

A TYPOLOGY OF RELATIONSHIPS BETWEEN STATE AND NON-STATE JUSTICE SYSTEMS¹

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Introduction

The existence of normative legal systems operating independently or semi-independently from the state is an empirical reality in almost every decolonised country in the world.² However, despite the prevalence of non-state justice systems, and the growing official and academic recognition of their existence, to date few comparative studies have been made of them (with the notable exception of Morse and Woodman 1988). Further, although in much of the literature concerning non-state justice systems (especially that written by law reform commissions and donor agencies) there are references to the need to ‘recognise,’ ‘empower’ and ‘harmonise’ relations between state and non-state systems, as yet there has been limited enquiry into what exactly is meant by these terms. One explanation for this is the connection of this enquiry with sensitive issues concerning state sovereignty. While it is easy to agree in theory with broad statements about the need for recognition of non-state systems, once the actual

¹ This article is based on a chapter of my PhD thesis, Forsyth 2007.

² In fact, it is increasingly being recognised that legal pluralism even exists in western societies, and this state of affairs is contributed to by the growth of transnational laws and the presence of large groups of migrants who bring their own systems and observances of law with them to their adopted countries. See for example Shah (2005) who discusses legal pluralism in the United Kingdom.

detail is broached, significant levels of disagreement emerge.³ This may be due to what Blagg calls the “meticulously embroidered fiction that it is possible to both ‘empower’ communities and not to give up any of one’s own” (Blagg 2005: 340).

The aim of this paper is therefore to produce a comparative analysis of the range of possible relationships between state and non-state justice systems. It does this through the creation of a typology that sets out seven different models of relationship, the specific details that differentiate one model from another, the potential advantages and disadvantages of the different models, and the situations in which these models are working or not working and why. The typology is based on a comparative analysis of the literature on non-state justice systems from over twenty jurisdictions.⁴

In the majority of countries surveyed, there are only two major legal orders – most commonly the state and a customary justice system. However, there are other jurisdictions where there are three, and possibly even more, main legal orders. In addition to customary law systems, the most common types of non-state legal systems are religious-based legal systems, such as the *shari’ah* courts in Nigeria (Oba 2004a),⁵ and it is also increasingly recognised that there are trans-national legal systems.⁶ Although the focus of this paper is on a situation involving two

³ For example, Fitzgerald argues that

[t]here is a significant body of literature in Australia around the well-recognised imperative to recognise customary law, and significant disagreement as to what this terms means in practice (Fitzgerald 2001: 112).

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

⁵ Another example is in Western Sumatra where there are *adat* courts, Islamic courts and state courts: see F and K von Benda-Beckmann (2006).

⁶ Such as international law, European Community law, and *lex mercatoria*. See for example Twining (2003: 199) and Santos (2006: 50–51). Santos argues elsewhere that we are now entering the third phase of legal pluralism that is concerned with “suprastate, global legal orders coexisting in the world system with both state and infrastate legal orders” (Santos 2002: 90).

types of system only, consideration is also given to how this approach could be adapted to fit a situation where three or more types of legal systems must be accommodated.⁷

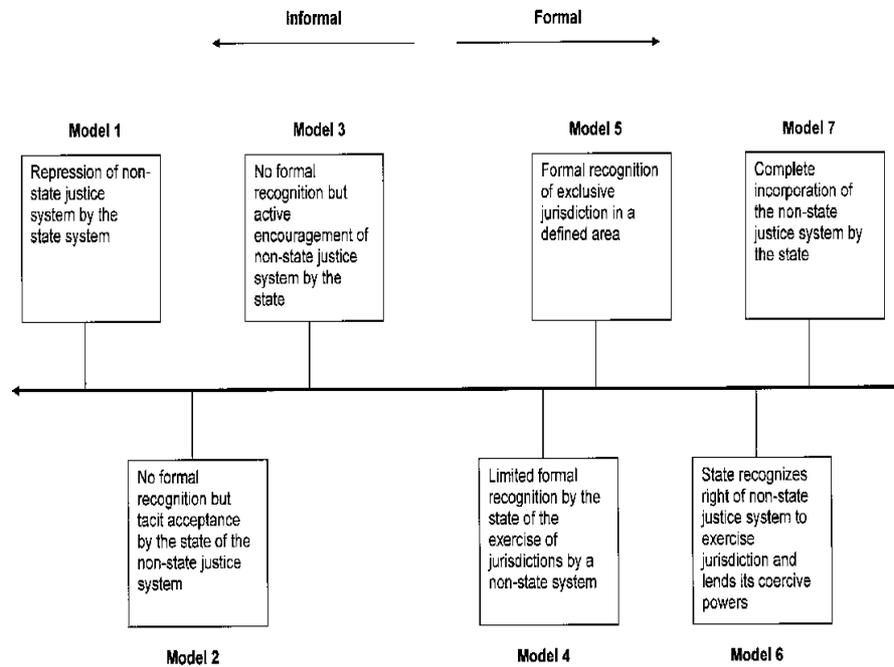
A typology of different types of relationship between non-state and state justice systems

The typology proposed in this paper conceptualises various types or models of relationship as existing along a spectrum of increasing state acceptance of the validity of the exercise of adjudicative power by the non-state justice system. At one end of the spectrum the model of relationship involves the state outlawing and suppressing the non-state justice system, while at the other end the model involves the state incorporating the non-state justice system into the state legal system. The proposed framework can be diagrammatically represented as shown in Figure 8.

There are a number of general points to be made about this framework before a detailed description of the different models included in it is entered into. First, many of the models discussed contain *within themselves* a significant range of relationships. It is for this reason that they should be viewed as existing on a spectrum, where one model gradually fuses into another as the detail of the actual operation of the relationship is worked out. That said, there are some places along the spectrum where clear lines *can* be drawn and it is possible to say that a fundamentally different approach has been adopted. The first of these points is the decision by the state to formally recognise the legitimacy of the exercise of adjudicative power by the non-state justice system. This step changes the relationship from one of informality to one of formality, thus radically altering the nature of the linkages required between the two systems, for example by introducing questions of supervision and appeal. However, the importance of this distinction should not be over-stated. Bouman argues, “[i]t is a mistake to equate recognition with active, explicit national regulations” (Bouman 1987: 289). He observes that in Botswana the unwarranted and non-formally recognised customary

⁷ Although during the time of the Condominium in Vanuatu (1906 – 1980) there were two *state* systems – the English and the French – this situation was so particular that no consideration will be given to the possibility of two state systems existing in a particular jurisdiction.

Figure 1 Typology of relationships between the different systems



courts are by no means autonomous but are controlled indirectly by the state. This suggests the necessity to recognise that even an informal relationship may allow the state to exercise a degree of control over a non-state justice system. Further, this regulation may in fact be as effective in supporting/ regulating non-state justice systems as formal recognition.

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

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

A second general point about the framework is that it considers the response of the state towards the non-state justice system as the defining feature of the relationship, and is thus based on the assumption that there will always be a state system and this will always be important. Of course, there were previous periods of history (especially prior to the treaty of Westphalia in 1648) when this was widely not true, and Chanock (2005: 366) argues that even today in many countries state law has a limited role, “not only in the normative universe, but also in its use as a means of settling disputes.” However, because of the way the international system of granting states sovereignty over law making works today, there is no jurisdiction where state law does not at least have *theoretical* capacity to regulate local disputes, which justifies this assumption. It is also supported by Santos who argues, “[t]he nation state and the inter-state system are the central political forms of the capitalist world system, and they will probably remain so for the foreseeable future” (Santos 2002: 94).

The third general point to be made about the framework is that it is concerned with what Woodman has termed institutional pluralism, which involves recognition of the structures, institutions and processes of other legal systems (Woodman n.d.). For this reason, hybrid legal structures such as the Village Courts in PNG or the Island Courts in Vanuatu are not included in the typology as they are essentially modified state bodies.

