8. A new method of legal pluralism

It has been pointed out by many scholars that in today's Western world the State is becoming increasingly 'hollowed-out', meaning that more and more state functions are being devolved to non-state actors.[1] In Vanuatu and many other developing countries, however, the opposite of this has occurred: the State has engaged in a process of *taking over* more and more of the functions traditionally performed by community leaders in stateless communities. This has particularly been the case in countries emerging from periods of weak or scattered government (such as those emerging from civil war) to a stronger state. In these countries, it is the village or traditional levels of government that have been hollowed out, creating deepening problems of a variety of kinds, such as the governance of growing numbers of unemployed youth. This suggests that at any given period in any particular jurisdiction, there is likely to be flux in the division of functions between state and non-state actors. In the context of developing countries, although there has recently been a degree of recognition of this—and of the consequent need to develop capacity at state and non-state levels, and effective linkages between these levels[2] —there is currently a lack of a methodology for *how* to go about doing this.[3]

This chapter therefore takes the next step by devising a seven-step methodology for managing a shift in functions between state and non-state, so that each performs the jobs that it can do best and the weaknesses of one are covered by the strengths of the other. It does this by reflecting on a method that has proved useful in Vanuatu, drawing out its systemic features and offering it as a starting point for any jurisdiction investigating policy options for relating their different legal orders to each other. Although this chapter is concerned with just the legal aspect of this division of functions between state and non-state actors, it is hoped that the general approach outlined will have a broader application and apply to any situation where there is controversy about, or a shift in functions between, state and non-state bodies. Of course, it is important to note that the method proposed here has been tested only in one country and it is expected that each jurisdiction will need to make its own adaptations. Indeed, an important part of the method is feeding back into it lessons learnt and useful alterations developed during the implementation stages (Step 7 below).

The methodology this chapter proposes is one of how to grasp the holistic quality of a nation's legal system, how to pull it apart and then how to identify the complete range of options for recombining them (actually steering the process of their recombination), while the normative part of the method helps us to think more clearly about the strengths or weaknesses of that option in that context. There are two principles that are at the centre of the proposed method. The first

is the principle of not privileging the state over the non-state system. In Chapter 2, we saw that legal pluralists demonstrated how treating the state as superior to other types of legal order with no justification for doing so forced non-state justice systems into a subordinate position, thus limiting the possibilities for them to operate to their maximum potential and for a situation of true legal pluralism to flourish. In this method, there is therefore a constant refusal to treat the state system in a more advantageous way than the non-state system, such as in regulation and oversight, merely because 'it is the State'. As discussed in the previous chapter, however, where the State's structural characteristics provide a normative advantage in making reforms, this should be capitalised on. The second principle is what Braithwaite refers to as 'incremental transition' and defines as 'experimentation…[and] innovation combined with evaluation'.[4] This principle means that all change should be viewed as being progressive and as being linked with the obligation to carry out empirical research designed to test the extent to which the changes are working and why this is or is not happening. In other words, the approach is explanatory/empirical as well as normative.

The proposed methodology is described in the remainder of this chapter, with Vanuatu used to illustrate how it could be applied in practice. Thus, although this study does not provide 'the solution' to the problems it raises, which would be not only impossible but inappropriate for a single, foreign scholar, it does provide a methodology the country can implement itself in its search for the solution. It should also be acknowledged that in many ways the process that is suggested is an ideal one, in that there might be resource issues, time constraints and problems such as lack of political will that will impact on the ability of Vanuatu, or any other jurisdiction, to carry out all seven steps. It is for this reason that the proposed method is an incremental one, to be implemented over time, when the conditions are ready. Finally, although Vanuatu has two major legal systems, the methodology can apply equally where there are three or more.

Step 1: Analyse the operation of the state and non-state systems

Step 1 of the method is to do 'whole-of-society' fieldwork, focusing on the different systems of legal ordering. The aim is to discover what systems operate in a particular jurisdiction, their norms, fundamental principles, procedures and key institutions; their strengths and weaknesses; and their formal and informal relationships with each other. The central approach is to interview key players within the systems referred to by other key players about their individual contribution to how the system works and how they see the system working overall. Put another way, it is interviewing with a micro–macro orientation. The interviewing continues until there are more and more informants who are saying the same thing that has been said many times before. This method should be

triangulated with other research methods, such as participant observation and documentary analysis of primary and secondary sources. The importance of this step cannot be overemphasised, but it is frequently neglected. For example, Galanter and Krishnan comment that in India both sides in the debate about the development of Lok Adalats (hybrid local courts) base their arguments on supposition rather than investigation.[5]

This process was carried out in Vanuatu, in the domain of criminal law. The detailed results are discussed in Chapters 4 and 5. Some of the key findings are that:

