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POST-CONFLICT TRADITIONAL JUSTICE: A CRITICAL OVERVIEW

Tim Allen (LSE)

Anna Macdonald (King's College London)

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The Editor, Justice and Security Research Programme, International
Development Department, LSE, Houghton Street, London WC2A 2AE

Or by email to: Intdev.jsrp@lse.ac.uk

Post-Conflict Traditional Justice: a critical overview

Tim Allen, Professor of Development Anthropology, LSE

Anna Macdonald, PhD Candidate, Department of War Studies,
King's College London

Introduction¹

Since the mid-1990s, there has been a proliferation of attempts to adapt and institutionalise forms of traditional justice as part of post-conflict policy. This has occurred in places as diverse as Timor Leste and Sierra Leone, Rwanda and Afghanistan. While anthropologists have long been interested in traditional justice, and have emphasised it in studies of rapid social change and post-conflict reconciliation, it is a relatively new arena for transitional justice.² Indeed, the foregrounding of traditional justice mechanisms as a possible alternative to new international mechanisms seems to have come as a bit of a surprise to those promoting truth commissions, criminal courts and tribunals. There are certainly paradoxical aspects to it, given that the shift of interest towards local accountability mechanisms is occurring at the same time as international criminal law is expanding its reach. However, both trajectories may also be viewed as being part of the same process in that they seek forms of viable justice that are less directly connected with the formal authority of sovereign states – authority which may be very partial and compromised in politically fragile post-conflict circumstances.

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² Anthropologists have been interested in these issues since Bronislaw Malinowski's pioneering work *Crime and Custom in Savage Society* (1926). Malinowski's arguments have been developed by anthropologists such as Laura Nader who argues that 'law cannot be understood apart from its social and cultural context' (1965: 10). Indeed in 1948, at a time when the United Nations was beginning to promote and codify its human rights architecture, the American Anthropological Association issued a statement rejecting the universality of the project. Human rights, it was argued, were an extension of the Western rationalist project; the concept ignored the diversity of mankind and the culturally contingent nature of law. Today, despite a more moderate relativist position that tells us there are overlapping values from which we might be able to identify a common core of human rights principles (Twinning 2010; Messer 1993), there does remain concern that human rights law, premised as it is on the individual as the essential unit of moral agency, will continue to struggle for meaning and relevance in non-western cultures which, it is claimed, have different concepts of personhood and the self (Matua 2001; Messer 1999; Collier et. al 1995). See Betts (2005) for a good summary of these debates.

The actual content of the traditional justice category is rather vague. Other adjectives such as customary, informal, community-based, grass-roots, indigenous and local are all sometimes used interchangeably. To a large extent, it has become a catch-all designation to describe procedures in those places that other kinds of justice provision cannot reach, and also as an explanation for why more formal judicial mechanisms introduced in post-conflict settings seem to have such limited effects. It has been explicitly linked to the promotion of more relevant and grounded transitional justice, although the desire for a holistic approach - one that strikes a balance between meaningful customary practices and universal principles - is essentially an aspiration whose applicability and efficacy has rarely been tested. Aid agencies, human rights activists, and local power brokers are finding in traditional justice ways of furthering their diverse agendas. Yet, despite some grand claims, in reality we still know remarkably little about the role and impact of informal justice processes in post-conflict situations (Kelsall 2009; Huyse and Salter 2008; Shaw et. al 2010). As so often in discussions of justice, normative notions of what is inherently believed to be right, shape perceptions, rather than evidence about what has been occurring. One consequence is a tendency to misleadingly generalise about traditional justice as if it is some sort of cohesive and homogenised alternative to formal systems. Much more rigorous, nuanced and systematic research is required. Highlighted below are certain characteristics of the way in which traditional justice is currently discussed within the transitional justice literature and among transitional justice practitioners, followed by comments on important controversies.

Fundamentals

To begin with, it is helpful to place interest in the local dynamics of justice in conflict and post-conflict situations in a broader context. The World Bank's World Development Report 2011 draws attention to the paucity of information about what is happening on the ground in war affected and politically fragile locations. Meanwhile, other World Bank publications have been drawing attention to the need to take better account of cultural and ethnic diversity when designing and implementing development programs, including practices such as witchcraft, spirit possession and spiritual healing (Marc 2010: 4). Such a perspective remains controversial within the World Bank and in other development organisations such as the UK's Department for International Development (DfID). Nevertheless, it is evidently the case that

throughout the global south there are vast regions in which the power and authority of state law is ‘nominal rather than operational’ (Falk Moore 1986:150).³ In 2007, the Organisation for Economic and Cultural Development noted that as much as 80% of the people in today’s fragile states rely on non-state actors for various forms of justice and security (OECD 2007). In Sierra Leone it has been estimated that some 85% of the population does not have access to formal justice and relies upon traditional measures (Sriram 2007:598). In Afghanistan, in those areas not controlled by the Taliban, an estimated 80-90% of all disputes are mediated in the customary system (Wojkowska 2006). Local justice tends to be more accessible to the poor, relatively quick and cheap and, crucially, the arbiter of issues of great social and economic concern, namely land and family/lineage issues. In Kenya, for example, where land is frequently a source of private and communal disputes, traditional institutions are widely held to be more reliable in resolving conflicts than the state (WDR 2011:134). Indeed, customary tenure is said to cover 75% of land in most African countries, affecting 90% of land transactions in Mozambique and Ghana (Wojkowska 2006:12).