A fourth observation is that it is possible that there may be two or more different models of relationship in existence in the one country at the same time. For example, in Bangladesh the *shalish* system of dispute resolution exists in three ways: as traditionally administered by village leaders; as administered by a local government body; and in a modified form introduced and overseen by NGOs.⁸ Indeed, the research suggests that it is likely that if a state co-opts the non-state justice system in a way which limits, rather than increases effective access to justice, then a non-state-authorized version of the same system will develop and exist simultaneously with the state form. For example, in Nigeria although there are state customary courts, local people prefer to use the non-state traditional courts as these are not seen as being imposed by the government as the customary

⁸ See Golub 2003. The position is maybe even more complicated in Botswana where there are warranted customary courts, unwarranted recognized customary courts (that are permitted to engage in reconciliation), and unwarranted not formally recognised courts and unwarranted not recognised courts. See Bouman 1987: 279.

courts are (Elechi 1996: 344). In situations where there are two different types of non-state justice system in one jurisdiction, such as a customary system and a religious-based system, it is also possible that there will be different relationships between the state and the different non-state justice systems.

Finally, it is not necessary for there to be a uniform relationship between the state and non-state justice system throughout the jurisdiction, but different relationships may be formed depending on the various needs and resources in particular localities. For example, the Northern Territory Law Reform Commission (2003: 6) has proposed that one approach to dealing with traditional law is for “each Aboriginal community [to] define its own problems and solutions”. The Australian Human Rights and Equal Opportunity Commission (2003: 29) has also recognised that “it is reasonable to expect that one size will not fit all and a variety of forms of modelling and agreement-making could be pursued in regard to community justice”.

Models of relationship

This section analyses seven different types of relationship between state and non-state justice systems. The models that involve *informal* state recognition are analysed in terms of the extent of support given by the state to a non-state justice system. The models that involve *formal* recognition of a non-state justice system by the state are analysed in terms of the extent of the recognition of jurisdiction recognised and its degree of exclusivity, the types of regulation or supervision the state exercises over a non-state justice system, and the linkages between the systems in terms of referral and appeals. For all models examples are given of where they have been used, an assessment is made of the advantages and disadvantages of each model, and finally suggestions are made as to the circumstances in which the model should be considered by a particular jurisdiction. There is also a discussion of how each of these models could be adapted to fit a three systems jurisdiction. It must be noted that these models, and this framework, are very much a beginning rather than a finished product, and are based on data that are often incomplete.

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

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

This model involves the state actively repressing a non-state justice system by making it illegal for it to deal with cases (rather than by merely outlawing the use of coercive force by the non-state justice system). It is not common, but formally exists in Botswana. As discussed below in model seven, Botswana has attempted to incorporate its customary justice system almost entirely into its state system, and perhaps as a result has tried to ensure that there will be no 'non-state' customary justice system to compete with its 'state' customary justice system. Thus section 33 of the *Customary Courts Act* (Chapter 04:05) provides that any person who attempts to exercise judicial powers within the jurisdiction of a duly constituted customary court or knowingly sits as a member of such a court is guilty of an offence. In reality, Bouman states, unwarranted and not formally recognised chiefly courts are in fact tolerated, or even supported, by the official police forces, although their adjudication activities are in violation of various national laws (Bouman 1987: 291). This suggests that enforcement of this model may be problematic.

This model could be used in a three systems jurisdiction either by the state outlawing one type of non-state justice system and developing a different relationship with the other or by outlawing them both. In the former scenario one of the factors that would influence the type of relationship between the permitted non-state justice system and the state would be the extent to which the permitted non-state justice system is prepared to also outlaw the prohibited non-state justice system.

Table 1

Significant Features	Advantages	Disadvantages	Circumstances in which the model should be considered
<p>A non-state justice system is actively suppressed by the state, for example by prosecuting those who administer the system</p>	<p>Ideally ensures a homogenous legal system with no competing systems undermining each other (assuming there are no other non-state justice systems in the country)</p>	<p>May not work in practice but merely force non-state justice systems to go underground⁹</p> <p>Breaches of natural justice and human rights of parties much harder to remedy if the system is operating in secret</p> <p>The benefits of non-state justice systems such as speed, local presence, and easy accessibility are lost</p> <p>May in fact alienate those who wish to use the non-state justice system even further from the state system</p>	<p>If the non-state justice system(s) were completely dysfunctional, abuses of human rights were pervasive and these problems were so entrenched as to be incapable of being fixed (for example, the Klu Klux Klan's justice system or that of the Mafia or Colombian bandits (Santos (2002: 92-93)) while the state system ensured access to justice to everyone</p>

⁹ For example, in relation to East Timor, Mearns states:

It was put to me in several different contexts that the local systems of resolving disputes and punishing crimes will go underground and act as a clandestine and preferred alternative to the formal system unless they are given recognition and regulated (Mearns (2002: 54).

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

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

In the vast majority of countries in the world where there is both a weak state and a non-state justice system of some sort, there is no formal recognition given to a non-state justice system, but the state turns a ‘blind eye’ to the fact that the non-state justice system processes the vast majority of disputes, and state actors often unofficially encourage reliance on the non-state justice system. The literature suggests that this model of relationship exists in: East Timor (Mearns 2002: 26), Lesotho (Schärf 2003a: 18), Malawi (Schärf 2003b), Zambia (Schärf 2003a: 50), Mozambique (Schärf 2003a: 59), Kiribati,¹⁰ Nigeria (Elechi 1996), the Solomon Islands (Corrin Care 2002: 210) and Vanuatu (Forsyth 2007). For example, in relation to East Timor Mearns notes:

Police are acting pragmatically at the village level by encouraging some (often most) situations to be resolved through the village chief (Chefe de Suco) and a village council. Like it or not, the local justice system is operating and appears to be the preferred system. (Mearns 2002: 26)

In this model, while the state does not actively suppress the non-state justice system, neither does it support it. The main advantages of such a relationship are fourfold. First, the fluid nature of such a relationship allows both systems to be flexible and guided by local circumstances in their relations with each other. Second, the non-state justice system is able to define its own norms and procedural framework, allowing it to remain dynamic and legitimate at the grassroots level. Third, as the sole means to enforce compliance is community agreement, the leaders of the system need to work hard to remain respected and valued by the communities they serve. Finally, such non-state systems often provide access to justice in areas not serviced by the state and keep a high percentage of cases out of the state system with no cost to the state.

There are, however, a number of disadvantages with this model, largely stemming from the possibility of ‘forum shopping’ inherent in the model. These problems

¹⁰ My knowledge of the situation in Kiribati comes from unpublished research papers written about the customary legal system there by some of my students at the University of the South Pacific.

may be seen as falling into five categories: temporal ordering problems, disempowerment problems, delegitimation problems, destabilisation problems and individual justice problems. Temporal ordering problems arise when the two systems compete about which should deal with a particular matter first. Disempowerment problems involve each system experiencing a loss of exercise of control over what it considers to be its legitimate work because of the actions of the other system. For example, leaders of non-state justice systems may find difficulties in enforcing their orders because they are prohibited from using force and may have their decisions over-ruled by the courts. Schärf reports that in Malawi:

[T]he chiefs lamented that because they function outside the constitutional and legal framework they find it difficult to have their judgements enforced. The chiefs demanded that they be given back their powers, particularly their former powers to order detention and the power to impose community service orders, since people are now often likely to ignore their decisions, advice and directives. (Schärf 2003b: 39)

Delegitimation problems arise from each system undermining the authority and legitimacy of the other, for example by people challenging the non-state justice system's authority on the basis that it is unconstitutional, and the state's authority on the basis that it is 'foreign' or not culturally relevant. Destabilisation problems include all the negative effects on society as a whole that flow from the tensions between the two systems and from the fact that they are not working harmoniously, such as community confusion and misinformation about which system is responsible for what, each system avoiding responsibility for certain types of cases (such as domestic violence) by claiming it is the responsibility of the other system, and state resources being wasted in processing cases that are later withdrawn to be dealt with by the non-state system. Individual justice problems are those that particular individuals face as a result of the relationship between the two systems, such as 'double jeopardy' - being tried and sentenced by both systems. A final problem with this model may be a lack of mechanisms for controlling abuses of power and breach of human rights by non-state justice systems. For example, Mearns notes that in East Timor "local patterns of dispute resolution certainly do not always accord with ideas of equality, democracy and international human rights" (Mearns 2002: 54).

