

# Mad Science?

## Possibilities for and Examples of Synthetic (Neo)Traditional Practices of Justice and Acknowledgement

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**T**ransitional justice has typically relied on a handful of mechanisms, including trials, truth commissions, and reparations programs in seeking justice after conflict. In many societies, however, these mechanisms have less salience and value than do traditional practices of justice. Often, this occurs in large part because these transitional justice mechanisms have been imported and the community has simply failed to engage with them. Customary law, on the contrary, is community based and well known to the people who use it. Thus, while the conventional transitional justice literature has relied on and recommended the use of mechanisms and approaches including trials, tribunals, and reparations schemes, this article explores the use of an alternative mechanism: customary practices of justice and acknowledgement. The idea is that practices of customary law might reasonably be used in transitional societies in place of other, “foreign” practices like truth commissions and trials to bring about the same objectives sought by the mechanisms more often used.

The article considers traditional practices of justice in transitional and pre-transitional societies as a means of bringing about the “transition” sought by scholars and practitioners of transitional justice. The scholarly literature, however, has focused on those practices utilized within particular ethnocultural groups, such as *mato oput* in northern Uganda. The article seeks to widen that debate, considering the possibility of utilizing synthetic, artificial, and neotraditional practices of justice and acknowledgement in ameliorating conflict and improving relations between two or more different ethnocultural groups.

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## Methodology

As part of a larger, ongoing study, I have been engaged since 2004 in an examination and analysis of the use of traditional practices of acknowledgement in Uganda and, since 2010, in Fiji. I am specifically interested in the role that these processes play in a society's acknowledgement of past crimes and abuses as well as how they succeed when other "Western" approaches, like the truth commission, have failed.<sup>1</sup>

This article is based on a number of "waves" of research that have been collected around traditional practices of justice in Uganda and one in the Fiji Islands. Each is a qualitative survey of the manner in which customary practices could be and are being used, focusing on a different aspect of these instruments and particularly on the opinions of various stakeholder groups regarding their use. The data that supports the arguments here has been collected in Uganda in more than 270 interviews conducted since 2004 with members of stakeholder groups, including conflict-affected women, government officials, traditional cultural institutions, urban educated youth, and religious leaders. In Fiji in 2010, during the beginnings of a broader, comparative study, 26 interviews were conducted.

## Customary Practices of Acknowledgement and Justice

As I have written elsewhere, traditionally, cultures and societies around the world had highly complex and developed systems for dealing with conflict and its resolution—and with the social deficits brought about by conflict. In traditional times, these systems carried out a number of functions, including mediation, arbitration, adjudication, restitution, and punishment—the same retributive elements included in the kinds of systems familiar in "modern" justice. They often also included elements of restoration and reconciliation, which typically functioned in tandem.<sup>2</sup>

### *Uganda*

In many parts of the world, these practices were shoved aside to make way for modern Western ideas and practices. Colonial rulers disparaged such traditional customs, allowing only "natives" within the colonies to utilize them and setting up separate mechanisms for use by "nonnatives," effectively creating a dual system.<sup>3</sup> In Uganda traditional practices were officially prohibited in 1962, at the time of independence, in favor of a harmonized court system modeled on the British system.<sup>4</sup> The 1967 constitution, promulgated by President Milton Obote, outlawed the many kingdoms and traditional cultural institutions across the country.

Yet, the kingdoms and other traditional cultural institutions remain, and traditional practices have continued in different parts of the country.<sup>5</sup> Traditional cultural institutions themselves have special status under Article 246 of the constitution.<sup>6</sup> Traditional practices are now legally provided for under legislation, including Article 129 of the 1995 constitution, which allows local council courts to operate at the subcounty, parish, and village levels.<sup>7</sup> The Children's Statute 1996 grants these courts authority to mandate any number of things, including reconciliation, compensation, restitution, and apology.<sup>8</sup> The government of Uganda has subsequently included these practices in the 2008 Agreement on Accountability and Reconciliation and the subsequent annexure, which emerged from the Juba Peace Talks.<sup>9</sup> These mechanisms broadly fit within very different approaches to justice, whether retributive or restorative, and fulfill different roles within their respective societies, from cleansing and welcoming estranged persons back home, to prosecution and punishment. However, they all draw upon traditional customs and ideas in the administration of justice in modern times.

These institutions are still widely used throughout the country by many of the 56 different ethnic groups.<sup>10</sup> Among the Karamojong, the *akiriket* councils of elders adjudicate disputes according to traditional custom, which includes cultural teaching and ritual cleansing ceremonies.<sup>11</sup> The Acholi use a complex system of ceremonies in adjudicating everything from petty theft to murder.<sup>12</sup> In the current context, at least two ceremonies have been adapted to welcome ex-combatant child soldiers home after they have been decommissioned: *mato oput* (drinking the bitter herb) and *nyouo tong gweno* (a welcome ceremony in which someone steps on an egg over an *opobo twig*).<sup>13</sup> These ceremonies are similar to those used by the Langi, called *kayo cuk*; the Iteso, called *ailuc*; and the Madi, called *tonu ci koka*.<sup>14</sup> The Lugbara, in the northwest part of the country, maintain a system of elder mediation in family, clan, and interclan conflict.<sup>15</sup> In some areas, however, these practices are no longer used regularly. I have found that traditional practices are, in fact, used far less widely in the “greater south” and among Ugandans of Bantu origin.

People from nearly every one of the ethnic groups in Uganda, though, have reported to me that “everyone respects these traditions” and that reconciliation continues to be an “essential and final part of peaceful settlement of conflict.”<sup>16</sup> A common understanding of these symbols, ceremonies, institutions, and their meanings remains throughout Uganda—even in those areas where such practices are no longer carried out.

### *Fiji Islands*

In Fiji these customs and traditions were enshrined in the Fiji Regulations (1876).<sup>17</sup> In 1967 the traditional Fijian court system and various related regulations were abolished.<sup>18</sup> According to the solicitor general, “At least by 1970 and the enactment of the new constitution, the traditional courts went out of use. They have not been reinstated and Magistrates now visit the more distant villages on circuit to adjudicate on criminal and civil matters.”<sup>19</sup> The chief justice notes that “there is a join between the traditional system and the Western system but not for serious cases like murder, rape, robbery with violence, and that kind of thing. There, we simply must apply legal principles, which are important in the community.”<sup>20</sup> Yet, these practices were legally protected and even encouraged to a large extent until 1997.

