

Romanticization Versus Integration?: Indigenous Justice in Rule of Law Reconstruction and Transitional Justice Discourse

Padraig McAuliffe*

Table of Contents

A. Introduction.....	42
B. <i>Ad Idem</i> : The Strengths and Weaknesses of Indigenous Justice.....	49
C. Better Late Than Never: The Embrace of Non-State Justice in Peace Building.....	54
I. How Indigenous Legal Ordering Came in From the Cold in Rule of Law Reconstruction	54
II. Overcoming Antipathy to Integration With the State.....	56
III. Advantages of Integration.....	60
D. Restoration, Idealization and Transitional Justice.....	62
I. Inherently Restorative Indigenous Justice?	63
II. A Binary Opposition with Formal Legal Structures	68
III. Thinking Like the State?.....	74
E. Transition as Opportunity.....	78
I. Internal Factors	79
II. External Factors.....	82
F. Conclusion.....	85

* Senior Lecturer, School of Law and Social Justice, University of Liverpool.

Abstract

There is great optimism in transitional justice literature that indigenous legal processes can capture the meaning of conflict in ways that more remote, state- or international-based processes cannot. However, if the innovations in terms of inclusiveness, gender, and fairness that transitional justice invariably promote when employing indigenous justice processes are to make a long-term, sustainable impact beyond the transitional moment, greater attention must be given to how their employment as a form of transitional justice might interact with the usually simultaneous process of rule of law reconstruction. If transitional justice actors are to interact productively with justice sector reformers and national governments to establish traditional dispute resolution mechanisms in post-conflict States, they will have to abandon some of their more romantic notions evident in the literature and policy documents of indigenous justice as something inherently restorative, as an antidote to the shortcomings of legal formalism or as a site of resistance to the State Leviathan. Enthusiasts for the employment of indigenous mechanisms in transitional justice can learn lessons from the processes of de-romanticization that legal pluralism went through and the experiences of peace building missions in recent decades.

A. Introduction

One of the key areas where the rights of indigenous peoples have been recognized is in the support found in international human rights law for their customs and institutions of normative ordering. This is most apparent in the admittedly non-binding 2007 *United Nations Declaration on the Rights of Indigenous Peoples* which recognized the rights to autonomy in local affairs (Article 4) and maintenance of autochthonous legal institutions (Article 5), before going on to declare in Article 34 that “indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards”.¹ This builds on similar prescriptions in earlier normative instruments such as Articles 8 and 9 of the International Labour Organization *Convention Concerning Indigenous and Tribal Peoples in*

¹ *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, Art. 34, GA Res. 61/295 annex, UN Doc A/RES/61/295, 1, 9.

*Independent Countries*² and Article 4 of the 1992 *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*.³ Peace agreements and times of political transition are often a time for renegotiating relationships between the State and indigenous communities, such as those between India and the Bodo community, Nicaragua and the Miskito or Bangladesh and the Chittagong Hill Tract peoples, and to address issues of discrimination and inequality that give rise to conflicts. These agreements tend to be dual – the State recognizes the separate identity, autonomy and land rights of indigenous peoples, while indigenous peoples recognize they are part of the State, even if the record of state adherence to agreements is chequered.⁴

Few practitioners or scholars in the fields of either rule of law reconstruction or transitional justice would today quibble with the principles found in the above agreements, having largely embraced indigenous mechanisms of dispute resolution as part of their peace building strategies in post-conflict and post-authoritarian States after initially dismissing them as irredeemably inimical to the type of democratic, modernizing polity the teleology of international intervention emphasizes. A role for indigenous justice, either in the form of discrete institutions for dispute resolution or substantive norms, now forms a core element of international best practice in these areas, as recognized in the UN Secretary-General's seminal *Rule of Law and Transitional Justice Report*.⁵ However, though superficially similar and supposedly mutually supporting, the fields of transitional justice and rule of law reform are distinctly different in terms of personnel, outlook, and approach to national systems of justice at any level, and a large degree of bifurcation has emerged between them.⁶ A disparity in the treatment of indigenous justice has emerged in the practice and scholarship of both fields. Transitional justice's engagement with indigenous law in the likes of the *mate oput* of Uganda, the *lisan* of East Timor, and the *gacaca* in

² International Labour Organization, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, Arts 8 & 9, 27 June 1989, 28 ILM 1382, 1386.

³ *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Art. 4, 18 December 1992, GA Res. 47/135 annex, UN Doc A/RES/47/135, 3, 5.

⁴ J. Gilbert, 'Indigenous Peoples & Peace Agreements: Transforming Relationships or Empty Rhetoric?', in G. O. Aguilar & F. Gomez Isa (eds), *Rethinking Transitions: Equality and Social Justice in Societies Emerging from Conflict* (2011), 207, 220-221.

⁵ UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616, 23 August 2004, 12, para. 36.

⁶ N. Kritz, 'Policy Implications of Empirical Research on Transitional Justice', in H. van der Merwe, V. Baxter & A. R. Chapman (eds), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (2009), 13, 16.

Rwanda draws to a significant degree on Western theories of restorative justice as an antidote to formalist state/international criminal justice mechanisms. As a consequence, indigenous justice has been valorized as a bottom up alternative to elitist settlements and presented as a commendable alternative to formal justice, largely resenting any role for the State in directing, supervising or monitoring it. By contrast, rule of law reconstructors view indigenous and formal justice in less dichotomized terms and situate their treatment of the former in a broader national and temporal framework. This viewpoint sees a role for the State in the operation of indigenous mechanisms as both desirable and legitimate. There is an awareness that indigenous norms and state institutions present a “clash of two goods” – respect for local traditions and practices, on the one hand, and the goals of sustainable, rights-based, non-discriminatory State building on the other.⁷ Through the process of integrating indigenous justice with the formal system, justice sector reformers endeavor “to build mutually beneficial linkages between the systems [...] to harness the positive aspects of each system and mitigate the negative”.⁸ However, the rich policy debates this position has stimulated in peace building and justice sector reform about rights, jurisdictional issues, enforcement and justice gaps have made little impact on transitional justice discourse and its embrace of indigenous social ordering. Transitional justice as a field should be commended for broadening its horizons to include indigenous forms of justice. However, these horizons have not been stretched far enough to generate the institutional safeguards that would make the rights-based, non-discriminatory alterations that indigenous processes transitional justice actors promote in response to crimes of the past sustainable once the attention of donors and activists switch elsewhere.

An obvious, initial explanation for this disparity lies in the failure of scholars and practitioners in the fields of both transitional justice and rule of law reconstruction to draw on the research of the other. The majority of the voluminous literature on indigenous justice in justice sector reform is anthropological in nature, with a marked focus on legal pluralism.⁹ Legal pluralism in essence is a concept used to comprehend interactions between legal and social rule

⁷ T. Barfield, N. Nojumi & J. A. Thier, ‘The Clash of Two Goods: State and Nonstate Dispute Resolution in Afghanistan’, in D. Isser (ed.), *Customary Justice and the Rule of Law in War-Torn Societies* (2011) [Isser, Customary Justice], 159, 185.

⁸ Barfield, Nojumi & Thier, *supra* note 7, 189.

⁹ L. Huyse, ‘Introduction: Tradition-based Approaches in Peacemaking, Transitional Justice and Reconciliation Policies’, in L. Huyse & M. Salter (eds), *Traditional Justice and Reconciliation After Violent Conflict: Learning from African Experience* (2008) [Huyse & Salter, Traditional Justice], 1, 10 [Huyse, Introduction].

systems embedded at various layers in the State.¹⁰ However, as Hinton notes, legal anthropology has been “largely silent” on the topic of transitional justice, engaging little with overall theory.¹¹ Though one can point out particularized studies in legal pluralist literature of individual indigenous justice processes that are employed in the service of transitional justice, they tend to be viewed solely through that pluralist lens with little or no attention to their perceived potency in post-conflict justice.¹² Hinton argues that this disengagement is best explained by transitional justice’s teleological impetus towards democratization and modernization which implicitly deprecates ostensibly more “backward” or even “barbaric” traditional practices in a manner reminiscent of the civilizing missions of colonialism.¹³ This indignation is somewhat misplaced; if anything, as this article goes on to argue, indigenous law and custom have more often been idealized in transitional justice literature.

This indifference is reciprocated in transitional justice scholarship. Though increasingly welcoming of indigenous justice processes, including references to the international legal standards noted above, eminent theorists in legal anthropology or legal pluralism generally are conspicuous by their absence. The few links between transitional justice and anthropology “have been tangential or indirect through related literatures on the anthropology of genocide, political violence, human rights, social suffering, and international law”.¹⁴ Only a handful of writers urging greater use of indigenous mechanisms in transitional justice have examined those processes in the context of the post-conflict or post-authoritarian State’s attempt to permanently regulate their relationship with subnational legal or customary orders.¹⁵ Consequently,

¹⁰ The most useful and most widely cited introductions to legal pluralism are S. Merry, ‘Legal Pluralism’, 22 *Law & Society Review* (1988) 5, 869 and J. Griffiths, ‘What is Legal Pluralism?’, 24 *Journal of Legal Pluralism and Unofficial Law* (1986) 1, 1.

¹¹ A. L. Hinton, ‘Introduction: Toward an Anthropology of Transitional Justice’, in A. L. Hinton (ed.), *Transitional Justice: Global Mechanisms and Local Realities After Genocide and Mass Violence* (2010), 1, 6 [Hinton, Introduction].

¹² A good example is the treatment of Rwanda’s *gacaca* and East Timor’s Community Reconciliation Process in the influential B. Connolly, ‘Non-State Justice Systems and the State: Proposals for a Recognition Typology’, 38 *Connecticut Law Review* (2005) 2, 239, which were examined purely as examples of legal pluralism, at pages 267-270 & 276-280 respectively.

¹³ Hinton, ‘Introduction’, *supra* note 11, 6-7.

¹⁴ *Ibid.*, 6.

¹⁵ Notable examples include P. Clark, who places indigenous justice more holistically within post-conflict reconstruction processes (‘Hybridity, Holism and “Traditional Justice”: The Case of the Gacaca Courts in Post-Genocide Rwanda’, 39 *George Washington International*

the literature tends to assume the form of simplified, dichotomized debates on subsets of the quotidian restorative justice versus criminal justice debate: justice for the people versus justice as a tool of the State,¹⁶ African justice versus Western justice,¹⁷ and “embedded” versus “distanced” justice.¹⁸ This focus tends to exclude perspectives on more prosaic issues of legal pluralism which form the basis for the understanding of indigenous justice in long-term rule of law reconstruction, perhaps illustrating once more the “familiar but self-deceiving separation of law, human rights, truth commissions and reconciliation from questions of nation-building” that has persisted in transitional justice.¹⁹ Legal anthropologists have long understood that the complexities inherent in a legal order composed of multiple layers may be “invisible” to outsiders.²⁰

This dichotomic presentation tends to obscure the commonalities of interest between indigenous justice processes and national rule of law reconstruction processes in post-conflict States. As Shaw points out, “[m]ost post-conflict [S]tates of the global South have dualist legal systems: formal state law and informal customary law”.²¹ However, the separation and interpenetration of indigenous justice in a dualist national legal system is a question that transitional justice scholarship has largely ignored, preferring instead to devote attention to issues like whether employment of indigenous law might influence admissibility of Sudanese cases to the ICC,²² or the extent to which traditional dispute resolution

Law Review (2007) 4, 765); Huyse & Salter, *Traditional Justice*, *supra* note 9, whose edited volume is the first sustained attempt to place transitional justice in a pluralist state justice reconstruction context, and E. Mobekk & R. Kerr who examine the use of informal justice mechanisms to deal with past atrocities and their interaction with the formal justice system (*Peace and Justice: Seeking Accountability After War* (2007), 151-172).

¹⁶ A. Meyerstein, ‘Between Law and Culture: Rwanda’s Gacaca and Postcolonial Legality’, 32 *Law & Social Inquiry* (2007) 2, 467, 495.

¹⁷ R. Nagy, ‘Transitional Justice and Legal Pluralism in Transitional Context: The Case of Rwanda’s Gacaca Courts’, in J. R. Quinn (ed.), *Reconciliations(s): Transitional Justice in Postconflict Societies* (2009), 86, 103, rejecting this dichotomy.

¹⁸ P. Gready, ‘Reconceptualising Transitional Justice: Embedded and Distanced Justice’, 5 *Conflict, Security and Development* (2005) 1, 3.

¹⁹ R. A. Wilson, ‘The Sizwe Will Not Go Away: The Truth and Reconciliation Commission, Human Rights, and Nation-Building in South Africa’, 55 *African Studies* (1996) 2, 1, 14 & 20.

²⁰ L. Chirayath, C. Sage & M. Woolcock, *Customary Law and Policy Reform: Engaging With the Plurality of Justice Systems* (2006), 4.

²¹ R. Shaw & L. Waldorf, ‘Introduction: Localizing Transitional Justice’, in R. Shaw *et al.* (eds), *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (2010), 3, 15.