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

In some countries where this model exists the state does formally recognise the non-state justice system in a very limited way, such as in Vanuatu where state courts are required to take into account any customary settlement that has been made when sentencing.¹¹ However, the courts are not allowed to dismiss a case on the basis that it has been already dealt with by the non-state justice system¹² and, in Vanuatu at least, the customary settlement only affects the quantum and not the nature of the sentence given by the state (*Public Prosecutor v Gideon* [2002] VUCA 7).¹³

No special considerations would need to be had in applying this model to a three systems jurisdiction as each system would build its own informal relationship with the other two systems.

¹¹ Section 39 of the *Penal Code (Amendment) Act 2006* (Vanuatu). It is a common law requirement in the Solomon Islands.

¹² In *Regina v Funifaka* [1997] SBHC 31 Palmer J held: “The payment of compensation or settlements in custom do not extinguish or obliterate the offence. They only go to mitigation. The accused still must be punished and expiate their crime.”

¹³ All South Pacific cases cited in this article are available at <<http://www.paclii.org.vu>> .

Table 2

Significant Features	Advantages	Disadvantages	Circumstances in which the model should be considered
<p>No formal recognition of right of non-state justice system to exercise adjudicative power</p> <p>Allowance by the state of informal relationships between the two systems</p>	<p>The linkages between the two systems remain flexible and dynamic</p> <p>The non-state justice system is able to define its own norms and procedural framework, thus allowing it to meet the changing needs of the community</p> <p>It keeps cases out of the state system with minimum cost to the state</p> <p>It provides people living in weak states with access to justice they may not have if they rely entirely on the state</p> <p>Leaves space for innovation</p> <p>It means the non-state justice system must continue to meet community needs and expectations to remain utilised</p>	<p>Temporal ordering problems</p> <p>Disempowerment problems</p> <p>Delegitimation problems</p> <p>Destablisation problems</p> <p>Individual justice problems</p> <p>May be problems of unregulated bias or discrimination against women and youth in the non-state justice system</p>	<p>If the non-state justice system is very strong with no need of state assistance; its own regulatory processes effectively do or could prevent abuse of human rights; and the informal links with the state system are clear, and do not lead to the undermining of each system and are not subject to abuses of power.</p>

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

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

This model involves the state fostering and supporting a non-state justice system at an informal level, but stopping short of endorsing its exercise of adjudicative power. Such a relationship also exists in many countries throughout the world, particularly where governments are becoming more aware of the limitations of the state justice system, and the value of non-state justice systems to overcome some of those limitations.

An example of this model is the Zwelethemba Model of Peace Committees in South Africa (Johnston and Shearing 2002: 151). This is a pilot project in a poor black community whose aim is to improve security for members of the community by using the ability and knowledge of those members. The program was initiated with the support of the national police and the Ministry of Justice. In essence, the Peace Committees receive complaints and then convene 'Gatherings' of members of the community who are thought to have the knowledge and capacity to solve the disputes. The Peace Committee members facilitate the process whereby those invited help to outline a plan of action to establish peace. If one of the parties wishes to go to the police then the Peace Committee members facilitates this. No force is used or threatened to ensure compliance. The issue of remuneration for the Peace Committee members is solved in an ingenious way: Committees earn a monetary payment for every successful Gathering held.¹⁴

Initial reviews of this pilot project were promising: it was found that commitments to plans of action took place in over 90 per cent of Gatherings, that the process was fast, that women and young people played a major role in the processes, and that the Peace Committees dealt effectively with serious problems such as domestic violence that may not have been dealt with by the police. In discussing the approach of the Zwelethemba Model of Peace Committees, Johnston and Shearing comment that

¹⁴ Success is defined as meaning that a particular case has conformed with the principles and procedures to which the Committee members have subscribed. Sixty percent of this money goes into a community fund for local development projects; ten percent supports the administrative expenses of the Committee and thirty percent goes to the Committee members who were involved in facilitating the Gathering.

it does not subscribe to a neo-liberal strategy whereby the state 'steers' and the community 'rows'. On the contrary, the model is based on a process in which governments provide support to local people who, themselves constitute a significant node in the governance of security. (Johnston and Shearing 2002: 157)

In Australia there are a number of ways in which the state is working informally with various Aboriginal communities that also fits this model. Examples are the Community Justice Groups (CJGs) in Queensland and Law and Justice Committees in the Northern Territory. Neither have any statutory authority, but they enter into various agreements with government and community agencies and work together with courts and police in a variety of ways including diversion programs, pre-court sentencing, and community service orders (Aboriginal and Torres Strait Islander Social Justice Commissioner 2003: 31-50).

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

Such community-based processes are generally an add-on to the existing system – tolerated and allowed to operate in tandem with the mainstream system, yet not given the legitimacy or support necessary for them to challenge the fundamental basis of the mainstream system or result in any reconfiguration of relationships and responsibilities. Power is ultimately retained by the relevant authorities within the formal system (Aboriginal and Torres Strait Islander Social Justice Commissioner 2003: 28).

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

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

In a three systems jurisdiction the state would need to consider whether to treat both non-state justice systems in similar ways or whether to differentiate between them, and, if so, on what grounds this difference of treatment could be justified.

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

- What kind of informal relationships should be fostered and with who (i.e. who are the people/institutions with the best potential to act as bridges between systems)?
- What level of formality should there be in the regulation of those relationships or linkages (i.e. a written policy or left to the discretion of people in the position of 'gate-keepers' e.g. police)
- Would people working for the non-state justice system be financed by the state and, if so, how?

Table 3

Significant Features	Advantages	Disadvantages	Circumstances in which the model should be considered
<p>No recognition of right of non-state justice system to exercise adjudicative power</p> <p>Active encouragement of the non-state justice system by the state</p> <p>Informal partnerships with government agencies</p>	<p>Allows the non-state justice system to remain as close to existing cultural practices as possible, and to develop organically, while assisting with the gradual process of reform</p> <p>Prevents state from dominating the non-state justice system thus preserving its integrity</p> <p>Leaves space for justice innovations</p> <p>Close links with state institutions facilitates mutual learning about the two systems</p> <p>The ability to refer cases to the state may provide an extra degree of legitimacy and power to the non-state justice system¹⁵</p>	<p>Does not provide support for the non-state justice system in terms of enforcement of orders</p> <p>May not provide an effective means of regulating non-state justice systems to prevent possible abuses of power</p> <p>Temporal ordering problems and the four categories of problems flowing from unrestricted forum shopping (see Table 2) may still exist although these may be able to be negotiated more readily</p> <p>Heavily dependent upon individuals working in the various systems and so susceptible to being short-lived</p>	<p>If the non-state justice system is very strong, effectively self-regulating, with no need of state assistance and all that is needed to ensure compliance with constitutional principles and fundamental human rights is some training and better linkages with the state system.</p>

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

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

This model involves the state giving limited legislative recognition to a non-state justice system, but no exclusive jurisdiction, no coercive powers and very little in the way of state resources and support. An important feature of this model is that the non-state justice system is also able to make rules or by-laws for the communities it governs, although this may be limited by the requirement that such laws must be in accordance with ‘custom and usage.’¹⁶ This feature is due to the recognition that in many customary governance systems there is no distinction drawn between the exercise of legislative and adjudicative power. The other significant feature of this model is that the state does not seek to exercise much regulatory power over the non-state justice system. In many ways this model resembles the relationship between equity and the common law before the *Judicature Acts* in the late 1800s (Dewhurst 2004: 225).