- the State is weak and under-resourced and this is not likely to change in the near future
- the *kastom* system is currently managing a large percentage of conflicts in the country, which is saving the state judicial system from being completely overburdened
- there is enormous community support for the *kastom* system, which is seen as more legitimate than the state system in certain contexts
- there is support for the state system and recognition that it has an important role to play, but frustration with its inadequacies
- the *kastom* system faces significant and growing problems with enforcement of decisions and compulsion to obey calls to meetings
- the *kastom* system has problems of chiefly bias, unenergetic chiefs, discrimination against women and children and chiefly disputes, all of which significantly affect its capacity to deliver effective justice but for which there is currently no system of regulation
- the chiefs are becoming increasingly frustrated by the demands the State places on them in regard to maintenance of law and order in their communities and the denial of any sort of state power or aid to assist them in carrying out their functions.

Step 2: Consider the aims of the overall justice system

The second task is to develop a national dialogue to consider the aims of any reforms of the overall system. In every jurisdiction there will be different priorities, constraints and problems that affect the final system chosen: some might be concerned more with ensuring access to justice for all than with a geographical minority; others with preventing human rights abuses; others with dealing with specific problems related to a breakdown of traditional communities; and yet others with decongesting state courts. For example, the aim of the Zwelethemba Model of Peace Committees is to improve security,[6] whereas for many projects sponsored by the UK Department for International Development it is to improve access to justice.[7] That said, many countries will no doubt share a number of general aims, such as one suggested by Braithwaite:

> [T]he long-run hope is for a radical redesign of legal institutions whereby the justice of the people will more meaningfully bubble up into the justice of the law and the justice of the law will more meaningfully filter down to place limits on the justice of the people.[8]

It could be that in a particular jurisdiction there are a number of competing aims, in which case it is necessary that these are clearly articulated and there is full community participation in the decision about which aims to pursue, or what sorts of compromises should be made. For example, there might need to be choices made between preserving traditional aspects of a customary justice system, such as the exclusion of women, with the desire to develop a greater role for women in the administration of justice.

Working out the aims or goals for every jurisdiction should involve stakeholders in both systems, as well as broad community consultation. It is essential that the key actors in both systems, as well as the general public, broadly agree on the foundational principles of the new structure.

In Vanuatu, it is still too early to say what the aims of the overall justice system are, as there has not been the kind of national debate that is necessary to identify these with certainty. On the basis of what has been discovered during the fieldwork, however, it is possible to hazard a guess as to what factors might go into a desired justice system for Vanuatu. It is likely to be a system that maximises the ability of everyone to have effective access to a conflict-management system that everyone affected by the conflict considers fair and legitimate. There is also likely to be pressure for the system to be consistent with international human rights standards. These aims incorporate, and juggle, three main ideas.

First, the idea of effective access to a conflict-management system requires that the access is not merely theoretical and involves considerations such as geographical accessibility, financial accessibility and that the institutions themselves (and the processes they use) are understandable to the people who use them. Second, there is a subjective requirement—namely, that the conflict-management system must be considered fair and legitimate by the parties to the conflict, as well as those affected by it, such as families or communities of the parties. This requirement in the context of situations of legal pluralism means that parties should be free to choose the system that they consider to be a fair and legitimate forum. There will, of course, need to be some regulations to deal with a situation where one party considers one legal system legitimate but not the other.

The third part to the aim is the objective requirement that the conflict-management system conforms to certain international human rights standards, such as those ensuring freedom from discrimination and the rules of natural justice. Such a requirement is necessary in addition to the two above to

deal with situations where the *parties* to conflicts consider the processes fair and legitimate, but they are in fact being dominated in some way by an oppressive force. An example of such a situation is a case where a husband beat his wife because she did not have his dinner warm for him when he came home. In a heavily patriarchal community, such as exists in some parts of Vanuatu, the response of the chief to a complaint by the woman might be that the man is entitled to do this and the woman might accept this due to her customary upbringing.[9] In such a situation, the conflict-management system must be changed because otherwise it reinforces the domination of women by men, which is slowly becoming less acceptable in Vanuatu, and is contrary to the constitution and the various international agreements that Vanuatu has ratified.[10] This aim is also responding to the fact that the *kastom* system is increasingly seen as a justice or rights system, as discussed in Chapter 4. In addition, as a practical matter, it is unlikely that Vanuatu would receive donor support for any reforms that would significantly limit international human rights standards. This is an example of a way in which particular aims might need to be the process of discussion and compromise.

