

**Customary Justice and the Rule of Law in the Eastern DRC: A Case Study of  
Baraza**

by

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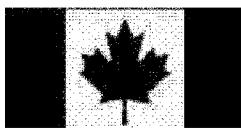
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## **ABSTRACT**

My Master's thesis is based on three months of field research in South Kivu, Democratic Republic of Congo where I studied a form of customary justice called baraza. My research goal was to explore if and how baraza contributes to building the rule of law. Typically, the rule of law programming is technocratic, top-down, state-centric and based on Western political and philosophical traditions.

I advance a more contextualized understanding that acknowledges the importance of history, politics, culture and customary forms of justice. My alternative definition—‘peace-based rule of law’ (PBROL)—is founded in structural and cultural peace, otherwise known as positive peace. Following from its role in contributing to positive peace, PBROL is also defined by the following characteristics: (1) an anti-colonial ethos that precludes the external imposition of one size fits all programming, (2) legal pluralism, including the recognition of different arbiters of justice, and (3) social responsiveness.

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## Table of Contents

<i>Abstract</i> .....	ii
<i>Acknowledgements</i> .....	iii
<i>Table of Contents</i> .....	iv
<b>Chapter One: Introduction</b> .....	1
1.1 Introducing the Problem.....	1
1.1.2 Research Questions .....	3
1.1.3 Contextualizing the Research Questions .....	4
1.2 Project Summary .....	7
1.2.1 Introducing the Conceptual Framework.....	7
1.2.2 Introducing the Research Methods .....	7
1.3 Chapter Breakdown.....	8
<b>Chapter Two: Context and Background</b> .....	12
2.1 Legal Systems in the DRC: Historical Context.....	12
2.2 Security Sector Reform and Rule of Law Programming in the DRC .....	14
2.3 The Case of Baraza .....	19
<b>Chapter Three: Conceptual Framework</b> .....	23
3.1 The Rule of Law Orthodoxy.....	24
3.1.1 The Liberal Peace Thesis.....	24
3.1.2 Democracy and the Rule of Law Orthodoxy.....	27
3.1.3 Economic Development and the Rule of Law Orthodoxy.....	28
3.2 Critiques of the Rule of Law Orthodoxy.....	28
3.2.1 Neo-Imperialism and the Rule of Law Orthodoxy.....	29

3.2.2 Critique of Top-Down, State-Centric Rule of Law .....	32
3.2.3 Critique of Rule of Law as Vehicle for Economic Development.....	33
3.3. Alternative Visions of the Rule of Law.....	34
3.3.1 Ends-Based Rule of Law.....	35
3.3.2 Context, Culture and the Rule of Law.....	36
3.4 Peace-Based Rule of Law.....	37
3.5 Customary Justice.....	38
3.5.1 Theorizing Tradition.....	43
3.5.2 Tradition: An Invented Reality?.....	43
3.6 Conclusion: Customary Justice and the Rule of Law.....	47
<b>Chapter Four: Methodology.....</b>	<b>49</b>
4.1 Methods.....	49
4.1.1 The Case Study.....	50
4.1.2 Participant Observation.....	56
4.1.3 Interviews.....	58
4.2 Fieldwork in the Eastern DRC.....	60
4.2.1 Ethical Considerations.....	60
4.3. Data Sources and Analysis.....	67
4.3.1 Limitations.....	69
4.3.2 Positionality and Reflexivity.....	70
4.4 Conclusion.....	74
<b>Chapter Five: Peace-Based Rule of Law and Baraza .....</b>	<b>76</b>
5.1 Peace-Based Rule of Law.....	76