An example of jurisdiction with this model is the Samoan village *fono*.¹⁷ The *Village Fono Act* is relatively recent; being only passed in 1990 shortly after the Samoan people had voted in favour of universal suffrage (previously only the *matai* or title-holders were eligible to vote). The Act, introduced as “a move to reinforce and strengthen rural self-reliance,” (Meleisea 2000: 197) and also possibly as a sweetener to the *matai* as compensation for their loss of political monopoly (Lawson 1996: 156), confirms in section 3(2) the authority of the village

¹⁵ For example Bouman explains that in Botswana one reason the unwarranted customary courts are held in awe by local people is because of their informal links with the state courts that allow them to refer cases to the state system and threaten the offenders with punishments (Bouman 1987: 291).

¹⁶ Chanock argues that in Africa the imperial view of custom requiring it to be static and fixed in order for it to have legal force came from the beliefs that African societies were static in nature “because of a cultural judgment that was made about African societies, which were seen as having failed to be ‘progressive’...” (Chanock 2005: 342–343). Unfortunately such beliefs seem to have transcended the end of colonialism and have been perpetuated by independent states such as Samoa.

¹⁷ Other examples are the Tuvaluan *falekaupule* (see the *Falekaupule Act 1997*) and the Tokelauan *taupulega* (see the *Taupulega Act 1986*).

fono (or council) “to exercise power or authority in accordance with the custom and usage of that village.” Section six provides that the village *fono* can impose punishment in accordance with the “custom and usage of its village,” and it specifies a number of punishments, including the power to impose fines and to impose work orders. The Samoan Supreme Court recently held that village *fonos* are not entitled to make an order of banishment, and may only petition the Land and Titles Court (a state court) to make such an order (*Leituala v Mauga* [2004] WSSC 9). Section 8 provides that the punishments given by the village *fonos* must be taken into account by a court in sentencing if the person is subsequently found guilty of the same matter. The Act also provides that there may be an appeal from decisions of village *fono* to the Land and Titles Court, which may allow or dismiss an appeal or refer the matter back to the *fono* for reconsideration. In the latter case there is no further right of appeal. The Supreme Court has jurisdiction to hear appeals from the Land and Titles Court in relation to alleged infringements of fundamental rights under the Constitution (*Sefo v Attorney-General* [2000] WSSC 18).

Another example of this model is the proposed CJGs recommended by the Western Australian Law Reform Commission in its final report into Aboriginal Customary Law (Law Reform Commission of Western Australia 2006a: 97). The proposal allows Aboriginal communities to apply to the Minister to be recognised as CJGs. Those communities with identifiable physical boundaries should then be able to set their own community rules and community sanctions to apply to everyone in that particular area. In order to avoid the problems of codification, the communities are free to decide for themselves the rules and sanctions and these may include the incorporation of matters that are offences against Australian law and offences against Aboriginal customary law (Law Reform Commission of Western Australia 2006a: 105). This ‘untethering’ of a non-state justice system from being limited to rules based on custom and tradition is a step that should be applauded as it recognises that indigenous communities need to have laws and procedures that change and develop to meet the needs of the community.

In order to be consistent with “the aim of facilitating the highest degree of autonomy possible” there are no limits on the matters that may be considered by the CJG, other than the constraints of the Australian law (Law Reform Commission of Western Australia 2006a: 104). The use of physical force by the CJG is prohibited, as is the power to detain someone, but the communities are given the power to refuse to allow someone to remain in the community for a

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

specified period.¹⁸ An underlying principle of the proposal is that no person can be forced to submit to sanctions imposed by a community. Consequently, the Discussion Paper noted that enforcement of the orders of the CJG “will depend primarily on the cultural authority it exerts and the support for the establishment of community rules and sanctions within the community itself.” (Law Reform Commission of Western Australia 2006b: 136)

In terms of linkages with the state system, the proposal states that it is the responsibility of the CJG to decide whether it should deal with a matter or refer it to the police. However, it also provides that “[t]he rules set by a community justice group do not replace mainstream law and the police retain full discretion about whether they charge an offender” (Law Reform Commission of Western Australia 2006a: 106). In addition, the CJGs are envisaged as playing a crucial role within the state system.¹⁹ The Final Report states explicitly that it was for this reason that the Commission concluded it was necessary for CJGs to be formally established.

The only regulation of the CJG is in terms of its composition. It is required to include a representative from each different family, social or skin group within a community and for it to be comprised of equal numbers of men and women (Law Reform Commission of Western Australia 2006a: 104). In addition, it must be shown that there has been adequate consultation with the members of the community and that a majority of the community members support the establishment of a CJG and its power to set rules and sanctions (Law Reform Commission of Western Australia 2006a: 105). There is no appeal from the CJG to the state courts. One way the state is envisaged as supporting CJGs is by the establishment of an Aboriginal Justice Advisory Council with the role of providing support and advice to communities who wish to set up CJGs. The state will also

¹⁸ There are some conditions attached to this: see Law Reform Commission of Western Australia 2006a: 109. However, this allowance of banishment is an interesting contrast to the position taken in Samoa with regard to the village *fonos*, and may perhaps come from the fact that Australia does not have a list of fundamental rights and freedoms in its constitution unlike Samoa.

¹⁹ By providing information about customary law and culture to the courts, presenting information about offenders at sentencing and bail hearings, participating in diversionary programs and in the supervision of offenders who are subject to court orders.

provide adequate resources and ongoing funding.

This type of model is the preferred model for Penal Reform International, which argues that:

traditional and informal justice forums should be allowed a wide jurisdiction in terms of both civil and criminal matters save only in cases involving the most serious offences such as murder and rape. The broad jurisdiction must go hand in hand with the absence of physically coercive measures. (Penal Reform International 2000: 139)

This view however is based upon the premise that such forums have the power of social pressure to secure attendance and compliance with an agreement.

One problem with this model is that it does not overcome the problem of double jeopardy because a person may be found guilty by the non-state justice system *and* the state system. Another concern is that there are not enough checks on the power of the non-state justice systems. For example, in Samoa it has been argued that the *Village Fono Act* “entrenches patriarchal and status based norms of customary law, and that these powers have been abused by traditional leaders.” (Corrin Care 2006: 32) There have been a number of cases where the *fonos* have ordered people to be banished and in the most extreme of cases, village *fonos* have ordered people to be “roped to large sticks like pigs” and even, on one occasion, killed.²⁰ In light of such cases there have been a number of scholars who have forcefully criticised the Act. For example, Meleisea argues:

[The Act] has in fact formalised the power of the *matai* and local hierarchies. The act allows *matai* to force compliance with their dictates through fines or even expulsion from the village. Increasingly rural people see *fa'a Samoa* as another word for oppression. (Meleisea 2000: 198)

Although these excesses are to an extent checked through the appeal process, often by the time the case finally emerges from the court system the consequences for

²⁰ Unfortunately many of these decisions are not readily available. However, they are discussed in Va'a (2000: 156–160). An initial decision in the murder case is available: *Police v Afoa* [1994] WSSC 3. See also Forsyth (2004).

