

Prologue

In 2001, I spent a year as a volunteer prosecutor in the Public Prosecutor's Office in Vanuatu, a small country in the South Pacific spread over approximately 83 inhabited and uninhabited islands. On one occasion, relatively soon after I had arrived, I went with some members of the Vanuatu Police Force to serve summonses in remote villages on one of the outer islands. We took a four-wheel drive and set out, following barely marked tracks, through the dense bush. From time to time, we arrived at villages consisting of leaf houses and surrounded by gardens used for subsistence agriculture, with perhaps only an odd yellow gumboot or an empty packet of rice lying around as a sign of modern life. On entering the village, we would announce why we had come and flourish a very white paper summons. Inevitably, the chief of the village would come to speak with us and explain in a bemused manner that the dispute that was the subject of the summons had been '*stretem long kastom finis*' (resolved in a customary manner already), often many months previously, and that everyone had forgotten about the conflict and had got on with their lives. The police were then in the unenviable position of having to explain that, nevertheless, the defendants would still have to attend court on the named day at the named time. Each time, the villagers would resignedly accept the summons and in return ply us with green coconuts and ripe pawpaw.

This excursion was the first time that I became aware of the indigenous system of conflict management (the '*kastom* system') in Vanuatu—a system that was unofficial and illegitimate in the eyes of the State, but that in effect was responsible for the maintenance of peace and harmony in most communities throughout Vanuatu. From time to time during that year, I came across other references to it: a complainant would tell me not to proceed with a case a few days before trial because the chiefs had dealt with it, or a defendant would plead in mitigation that he had already paid several pigs and fine mats in compensation to the victim's family. I occasionally heard intriguing references to '*kastom kots*' (customary courts) with written records of decisions and written laws. At the same time, I found myself working in an official system based on a Western model that seemed to suit the local circumstances like an old shirt several sizes too small—never fitting or working properly and constantly needing to be mended or 'strengthened', as the official development jargon put it.

When the year finished, I decided to investigate this *kastom* system of which I had had so many glimpses and hints, but had not been able to find discussed in any document or text. In particular, I wanted to discover what its real relationship with the state system was, and whether it was working, or whether the two systems were, as I suspected from the few times I had seen them involved in the same case, undermining and competing with each other. This book,

therefore, investigates the problems and possibilities of plural legal orders through an in-depth study of the relationship between the state and *kastom* justice systems in Vanuatu.

To date, studies of conflict management and customary law in Vanuatu by legal scholars have been limited to an investigation of the state system. In addition, the response by the Vanuatu Government and donors to concerns about potential breakdowns of law and order has been to engage in projects designed to build the capacity of the state judicial, policing and penal institutions, ignoring entirely the *kastom* system. This book argues that there is a need to move away from such a state-centric approach, which has not led to a more stable, capable or legitimate justice system. Instead, the scope of capacity building and strengthening must be broadened to include *all* legal orders involved in conflict management, and must therefore include the *kastom* system.

There are three main advantages to such an approach. First, the *kastom* system is currently used to manage the majority of conflicts in rural and urban communities in Vanuatu. By ignoring it, the opportunity to develop a crucial mechanism for the maintenance of law and order is lost. Second, strengthening the state system without taking into account the *kastom* system can have the consequence of undermining *kastom*, thus weakening conflict management overall. Finally, developing a mutually supportive relationship and strong links with the *kastom* system is the best way for the State to enhance its legitimacy in the eyes of the ni-Vanuatu, who still tend to view the state system as foreign and imposed.

Adopting the wider approach just advocated, this book poses a series of highly specific questions about the operation of the *kastom* system and its relationship with the state system. In addition to investigating the current relationship between the state and *kastom* systems and its benefits and disadvantages, it poses normative questions about how a more constructive interaction between the two could be supported. It concludes that, despite the very different natures of the two systems, it *is* possible for them to work together in a mutually beneficial and supportive manner, but this requires changes to the structural relationship between them, as well as adaptations made within each system.