5.2 Exploring PBROL through an Analysis of Baraza.....	81
5.2.1 Anti-Colonial Ethos.....	82
a. Local History.....	82
b. Local Conceptualization of Justice-Related Norms.....	83
c. Non-Imposition.....	87
5.2.2 Legal Pluralism.....	87
5.2.3 Dynamism: Social Responsiveness.....	90
5.2.4 Positive Peace: Cultural and Structural Peace.....	91
a. Structural Peace: The Organisation of and Participation in Baraza.....	91
b. Cultural Peace: Rebuilding Trust and Community through Reconciliation.....	93
5.2.5 Customary Justice and Violence.....	96
5.3 Problematic Concepts.....	98
5.3.1 Trust, Choice and Reconciliation: Baraza or State Justice? .....	98
5.4 Conclusion.....	104
<b>Chapter Six: Women’s Rights, Gender Equality and Baraza.....</b>	<b>106</b>
6.1 Protests in Uvira: the Reality of Insecurity and Inequality.....	107
6.2 Women, Gender Equality and the Law: The Legal Context of the DRC.....	109
6.2.1 State Law and Women’s Rights.....	109
6.2.2 Ambiguous Laws .....	110
6.3 The rule of Law Orthodoxy and Sexual Violence.....	113
6.3.1 Prioritizing Sexual Violence.....	113
6.3.2 The International Community’s Response to Sexual Violence.....	115

6.4 Baraza, Gender Justice and Patriarchy: The Messy Reality of Changing Norms.....	117
6.4.1 Baraza—Transforming Gender Norms?.....	119
6.5 Baraza: Witchcraft,Dowries and Domestic Violence.....	122
6.5.1 Domestic Abuse.....	123
6.5.2 Polygamous Arrangements.....	125
6.5.3 Witchcraft and Infertility.....	126
6.5.4 Dowry Payments.....	128
6.6 Conclusion.....	129
<b>Chapter Seven: Conclusions and Recommendations.....</b>	<b>131</b>
7.1 Recommendations and Areas for Future Research.....	135
<i>Appendices .....</i>	140
<i>Appendix I: Letter Confirming Ethics Clearance .....</i>	140
<i>Appendix II: Interview Questions .....</i>	141
<i>Appendix III: Table of Interviewees' Conflicts .....</i>	143
<i>Bibliography .....</i>	146

## **Chapter: 1 Introduction**

### **1.1 Introducing the Problem**

Peacebuilding and post-conflict reconstruction constitute significant fields of study within international relations theory and practice. Although not limited to peacebuilding or post-conflict reconstruction, the rule of law has emerged as paramount to these fields (Newman, Paris and Richmond, 2009). Building the rule of law in post-conflict societies has been deemed necessary for promoting everything from development, to democracy, to market economies (Carothers, 2006, ch.1). Consequently, international donors and governments have invested billions of dollars in rule of law programming in post-conflict and developing countries all over the globe (Brooks, 2003). Inherent in most rule of law programming, however, are deeply held assumptions about what a ‘modern’ society should look like and the normative and institutional framework necessary for implementing the rule of law to achieve this desired outcome.

Despite philosophical contestation over the meaning of the ‘rule of law,’<sup>1</sup> the common understanding of this concept is: the government rules through law and is subjected to those same laws (Tamanaha, 2001). However, the rule of law has been infused with various meanings by both orthodox and critical rule of law scholars; therefore, the philosophical definition I cite above has largely not been taken up in current rule of law debates, particularly in the peacebuilding context. A definition more relevant to current rule of law discussions is: a governance system that is based on laws. I focus on the justice aspect of this rather broad definition. Mani (1998) builds on this basic definition by recognizing that the goal of the rule of law in post-conflict situations is to “regenerate a culture of lawfulness and justice in order to avert a relapse into violence” (p. 17). Typically, justice and the rule of law are associated with

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<sup>1</sup> See, for example, Tamanaha (2001).

state legal systems, but I include other systems of law, following the more expansive conception of law proposed by legal pluralists.<sup>2</sup>

Petersen (2010) argues that rule of law programming in post-conflict situations has taken on a distinctly liberal form and has come to be associated with a set of characteristics for which Golub (2006) employs the term ‘rule of law orthodoxy.’ Golub (2006) characterizes the rule of law orthodoxy as a top-down, state-centric, punitive justice model and Kleinfeld (2006) adds that it is based in Western understandings of justice and how it should be institutionalized. Although the orthodoxy has been the dominant rule of law paradigm, critical scholars and programmers have conceptualized the rule of law differently. Through my research, I seek to contribute to debates between the rule of law orthodoxy and other interpretations of the rule of law. I will explore some of the problems with the rule of law orthodoxy which have been pointed to by critical scholars and develop a new understanding of the rule of law: ‘peace-based rule of law’ (PBROL).