Traditional and indigenous processes are currently receiving ever more attention in both state building and counter-insurgency policy (Branch 2011; MacGinty 2008), while putative traditional governance systems are being foregrounded in a manner that has not happened since the era of colonial indirect rule. It is believed that embedding orthodox peace building approaches in local culture will enhance their legitimacy and efficacy, thereby providing an authentic and familiar environment

³ Legal pluralism is both a social reality and a normative concept. The normative concept of legal pluralism has its roots in early twentieth century anthropology and anti-positivist legal philosophy (see Wilson 2007 for a good historical overview of the concept). Scholars noted that in many colonial contexts, state law was a remote factor in the normative structuring of society. Again, Bronislaw Malinowski’s work was formative. As Wilson notes, ‘he argued that social norms in non-state societies perform the same regulatory function as legal norms, thus non-codified social rules should be raised to the status of ‘law’’, (Wilson 2007: 346). This view became something of an orthodoxy among anthropologists but was soon under attack from Marxist legal historians and others who questioned whether colonial and indigenous laws could be conceptually divided. In arguments that echo today’s debates about post-conflict traditional justice, it was suggested that local customs were largely invented or re-invented by colonialists to entrench the positions of co-opted chiefs acting as agents at the local level. Others resisted the notion that customary law was simply a colonial legitimating device but stressed that the relationship between ‘colonial’ and ‘indigenous’ law was dynamic. As Falk Moore argued in her work on Tanganyika: “the paradox of directing change and preserving custom means that there can be no static concept of ‘customary law’” (1992: 11-46). Another challenge came from the ‘legal centralists’ who queried the logical endpoint of legal pluralism. There was concern that by collapsing the legal and the non-legal into one category, that category would be rendered meaningless. Legal centralists emphasised the importance of distinguishing norms such as social etiquette from formal state law: namely that the latter is drafted and enacted by state apparatus and backed by enforcement powers in the military and criminal justice system.

through which popular participation might begin to flourish (Branch 2011). As one UNDP report notes: “Existence of these systems cannot be overlooked. We need to develop strategies to take advantage of the benefits of informal systems” (Wojkowska 2006:13). In a similar way, the World Bank World Development Report 2011 notes that supplementing formal justice with traditional community systems can be a “best-fit”, but with a revealing caveat: “the lesson here appears to be to use a process of recognition and reform to draw on the capacities of traditional community structures and to ‘pull’ them gradually in the direction of respect for equity and international norms.” (WDR 2011:167). Selective support for traditional justice here provides a sort of indigenous anchor: a means by which the broader, donor supported accountability agenda can be grounded, authenticated and legitimised.

The interest in traditional justice is also linked to perceived limitations in the initial formulation of the transitional justice concept. Transitional justice emerged largely as a socio-legal policy response to the so-called ‘dirty’ wars in South America, and was associated with transitions from authoritarian and oppressive states to democratic states (Arthur 2009). These were states characterised by “relatively high levels of horizontal and vertical institutionalization” (De Grieff 2011:1). To a considerable extent that model applied in the South African case too, but what about northern Uganda or Southern Sudan, or the Democratic Republic of Congo? In those places it has not been clear that the violence has been *mostly* linked to formal government forces, nor is it clear that there is a transition from oppressive authority to democracy. Rather these are territories characterised by hybrid authority structures, and the prospect of achieving stable, accountable and representative governance is remote. In 2005, a rather poignant confessional was delivered by David Crane, the former Prosecutor of the Special Court for Sierra Leone: “Our perspectives are off kilter...we consider our justice as the only justice...we don’t create mechanisms by which we can consider the cultural and customary approaches to justice within the region” (cf. Kelsall 2009:11). This shortcoming had been acknowledged a year earlier by the UN Secretary General, Kofi Annan in a report to the Security Council entitled “The rule of law and transitional justice in conflict and post-conflict societies”, in which he observed that: “due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often vital role...” (UNSC 2004:12). Support for traditional justice provides much needed

diversity in each context, guarding against what scholars have disparagingly termed the ‘templatisation’ and ‘standardisation’ of transitional justice, or what the Security Council refers to as ‘one-size-fits-all’ solutions (UNSC 2004:1).

It is striking that the emergence of traditional justice as an alternative within a framework of transitional justice has actually been invigorated by the creation of the International Criminal Court (ICC). While it is the case that traditional justice was held up as an alternative to other international instruments, notably the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), the ICC cannot escape engagement with it. The reason for this lies in the wording of the Rome Statute. Multiple references to the requirement of the court to act ‘in the interests of justice’, without explanation of what that means, has enabled lobbying groups to demand serious consideration of alternative conceptions. Furthermore, the Rome Statute has allowed space for arguments to be made about traditional justice in relation to the requirement of the court to act in a way that is complementary with local procedures. The ICC itself has been on something of a learning curve in terms of how to handle such pressure. This is reflected in ICC statements such as the one that appeared in a 2003 ICC policy paper, which declares that the prosecutor “will take into consideration the need to respect the diversity of legal systems, traditions and cultures” (Allen 2006:129).

