

## **“THIS IS A COURT OF LAW, NOT A COURT OF MORALITY”: KASTOM AND CUSTOM IN VANUATU STATE COURTS**

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The title of this article is drawn from a statement by former Chief Justice of Vanuatu, Vaudin d’Imecourt.<sup>1</sup> Renowned for his flamboyant turn of phrase, I do not wish to imply that he is representative of the majority of legal professionals in the country. Yet, his statement provides a useful example of the exercises in division which take place in the state courts. In this case the division was framed as a demarcation between law and morality. In other circumstances the division took different forms: ‘this is the island court; we don’t know *kastom*'; ‘this is not a village court; we have to maintain order'.<sup>2</sup> Such statements lend themselves to the conclusion that the Vanuatu state legal system finds itself in a dichotomous position in relation to “introduced” law and indigenous practices, beliefs and expectations. This perception has been reinforced by the work of social scientific and legal scholars since independence in 1980, who have explored the ways in which custom or customary law find their way into state court proceedings and judgments. In this article I revisit this issue with the aim of destabilising and expanding the terms of reference used in those previous analyses. In particular, I argue that an elision has occurred between “custom” in English, and the apparently synonymous Bislama term “*kastom*”. This has served to obscure an important problematic in assessing ways to find a better “fit” between ni-Vanuatu expectations of justice and their experience of state courts. I start with a discussion of the term *kastom*, before moving on to examine the incorporation of “custom” into the state legal system. Using examples from written judgments and court proceedings that I observed during fieldwork, I discuss the ways in which the use of “custom” does not necessarily entail the use of “*kastom*”, and vice versa. In conclusion I consider the ways in which differentiating between custom and *kastom* might effect current assessments of the need for reform of the state court system in Vanuatu.

### ***KASTOM***

The term “*kastom*” has been much discussed in anthropological literature on Vanuatu (and other Melanesian countries) over the past thirty years, indicating the continued currency of the term in everyday life. While earlier discussions revolved around the issue of the “invention of tradition”, focussing on the supposed “revival” and possibly

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<sup>1</sup> ‘Our Divorce Courts are not Courts of morality, but Courts of law.’ *Banga v Waiwo* [1996] VUSC 5 <http://www.paclii.org>.

<sup>2</sup> Benedicta Rousseau, *The Achievement of Simultaneity: Kastom in Contemporary Vanuatu* (PhD thesis, University of Cambridge, 2004) chapter 6.

“spurious” nature of *kastom*,<sup>3</sup> more recent writings have attempted to find a general working definition for the term that embraces its multifarious role in contemporary discourse.<sup>4</sup> Bolton suggests that *kastom* might best be considered as ‘the word that people in Vanuatu use to characterise their own knowledge and practice in distinction to everything they identify as having come from outside their place’.<sup>5</sup> Her definition encapsulates well the oppositional origins of the conception of *kastom* in Vanuatu. Emerging from early European contacts and the introduction and adoption of Christianity through the 19<sup>th</sup> and 20<sup>th</sup> centuries, *kastom* came to stand for, often purposeful, resistance to colonisation and local adoptions of external practices and belief systems.<sup>6</sup> In the lead-up to independence through the 1970s, *kastom* acted as a conceptual national tie for ni-Vanuatu, providing an assertion of the possibility of a distinct national identity.

While it can be said that *kastom* retains some of those meanings, I would argue that its contemporary usage requires some addition to previous definitions. *Kastom* no longer stands in opposition to Christianity. With few exceptions, Christian principles are viewed as a core part of indigenous identity, and previously perceived incompatibilities between *kastom* and Christianity have been ironed out (or at least smoothed over). *Kastom* continues to occupy a discursive position as a shared property of ni-Vanuatu. However, it is recognised that firstly, *kastom* practices do differ from area to area within the archipelago, and secondly, that certain circumstances and settings are more conducive to the presence of *kastom* than others. For that reason, “non-*kastom*” is not just to be found outside the borders of Vanuatu, but rather it exists as a potential outcome of particular settings - and the types of relationships it is possible to form in them - many of which might be characterised as products of modernity – towns, workplaces, parliament, and institutions such as state courts. As such, *kastom* is not a broad assertion of indigeneity nor simply used to signal autochthony of practice; rather, it becomes a measure of the correct or appropriate way of being. Centred around the values of respect, unity and harmony, in contemporary everyday life *kastom* operates as a critical tool in determinations of the propriety and legitimacy of behaviour, personality, relationship and intent.