The focus of the analysis of the state system is the criminal justice system, rather than the state legal system as a whole, largely for reasons of manageability. Criminal justice was chosen because it is an area where there is considerable interaction between the two systems, and it is also where most ni-Vanuatu come into contact with the state system. The focus therefore allows for an analysis of an aspect of the state system that has some of the closest connections with the *kastom* system, and also the most relevance to the majority of ni-Vanuatu.¹

The *kastom* system itself has not been split up into criminal and civil aspects because there is no traditional or current distinction between criminal law and

civil law. The main areas that the *kastom* system deals with today are land disputes, issues relating to marriage and children, disputes over the payment of debts and failure to honour agreements and offences of some sort committed by one person against another. All of these are generally referred to as '*trabol*' (trouble) or '*raorao*' (a dispute). For example, for *kastom* purposes, there is no distinction between '*raorao blong graon*' (a land dispute) and '*raorao blong stilim woman*' (a dispute about adultery). In *kastom*, the overriding aim is to restore peace and harmony in the community, and therefore the distinction that is drawn in Western legal systems between punishment and compensation for criminal and civil matters does not apply. In conducting the study, however, the focus has been on those areas where the state criminal justice system and the *kastom* system interact and other areas, such as land disputes, are marginalised as far as possible.

The research in this book is based on five years of fieldwork in the *kastom* and state justice systems from 2002 to 2007. The primary research methodology was in-depth interviews with an extensive number of stakeholders from both systems. In total, 129 people were interviewed, from a variety of different groups, including: chiefs, police officers, members of the judiciary, prosecutors, lawyers, members of the provincial government, women's and youth organisations, cultural organisations, church officials and non-governmental organisations (NGOs). In addition, participant observation, documentary analysis and questionnaires were used. A final technique was the holding of a two-day conference that brought together chiefs, members of the judiciary, police and lawyers to discuss the issues raised in the study and to begin to take steps to formulate responses to them.² Much of the material gathered has never previously been recorded or commented on due to the previous focus by legal scholars on the use of substantive customary law by the *state* system and the consequent lack of attention paid to customary institutions and processes.

Chapter 1 of this book aims to orient the reader to present-day Vanuatu. It situates Vanuatu within Melanesia and explores the current cultural, social, political and legal setting through an examination of some of the most important divisions in Vanuatu society today: place (including land), language, politics, religion, gender and age. In doing so, it demonstrates that Vanuatu is a country accustomed to dealing with diversity and that a degree of fragmentation and lack of consistency and coherence throughout the country should not necessarily be seen as a sign of weakness or fragility. Rather, the ability of ni-Vanuatu to draw on diverse practices in all areas—religion, language, culture—is something that could be drawn on in developing a vibrant legal pluralism.

The next chapter sets up the theoretical framework within which the role of the *kastom* system and its relationship with the state system are analysed. It argues that legal pluralism is a more useful theory for this exercise than the positivist

approach, which has previously been adopted by legal scholars examining customary law, as legal pluralism recognises that multiple forms of law may be present within any social field and that different forms of law can have different ranges of functions. Adopting a legal pluralist approach, the *kastom* system is recognised as a system of law existing semi-autonomously in the same social field as the state system. The chapter also discusses, however, some of the current limitations of legal pluralism—in particular, its current lack of concern with normative questions about what relationships between state and non-state justice systems could, and should, look like. Finally, the chapter draws together some threads that are used in later chapters to develop legal pluralism as a normative tool.