Colloquially, strong evidence indicates that these practices have continued to exist beyond their official abolition: “There is officially no such thing as customary law in Fiji, but it’s really a matter of definition. Most of our customs have been codified, and it is sometimes difficult to distinguish, now, what is customary law.”<sup>21</sup> As in many other parts of the world, different customary practices existed to resolve conflict and to reconcile the population; collectively, they are called *i soro*.<sup>22</sup> The *matanigasau* is a ceremony that aims to restore peace and harmony to the heart of the extended family group when one party goes to ask forgiveness. Other ceremonies of pardon also exist, such as the *bulu bulu*, in cases of injury, to “bury the bad thing that has happened.”<sup>23</sup> Another, *veisorosorovi*, “brings both parties together to sit, discuss, and agree together, after which a *tabua* [whale’s tooth] is always presented to seal what has been agreed upon. Once the *tabua* is presented, that’s the end of it. Sometimes the *tabua* can be a curse because you must follow what you’ve agreed to by accepting it. All of these are traditional forgiveness and reconciliation and may be used instead of the Western court system or in conjunction with it.”<sup>24</sup> A former chief magistrate points out that “even until today, if there are some problems, people will use the village system—a committee set up to resolve their problems. In rural areas, everybody talks together in a traditional way, on mats, under a tree, and so on.”<sup>25</sup>

Within the community of Fijians of Indian descent, similar customary practices of law existed and were used to govern—here, too, born out of necessity since the European laws extended only to the European community, and the Fiji Regulations, only to the indigenous Fijian community. These practices, however, do not now exist. Called *panchayats*, they were based on the *panchayats* in rural India, where “the jurisdiction of the *panchayat* is wide: everything having to do with the caste or its members. . . . They handle[d] cases as serious as death by poisoning or

causing severe injury, but most cases [were] less dramatic: arguments about marriage arrangements, insults, fighting with weapons, or infringement of someone's hereditary territory predominate."<sup>26</sup> Fijian *panchayats* were ad hoc councils of "men of generally acknowledged reputation . . . with the power to demand any penalty [they thought] fit (an apology, a fine) or to dismiss the case. But council leaders [had] no power to enforce their decision. This is left to the weight of public opinion."<sup>27</sup> Adrian Mayer points out that "all the panchayats recorded were *ad hoc* bodies, called to hear a specific dispute, rather than permanent entities organized on a territorial or cultural basis."<sup>28</sup> They heard evidence presented by both sides, conferred, and handed down their decisions.<sup>29</sup> Robert Hayden writes that

what is perhaps of greatest interests for present purposes is that the task faced by the panchayat is one of finding facts, in the sense of creating a definitive public account of what happened in the incident in question. This point needs stressing: the panchayat is held precisely because there is as yet no commonly accepted knowledge of an important event. While many members of the community may already have some knowledge of the incident, such knowledge is unauthorized and can not be used in public discourse. . . . The purpose of the panchayat is to create what Brenneis calls a "public record" of the dispute: "a single and non-contradictory account of crucial events" which can be used to guide future behaviour. . . . The outcome of a successful panchayat is that the disputants shake hands and resume some semblance of normal social relations.<sup>30</sup>

Anyone could bypass the association and, therefore, the *panchayat*, by going to court.<sup>31</sup>

Even after independence in 1970, all of these practices, both within the indigenous Fijian community and within the community of Fijians of Indian descent, continued to be legally sanctioned.<sup>32</sup> As far back as 1984, reinvigorating the Fijian court system had the blessing of the Great Council of Chiefs. In 1994, backed by those same chiefs, the Ministry of Fijian Affairs came out strongly in favor of using the traditional court system during a Commission of Inquiry on the Courts.<sup>33</sup>

Current programs within the prison system and elsewhere have been making use of the traditional structure: "*Sevusevu* is used as a sacred way of beginning a conversation, a grounding on which everything else must proceed."<sup>34</sup> One official observes that "framing issues in traditional ways is useful in getting people to buy in. The NGO [Nongovernmental Organization] Coalition and Dialogue Fiji use this kind of approach."<sup>35</sup> Even proper judges of the courts in Fiji use the traditional setting to gain buy-in: "I would come into a courtroom to find a chair and table provided and everyone sitting on the floor. And so I would push the table aside and sit on the floor myself, consulting the elders as I went along."<sup>36</sup> The chief justice of the Supreme Court tells a similar story.<sup>37</sup>

Today, customary law of any stripe is no longer formally recognized as a general source of law by the constitution.<sup>38</sup> The Constitution Amendment Act 1997 repealed the 1990 constitution. The act omits section 100.3, which had appeared in that constitution and read as follows: “Until such time as an Act of Parliament otherwise provides, Fijian customary law shall have effect as part of the laws of Fiji.”<sup>39</sup> Section 195.2.e of the subsequent 1998 constitution, though, does protect customary law to some extent: “All written laws in force in the State (other than the laws referred to in subsection [1]) continue in force as if enacted or made under or pursuant to this Constitution and all other law in the State continues in operation.”<sup>40</sup> Similarly, section 186.1 is explicit in upholding laws related to customary law: “The Parliament must make provision for the application of customary laws and for dispute resolution in accordance with traditional Fijian processes.”<sup>41</sup> However, since the abrogation of the constitution in 2009, all of this stands in question.

### *Commonalities*

The literature surrounding customary practices identifies five characteristics that most have in common. The first is that customary practices are nearly always undocumented and uncodified.<sup>42</sup> The second is the “mix” of customary practices already at play at any given time, blending cultural, religious, social, and other practices. The third is that customary practices are “localized and particularistic . . . [taking on] different forms as dictated by ecological factors, population density, political organization, economic relations, and so on.”<sup>43</sup> Fourth, such practices balanced the many interests and power dynamics that existed within the community.<sup>44</sup> Fifth, oftentimes great importance was placed on value consensus and social cohesion.<sup>45</sup> According to Luc Huyse,

A Penal Reform International report on informal justice systems in Sub-Saharan Africa lists several strong points of such arrangements:

They are accessible to local and rural people in that their proceedings are carried out in the local language, within walking distance, with simple procedures which do not require the services of a lawyer, and without the delays associated with the formal system.