This formulation makes clear the fact that *kastom* is more than “just” practice, a point of particular relevance to this discussion. Instead, it incorporates a specific orientation of persons that may be expressed in practice, but is more than the mechanics of an activity. To successfully enact *kastom* involves being assessed and recognised by others as *kastom*. For example, the practice of ni-Vanuatu politicians cementing coalitions or mending rifts within their political parties with a “pig-killing” ceremony is widely frowned upon. These ceremonies are often seen to lack the proper intent or motivation to be considered *kastom*, and the frequency with which the alliances thus cemented crumble

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<sup>3</sup> See, for example Robert Tonkinson and Roger Keesing (eds), ‘Special issue: Reinventing Traditional Culture: the Politics of *Kastom* in Island Melanesia’ (1982) 13 *Mankind*.

<sup>4</sup> See Rousseau, above n 2, chapter 1 for an overview of these debates.

<sup>5</sup> Lissant Bolton, *Unfolding the Moon: Enacting women’s kastom in Vanuatu* (2003) xiii.

<sup>6</sup> Margaret Jolly, *Women of the Place: kastom, colonialism and gender in Vanuatu* (1994) provides a full discussion of this conceptualisation of *kastom*.

is used as evidence to back up this assessment.<sup>7</sup> The use of *kastom* as a means to judge and sometimes invalidate the actions of others has resulted in the suggestion that it operates as an ideological weapon to consolidate existing inequalities. Huffer and Molisa point to the invocation of *kastom* as a means to suppress criticism of politicians and chiefs.<sup>8</sup> Yet two factors suggest that this is a simplistic view of how *kastom* circulates in contemporary Vanuatu: the criticism of politicians mentioned above is as likely to be heard from a bus driver or a shop assistant as from a male leader; furthermore, *kastom* forms the basis of critiques of present power relations.<sup>9</sup> These factors rebut too the idea that *kastom* is the preserve of chiefs. *Kastom* needs to be considered as a potential resource for the majority of ni-Vanuatu to use in orienting their own behaviour and judging that of others. With this formulation of how *kastom* operates in mind, I turn now to a consideration of “custom”, and its role in the state legal system.

## CUSTOM

The English term “custom” has held a formal position in relation to state law in Vanuatu since independence in 1980. What is surprising though is the lack of definition as to what is being denoted by the term. The *Constitution* contains a number of sections that mention “custom”. In Article 95 the process for carrying over legislation from the Condominium is spelt out, stating that,

Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom

Article 95(3) affirms that ‘customary law shall continue to have effect as part of the law of the Republic of Vanuatu’. Addressing ‘ascertainment of rules of custom’, Article 51 states that, ‘Parliament may provide for the manner of the ascertainment of relevant rules of custom and may in particular provide for persons knowledgeable in custom to sit with the judges of the Supreme Court or the Court of Appeal and take part in its proceedings. Article 52 states that, ‘Parliament shall provide for the establishment of village or island courts with jurisdiction over customary and other matter and shall provide for the role of chiefs in such courts’. Thus “custom” is asserted as playing a role in the state legal system, but remains undefined.

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<sup>7</sup> For a recent example of such ceremonies see Royson Willie, ‘Lini Sets an Example for Others to Follow’. *Daily Post* (Port Vila, Vanuatu) 3 October 2008 <http://www.dailypost.vu> (Accessed on 2 December 2008). For recent criticism of this practice see Len Garae, ‘Sokomanu breaks silence with opinion’. *Daily Post* (Port Vila, Vanuatu) 8 October 2008 <http://www.dailypost.vu> (Accessed on 2 December 2008).

<sup>8</sup> Elise Huffer and Grace Molisa, ‘In Search of the Nakamal Way’ (Discussion Paper 99/4, State, Society and Governance in Melanesia Project, Australian National University, 1999).

<sup>9</sup> See, for example, Roslyn Tor and Anthea Toka, *Gender, kastom and domestic violence* (2004).