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

the victim – banishment, destruction of property, bodily injury – are not easily mended. Another problem with the village *fono* system noted by scholars is that the legislation restricts the powers of the *fono* rather than enhancing them (Corrin Care 2006: 32). The removal of the traditional power of banishment is a prime example of this. Corrin Care argues:

The possibility of mutual support and cross-fertilization of ideas for culturally appropriate penalties held out by earlier decisions on banishment in the formal courts of Samoa has gradually diminished. In Samoa, ownership has been taken from the indigenous forum on the grounds that only the formal courts guarantee the offender due process; a stance that ignores the cultural context of local sanctions. (Corrin Care 2006: 58-59)

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

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

Table 4

Significant Features	Advantages	Disadvantages	Circumstances in which the model should be considered
<p>State recognises validity of exercise of adjudicative power by non-state justice system</p> <p>State leaves enforcement to the non-state justice system</p> <p>No exclusive jurisdiction given to the non-state justice system</p> <p>Very limited regulation of non-state justice system</p> <p>Non-state justice system has power to implement its own procedures and substantive laws</p>	<p>Non-state justice system retains a high degree of autonomy</p> <p>Helps to build pride and respect for non-state justice system</p> <p>Non-state justice system is not an expense for the state as they operate independently on the basis of voluntary work (note the WA model proposes payment for non-state justice system)</p> <p>Non-state justice system not subject to challenges about the legitimacy of their exercise of power by the state or the community</p> <p>Legal pluralism is formally embraced by the state which</p>	<p>Does not deal with problem of double jeopardy</p> <p>Does not assist the non-state justice system with enforcement or resources</p> <p>May lead to abuse of human rights and natural justice in the name of ‘tradition’</p> <p>Appeals may not always be an option in small communities where people may fear upsetting powerful traditional authorities</p> <p>There may still be unregulated ‘forum shopping’ and related problems</p>	<p>If the non-state justice system is very strong with no need of state assistance, but its own regulatory processes need some state regulation in order to ensure human rights are protected</p>

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

	<p>increases the likelihood that the state will work together with the non-state justice system</p> <p>Possibility of appeal (if exists) provides an extra safeguard for ensuring respect for human rights and fair process by the non-state justice system</p> <p>Enhances the cultural authority of traditional leaders</p> <p>Greater clarity in the jurisdiction of each system and the pathways between the two systems</p>		
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Model 5: Formal recognition of exclusive jurisdiction in a defined area

This model involves the state recognising the legitimacy of the non-state system exercising *exclusive* jurisdiction within a defined area. This area may either be a specific geographical location, such as a village or a reserve, or a specific type of subject matter, such as family law or minor criminal matters. It may also involve a separate system for members of a particular ethnic group, even where there is no discrete geographical boundary for that group. What is crucial in this model is that the non-state justice system makes the final decision in a particular case. In many ways this model is similar to that which exists in federations where each state or province has limited exclusive jurisdiction over certain matters occurring within its

geographical boundaries.²¹ In this model each system exists separately from the other, and exclusive jurisdiction over particular cases is determined through an agreement that may take the form of legislation or of contract. This model has also been described as involving “parallel justice systems.” (Dewhurst 2004; Webber 1993).

An example of a situation where jurisdiction is shared on the basis of subject matter is Nigeria where cases involving Islamic personal law are dealt with in the *shari’ah* court system (Oba 2004a: 130). An example of a situation where jurisdiction is shared on the basis of geography is Panama where the Kuna Indians live in internally regulated administrative territories, although this is under the jurisdiction of the national government (Horton 2006: 830).²² Finally an example where jurisdiction is based on ethnicity is the situation in many Latin America countries where a significant number of constitutions have recently been amended to recognise the right of indigenous peoples to apply their own customary laws.²³

²¹ Webber argues,

[t]he very existence of federalism is premised on the idea that variation in law from one part of the country to another is legitimate. This variation even affects the criminal law, though indirectly, through provincial control over policing, prosecution, the establishment of courts, some elements of the corrections system, and such other associated measures. (Webber 1993: 152)

²² Roy notes that among notable examples of autonomy arrangements in formally unitary states are South Tyrole (Italy), Catalonia (Spain), Isle of Man (U.K.), and Northern Ireland (U.K.). Among the highest forms of autonomy exercised in indigenous peoples’ territories are Greenland (Denmark), Mizoram and Nagaland (India) and Kuna Yala (Panama) (Roy 2004: 124).

²³ The reason for the introduction of such constitutional provisions can most likely be found in the International Labour Organization Convention 169 concerning Indigenous and Tribal People that provides:

Article 8(2) These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental human rights defined by the national legal system and with internationally recognised human rights....

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

For example, article 246 of the *Constitution* of Colombia provides that:

The authorities of the indigenous peoples may exercise jurisdictional functions within their territories in accordance with their norms and procedures, provided they are not inconsistent with the Constitution and the laws of the Republic. The law shall regulate the way this special jurisdiction will relate to the national judicial system.²⁴

However, it appears that in many states these constitutional provisions have not as yet been implemented in practice (Faundez 2003: 9). Faundez explains:

Courts in Latin America, however, have a unique problem because, although most constitutions today recognise multiculturalism and legal pluralism, legislatures have failed to address the crucial question as to how indigenous or other non-state forms of law are related to state law. As a consequence, courts have no substantive legislative guidelines on how to respond to their activities or decisions of non-state justice systems. Not surprisingly, in the case of Peru, the response of the courts to the non-state justice system has generally been hostile (Faundez 2003: 57).

A slightly different picture in relation to Colombia is presented by Assies (1999), who observes that it has taken two important steps to progress the constitutional provisions. The first is the commissioning of a study of indigenous legal systems and the second is the creation of a new constitutional court. He states that this court appears in some cases to have “[extended] a large degree of autonomy to a relatively acculturated community” (Assies 1999: 154). He concludes:

An outstanding feature of the Constitutional Court verdicts is that they seek to promote intercultural dialogue rather than to resolve

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

²⁴ Article 149 of the Peruvian constitution contains a similar provision.

all conflicts of jurisdiction through the usual means of state intervention based on the unilateral imposition of a unified body of positive law (Assies 1999: 157).

In the absence of more detailed information about the actual workings of these systems it is impossible to determine whether they fit exactly into this model or whether the state in fact remains the final arbiter, thus bringing them closer to the previous model. In most countries it would seem that the state keeps at least a small degree of control over the non-state justice systems, thus making this model more of an ideal than a reality experienced in any jurisdiction.²⁵

The principal advantage of such a system is that it allows non-justice systems to function without interference from the state system which may distort it or undermine its effectiveness or interfere with its integrity. For example, Webber argues that such a system may be required in Canada because a measure of separation is required if distinctively Aboriginal approaches and procedures are to be re-established. He states this approach “allow[s] the administration of justice in Aboriginal communities to take into account the experience of Aboriginal peoples ... rather than baldly imposing the language and forms of non-Aboriginal traditions” (Webber 1993: 138). A second advantage is that this model stops forum shopping and its associated problems, as matters will only be able to be dealt with in one system. Thus Dewhurst argues, also in the context of advocating such a model for Aboriginals in Canada:

If Aboriginal systems are considered to be alternative, preliminary, of lower authority, or unofficial, their opponents will resort to the more ‘final’ or ‘official’ adversarial system Instead, Aboriginal justice systems must be designed as authoritative and parallel models of justice (Dewhurst 2004: 213).

Further, as Oba argues in the Nigerian context, having appeals from a non-state system to a state system may in fact create injustice, as the state system may be ill-equipped to deal with the law and procedures of the non-state system. Thus he

²⁵ A parallel system of justice for the Maori in New Zealand was also proposed by Jackson (1988). His report, and the responses it provoked, raise many of the issues involved in such a system, as well as demonstrating the sensitivity of the political issues involved.

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

comments that “[i]t is definitely unacceptable to Muslims that someone who is not subject to Islamic law, who may be totally bereft of any knowledge of Islamic law and may even have an aversion to it be engaged in its administration” (Oba 2004b: 899). He concludes that a parallel series of courts is the most feasible option for Nigeria (Oba 2004b: 900).