In most cases, the type of justice they offer—based on reconciliation, reparation, restoration and rehabilitation—is more appropriate to people living in close-knit communities who must rely on continuous social and economic cooperation with their neighbours. . . . They help in educating all members of the community as to the rules to be followed, the circumstances which may lead to them being broken, and how ensuing conflict may be peacefully resolved.

The fact that they employ non-custodial sentences effectively reduces prison overcrowding, may allow prison budget allocations to be diverted towards social development

purposes, permits the offender to continue to contribute to the economy and to pay reparation to the victim, and prevents the economic and social dislocation of the family.<sup>46</sup>

It is important to note, though, that customary practices are themselves sometimes the site of conflict within and/or between groups. For example, the legitimacy of the leadership within communities that elect to employ these kinds of practices might be in question—and this could result in an abuse of power within these traditions.<sup>47</sup> Sometimes, the presence of “outsiders” results in contestation.<sup>48</sup> In other instances, the sheer distance (whether in terms of time or of geographic space) that separates contemporary practitioners from the necessary resources for those traditions hampers their success.<sup>49</sup> In other cases, whole groups are left out of the process in many ways.<sup>50</sup> Consequently, both scholars and practitioners must keep in mind the limitations within which customary practices sometimes work as well as the possibility that their use might be the cause of further conflict or disenfranchisement.

### Between-Group Practices: Existing Synthetic Approaches

The previous section described customary practices of justice and acknowledgement used to ameliorate relations and deal with wrongs committed within a particular ethnic group, which has normally been the case. In a number of different examples, however, customary practices of justice and reconciliation are carried out between groups. In some cases, the impetus for this between-group focus is grassroots and organic.

In northern Uganda, for example, after a war between two ethnic groups, “revenge was turned into reconciliation when the bending of the spears (*gomo tong*) ritual was performed.”<sup>51</sup> “The conflicting parties exchange their spears symbolising an end to the war or conflict.”<sup>52</sup> Thomas Harlacher and his coauthors cite *gomo tong* as a “symbolic ceremony to mark the end of a war or bloody conflict between different Acholi clans or chiefdoms, or between Acholi and neighbouring ethnic groups. The ritual implied a vow by both sides evoking ‘the living dead’ and promising that such killings would not be repeated. If one side did again lift a spear against the other without a very good—and new—cause, the tip of the spear would turn back against the aggressor.”<sup>53</sup> Ladit Arweny, one of the participants in a landmark 1986 *gomo tong*, recorded a specific case: “Acholi traditional Chiefs and Elders initiated reconciliation with the people of West Nile and peaceful reconciliation was performed on the 11th February 1986 in Palero some 26 miles north of Gulu in Acholiland. From that time there would be no war or fighting between Acholi and Madi, Kakwa, Lugbara or Alur of West Nile.”<sup>54</sup>

A similar ceremony, *amelokwit*, took place between the Iteso and the Karamojong in 2004.<sup>55</sup> Since that time, a number of activities have been carried out to continue the spirit of reconciliation inspired in the *amelokwit*:

Joint activities between Teso and Karamoja are being championed to address the challenges of cattle rustling. Cattle rustling has kept interaction between the Iteso and Karamojong at bay. It has led to loss of life and sources of livelihood for the two peoples. Joint activities are aimed at enhancing interaction [and] dialogue for peaceful co-existence. . . .

In order to introduce and reinforce peace building in the planning, budgeting and implementation processes at district level, . . . [an indigenous NGO, Teso Initiative for Peace] facilitated the formation of District Peace Monitors Committee in the 8 neighbouring districts affected by cattle rustling. . . . 38 people have been trained so far in Early Warning Systems and Early Response Actions.<sup>56</sup>

Other activities used to undergird the *amelokwit* include cultural music festivals on peace with Iteso and Karamojong, dialogue meetings between leaders in the bordering subcounties, and exchange visits between children in school and women within Teso and between Teso and Karamoja. Income-generating projects—including a Teso-Karamoja joint cassava multiplication farm of 36 acres, joint dam rehabilitation and desilting, and a resettlement process—have been put in place.<sup>57</sup>

In other cases, however, the impetus for the carrying out of between-group practices is somehow superimposed onto relations between the two groups.<sup>58</sup> The *gacaca* courts in postgenocide Rwanda, mediating between Hutu and Tutsi, provide a useful example: “The Rwandan government revitalized a traditional mechanism for seeking justice: the Gacaca system[, w]ith its rules adjusted to the twenty-first century’s requirements and the specific postgenocidal context.”<sup>59</sup> Peter Uvin observes that

from mid-1997, senior Rwandans began thinking about innovative ways of dealing with this challenge. Out of these discussions grew the idea of transforming a traditional Rwandan community based conflict resolution mechanism called *gacaca* into a tool for judging those accused of participation in the genocide and the massacres. This system . . . [was] labelled the “modernized *gacaca*” and constitutes an unprecedented legal-social experiment in its size and scope. . . .

Throughout the country *gacaca* tribunals . . . [were] created composed of persons of integrity elected by the inhabitants of cells, sectors, districts and provinces. Each prisoner (except those accused of category I crimes) . . . [was] brought before the tribunal in the community where he or she . . . [was] alleged to have committed a crime. The entire community . . . [was meant to be] present and act as a “general assembly”, discussing the alleged act or acts, providing testimony and counter-testimony, argument and counterargument. The community . . . elect[ed] among those present 19 people to constitute the bench. These people . . . [were to have been] of high moral standing, non-partisan and not related to those accused.<sup>60</sup>

It is clear that institutions change over time.<sup>61</sup> Leslie Marmon Silko writes that “human communities are living things that continue to change; while there may be a concept of the ‘traditional Indian’ . . . no such being has ever existed. All along there have been changes.”<sup>62</sup> Further, Margaret Andersen and Howard Taylor note that “social change is the alteration of social interactions, institutions, stratification systems, and the elements of culture over time.”<sup>63</sup> Like any social practice located in the sphere of actions governed by human activity, one expects that social customs will become modified as those actions that inform them also become altered.

Thus, like all institutions, traditional practices of acknowledgement and justice have also changed. In some instances, these traditions have continued without interruption over time but have gradually been adapted. Traditional values and teachings continue to inform the ritual of such practices—certainly the case with the Ugandan and Fijian mechanisms outlined above, both within and between groups. As such, these customs look very similar to the kinds of mechanisms understood to have existed in pre-Western societies. In many cases, these mechanisms have also been formalized, in that their proceedings are regularized and carried out according to prearranged and codified rules.