This definitional vacuum has contributed to the ongoing assumption that “custom” and “law” remain separate, with integration as an ideal or end goal also assumed. The two categories tacitly provide mutual definition: “custom” is what “law” is not – unwritten, indigenous - and “law” is therefore not “custom”.<sup>10</sup> This formulation is backed up by the commonly heard description of state courts as “*kot blong waetman*”, administering “*loa blong waetman*”, and the scholarly use of the term “introduced” to describe the same. The acceptance of this division as fact can be further extrapolated to a presumption of incompatibility. I suggest that this is a problematic starting point for an analysis of the situation as it does not indicate what is being done when “custom” is used in state court proceedings. Nor does it encourage an exploration of the ways in which *kastom* orients various actors in those proceedings. In addition, it tends towards a replication of divisions prevalent during the colonial period that posited “custom” as “native practices”, often seen as incompatible with “civilised values”; custom was “what they do” in distinction to “what we do” as defined and reinforced through law.

Under the Condominium administration all laws were derived from either British or French legislation and jurisprudence. Citizens of either of those countries resident in the New Hebrides would be subject to their respective laws, while those of other countries would choose which code they preferred to be governed by. Article 8(4) of the London Protocol of 1914 which cemented Condominium procedures stated that the administration was to ‘cause a collection of native laws and customs...and these where not contrary to the dictates of humanity and maintenance of order shall be utilised for the preparation of a code of native law, both civil and penal’. In practice this did not occur. Instead, indigenous residents of the New Hebrides were subject to a Native Criminal Code based, again, on French and British law.

The office of assessor can be seen as a recognition of “custom” as of some relevance to the administration. Assessors acted as advisors to the French and British District Agents whose job it was to enforce the law of the Condominium on the indigenous population. While the interpretation of this office varied from place to place, from the point of view of the administration the assessor acted as something of a cultural interpreter. As Rodman describes the role, ‘to [District Agents], assessors were the government’s men-on-the-spot, trusted middlemen with responsibility for bringing disputes to the attention of the government, invaluable informants and advisors on matters such as matrilineal land inheritance, pig-killing, and menstrual taboos’.<sup>11</sup> This description indicates that “custom” was not necessarily nor officially seen to hold the key to process, resolution or punishment. Rather, it is implied that an understanding of the *practices* of indigenous people may be germane to the explication of the circumstances of a case. This emphasis on custom-as-practice is not specific to the colonial history of Vanuatu. Discussing the use of custom in Papua New Guinea, Goddard points to a similar trend there. Using the example of sorcery as an outlawed “custom”, he shows how the legal formulation of that practice actually subsumed multiple practices involving different actions, motivations and

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<sup>10</sup> Brian Tamahana, ‘The Folly of the “Social Scientific” Concept of Legal Pluralism’ (1993) 20(2) *Journal of Law and Society* 192.

<sup>11</sup> William Rodman, ‘A Law Unto Themselves: Legal Innovation in Ambae, Vanuatu’ (1985) 12 *American Ethnologist* 603, 607.

outcomes. The category of sorcery as a single “custom practice” continues to be outlawed in Papua New Guinea, reflecting ‘the uncritical perpetuation of imprecise colonial concepts of indigenous practices generally glossed as custom’.<sup>12</sup> This construction of custom as decontextualised practice, evacuated of meaning can be seen in some of the state court proceedings I discuss below, and may be what often enables the use of custom to be considered not-*kastom*. The possible dissonances between custom and *kastom* in state courts are discussed in the next section with reference to written judgments, court sittings observed in the course of fieldwork in Vila, Santo and Lakatoro, and observation of the broader circumstances of some of these cases. By combining these different sources of data I show that analysis of the position of state courts in Vanuatu must consider them as part of the broader life of the country, rather than taking as read their inherently foreign and separate nature.

## FINDING KASTOM IN THE STATE COURTS

### Recognising reconciliation and compensation

Probably the most common way in which “custom” enters state court proceedings has been through Sections 118 and 119 of the *Criminal Procedure Code* [Cap 136], now superseded by Sections 38 and 39 of the *Penal Code (Amendment) Act 2006*. These sections provide for “promotion of reconciliation” and for any compensation paid to be taken into account in sentencing. Section 38 states that ‘a court may in criminal proceedings, promote reconciliation and encourage and facilitate the settlement according to custom or otherwise’. Section 39 states that ‘the court must, in assessing the penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom and if such has not yet been determined, may...postpone sentence for such purpose’. These provisions suggest an openness to alternative settlement procedures and awareness that state courts may not be the only forum in which conflict is sorted out. And in both sections “custom” is foregrounded as the means to that alternative end. When the application of these provisions is examined “in action”, interesting and contradictory outcomes emerge that suggest the implementation of these measures does not always subscribe to a simple recognition of alternative procedures, and sheds further light on the difference between custom and *kastom*.