However, there are a number of problems with such a system. First, separation on the basis of geography brings up very visibly problems of equality before the law. These arguments have been dealt with exhaustively by Webber, and for reasons of space his arguments will not be repeated here (Webber 1993: 147–155). He concludes that “when one thinks more carefully about freedom, equality, and the relevance of culture for law, there are circumstances in which parallel systems of Aboriginal justice are both acceptable and appropriate” (Webber 1993: 134. See also Crawford 1988: 40–43.) Dewhurst (2004) suggests that such concerns can be overcome by allowing all accused, Aboriginal and non-Aboriginal alike, to elect the system under which they would be tried. Second, the absence of any degree of regulation by the state system means there is the possibility that there will be abuses of power that will go unchecked, particularly in sensitive areas such as cases involving women and children. Webber suggests that such concerns raise the more general issue of trust in non-state institutions, observing that overcoming this may require that these institutions are ‘reinvented’ in a way that would allow for a system of checks such as did not exist, or existed in a different form, hundreds of years ago (Webber 1993: 147). A third concern is raised by Horton who argues that indigenous territorial and political autonomy may be used to justify state neglect and abandonment (Horton 2006: 835).

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

- Would parties be required to elect at the outset which system to use? What would happen if they disagreed?
- What should a system do if a case comes before it that has already been adjudicated by another system?
- Should the division in jurisdiction be on the basis of subject matter or territorial reach²⁶ or ethnicity of parties?

²⁶ Conflict of laws rules may be useful in working out the specific details of such an arrangement.

- Should the state have control over any procedural elements of the non-state justice system (for example to reduce likelihood of bias or abuses of power etc), as an initial pre-requisite for recognition?²⁷
- If there are constitutional guarantees about justice how can these be accommodated and which system will adjudicate on potential breaches?

Table 5

Significant Features	Advantages	Disadvantages	Circumstances in which the model should be considered
<p>Non-state justice system is given exclusive jurisdiction that is limited on the basis of territorial reach, subject matter or ethnicity of users</p> <p>State does not provide enforcement mechanisms or regulate non-state justice system</p>	<p>Non-state justice systems allowed to function independently and autonomously</p> <p>No forum shopping allowed</p> <p>Non-state justice system recognised as being fully equal with state system (consequently empowers and legitimises customary justice system)</p> <p>Only administrators skilled in the system have the right to make decisions concerning the</p>	<p>No facilitation of cross-fertilisation between the two systems</p> <p>No ability for the state to control abuses of power, bias, discrimination against women etc</p> <p>Non-state justice system not supported by state resources or coercive powers</p> <p>State may be able to justify abandonment and neglect of areas regulated by non-state justice system</p> <p>Concerns about equality before the law</p>	<p>Where there are discrete groups of people within a state with very different justice needs that can be met completely by a non-state justice system and are not being met by the state justice system</p>

²⁷ Webber comments that “[a]cceptance of the general principle may depend upon the detailed justification of very specific institutional arrangements” (Webber 1993:147).

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

	implementation of its norms Helps to build pride and respect for non-state justice systems that may have been historically marginalized		
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Model 6: Formal recognition and the giving of state coercive powers to a non-state justice system

In this model the state recognises the right of a non-state justice system to exercise jurisdiction, and also provides support in terms of using its coercive powers to enforce decisions made by a non-state justice system. The exercise of jurisdiction is exclusive in that a person who has been dealt with by one system cannot go afresh to the other system. However it is not exclusive in that a person may appeal from the non-state justice system to the state. It responds to the situation where there are a number of competing requirements: state support for a non-state justice system in terms of resources and enforcement; the need for a non-state justice system to operate within the values underlying the constitutional framework of the state; and the desire to maintain a non-state justice system in a form that is as unchanged as possible so as to preserve its advantages in terms of accessibility, legitimacy, speed, simplicity, informality, holistic approach and cultural relevance. The continuing challenge with a model such as this is to provide sufficient support to a non-state justice system while resisting the temptation (and political pressure) to over-regulate and modify it.

To date no country in the world has implemented a model which successfully manages all of these criteria, but the South African Law Commission (SALC) has come a long way in developing a proposal for such a model. The general approach adopted by the SALC is, as Schärf comments, to regulate non-state justice systems rather than incorporate them, and to generate clear and easy links between state and non-state systems while ensuring that they operate within the law (Schärf 2003a: 35). Based on a long and extensive discussion process, the SALC produced a *Report on Traditional Courts and the Judicial Function of Traditional Leaders* (2003) and also a draft *Customary Courts Bill* (2003) (the Bill). The preamble of

the Bill explains that its purpose is to establish customary courts and to modernise and consolidate the existing provisions concerning chiefs' courts "so that their operation is in conformity with the principle of democracy and other values underlying the Constitution". Although this Bill was completed in 2003, to date it has not been tabled before parliament. According to the drafter of the Report, the Bill has not as yet left the Minister's desk.²⁸ Schärf states that the government is delaying dealing with the issue of chiefs' powers for fear of the political conflict that it will generate (Schärf 2003a: 33).

The Bill and the Report do however present a very well-thought out model that juggles reasonably successfully the competing criteria outlined above. The Bill provides for the establishment of customary courts by the Minister and states that these will be courts of law. The Report notes that the decision to recognise these courts as courts of law was made to accord them with the necessary powers and dignity, stating that "finality and enforceability of decision of these courts are important if they are to be respected and to lessen the workload on the magistrates' courts." (SALC 2003: 5) Although the courts are 'created' by the state, it is clear from the Report and other provisions in the Bill that this creation will entail the recognition of the courts that currently exist in the non-state justice system. The Bill provides a number of options for the composition of the courts, due to the competing desires of having the courts constituted in accordance with custom, and the desire to ensure a representation of women in the courts.²⁹

The courts are given both civil and criminal jurisdiction, although the criminal jurisdiction is limited by a list of offences the courts will not have jurisdiction over. These include serious offences and also offences connected with domestic violence. The courts are authorised to apply both customary law and also some written state law to determine criminal cases. The Report notes that although doubts have been expressed over the ability of the courts to handle common law crimes, this was included so that congestion in the magistrates' courts could be relieved and people would not have to travel long distances to go to court (SALC 2003: 15).

²⁸ Email communication with Professor Sam Ruege (17 July 2006).

²⁹ All three options mandate women members, but vary between requiring 50% of the members to be women and requiring that women must be included in its composition.

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

In many ways the courts are left free to function as they wish, with matters such as the different levels of the courts and the procedure they follow being determined according to customary law. The Bill also allows a person to choose to be represented by another or not in accordance with customary law, which, the Report notes, implicitly excludes legal practitioners (SALC 2003: 24).

The Bill gives fairly significant powers to the customary courts, providing that a person who fails to obey a summons can be arrested, and that a magistrate's court must enforce a decision made by a customary court if the decision is not followed within the time specified. The courts have powers to fine people, make orders of compensation and also to make orders to keep the peace and to give suspended sentences. There appears to be no provision to order community work or any discussion about this in the Report.

There are a number of ways in which the state regulates the customary courts. It requires that all fines are to be paid into a special account, and that the courts keep written records of certain basic information concerning the cases they deal with, and there is a system of appeals to the state courts. In addition the Bill creates a Registrar for the Customary Courts whose general role is to guide and supervise the courts and to transfer cases to the state system where it is appropriate. The Report explains that:

The preponderant view was that keeping the supervision and monitoring of customary courts away from magistrates courts and leaving the process to a dedicated office would insulate customary law and adjudicatory procedures from encroachment by the common law through too much association with magistrates' courts (SALC 2003: 30).

A further type of control over the courts is the section that penalises members of the court who take a reward in consideration for doing or not doing an act as a member of the court.

The relationship between the two systems is very clearly regulated in this model. In addition to the appeal procedures there are also detailed provisions relating to the transfer of cases between the different systems. Generally the Bill provides that if one party demands that a case be transferred to another court the issue is given to the Registrar for Customary Courts to decide and he or she may transfer the case if it is in the interests of justice to do so. However, in all criminal cases the

accused person has the right to demand that the case be transferred to another court of competent jurisdiction.