The *gacaca* courts in Rwanda are different. They are a newly constituted practice constructed in the manner of a collection of traditional practices that had ceased to exist for years and that now carry the same traditional name. Similarly, traditional elders’ courts that operate in Aboriginal communities across Canada and Navajo Courts that have been (re)created in the United States mimic those traditional practices that used to exist.<sup>64</sup> They are modeled on old institutions, with changes to make them relevant to contemporary circumstances. In this way, they are “neotraditional” institutions.<sup>65</sup> According to I. William Zartman,

The task of distinguishing the new from the known raises its own inherent problems of terminology. Most open to discussion is the notion of tradition itself, a term that has occasioned vast discussions and inspired great ambiguity. . . . Conflict management practices are considered traditional if they have been practiced for an extended period and have evolved within African societies rather than being the product of external importation. Tradition continues to exist, even in the contemporary—or modern—period. . . . It is quite another matter to revive practices from history that have fallen into disuse and therefore would have to be readjusted and refurbished to fit into a modern context. At the same time, tradition is likely to have been updated, adjusted, and opened to new accretions in order to stay alive through changing times. Traditional does not mean unaltered or archaic.<sup>66</sup>

## The Possibility for Synthetic (Neotraditional) Practices of Justice and Acknowledgement

In plural societies in which conflict has occurred between different ethnic groups and customary practices of justice and acknowledgement are in use, those practices do not often rightfully or necessarily apply to the resolution of conflict *between* those groups—even if they might well be used to resolve within-group conflict.<sup>67</sup> For example the *veisorosorovi* in Fiji is completely foreign to Fijians of Indian descent, as the *panchayat* is to Fijians of ethnic descent. Similarly, Aboriginal healing circles and elders' courts are not at all understood by Canadians of European descent. In contrast, Canadians of Aboriginal descent, as the New Zealanders of Aboriginal descent, feel uncomfortable with the European-based court systems.<sup>68</sup>

With all of this lack of understanding and cultural specificity, the possibility for creation of a synthetic, between-group practice of justice and acknowledgement needs to be considered. The use of the word *synthetic* here refers to a process defined by a standard dictionary as “not natural or genuine; artificial or contrived.” That is, I argue that “traditional” processes of acknowledgement and justice between groups could, in fact, be made up:

This [question of how to merge different strategies] is not a problem that is unique for Third World countries in general, or African post-conflict societies in particular. The search in Western Europe and North America for a justice mechanism that can complement a purely punitive approach has generated renewed interest in traditional non-state systems of dealing with crime. In Australia, New Zealand, Canada and the United States traditional justice systems belong to the aboriginal heritage and have recently been revived. Interest in restorative justice programmes is on the rise in other Western countries but this is based more on progressive contemporary philosophies of justice than on a forgotten local tradition. One example is victim-offender reconciliation programmes. That formula has been used predominantly to handle fairly minor crimes, although initiatives in conflict contexts such as Northern Ireland have tried to extend the concept.<sup>69</sup>

Eghosa Osaghae argues that the explicit use of customary practices in modern situations is important for two reasons. One is that their use will mitigate perceptions of what he calls “anticolonial and anti-imperialist elites . . . reinforced by the larger context . . . imposed by Western countries and other multilateral organizations.” The second is that “the incorporation of traditional systems not only helps to contextualize conflict management but also facilitates the participation of local peoples who are usually left out.”<sup>70</sup>

People in a homogeneous society are more confident that they are familiar with the customs of their society than people in a diverse, multicultural society can be.<sup>71</sup> Yet, as Stephanie Lawson establishes, “unity and consensus . . . *may* be

achieved despite social or cultural dissociation between groups” (emphasis added).<sup>72</sup> That is, distinct groups within a plural society can find common ground. John Braithewaite observes that “locals with shared traditional, reconciliatory and justice sensibilities might mediate fertile new hybrids.”<sup>73</sup> This assumes, of course, that cross-cutting associations between the two disparate groups can and do occur—as is the case between the Iteso and Karamojong, as detailed above.<sup>74</sup>

For example, across much of southern and western Uganda, the exchange of dried coffee beans, eaten together, symbolizes that an acknowledgement of past wrongdoing has taken place and solidifies the two parties coming together again. Similarly, in northern Uganda, the preparation, exchange, and eating of goat in the *mato oput* ceremony symbolize that an acknowledgement of past wrongdoing has taken place and solidifies the togetherness of the two parties.<sup>75</sup> Many of the rituals and cultural practices surrounding acknowledgement and justice in Uganda are cemented by partaking in a common meal or in eating together. Even some Christian and other religious leaders who might oppose the use of customary practices because of their link with animistic or other traditional practices are inclined toward eating together and equate it with Holy Communion.<sup>76</sup> This is an example of a cultural practice that symbolizes the same thing across ethnic cultures, albeit with variation, and which might usefully be employed in thinking about those “shared traditional, reconciliatory and justice sensibilities” discussed by Braithewaite, above.<sup>77</sup>

Eric Hobsbawm contends that “any social practice that needs to be carried out repeatedly will tend, for convenience and efficiency, to develop a set of such conventions and routines, which may de facto or de jure formalize for the purposes of imparting the practice to new practitioners.” He emphasizes that

inventing tradition . . . is essentially a process of formalization and ritualization, characterized by reference to the past, if only by imposing repetition.

. . . We should expect . . . [the invention of tradition] to occur more frequently when a rapid transformation of society weakens or destroys the social patterns for which “old” traditions had been designed, producing new ones to which they were not applicable, or when such old traditions and their institutional carriers and promulgators no longer prove sufficiently adaptable and flexible, or are otherwise eliminated.