In some cases the use of these measures follows a straightforward path. Settlements in “custom” were mentioned in a matter-of-fact manner in relation to sentencing: ‘I accept you are very sorry. I also accept you have made a full custom settlement’;<sup>13</sup> ‘In sentencing the defendant the following additional factors... were taken into consideration in mitigation... He has undertaken to perform and settle matters between the complainant and her relatives in accordance with custom’.<sup>14</sup> The reduction of a sentence in light of “custom” payments was set out in more detail in some cases. In *Public Prosecutor v*

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<sup>12</sup> Michael Goddard, ‘The Snake Bone Case: Law, Custom, and Justice in a Papua New Guinea Village Court’ (1996) 67 *Oceania* 50, 54.

<sup>13</sup> *Public Prosecutor v Tor* [2002] VUSC 28 <http://paclii.org.vu>.

<sup>14</sup> *Public Prosecutor v Matavusi* [2000] VUSC 42 <http://paclii.org.vu>.

*Gideon*<sup>15</sup> in which the defendant pleaded guilty to a charge of unlawful sexual intercourse with a 13 year old girl, the judgment outlined how a “customary settlement” was performed ‘where the defendant paid VT30,000 fine to the girl’s relatives, also the chief, a pig, mat as customary settlement’. Imposing a sentence of eighteen months imprisonment, Justice Marum stated that both the guilty pleas and “custom settlement” had been ‘taken into account’. He went on to conclude that ‘on the basis of customary settlement the court is of the view that a suspended sentence will serve a better purpose’.

Other cases indicate more complex issues emerging from the use of the provisions. *Public Prosecutor v Wayane*<sup>16</sup> involved charges of rape and aiding rape against six defendants, all of whom had taken part in a “custom settlement”. The details of the settlement are set out in the judgment: “[The victim’s] father arranged a meeting where the defendants made apologies to the victim followed with shaking hands and payments of ten mats, VT 10,000, two pigs, kava and some more other island food”. The Justice (Justice Marum) then made explicit reference to the relevant provisions of the *Criminal Procedure Code*, but also explained that the act of settlement would not enable any escape from punishment:

I will impose a custodial sentence as opposed to other form of sentencing. This may not go down well with the relatives of both parties and even the defendants as the matter had been settled by custom and they may ask why punish the offenders again when they had paid the price of what they did in the custom. A defendant commits an offence must pay the price for the penalty described by such offence and customary settlement cannot exchange such punishment but can only use to ease the ill feelings between the parties and their relatives...

This line of argument indicates an acceptance that an act has been carried out – “custom” – but indicates too a recognition that there are specific meanings and intents orienting that act – *kastom*. This suggests an understanding by the Justice of *kastom*, but, at the same time, he posits it as serving a different purpose to that of the state court. This judgment moves away from a more mechanistic view of “custom”, but the fact that the Justice understands *kastom* is what leads to its ultimate diminishment in terms of the judgment.

A second example illustrates again some of the complexities that emerge when judges move away from simply “taking into account” custom, and turn to the consideration of *kastom*. *Public Prosecutor v Tariodo*<sup>17</sup> resulted in the acquittal of the defendant charged with rape, making the provisions of the *Criminal Procedure Code* irrelevant. Despite this, the details of a “custom settlement” appear to have played a major role in the process and outcome of this case. As events were recounted in the judgment, the women was seen to have made only one clear statement that she had had non-consensual sex. Evidence given by many witnesses had her using Bislama phrases to explain events:

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<sup>15</sup> [2001] VUSC 118 <http://paclii.org.vu>.

<sup>16</sup> [2000] VUSC 57 <http://paclii.org.vu>.

<sup>17</sup> [2002] VUSC 37 <http://paclii.org.vu>.

‘*touchem nogud hem*’ [touching her in an inappropriate manner]; ‘*pullem shirt mo shirt i broke*’ [tugging and tearing her shirt]; ‘*tufala i holem nogud mi nomo*’ [the two of them “held me” in a bad way].<sup>18</sup> Matters were muddied further by the evidence surrounding a meeting that took place the day after the alleged rapes: ‘A custom meeting was arranged for the next day. The two defendants were each fined Vt25, 000 and a pig. They didn’t pay this and a few days later the matter was reported to the police’. The defence argued that the ceremony had been for the purpose of ‘*clinim gud face*’.<sup>19</sup> This was backed up by their sole witness, a chief, who said that *clinim gud face* – rather than dealing with accusations of rape – was the basis of the meeting. He explained that it was necessary in this case as the two defendants were both married men. This seems to imply that consensual, although illicit, sex was being acknowledged. The complainant’s mother agreed with the chief’s statement as to the reason for the meeting, and the judge was prompted to state that ‘it is not entirely clear...if the mother understood rape was being alleged until they went to the police’.