I employ the term ‘peace-based rule of law’ to distinguish my conceptualization of the rule of law from the orthodoxy and other conceptualizations. In rule of law theory and practice there is a key distinction between formal and substantive conceptualizations. “Formal theories focus on the proper form and source of legality, while substantive theories also include requirements about the content of the law (usually that it must comport with justice or moral principle)” (Tamanaha, 2004, p.92). Peace-based rule of law is a substantive conceptualization of the rule of law. Through my conceptualization of PBROL, I explicitly recognize the goal of rule of law programming in post-conflict societies: dealing with conflicts, disputes and transgressions in such a manner that the country does not resume warfare or violent conflict. Laws conforming to PBROL are founded on local understandings of justice and include the

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<sup>2</sup> See, for example, Tamanaha (2008) and Merry (1998).

structures and procedures used to deal with disputes, conflicts and transgressions (hereafter referred to as conflicts). In addition, PBROL focuses on creating (when not already existent) or reinforcing norms, structures and procedures that use peaceful means to address conflicts and promote positive peace. This conceptualization of the rule of law requires one to accept that the specifics of the rule of law programming will necessarily vary by context, must be defined by those to which it applies, cannot be imposed on populations from external forces, but must also rely on peaceful means for dealing with conflicts. This concept is strongly influenced by anti-imperialist and anti-colonial discourse and it views the hegemony of the rule of law orthodoxy, a Western-based justice model, as problematic in contexts that do not share the historical and philosophical roots in which the orthodoxy is founded. I will further unpack PBROL in the Conceptual Framework and Peace-Based Rule of Law and Baraza chapters.

### *1.1.2 Research Questions*

Stemming from an interest in this relatively new area of study which considers the role of customary justice in building the rule of law, specifically in post-conflict or transitioning societies, I developed research questions that can add to the existing research. My research questions are: 1) Can customary justice contribute to building peace-based rule of law? 2) As a customary justice mechanism in the eastern DRC, does baraza play a role in building peace-based rule of law in the communities where it operates? What is its role? In other words, how can it be understood to contribute to or detract from peace-based rule of law? A subsidiary purpose of my research is to examine how baraza, as a customary justice mechanism, fits into broader debates between notions of formal and customary justice. My examination of these questions will be founded on my research of baraza, a locally-based example of a customary justice mechanism.

### *1.1.3 Contextualizing the Research Questions*

To situate PBROL in rule of law theory and differentiate it from the orthodoxy, I explore the orthodoxy and some of its weaknesses. The underlying problem of the rule of law orthodoxy is that it is based on a Western conception of law that understands law to be value-neutral, rather than explicitly recognizing that law is political (Petersen, 2010), as is rule of law programming (Chandler, 2006). The political aspect of the rule of law orthodoxy is clear: “[...]rule of law programming has adopted a distinct and narrowly conceived liberal character, forming a foundation of current liberal peacebuilding interventions” (Petersen, 2010, p. S15). However, this underlying ideology is rarely explicitly recognized, resulting in the propagation of the idea that the rule of law is value-neutral and universal. In the Conceptual Framework I will further explore the rule of law orthodoxy’s foundation in liberalism, particularly the liberal peace thesis which guides orthodox rule of law programming in post-conflict and transitioning contexts.