Step 3: Examine the current positive and problematic features in the relationship between the systems

This next step[11] requires fieldwork into the operation of the state and non-state systems and those areas where they interact to discover the positive and negative features of their relationship. Key players in the systems, and especially those who act as 'gatekeepers' between the systems, must be interviewed. Identifying these gatekeepers is an important step also because they are the people who are most likely to be instrumental in building bridges between the systems. In addition, case studies should also be done where possible to demonstrate the real relationship between the two systems and the strengths and weaknesses of that relationship. The advantage of combining case studies with in-depth interviews is that it is possible to understand how people would like to see the systems working in practice (which often comes through in interviews) and also how they really do operate in reality (which comes through in case studies).

This step has been carried out in Vanuatu and the results are discussed in Chapters 5 and 6. The relationship between the two systems was found to be, for the most part, informal and undefined, continuously shifting in response to local conditions and individual relationships. One of the important variants was the strength of the state system in a particular area—in terms of manpower and other resources available. The strengths of the relationship were found to be its fluid nature, allowing it to adapt in response to the needs of each particular situation, the fact that the *kastom* system was able to define its own norms and procedural framework, allowing it to remain a dynamic and legitimate grassroots justice system, the fact that it was based entirely on respect and so dependent

on the community for support and, finally, the *kastom* system provided access to justice in areas not serviced by the State and kept a high percentage of cases out of the state system at no cost to the State. An additional important strength of the current situation is that some people have roles in both systems, such as chiefs who are also police officers, and are able to act as links between the two systems. These are the people who, according to Putnam, are crucial to building social capital because they not only share bonding capital within these groups but bridging capital between groups.[12] As Granovetter points out, even if the bridges are shaky, there can be great strength in weak ties.[13] In Vanuatu, the Church, the Malvatumauri and the police officer chiefs provide much of this bridging capital.

A significant number of tensions and problems have also been found to exist in the relationship, the principal ones being:

- the ability to engage in unregulated 'forum shopping' leads to destabilisation and undermining of both systems and places vulnerable complainants under considerable pressure
- there is confusion and misinformation about which system has responsibility for dealing with different types of cases
- this confusion leads to confrontations between chiefs and state officials and considerable frustration on both sides
- this confusion also leads to both systems avoiding responsibility for dealing with domestic violence cases and refusing to take responsibility for fixing certain breakdowns in law and order
- there are no clear pathways for how a particular matter should move between the two systems; this means that in cases where the state system deals with the matter first this has consequences for the ability of the *kastom* system to deal effectively with the matter and vice versa
- when a case is dealt with in both systems, many defendants feel they are being punished twice for the same offence
- the operation of the state system disempowers and demoralises chiefs
- the operation of the *kastom* system undermines the effective operation of the state system—for example, by creating a competing forum that might be considered more legitimate and by delaying the reporting of cases and causing people to withdraw cases from the police when they have not been fully processed, thus wasting state time and resources
- the state system hinders the operation of the *kastom* system by prosecuting chiefs for enforcing their orders, making orders that contradict those of the *kastom* system and making orders that interfere with the ability of the chiefs to operate.

Step 4: Consider the applicability of the different models of relationship to this context

The next step is to establish a national dialogue to determine which of the seven models set out in the previous chapter comes the closest to overcoming the problems identified in the relationship between the systems, as well as the problems *within* the systems, without disproportionately jeopardising the existing advantages.

Taking this step involves looking at the tables in the previous chapter, especially the column that sets out 'circumstances in which this model should be considered' and analysing whether or not these particular circumstances apply. The consideration of possible models should also take into account factors such as whether or not certain models have already been tried and failed, and any particular cultural or historical reasons that would make a particular model impossible.[14] It is also possible that a particular jurisdiction might choose to combine various features from a number of different models to create a new model. For example, a jurisdiction might feel that having completely parallel justice systems might not work and so could give a limited right of appeal to state courts, thus combining Models 4 and 5.

In selecting a model, the main questions to be decided are whether or not the State will formally recognise the validity of the exercise of adjudicative power by a non-state system and, if so, the extent of that jurisdiction, and the State's powers of regulation and whether or not the non-state system will be able to use coercive power. The other questions or details that should be considered are set out under each of the models in the previous chapter.

The practical way the task of choosing a model can be implemented will vary from country to country, but a possible option is the establishment of a task force with equal representation of key players from the state and non-state systems, as well as other interest groups such as women and youth groups. This task force could hold focus groups to debate particular issues and also regular public briefings to discuss findings and gather feedback throughout the jurisdiction (importantly, paying as much attention to rural areas as to urban ones). It might also be advisable to hold at least one national summit on the issue to which a wide range of stakeholders is invited, as this might focus the national attention on the issues involved and generate a degree of unanimity in the direction to be followed. Particularly in countries where there is limited scope for dissemination of written materials, the importance of utilising avenues such as public meetings and even the radio for debates and discussions cannot be overemphasised.