It is clear from the evidence outlined in the judgment that complaining to the police was precipitated by the defendants’ non-payment of the fines imposed at the meeting. Under questioning from the defence, the mother of the complainant ‘agreed she was angry when the two defendants failed to pay the fine and then she...went to the police’. Furthermore, ‘she said a small custom fine had now been paid and they wanted to withdraw the case’. In addition to these statements, the justice implied that enough doubt had been introduced by the defence through the complainant’s “admission” that ‘there was no force or assault’ and that she ‘agreed it was “normal” sexual intercourse’. This doubt was consolidated by the evidence concerning the reasons assumed by participants to be behind the custom meeting and resulting fines.

In this case, the fact of a custom settlement became a source of evidence, contributing to the acquittal of the two accused. The judgment did not consider the ceremony and fines as an admission of guilt, but rather implied that doubt had been introduced by witnesses testifying that their participation in the meeting was not related to rape. In this way, the *kastom* imperative of reconciliation and the restoration of harmonious relationships through the meeting and process of *klinim fes* was used as evidence to undermine the case. This suggests an awareness on the part of the defence counsel, witnesses and the justice of the *kastom* motivations for the actions involved in settlement, and this interpretation indicates that the actions were not just “taken account of”. Instead, they were weighed up as evidence from a *kastom*-informed perspective, in the same way that other evidence was assessed from a more strictly state legal perspective. We are able to

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<sup>18</sup> As Crowley’s Bislama dictionary indicates (Terry Crowley, *An Illustrated Bislama – English and English – Bislama Dictionary* (1990)), *holem* has a variety of meanings that could be relevant in this context: hold, grab hold of, grasp, caress. This potential range of meanings and the euphemistic manner in which sexual acts are talked about in Bislama seems, in this case, to be used to throw doubt on the validity of the complaint.

<sup>19</sup> This translates literally as “cleaning your face well”, however, in the context of *kastom*, I would translate it as meaning “to remove shame”. It indicates that matters are now over in that acceptance of the fine amounts to acceptance that there is no further need for shame on the part of those fined. The concept of *klinim fes* does not always involve the level of ceremony indicated in this case, nor necessarily high fines.

see in this instance a move ‘beyond recognition’<sup>20</sup> highlighting the fact that ni-Vanuatu in their roles in the state legal system do not necessarily bring a non-*kastom* eye to their work. Such evidence reiterates the need to consider the state courts as part of, rather than apart from, the broader context of contemporary Vanuatu. *Kastom*, as a measure of propriety that informs everyday life, can orient the way in which court personnel carry out their work.

### ***Kastom* as indigenous jurisprudence**

My aim here is not to suggest that ni-Vanuatu find state courts a comfortable and familiarly indigenous institution. Rather, I hope to elucidate the ways in which indigenous sensibilities find their way into the courts. As the above cases show, this can take place in a fairly subtle manner. However, then Senior Magistrate (now Chief Justice) Vincent Lunabek’s judgment in *Waiwo v Waiwo and Banga*<sup>21</sup> shows that *kastom*-oriented argumentation can also be made explicit, and be used to develop what could be termed an indigenous jurisprudence. That case involved a petition for divorce on the grounds of adultery, and an application for damages by the petitioner against the respondent (her former husband) and co-respondent (the woman he admitted committing adultery with). Neither the dissolution of the marriage nor the accusation of adultery were disputed; instead the area of contention was the claim for damages. As the judgment states, ‘the only point in issue in this case is about the nature of damages claimed by the Petitioner...as to whether damages claimed in such a petition is of punitive or compensatory nature’. This question revolved around differing interpretations of the *Matrimonial Causes Act 1986*, and broader issues regarding the applicability of laws carried over at the time of independence.

In discussing this issue, Justice Lunabek emphasises knowledge and intent on the part of the parties involved directly in the case, and on the part of Vanuatu legislators. The counsel for the petitioner had argued that while the Vanuatu *Matrimonial Causes Act 1986* may be based on the British *Matrimonial Causes Act 1965*, carried over at the time of independence, it had been revised by the Vanuatu Parliament in 1986. This meant that any use of the legislation had to take into account the intention of Parliament. To bolster this argument, she also emphasised the serious nature of adultery in Vanuatu and the fact that punitive damages are frequently awarded as part of “customary settlement”; ‘clearly...local circumstances are different from those of the United Kingdom’.