Furthermore, Chandler (2006) argues that rule of law programming has been largely ineffective, even being labelled ‘irrational and arbitrary.’ Researchers and practitioners have argued that the problem is not the rule of law, *per se*, but the application of the rule of law orthodoxy regardless of context (Upham, 2006; Golub, 2006). The problems that I will consider in this thesis are: the imposition of the rule of law from above; the state-centric nature of rule of law programming; rule of law programming as overly technocratic; and the decontextualized nature of rule of law programming. ‘Decontextualized’ refers to the lack of regard for local history, politics, culture or economics when implementing rule of law programming. Instead, (re)constructing formal justice systems in the image of Western models remains the dominant strategy for building the rule of law (Isser, ‘Conclusion,’ 2011); a strategy that has been largely unsuccessful in non-Western contexts.

Recognizing the above outlined problems with the rule of law orthodoxy, there has been a shift, by some, to try to understand how rule of law programming can be modified to make it more relevant in the eyes of the populations that it affects. Some have advocated incorporating customary justice into rule of law programming in the hopes of making it contextually meaningful (Isser, ‘Conclusion,’ 2011). Customary justice encompasses a vast array of justice systems, making it hard to define. A working definition for this thesis is ‘traditionally-based means of addressing conflicts, disputes, and transgressions.’ ‘Tradition’ alludes to practices and beliefs that are dynamic, political and constructed, but have a history in the area where they are practiced. Isser (‘Introduction,’ 2011) points to some common characteristics of customary justice; these informed my understanding of this concept. Isser characterizes customary justice systems as having “their origins in long-standing localized social structures, which greatly inform their notions of justice” and “they are contested spaces subject to continuous influence and change” (p.7). This definition touches on the local and historical nature of these systems, but also acknowledges that they are not static mechanisms existing in isolation from broader power struggles.

Theorizing customary justice into the rule of law has been difficult, not least because of the localized and diverse nature of customary justice systems. Incorporating customary justice mechanisms into rule of law programming has been resisted for a variety of reasons. One major reason for resistance is the poor reputation customary justice systems have for reinforcing inequality. However, progress has been made in theorizing customary justice and the rule of law and to shed light on these practices to demystify them, mostly through case studies of particular customary justice mechanisms and their roles in building the rule of law (Isser, ‘Introduction,’ 2011). This thesis seeks to add to this relatively new area of study, which examines customary

justice and the rule of law. This research is a case study of baraza, a customary justice mechanism that is being revitalized in the eastern Democratic Republic of Congo (DRC) by a grassroots organization, Fondation Chirezi (hereafter, Chirezi). I will use this case study to exemplify some of the tensions between the rule of law orthodoxy and more critical understandings of the rule of law.

Baraza is a dispute resolution mechanism based on local justice practices that have a history in South Kivu. Although I will not be able to determine *causally* whether, or *how much*, customary justice builds peace-based rule of law in the eastern DRC, I have set out to examine whether and how it can *contribute*, using baraza as an example. George and Bennett (2005) argue that “When a complex explanation identifies a number of contributing causes, it may be difficult, even with the help of counterfactual analysis, to offer a convincing argument that one condition or another was necessary to the outcome” (p.27). This is why, in complex cases, George and Bennett (2005) advocate for identifying variables as favouring an outcome, or being a contributing cause, not a necessary or sufficient condition. The complexity of post-conflict situations and peace-based rule of law is evident, meaning that there will be a wide range of factors that could contribute to or hamper building peace-based rule of law. I only aim to identify whether it is reasonable to argue that baraza, as an example of a customary justice mechanism, does contribute but, more importantly, *why* or *how* it does so. Exploring the types of conflict mediated at baraza, why participants went to baraza and the existing literature on the rule of law and customary justice will help theorize the *why* or *how*.

## **1.2 Project Summary**

### *1.2.1 Introducing the Conceptual Framework*

To execute this research in an academic manner, important decisions had to be made about how I would frame my research. I contemplated the lens through which I would undertake my research and analyze the data collected. My conceptual framework is composed of a synthesis between the rule of law discourse, theory of ‘tradition’ and the under-theorized concept of customary justice. I critically examined the rule of law concept and, for my thesis, discarded the rule of law orthodoxy in favour of my own understanding of the rule of law: peace-based rule of law (described above).