²² Mobekk & Kerr, *supra* note 15, 165-166.

might be accommodated within the penological templates of transitional justice,²³ or the ethical superiority of localized mechanisms vis-à-vis positivistic secular law.²⁴ By contrast, little or no attention is devoted to the more practical issue of the relationship between these mechanisms and simultaneous domestic rule of law reconstruction. For example, transitional justice scholarship is greatly concerned about whether the *mato oput* tradition of Uganda's Acholi people can satisfy the ICC's complementarity requirements,²⁵ but the more pressing issue in the long-term may be whether the State or local communities would be content to see their local mechanisms being given so unprecedented a responsibility. In Burundi, a clash has emerged between international donors and NGOs who are attempting to rehabilitate the traditional *bashingantaha* process for the purposes of transitional justice, and the national government that resists using it in this way.²⁶

To the extent that transitional justice acknowledges pluralistic legal orders, it does so in an over-simplistic binary manner that views state and indigenous systems as separate formal/retributive and informal/restorative spheres, failing to comprehend the ambiguous, competitive, intertwined and mutually inter-dependent relationships between them. Without attention to such complexities, any promotion, improvement or reappraisal of indigenous law fostered by transitional justice will be self-contained or diverge too far from on-going processes of rationalizing formal-informal justice relationships. The benchmarks by which the use of indigenous law as a form transitional justice are assessed, such as trust between antagonistic groups, empathy for the other's position, psychosocial healing and democratic dialogue, are far removed from the more prosaic pluralist-organizational issues justice sector reformers consider when they approach indigenous justice from a more long-term perspective: how formal or informal should the relationship between state and indigenous justice systems be? What matters and punishments can indigenous justice deal

²³ M. A. Drumbl, 'Punishment Post-Genocide: From Guilt to Shame to Civis in Rwanda', 75 *New York University Law Review* (2000) 5, 1221.

²⁴ J. O. Latigo, 'Northern Uganda: Tradition-Based Practices in the Acholi Region', in Huyse & Salter, *Traditional Justice*, *supra* note 9, 85, 101.

²⁵ I. Eberечи, 'Who Will Save These Endangered Species – Evaluating the Implications of the Principle of Complementarity on the Traditional African Conflict Resolution Mechanisms', 20 *African Journal of International and Comparative Law* (2012) 1, 22, 31-32.

²⁶ B. Ingelaere & D. Kohlhagen, 'Situating Social Imaginaries in Transitional Justice: The Bashingantaha in Burundi', 6 *International Journal of Transitional Justice* (2012) 1, 40, 41 [Ingelaere & Kohlhagen, *Transitional Justice*].

with or apply and what can it not? What framework should exist for appeals or resolution of conflicting principles? How applicable are constitutional standards of human rights and non-discrimination?

This article examines the consequences of the failure of transitional justice to marry its strong support for indigenous justice to an appreciation of the complexities of legal pluralism of which their brethren in rule of law reconstruction are more aware. It argues that while rule of law reconstructors and transitional justice practitioners have a similar appreciation of both the values and dangers of indigenous justice, the latter's tendency to romanticize and isolate indigenous mechanisms (largely born of a belief in their restorative potential) will contribute less to securing the autonomy of these mechanisms, respect and full-functioning as the State consolidates after transition than the more pragmatic and integrationist approach of the former. The view of indigenous law in transitional justice is too self-contained and insufficiently dynamic to contribute usefully to the simultaneous processes in which the State and peace builders attempt to reconcile local perceptions of social order with national concerns over human rights, jurisdictional disputes and the gaps in the rule of law.

This article argues that when indigenous law is being employed as a form of transitional justice, it should complement, or at least not obstruct, the usually simultaneous process by which the State and peace builders attempt to accommodate these customs in an invariably ravaged national justice system. Section B examines why practitioners in the fields of transitional justice and rule of law reconstruction are largely in agreement on the strengths and weaknesses of indigenous law. Section C examines the support for the integration (to greater or lesser degrees) of indigenous justice with the State in rule of law reconstruction. Section D examines the radically different restorative justice roots of the support for indigenous law in transitional justice, and why this has led to antipathy or indifference towards the merits of integration with the formal justice system that rule of law reconstruction has latterly embraced. Section E examines how those enthusiastically advocating the employment of indigenous law as a form of transitional justice can then take advantage of its high profile, the involvement of NGOs and the relative flexibility of indigenous justice in periods of political flux to serve a more immediately realizable, sustainable, and more mundane role as a model for a rights-based, more inclusive interaction of non-state and state-based justice in the long-term.

B. *Ad Idem*: The Strengths and Weaknesses of Indigenous Justice

There exists no universal or generally accepted definition of what constitutes indigenous law. An indigenous group may be defined by its nation, ethnicity, or locality and identified by its practice of unique traditions or retention of social, cultural, economic, and political characteristics that are distinct from those of the dominant societies in which they live. Typical definitions of indigenous justice to the effect that it is an accumulation of historical practices, locally defined and applied by the whole community, guided by a distinct world vision and holistically organized (rather than atomized into isolated subject areas) are not inaccurate.²⁷ However, they draw attention to the fact that the characteristics of what we might call indigenous justice overlap to a significant extent with a plethora of conceptually distinct dispute resolution mechanisms that fall outside the scope of the formal justice system, labeled as *customary*, *traditional*, *non-state*, *subnational*, *non-state*, *informal* and *popular*, which are generally used interchangeably with indigenous justice (the question of whether these mechanisms are legal or merely normative is beyond the scope of this paper). Within these categories, differing norms will be applied by differing institutions on differing subject matters among differing population sub-groups. The characteristics of what I label indigenous justice systems are heterogeneous, therefore, and will of course vary in strength, coercive and restorative potential, symbolic power and allegiance of the indigenous group. Among the key attributes are the following:

- The resolution of disputes is a predetermined responsibility of political, hereditary or spiritual authorities who are appointed from within an indigenous community.
- Crimes and disputes are viewed as relating to the entire community, as opposed to only the parties most immediately involved.
- Decisions are arrived at after consultation.
- The applicable norms, procedures, and sanctions exist for the primary purposes of maintaining internal community equilibrium and protecting cultural values.

²⁷ X. Albó, 'Como Manejar la Interculturalidad Jurídica en un País Intercultural?', in Instituto de la Judicatura de Bolivia (ed.), *Justicia Comunitaria en los Pueblos Originarios de Bolivia* (2003), 85, 89-90.

- The process is voluntary, even if enforcement of decisions requires social pressure from the community.
- The process is informal, lacks rules of evidence and eschews legal representation.

Bearing in mind these characteristics, one sees shared assumptions about the strengths and weakness of traditional justice in the literature, policy documents, and practice of those in justice sector reform and transitional justice. The emphasis on traditional justice in both transitional justice and justice sector reform is the result of a consensus that top down, formal, national level processes alone were insufficient to reckon with the legacy of past abuses or to build a more comprehensive justice system respectively, and that more bottom up perspectives with national ownership were essential to empower vulnerable groups and create access to justice. Nevertheless, the engagement of both justice sector reformers and transitional justice practitioners with customary law was less the product of conscious policy than the generic post-conflict or post-authoritarian ecology of the States to which they were deployed. In States attracting the attention of peace builders and transitional justice, the formal legal system generally manifests significant degrees of dysfunctionality.²⁸ In transitions from authoritarian rule to democratic rule, there will usually be some continuity between the old and new legal dispensations. Even in the most fragile and conflict-torn of transitions, a *tabula rasa* in relation to rules and norms is unlikely to be present. Though there may be a vacuum in terms of formal legal structures, highly resilient and historically embedded forms of traditional justice usually fill the gaps until the point where their competences are snapped. For example, the customary *xeer* system gained in importance in the course of Somalia's twenty-year civil war, especially in the areas of peace and security.²⁹ Consequently, the existence in the transitional environment of these systems, invariably more entrenched, legitimate, and accessible than the formal justice system, is an inevitable element of most rule of law reconstruction. In these contexts, non-recognition of customary justice is entirely unrealistic as either a security vacuum would emerge or the structures would operate underground.³⁰

²⁸ For a generic description of common conditions see B. Baker & E. Scheye, 'Multi-layered Justice and Security Delivery in Post-Conflict and Fragile States', 7 *Conflict, Security and Development* (2007) 4, 503, 507-511.

²⁹ J. Gundel, *The Predicament of the 'Oday': The Role of Traditional Structures in Security, Rights, Law and Development in Somalia* (2006), 4-13.

³⁰ D. Mearns, *Looking Both Ways: Models for Justice in East Timor* (2002), 54.

Similarly, transitional justice also has to reckon with a pre-existing traditional justice sector more readily available than the *ad hoc* mechanisms it can formulate. Refusal to engage with indigenous law has generally proven impossible, given the tendency of indigenous mechanisms to self-activate as transitional justice processes for re-integration of offenders before the State can formulate a response in the likes of Burundi,³¹ Peru³² and Mozambique.³³

In terms of strengths, both viewpoints accept the necessity of informal justice given the formal legal system's chronic weakness – previous association with an illegitimate regime, human rights abuses, and the sheer lack qualified professionals in formal institutions of justice which prevents the reconstructing State from penetrating beyond metropolitan areas into rural areas. Some conflicts in local social relationships are entirely unsuited to state intervention. Consistent figures of around 80-90 per cent of all legal disputes are resolved outside the formal system in most of the developing world.³⁴ Where no functioning justice options are available, increased vigilantism usually occurs.³⁵ However, indigenous mechanisms should not be regarded merely as poor substitutes for the State, but rather as something deeply embedded within local cultures.³⁶ Beyond their evident utility, customary laws might have spiritual roots that resound with the indigenous world view. Above all, the popularity of these processes may flow from their emphasis on communal ownership, participation, compromise and compensation, which is more likely to defuse the type of social acrimony whose avoidance is necessary in economically marginal, interdependent localities.³⁷ Wrongdoing is rarely understood as a crime to be punished, but may instead be conceptualized as an action against the social order or circulation of values which

³¹ A. Naniwe-Kaburahe, 'The Institution of Bashingantahe in Burundi', in Huyse & Salter, *Traditional Justice*, *supra* note 9, 149, 161.

³² K. Theidon, 'Justice in Transition: The Micropolitics of Reconciliation in Postwar Peru', 50 *Journal of Conflict Resolution* (2006) 3, 433, 456.

³³ A. Honwana, 'Healing and Social Integration in Mozambique and Angola', in E. Skaar *et al.* (eds), *Roads to Reconciliation* (2005), 83.

³⁴ B. Z. Tamanaha, 'The Rule of Law and Legal Pluralism in Development', 3 *Hague Journal on the Rule of Law* (2011) 1, 1, 4 [Tamanaha, Rule of Law].

³⁵ E. Harper, 'Engaging With Customary Justice Systems', in J. Ubink (ed.), *Traditional Justice: Practitioners' Perspectives on Legal Empowerment* (2011), 29, 39.

³⁶ D. Isser, 'Understanding and Engaging Customary Justice Systems', in Isser, *Customary Justice*, *supra* note 7, 325, 327 [Isser, Understanding and Engaging Customary Justice Systems].

³⁷ Penal Reform International, 'Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems' (2000), available at <http://www.gsdr.org/docs/open/SSAJ4.pdf> (last visited 15 June 2013).

must be rebalanced. Indigenous justice tends to be more accessible, cheaper, and responsive on account of its informality and proximity, though popularity will vary from group to group, territory to territory. Finally, indigenous justice systems tend to deal with bread and butter issues most appropriate for, and susceptible to, localized resolution such as family, land claims, and community disputes. They incorporate issues that the criminal justice system cannot deal with like sorcery, the supernatural and family break-ups that can bitterly divide societies.³⁸

However, while indigenous justice mechanisms are popular, this does not mean they are immune to abuses or marginalization of weaker members of society. While much is made of their harmonizing potential, “indigenous law [...] is not always the expression of harmonious egalitarianism. [It] often reflects narrow and parochial concerns; it is often based on relations of domination; protections that are available in public forums may be absent.”³⁹ Two of the most commonly aired complaints from within and outwith indigenous groups about their justice mechanisms relate to their tendency to reinforce power hierarchies and the frequency of human rights abuses. Indigenous justice, like all systems of justice, may reflect elite capture of power structures within their communities. Those who administer customary law often tend to be older “Big Men” from dominant families who generally tend to be financially prosperous, while the lack of any organized accountability to their community may exacerbate the ever-present risk that considerations of power would take precedence over equity.⁴⁰ Vulnerable groups like women, the young, AIDS victims, and those considered as outsiders to the indigenous group find themselves marginalized by a system that is rarely sensitive to their needs. As Connolly argues, “weaker members of the community [...] may accept the jurisdiction of the traditional forum less voluntarily, and sanctions imposed against them may reflect their weaker position in society”.⁴¹ Given this risk, the search for consensus and harmony may in fact result in the unhealthy muffling of legitimate resentments.

³⁸ Department for International Development (DFID), ‘Briefing: Non-state Justice and Security Systems’ (2004), available at <http://www.gsdr.org/docs/open/SSAJ101.pdf> (last visited 15 June 2013), 1 & 10.

³⁹ M. Galanter, ‘Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law’, 19 *Journal of Legal Pluralism and Unofficial Law* (1981), 1, 25.