This step is yet to be taken in Vanuatu. From the basis of this study, the possible models to consider are Models 4, 5 and 6, as the informal relationship that currently exists is becoming increasingly unviable. It could be, however, that

for political reasons (the reluctance of the State to empower the chiefs), consideration should also be given to Model 3, particularly if a focus is given to establishing more structured relationships such as the Zwelethemba Model of Peace Committees in South Africa. Some of the issues involved in making the choice of model were discussed at the Vanuatu Judiciary Conference in 2006 and there was considerable disagreement between the different stakeholders—chiefs, judiciary, police—about most of them, thus illustrating the need for a slow and open process of discussion and negotiation in the future.[15]

Step 5: Develop the chosen model so that it becomes one of mutual adaptation, mutual recognition and mutual regulation

The previous step largely involves the State determining what relationship it will have with a non-state system and how it will recognise and regulate it, although its approach to this will be informed very much by the attitudes of the key actors in the non-state justice system. One of the principles at the centre of this proposed methodology, however, is not to privilege the state over the non-state system without good reason. This step therefore aims to remedy the state bias of Step 4 by modifying the model selected so that it becomes balanced in terms of responsibility and direction between the state and non-state systems—in other words, so that they are both (all) 'steering the boat'. In effect, this means that for every step taken by the State towards learning about, adapting to, recognising and regulating a non-state system, consideration should be given to how a reciprocal measure could be taken by a non-state system towards the state system. In order for such reforms not to create duplicate structures, it will be important for the efficiency capacity of both systems to be strengthened. This, together with prudent rules about when one system should defer to the other, should result in each steering the efficiency out of the other. As discussed in Chapter 7 (under 'Mutual adaptations/innovations by state and non-state systems'), there are considerable difficulties associated with the practicalities of implementing reforms in non-state justice systems. Many of the steps in this section therefore require the non-state justice system to form partnerships with either the State or donor organisations.

To apply this to Vanuatu it is necessary to first choose the model, which as explained above has not yet been done. For the purposes of this exercise, however, Model 6—in which the State formally recognises the *kastom* system and enforces its judgments, if necessary, with the use of state force—will be used. For reasons of space, this discussion will be limited to its essentials, as its purpose is not to provide a blueprint for Vanuatu but rather to illustrate the approach of integral plurality that is being advocated.

Internal adaptations

This step involves each system considering ways it can adapt or reform *itself* so it can strengthen the links between, and work together better with, the other system. A non-legal example of this occurring successfully in Vanuatu is the relationship of Christianity and *kastom*, where both have adopted elements of the other and today they are perceived as coexisting harmoniously and supporting each other.[16] The systems might draw from the mutual adaptation suggestions set out in Chapter 7 (under 'Mutual adaptations/innovations by state and non-state systems') or develop new ideas.

The state system

In Vanuatu, the simplest first steps to take to move in this direction are:

- to formalise a way to facilitate learning about the *kastom* system (such as through a series of workshops)
- reintroducing assessors, at least into the Supreme Courts if not the Magistrate's and appeal level as well
- making greater use of the *kastom* system in terms of diversion and sentencing.

In addition, consideration should be given to an idea that emerged from the Vanuatu Judiciary Conference, which is that there should be an office established within the government to ensure that the state system uses the *kastom* system as much as possible. It was suggested that this office could be established within the Ministry of Justice and its role would be to monitor and ensure coordination of projects and the two systems and provide funding, training and consultation.[17] Many of these steps would, in fact, be mutually supportive—for example, the inclusion of assessors in state courts would open paths of mutual learning.[18]

The *kastom* system

As for the state system, one of the most fundamental steps for the *kastom* system to take is to educate the chiefs about the workings of the state system and their role, such as it is, in it. There is also a good deal of scope for the *kastom* system to make changes to accommodate some human rights and natural justice issues, such as the right for all parties, regardless of gender, to be allowed to speak and the right for parties to have an unbiased panel of decision makers (and processes to ensure these rights can be exercised).[19] It is important that such reforms are seen to be warranted and necessary by the key actors in the *kastom* system, so that ownership of them is felt at a grassroots level and they are not seen as something that is being imposed on them.