Customary justice is highly localized. It is shaped by the realities of the population that it is assisting, such as the culture, politics, economics, social norms and expectations and justice traditions. The reason that theorising of tradition was incorporated into the conceptual framework was to clarify what is meant by justice traditions. Tradition often connotes static, archaic practices particular to a certain locale. This is not the way tradition is understood in my research nor how I apply the concept to customary justice. In my research, tradition is theorized as constructed, dynamic, reflexive and locally relevant. That is not to suggest that ‘tradition’ is a simple concept; on the contrary, it is extremely complex and discussed at greater lengths in the Conceptual Framework Chapter. Reflecting my conceptualization of tradition, customary justice is also seen as flexible and dynamic. It tends to be based on local justice traditions, but does not necessarily maintain the exact procedures and norms with which it is associated.

### *1.3.2 Introducing the Research Methods*

The outlined conceptual framework is what guided my understanding of the data I collected; the Research Methods chapter details how I collected my data and why I chose

particular methods. The case study of baraza can be considered a building block, which contributes to the literature attempting to theorize customary justice and its role in building the rule of law. Participant observation and interviews were the primary methods used to collect data. I observed baraza proceedings in Uvira, Kiliba and Makobola in South Kivu, DRC. I conducted interviews with 30 baraza disputants. I also collected records detailing baraza proceedings that were kept by Chirezi.

Important to my methods was ensuring that my research was conducted ethically. I included multiple safeguards to prevent victims from being re-traumatized or re-victimized, including confidentiality, only interviewing individuals who had already made their dispute public through baraza, keeping participant names and recorded interviews in a locked location and ensuring that there were counselling and debriefing services available. I worked with two translators, changing when it became clear that the first translator was not a right fit for this project. I also consider issues of power throughout the Research Methods chapter.

### **1.3 Chapter Breakdown**

The breakdown of the chapters is as follows: The second chapter is Context and Background. This chapter begins with a brief history of the DRC to illustrate colonial violence and to point out the colonial-indigenous interaction that influenced the ‘invention’ of legal traditions in the region. Aspects of the present situation are included only insofar as they are relevant to this thesis, notably rule of law programming in the eastern Democratic Republic of the Congo (EDRC) and a detailed description of baraza. Attention is paid to the type of rule of law programming advanced by the international community, namely orthodox rule of law under the rubric of security sector reform. A focus on the UN’s programming in the EDRC is included

as the UN ultimately reflects international norms and standards. The procedures and the structure of baraza is also explored in this chapter.

The third chapter is the Conceptual Framework. The Conceptual Framework chapter not only articulates the lens through which I interpret and analyze the data collected, it can also be understood as a concise literature review of the concepts that are the backbone of my conceptual framework: the rule of law and PBROL, tradition and customary justice. This chapter begins with a discussion of the rule of law. The rule of law orthodoxy is critically analyzed and determined to be problematic. Alternatives to the rule of law orthodoxy are also considered and a more nuanced and contextually-based understanding of the rule of law that I propose, peace-based rule of law, is developed for use in this thesis. Following the discussion of the rule of law is a consideration of the concept ‘tradition.’ In this research, tradition is understood as constructed, fluid, dynamic and culturally-based and, thus, contextually relevant. This understanding of tradition enhances the conceptualization of customary justice, which is often based on local traditions which are incorrectly presumed to be archaic and static. Tradition, as described above, is used to support the claim that customary justice is neither static, nor archaic, but is based on locally (with external interactions) constructed practices.

Chapter four is Research Methods. This chapter outlines and justifies the methods chosen for this research. A critical examination of case study research is included and the choice to conduct a single case study is explained. Data was gathered through interviews with past and current disputants. In addition to interviews, I observed baraza proceedings, ‘official’ and ‘unofficial’ meetings between baraza mediators, and Chirezi activities generally. Chirezi also provided me with written documents detailing baraza cases and their outcomes. After reviewing the methods undertaken, the chapter examines ethical concerns of the fieldwork for this project.