Many activists and some scholars believe that traditional justice is not just an alternative or possible supplement to more established processes. Rather, they take the view that it is better, or at least that a fully integrated approach is the best option; one in which conventional legal processes are not privileged, and “multiple pathways to justice” can be “interwoven, sequenced and accommodated” (Roht Arriaza 2006:8).

This view is premised on an acceptance that not only formal trials but also truth commissions are insufficiently attentive to social integration and reconstruction. The latter have often been portrayed as somehow more culturally embedded, but critics have argued that they can be equally remote from local realities. As Priscilla Hayner notes, “indigenous national characteristics may make truth-seeking unnecessary and undesirable, such as unofficial community based mechanisms that respond to recent violence or a culture that eschews confronting reality directly” (Hayner 2001:186).

From Peru, to Cambodia, to Sierra Leone, scholars have highlighted the danger of what one termed the “tyranny of total recall” (Theidon 2009). These societies, it is argued, are characterised in varying degrees by social ideas of forgiveness. Rosalind Shaw, meanwhile, has traced the genealogy of truth commissions and finds their genesis in a western tradition of confession that has no immediate resonance in contexts such as Sierra Leone, where a factually accurate depiction of the past is less important to reconciliation than the realisation of a ‘cool heart’. (Maguire 2005; Shaw 2006; Theidon 2006; Kelsall 2009:14).

The problem for transitional justice scholars and practitioners then, is that internationally sponsored judicial and non-judicial processes and decisions appear to be making little sense and garnering very limited support from the very constituencies they are supposed to be benefitting. The appeal of a more locally orientated justice, in contrast, is claimed to lie in its potential to repair and restore communal relationships via familiar, locally grounded processes that all community members can associate with (Alie: 2008; Latigo 2008). Traditional justice is laudable, so the argument goes, because it is culturally relevant. It draws upon authentic indigenous identities and rituals and “taps into profound spiritual worlds” based on non-western concepts of community harmony and well-being (Arriaza 2006:12). It is also suggested that justice built on established customs of reconciliation and compensation is more appropriate and pragmatic in close knit community settings, where people remain dependent on continuous social and economic relationships with their neighbours (PRI 2002). Thus, James Otto, the head of Human Rights Focus in northern Uganda, graphically expressed opposition to the ICC’s intervention by explaining that: “there is a balance in the community that cannot be found in the briefcase of the white man” (Allen 2006:134).

To some extent, too, support for traditional justice has been pragmatic. The vast scale of atrocity crimes in places where transitional justice currently operates makes it very hard to hold every suspected perpetrator accountable. The *gacaca* system that emerged in Rwanda in 2001 to deal with the aftermath of the 1994 genocide was partly a national response to this kind of logistical dilemma. At least 800,000 people had been killed during the violence and the country’s jails were reaching bursting point with 120,000 alleged perpetrators and only fifteen judges able to oversee their

trials. The United Nations Security Council had set up the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania in November 1994, but there was wide-spread frustration with the Court: it was seen as too slow, too expensive and too far removed from Rwanda. The Rwandan government's response was to adopt and adapt a traditional community conflict resolution system, the *gacaca*, and to train more than 250,000 community members to serve on panels in 11,000 jurisdictions (Clark 2010:3). As Clark explains, the Gacaca Law was enacted with the aim of expediting justice for genocide crimes by relieving the national courts and the ICTR of the vast numbers of low-level suspects and allowing them to focus on the more senior accused. The *gacaca* system was also intended to pursue the broader reparative goals of social healing and reconciliation (63-64).⁴

The focus on traditional justice has certainly gained momentum since the *Gacaca* courts were set up and there are now numerous programmes aimed at supporting it, but this has not resulted in a formalised typology in any international agreement. There is also diversity in state recognition of post-conflict traditional justice processes, ranging from *de facto* rejection to full incorporation (Wojkowska 2006). In Burundi, for example, the National Council of Bashingantahe was created by constitutional fiat to mediate disputes, including interethnic massacres and violence occurring since 1993. This occurred with foreign support in 2005, but the government has little enthusiasm for a revival of a precolonial decentralised system of adjudication that endowed the king and his chiefs with significant power at the local level (Uvin 2010; Dexter and Ntahombaye 2006). Meanwhile, in Mozambique, the government has been quietly tolerant of traditional accountability and reconciliation rituals. Ordinary people have been conducting *magamba* spirit ceremonies to create a socio-cultural environment conducive to engagement with the past and communal repair (Igreja 2008). However, there has been no formal engagement or endorsement of these practices and the official line, premised on the allocation of impunity to known perpetrators of terrible acts, is to try to forget what happened.

In contrast, in some other post-conflict places, such as Sierra Leone and East Timor, traditional justice has been officially recognised and sanctioned. The 2000 Sierra

⁴ The *gacaca* courts closed officially in 2012 (<http://www.bbc.co.uk/news/world-africa-18490348>)

Leone Truth and Reconciliation Act authorised the Truth and Reconciliation Commission (TRC) to “seek assistance for traditional and religious leaders to facilitate its public sessions and in resolving local conflicts arising from past violations of abuses in support of healing and reconciliation” (TRC Act Part 3(2)). Incorporation of traditional justice into the workings of the TRC was, however, rather weak (Huyse and Salter 2008; Kelsall 2005). In East Timor, the government incorporated a more extensive range of customary law into their Reception and Reconciliation Commission (CAVR) community hearings. Three quarters of the reconciliation hearings involved a local dispute resolution practice named *nahe biti boot* (Drexler 2009; Stanley 2009). The hearings also incorporated long-established processes of *adat* or *lisan* to build local participation.⁵ In both Sierra Leone and East Timor, then – albeit to varying degrees – traditional justice has been used to supplement and legitimise more ‘formal’ transitional justice processes. However, Rwanda is the only country where an adapted traditional accountability mechanism has been made wholly part of the official post-conflict justice policy, and granted a central role as part of the formal state system (Wojowska 2006:27).⁶