According to Hobsbawm, invented traditions seem to belong to three overlapping types: “a) those establishing or symbolizing social cohesion or the membership of groups, real or artificial communities, b) those establishing or legitimizing institutions, status or relations of authority, and c) those whose main purpose was socialization, the inculcation of beliefs, value system and conventions of behaviour.”<sup>78</sup>

There are many ways to approach the creation of synthetic practices. Harry Blagg and Braithewaite caution against appropriating indigenous custom “to a

western project . . . putting indigenous ideas into foreign contexts where it is detached from the cultural moorings that give the indigenous project point and purpose.”<sup>79</sup> As Hobsbawm notes, though, “sometimes new traditions could be readily grafted on old ones, sometimes they could be devised by borrowing from the well-supplied warehouses of official ritual, symbolism and moral exhortation.”<sup>80</sup> According to Huyse, “The specificity of . . . [approaches] is the use of ritualistic ingredients.”<sup>81</sup> It is clear that communities need to capitalize on those shared understandings and cultural mores that do exist: “Those who participated in the [truth commissions in Uganda and Haiti, for example,] felt uneasy about coming forward, as experience had taught the victims of past crimes to distrust such ‘official’ bodies,” which had little or no cultural significance.<sup>82</sup>

Putting in place an “acceptable cross-cultural synthesis of [any] reconciliation model,” then, seems a possibility.<sup>83</sup> Steven Ratuva claims that “these same principles can be re-designed and used as a basis for conflict resolution at the national level.” He argues that the traditional indigenous Fijian model, for example, has a number of strengths, including its malleability, depending on the circumstances in which it is constituted; its traditional use in communal conflict resolution; and its utility in transforming relationships. In the Fijian case, therefore, Ratuva argues that there is good reason to consider using “tried and true” practices—or at least those practices that have some resemblance to those traditions that people will understand.<sup>84</sup>

Ratuva suggests four practical measures for consideration, which might easily be applied when considering how to build a synthetic practice of justice and acknowledgement: First, he recommends that the customary practices of each of the two or more ethnic groups in question be examined. Then, each of the groups needs to be persuaded to see each other’s practices as having value. “This,” he says, “is to ensure a cross-cultural synthesis of peace-building mechanisms as a way of providing assurance and a sense of ‘ownership’ for different ethnic groups. The . . . model should be ‘negotiated’ rather than imposed in order for it to work in such a context.” Ratuva is clear that applying such principles cross culturally will be difficult, yet he argues that it is possible and holds clear promise. Second, he maintains that the process is meant to apply only to mediation between groups—not individuals—and further contends that the synthetic approach could be used at any level of society, from local and grassroots to the regional level. Third, Ratuva believes that the model could prove useful in transforming relationships around questions of legitimacy, institutionalized conflict, and cultural discourse. Fourth, he states that the “model is largely for addressing fractured relationships and may be less effective in dealing with the deeper roots of some problems such as socio-

economic distribution. In this case, the . . . model could be used as a supplementary process to complement redistributive strategies such as affirmative action.”<sup>85</sup>

Some precedent exists for this kind of synthesis: “Even at the national level, attempts have been made in some countries to entrench ‘traditional’ ways.”<sup>86</sup> For example, the International Criminal Division (formerly the War Crimes Division) of the High Court of Uganda, through its Justice, Law, and Order Sector Transitional Justice Working Group, has been trying to determine the modalities of the inclusion of customary practices of justice and acknowledgement within the division and elsewhere.<sup>87</sup> That is, customary practices might soon be employed within the formalized Western criminal justice system—a distinct hybridity that has not been seen before.

### Problems to Be Addressed

Still, concerns are often raised about the synthetic production of customary practices of acknowledgement and justice between groups—and about the use of anything resembling “customary” practices at all. Three of these are discussed below.

#### *Codification*

A concern about codification arises, particularly in regard to creation of synthetic practices, because a great many modalities must be worked out. Further, there may well be discrepancies in understanding between those in different ethnic groups about meaning and requirement, which would not necessarily exist within ethnic groups. Many argue that their malleability makes customary practices so valuable.<sup>88</sup> As noted above, Osaghae considers the ability of customary practices to change and to be “socio-culturally responsive” a cross-cutting characteristic of traditional practices.<sup>89</sup> Jean Zorn and Jennifer Corrin Care note that “a codification freezes rules as they were at the moment they were written, and they lose the essence of custom, which is that it is unwritten and changes all the time, as the culture of which it is an expression changes or simply to accommodate the needs of the parties. . . . Custom exists as behaviour. Reduced to a written rule of law, it becomes something other than what it was.”<sup>90</sup>

The challenge, of course, is that when things aren’t written down, meaning and/or procedure may become clouded over time. Although that might be acceptable within a particular ethnic group, where there is to a large extent a common understanding, this is not always the case in between-group situations. Such a difficulty must be seriously considered before embarking on a new program of “invented” customary practice.

### *Authenticity*

Scholars and practitioners of customary practices of acknowledgement and justice often raise the question of authenticity: “It is clear that African traditional conflict management techniques depend to a large extent on the existence of a community of relationships and values to which they can refer and that provide the context for their operations. . . . It has often been noted . . . that African traditional methods essentially focused on intracommunity conflict and worked because of the support given to them by the community.”<sup>91</sup> Communities with different contextual understandings and values to which they can refer face a conundrum. These may be variations in substance, interpretation, and form. Moreover, even though groups may have difficulty coming together, at least initially, over form and interpretation of core concepts and “substantive” principles, there is generally going to be agreement between groups on what those core concepts are.<sup>92</sup> The latter will provide some common basis of understanding as the discussion then moves into how to interpret those sentiments in a practical way and then how to implement them within the affected communities.

### *Power*

As I have written elsewhere and mentioned briefly, above, customary practices of justice and acknowledgement are vulnerable to the abuse of power. They are sometimes carried out by individuals who, although at first glance, appear to be the justifiable wielders of power, may in fact be abusing this power. Consequently, we need to be very careful to understand the power dynamics at play behind and within these traditional practices of acknowledgement and justice—particularly in situations where practices are not written down and not regulated, even if they are subject to rules like human-rights declarations and so on—and not promote the abuse of power. Mechanisms of justice adopted within larger strategies of transitional justice must be fair. They must be equal. They must be transparent. And they must be universal. Any position or mechanism that abuses power—whether by making an unauthorized appointment or by reaping an undeserved privilege—is illegitimate. These abuses must not be allowed to persist. Further, the privileging of these mechanisms over others within a transitional context is simply wrongheaded.<sup>93</sup>

## Conclusions

The utility of customary practices of acknowledgement and justice within communities has been established elsewhere. Clearly, their outcomes are impor-

tant, and communities trust in and rely on such practices. Nevertheless, little is known about how these same principles might be used in ameliorating difficult relationships between ethnic groups. The consideration of what between-group practices might look like and how and why they should be employed is critical for the “buy-in” of individuals and groups at the local, regional, and state levels—particularly in plural societies where culturally distinct groups have been at odds.