A particular approach to advancing such reforms in Vanuatu is to find places where communities have already successfully implemented such measures (for example, the chiefly council in Erromango that includes a woman) and then to

use that as a role model for other communities. Vanuatu Cultural Centre fieldworkers could carry out this initial research in conjunction with local scholars or donor organisations. Such an approach is similar to Parker's concept of 'triple-loop learning', which involves a successful development at a local level being replicated at successively higher levels of an organisation or structure—for example village, island, nation.[20] An important part of each 'loop' of the learning cycle is reflecting on how the diversity in the different levels can be accommodated and managed (for example, if a procedure is taken from a village-level council and applied to an area-level council), as well as the experiences from the previous level. This approach ensures that indigenous solutions are being used, rather than introduced ones.[21] An issue that might need to be overcome with this approach if it is used across islands is the risk that people from other communities might say in response to the suggested reform 'that is their *kastom*, this is ours'. With appropriate leadership, however, from non-state justice system leaders committed to the reform agenda, these sorts of attitudes should be able to be overcome.

Recognition

State recognition of the *kastom* system

The model chosen involves the State recognising the legitimacy of the *kastom* system to exercise adjudicative power. Two questions to be answered initially are: how will the State determine who are the legitimate administrators of the *kastom* system and what should be the extent of the recognition?

In terms of the first question, there are three possible approaches. The first is not to prescribe what the *kastom* system is or who can legitimately operate it, but to leave the issue to be dealt with on an individual basis (such as when a chief comes to a court asking for a judgment to be enforced). Given the existing level of disputes over chiefly title, this is unlikely to be a workable strategy and runs the risk of the courts being coopted into local power struggles. The second, and most preferable, approach is that taken in Botswana, where the chiefs apply to the State for recognition of their court. A possible refinement of it could be for the minister to impose certain criteria on the recognition of such a court, such as that the court has a certain proportion of women as members and provides guarantees about the right of women and children to speak. Such a system would leave to the individual community the decision about whether to form a relationship with the State and have access to its coercive powers in return for submitting to a degree of regulation or to remain alone and rely on the strength of *kastom* and respect to enforce orders. Importantly, in making such a decision, the community as a whole is likely to be involved in a discussion of the issues, which will have an invaluable educative effect about the roles and limits of each system.

The question about the extent of jurisdiction involves further questions, such as: should *kastom* courts have jurisdiction over *kastom* and state offences and matters, or just *kastom* ones? Should there be a list of offences or matters that the *kastom* system should not deal with? Should the *kastom* system have exclusive jurisdiction over any matters or offences? Should there be cross-referral provisions to ensure that only one system can deal with the conflict? Answering these questions is beyond the scope of this book, but the problems in Botswana (where the non-state system exercises jurisdiction over state matters)[22] suggest that the *kastom* system should deal only with *kastom* offences, as in South Africa.[23]

Kastom system recognition of the state system

The decision by the *kastom* system to recognise the state system involves the *kastom* system determining what offences or matters can legitimately be determined by the state system and whether there should be any areas where the State should exercise exclusive jurisdiction. It is likely that there will be broad agreement that the state system has exclusive jurisdiction over non-customary matters, such as taxation, customs and other laws that are essentially part of a modern nation-state. The difficult areas are likely to be in the area of criminal law, particularly sexual offences and serious assault and murder cases, which have been shown by this study to be contested areas. It could be that different parts of the *kastom* system throughout the country might choose to recognise the state system differently—and this is something that will need to be discussed and negotiated. For example, it might be that in areas where there is no police post, the *kastom* system will recognise the State's right to exercise jurisdiction in a more limited way than in urban areas.

In terms of implementation of these decisions, written policies might be drawn up or oral agreements made and publicised by various levels of the *kastom* system about what to do when particular cases arise over which the state system is recognised as having either exclusive or shared jurisdiction.

Regulation

State regulation of the *kastom* system

We saw in Chapter 7 that the issue of regulation of non-state justice systems was one of the most controversial and complex in the reform of pluralist relationships. The amount and type of regulation are very much dictated by the type of relationship adopted. For example, it is apparent that when the State is using its own coercive powers to enforce decisions made by non-state justice systems there is a need for some type of regulation. As Blagg comments, 'There is an inherent tendency for coercive policing powers to be misused unless restrained by oversight, visibility and mechanisms of accountability.'[24] If there is too

much regulation, however, the non-state system risks losing its integrity and those very features that distinguish it from the state system and make it so valuable: accessibility, adaptability, legitimacy, familiarity and timeliness. One way to find the balance between over and under regulation is to adopt a policy of minimal intervention—that is, to intervene only in the substantive and procedural organisation of the non-state justice system where empirical research has shown that constitutional or human rights breaches have occurred or are likely to occur. The Traditional Courts model in South Africa demonstrates that it is theoretically possible to have such a 'hands-off' approach and yet be confident that citizens will still be assured of their rights to a fair trial.