Key Issues and Controversies

As noted in the introduction, literature promoting traditional justice as an aspect of transitional justice tends not to be focused on measuring the effectiveness of such processes or on understanding how such processes are experienced on the ground (Weinstein: 2011). The result is a knowledge gap which has “produced decision making based on weak data, ex-ante evaluation and speculation” (Huyse and Salter 2008:6). However, while the literature remains small and partial, it is becoming gradually more nuanced. In the following sub-sections we comment on some of the key debates that have emerged.

⁵ According to Drexler (2009) These practices, which are variable across regions, are based on historical knowledge, ceremony, and customary belief. They are generally led by traditional, spiritual leaders who take a significant role in deciding right from wrong.

⁶ It remains to be seen whether a similar situation will emerge in Uganda. The June 2007 Agreement on Accountability and Reconciliation between the Ugandan Government and the Lord’s Resistance Army (LRA) plans full integration of traditional ceremonies into the national policy on war crimes of the past.

Does state capture matter?

The term traditional justice usually ends up referring to a range of qualities found in local procedures which are in some way similar to those associated with conventional judicial processes, or established notions of transitional justice, or with generalised ideas about forgiveness. However, this kind of perception may mean that other qualities of local procedures may be entirely overlooked. Kimberly Thiedon, for example, has warned of “the facile embrace of the local or community” as the “the realm of solution” (Theidon 2009:296). Just because a process or an institution is nominally traditional does not insulate it from interference from various kinds of public authority, including the state. Furthermore, as anthropologists have shown, local customs relating to accountability can be highly dynamic and remarkably adaptable; they are rarely static and timeless. This is partly because they are mostly not written down but are endlessly negotiated. To codify or regulate them changes them.

These are issues that have been raised about the *gacaca* courts in Rwanda. International NGOs such as Amnesty International and Human Rights Watch, as well as non-Rwandan scholars have argued that the modern *gacaca* courts are controlled by the Rwandan government and have been used by an increasingly oppressive and authoritarian state to regulate reconciliation and justice processes in the peripheries (Ingalaere 2008; Waldorf 2006). The argument follows that the state has interfered in the hearings in order to collectivise the guilt of all Hutu and in doing so, has coerced Rwandans into publicly sharing the details of the genocide, thus violating a cultural and pragmatic inclination towards silence. Thus, legislation has transformed the original *gacaca* institution into something qualitatively different: spurious legalistic procedures, state control and forced participation for the population mean that the current process bears only partial resemblance to that on which it was originally modeled.

Other analysts have taken a more complex position, accepting that there has been a good deal of state capture, but noting that the *gacaca* system is not homogenous, and that the government’s controlling role is not as pervasive as has been suggested. The *gacaca* system, they maintain, has a degree of autonomy and continues to resonate with local custom, even if the local courts are not quite what they were before. Phil

Clark in particular has highlighted the elasticity and dynamism of the *gacaca* courts in his important finding that “*gacaca* in one village could differ enormously from *gacaca* in another only a kilometer away” in terms of conduct, vibrancy of debate and “societal impact” of hearings (Clark 2009:5; Clark 2010). In his analysis, arguments about the government’s role in *gacaca* tend to neglect the “importance of individual and communal agency in *gacaca* and the vital role of the general population in running and shaping the institution, often with highly unpredictable results” (2010:87).

These autonomous and varied aspects of *gacaca* must be accepted. It is still, however, the case that the Rwandan government effectively used the system to institutionalise the allocation of blame. Where the state can, perhaps, most effectively ‘capture’ traditional justice or at least most successfully manipulate it, is not in the battle for direct control of these processes but rather in the battle of perceptions of wrongdoing. This has been a fundamental problem with the focus on the ritual of *mato oput* in Uganda. The focus on a custom associated with just one group, the Acholi, implies that the Lord’s Resistance Army insurgency was a local affair, when in fact it was a conflict underpinned by national and international dimensions (Allen 2006, 2010). Elizabeth Drexler comes to a similar conclusion in Timor Leste, where she observes that the “excessive localization” of transitional justice processes risks “horizontalising conflicts”, positing them as “conflicts between different groups in society, rather than between a state and its citizens” (Drexler 2009:50). In both these cases, a preoccupation with local justice (unintentionally or otherwise) protects crimes allegedly perpetrated by government officials and soldiers from scrutiny and accountability. It actually makes national political justice more elusive (Branch 2011).

Is traditional justice restorative?

Related to the above discussion is the long-standing question as to whether justice should be restorative or retributive. As has already been indicated, some enthusiasts of traditional approaches assert that they are essentially restorative and reparative (Cobban 2007). Although the evidence base for this is open to question, it does seem that communal reconciliation and social repair are the apparent goals of reintegration rituals in many situations. This has been described for lower level ex-soldiers and perpetrators in countries such as Timor Leste and Sierra Leone (Shaw 2002).