The invention of these practices, however, is slightly more controversial. Can an invented past be regarded as traditional? The answer, even from the perspective of the “invention of tradition” school championed by Terence Ranger, is yes. Hobsbawm states that “the object and characteristic of ‘traditions’ including invented ones, is invariance.”<sup>94</sup> Traditions are relatively more enduring and resistant to change.<sup>95</sup> Ratuva remarks that “mobilizing aspects of local culture as means of addressing conflict is an important dimension” of any practice of conflict resolution, including acknowledgement and justice.<sup>96</sup> This is as true of within-group practices as it is of those employed to ameliorate division between groups.

## Notes

1. See Joanna R. Quinn, *The Politics of Acknowledgement: Truth Commissions in Uganda and Haiti* (Vancouver: University of British Columbia Press, 2010).

2. Joanna R. Quinn, “Tried and True: The Role of Informal Mechanisms in Transitional Justice” (paper presented at the International Society of Political Psychology Annual Meeting, Toronto, 6 July 2005).

3. Mahmood Mamdani, *Citizen and Subject* (Kampala: Fountain Publishers, 1996), 109–10. See also F. D. Lugard, *The Dual Mandate in British Tropical Africa* (London: W. Blackwood and Sons, 1922).

4. British Colonial Office, *Report of the Uganda Relationship Committee* (London: British Colonial Office, 1961).

5. Philip Briggs, *Uganda* (Old Saybrook, CT: Globe Pequot Press, 1998), 22.

6. Government of Uganda, *Constitution of the Republic of Uganda, 1995*, accessed 12 May 2014, [http://www.parliament.go.ug/new/images/stories/constitution/Constitution\\_of\\_Uganda\\_1995.pdf](http://www.parliament.go.ug/new/images/stories/constitution/Constitution_of_Uganda_1995.pdf).

7. The local council courts, formerly known as resistance council courts, “were first introduced in Luweero in 1983 during the struggle for liberation. In 1987 they were legally recognized throughout the country.” See John Mary Waliggo, “The Human Right to Peace for Every Person and Every Society” (paper presented at Public Dialogue, organized by Faculty of Arts, Makerere University, in conjunction with Uganda Human Rights Commission and NORAD, Kampala, Uganda, 4 December 2003), 7, author’s collection; and “Uganda: Constitution, Government & Legislation,” *Jurist*, accessed 30 April 2005, <http://jurist.law.pitt.edu/world/uganda.htm>.

8. Government of Uganda, *Children’s Statute*, 1996.

9. These documents form one part of a five-part agreement signed in June 2007 and February 2008, respectively. Although the agreements were signed, at the time of this writing, the final agreement has not been signed, and both parties have walked away from the talks. See Joanna R. Quinn, “Accountability and Reconciliation: Traditional Mechanisms of Acknowledgement and the Implications of the Juba Peace Process” (paper presented at the conference “Reconstructing Northern Uganda,” held by the Nationalism and Ethnic Conflict Research Group, University of Western Ontario, London, Ontario, 9 April 2008). At the time of this writing, the government of Uganda, through its Justice, Law, and Order Sector Transitional Justice Working Group, is trying to determine the modalities of the inclusion of these practices within the War

Crimes Division of the High Court and elsewhere. Christopher Gashirabake, Ministry of Justice and Constitutional Affairs, interview by the author, Kampala, Uganda, 4 July 2008; and Hon. Justice James Ogoola, principal justice, High Court, and chairman, Transitional Justice Working Group, interview by the author, Kampala, Uganda, 25 September 2008.

10. These practices vary widely and are used in different situations for different reasons. Some are targeted at individuals while others are group oriented. For a more in-depth discussion of the use of traditional mechanisms in Uganda, see Joanna R. Quinn, "What of Reconciliation? Traditional Mechanisms of Acknowledgement in Uganda," in *Reconciliation(s)*, ed. Joanna R. Quinn (Montreal: McGill-Queen's University Press, 2009), forthcoming.

11. Bruno Novelli, *Karimjong Traditional Religion* (Kampala: Comboni Missionaries, 1999), 169–72, 333–40; and Peter Lokeris, minister of state for Karamoja, interview by the author, Kampala, Uganda, 18 November 2004.

12. See Thomas Harlacher et al., *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War* (Kampala: Thomas Harlacher and Caritas Gulu Archdiocese, 2006).

13. For an excellent description of *mato oput*, see Sverker Finnström, *Living with Bad Surroundings: War and Existential Uncertainty in Acholiland in Northern Uganda*, Uppsala Studies in Cultural Anthropology no. 35 (Uppsala: Department of Cultural Anthropology, Uppsala University, 2003), 297–99.

14. Government of Uganda and Lord's Resistance Army/Movement, "Annexure to the Agreement on Accountability and Reconciliation" (Juba: Government of Uganda and Lord's Resistance Army/Movement, 19 February 2008), Art. 21.1.

15. Joseph Ndrua, "A Christian Study of the African Concept of Authority and the Administration of Justice among the Lugbari of North Western Uganda" (MA thesis, Catholic Higher Institute of Eastern Africa, 1988), 42–56.

16. Sabiny man studying at Makerere University, confidential interview by the author, Kampala, Uganda, 7 November 2004; and Waliggo, "Human Right to Peace," 9.

17. Mere Momoivalu, "A Separate System of Justice," *Review*, September 1994, 40.

18. Ratu Filimone Ralogaivau, "A Primer on Fiji's Great Council of Chiefs," *Fiji Times*, 27 April 2006.

19. Christopher T. Pryde, solicitor general of Fiji, correspondence with the author, 8 February 2011.

20. Hon. Justice Anthony Gates, chief justice of Fiji, interview by the author, Suva, 29 June 2010.

21. Alipate Qetaki, general manager, Native Land Trust Board, interview by the author, Suva, 21 June 2010.

22. For an excellent description of many of these customs, see M. Toro, "Disputes in a Fijian Village Setting" (MA thesis, University of the South Pacific, 1973). See also Andrew Arno, "Ritual of Reconciliation and Village Conflict Management in Fiji," *Oceania* 47, no. 1 (1976): 49.