⁴⁰ International Development Law Association, ‘Customary Justice: Challenges, Innovations and the Role of the UN’, in J. C. Botero *et al.* (eds), *Innovations in Rule of Law: A Compilation of Concise Essays* (2012), 55, 56.

⁴¹ Connolly, *supra* note 12, 246.

Human rights abuses tend to be the most frequent source of criticism of traditional justice, even when they are grounded in complex, context-specific rationales based in culture and socio-economics. Procedural complaints are the most common – indigenous justice mechanisms often incur allegations of “miscarriage of justice, favouritism, coercion, arbitrary imprisonment or extended detention without trial”,⁴² problems which are exacerbated by the lack of review. A further concern is the harsh physical punishments and banishments employed like torture, honor killings, or payment of blood money.⁴³ Even where restorative methods are preferred, these systems can still uphold traditional practices that violate the rights of the vulnerable. Again, indigenous justice often has the effect of undermining the socio-economic status of women who may not be able to own or inherit property, and may be subservient within the family, while in some cultures women may be forced to marry their rapists, be punished for suffering sexual abuse, or see compensation given to their kin group collectively for her loss in marital value.⁴⁴ The patriarchal dominance of indigenous justice operates to preclude a role for females in decision-making.

A further problem is that of competence. Indigenous justice systems may work well internally when dealing with problems that predictably arise within the group, but struggle when trying to restrain bodies outside the community like the government, civil service or corporations.⁴⁵ If the boundaries of what constitutes the indigenous group are made ambiguous by migration or inter-marriage, the customary law may be of little utility when some groups or individuals are considered to lie outside of its remit.⁴⁶ Indigenous processes are generally unsuited to very serious crimes like murder or organized crime which expose the limits of community solidarity. Here it is often recognized by both the indigenous group itself and the State that the formal system’s emphasis on rights, adversarialism and punitive sanctions may be more appropriate. This tendency is also visible in transitional justice discourse where a division of labor is usually envisaged between international or national trials and/or truth commissions for the most serious offenders or offences, and more localized processes for those lower in the hierarchy. A problem emerges when this division of labor turns into a complete separation.

⁴² F. M. Deng, ‘Customary Law in the Cross Fire of Sudan’s War of Identities’, in Isser, *Customary Justice*, *supra* note 7, 285, 316.

⁴³ International Development Law Association, *supra* note 40, 55.

⁴⁴ See generally the special edition entitled ‘Women’s Rights and Traditional Law: A Conflict’, 13 *Third World Legal Studies* (1995).

⁴⁵ Isser, ‘Understanding and Engaging Customary Justice Systems’, *supra* note 36, 331.

⁴⁶ Barfield, Nojumi & Thier, *supra* note 7, 174-175.

C. Better Late Than Never: The Embrace of Non-State Justice in Peace Building

For non-state justice processes like those of indigenous law to form a core part of a rule of law reconstruction strategy, two things had to happen. Firstly, peace builders on the ground had to overcome an instinctive antipathy to non-state forms of ordering which would lie largely beyond their immediate control or that of the State which they were helping rebuild. Secondly, those coming from a legal-pluralist background who were best placed to assist in this process needed to overcome an aversion to state influence on indigenous justice.

I. How Indigenous Legal Ordering Came in From the Cold in Rule of Law Reconstruction

To begin with the former, those involved in intensive “third generation” peace building were slow to concede that the accessibility, legitimacy, and popularity of indigenous justice systems meant that it regulated how a majority of people actually ordered their lives. This disinclination is generally explained by the perceived pervasiveness of human rights shortcomings canvassed above, and the sheer fact of the unfamiliarity of non-state regulation to those from States where the formal justice system long exercised hegemony. Some argued that they were so far removed from the goals of the rule of law that “justice strategies should seek to replace rather than engage them [...] [a]ccording to this argument, any official recognition of customary systems is tantamount to sanctioning human rights violations”.⁴⁷ Normative structures outside of the State were variously viewed as “disorderly, corrupt, unimportant or even potentially subversive”.⁴⁸ Indigenous justice emerged more as a competitor than a complement to the formal justice sector, with the consequence that enduring discriminatory or abusive practices went unchallenged. The failure of rule of law reconstruction in the likes of Cambodia, Afghanistan, East Timor concerned exclusively with rebuilding centrally organized courts, prisons, and police demonstrated that narrow technical formalism could not ground the rule of law as it neglected the everyday, lived dynamics of the social order outside the major cities.

⁴⁷ Isser, ‘Understanding and Engaging Customary Justice Systems’, *supra* note 36, 341.

⁴⁸ J. Faundez, ‘Legal Pluralism and International Development Agencies: State Building or Legal Reform?’, 3 *Hague Journal on the Rule of Law* (2011) 1, 18, 18.

In light of these failures and the evident capacity gaps in justice provision, rule of law reconstruction now focuses on strengthening and reforming non-state justice institutions and linking them to the formal legal system. Even though indigenous systems of justice may not meet ideal rule of law requirements, they fulfill rule of law functions insofar as they establish and maintain rule governed behavior among citizens.⁴⁹ Consequently, this reversal of policy should not be mistaken for a turn towards restorative justice, justice from below as something meritorious in itself, or a rejection of a role for the State at the local level. Nevertheless, the embrace of non-state justice should not be regarded as merely “the messy compromise which the ideology of legal centralism feels itself obliged to make with recalcitrant social reality”.⁵⁰ The concentration on justice gaps was allied with a more positive case for integration that built on the new understanding of underdevelopment which emphasized that poverty was as much about powerlessness and lack of availability of protection from the law as it was about material deprivation.⁵¹ As peace builders recognized that the old rule of law orthodoxy, which was premised on the reform of courts, legislature and police enjoying a trickle-down effect to benefit the poor, yielded negligible results, it was gradually assumed that indigenous justice would be inherently more empowering for people who could collaboratively control it.⁵² As practice made apparent the reality that rebuilding the formal rule of law system might take decades to complete, integration of indigenous mechanisms with the formal sector moved from an interim strategy to form a core part of any effective justice sector reform:

“The general view among leading policy-makers is that customary law should not only be recognized and applied by the traditional institutions but should be the main source of legislation and governance in all areas except those where modern exigencies require adopting from outside sources. This is a radical departure from

⁴⁹ Tamanaha, ‘Rule of Law’, *supra* note note 34, 15.

⁵⁰ Griffiths, *supra* note 10, 7.

⁵¹ UNDP, ‘Programming for Justice: Access for All: A Practitioner’s Guide to a Human-Rights-Based Approach to Access to Justice’ (2005), available at <http://www.unrol.org/doc.aspx?d=2311> (last visited 15 June 2013), 5.

⁵² See generally S. Golub, ‘Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative’ (2003), available at <http://www.carnegieendowment.org/files/wp41.pdf> (last visited 15 June 2013).

earlier approaches that relegated customary law to a subordinate position.”⁵³

This focus is typically both pragmatic and normative. Peace builders and state agencies may legislate to regulate troublesome aspects of non-state law, clarify indigenous law, build links like monitoring, appeals or advice from the formal legal system, develop the capacity of indigenous authorities in areas like mediation and administration, and engage in human rights and gender awareness raising. Though indigenous justice will inevitably endure some loss of voluntariness and flexibility, all forms of integration attempt “to combine the virtues of traditional legal institutions (accessibility, informality, economy of time and money, and familiarity of legal norms) with those of the state legal system (impartiality, uniformity of law and [state] legitimacy)”.⁵⁴ Some of the uniqueness and flexibility of the law is regrettably lost in this way, but this is an inevitable by-product of using indigenous mechanisms to fulfill rule of law functions that the State is unable to provide in a manner that is accountable and standards-driven. In response, the State must demonstrate greater sensitivity to indigenous socio-political structures and co-operate with them strategically and sustainably in delineating the blurry lines between formal and informal law.

II. Overcoming Antipathy to Integration With the State

However, a more assertive role for the State in monitoring, regulating or sharing responsibility with indigenous justice systems goes somewhat against the grain of a significant strand of what might be labeled “classical” legal pluralist thought. The abandonment of a purely formalist approach to rule of law reconstruction in the first decade of this century mirrors the early rejection by legal pluralists in the 1970s and 1980s of what they described as “legal centralism”, namely the notion that “legal reality, at least in ‘modern legal systems’, more or less approximates to the claim made on behalf of the [S]tate”.⁵⁵ Rejecting this legal-centralist “false ideology”, pluralists pushed for an expansive understanding of the term “law” to embrace multiple sub-state legal orders, from sports associations to the family to indigenous justice.⁵⁶ The antipathy to legal centralism is not surprising given fact that legal anthropologists have little

⁵³ Deng, *supra* note 42, 314.

⁵⁴ Penal Reform International, *supra* note 37, 129.

⁵⁵ Griffiths, *supra* note 10, 4.

⁵⁶ Galanter, *supra* note 39.

interest or professional inclination to examine state legal systems – part of the impetus for the emergence of legal pluralism came from the determined assertion that legal centralism “impaired our consciousness of ‘indigenous law’”.⁵⁷ The recognition of non-state orders as law was welcome, but as Tamanaha argues, it also had a political impetus in that, by raising the prestige of informal non-state “law”, it deliberately tended to lessen the stature of state law.⁵⁸ Legal pluralists moved away from emphasizing the equivalence of indigenous justice to state law, to a process of contrasting it favorably with state law.⁵⁹ As Sharafi puts it, there was a notable tendency for ideologically committed scholars in the field to aggressively assert that non-state law was more egalitarian and less coercive than state law.⁶⁰ Given the colonial roots of legal pluralism in the study of how imperialist States imposed centralized legal systems and regulated indigenous structures as forms of divide-and-rule, cheap administration, or to fashion compliant labor forces for the colonial exploitation of natural resources, this new focus was seen as a valuable corrective.⁶¹ As such, legal pluralism as a field was “embedded in relations of unequal power” between a dominant class and an oppressed one, and implied a suspicion of the superior hierarchical position and coercive power of the formal legal system.⁶² For some, this was a struggle against Western state-centric ethnocentrism,⁶³ while others saw it as a conscious distancing from dominant legal ideologies.⁶⁴

Even after colonialism formally ended in national independence, to the extent that an informal legal system was brought pluralistically within the State’s legal order, it was considered to still lie within the ideology of legal centralism and was pejoratively labeled as a “weak legal pluralism”, “a fixture of the colonial experience [...] proving one of the most enduring legacies of

⁵⁷ *Ibid.*, 18.

⁵⁸ B. Z. Tamanaha, ‘The Folly of the “Social Scientific” Concept of Legal Pluralism’, 20 *Journal of Law and Society* (1993) 2, 192, 205 [Tamanaha, The Folly].

⁵⁹ *Ibid.*, 209.

⁶⁰ M. Sharafi, ‘Justice in Many Rooms Since Galanter: De-Romanticizing Legal Pluralism Through Cultural Defence Galanter Influenced Scholars’, 71 *Law & Contemporary Problems* (2008) 2, 139, 139.

⁶¹ Merry, *supra* note 10, 874 & 870.

⁶² *Ibid.*, 874.

⁶³ M. Chiba, ‘Toward a Truly International Sociology of Law Through the Study of the Legal Pluralism in the World’, in A.-J. Arnaud (ed.), *Legal Culture and Everyday Life* (1989), 129, 134.

⁶⁴ F. v. Benda-Beckman, ‘Distance or Submission: On Difference in Socio-Legal Studies’, address to the Socio-Legal Groups Annual Conference 1989, cited in Tamanaha, ‘The Folly’, *supra* note 58, 198.

European expansion”.⁶⁵ The embrace by independent, post-colonial States of indigenous justice as a form of nation building was viewed as an inherently oppressive homogenization and subordination of indigenous societies.⁶⁶ Given the obvious risks of cultural disintegration in modernizing States and the observable tendency for many relationships between States and indigenous peoples to be confrontational, this caution was understandable. Though legal pluralism made a valuable contribution in recognizing the heterogeneity of the normative realm and undermining the claim of state monopoly of law, attempts to understand legal pluralism as bodies of norms constituting the “real” legal order administered parallel to, but separate from, the State faltered for a number of inter-related reasons.

First and foremost, legal pluralism changed from a purely analytical concept employed by the academy to explain issues surrounding the various layers of normative regulation to a policy concept applied in practice to messy realities in developing States.⁶⁷ Scholars and practitioners recognized that a binary analysis of state versus indigenous justice could not take account of the reality on the ground that there is no clear-cut distinction between the two, “but instead a continuum of differentiation and organization of the generation and application of norms” which at various points complement and frustrate each other.⁶⁸ Though newly independent States in the developing world continued to manifest relationships of domination and subordination, it became impossible to re-apply a colonizer-colonized relationship of subjugation and exploitation as inevitable consequences of the State establishing a relationship with indigenous ordering.⁶⁹ Certainly, after colonialism, newly independent States would view increased supervision of these mechanisms as furthering nationalization projects against both the old colonial power and separatist elements within the State.⁷⁰ The extent to which the State recognizes (or does not) the various customary

⁶⁵ Griffiths, *supra* note 10, 5-6.