However, too much has been made of the almost intangible innateness of non-western impulses towards forgiveness and restoration of social harmony. Such arguments reached their rhetorical height at the time of the South African Truth and Reconciliation Commission (TRC). As Pierre Hazan notes, Archbishop Desmond Tutu successfully “constructed a spiritual dimension to the process, linking Christian forgiveness and African mysticism to the goal of reconciliation” (Hazan 2009:36). The resulting narrative was the notion that the ‘third way’ (amnesty without oblivion) was somehow the African way. Invoking the concept of *ubuntu* which is largely a romantic expression of the ‘rural African community’, Tutu said in one interview, “Ubuntu says I am human only because you are human...you must do what you can to maintain this great harmony which is perpetually undermined by resentment, anger, desire for vengeance. That is why African jurisprudence is restorative rather than retributive” (cf. Wilson 2001:9). But this is misleading. We only need to look at the legacy of the South African TRC to understand that a single prescription of how to deal with South Africa’s past was oppressive, and dissenting voices, although present at the time, were largely drowned out. Studies reflecting on the success of the TRC have found that earlier support for amnesty was “a reluctant, contingent concession that coexisted with a basic interest in seeing at least a degree of accountability” and that victims involved in hearings stressed that the desire for acknowledgement of wrongdoing and learning new information was the priority: it was truth, not reconciliation or forgiveness that was paramount (Backer 2010:453; Chapman and Van Der Merwe 2008).

Despite the emphasis on a restoration of social harmony, there is a clear accountability component to most of the documented reconciliation rites (Huyse and Salter 2008). Reconciliation ceremonies in Uganda, Mozambique, Rwanda, Sierra Leone and Burundi that have been adopted by activists tend to contain the requirement that the offender must acknowledge his or her guilt in order to be redeemed. In northern Uganda, for example, it is obvious to anyone who had read historical studies and early sources on the region that claims about the Acholi people forgiving offenders and accepting compensation were overblown. Punitive measures were common. It depended on the crime, who had committed it, and who was arbitrating (Allen 2006, 2010; Porter 2012). In situations in which a crime is locally

understood to be heinous, such as certain kinds of witchcraft, punishment could be very severe. In many places that remains the case, and violent responses to alleged witches and sorcerers have been reported from numerous parts of Africa (Allen and Storm 2012; Ralushai Commission 1996; Moore and Sanders 2001; Geshiere 2008; Ashworth 2005). In several countries, including South Africa, there have also been concerted efforts to incorporate trials for what might be called traditional or customary crimes into the formal system, and to ensure custodial sentences for those found guilty. In the Central African Republic, a UN prison study found that more than half of those being held had been accused of witchcraft (Njeng'ere 2010).

In Timor Leste meanwhile, it is true that the Community Reconciliation Hearings were successful in reintegrating low level combatants. The Commission for Reception, Truth and Reconciliation (CAVR) in Timor Leste is said to have gained more than just legitimacy by promoting the hearings among traditional leaders. It secured widespread participation (Stanley 2009; Pigou 2003). The CAVR undertook 216 community reconciliation hearings for 1,379 perpetrators and it is also estimated that up to 40,000 people attended (CAVR 2005:126). Such achievements are impressive but it is important not to conflate the characteristics of a process with its outcomes. Widespread frustration has been reported among participants, who lamented their inability to challenge Indonesian impunity (Stanley 2009; Drexler 2009).

The reality is that Western justice systems and indigenous dispute resolution systems pursue the similar objectives to different degrees and the restorative/retributive dichotomy is exaggerated and essentialising.⁷ Usually the biggest difference between formal and informal approaches is the choice of actual procedures employed to reach the various objectives (PRI 2002). Although there are exceptions, informal systems tend to draw more on ritual elements and to emphasise the community dimension of criminal behavior over individual accountability (Huyse and Salter 2008). This is where local processes have very clear benefits. In complicated situations the 'guilty',

⁷ This finding is shared by two important reports on the role of informal justice systems in sub-Saharan Africa, Penal Reform Initiative (2002) and Huyse and Salter (2008).

'not guilty', 'victim', 'perpetrator' dichotomies can be misleading and even harmful. Violent conflicts characterised by moral 'grey zones', in which different forms of guilt and innocence are mixed, are complicated territory for criminal law and render the delivery of clear verdicts a difficult exercise (Shaw et al 2010; Hinton 2011). These are situations in which people inhabit shifting 'perpetrator-victim' identities: the child soldier, abducted from its family and forced to commit brutal crimes in the course of conflicts in Sierra Leone and Uganda provides a case in point (Baines 2009). Courtrooms are not usually capable of dealing with the subtlety needed to address such complexities and moreover, the shaping of these complexities into simple legal categories risks misrepresenting the situation and can make post-conflict reconciliation ever harder (Shaw et. al 2010; Hinton 2011). As one scholar notes "a combination of palavers, the African way of prolonging discussions, and ritual events create in principle, more opportunities for exploring issues of accountability, innocence and guilt that are integral to the legacy of violent conflict" (Huysse 2008:15).

Does it matter that traditional justice can be discriminatory?