Assessing this model is made difficult by the fact that it has not been implemented in practice anywhere as yet. This, in itself, suggests a significant problem with the model, namely the likelihood that governments will perceive such a model as too great a threat to their power.

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

Such concerns can, however, be managed. First of all there should be an enquiry into what sort of constitutional breaches are likely to occur, based on empirical evidence rather than non-factually based assumptions, and then mechanisms developed which can manage these in the least intrusive way possible. Thus, the Australian Law Reform Commission has argued:

It cannot be argued that the establishment of local ‘traditional courts’ or similar mechanisms will necessarily involve breach of the Convention [ICCPR] standards, provided appropriate procedural safeguards are established (Australian Law Reform Commission 1986: 74).

One procedural mechanism which can be used, and has been used in the South African *Customary Courts Bill* and also in the Samoan village *fonos*, is that of appeal. The European Court of Human Rights has held that procedural or other defects at first instance can be cured on appeal.³⁰ This approach has also been suggested by the New Zealand Law Reform Commission (2006: 160) which

³⁰ *Adolf v Austria* (1982) ECHR Ser A vol 49, cited in Australian Law Reform Commission 1986: 74.

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

argues, “[t]he principles of natural justice may be maintained, however, through adequate appeal rights, in the case of those community justice bodies now provided for by statute”. When considering the types of appeals possible, it suggests that the courts could adopt a policy of not overturning non-state justice system outcomes without good reason, and where these exist the court may go further and suggest guidelines to prevent further prejudice in future. The courts may also consider referring the matter back to the non-state justice system for reconsideration (New Zealand Law Reform Commission 2006: 165). It in fact concludes that “[u]ltimately, the recognition of community justice bodies may best advance the constitutional objectives of respecting both human rights and the inherited wisdom of the Pacific” (New Zealand Law Reform Commission 2006: 165).

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

- Should non-state justice system courts be established (as in South Africa) or recognised (as in Botswana (see model 7))?
- Will the state enforce the orders of the non-state justice system both in terms of punishments and in terms of orders to attend hearings? If so, how? By state authorities? Or will it give immunity to officials of the non-state justice system in the use of reasonable force? Or assist in establishing a special police force for the non-state justice system?³¹ Or should the parties have to sign an agreement that they will abide by the decision of the chiefs at the end of the meeting?
- How many layers of non-state justice system courts should there be?
- Should there be a non-state justice court of appeal or should a state court be the appeal court? On what grounds could there be an appeal?
- To what extent should the composition of non-state justice system courts be regulated by the state?

³¹ For example in Botswana the duties of the Local Police (an unofficial police force) is

to assist the Chief in the exercise of his lawful duties, preserve the public peace, prevent the commission of offences, apprehend offenders, execute orders (in particular administering corporal punishment) and warrants, and act as a messenger in Customary Court matters (Bouman 1987: 284).

- Should the state mandate that women also serve judicial roles in the non-state justice system courts?
- Where a party is outside the non-state justice system (for example from a different custom area) what procedures should apply?
- What should the jurisdiction of the non-state justice system be? How should it be determined?
 - By agreement between parties?
 - By limits set by regulations?
 - Should one or either party be able to opt out of the jurisdiction of the non-state justice system?
- Should the non-state justice system be given jurisdiction over state crimes as well as customary offences?
- If criminal jurisdiction is given, what should be the rules about which non-state justice system court has jurisdiction? (i.e. should it be where the crime is committed?)
- Should any particular procedural requirements be mandated by the state? For example the right of women and youth to have a voice?
- What rules if any should there be about the keeping of notes of proceedings and the keeping of such records?
- Should legal or other representation be allowed?
- Should there be any limitations on the types of orders that can be made?
- Should there be fixed fees the non-state justice system can charge? If so, should there be rules about what can happen to these funds?
- Should the members of the courts be paid?
- What safeguards should be created to guard against abuse of power in the non-state justice system?
- Should there be supervision of the non-state justice system? If so, by whom? Magistrates or a special body?
- Should there be a special office, such as a secretariat, created to manage the non-state justice system and its relationship with the state system?

If either this model or the previous model were adopted in a three systems jurisdiction the state could either treat both non-state justice systems the same, or give limited or full recognition to one and adopt a different relationship with the other. In both cases additional questions would need to be considered, including:

- What pathways could or should exist between the two non-state justice systems and how and where should these be formalised?

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

- How can disagreements over jurisdiction between the non-state justice systems (for example there may be disagreement between religious courts and customary courts over who should deal with cases such as adultery). be resolved?

Table 6

Significant Features	Advantages	Disadvantages	Circumstances in which the model should be considered
<p>State formally recognises validity of the exercise of jurisdiction by non-state justice system</p> <p>State lends its coercive powers to the non-state justice system</p> <p>Clear linkages and pathways for the transfer of cases between systems</p> <p>Non-state justice system free to apply its own norms and procedures</p>	<p>Balances state support for the non-state justice system in terms of resources and enforcement; the need for the non-state justice system to operate within the values underlying the constitutional framework of the state; and the desire to maintain the non-state justice system in as unchanged a form as possible so as to preserve their various advantages</p> <p>Pathways can be instituted to avoid double jeopardy and duplication/waste of resources</p> <p>Forum shopping is limited</p>	<p>The non-state justice system aligns itself very closely with the state and thus fundamentally alters the basis on which it gains its power and legitimacy.</p> <p>As the chiefs are no longer dependent upon the community for support, they may be less inclined to look after their community and thus become less accountable at a local level than if they continually needed to maintain their community's support.</p> <p>The state would have to expend resources on the non-state justice system</p> <p>May require traditional leaders to administer state laws which they may not be equipped to do</p> <p>Limits space for</p>	<p>Where the non-state justice system requires assistance from the state in terms of enforcement of orders and where some degree of regulation from the state would better ensure human rights are not being breached, and limits can be placed on the power of the state on its regulation of the non-state justice system</p>

		innovation for the non-state justice system There may be a lack of political will to introduce such a model	
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Model 7: Complete incorporation of the non-state justice system by the state

The last model involves incorporating the non-state justice system entirely into the state system by “bureaucratising and ‘civilising’ [it and] embracing [it] as the lowest tier into the family of courts under the Constitution” (Schärf 2001). This model has been adopted in some African countries, for example Botswana (Bouman 1987) and Nigeria (Elechi 1986). This model is in many ways very close to the ‘hybrid’ structures of village courts discussed below, but is different in principle, even if not in practice, because the idea is to draw the non-state justice system into the state system, rather than to create a new hybrid system from the start. Of course, the various regulations the state may impose on a non-state justice system as part of the incorporation may mean that in practice it ends up looking just as much a hybrid system as one that has been crafted as such initially. It is also similar to model six, but differs from it in that the non-state justice system is conceived as part of the state system, uses state norms and procedures, and has little room to develop itself organically. This demonstrates that the intention and philosophy behind a reform agenda may often be just as important as the substantive content.

In Botswana the two highest levels of customary courts were incorporated into the state system during the colonial period through a long process which began in 1934 (Roberts 1972: 106). Today the relationship between the two systems is governed by the *Customary Courts Act*, section 7(1) of which allows a chief to submit to the Minister a recommendation for the recognition, establishment or variation in jurisdiction of customary courts within his area. The Minister may then recognise or establish the court and define its jurisdiction, prescribe the constitution of the court and the powers of the members of the court (sections 7(2) and 8). Through the Act and the rules made under the Act, the customary courts are very significantly controlled by the state. The courts are required to use state law rather than customary law in the area of criminal law, as section 12(6) provides that “no person shall be charged with a criminal offence unless such offence is created by the Penal Code or some other law.” An example of the

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

consequences of this is the case of *Bimbo v State* where the accused was convicted of adultery by a customary court, but the High Court quashed the conviction on the ground that adultery is not an offence created by the Penal Code or other written law (Otlhogile 1993: 532). Further, customary courts are required to follow the provisions of the *Customary Courts (Procedure) Rules* in criminal cases, meaning that even their procedural flexibility is curtailed (section 21). The courts are, however, given considerable power, including the power to compel attendance (section 29), to imprison and even to impose corporal punishment (section 18).