⁶⁶ For an exposition of this idea (not an espousal of the position), see L. Nader & H. F. Todd, ‘Introduction: The Disputing Process’, in L. Nader & H. F. Todd (eds), *The Disputing Process – Law in Ten Societies* (1978), 1, 32.

⁶⁷ A succinct description of the two variants is found in H. M. Kyed, ‘The Politics of Legal Pluralism: State Policies on Local Pluralism and Their Local Dynamics in Mozambique’, 59 *Journal of Legal Pluralism and Unofficial Law* (2009), 87.

⁶⁸ Merry, *supra* note 10, 877.

⁶⁹ G. D. Westermarck, ‘Court is an Arrow: Legal Pluralism in Papua New Guinea’, 25 *Ethnology* (1986) 2, 131, 131.

⁷⁰ M. Toufayan, ‘When British Justice (in African Colonies) Points Two Ways: On Dualism, Hybridity, and the Genealogy of Juridical Negritude in Taslim Olawale Elias’, 21 *Leiden Journal of International Law* (2008) 2, 377, 402.

mechanisms within its borders has implications for national public order as it determines the reach of the State at local the level and how that reach is exercised. Some degree of control, supervision, or co-operation may allow the state leadership to check local power structures and assert its monopoly on the legitimate use of force.

As post-colonial States became embedded in social reality at all levels, the pluralist insistence that non-state law could be conceptualized independently of state law on the basis that “the [S]tate is not a universal social fact but a temporally and geographically contingent occurrence”⁷¹ gave way to the realization that even the remotest communities could not be insulated from the State’s power.⁷² Motives for state interaction with indigenous legal systems are many, varying from the benign (economic development, human rights and non-discrimination, legitimation) to the baleful (repression, exploitation). In light of these complexities, it was slowly acknowledged within legal pluralist scholarship that the view of all law as the product of the ruling class was too reductionist⁷³ and reliant on an overly simplistic view of the positivist legal tradition of law as the hierarchically organized product of the sovereign.⁷⁴ For example, some States embraced indigenous mechanisms to extend or decentralize the state justice system on the basis of the simple principle that two (or three, or four) justice systems may be better or more legitimate than a single weak one. The expansion of the state sector did not necessarily militate against the complementary expansion of the non-state sector.

As debates over legal pluralism shifted from colonial and post-colonial mindsets to begin examining the limits of tolerance in multi-cultural societies, discomfort increased with the simplistic binary approach of ideologically endorsing non-state law and deprecating the formal legal system.⁷⁵ The acceptance of the need for the State to intervene against human rights breaches and discriminatory practices has been sketched out earlier, and its general acceptability to indigenous societies will be canvassed in Section E. Even those urging the use of customary justice as an antidote to exploitation of indigenous groups and formalist legal orthodoxy argue that non-state processes operate best when it integrates with other types of state legal services.⁷⁶ Of course, by the

⁷¹ Tamanaha, ‘The Folly’, *supra* note 58, 201.

⁷² G. Woodman, ‘How State Courts Create Customary Law in Ghana and Nigeria’, in B. W. Morse & G. R. Woodman (eds), *Indigenous Law and the State* (1988), 181, 209.

⁷³ Merry, *supra* note 10, 885.

⁷⁴ Tamanaha, ‘The Folly’, *supra* note 58, 194, 195 & 196.

⁷⁵ Sharafi, *supra* note 60, 140.

⁷⁶ Golub, *supra* note 52, 35.

time of the explosion of peace building from the 1990s onwards, the need to synthesize the seemingly opposed cultures of the state and indigenous society was long accepted in legal pluralist discourse, and the separatist position was eclipsed. However, it is relevant insofar as the attitudes essayed therein endure in the view of indigenous legal systems in transitional justice discourse.

III. Advantages of Integration

Isser lists the most pertinent advantages in linking state and non-state systems as follows:

- alleviation of case-loads in the overburdened formal system
- oversight of the customary system
- mitigation of the effects of forum-shopping
- recognition of multiculturalism⁷⁷

Considerations of space preclude a detailed survey of the ways in which state and indigenous law are interpenetrated. There is no ideal ratio of state to customary mechanisms to which peace builders or governments should aspire. For example, Connolly has identified four general ways in which States engage with non-state mechanisms, namely abolition, non-incorporation, partial incorporation, and full incorporation,⁷⁸ while Forsyth outlines seven potential models ranging from repression by the State to complete incorporation.⁷⁹ None of these models is mutually exclusive; they will display infinite variation and may be present in more than one form at any given time. Whichever mix of these approaches is taken will reflect the history, culture, and political economy of the State, the level of assimilation of the indigenous group and the relative strengths of formal and indigenous mechanisms. At the most integrative end of the spectrum, governments might engage in the codification of customary laws or registration of decisions by indigenous authorities, undertake human rights and technical training, fund traditional processes or even depute state officials to take part. However, even this type of recognition should not be presumed to require active, intrusive regulation. At a more basic level (assuming they do not intend on abolition), governments will have to clarify the role of indigenous

⁷⁷ Isser, 'Understanding and Engaging Customary Justice Systems', *supra* note 36, 359.

⁷⁸ Connolly, *supra* note 12, 239.

⁷⁹ M. Forsyth, 'A Typology of Relationships Between State and Non-State Justice Systems', 56 *Journal of Legal Pluralism and Unofficial Law* (2007), 67, 70.

justice mechanisms in jurisdictional terms and assess their conformity with the emerging or revived constitutional order and international human rights law.

To begin with the clarification of jurisdiction, the risk of conflict between two different sources of legal authority is self-evident. Owing to the weakness of the formal justice system, bureaucratic guidelines will need to be developed to determine which of the state or indigenous mechanisms should assume responsibility for dealing with a certain offence, what the enforcement role for the State is if the power of community shaming is not enough to force recalcitrant parties to compromise, and how jurisdictional disputes should be resolved procedurally. Indigenous communities are often keen to avoid the inefficiencies that flow from aggrieved parties forum-shopping in both state and indigenous mechanisms to resolve a dispute. Without some degree of jurisdictional allocation, a “two-track system” where the wealthy enjoy access to state justice and the poor make do with an ostensibly second-class process may result.⁸⁰ Overall, pluralist legal models rarely stray far from one where the State retains jurisdiction over issues of government, commerce and serious crime and non-state processes cover some family, property and religious disputes, in addition to minor crime.

In terms of human rights, because the State remains the primary duty-bearer in this area, a State that recognizes the resolutions of indigenous mechanisms tend to do so (in theory if not always in practice) to the extent that they comply with constitutional human rights guarantees. As such, international human rights norms replicate in a more legitimate form some of the functions of old colonial repugnancy clauses.⁸¹ Exemplary appeals to higher courts to challenge instances of abuse of power, overly harsh punishment and unaccountable decision-making in indigenous processes might provide some top down human rights protection. Indigenous mechanisms will not require the whole panoply of procedural rights to be guaranteed in the formal system, and full compliance with constitutional or international human rights guarantees may be impossible, but with integration of the systems, progress can be made. It is on the presumption that fair and rights respecting informal justice supports stability (while discriminatory or abusive instantiations of it increase potential for conflict) that peace building missions of the UN and NGOs promote human rights standards and monitoring within them,⁸² though the UN and most INGOs are in any case required to operate within a normative framework of

⁸⁰ R. Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (2002), 37-38.

⁸¹ Toufayan, *supra* note 70, 400.

⁸² Harper, *supra* note 35, 4.

internally accepted human rights standards. In affirming the UN's commitment to legal pluralism as a policy on the ground, the UN Secretary-General called on States to clarify the relationship between their informal and formal legal systems as a means of bringing the former into line with international human rights standards and ensuring access to justice for marginalized groups.⁸³ Without some human rights monitoring, state preservation of the indigenous justice system might result less in access to justice for the poor than in "poor justice for poor people".⁸⁴

Of course, successful integration to assuage jurisdiction and human rights concerns is easier said than done. Faundez notes that most interaction between state and non-state justice systems rarely yields improvements on the rule of law or produces results that further good governance.⁸⁵ The state system might be utterly unprepared to understand or apply radically different indigenous norms, while the autonomy, non-coerciveness and flexibility of customary mechanisms might suffer without any assurance the conflict between rule systems will dissipate or that the moral authority of either will endure undiminished. Nevertheless, transparent, accountable, and mutually agreed co-operation can generate incremental benefits, mitigating certain persistent problems, even if some remain unresolved, without displacing the traditional functions of indigenous justice.

D. Restoration, Idealization and Transitional Justice

While peace builders must grapple with the modalities of the coexistence of legal orders with different sources of authority, there is little evidence that such contingencies inform policy where international actors working in transitional justice apply or assist in the application of indigenous law to the legacy of conflict or authoritarianism. This may be explained by a conscious distancing by those who advocate the use of non-state systems of justice of those systems from the State. Much like the growth of legal pluralism can be attributed to a rejection of legal centralism, the mindset animating the move to non-state forms of law in transitional justice can be explained by a dissatisfaction with the

⁸³ UN Secretary-General, *Report of the Secretary General on Delivering Justice: A Programme of Action to Strengthen the Rule of Law at the National and International Levels*, UN Doc A/66/749, 16 March 2012, 6, para 18.

⁸⁴ M. Stephens, 'Typologies, Risks and Benefits of Interaction Between State and Informal Justice Systems', paper given at Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies Conference, 17-18 November 2009, Washington DC.

⁸⁵ Faundez, *supra* note 48, 20.

formalized template of national trials and national truth commissions, the “one-size fits all” formula so routinely discommended in the transitional justice policy making.⁸⁶ Like the legal pluralists of the 1970s and 1980s, many in transitional justice in the 1990s and 2000s worried about the effectiveness of formal state institutions and the extent to which they represent imperialist standard setting. The turn towards traditional justice was motivated by the laudable realization that decontextualized attempts to replicate the ideal of Western justice in post-conflict States were doomed to failure.⁸⁷ Formal systems were criticized for failures to give voice to victims’ experiences, to resolve contested truths, or to address broader structural causes of human rights abuses.⁸⁸ The dependence of criminal law on fixed categories of perpetrator and victim and fixed categories of guilt or innocence was deemed insufficient to address the grey areas of society-wide participation or complicity.⁸⁹ Implicit in this critique was the notion that formalist methods excluded more legitimate, participatory, and effective indigenous approaches that respected the constructive agency of those most affected.⁹⁰ Scholars would argue that top down processes of national reconciliation were inferior and less useful than more localized, day-to-day reconciliation among intimate (former) antagonists who must now live side by side.⁹¹ The embrace of an ostensibly more context specific approach interacted with an emergent strand of transitional justice scholarship which emphasized the need for holistic, multi-faceted responses to atrocity as a spectrum of mutually supportive mechanisms harmonizing as many perspectives as possible over the previous binary divisions of “truth v. justice” understandings.⁹²

I. Inherently Restorative Indigenous Justice?

In a scholarly climate increasingly hostile to formalist approaches that were viewed as irredeemably flawed, indigenous systems of justice in particular

⁸⁶ UN Secretary-General, *supra* note 5, 1, Preamble (para. 1), 1.

⁸⁷ K. McEvoy, ‘Letting Go of Legalism: Developing a “Thicker” Version of Transitional Justice’, in K. McEvoy & L. McGregor (eds), *Transitional Justice From Below: Grassroots Activism and the Struggle for Change* (2008) [McEvoy & McGregor, Transitional Justice], 15, 41-42 [McEvoy, Letting Go of Legalism].

⁸⁸ J. Ramji-Nogales, ‘Designing Bespoke Transitional Justice: A Pluralist Process Approach’, *32 Michigan Journal of International Law* (2010) 1, 1, 10-11.

⁸⁹ Clark, *supra* note 15, 773.

⁹⁰ M. A. Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’, *99 Northwestern University Law Review* (2005) 2, 539, 597.

⁹¹ Theidon, *supra* note 32, 455-456.

⁹² Ramji-Nogales, *supra* note 88, 4.

found favor for their local reach and potential synthesis of the values of criminal trials and truth commissions. As Nagy notes, the rationale for embracing *gacaca*, like other traditional mechanisms, “is perhaps best understood against the foil of what has not worked”.⁹³ Transitional justice scholarship began to echo the call in Western nations to revolutionize the way in which States respond to crime and socially disruptive behavior. In so doing, it drew on restorative justice principles as the primary iteration of this would-be revolution – restorative justice has long been posited as the conceptualization of justice most congruent with indigenous forms of justice. As a result, the groundswell of enthusiasm for applying indigenous law as a response to conflict stems less from a pluralist gaps analysis of how post-conflict or post-authoritarian States should respond to justice capacity shortfalls than from a belief in the value of restorative justice, which is premised on the belief that trial of crime by the State privileges law and “steals” the property of conflict from the excluded victim and immediate community to whom it belongs.⁹⁴

Defining the widely contested concept of restorative justice is a difficult task. An elusive notion, it tends to draw strong support from many people who nevertheless have wildly divergent opinions about what it is. What one is ultimately left with is a motley assortment of characteristics and aspirations. Overall, restorative justice

“revolves around the idea that crime is, in essence, a violation of a person by another person (rather than a violation of legal rules); that in responding to a crime our primary concerns should be to make offenders aware of the harm they have caused, to get them to understand and meet their liability to repair such harm and to ensure that further offences are prevented; that [this] should be decided collectively by offenders, victims and members of their communities through constructive dialogue in an informal and consensual process; and that efforts should be made to improve the relationship between offender and victim to re-integrate the offender into the law-abiding community.”⁹⁵

⁹³ Nagy, *supra* note 17, 91.