Addressing this issue in his judgment, Justice Lunabek expanded on the points regarding knowledge and intent on the part of legislators, and agreed that the Vanuatu Act was thus separated from its British antecedent:

...it is primarily the duty of the Court to interpret an Act of Parliament in such a reasonable manner so as not to defeat the intention of Parliament and the purpose for which the Act was enacted. It would be

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<sup>20</sup> Jonathan Aleck, ‘Beyond Recognition: Contemporary Jurisprudence in the Pacific Island and the Common Law Tradition’ (1997) 7 *Queensland University of Technology Law Journal* 137.

<sup>21</sup> [1996] VUMC 1 <http://paclii.org.vu>.

absurd to presume that...the provisions there were intended to apply to damages claimed...on the ground of adultery as applied in the United Kingdom, that is for compensatory damages only, having regard to the fact that to the knowledge of members of Vanuatu Parliament, Vanuatu circumstances are different from those of the United Kingdom...and that adultery is considered in Vanuatu as a serious offence most importantly on the basis of custom.

In deciding to award punitive damages a further point of relevance for Justice Lunabek was the fact that all three parties involved were from the same “custom area”, so a shared understanding of adultery and its punitive consequences could be assumed.

The judgment contained a schematic account of how “custom” could be incorporated more fully into state court proceedings,<sup>22</sup> stating that ‘custom must be discovered, adopted and enforced as law. This case is a testing point of this process bearing in mind...that Vanuatu jurisprudence is in its infancy and that we have to develop our own jurisprudence’. Pursuing this aim, Justice Lunabek’s argument centred on a number of factors: that adultery is considered an offence in “custom”; that all those involved in this case came from the same “custom” area; that fines charged in “custom” can be seen as punitive rather than compensatory; and, lastly, that no explicit evidence needs to be given in state courts as to the existence of “custom” punishments for certain offences if that knowledge can be presupposed on the part of the judiciary hearing the case. I argue that this final point can be interpreted as an argument in favour of recognising the role that *kastom* plays in contemporary Vanuatu, acting as a shared morality that may be assumed to orient the intent and assessment of actions. Here, Justice Lunabek suggests that certain knowledge may be assumed – what is considered wrong from a *kastom* perspective – and that this knowledge informs the actions of legislators, without necessarily needing to be made explicit. Law can be considered to have a *kastom*-oriented intent even when it “looks” the same as a British statute.

Later that year this decision was appealed and overturned by then Chief Justice d’Imecourt.<sup>23</sup> The grounds for his decision provide a good illustration of the difference between custom and *kastom* in state courts, with d’Imecourt rejecting Lunabek’s argument for assumed knowledge, intent and understanding on the part of court personnel. His argument rested on a model of “custom” as a set of specific rules and practices that apply in small areas, the knowledge of which rests in the hands of certain “experts”: ‘It is essential to remember that Judges and magistrates are not custom Chiefs and are not experts in custom of any area let alone of the whole of Vanuatu. Nor is there any such a thing as THE custom of Vanuatu’. This dismissal of Lunabek’s broader use of what I would term *kastom* was backed up by a series of assertions focussed on practical aspects of custom. d’Imecourt asserted that no customary law is written down, making its inclusion in state court proceedings difficult, and that custom punishments are not compatible or commensurable with those of state courts. ‘One must not forget...that in true custom, money plays no part at all as there is no money in custom. It is only in

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<sup>22</sup> A more detailed account of this aspect of the judgment is provided in Rousseau, above n 2.

<sup>23</sup> *Banga v Waiwo* [1996] VUSC 1 <http://paclii.org.vu>.

relatively recent times that money has made its way into custom settlement'. The tone of his judgment indicates a view of custom as inherently localised practice, and implicitly aligned with the past. This stands in contrast to Lunabek's more fluid model of *kastom* as a contemporary phenomenon that can be assumed to orient ni-Vanuatu behaviour. In addressing this component of Lunabek's judgment, d'Imecourt equated the imposition of punitive damages with "moralising", which for him had no place in state courts: 'It is important to note that the Court is not there to punish mere immorality. We are not concerned with the moral aspect of the adulterers'. In this way, an extreme empiricism was brought to bear on state law in order to negate Lunabek's prototypic foray into *kastom* as the appropriate jurisprudential basis for Vanuatu.