The two main options for regulation of the *kastom* system by the State are appeals and supervision. One way to apply the principles of minimal interference to appeals is to have the appeal structure limited in various ways. For example, in Samoa, there are limited grounds of appeal to the Supreme Court, thus ensuring that the state courts (except for the Land and Titles Court, which is a hybrid customary system) become involved only when there are allegations of breaches of the fundamental rights provisions in the constitution. In addition, it might be possible to limit the types of orders that could be made on appeal—for example, allowing only a state court to send a matter back for rehearing, perhaps with some policy guidelines designed to remedy the problems that occurred in the first instance. A further possibility could be the setting up of a *kastom* court of appeal that draws its personnel, procedures and substantive laws from both systems.

In terms of supervision, it is also possible to have a structure based on a principle of minimal interference. The approach suggested by the South African Law Reform Commission of having a separate registrar outside the state court system, whose purpose is to guide and supervise the courts and transfer cases where necessary, is one that could be considered.

In addition to appeals and supervision, there are other secondary forms of regulation, such as requiring *kastom* courts to meet certain standards before the State agrees to enforce their judgments (such as the requirements of natural justice), or requiring that all sitting fees be paid into a particular account or accounted for in some other transparent way.

Kastom system regulation of the State

Regulation of the state system by the non-state justice system requires a significant amount of creative thinking, as there is little available material on where this has been tried actively in particular jurisdictions. It is unlikely that the *kastom* system would have the ability, or even the desire, to regulate the state system through appeals. There are, however, a number of *indirect* ways that the *kastom* system could regulate the state system. Such initiatives are likely

to have a significant impact on enhancing the legitimacy of the state system and, hopefully, mean that it will no longer be viewed as '*kot blong waetman*'.

One indirect means is a requirement that before any significant change of legal principle or policy that will have relevant implications for the *kastom* system[25] is made by the Supreme Court or the Court of Appeal, the issues involved are discussed, and the decision concurred in, by representatives from the *kastom* system. One mechanism for doing this is for chiefs to sit as assessors in the Court of Appeal.[26]

Another approach might be the holding of a conference each year, attended by representatives of both systems and at which the judiciary is required to report to the chiefs on various matters concerning the administration of justice, and listen to their feedback and create action plans for implementing any proposed reforms that could then be reported back on the next year. Where customary leaders are dissatisfied with the quality of the listening, they could discuss pulling back certain kinds of cases from the police, the courts and the prison system.

A final idea is to include a traditional leader on the judicial appointments committee and make knowledge of customary law a factor in determining eligibility for the position of judicial officer, as has been done in Bougainville.[27]

Step 6: Develop a method of progressive implementation and evaluation of changes

This step is to develop a method of implementation of the changes that maximise the chances that the relationship between the systems is dynamic and that the links between the systems are continually reinforced. The method advocated for achieving this is an incremental one, with a method of evaluation of the changes that have occurred built into it. The method works by defining some practical initial steps for moving forward incrementally to make the changes identified, and then evaluating those changes before moving forward with further steps in light of that evaluation, and so forth. A further principle that informs this approach is Selznick's concept of responsiveness, which 'entails reconstruction of the self as well as outreach to others.[28] Established structures, rules, methods, and policies, are all open to revision, but revision takes place in a principled way, that is, while holding fast to values and purposes.' State and non-state systems are therefore viewed as existing in a dynamic relationship, which requires them to modify certain aspects of the way they relate to each other and in themselves, while retaining their own integrity.[29]

In Vanuatu, from the side of the state system, the first step that could be made could be the introduction of assessors in one level of state courts. At the end of a given period, there could be a review of how well this had worked, and if it had proved to be a success then they could be implemented at other levels. If

they had not been then there could be an investigation into why not and whether it was worth trying again with a different implementation strategy, or trying one of the other mutual-adaptation possibilities set out in Chapter 7. From the side of the *kastom* system, the first step could be research into communities where the various village, area and island councils are working well and the reasons for this, and then a program devised to apply the lessons learnt from the research to another group of village, area and island councils that is not currently functioning as well. This process could then be evaluated and the lessons learnt applied to implementing the changes with a broader group of chiefly councils, and so on.

Step 7: Revise the model pluralist method

The final step is to make sure that the seven-model typology developed in Chapter 7 is continually revised in light of new empirical experiences throughout the world, by adding new models or new advantages/disadvantages of existing models that should be considered.