⁹⁴ J. Larson Sawin & H. Zehr, ‘The Ideas of Engagement and Empowerment’, in G. Johnstone & D. W. Van Ness (eds), *Handbook of Restorative Justice* (2007), 41, 42.

⁹⁵ G. Johnstone, *Restorative Justice: Ideas, Values, Debates* (2002), ix.

There is no agreement on whether it should be viewed as a process or as an outcome, whether it is a set of values or practices, and, if the latter, what particular practices can be included within its orbit.⁹⁶ This general uncertainty over what restorative justice is has two main consequences. The first is a tendency to unite over the near unanimous consensus of what it is not, namely formal (criminal) justice. Restorative justice has consequently been explained by a polarized contrast with a formal justice system invariably essentialized as retributive.⁹⁷ As one of the first advocates of what we now label as restorative approaches put it, punitive justice manifests hostility to the law breaker, labels him the enemy and fosters retribution or exclusion, in contradistinction to a more reconstructive attitude that attempts to comprehend the causes of conflict, remedy its effects and prioritizes future good over past desserts.⁹⁸ What is important is that this presentation has evolved into a binary oppositional rhetoric in which “all the elements associated with restorative justice are good, whereas all those associated with retributive justice are bad”,⁹⁹ which can only serve to distort the general understanding of what modern criminal justice systems do. This bias, to the extent that it is replicated in relation to indigenous systems of justice, is not conducive to a considered appraisal of what societies may need in the context of transition. Justice sector reformers argue that similarly indiscriminate critiques of liberal legalism, such as that also in evidence in classical legal pluralism, too often leads to a “state law bad, folk law good” attitude which not only obscures the harm of some indigenous practices, but also unduly fetters the ability of that state law to mitigate these harms.¹⁰⁰

The second consequence of the general failure to define *practices* that meet the threshold of restorative and those that do not is a concentration on the *values* of restorative justice. The values associated with restorative justice are entirely unobjectionable – honesty, humility, empathy, responsibility, respect, equality, inclusion, care, and trust.¹⁰¹ Viewed purely in these terms, all forms of restorative justice run an obvious risk of romanticization. However, when coupled with the

⁹⁶ K. Daly, ‘The Limits of Restorative Justice’, in D. Sullivan & L. Tiftt (eds), *The Handbook of Restorative Justice: A Global Perspective* (2006), 134, 135.

⁹⁷ J. Braithwaite, *Restorative Justice and Responsive Regulation* (2002), 5.

⁹⁸ G. Mead, ‘The Psychology of Punitive Justice’, in D. Melossi (ed.), *The Sociology of Punishment: Socio-structural Perspectives* (1998), 33.

⁹⁹ K. Daly, ‘Restorative Justice: The Real Story’, 4 *Punishment & Society* (2002) 1, 55, 59 [Daly, Restorative Justice: The Real Story].

¹⁰⁰ M. J. Trebilcock & R. J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (2008), 36.

¹⁰¹ K. Pranis, ‘Restorative Values’, in Johnstone & Van Ness, *supra* note 94, 59, 61-62.

observable tendency among scholars in restorative justice to glorify indigenous law “as the consensus process of wise and peaceful peoples, ignorant of the power struggles that lie beneath”, the risk of romanticizing indigenous justice as restorative justice is significantly exacerbated.¹⁰² Western restorative justice discourse typically self-presents as embattled, faced with a highly skeptical public more comfortable with the under-performing but nevertheless hegemonic state justice system. In this milieu, advocates use origin myths of the superior traditional forms of restorative justice that existed before the imposition of the formal justice system to “maintain a strong oppositional contrast of the good and the bad justice [...] to move an idea into the political and policy arena”.¹⁰³ On similar lines, transitional justice advocacy is often presented in heroic terms, speaking truth to power on behalf of disenfranchised masses, selflessly enduring rocky relationships with the State, and reacting against the cynicism and betrayal of values inherent in the sovereign control of justice.¹⁰⁴

What is significant about the embrace of indigenous systems in transitional justice is that it is not rooted in the mechanics of how the transitional state should respond to the existence of sub-state legal systems, but rather in the more familiar appropriation by restorative justice of indigenous legal processes in Western States. Indeed, the employment of indigenous justice for past human rights abuses is usually legitimized in the literature by references to trends in the West.¹⁰⁵ The inspiration come less from the pluralist accommodations of a Bolivia or a Botswana than from the restorative police cautioning schemes, family group conferences and victim-offender mediation employed in Australasia and North America which superficially replicate the ideal indigenous justice principles of communication between victim and perpetrator, reparation of harm etc. Prominent transitional justice scholars such as Dyzenhaus, Mani, Huyse, and Leebaw have located the attraction of transitional justice to customary law in the application of indigenously influenced victim-offender mediation, sentencing circles, community reparations boards and family group conferencing in States

¹⁰² Connolly, *supra* note 12, 245.

¹⁰³ Daly, ‘Restorative Justice: The Real Story’, *supra* note 99, 63.

¹⁰⁴ E. Brahm, ‘Transitional Justice, Civil Society, and the Development of the Rule of Law in Post-Conflict Societies’, 9 *International Journal of Not-For-Profit Law* (2007) 4, 62, 62.

¹⁰⁵ Huyse, ‘Introduction’, *supra* note 9, 20 & 21 and L. Waldorf, ‘Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice’, 79 *Temple Law Review* (2006) 1, 1, 14-16.

like Canada, Australia, and New Zealand,¹⁰⁶ the “informal justice” movement of the 1970s that emerged due to dissatisfaction with the state criminal justice system,¹⁰⁷ and alternative dispute resolution practices like indigenous courts and juvenile justice programs.¹⁰⁸ These programs have been born of a belief that the rationales for criminal law in the West are unsatisfactory, counter-productive, and remote from the needs of victims. This belief has been transplanted uncritically to the radically different milieu of transition.

However, the employment of indigenous justice practices to generate and promote restorative justice theories in the West is increasingly criticized as an Orientalist appropriation of these customs by essentializing the societies from which they spring as static and overlooking the heterogeneity of identities, experiences and relationships with the State among indigenous populations.¹⁰⁹ Of course, this Orientalism differs significantly from traditional Orientalism in that while the latter did so to promote the idea of Western society as rational and superior, the more modern Orientalism deprecates these characteristics.¹¹⁰ The “Orientalizer” is now less the European imperialist of the 18th and 19th centuries, but rather a romantic, present-day outsider shaped, like the classical legal pluralists before them, by anti-imperialism. Difference is elided not with weakness, as before, but with strength. However, the objectification and description characteristic of the old Orientalism now goes hand-in-hand with a process of unproblematically subject-object structured valorizing of the “other”.¹¹¹ The restorative justice gaze can lead to reductivist oversimplifications of indigenous processes (a) as the needs of indigenous people are defined in association with dominant and prevailing images of indigeness (for example, as harmonious communities hermetically sealed from the State)¹¹² and/or (b) to

¹⁰⁶ L. Huyse, *All Things Must Pass Except the Past* (2009), 190-191 and D. Dyzenhaus, ‘Judicial Independence, Transitional Justice, and the Rule of Law’, 10 *Otago Law Review* (2003) 3, 345, 367.

¹⁰⁷ Mani, *supra* note 80, 36-37.

¹⁰⁸ B. A. Leebaw, ‘The Irreconcilable Goals of Transitional Justice’, 30 *Human Rights Quarterly* (2008) 1, 95, 104.

¹⁰⁹ M. Cain, ‘Orientalism, Occidentalism and the Sociology of Crime’, 40 *British Journal of Criminology* (2000) 2, 239.

¹¹⁰ On Orientalism generally, see E. W. Said, *Orientalism* (1978).

¹¹¹ M. E. Turpel, ‘Aboriginal Peoples and the Canadian Charter: Interpretative Monopolies, Cultural Difficulties’, 6 *Canadian Human Rights Yearbook* (1989-90), 3, 31.

¹¹² M. Blaser, ‘Life Projects: Indigenous Peoples’ Agency and Development’, in M. Blaser *et al.* (eds), *In the Way of Development: Indigenous Peoples, Life Projects and Globalization* (2004), 26, 31-32.

facilitate understanding of their practices in order co-opt them for export to Western States.¹¹³

II. A Binary Opposition with Formal Legal Structures

As transitional justice views indigenous law through a similarly restorative lens, the tendencies within that field to celebrate distance from the inferior formal system and romanticize indigenous processes are evident. To begin with the latter, Kerr and Mobekk argue that “[t]here has been a tendency in international interventions to equate the concept of ‘traditional’ with ‘fair’, ‘good’ and ‘impartial’, particularly in situations where international interveners are sensitive to stepping on the culture of the country”.¹¹⁴ Given the presumed rootedness of traditional justice in indigenous culture and its equally assumed “bottom up” authenticity, the potential for making grandiose claims about what it can achieve in a transitional context are obvious. The potential use and impact of traditional mechanisms have been reviewed more favorably than their modest record would suggest appropriate – “awareness of the many weaknesses was not lacking, but they were too often kept in the shade”.¹¹⁵ Community-based healing in Mozambique is deemed to have ended cycles of violence there,¹¹⁶ the restorative customs of the *campesinos* in Peru are esteemed as “several steps” ahead of that at the national level,¹¹⁷ and the Rwandan *gacaca* is viewed as an “inherently a participatory and communal enterprise” and “an important mechanism for promoting democratic values”.¹¹⁸ These optimistic analyses evoke the tendency of restorative justice to make imprecise claims or to oversell tales of repair and goodwill to transcend adversity that comes from the hegemonic status of well-established, formalized systems lest, the nascent idea of restorative justice meet a premature death.¹¹⁹ After all, it is hard to draw causal connections between any post-conflict policy and the end of violence given the

¹¹³ J. Tauri, ‘Indigenous Perspectives and Experiences: Maori and the Criminal Justice System’, in R. Walters & T. Bradley (eds), *Introduction to Criminological Thought* (2011), 187, 196.

¹¹⁴ Kerr & Mobekk, *supra* note 15, 167.

¹¹⁵ Huysse, ‘Introduction’, *supra* note 9, 6.

¹¹⁶ H. Cobban, ‘The Legacies of Collective Violence: The Rwandan Genocide and the Limits of Law’, *27 Boston Review* (2002) 2, available at <http://bostonreview.net/BR27.2/cobban.html> (last visited 15 June 2013).

¹¹⁷ Theidon, *supra* note 32, 456.

¹¹⁸ E. Daly, ‘Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda’, *34 New York University Journal of International Law and Politics* (2002) 2, 355, 375-376 [Daly, *Between Punitive and Reconstructive Justice*].

¹¹⁹ Daly, ‘Restorative Justice: The Real Story’, *supra* note 99, 66 & 73.

myriad alternative explanations rooted in economics or politics, “several steps” does not amount to a precise measurement, and participation in *gacaca* has often been forced in a very undemocratic manner. It is only recently with the opening of transitional justice to greater empirical scrutiny that the “myth-making”,¹²⁰ “blanket support”¹²¹ and “overselling”¹²² that has characterized the approach to non-state justice processes is now being revised. Allen’s argument that scholars have accepted too readily the potential for restoration in the Acholi community’s mechanisms in Uganda is one that applies equally to many other transitions where indigenous justice has been bruited or applied.¹²³

Some now argue that theories on traditional justice’s superior applicability to formal justice in transition have been overly positive.¹²⁴ The most obvious realization is one alluded to earlier, namely that traditional mechanisms are frequently quite punitive. While traditional justice in the likes of Mozambique and East Timor followed a restorative template, physical punishments were employed in places like Sierra Leone and Liberia. Where ostensibly restorative modes of justice were pursued, they diverged significantly from facile Western imaginings of communitarian harmony. While Western restorative justice is victim-centered, communal stability emerges in many indigenous iterations of transitional justice as the primary aim – the search for consensus tends to favor the interests of the community as a whole over those of victims, and is often coercive towards them.¹²⁵ Superficial reintegration of offenders into communities and “pretended peace” on the part of victims have been the order of the day in many communities.¹²⁶ Indigenous justice’s perpetual inability to deal with situations involving people from different communities, recalcitrant armed groups and government officials is compounded by the vertical nature of mass conflict originating from or against the state security apparatus, cross-hatching the internal borders that mark the limits of communities. Conflicts are often fought between and not within indigenous groups, meaning that the common bonds that undergird customary justice are absent. Customary

¹²⁰ Huyse, ‘Introduction’, *supra* note 9, 6.

¹²¹ Kerr & Mobekk, *supra* note 15, 161.

¹²² McEvoy, ‘Letting Go of Legalism’, *supra* note 87, 30.