### **Island Courts**

The preceding material has illustrated the difference between custom and *kastom* in relation to state court proceedings, suggesting that courts "taking into account" custom does not necessarily equate to interpreting it from a *kastom*-oriented perspective. It also shows that there are spaces in the state court system for the use of *kastom*, lending credence to Justice Lunabek's contention that an indigenous jurisprudence can be developed. In this final section I consider *kastom* in relation to the island courts. I argue that the consciously "custom" aims of these courts may in fact lead to greater frustration on the part of court personnel and other participants due to the difficulties around using *kastom* in proceedings.

The introduction of Island Courts in 1983 could be seen as the realisation of the constitutional provisions contained in Article 52 for courts which would have 'jurisdiction over customary and other matters' and 'provide for the role of chiefs' in them. In compliance with the requirements set out in the *Constitution*, the *Island Court Act* [Cap 167] emphasised the role of "custom" in the new courts:

Subject to the provisions of this Act an island court shall administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order<sup>24</sup>

The difference in the style of Island Courts from that of other state courts was also reinforced by the fact that legal practitioners are not allowed to participate in proceedings.<sup>25</sup> Although each court has a supervisory magistrate appointed by the Chief Justice, the actual justices are "lay" people, all of whom must be 'knowledgeable in custom', and amongst them must include 'a custom chief residing within the territorial jurisdiction of the court'.<sup>26</sup>

Despite the intent of the constitutional provisions from which the Island Courts arose, and the explicit inclusion of "customary law" in section 10 of the Act, one commentator

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<sup>24</sup> Section 10 *Island Courts Act* [Cap 167].

<sup>25</sup> Section 27 *Island Courts Act* [Cap 167].

<sup>26</sup> Section 3 *Island Courts Act* [Cap 167].

makes the point that ‘the warranted jurisdiction...does not actually involve any general or specific custom law jurisdiction. Rather the warrants indicate that the focus of the courts’ jurisdiction [is] minor introduced law matter’.<sup>27</sup> For this reason, it appears that the defining characteristic of the Island Courts as opposed to the higher courts in Vanuatu must be the procedure followed. As well as the restrictions on the participation of lawyers, section 25 of the Act stipulates that ‘an island court shall not apply technical rules of evidence but shall admit and consider such information as is available’, thus giving a flexibility to proceedings perhaps not possible in other state courts. From my observations it is possible to perceive an air of “informality” in Island Court proceedings. Members of “the public” – usually people connected to the case in some way – would frequently interject with additional information, or to challenge the version of events being put forward by defendants or witnesses. Defendants too would take the opportunity to raise issues that they saw as related to the case in hand –often related to pre-existing land disputes. In one case I observed in Santo a group of young male defendants used the court hearing as a chance to openly criticise their chief, going as far as to threaten to kill him after the court hearing. I would argue that these examples indicate that the relational focus of *kastom* is able to come to the fore in Island Court proceedings: connections are being made between a wider group of people than just the defendant and witnesses; participants are undertaking discussion of present events in relation to a broader history of interaction. Yet this *kastom*-oriented behaviour is only possible up to a point. In Island Court hearings a tension emerges between the need for resolution from the perspective of *kastom* and the inherently singular focus of state court procedure. Attention is often called back from the relational aspects of the case to the particular charge being faced. Defendants are frequently instructed that a land dispute cannot be discussed at the present time as it necessitates another case being brought. In a particularly telling statement a justice in the Island Court in Santo admonished a defendant, reminding him that ‘this isn’t a village court; you can’t just talk about anything’.<sup>28</sup>

The controls thus imposed on Island Court participants are not limited to defendants and witnesses though. It is possible to see also constraints on the justices as they attempt to use *kastom* to orient their state court activities. The Island Courts legislation, in section 3(1) explicitly calls for the appointment of justices with reference to “custom”, but this does not mean that they are enabled to act with reference to *kastom*. A recent appeal case illustrates this problem.<sup>29</sup> The Efate Island Court had been asked to determine the rightful holder of a chiefly title. Their decision was appealed on a number of grounds, amongst which was a claim that the judges had shown bias in their actions at the hearing. It was claimed that ‘the hearing was conducted in the claimants shed and all lunch for the Judges were prepared and served by the Claimant’s relatives and all ate together on the Claimants shade together right through the proceedings. There was also evidence of Judges drinking kava together with Claimant’s relatives after court cases in the afternoon’. The magistrate allowed this part of the appeal, reinforcing the judgment in

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<sup>27</sup> Anita Jowitt, ‘Island Courts in Vanuatu’ (1999) 3 *Journal of South Pacific Law* [http://www.vanuatu.usp.ac.fj/journal\\_splaw/Working\\_Papers/Jowitt1.html](http://www.vanuatu.usp.ac.fj/journal_splaw/Working_Papers/Jowitt1.html) (Accessed 1 June 2009).

