination of chiefly title (*Tenene vs Nmak* [2003, VUSC 2, <<http://www.paclii.org/>>]) and customary adoption (*M vs P, Re the child G* [1980–94, Van LR 333]).
- <sup>185</sup> Relevant considerations in the decision about referral will include whether the parties agree to the referral and whether individual rights and interests can be protected.
- <sup>186</sup> New Zealand Law Reform Commission, *Report of Proceedings*, p. 179.
- <sup>187</sup> Australian Law Reform Commission, *The recognition of Aboriginal customary laws*, p. 834.
- <sup>188</sup> Government of Autonomous Region of Bougainville 2004, *The Constitution*, Section 121.
- <sup>189</sup> *Ibid.*
- <sup>190</sup> Bougainville Constitutional Commission, *Report on the Third and Final Draft of the Bougainville Constitution*, p. 197.
- <sup>191</sup> Originally in Papua New Guinea, all *kiaps* were expatriates but locals were introduced to the role by the 1960s (Gordon and Meggitt, *Law and Order in the New Guinea Highlands*, p. 47).
- <sup>192</sup> Dinnen, 'Violence and governance in Melanesia', p. 5.
- <sup>193</sup> *Ibid.* See also Dinnen, Sinclair 2001, *Law and Order in a Weak State*, pp. 23–9.
- <sup>194</sup> It should be noted that Penal Reform International (*Access to Justice in Sub-Saharan Africa*, p. 169) argues that people should be able to 'shop for justice' by moving freely between the various systems as suits themselves.
- <sup>195</sup> The danger of judicial domination of *kastom* proceedings could be avoided by making sure the judge is in the minority, not giving him/her a power of veto or ensuring that he/she attends by invitation only.