¹²³ T. Allen, ‘Ritual (Ab)use? Problems With Traditional Justice in Northern Uganda’, in N. Waddell & P. Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (2008), 47, 47.

¹²⁴ Waldorf, *supra* note 105, 44-46.

¹²⁵ L. Arriaza & N. Roht-Arriaza, ‘Social Reconstruction as a Local Process’, 2 *International Journal of Transitional Justice* (2008) 2, 152, 161.

¹²⁶ Nagy, *supra* note 17, 96.

mechanisms have struggled to reckon with crimes that have cross-regional dimensions such as those committed between the Acholi and Langi in Uganda¹²⁷ or by transient paramilitary groupings in Rwanda.¹²⁸ Though suited to restoring harmony when property disputes, family disturbances, or minor crime upset community relations, crimes committed in the context of conflict, rebellion, or state repression lie far outside its competences. Observers most familiar with *bashingantabe*,¹²⁹ *mato oput*¹³⁰ and *gacaca*¹³¹ contend that these mechanisms are unsuited to dealing with gross human rights violations, and only the latter has consistently done so. The obvious implication is that there must be some role for the state justice system in deciding which crimes can be devolved to the local level and which cannot.

However, progress towards tempering these weaknesses in transitional justice deployments has been impaired by the second notable tendency in restorative justice discourse, which is to advocate distance from the formal justice system. Though all transitional justice advocates believe there is a role for the State in trying the most serious crimes or stimulating national reconciliation through a truth process, there is a sense in the literature that localized processes should enjoy as splendid an isolation from the State as possible. In this, it mirrors the position of many restorative justice advocates who assume the ideal justice system should be pure and not contaminated by others in its field of operations.¹³² As Daly describes it, with echoes of the earlier wave of classic legal pluralists:

“If the first form of human justice was restorative justice, then advocates can claim a need to recover it from a history of ‘takeover’ by state-sponsored retributive justice. *And*, by identifying current indigenous practices as restorative justice, advocates can claim a need to recover these practices from a history of ‘takeover’ by white colonial powers that instituted retributive justice.”¹³³

¹²⁷ L. Huyse, ‘Conclusion and Recommendations’, in Huyse & Salter, *Traditional Justice*, *supra* note 9, 181, 189.

¹²⁸ T. Longman, ‘Justice at the Grassroots? Gacaca Trials in Rwanda’, in N. Roht-Arriaza & J. Marriezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (2006), 206, 220.

¹²⁹ Ingelaere & Kohlhagen, ‘Transnational Justice’, *supra* note 26, 52.

¹³⁰ Latigo, *supra* note 24, 114.

¹³¹ UNHCR, *Gacaca: Le Droit Coutumier de Rwanda* (1996).

¹³² Daly, ‘Restorative Justice: The Real Story’, *supra* note 99, 59.

¹³³ *Ibid.*, 62.

The influence of Western restorative justice theory on transitional justice is most evident in the tendency of scholars in the latter field to criticize the formal justice system, to advocate distance from it, and to resist any role of the State in guiding, overseeing or standardizing the application of customary law to the problems of transition. Most analyses in academia and journalism of the applicability of indigenous justice in transition are premised on a romantic (and arguably caricatured) endorsement of traditional mechanisms as authentically African/Amerindian/Asian and therefore better at dealing with the past than “Western” and “retributive” justice. To begin with the latter categorization, when drawing comparisons between what the formal system and indigenous justice can offer, the formal system is invariably described as retributive or punitive¹³⁴ and is contrasted with alternative systems that are unquestioningly presented as restorative, reconstructive or community building.¹³⁵

State-based justice is also generally described as “Western”,¹³⁶ implying that the State is an alien imposition inherently divorced from the interests of the communities that constitute it. For example, Chopra, Ranheim & Nixon warn that “a new justice system will become dominated by elites unfamiliar with local realities or intent on introducing a foreign and inaccessible justice system”.¹³⁷ This approach casts indigenous justice and the supposedly alien notion of state law as irreconcilably separate phenomena. In transitional justice, discourse interference by the State in indigenous justice is typically presented as compromising the pristine, restorative nature of localized justice processes. Certainly, even the loosest incorporation by the State may compromise voluntariness, and enforcement by the State of global human rights standards may mar their effectiveness. However, integration is not a zero-sum game

¹³⁴ B. Oomen, ‘Justice Mechanisms and the Question of Legitimacy: The Example of Rwanda’s Multi-layered Justice Mechanisms’, in K. Ambos *et al.* (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (2009), 175, 187 [Oomen, Justice Mechanisms]; Eberchi, *supra* note 25, 109; C. Villa-Vicencio, ‘Transitional Justice, Restoration, and Prosecution’, in Sullivan & Tift, *supra* note 96, 387, 387.

¹³⁵ Daly, ‘Between Punitive and Reconstructive Justice’, *supra* note 118, 367 & 378.

¹³⁶ L. Hovil & J. Quinn, ‘Peace First, Justice Later: Traditional Justice in Northern Uganda’ (2005), available at http://www.refugeelawproject.org/working_papers/RLP.WP17.pdf (last visited 15 June 2013), 22; A. R. Iliff, ‘Root and Branch: Discourses of “Tradition” in Grassroots Transitional Justice’, 6 *International Journal of Transitional Justice* (2012) 2, 253, 264; Longman, *supra* note 128, 218; D. E. Peachey, ‘The Elusive Quest for Reconciliation in Northern Uganda’, in N. Palmer *et al.* (eds), *Critical Perspectives in Transitional Justice* (2012), 289, 306.

¹³⁷ J. Chopra, C. Ranheim & R. Nixon, ‘Local-Level Justice Under Transitional Administration: Lessons from East Timor’, in Isser, *Customary Justice*, *supra* note 7, 119, 155.

where a stronger role for the State automatically corresponds with a weakening or corrupting of indigenous law. The portrayal of the State as foreign and inappropriate is not how all or even most citizens in these States regard the formal justice system. To begin with, the preference of indigenous communities for their customary justice processes may be symptomatic of poor access to a functioning formal justice system, as opposed to a normal or ethical preference for the former.¹³⁸ Formal legal structures may be unpopular not because the idea of state justice is illegitimate *per se*, but because justice has been administered badly in the past. Justice sector reformers recognize, in a way that transitional justice scholarship has not, that citizens' institutional preferences for justice are guided more by the options available to them than by the incumbency of a legal culture.¹³⁹ Most rule of law reconstruction is premised on the assumption that a society's perception of the judicial system changes if it is seen to work. Avoidance of the criminal justice system because people do not have faith in it risks becoming self-perpetuating.

Furthermore, most indigenous communities with traditional justice mechanisms willingly concede a role for the State and recognize a role for state oversight in relation to crimes that test the limits of the social order. In most pluralist States, sophisticated moral economies of justice apply to questions of jurisdiction. For example, in East Timor 69 per cent of people would use local justice and 13 per cent the formal system for theft, while 91 per cent recognize the formal system as the appropriate mechanism for murder trials.¹⁴⁰ Liberians generally believe that cases should progress upwards from customary mechanisms if resolution at this level proves impossible, while offences above a threshold of seriousness should only be dealt with by state courts.¹⁴¹ As Allen argues in the context of Uganda, significant numbers in indigenous communities do not reject the use of formal justice to address unprecedentedly serious offences.¹⁴² Incorporation of indigenous justice into the state system may allow marginalized

¹³⁸ Harper, *supra* note 35, 2.

¹³⁹ Oomen, 'Justice Mechanisms', *supra* note 134, 180.

¹⁴⁰ P. Pigou, *The Community Reconciliation Process of the Commission for Reception, Truth and Reconciliation* (2004), 34.

¹⁴¹ S. C. Lubkeman, D. H. Isser & P. A. Z. Banks III, 'Unintended Consequences: Constraint of Customary Justice in Post-Conflict Liberia', in Isser, *Customary Justice*, *supra* note 7, 193, 219.

¹⁴² Allen, *supra* note 123, 85.

members of the community to appeal apparently prejudicial resolutions from traditional mechanisms to the state legal system.¹⁴³

With any increase in the State's role, the basic principles and procedures of indigenous justice might be modified, while integration or incorporation with the State cannot be assumed to be an apolitical "benign recognition" of socio-cultural diversity or what already exists.¹⁴⁴ Regulating traditional forms of justice by the State is as much a political process as a technical one.¹⁴⁵ The involvement of the State in indigenous justice may realign local political balances and may increase the State's legitimacy and hierarchical power to the extent that it can define who indigenous authorities are and what competences they enjoy. However, the presumption that formal law would "exercise a constant pressure in the desired direction" of absorption into the State or gradual resemblance to formal law does not take account of the weakness of the State where rule of law reconstruction and transitional justice are employed.¹⁴⁶ For reasons discussed in greater detail in Section E, the typical asymmetry in power between indigenous groups and the State may be radically revised in transition. Any relationship between outright repression (practically impossible because the transitional State is too weak) or outright control (again, practically impossible for the same reason) will tend to be fluid, allowing both systems to be flexible and influenced by local circumstances in their relations with each other.¹⁴⁷ Indeed, research suggests "that it is likely that if a [S]tate 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 simultaneously with the state form".¹⁴⁸ In effect, norms may be driven underground if the State trespasses too far. Even if integration is more limited, it may in fact "invigorate competition between state and non-state providers over authority and 'clients'".¹⁴⁹ Indigenous groups in post-conflict States have long recognized that though the state legal system may penetrate their legal mechanisms, it will rarely dominate it – "there is room for resistance and autonomy".¹⁵⁰ Even as tradition is regulated, it can be

¹⁴³ C. Nyamu-Musembi, 'Review of Experience in Engaging with "Non-State" Justice Systems in East Africa' (2003), available at <http://www.gsdrc.org/docs/open/DS37.pdf> (last visited 15 June 2013), 27.

¹⁴⁴ Kyed, *supra* note 67, 89.

¹⁴⁵ *Ibid.*, 90.

¹⁴⁶ Griffiths, *supra* note 10, 8.

¹⁴⁷ Forsyth, *supra* note 79, 75.

¹⁴⁸ *Ibid.*, 71.

¹⁴⁹ Kyed, *supra* note 67, 90.

¹⁵⁰ Merry, *supra* note 10, 878.

invoked to resist the imposition of unwelcome laws.¹⁵¹ The ultimate outcome of state legal pluralism is unpredictable – pre-existing social arrangements may be too strong for formal or informal influence from above to affect it significantly. As Tamanaha argues, authorities in non-state legal systems “will defend and exert the power of their particular systems in situations of a clash, not only because of their genuine commitment to and belief in the system, but also because their identities, status and livelihoods are linked to it”.¹⁵²

Of course, any such contestation may not arise – many States in transition will be reluctant to risk social upheaval by undermining indigenous law and may acknowledge formally or informally that they may not be efficient providers of justice services for many years, if ever. Integration might better be understood as an organized decentralization of legal services, rather than as the power-grab seemingly feared by earlier legal pluralists and the later transitional justice literature. The greater concern in some indigenous communities will be the power of local elites and not the distant State. Devolution or tempering of local authority from these elites inevitably requires state intervention.¹⁵³

III. Thinking Like the State?

However, one sees in transitional justice literature a distinct sense that those who administer and rely on indigenous mechanisms reject state encroachment on their processes as corrupting and illegitimate, which underlies a misleading conception of indigenous justice as bastions of resistance to the overweening, centralizing State. As noted above, there is a risk that values of indigenous justice may be lost or weakened while the State itself can be abusive and cynically use traditional justice to consolidate local power bases. However, the State might also strengthen the indigenous justice system, particularly if it has been weakened through conflict and repression, a danger examined later in Section E. Optimists argue “the complete incorporation of [non-state justice systems] into the formal state justice system will ensure that the decisions of the newly official courts are backed by the enforcement power of the [S]tate”.¹⁵⁴ While indigenous leaders in some States discourage their communities from using the state legal system

¹⁵¹ T. W. Bennett, ‘Comparative Law and African Customary Law’, in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006), 662, 665.

¹⁵² B. Z. Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’, 30 *Sydney Law Review* (2008) 3, 375, 400.

¹⁵³ Harper, *supra* note 35, 6.

¹⁵⁴ Connolly, *supra* note 12, 271.

as they view it as weakening their credibility,¹⁵⁵ in others, accountability to the State may in fact bolster their legitimacy. In particular, a credible threat of resort to the state justice system has consistently been shown to induce compliance with settlements from informal system processes (though it could hardly do otherwise).¹⁵⁶ Arguments like those of Sarkin to the effect that the new *gacaca* process “may see the politicization of these structures, thus making them lose their traditional function in [the] future”¹⁵⁷ pose a distinct risk of Orientalism by constructing and essentializing traditional mechanisms as entirely outside of the national political and legal context¹⁵⁸ or presenting their communities as ahistorical and unchanging.¹⁵⁹ Recognition by the political power-holders is often welcome – some customary authorities have pro-actively “defined their objectives, functions, structure and jurisdiction in the form of regulations, sought out human rights training or lobbied for state endorsements”.¹⁶⁰

Transitional justice’s presentation of state criminal law as inherently retributive or Western flows from, and re-enforces, the rigidly stratified images of indigenous justice as bottom up and state justice as top down that dominate the view of the former which in turn tends to lead to an unhelpfully atomized view of the mechanisms in a post-conflict environment. Like the legal pluralists of the 1970s and 1980s, “from below” perspectives are generally welcomed for their “resistant” and “mobilizing” character in response to powerful hegemonic political, social or economic forces.¹⁶¹ As McEvoy and McGregor note, the emphasis on bottom up approaches builds on earlier subaltern studies that reasserted the agency of persons who are socially, politically, and geographically excluded from a society’s established structures for political representation, in place of an earlier emphasis on the dispositions of “elites”.¹⁶² These “from below” perspectives are normally assumed to operate outside of the structures

¹⁵⁵ Harper, *supra* note 35, 14.