The relationship between the two systems on an institutional level is very close. The Act provides for appeals to the state courts from the customary courts (section 42) as well as supervisory provisions (by chiefs) (section 40) and “revisory” provisions by magistrates (section 39). There are also complex transferral procedures between the two different sorts of courts (section 37). Griffiths comments that the closeness of the two courts is not merely determined by these institutional links, however, but that “[t]he personnel themselves view their role and that of their institution as part of a larger whole, an overall system in which these institutions have their place” (Griffiths 1996: 203). There is even some suggestion of an actual change of personnel within the two systems. For example, Schärf reports that although the Customary Court of Appeal is in theory staffed by chiefs, in practice it is sometimes staffed by non-chiefly bureaucrats (Schärf 2003a: 63).

The significant advantage of this model is that it allows, indeed fosters, a cross-fertilisation of ideas and procedures between the two systems. Schärf notes that “the literature reveals an active dialogue between customary courts and magistrates’ courts and equally that in this situation neither legal system remains pure (Schärf 2003a: 66). In other words customary law is increasingly incorporating aspects of general law and vice-versa.” Griffiths similarly finds that it is no longer possible in Botswana to see the customary system as “representing something ‘other’ than state justice, as more egalitarian and from which considerations of power and status [are] absent” but also that neither can the Magistrate’s court be seen as “representing an inaccessible and inflexible rule based system of justice” (Griffiths 1996: 212. A negative consequence of this, as Griffiths points out elsewhere, is that women may not be able to rely on the state system for equality and neutrality, but may find that there, too, “gender cuts across social and economic divisions ... to place women generally at a disadvantage when it comes to negotiating their status with men.” Griffiths 1988:

136). Some of the other advantages of this model are that it brings non-state justice systems into conformity with state constitutions, it provides enforcement mechanisms for the non-state justice system, it makes non-state justice system officials more accountable, and it prevents there being two or more conflicting systems of justice in operation. Schärf concludes that “[b]oth warranting and recognizing customary courts appears to have reduced the worst excesses of such courts” (Schärf 2003a: 68).

However, there are also a number of disadvantages with the model. First, it has been argued that the dominance of the state undermines the non-state justice system. Otlhogile states that “[a]lthough the relationship between these two legal regimes could have been mutually enriching, the inevitable precedence of general law over customary law has served to undercut the legal and moral authority of both institutions” (Otlhogile 1993: 532). Schärf similarly comments that the fact that the magistrates can and do overturn the judgment of chiefs undermines the influence of chiefs and headmen (Schärf 2003a: 66). Elechi states that in Nigeria the Customary Courts

are accused of being unnecessarily formal and rigid, employing a coercive rather than a persuasive approach. Even though the Customary Courts are staffed by indigenous people, they are employed by and are accountable to the central government. The delivery of justice in the customary Courts is hampered by a bureaucratic structure and corruption. (Elechi 1996: 344)

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

The voluntary nature of the process is undermined by the presence of state coercion. As a result, the courts no longer rely on social sanctions and public participation loses its primary importance. At the same time, decisions which do not conform to procedural requirements, or which deviate from the strict law in the interests of reconciliation may be reviewed and overturned on appeal to the higher courts. Procedural requirements invariably become greater and public participation is curtailed. (Penal Reform International 2003: 129)

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

Another problem with this model is discussed by Boko. He points out that although judges in the customary courts are untrained, and some barely literate, they are nevertheless expected to interpret and apply provisions of written penal laws, none of which have been translated into the vernacular. These courts can sentence people to custodial sentences of over 5 years. He argues:

The only feature of the customary courts which endears them to the government is that they dispose of their cases quickly and swiftly. But the quality of the justice they dispense is highly questionable. Perhaps it is time note was taken that justice rushed may also be justice denied . . . (Boko 2000: 460)

A final problem is that in the context of existing local power struggles, such as between traditional elites and commoners, state incorporation of traditional chiefly tribunals may give a considerable advantage to one side.³²

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

³² I am grateful to Gordon Woodman for this point. Gordon Woodman <G.R.Woodman@bham.ac.uk>, email (25 May 2007). F. von Benda-Beckmann has similarly commented that

[s]tudies critically examining local traditional laws, focussing on class, caste, gender and age differences, have shown that 'folk law' often turns out to be the law of local elites and/or the senior male population. . . . Recourse to state law and its 'non-traditional' values can be an important resource in the struggle for emancipation. (F. von Benda-Beckmann 2001: 50)

Table 7

Significant Features	Advantages	Disadvantages	Circumstances in which the model should be considered
<p>Incorporation of non-state justice system into state system</p> <p>Non-state justice system follows state procedural and substantive laws</p>	<p>Fosters a cross-fertilisation of ideas and procedures between the two systems</p> <p>It brings the non-state justice systems into conformity with state constitutions</p> <p>It provides enforcement mechanisms for the non-state justice system</p> <p>It makes the non-state justice system officials more accountable;</p> <p>It prevents there being two conflicting systems of justice in operation which alleviates the problems of undermining,</p>	<p>State has to invest considerable resources</p> <p>Untrained judicial officers are required to administrate state legislation</p> <p>Traditional leaders may feel they are being dominated by the state system and refuse to co-operate</p> <p>Many of the advantages, such as informality, flexibility etc of the non-state justice system would be reduced</p> <p>Changes the basis on which the non-state justice system wins its legitimacy and support</p> <p>Payment of people involved in the non-state justice system may lead to</p>	<p>Where the non-state justice system has already adopted many features of the state system and has lost its traditional basis of legitimacy (for example by being used by colonial governments in a system of native rule such as in many African countries)³³ and there is a need for more grass-roots courts.</p>

³³ Santos refers to the fact that after Independence in Mozambique traditional authorities were “[s]een as obscurantist remnants of colonialism” (Santos 2006: 64).

STATE AND NON-STATE JUSTICE SYSTEMS: A TYPOLOGY
Miranda Forsyth

	<p>double jeopardy and forum shopping.</p>	<p>jealousy, division and corruption in the non-state justice system</p> <p>May stifle the dynamism of the non-state justice system</p> <p>Problem of ‘creeping procedural formalism’</p> <p>May make the non-state justice system less accessible to the public</p> <p>There may still be ‘non-state’ non-state justice systems competing with and undermining the ‘state’ non-state justice systems</p> <p>The basic principles of decision making of the non-state justice system are likely to be substantially modified.</p>	
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Conclusion

The aim of this paper has been to unpick terms such as ‘recognise’ and ‘harmonise’ by exploring in detail as many different types of relationship as possible that state and non-state justice systems can have with each other. These have been conceptualised as existing along a spectrum of increasing state recognition of the non-state justice system and specific features of their

relationship were highlighted. The dimensions of variation that underpin the typology are as follows:

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

Through surveying literature from many different jurisdictions, it appeared that in the majority of them relationships between state and non-state justice systems are not mutually supportive, and even the more ‘successful’ examples have problems we have identified. These findings suggest that for many jurisdictions what is required is reform of the relationship between the state and non-state justice system(s) to maximise the chances of the systems cooperating with each other, performing the tasks for which they are best suited to their fullest potential, and covering each others’ weaknesses with their own strengths. It is hoped that this typology may be a useful starting point for countries wishing to undertake such reforms.

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Miranda Forsyth

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