23. Viviane Cretton, "Cakobau's Sisters: Status, Gender and Politics in Fiji," Working Paper no. 11 (Canberra: RSPAS, Australian National University / University of Lausanne, Switzerland, Gender Relations Centre, 2004), 2. See also Joe Salabogi, interview by the author, Suva, 28 June 2010.

24. Salabogi, interview. See also Steven Ratuva, "Re-inventing the Cultural Wheel: Re-conceptualizing Restorative Justice and Peace Building in Ethnically Divided Fiji," in *A Kind of Mending: Restorative Justice in the Pacific Islands*, ed. Sinclair Dinnen with Anita Jowitt and Tess Newton Cain (Canberra: Pandanus Books, 2003), 155–60.

25. Naomi Matanitobua Raiki, former chief magistrate, interview by the author, Nausori, 28 June 2010.

26. Robert M. Hayden, "Turn-Taking, Overlap, and the Task at Hand: Ordering Speaking Turns in Legal Settings," *American Ethnologist* 14, no. 2 (May 1987): 256.

27. Adrian C. Mayer, "Factions in Indian and Overseas Indian Societies, Part 4: Factions in Fiji Indian Rural Settlements," *British Journal of Sociology* 8, no. 4 (December 1957): 319. See also Mayer, "Associations in Fiji Indian Rural Society," *American Anthropologist* 58, no. 1 (February 1956): 104.

28. Mayer, "Associations," 104.

29. *Ibid.*

30. Hayden, "Turn-Taking," 261.

31. Mayer, "Factions," 319.
32. See Isireli T. Fa, "Customary Land Rights over Native Land in Fiji: An Analysis of the Legal Status of Customary Land Rights in the Fijian Courts" (LLM thesis, University of Auckland, 1989).
33. Momoivalu, "Separate System of Justice," 40–43.
34. Tui Clary, doctoral candidate, Otago University, interview by the author, Suva, 24 June 2010.
35. Joseph Camillo, executive director, Ecumenical Centre for Research, Education and Advocacy, interview by the author, Suva, 29 June 2010.
36. Salote Kaimacuata, former judge, interview by the author, Suva, 25 June 2010.
37. Gates, interview.
38. Jennifer Corrin Care, "The Status of Customary Law in Fiji Islands after the Constitutional Amendment Act 1997," *Journal of South Pacific Law* 4, no. 1 (2000): 1, <http://www.usp.ac.fj/index.php?id=13193>.
39. *Constitution of the Sovereign Democratic: 1990 Republic of Fiji*, [11], accessed 6 June 2014, [http://confinder.richmond.edu/admin/docs/Fiji\\_1990.PDF](http://confinder.richmond.edu/admin/docs/Fiji_1990.PDF).
40. *Fiji Constitution* (Effective since: 28 July 1998), accessed 6 June 2014, [http://www.servat.unibe.ch/icl/fj00000\\_.html](http://www.servat.unibe.ch/icl/fj00000_.html).
41. Care, "Status of Customary Law," 1.
42. There is some debate about what constitutes codification. See Joanna R. Quinn, "Problematizing the Formal/Informal Distinction in Customary Justice: Mechanisms of Acknowledgement in Uganda," *Uganda Living Law Journal* 7, no. 2 (Fall 2009): 3, forthcoming; and Eric Hobsbawm, "Introduction: Inventing Traditions," in *The Invention of Tradition*, ed. Eric Hobsbawm and Terrence Ranger (Cambridge, UK: Cambridge University Press, 1988), 1. See also Jean G. Zorn and Jennifer Corrin Care, *Proving Customary Law in the Common Law Courts of the South Pacific*, Occasional Paper no. 2 (London: British Institute of International and Comparative Law, 2002), 67.
43. Eghosa E. Osaghae, "Applying Traditional Methods to Modern Conflicts: Possibilities and Limits," in *Traditional Cures for Modern Conflicts: African Conflict "Medicine"*, ed. I. William Zartman (Boulder, CO: Lynne Rienner Publishers, 2000), 210.
44. See Joanna R. Quinn, "Power to the People? Abuses of Power in Traditional Practices of Acknowledgement in Uganda" (panel, Disputing Ideas in Transitional Justice, Canadian Political Science Association, Montreal, Quebec, 1 June 2010). See also Joanna R. Quinn (invited presenter), "Spoiled Rotten? Outsiders and the Use of Traditional Mechanisms in Uganda" (panel, Transitional Justice Praxis International Studies Association, New Orleans, LA, 17 February 2010).
45. Osaghae, "Applying Traditional Methods," 209–13.
46. Penal Reform International, 2002, as cited in Luc Huyse, "Conclusions and Recommendations," in *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, ed. Luc Huyse and Mark Salter (Stockholm: International Institute for Democracy and Electoral Assistance [IDEA], 2008), 181–82.
47. See Quinn, "Power to the People?"
48. See Quinn, "Spoiled Rotten?"
49. See Joanna R. Quinn, "Here, Not There: Theorizing about Why Traditional Mechanisms Work in Some Communities, Not Others" (panel, Lost in Transition? Justice and Traditional Practises in Post-Conflict Societies International Studies Association, New York, 15 February 2009).
50. See Joanna R. Quinn, "Gender and Customary Mechanisms in Uganda," in *Confronting Gender Justice: Women's Lives, Human Rights*, ed. Debra Bergoffen et al. (New York: Routledge, 2010), 482–519.
51. Finnström, *Living with Bad Surroundings*, 252.
52. Dani Wadada Nabudere, James Otto, and Jimmy Okot, *The Hidden War: The Forgotten People; War in Acholiland and Its Ramifications for Peace and Security in Uganda* (Kampala: Human Rights & Peace Centre [HURIPREC], Liu Institute for Global Issues, Human Rights Watch, 2003), 155, <http://allafrica.com/download/resource/main/main/idadtcs/00010178:affb3b76075dd71c20d0b054b065bfff9.pdf>.
53. Harlacher et al., *Traditional Ways of Coping*, 91.
54. Ladit Arweny, personal account as cited in Finnström, *Living with Bad Surroundings*, 299.