This section of the chapter explores confidentiality, retraumatization, data storage, translators, power dynamics and positionality.

The fifth chapter is a substantive exploration of PBROL using baraza as a case study. I begin by outlining the characteristics and goals of PBROL. Positive peace is the over-arching concept that guides my conceptualization of PBROL; the other characteristics stem from positive peace. The defining characteristics of PBROL are: an anti-colonial ethos, including a local history, locally defined justice-related concepts and non-imposition; legal pluralism, the co-existence of different systems of law; and dynamism, the ability to respond to social change.

The sixth chapter explores justice, gender equality and women's rights in the EDRC. This chapter begins by examining the legal situation as it relates to women's rights and gender equality. Components of the Constitution are considered, as well as components of the Family Code and the Penal code. Following an exploration of national laws, the efforts of the international community to promote justice, women's right and the rule of law are explored, concluding that there is an overwhelming focus on trials for sexual violence, especially perpetrated by combatants. The second half of this chapter analyzes the hotly debated topic of women's rights and customary justice. Due to the misconception of customary justice as archaic, regressive and static, some scholars have argued that customary justice systems perpetuate gender inequalities and that this phenomenon is inherent to these systems. Attention is thus directed to conflicts involving women that were mediated through baraza, particularly those that the state legal system does not regulate, or regulates in a discriminatory manner. The chapter concludes with a more nuanced understanding of the tension between customary justice and women's rights.

The final chapter is the Conclusion. In this chapter I review my findings and consider how customary justice may contribute to building a rule of law culture. I also make recommendations for engaging with customary justice in the eastern DRC. This component considers the techniques for engaging with customary justice mechanisms and the most practical method for doing so in the eastern DRC.

## **Chapter 2: Context and Background**

My research question is significant as it adds to discussions around building the rule of law, a major concern of peacebuilding and post-conflict reconstruction, in a complex post-conflict situation, the eastern DRC. The DRC has a long history of violence, yet little research has been conducted on how customary justice can help build the rule of law, or on customary justice more generally. A brief and focused history of the DRC is useful to gain an understanding of the context in which baraza has been revitalized and why this is an important case to study. This history is in no way comprehensive; it is only meant to provide the setting for where my research was conducted and why it was an appropriate location for a case study to address the rule of law debates. Through the following historical and contextual outline, I wish to illustrate some profound problems with the DRC's state legal system and the situation in which baraza is operating.

### **2.1 Legal Systems in the DRC: Historical Context**

The history of the DRC is unique, yet similar, to that of other African countries. As with other African countries, the DRC was colonized and its borders were drawn by European powers. Prior to colonization, the DRC was neither *terra nullius*, nor was it void of political, economic and social structures. I will not address the pre-colonial era here, but there are resources on the topic.<sup>3</sup> To understand the origin of instability and violence in the DRC, I will begin my historical examination with the colonial era.

In Vanthemsche's (2006) article examining the history of Belgian colonialism in the DRC, he writes “repression, murder, forced labour, racism and exploitation were intrinsic dimensions of the Belgian rule in the Congo, as they were in all colonial enterprises” (p. 90).

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<sup>3</sup> See, for example, Hochschild (1998), especially “Prologue: The Traders are Kidnapping our People;” and Newbury (2009).

This is an apt description of the Belgian colonial endeavour in the Congo. In 1885, the Congo was recognized as the territory of King Leopold II of Belgium. It was in this year that the borders were created by European powers. Englebert (2000) observes that in the Congo the colonial boundaries united different governance systems and split important kingdoms or political cultures. The borders reflect the desires of Europeans and do not relate to any pre-colonial social groups (Crabb<sup>4</sup>, 1966). The Congo remained the territory of Leopold II until 1908, when international pressure forced Leopold to cede power to the Belgian state (Vanheremesche, 2006). Belgium implemented a policy of indirect rule in its colonies (Prinsloo, 1993).