From Afghanistan to Sierra Leone, studies have highlighted the persistent ethnic, religious, generational and gender hierarchies and divisions that complicate and limit the effectiveness of traditional practice from a transitional justice perspective. This is a point implicitly recognized in Kofi Annan's observation to the UN Security Council that the rule of law and transitional justice must be "in conformity with both international standards and local tradition" (UNSC 2004:12).

In African contexts, for example, social accountability is closely connected with hierarchies, ones which may systematically subordinate and repress particular groups, notably women. Probably the most frequently mentioned cause of concern is that tradition-based systems of dispute resolution are likely to be dominated by men. As Huysse and Salter find in their edited collection on post-conflict traditional justice, in Mozambique only the spirits of men killed during the civil war are allowed to return to the realm of the living to claim justice; in Burundi, women are not allowed to become members of the Ubushinganthe, they can only participate in the proceedings as the wife or the widow of a member; and the traditional justice system in Sierra Leone exhibits a clear prejudice towards married women, although some provision is

made for female representation (Huysse and Salter 2008). It has been documented that in Somalia, a woman who is raped is often forced to marry her attacker, while customary practices of wife inheritance as an aspect of ritual cleansing continue in parts of Kenya (Wokowska 2006). In Afghanistan women can be exchanged in compensation for criminal offences. This is regarded as preferable to the alternative: a blood feud that might escalate into full-blown tribal conflict (Schmeidl 2011). A Commission on Conflict Mediation set up in Khost Province in 2007 attempted to integrate formal and informal justice processes and whilst it has been regarded as relatively successful, the Commission still follows the practice of only allowing men to litigate traditional justice (Schmeidl 2011:162). In Timor Leste, women were sidelined in the community reconciliation hearings because their participation faced resistance from male family members, and also because they were constrained in their ability to attend due to family and home duties. In a study by Elizabeth Stanley, CAVR staff commented that this was probably to be expected: “We are living in a patriarchal society so patriarchy is bound to be reflected in the collation of testimonies” (Stanley 2009:117). Despite efforts by regional workers to access women’s stories she finds that the CAVR “framed women out of stories” (Stanley 2009:117).

The male dominance of local justice mechanisms can also be compounded by overtly patriarchal characteristics. Rituals may be co-opted by male elders to further their own interests. In Sierra Leone, for example, customary law is the domain of senior men and this creates concern among younger men that their land and other possessions may be removed from them through “notoriously arbitrary and excessive fines” (Shaw et. al 2010:16). It has been observed that although the TRC reconciliation rituals may have been effective in helping to re-integrate high ranking ex-combatants, they also “retrenched young men’s subordination to ‘big men’, a situation that had watered the roots of Sierra Leone’s armed conflict in the first place” (Shaw et. al 2010:17). It has also been noted that elders in northern Uganda have deployed traditional justice techniques as a way of disciplining returning LRA combatants, particularly young men and women (Branch 2011). Sometimes traditional justice seems to be focused on the *reconstitution* of *preconflict* structures. The kind of senior male authority that is legitimated in customary law is largely upended during conflict and war. Family dislocation, mass displacement into refugee

camps and mass migration (particularly of youth) into the cities has disrupted the 'natural biotope' of traditional practice and undermined the status enjoyed by customary leaders (Huysse and Salter 2008:185-186). But is it socially progressive to reinstate the social order? If that social order was linked to the outbreak of violent conflict, it is not at all clear that such an agenda is appropriate. Also many will resist it if they can, especially women and young people who have found new opportunities during times of upheaval (Branch 2011). Sometimes it is in such circumstances that accusations of witchcraft proliferate, with arbitration procedures being co-opted by senior men to assert authority, and vulnerable women often ending up being targeted (Allen and Storm 2012).

There are, however, some interesting ways in which traditional mechanisms are being used to challenge traditional values and social orders. In Afghanistan, the *jirga*, traditionally an ad hoc forum for Pashtun elders to assemble and discuss a particular issue of concern, has been re-designated to describe any gathering aimed at consultation with the general population. In 2010, Afghan Civil Society groups established the *Victims Jirga for Justice* in response to the flawed, non-inclusive government run *Peace Jirga*. The *Victims Jirga* included over one hundred victims from all over Afghanistan and provided the first truly national articulation of a transitional justice agenda, including demands for prosecutions, truth seeking and reparations (Kouvo and Mazoori 2011). By loosely adopting the traditional *jirga* framework for discussion, the meetings provided a familiar and supportive space to recount the abuses that had been endured and to formulate policy proposals to the government (Kouvo and Mazoori 2011). Similar 'curative' spaces have been created by Women's Courts in Guatemala and Columbia. In Columbia, women have been holding regional tribunals in preparation for the launch of the permanent Columbian Women's Court Against Forgetting and Re-existence (Quest 2008). A hybrid of legal and non-legal procedures, the tribunals include rituals of apology and judgment by a panel of 'wise women'. In the case of the Victims Jirga and women's courts, traditional processes are being used by excluded populations to facilitate testimony and to formulate recommendations based on these testimonies to the government. Nevertheless, whilst promising, these kinds of measures are far from widespread, and the underlying problem remains. In practice, customary justice can elevate the goal of community harmony above individual rights and freedoms in worrying ways.

Is traditional justice appropriate to deal with mass crimes?