<sup>28</sup> Rousseau, above n 2.

<sup>29</sup> *Kalowia v Mapula* [2008] VUMC 1 <http://paclii.org.vu>.

*Maasai Family and Or v Lulu and Or* which stated that the judges in that case ‘should certainly never...take lunch with one of the parties in the absence of the other...The Court should physically separate itself from the litigants’. This enjoinder to remove yourself from particular social interactions, and particularly to receive food in an impartial manner, represents a model of personal conduct in conflict with the relational focus of *kastom*. In this way, the role of Island Court justice involves a purposeful renunciation of the networks of relationships that define sociality in *kastom*.

The Island Courts thus place court personnel, defendants, witnesses and other participants in a contradictory position. While custom is foregrounded, *kastom* is still incompatible with much of the structural and procedural aspects of the courts. As the above examples show, this can result in unsatisfactory outcomes for those involved. The frustration that emerges from this is manifested in the reiteration of boundaries discussed at the start of this article: ‘these people should sort out their problems with their chiefs. The island court doesn’t know *kastom*...The court isn’t your family’.<sup>30</sup> Such statements represent the realisation on the part of island court justices that more appropriate ways of dealing with conflict may be found outside the state courts. It also lends weight to the perception that, despite legislative intent, the result is an imperfect enforcement of existing state law which does not enable ni-Vanuatu to pursue resolution in line with *kastom*.

## CONCLUSION

The approach followed in this article offers an alternative to both positivism and legal pluralism when considering the situation of state courts in Vanuatu. To focus solely on the legislative and procedural provisions for “custom” leads inevitably to questions of how the seeming ideal of “integration” between “custom” and “law” might be achieved, and of the relative superiority of sources of law. A pluralist approach might instead consider custom or *kastom* as a legal system that should be considered on an equal footing with the state legal system.<sup>31</sup> There are merits to such an approach, but it can lead to the loss of several of the key characteristics of *kastom* in contemporary Vanuatu: rather than being a potentially codifiable set of rules and actions, it is the conceptual category that orients action. It is not defined and “owned” by those who occupy positions of authority (although they may find it easier to voice their views on *kastom*). Instead, it is a generalised property of the majority of ni-Vanuatu, used as a moral compass that orients action and as a critical tool for the evaluation of propriety of behaviour, personality, motivation, intent and outcome. To equate *kastom* with “custom” as it appears in legislation is to obscure the existence of a widely held view of what an appropriate system of justice might look like. From this perspective, “the law” doesn’t necessarily have to look radically different to be *kastom* or considered in a *kastom*-oriented manner; conversely, as illustrated above, law that explicitly addresses “custom”, such as sections 38 and 39 of the *Penal Code (Amendment) Act 2006*, may not lead to outcomes that will be considered *kastom*. With this in mind, it may be necessary to reconsider what is being said when courts are labelled as “*blong waetman*”, and when ni-

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<sup>30</sup> Rousseau, above n 2.

<sup>31</sup> For a recent example of this approach see Miranda Forsyth, *A Bird that Flies with Two Wings: the kastom and state justice systems in Vanuatu* (PhD thesis, Australian National University, 2007).

Vanuatu argue for a better integration of *kastom* and state law. Is the question about finding a way to recognise indigenous practice, or is it a desire to allow people to do things and assess actions “in the right way”? The evidence presented in this article does not show that ni-Vanuatu experience state courts as inherently “of their place”, yet within the existing system there is scope for the appearance of *kastom*. I argue, therefore, that eliding *kastom* and custom perpetuates a separation between ni-Vanuatu and their court system that may not allow recognition of how courts can be used and experienced. It is hoped that this provides a starting point for further research that foregrounds ni-Vanuatu *experiences* of state courts, as part of contemporary life, and without presupposing a monolithic gulf between the logic applied to everyday life and that which orients people’s behaviour and motivations in state institutions.