Historically, as Crabb (1966) points out, the governance institutions themselves were imposed by the colonial powers, and often overpowered the indigenous institutions. The colonial system's interaction with the indigenous one means that both were modified as a result. For example, the colonial administration manipulated the 'tribal system;' they used it as a device for the functioning of their own, imposed, administrative system (Crabb, 1996). Prinsloo (1993) notes that the colonial administration also manipulated indigenous legal structures. The African population was to be governed by indigenous law, unless contrary to public order or provisions of a statute; however, in the case of criminal law everyone was subject to the Congo's Penal Code, created by the Belgian administration (Prinsloo, 1993). The colonial-indigenous interaction is crucial when examining so-called traditional, indigenous, or customary structures in the post-colonial era. This topic will be further discussed in the theory section of this paper, but it warrants mentioning at this time to add to one's awareness of the colonial-indigenous

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<sup>4</sup> Although the article "Environment and the Nature of the Legal System in Congo-Kinshasa" by John H. Crabb was useful in some respects, this article was published in 1966 and still demonstrates a colonial mentality in its analysis of information.

interaction and that custom cannot be equated with the pre-colonial era due to the impacts that the customary and the colonial socio-political realms had on one another.

## **2.2 Security Sector Reform and Rule of Law Programming in the DRC**

Independence was attained in 1960. In 1965 Mobutu Sese Seko came to power (Kabwit, 1979). After gaining power, Mobutu ensured that his regime was centralized, with him holding most of the power (Kabwit, 1979.) Kabwit's (1979) article continues by detailing the corruption and mass human rights abuses perpetrated with impunity by Mobutu's regime. Impunity was entrenched in the Congolese system during the Mobutu era, and is a problem that persists to this day. A major aspect of the international community's current focus on the rule of law is an end to impunity. However, the population continues to distrust the state justice system and often relies on local courts that are linked with the chieftaincy system (Derks, 2012). This is not surprising; as Mobekk (2012) points out, the DRC suffers from a legacy of corruption and political control of the security and justice institutions.

Warfare has persisted in the DRC, especially in the east, since the Rwandan genocide of 1994. In order to keep this historical contextualization brief, I will not delve into the details of the various and ongoing conflicts.<sup>5</sup> The post-Mobutu era (after 1997) has been one of instability and violent conflict, peppered with peace agreements and periods of relative calm. The present situation is one in which the state is unable to project its power to the far reaches of the country, notably the eastern region (Derks, 2012). Some, such as Autesserre (2010), would still label the eastern region a war or conflict zone, while others argue it is in a post-conflict era. Based on my research and fieldwork, I would argue that the eastern DRC is still in a state of violent conflict (especially in the wake of elections), but experiences periods and locations where hostilities have

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<sup>5</sup> For detailed information and analyses concerning war and violent conflict in the DRC in the post-Mobutu era see, for example, Autesserre (2010); Lemarchand (2008), especially parts I and III; Prunier (2009a); Prunier (2009b); Stearns (2011).

ceased, such as Uvira while I was there from 1 September 2011 to 23 November 2011. Throughout my thesis, I will refer to rule of law and customary justice in *post-conflict* contexts; this is based on the internationally recognized understanding of post-conflict as post-peace agreement. The reality, however, is clear: in the DRC, violent conflict has persisted into the so-called transition (Autesserre, 2006).

The DRC has experienced different forms of international intervention since its independence. Those related to security-sector reform (SSR) have had a rule of law component. However, to present date, there has been little consideration of customary justice practices and how they can contribute to rule of law programming in the region. Rule of law programming has been guided by the rule of law orthodoxy, which is characteristically top-down and focused on institutional reform (this concept is more thoroughly defined and dissected in the Conceptual Framework chapter). I will outline the international community's rule of law focus somewhat generally, then use the UN and the EU as examples of what the international community is doing in the region. The UN is the organization that is supposed to reflect international norms and standards and has a long-standing history in the DRC, and is therefore a useful example. The EU has major security sector reform projects and is investing a lot of money into them, making their programs an interesting example as well. These two organizations represent key powers operating in the DRC and undertaking SSR; their influence in the east cannot be understated. As this project is focused on the case study of baraza, there is no space to conduct a thorough overview or analysis of all rule of law programming sponsored by international actors; as such, these two cases should be understood as exemplary.