The next two chapters deal in detail with the operation of the *kastom* system. Chapter 3 is mostly historical and surveys the ethnography of Vanuatu since contact with Europeans to the present day, drawing out the main themes that relate to conflict management, the maintenance of law and order and leadership structures. The motifs elicited serve as an introductory framework within which the current debates over the role of the *kastom* system and chiefs can be more readily understood and appreciated. The fourth chapter explores the current operation of the *kastom* system. We see from the data that the *kastom* system is pervasive, diverse, mostly restorative, dynamic and focused on peace and harmony in the community more than on individual justice. In addition, there is considerable public support for its continuation, even among women, youth and key actors in the state justice system. It is, however, also at times discriminatory towards women and youth, biased, suffering from problems such as a lack of enforcement power and lack of respect, and is in need of checks on abuse of power by the chiefs who administer the system. The *kastom* system therefore, like the state system, is itself in need of strengthening and reform.

Chapter 5 then turns to considering the state system and its relationship with the *kastom* system. It does this through exploring various different institutions—the courts, police, the prosecution, the Public Solicitor, prisons and the National Council of Chiefs (the *Malvatumauri*)—their current capacity and the challenges they are facing, and the formal and informal relationship each institution has with the *kastom* system. Chapter 6 follows on from this by discussing the current problems with the relationship between the two systems and speculates why those problems exist. It does this largely through focusing on a case study. We see that the state system, based mainly on common law doctrines introduced during the colonial period, is geographically limited, under-resourced and viewed as foreign by a large proportion of the population. It is, however, generally respected and highly regarded for its independence. Currently, the state system does not formally recognise the *kastom* system and so the relationship between the two systems is an informal one whose specific form in any given place is determined largely by the particular individuals and

histories involved. This has advantages in that it allows the relationship to be fluid, flexible and responsive to local circumstances, but there are many significant disadvantages as well. The main problems include: forum shopping; confusion, dispute and mutual irresponsibility about which system applies to a given case; a lack of clear pathways for moving matters between the two systems; double jeopardy; disempowerment and demoralisation by chiefs; and frustration by state officials and the wastage of state resources when cases are removed by the parties from the state system to be dealt with 'in *kastom*'. The two systems are therefore presently at best working in parallel and giving each other only limited assistance. More often, they compete with and undermine each other. Although very few ni-Vanuatu advocate abandoning the state system, the majority of the informants interviewed for this study feel that it needs to develop a far closer relationship with the *kastom* system to allow it to become more accessible, legitimate and culturally relevant. These findings suggest that what is needed in Vanuatu is structural reform that will allow the two systems to be mutually supportive and mutually accountable.

The last two chapters broaden the focus to explore the relationship between state and non-state systems in plural jurisdictions generally. Chapter 7 uses the insights generated through the empirical study of plural legal orders in Vanuatu and from a literature survey of 20 other jurisdictions to develop a typology of relationships that can exist between state and non-state justice systems. This typology is then used to develop a new method of *doing* legal pluralism in the final chapter. This new method allows a state to mould the form of legal pluralism in its jurisdiction by having regard to factors such as the strengths and weaknesses of the existing legal orders and their current relationship, the aims of the overall justice system, the extent to which the State is prepared to formally recognise the validity of the exercise of judicial power by a non-state system, whether the State is prepared to lend its coercive powers to a non-state system and how each system can recognise, regulate and adapt itself to the other. The question of what relationship between the state and *kastom* systems in Vanuatu would work best is therefore answered by providing a general methodology that can be used more widely to realise the potential of multiple legal orders.

ENDNOTES

¹ Of course, some non-criminal domains of state law are of little interest in *kastom*. Vanuatu *kastom* cares little about patent or international trade law. To that extent, the analysis of this thesis becomes less central in these domains. It is, however, hard to think of any aspect of law, including these two, where there is not some interaction. The customary laws of intellectual property rights are of burgeoning interest and Vanuatu villages do follow certain norms when they (occasionally) indulge in overseas trade.

² Forsyth, Miranda 2006a, *Report on the Vanuatu Judiciary Conference 2006: The relationship between the kastom and state justice systems*, University of the South Pacific, <http://pacli.org.vu/vu/2006_jud_conf_report.html>