55. Iteso focus group, conducted by the author, Kampala, Uganda, 31 August 2006.
56. "Key Activities," Teso Initiative for Peace, accessed 15 January 2012, <http://tipsoroti.wordpress.com/projects/>.
57. Ibid.
58. The term *superimposed* is defined as "added or imposed without integration."
59. "Revitalizing Tradition to Promote Reconciliation: The Gacaca Courts in Rwanda," in *People Building Peace II: Successful Stories of Civil Society*, ed. Paul van Tongeren et al. (Boulder, CO: Lynne Rienner, 2005), 466–71.
60. Peter Uvin, "The *Gacaca* Tribunals in Rwanda," in *Reconciliation after Violent Conflict: A Handbook*, ed. David Bloomfield, Teresa Barnes, and Luc Huyse (Stockholm: International IDEA, 2003), 116–17.
61. Max Weber was one of the early proponents of the theory of social change. See Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich, trans. Ephraim Fischoff et al. (New York: Bedminster Press, 1968).
62. Leslie Marmon Silko, *Yellow Woman and a Beauty of the Spirit: Essays on Native American Life Today* (New York: Simon and Schuster, 1996), 200.
63. Margaret L. Andersen and Howard F. Taylor, *Sociology: Understanding a Diverse Society* (Belmont, CA: Thomson Wadsworth, 2005), 618.
64. Rupert Ross, *Returning to the Teachings* (Toronto: Penguin, 1996); and Philmer Bluehouse and James Zion, "The Navajo Justice and Peace Ceremony," in *Mediation Quarterly* 10, no. 4 (Summer 1993): 328.
65. Stephen Brown, "Forging National Unity in Rwanda: Government Strategies and Grassroots Responses" (paper presented at "Reconciliation," a conference held by the Nationalism and Ethnic Conflict Research Centre at the University of Western Ontario, 14–15 May 2005). See also Priscilla Hayner, *Unspeakable Truths* (New York: Routledge, 2001), 192.
66. I. William Zartman, "Introduction: African Traditional Conflict 'Medicine,'" in Zartman, *Traditional Cures for Modern Conflicts*, 7.
67. Stephanie Lawson distinguishes between plural societies, those "with immutable systemic dissociation between culturally distinct groups that are themselves homogeneous," and pluralistic states, like the United States. She says that "plural states lack a fundamental 'social will' to hold it together." Lawson, *Tradition versus Democracy in the South Pacific: Fiji, Tonga and Western Samoa* (Cambridge, UK: Cambridge University Press, 1996), 42.
68. Stéphanie, Anne-gaëlle Vieille, "Rethinking Justice in Transitional Justice: An Examination of the Māori Conception and Customary Mechanism of Justice" (PhD diss., University of Western Ontario, December 2011), chap. 4.
69. Luc Huyse, "Introduction: Tradition-Based Approaches in Peacemaking, Transitional Justice and Reconciliation Policies," in Huyse and Salter, *Traditional Justice and Reconciliation*, 20–21.
70. Osaghae, "Applying Traditional Methods," 201–2.
71. Zorn and Care, *Proving Customary Law*, 26.
72. Lawson, *Tradition versus Democracy*, 42.
73. John Braithewaite, "Traditional Justice" (paper prepared for the Project on Restorative Justice, Reconciliation, and Peacebuilding, University of Notre Dame, and presented at the International Symposium on Restorative Justice, Reconciliation, and Peacebuilding, New York University School of Law, 11 November 2011), 8.
74. Caitlin Donnelly and Joanne Hughes, "Contact and Culture: Mechanisms of Reconciliation in Schools in Northern Ireland and Israel," in *Reconciliation(s): Transitional Justice in Postconflict Societies*, ed. Joanna R. Quinn (Montreal: McGill-Queen's University Press, May 2009), 150–53.
75. Sister Specioza Kabahoma, Justice and Peace Commission, Uganda Catholic Secretariat, interview by the author, Nsambya, 10 November 2004.
76. Joanna R. Quinn, "'The Thing behind the Thing': The Role and Influence of Religious Leaders on the Use of Traditional Practices of Acknowledgement in Uganda," *Review of Faith and International Affairs* 8, no. 1 (Spring 2010): 6.

77. Braithewaite, "Traditional Justice," 8.
78. Hobsbawm, "Introduction: Inventing Traditions," 3, 4–5, 9.
79. Braithewaite, "Traditional Justice," 5. See also Harry Blagg, "A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia," *British Journal of Criminology* 37 (1997): 481–501.
80. Hobsbawm, "Introduction: Inventing Traditions," 6.
81. Huuse, "Introduction," 14.
82. Quinn, *Politics of Acknowledgement*, 146.
83. Frank Hoare, "Community Trauma Healing in Fiji," undated manuscript, the author's collection, 17–18. See also Hoare, "Building Inclusive Community in a Divided Society: From Separate Ethnic Inculcation to an Intercultural Dialogue of Faith in the Multi-Ethnic Context of the Catholic Church in Fiji" (DMin diss., Catholic Theological Union at Chicago, 2008).
84. Ratuva, "Re-inventing the Cultural Wheel," 160–61.
85. Ibid.
86. Osaghae, "Applying Traditional Methods," 203.
87. Gashirabake, interview; and Ogoola, interview.
88. See, for example, Jonathan Aleck, "Beyond Recognition: Contemporary Jurisprudence in the Pacific Islands and the Common Law Tradition" (paper presented to the South Pacific Legal Studies Group at the 46th Annual Conference of the Australasian Law Teachers' Association, Perth, Australia, 13 July 1991), 6.
89. Osaghae, "Applying Traditional Methods," 209.
90. Zorn and Care, *Proving Customary Law*, 47, 67.
91. I. William Zartman, "Conclusions: Changes in the New Order and the Place for the Old," in Zartman, *Traditional Cures for Modern Conflicts*, 224, 225.
92. See Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Ithaca, NY: Cornell University Press, 2003), 93–98. Donnelly applies his discussion of concept, interpretation, and implementation to questions of cultural relativism within a broader discussion of universal human rights. I argue that this same framework could be appropriated for the discussion of finding a common understanding of customary practice between groups.
93. See Quinn, "Power to the People?"; and Quinn, "Spoiled Rotten?"
94. Hobsbawm, "Introduction: Inventing Tradition," 2.
95. Osaghae, "Applying Traditional Methods," 204.
96. Ratuva, "Re-inventing the Cultural Wheel," 161.