Conclusion: doing legal pluralism

This final chapter applies the lessons learnt through the study of plural legal orders in Vanuatu to the development of a methodology that can be used to 'do' legal pluralism in any given jurisdiction. It has shown that although today legal pluralism is not widely used by those examining customary law or engaging in practical legal reform, it has the potential to be an extremely useful tool for both. The theory of legal pluralism permits us to move from focusing all inquiries on the state system—as is required by positivism—to exploring other legal orders that exist in a given jurisdiction. Such inquiry could reveal that these systems are, in reality, performing the same work as the state system in a different, and sometimes better, way. We therefore see that in Vanuatu the *kastom* system manages more conflicts than the state system and is often preferred to the state system due to its accessibility, familiarity, efficiency and cultural relevance. Legal pluralism also provides valuable insights into the interrelationship between the various systems. It might reveal that legal orders in a society operate semi-autonomously and consequently that changes to one (through conscious reforms or societal change) will have significant consequences for the operation of the other. For example, in Vanuatu, the state system was shown to be negatively affecting the *kastom* system in a number of ways, including by undermining and destabilising the authority of the chiefs and interfering with their ability to operate their system, and vice versa. Legal pluralism thus allows us to create a complete picture of the various systems that manage conflict in a society and the ways in which these systems interact with one another.

Of course some legal theorists might argue that a situation of deep or institutional legal pluralism breaches the rule of law.[30] Although the rule of law is not a

clearly defined principle,[31] there is broad agreement that it entails some requirement that human behaviour is regulated by general prescriptions, and that this is incompatible with extensive discrimination.[32] Fuller, for example, therefore argues that the rule of law requires that 'like cases must be treated alike' and that 'alternative enforcement of the rules, such as lynch mobs, street violence, and vigilantism, which create incongruence between announced legal rules and social reality must be suppressed'.[33] Such principles appear to support the universal observance of state law and to be breached by a situation in which, for example, in some areas of a country adultery is punishable but not in others, as can occur in a legally pluralist country.

Before accepting such a judgment, however, it is necessary to go behind the notion of the rule of law and investigate the principles that support it. The main rationale for the rule of law is to be a safeguard against arbitrary governance by ensuring that people are regulated by clear, known, accepted rules. In many pluralist countries, however, state law is considered by many to be foreign and arbitrary and treating everyone (for example, an educated urban dweller and an illiterate farmer) equally in reality results in substantial inequality and injustice. As Woodman comments, in 'countries where state law is largely a foreign implanted law, but customary law [is] an effective factor of local social cohesion, any additional empowerment of the state may result in a diminuition in the totality of the rule of law'.[34] If, therefore, we really wish to embrace the true basis of the rule of law, it might be more just to allow people to be regulated by their own legal orders, which are clearer and more legitimate and ensure greater equal treatment in pratice, than to attempt to impose a universal state law.[35] Various ways this could be done, together with detailed consideration of their practical and legal consequences, are set out in the typology in Chapter 7.

The limitation of legal pluralism to date has been that after helping to create a picture of the various systems that manage conflict in a society—and in doing so identifying the problematic areas in the relationships between the various legal systems—it is unable to take us further. In other words, it has not provided a normative path for reforming the various systems to allow them to work together better. Possibly, the focus that has been given to internal definitional debates in the past decade and the unwillingness to transcend normative relativism have prevented legal pluralism from continuing as the vital force it was in the 1970s and 1980s.

The major theoretical contribution of this book is therefore to move beyond this current limitation by devising a seven-step methodology that can be used to take the recognition of a situation of legal pluralism to the next step, by reforming the relationship between legal systems to allow them to work together better. It has shown that questions concerning which normative orders should be termed 'legal' and the differences between 'weak' and 'deep' legal pluralism are not as

significant as confronting highly specific questions about relationships between state and non-state justice systems. The emphasis of the new method is on developing practical responsiveness to the realities of the relationship between state and non-state legal systems in a particular jurisdiction.[36] Whether what is achieved in a particular jurisdiction is weak or deep pluralism is not a preoccupation; what is important is that a way has been found for the legal systems to work together in a more supportive and mutually accountable manner than previously.

The keys to successful implementation of this method are a refusal to privilege the state over non-state systems without a good reason, creative thinking about possible relationships for the systems and mutual-adaptation possibilities, the need for continual empirical research using a participatory method, the adoption of an incremental approach and the desirability of robust public debates and participation throughout the implementation process. Further, in addition to employing a pluralist theory that pays equal attention to state and non-state systems, it is important to use a pluralist or grassroots *methodology* such as has been adopted in this study. A pluralist methodology takes as its field of inquiry all legal orders and investigates them using whatever avenues for research are available: documentary analysis, interviews, observations, conferences, and so on. The aim is to creatively blend different research techniques so as to discover, as well as possible, all of the factors affecting the management of conflict in a particular jurisdiction.

It is hoped that combining such a pluralist theory and methodology will assist any jurisdiction's justice system to become one that, in the words of one respondent, is 'a bird that flies with two wings'.

ENDNOTES

[1] For example, Johnston and Shearing, *Governing Security*, p. 145.

[2] For example, Dinnen, 'Violence and governance in Melanesia', p. 70.