¹⁵⁶ Galanter, *supra* note 39, 24.

¹⁵⁷ J. Sarkin, ‘Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda’s Approach in the New Millennium of Using Community Based Gacaca Tribunals to Deal With the Past’, 2 *International Law Forum* (2000) 2, 112, 119.

¹⁵⁸ A risk noted in B. Oomen, ‘Donor-Driven Justice and its Discontents: The Case of Rwanda’, 36 *Development and Change* (2005) 5, 887, 903 [Oomen, Donor-Driven Justice and its Discontents: The Case of Rwanda].

¹⁵⁹ Nagy, *supra* note 17, 100.

¹⁶⁰ Harper, *supra* note 35, 15.

¹⁶¹ K. McEvoy & L. McGregor, ‘Transitional Justice From Below: An Agenda for Research, Policy and Praxis’, in McEvoy & McGregor, *Transitional Justice*, *supra* note 87, 1, 3 [McEvoy & McGregor, Transitional Justice From Below: An Agenda for Research].

¹⁶² McEvoy & McGregor, ‘Transitional Justice From Below: An Agenda for Research’, 4-5.

of the State.¹⁶³ However, a problem that emerges is one that was also apparent in earlier legal pluralism, i.e. that employing alternative mechanisms as a site of resistance to the State is seen as imperative regardless of the transitional context – autonomy from governmental influence is applauded irrespective of whether the government is elected, consensual, majoritarian, or merely disguised authoritarianism; irrespective of whether that government intends to oppose, tolerate, welcome or control alternative forms of justice; irrespective of whether that particular brand of justice from below is tolerant, abusive, exclusionary or inclusionary. For example, Lundy and McGovern argue for the promotion of local ownership and control, but do so because it transfers power “from the dominant, decision-making people and institutions to those who are subordinated during the process”.¹⁶⁴ Likewise, Daly argues that applying non-state forms of justice in the process of transitional accountability would permit citizens to define justice for themselves in preference to having it imposed on them from above, instantiating a transfer of power from central government to the people.¹⁶⁵

This presumption that the citizens of a State are automatically subordinated by involvement of that State in transitional justice may bear little relation to the lived reality of many communities. Similarly, the common and distinctly pejorative usage of “elites” to describe any and all transitional governments regardless of how representative, legitimate or accountable they may be is one that needs to be examined, as it implies a level of remoteness from, or disdain for, indigenous initiatives that may bear little relation to reality.¹⁶⁶ Scholars warn generally of “the risks of political capture”,¹⁶⁷ the “dissemination of state authority”,¹⁶⁸ the need “to keep a safe distance from formal power under the [S]tate”,¹⁶⁹ and the risk that a given mechanism might benefit elites more than

¹⁶³ *Ibid.*, 6.

¹⁶⁴ P. Lundy & M. McGovern, ‘The Role of Community in Participatory Transitional Justice’, in McEvoy & McGregor, *Transitional Justice*, *supra* note 87, 99, 109.

¹⁶⁵ Daly, ‘Between Punitive and Reconstructive Justice’, *supra* note 118, 376.

¹⁶⁶ The word is used, *inter alia*, by S. Robins, ‘Transitional Justice as an Elite Discourse: Human Rights Practice Where the Global Meets the Local in Post-Conflict Nepal’, 44 *Critical Asian Studies* (2012) 1, 3; A. Senier, ‘Traditional Justice as Transitional Justice: A Comparative Case Study of Rwanda and East Timor’, 23 *Fletcher Journal of Human Security* (2008), 67, 76; Arriaza & Roht-Arriaza, *supra* note 125, 153.

¹⁶⁷ Ramji-Nogales, *supra* note 88, 54.

¹⁶⁸ Iliff, *supra* note 136, 261.

¹⁶⁹ Latigo, *supra* note 24, 111.

local communities,¹⁷⁰ but these warnings are premised on a number of dubious presumptions – that the interests of the State and indigenous communities share no overlap, that state involvement is inherently domineering, and that the remote State presents a greater threat to the individual or community cohesion than local dispute resolution practices. On this presentation, the division of the State into dominant elites and disempowered indigenes begins to look every bit as simplistic as the division of humankind into victims and perpetrators that sparked the search for alternative forms of justice in the first place. The study of modern legal pluralism reveals a more dialectical, dynamic, and interactive relationship of penetration and resistance between the layers.¹⁷¹

Nevertheless, there is resistance to an assertive role for the State in the regulation of traditional mechanisms on the basis that if transitional justice “sees like the [S]tate” it may undermine developing lines of ownership and accountability to the communities they were bound to serve.¹⁷² Though the danger is real, two things already noted earlier should be remembered – firstly, the legacy of conflict is often such that old modes of ownership and accountability have been sundered, and secondly, a role for the State does not automatically mitigate against ownership and may augment existing local accountability.¹⁷³ Injunctions by others that the sovereign authority should not co-opt local justice,¹⁷⁴ formalize it¹⁷⁵ or “administratize” it¹⁷⁶ when dealing with past human rights abuses comes close to wishing away the State. It echoes the earlier regret of the pluralists at state encroachment, though this gave way to a realization that ignoring the role of the State made history incomprehensible, denied the ongoing importance of power relationships,¹⁷⁷ and ignored the inevitability of a clash between orders.¹⁷⁸ As Forsyth argues, the Nation State is a permanent fixture as the political form of the modern world system – “there is no jurisdiction where state law does not at least have *theoretical* capacity to regulate local disputes”.¹⁷⁹ If, as advocates of

¹⁷⁰ L. Waldorf, ‘Rwanda’s Failing Experiment in Restorative Justice’, in Sullivan & Tiftt, *supra* note 96, 422, 426.

¹⁷¹ Merry, *supra* note 10, 884, 889 & 890.

¹⁷² McEvoy, ‘Letting Go of Legalism’, *supra* note 87, 28.

¹⁷³ McEvoy & McGregor, ‘Transitional Justice From Below: An Agenda for Research’, *supra* note 161, 10.

¹⁷⁴ Waldorf, *supra* note 105, 9.

¹⁷⁵ Arriaza & Roht-Arriaza, *supra* note 125, 170.

¹⁷⁶ Meyerstein, *supra* note 16, 486.

¹⁷⁷ J. Zorn, ‘Lawyers, Anthropologists and the Study of Law: Encounters in the New Guinea Highlands Review Essay’, 15 *Law & Social Inquiry* (1990) 2, 271, 293.

¹⁷⁸ P. Fitzpatrick, ‘Law and Societies’, 22 *Osgoode Hall Law Journal* (1984) 1, 115, 117.

¹⁷⁹ Forsyth, *supra* note 79, 71.

a role for non-state law in transitional justice argue, informal justice processes can make a valuable contribution to the success of transition (and, by corollary, its failure could jeopardize it), it is to be expected that the State will take a close interest in them, though this is not say this attention necessarily conduces to better justice or more reconciliation. The resentment in transitional justice over a role for the State assumes the same sense of resentment is preponderant within the indigenous group. However, it is entirely possible that the indigenous community want the state and traditional justice systems to work in tandem to fill rule of law gaps, rein in the influence of abusive local elites or tackle abuses at the community level. As Betts argues, too often, transitional justice's analysis of indigenous justice entails a return to an idealized indigenous social world that may never have existed.¹⁸⁰ The presumption that weakening the role of government may enhance the trust that people have in the process,¹⁸¹ or that there is merit in leaving "as much power as possible" to those outside the central state power structure¹⁸² may reflect the concerns of Western restorative justice more so than the needs of women, the young and the "other" in communities where customary law applies.

E. Transition as Opportunity

One sees in the restorative justice-rooted transitional justice literature of the last twenty years many of the same impulses that animated classical legal pluralism in the 1970s and early 1980s – a progressive identification with the disempowered and a commensurate disdain for accumulated power, be it national or imperial, a rejection of the hegemonic claims of formal law, and the gradual shading of a discourse based on the equivalence of indigenous law with state law to one asserting its superiority. However, after a period of over-exuberant theorizing and greater involvement with indigenous justice on the ground, the initial classical legal pluralist tendency to "celebrate nonstate law as inherently less objectionable than state law" was forced towards "a less polemical and politically invested approach to legal pluralism".¹⁸³ There are signs that the treatment of indigenous law in transitional justice discourse may yet enjoy a similarly productive revision – advocacy of traditional forms of law by its

¹⁸⁰ A. Betts, 'Should Approaches to Post-Conflict Justice and Reconciliation be Determined Globally, Nationally or Locally?', 7 *European Journal of Development Research* (2005) 4, 735, 738.

¹⁸¹ Daly, 'Between Punitive and Reconstructive Justice', *supra* note 118, 377.

¹⁸² *Ibid.*, 376-377.

¹⁸³ Sharafi, *supra* note 60, 146.

enthusiasts in the literature occasionally features pleas not to over-eulogize¹⁸⁴ or romanticize¹⁸⁵ it and to beware its “seductive appeal”.¹⁸⁶ However, the tendency persists to draw dichotomies with the state justice sector and to separate the two spheres. Until transitional justice begins to engage with the work of later legal pluralists and justice sector reformers in dualist States, there will be no positive policy to inform these negative cautions and it may do little to promote the long-term recognition and empowerment it fosters in its short-term engagements.

This is all the more unfortunate because the paradigmatic setting for transitional justice, namely societies emerging from authoritarianism or conflict, represents the most radical opportunity both to vindicate indigenous justice in the new State’s political and judicial structures and to ameliorate some of the human rights and discrimination concerns shared by the international human rights community and domestic reform constituencies. There are two main reasons for this. Firstly, while typically the State’s relationship to indigenous justice evolves or regresses organically, when periods of conflict or authoritarianism give way to a government committed at least minimally to the rule of law and liberalization, the organic process is ruptured significantly. The role of indigenous justice before the transition will have a significant effect on attitudes to non-state law after it. Secondly, transitional justice involves an influx of INGOs and UN actors normatively committed to state-building, human rights and non-discrimination, who have significant scope to work with both the State and indigenous reform constituencies.

I. Internal Factors

To begin with the former, the legacy of conflict or authoritarianism will significantly affect the functioning and legitimacy of indigenous justice, even if the wide variations in experience make even the most general of conclusions hazardous. Because violent conflict is synonymous with forced relocations in affected rural areas to towns or refugee camps, indigenous social structures might be ruptured (for example Sierra Leone),¹⁸⁷ indigenous leaders might be killed in significant numbers (for example Guatemala),¹⁸⁸ or traditional ceremonies

¹⁸⁴ Lundy & McGovern, *supra* note 164, 100.

¹⁸⁵ Arriaza & Roht-Arriaza, *supra* note 125, 161.

¹⁸⁶ Mani, *supra* note 80, 38.

¹⁸⁷ J. A. D. Alie, ‘Reconciliation and Traditional Justice: Tradition-based Practices of the Kpaa Mende in Sierra Leone’, in Huyse & Salter, *Traditional Justice*, *supra* note 9, 123, 140.

¹⁸⁸ J. A. Hessbruegge & C. F. O. Garcia, ‘Mayan Law in Post-Conflict Guatemala’, in Isser, *Customary Justice*, *supra* note 7, 77, 96.

became impossible, as in Uganda.¹⁸⁹ The brutality of conflict may see taboos disregarded and sacred places violated, while the widespread availability of weapons might make hitherto obedient groups or individuals unwilling to accept settlements dictated by traditional authorities in the event of disputes. For example, militia leaders in Afghanistan commandeered customary justice previously applied by the traditional *jirgas*.¹⁹⁰ Traditional authorities may have been complicit in war crimes, such as in Rwanda where one in six *gacaca* judges had to be replaced because of suspicion of complicity in genocide,¹⁹¹ or failed to prevent them, as in Burundi.¹⁹² The way indigenous justice operated in the past may itself be a significant factor in catalysing conflict – the marginalization of young men motivated many to join Sierra Leone’s rebel RUF who went on to target chiefs,¹⁹³ while traditional rites have been used to frame the worldview of young recruits to the LRA in Uganda.¹⁹⁴ In authoritarian regimes, traditional justice might also be degraded – for example, Malawi’s chiefs were discredited by the manner in which they lent support to the repressive rule after independence.¹⁹⁵ In these conditions of weakness, the indigenous justice system might need, and welcome, state assistance, particularly in relation to enforcement of decisions.