Probably the most important outstanding question in any given instance where traditional processes are a focus of post-conflict policies, is whether the measures being promoted are really capable of dealing with large-scale war crimes, genocide and crimes against humanity, sometimes committed over long time periods and often involving the destruction of the very social and material systems upon which indigenous processes depend. As has already been alluded to, it is unclear whether community based processes can resolve inter-communal problems as their scope and legitimacy tends to be limited.⁸ A major concern among international lawyers, and human rights NGOs is that customary tools do not respect the duty under international law to prosecute mass atrocities. Large NGOs such as Human Rights Watch and Amnesty International are outspoken defenders of this position and accept no curtailment of the international obligation to prosecute. Legalist critics apply strict criteria in their assessment of community based justice processes and as such, institutions like the *gacaca* have come under widespread criticism for an apparent failure to ensure due process, including, for example, professional representation and rules of evidence (Human Rights Watch 2011).⁹ In Uganda, there were early suggestions that traditional rituals might satisfy the ICC's complementarity criteria. As soon as the idea for a special War Crimes Division in the High Court of Uganda was mooted during the Juba Peace Talks that began in 2006, it was this that became the focus of 'complementarity' arguments to challenge the jurisdiction of the ICC.¹⁰ As Sarah Nouwen has noted, "debates on whether traditional justice meets international standards, or more specifically the ICC's complementarity requirements, have gone quiet" (Nouwen 2011:1137).

Analysts with a less narrowly legalistic approach than some of the major international human rights NGOs are more open to the possibilities of informal procedures. Among

⁸ It is worth pointing out that even the more formal, legalistic procedures (including the International Criminal Court) are not designed to address those conflicts that have crossed over national borders or that have been fuelled by neighbouring countries (Sriram 2007)

⁹ It should be noted, however, that scholars have criticised the excessive legalism of INGO interpretations of *gacaca*. Phil Clark in particular has noted that INGOs have wrongly interpreted *gacaca* primarily as 'a judicial institution that can be analysed through its governing legal documents' (Clark 2010: 4)

¹⁰ This was later renamed the International Crimes Division of the High Court of Uganda.

such commentators there is a tendency to begin with an ideal model of transitional justice in which traditional processes are complementary to more formal post-conflict justice processes. Although findings remain rather vague, inconclusive and anecdotal, studies of places as varied as Peru, Burundi and Afghanistan tend to suggest that traditional processes are “partially effective” and “partially legitimate” in addressing post-conflict justice issues (Huysse and Salter 2008:188-190), and that they could effectively combine with other strategies for dealing with accountability and reconciliation. However, even where this is being attempted, we do not have a clear enough understanding about how different processes actually function together in practice and with what outcomes. In so far as there is evidence, it would appear that the relationship is characterised by suspicion, friction and sometimes incompetence rather than by productive cooperation.

Competition of this kind is evident in Rwanda, where international, national and localised courts comprise judges and lawyers with “divergent interpretations of the role and objectives of transitional justice” resulting in a “stratified and at times competitive set of criminal courts” (Palmer 2012:3). In Sierra Leone, the TRC and the SCSL worked in parallel for eighteen months and the precise nature of their relationship was never clarified. The two bodies ended their period of parallel operation with tension over testimony of indicted prisoners but it is still a matter of debate as to whether the court and the TRC, generally, coexisted happily (Schabas 2004). Certainly the lack of clarity between the two institutions confused Sierra Leoneans and one widespread theory was that there was an underground tunnel linking the two, through which information given to the TRC was immediately leaked to the SCSL (Nkansah 2012). Meanwhile, in Timor Leste, the failure of collaboration between the CAVR process and the Special Crimes Unit has been commented on by victims who suggest that ‘good’ progress in the former was “downgraded” by the failure of the latter to bring cases to court and that there remains “a considerable amount of unfinished business – a significant caseload that falls in between the two procedures” (Stanley 2009:122). Finally, Tim Kelsall (2009) has shown how the kinds of ‘supernatural evidence’, common to ritual and informal processes, fared during the hearings of the Special Court for Sierra Leone. He finds that rather than clash directly, international legal and local norms appeared to simply elude one another. He argues that the Court’s decision to sidestep the issue of magic and the

occult during the trial was an ethnocentric mistake which made little sense to local populations.

Does it matter that traditional justice is sometimes largely invented?

As elsewhere in Africa, research in northern Uganda has shown how rituals and ceremonies are used to interpret the spirit world and the experience of misfortune, and to re-establish or make manifest social relations. Ceremonies and rituals that become important at any particular time are by no means always old ones that are taken 'off the peg', but rather ideas about old models are used to help shape new ones. Despite this, attempts *have* been made to try and codify rituals into an ostensibly coherent form of traditional justice. During the time of the Ugandan Protectorate, the British administrators incorporated selected tribal customs into the indirect system of government through chiefs and other local agents. More recently in northern Uganda, in the context of efforts to establish peace and reconciliation during the twenty year conflict between the Government of Uganda and the Lord's resistance army (LRA), there have been moves to codify community based rituals, particularly those that draw on traditional Acholi values and institutions. For the powerful coalition of sympathetic international agencies, activists, traditional leaders and religious leaders advocating this, the reasons were twofold: firstly, the war had led to a breakdown in traditional social values that needed to be restored and secondly, decisions about peace, justice and reconciliation should be made by the victims and not by the Ugandan government or a by foreign institution, such as the ICC (Allen 2006; 2010).