[3] For example, Corrin Care ('A green stick or a fresh stick?', p. 59) states that there is a 'lack of any proved theory or methodology to guide any unification project in this field'.

[4] Braithwaite, John 2003, 'Principles of restorative justice', in A. von Hirsch et al. (eds), *Restorative Justice and Criminal Justice: Competing or reconcilable paradigms?*, p. 4.

[5] Galanter and Krishnan, '"Bread for the poor"', p. 833.

[6] Johnston and Shearing, *Governing Security*, p. 158.

[7] Government of the United Kingdom, *Non-State Justice and Security Systems*.

[8] Braithwaite, 'Principles of restorative justice', p. 18.

[9] A female respondent once told me that she accepted her husband beating her because 'otherwise how will I learn?'.

[10] Such as the *Convention on the Elimination of All Forms of Discrimination Against Women*.

[11] It might be more advantageous in some situations to reverse the order of Steps 2 and 3 as sometimes the precise nature of the challenges posed—and therefore the way in which principles should be framed—is clear only once the interaction between the two systems has been examined.

[12] Putnam, Robert 2000, *Bowling Alone: The collapse and revival of American community*.

[13] Granovetter, Mark 1973, 'The strength of weak ties', *The American Journal of Sociology*, vol. 78, no. 6, p. 1360.

[14] For example, in South Africa and some other African countries, the use that was made of the chiefs by the colonial governments made their acceptance by the community after independence difficult, which in turn affected the role they could play in the justice system. For example, Santos referred to the fact that after independence in Mozambique, traditional authorities were '[s]een as obscurantist remnants of colonialism'. Santos, 'The heterogeneous state and legal pluralism in Mozambique', p. 64.

[15] Forsyth, *Report on the Vanuatu Judiciary Conference 2006*.

[16] Discussed in detail in Chapter 1 under 'Religion and denomination'.

[17] Forsyth, *Report on the Vanuatu Judiciary Conference 2006*, p. 16.

[18] It should be noted that steps have already been taken towards achieving some of these adaptations. As already discussed, the Vanuatu Judiciary Conference in 2006 took the *kastom* system and its relationship with the state system as its theme and involved two days of discussion between the chiefs and the judiciary. In addition, the introduction of new legislation governing correctional services (discussed in Chapter 5 under 'The relationship between the prisons and the *kastom* system') is moving towards facilitating a greater relationship between the two systems.

[19] Some steps are also currently being taken in implementing some of these ideas. I am involved in a project that is a joint initiative of the University of Queensland's Australian Centre for Peace and Conflict Studies and the Malvatumauri that involves, in part, providing training to chiefs throughout Vanuatu on the functioning of the state system of governance and law and the role of the chiefs in it.

[20] Braithwaite, John, Healy, Judith and Dwan, Kathryn 2005, *The Governance of Health and Australia, The Commonwealth of Australia*, p. 31; Parker, Christine 2002, *The Open Corporation*, pp. xi, 251, 278.

[21] Woodman makes a similar suggestion when searching for 'the possibilities of activism in customary law'. He therefore states, 'A starting point might be found in the studies of ways in which some categories of subjects of customary law have manipulated and eventually changed the law to their advantage, either as individuals or as communities.' Woodman, 'Legal pluralism and the search for justice', p. 152.

[22] Discussed in Chapter 7, Model 7.

[23] Discussed in Chapter 7, Model 6.

[24] Blagg, *A New Way of Doing Business?*, p. 332.

[25] Obviously, this would not include matters such as customs duty or foreign relations.

[26] There might be a requirement that the judges and a majority of the assessors agree on the new principle or that if the judges and assessors cannot agree the judges must provide written reasons justifying their decision not to follow the assessors, as is the case in Fiji (*Criminal Procedure Code* [Fiji]:s 299).

[27] Bougainville Constitutional Commission, *Report on the Third and Final Draft of the Bougainville Constitution*, p. 197.

[28] Selznick, Philip 1992, *The Moral Commonwealth: Social theory and the promise of community*, p. 338.

[29] Selznick (ibid., p. 322) states, 'The chief virtue of integrity is fidelity to self-defining principles. To strive for integrity is to ask: What is our direction? What are our unifying principles? And how do these square with the claims of morality?'

[30] This issue was discussed in more detail in the context of Model 5 in Chapter 7.

[31] Walker, David 1980, *The Oxford Companion to Law*, p. 1093.

[32] Woodman, 'Customary law in common law systems', p. 31.

[33] West, Robin 2003, *Re-Imagining Justice*, p. 64.

[34] Woodman, 'Customary law in common law systems', p. 31.

[35] See the discussion about Model 5 in Chapter 7, where this issue is examined.

[36] Selznick, *The Moral Commonwealth*, p. 338.