On the other hand, Section B has already illustrated that in some situations of armed conflict, informal justice institutions “often gain more importance due to the breakdown of the formal court system”.¹⁹⁶ As noted earlier, most dualist States, and in particular those emerging from conflict, tend to maintain that dualism primarily because they have no choice given the parlous State of the formal legal system, though it also tends to increase state legitimacy, functionality and power. Indigenous dispute resolution might emerge stronger in the process of democratization, such as in Samoa where the authority of traditional leaders (*matai*) was recognized in legislation as a “sweetener” for the loss of their political

¹⁸⁹ Hovil & Quinn, *supra* note 136, 26.

¹⁹⁰ Barfield, Nojumi & Thiers, *supra* note 7, 172.

¹⁹¹ B. Ingelaere, ‘The Gacaca Courts in Rwanda’, in Huyse & Salter, *supra* note 9, 25, 34 [Ingelaere, Gacaca Courts].

¹⁹² Naniwe-Kaburahe, *supra* note 31, 161.

¹⁹³ S. Archibald & P. Richards, ‘Converts to Human Rights? Popular Debate About War and Justice in Rural Central Sierra Leone’, 72 *Africa: Journal of the International African Institute* (2002) 3, 339, 344.

¹⁹⁴ Allen, *supra* note 123, 50.

¹⁹⁵ DFID, *supra* note 38, 10.

¹⁹⁶ T. J. Röder, ‘Informal Justice Systems: Challenges and Perspectives’, in Botero *et al.*, *supra* note 40, 58, 58.

dominance with the introduction of universal suffrage.¹⁹⁷ In the world's newest independent State of South Sudan, the Juba government promotes traditional justice as central to the country's self-image in recognition of the war-time role it played in affirming a distinct national identity contrasting with Khartoum's use of *sharia*.¹⁹⁸ Indigenous justice might enjoy sufficient legitimacy to form an explicit part of a peace settlement, such as in Guatemala's peace accords (where the Government agreed to recognize and integrate Mayan law) or Burundi's Arusha accords which speak of rehabilitating *bashingantabe*.

The transitional government's attitude to non-state means of normative ordering will inform the simultaneous process of state building. If indigenous justice is strongest where the State is weak, then it may decline in importance as the State develops judicial capacity that extends across the whole national territory. Support for the separation as far as possible of the two systems flows from the fear that "customary law is not equipped to compete with the monolithic strength of introduced law systems and will be the inevitable loser in any circumstances where there is a choice between the systems".¹⁹⁹ Changes in politics and economics will change behavior and alter demand as the distribution of rights, responsibilities and resources is in flux. Certain duties and prerogatives will be lost over time, particularly in relation to criminal law where risks of human rights abuses and the desire for state control are greatest. The sheer fact of the existence of a formal system might alter the choice of dispute resolution forum on the part of indigenous litigants – the presumption among rule of law reformers is that (re)building the state system will create competition that will force indigenous processes to adapt,²⁰⁰ though many hope some of the modalities of the non-state sector will reciprocally inform state justice.²⁰¹ Beyond this, the seemingly unstoppable march of globalization and capitalism might have the biggest impact on indigenous justice, irrespective of state policy, by loosening kinship ties, narrowing traditional duties of individuals, and undermining the need for social solidarity by increasing self-sufficiency.²⁰² Even if peace builders and most States have moved beyond regarding traditional law as a problem to

¹⁹⁷ S. Lawson, *Tradition Versus Democracy in the South Pacific: Fiji, Tonga and Western Samoa* (1996), 156.

¹⁹⁸ Deng, *supra* note 42, 285-291.

¹⁹⁹ K. Brown, 'Customary Law in the Pacific: An Endangered Species', 3 *Journal of South Pacific Law* (1999), available at http://www.vanuatu.usp.ac.fj/journal_splaw/articles/Brown1.htm (last visited 15 June 2013).

²⁰⁰ Harper, *supra* note 35, 15.

²⁰¹ Kyed, *supra* note 67, 93.

²⁰² Toufayan, *supra* note 70, 396.

be remedied, if transition is ultimately successful, customary mechanisms will have to adapt by dividing jurisdiction with the State, and by being accountable to the State and to those who use it through some form of judicial review. The alternatives may ultimately be repression or obsolescence.

In any case, the role of traditional processes in the new state order is ripe for reconsideration. For example, in the aftermath of Burundi's National Reconciliation Policy, a commission on national unity recommended that *bashingantaha* be adapted to the needs of the modernizing State.²⁰³ Since then, greater government support and capacity building have been forthcoming.²⁰⁴ The Sierra Leone Truth and Reconciliation Commission advocated alterations in the relationship between chiefs and the State and was followed in recent years by draft legislation to regulate customary law in relation to gender, children and appointments of traditional authorities.²⁰⁵ The use of *gacaca* was revived and reconsidered by the Kigali government as a key part of establishing a new Rwandese identity. Whether change is compelled by socio-economic change, by refinement of the formal justice system or by transition, the challenge for the State and peace builders is to ensure that any monitoring, integration or alteration of indigenous law should proceed sensibly. The challenge is to achieve a pragmatic pluralism that facilitates day-to-day choices on the part of the population but which prevents abuse.²⁰⁶

II. External Factors

It is for these reasons that the general optimism in the literature, believing that transitional justice can instigate a normative shift while maintaining stability, applies with force in the context of indigenous justice.²⁰⁷ The manner in which transitional justice actors deploy to these contexts is apt to catalyze change in indigenous law. Firstly, most transitional justice actors in the field hail from INGOs or development agencies, who are the best equipped to foster imaginative change. As Golub argues, "most legal empowerment work is carried out by international and country-specific civil society groups because they tend to demonstrate more of the requisite initiative, dedication, and flexibility than

²⁰³ Naniwe-Kaburahe, *supra* note 31, 161.

²⁰⁴ *Ibid.*, 162, 168.

²⁰⁵ G. Corradi, 'Human Rights Promotion in Post Conflict Sierra Leone: Coming to Grips With Plurality in Customary Justice', 60 *Journal of Legal Pluralism and Unofficial Law* (2010), 73, 87-90.

²⁰⁶ Shaw & Waldorf, *supra* note 21, 22.

²⁰⁷ R. G. Teitel, *Transitional Justice* (2001), 6.

do government agencies”.²⁰⁸ Secondly, given the scale and diversity of the non-state sector, practitioners acknowledge that “focussing on a particular problem or service offers a good entry point to engage local communities, actors, as well as central state services”.²⁰⁹ As the examples of *gacaca*, *nabe biti*, and *mato oput* illustrate, transitional justice offers an incomparably high profile, but nonetheless particularized engagement in which to promote and exemplify reform. The operation of indigenous justice in the service of reconciliation and pacification can attract unprecedented amounts of funding from bilateral and multilateral donors that would otherwise not have gone to these mechanisms.²¹⁰ NGOs tend to prioritize human rights and gender equality – the strings attached to this funding generally stipulate training, human rights education, outreach and monitoring, all of which will benefit non-state justice systems in the long run.²¹¹

However, it would be unfair to suggest that transitional justice actors catalyze normative or institutional change in indigenous justice through imposition. Two noteworthy (but by no means universal) conclusions that peace builders have drawn from their dealings with long-established forms of non-state justice have been that (a) reforms resulting from internal critique are more effective than blatantly heavy-handed dictates, and (b) where this internal critique occurs, indigenous leaders tend to be responsive to changing normative attitudes, as failure to do so might undermine their level of respect in the community.²¹² References to indigenous mechanisms in transitional justice literature are replete with allusions to their inherent flexibility and predisposition to evolve in light of changing social circumstances, which in this respect above all others they surpass formal justice systems. Transitional justice, with its consistently reiterated commitment to consultation, has served as an excellent opportunity for (a) opening up discussion by those marginalized within traditional processes to challenge the domination and manipulation of indigenous norms by the powerful and to press for more inclusive comprehension of indigenous mores, and (b) “vernacularizing” human rights ideas into arrangements that are relevant

²⁰⁸ S. Golub, ‘The Past, Present and Possible Future of Legal Empowerment: One Practitioner’s Perspective’, in Botero *et al.*, *supra* note 40, 38, 38.

²⁰⁹ L. van de Goor & E. van Veen, ‘The Heart of Developmental Change: Rule of Law Engagements in Situations of Fragility’, in Botero *et al.*, *supra* note 40, 67, 69.

²¹⁰ Oomen, ‘Donor-Driven Justice and its Discontents: The Case of Rwanda’, *supra* note 158, 906.

²¹¹ Kerr & Mobekk, *supra* note 15, 160.

²¹² T. Mennen, ‘Putting Theory into Practice – Improving Customary Justice’, paper given at Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies Conference, 17-18 November 2009, Washington DC.

to the lived experience of communities and that can be appropriated by them to the extent that they are of utility in furthering individual or communal interests.²¹³

Education and awareness raising of these issues are often undertaken to encourage participants to apply basic human rights standards, training manuals are designed and participation of vulnerable groups encouraged. For example, transitional justice has been influential in empowering women as equal partners – women have headed localized truth-seeking projects in Sierra Leone,²¹⁴ and seen more involvement in Rwanda's *gacaca* than was traditionally allowed,²¹⁵ while in East Timor, stipulations that a minimum 30 per cent of all Regional Commissioners be women were observed in the CAVR Community Reconciliation Process. Once given this push, communities "willingly appointed female representatives".²¹⁶ Development agencies consistently warn that donor engagement is not appropriate where non-state justice systems violate basic human rights.²¹⁷ Where international actors support indigenous mechanisms to re-integrate soldiers or foster communal reconciliation, they can resist the employment of abusive or discriminatory forms of punishment.

However, the failure to integrate perspectives from rule of law reconstruction into support from NGOs, scholars, activists, and aid agencies for using indigenous mechanisms to engage with past human rights violations means that the beneficial innovations they bring to traditional processes for the purposes of reckoning with the past abuses may not be sustained.

The interaction of transitional justice activists with customary law emphasizes disengagement from the State, making it less likely that these innovations remain sustainable in the long term. Transitional justice actors are good at facilitating training and internalizing human rights and non-discrimination, but sustainable improvement will take a significantly longer time span than the period where the State is thronged with transitional justice and human rights NGOs and funding. Only the State can maintain these alterations beyond the foreshortened temporal horizons of transition and adjust as necessary the balance between the state and indigenous justice and security providers.

²¹³ Corradi, *supra* note 205, 94.

²¹⁴ Alie, *supra* note 187, 133.

²¹⁵ Ingelaere, 'Gacaca Courts', *supra* note 191, 52.

²¹⁶ Pigou, *supra* note 140, 83.

²¹⁷ DFID, *supra* note 38, 4.

F. Conclusion

There is great optimism in transitional justice literature that indigenous legal processes can capture the meaning of conflict in ways that more remote, state- or international-based processes cannot. However, if these mechanisms are (a) to make a long-term, sustainable impact beyond the transitional moment, or (b) effectuate change in the everyday lives of survivor populations, greater attention must be given to how their employment in the context of transitional justice might interact with the national rule of law strategy overall. In so doing, transitional justice will have to abandon some of the more romantic notions it has of indigenous justice – as something inherently (and primarily) restorative, as an antidote to the shortcomings of legal formalism or as a site of resistance to the State Leviathan. As Inksater argues, “generalizations that characterize indigenous justice systems as homogenous and isolated models are inaccurate and fail to recognize the distinct nature of the local context and the degree to which indigenous legal orders interact with state law”.²¹⁸ Current scholarship in transitional justice exaggerates the grounds for conflict with the State and unduly disregards the possibilities for harmonious interpenetration. In so doing, it has drawn on ideal applications of restorative justice in that Western milieu, which are of questionable relevance to dualist States. Transitional justice comes too close to the view of non-state legal systems found in earlier legal pluralism as parallel but entirely autonomous,²¹⁹ and occasionally wanders into the territory of “rhetorical stone-throwing” that once characterized the field.²²⁰

Enthusiasts for the employment of indigenous mechanisms in transitional justice can learn lessons from the processes of de-romanticization that legal pluralism went through and the experiences of peace building missions. If they do so, they can make the innovations in terms of inclusiveness, gender and fairness that transitional justice invariably promotes more sustainable in the transitional state by acknowledging the porosity of the boundaries between state and indigenous legal orders and embracing denser interactions between the two fields. The pure, autonomous identity of indigenous justice transitional justice scholarship romanticizes must give way to an approach that productively synthesizes fragmented elements from these seemingly opposed cultures, as

²¹⁸ K. Inksater, ‘Transformative Juricultural Pluralism: Indigenous Justice Systems in Latin America and International Human Rights’, 60 *Journal of Legal Pluralism and Unofficial Law* (2010), 105, 113.

²¹⁹ As described by Merry, *supra* note 10, 879.

²²⁰ Tamanaha, ‘The Folly’, *supra* note 58, 195.

opposed to allocating them to largely separate spheres of activity. This approach would attempt to ensure that the different legal orders that exist in any transitional or peace building ecology operate in a way that maximizes their ability to cross-fertilize, accommodate and supplement each other, as opposed to the dominant antagonistic presentation where one undermines and conflicts with the other.