This approach was subsequently articulated vigorously in the peace negotiations between the Ugandan government and the LRA in Juba, and ended up being formalised in the 2007 Agreement on Accountability and Reconciliation signed between the Government of Uganda and the LRA, that listed both Acholi and non-Acholi rituals as part of the broader transitional justice effort in Uganda, alongside a new War Crimes Division in the High Court and a possible truth commission. During these developments, the local justice mechanisms were promoted without much understanding of local circumstances. Indeed, serious concerns had emerged about the chieftaincy system's capacity to implement the agenda that was being proposed. Critical examinations concluded that traditional structures were weak and fragmented; that many of the elders were themselves not sure how to carry out traditional rituals;

and that there was widespread disagreement about who the *real* traditional leaders were (Bradbury 1999; Acord 2000). It was also noted that there were tensions between elders over the possible financial benefits; and that there were concerns that the external support for traditional chiefs was just another way of trying to bring the region under closer government control without contributing to improved education and economic development (Bradbury 1999). Other research in the region undertaken in 2004 and 2005 found that northern Ugandan populations were critical and circumspect about the value and potential of traditional justice solutions and that few people considered the traditional structures a key priority (Allen 2006; Pham et al 2007).

Does this matter if the newly codified practices prove to be helpful? Probably it does. The problem with codifying selected local practice, as noted above, is that it takes them out of the contexts in which they have been used and adapted flexibly to specific circumstances, and it reifies them. If they are categorised and institutionalised into semi-formal judicial systems they will inevitably be very different to what they were to start with. They will lose their flexibility and will no longer have the many resonances and associations of lived ritual actions. But crucially, they will have a status that is at least partly based on their externally supported authority. They will become privileged rites and most likely the preserve of certain figures of male authority recognised by the international community or by the government. Interestingly, one supportive NGO report conceded that elders will need to be trained on traditional practices and the younger generation “do not even know how to be Acholi” (Liu Institute 2000:22). It is revealing that on one occasion, the USAID funded Northern Ugandan Peace Initiative (NUPI) arranged for elders to explain Acholi forgiveness rituals to representatives of ‘the youth’. At the time, the paramount chief admitted that he did not know how to perform the traditional *mato oput* ceremony (Allen 2010). It seems odd that it is now up to non-Acholi experts and outsiders to help revive those traditions among the Acholi.

This was most likely not the intention of many of the advocates of traditional justice, but it is certainly symptomatic of what Adam Branch has described as the “ethnojustice” agenda (Branch 2011). This approach mistakenly views traditional systems of justice as a “single, coherent and positive system...universally,

consensually and spontaneously adhered to by all members of that culture” (Branch 2011:163). It goes without saying that the reality is more nuanced than this. In a study of the Kpaa Mende, in southern and eastern Sierra Leone, Joe Alie found that certain Mende customary practices are only applicable to, and resonant with, certain elements of the community and, since there has been a great deal of intermarriage with other ethnic groups over the years, these practices may not be suitable for settling disputes between Mende and non-Mende people within the community (Alie 2008). In northern Uganda, the Acholi *Mato Oput* receives the most attention, but the Langi, Teso and Madi, also affected by the twenty year conflict, have their own rituals. An even more neglected fact, even though it may sound like a truism, is that attitudes towards traditional approaches vary *within* ethnic groups too. There is no integrated system of traditional justice amongst the Acholi for example. Traditional approaches are less relevant and less acceptable to some – this is especially true for young people who have grown up during a time of war with restricted opportunities to experience or participate in such practices. As Branch points out, and it is surely a point that is applicable across contexts: rather than Acholi traditional justice, we should talk about Acholi *traditions* of justice (Branch 2011:177).

Conclusion

It is difficult to conclude with a general statement about traditional justice, because it is not clear exactly what is being discussed. Measures associated with social accountability vary widely within population groups as well as between them, and the kinds of mechanisms selected to be called traditional justice by advocates are rarely more than a selection of activities that conform with normative ideals, usually linked to the notion that they ought to be restorative. As we have indicated here, research reveals that local judicial measures may be linked to state interests, or may have qualities that are highly problematic from an international perspective. However, problems of legitimacy, exclusion, gender bias and politicisation are also manifestly evident in formal national justice systems dealing with post-conflict accountability, and these problems also emerge in various ways at the level of international tribunals and courts. Hence, the turn to the local and the traditional for a better approach is likely to persist, whatever the controversies involved.

To date there is little detailed knowledge on the effects of those projects and programmes that have sought to promote putatively traditional systems. The findings of research that has been carried out suggest that they may be helpful in some instances, but overall results are mixed. In some instances counter-productive consequences have been noted. Much more adequate assessment is required and much better monitoring. There is no doubt that local rituals and customs are important for populations caught up in violent conflict and dealing with its aftermath. However, there is also no doubt that those local rituals and customs do not form a coherent alternative to formal national and international processes. Traditional justice cannot be harnessed to the transitional justice agenda in a straightforward way. The situation will vary radically from place to place, and where it occurs, the local mechanisms will take on hybrid qualities. Indeed to call them traditional will almost inevitably become a misnomer. They will change, and how they change needs to be closely observed to ensure positive outcomes.

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Contact details:

email: Intdev.jsrp@lse.ac.uk

Web: lse.ac.uk/internationalDevelopment/research/JSRP/jsrp.aspx

Tel: +44 (0)20 7849 4631