In the context of the EDRC, rule of law programming generally falls under the larger category of SSR, the sections of which are: military, police, justice and corrections (Mobekk,

2009). The research suggests that justice-sector reform and the rule of law are subordinate to the other SSR goals. Mobekk (2009), for example, argues that judicial reform, necessary for the rule of law, has not received sufficient attention, being undermined by the other sectors of SSR. This may partly explain why the programming has been primarily based on an orthodox conceptualization of the rule of law, while the justice sector reform is understood as a component of state-building. It is easier to accept rather than challenge the rule of law orthodoxy, especially if it is considered subsidiary to other SSR projects. While customary or local justice may be mentioned in rule of law programming, it is only in passing and without thorough analysis. In discussing the rule of law in the DRC, Mobekk points out that people often rely on traditional justice mechanisms. However, aside from recognizing that traditional justice *can* be problematic, Mobekk does not elaborate on their role in judicial reform or rule of law programming. In the following paragraphs, I will elaborate on SSR and the rule of law using the UN and EU rule of law programs as examples.

The United Nations has organized missions in the DRC since 1999. The first mission, United Nations Organization Mission in the DR Congo (MONUC), was replaced by The United Nations Organization Stabilization Mission in the DR Congo (MONUSCO) in June 2010. The Rule of Law section of these missions was established in 2004. The key objectives of this section are<sup>6</sup>:

- 1) To support civilian and military justice systems to be more effective in delivering justice. An effective justice system inspires confidence in the public and contributes to security and political stability;

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<sup>6</sup> All objectives taken directly from MONUSCO's "What is the Rule of Law Section Mandate?" Found at, <http://monusco.unmissions.org/Default.aspx?tabid=10804&language=en-US>

- 2) To support the justice system by providing immediate assistance to enable existing DRC capacity to be fully maximized;
- 3) To assist the DRC authorities in designing mid-term coordinated strategic plans to reform justice sub-sectors, such as legislation, military justice and courts;
- 4) To facilitate short-term implementation of urgent elements of longer-term reform strategy, including building capacity to investigate and try cases involving international crimes.

Achieving these goals will indeed improve the efficacy of the state justice system; however, they remain limited in their ability to increase access to justice for all in the DRC. These reform goals reflect the dominant rule of law paradigm and are susceptible to various critiques. The top-down nature of the outlined reforms does little to ensure the accessibility of justice for the rural, poor, and vulnerable population. There is no consideration for local understandings of justice, nor are there detailed goals for raising awareness about the legal reforms. The outlined objectives seek to reinforce the formal justice system, in which much of the population does not have confidence, yet does not encourage the participation of locals in creating reforms that will make the system more accessible in terms of language, procedure and cost. Furthermore, these objectives risk leading to investment of substantial resources to reinforce a system that many in the country do not trust. Building that trust takes a great amount of time, especially when a change in justice norms is being advocated, yet there is little consideration of how to provide access to justice in the meantime, nor is there a thoroughly researched analysis and plan for indigenizing these norms.

Considered from another standpoint, there is also an ethical problem associated with the UN's attempt to reinforce internationally defined justice norms and procedures at the expense of

locally conceptualized justice initiatives. In Galtung's (1996) theorization of peace and violence, this imposition may be considered cultural violence. Cultural violence is described as the aspects of a culture that can be used to legitimize structural or direct violence (Galtung, 1996). Even as the UN is meant to reflect accepted international norms, when this is based on a state system there are further questions that need to be asked. In the DRC, given that the past two elections have not been considered free and fair, is the state really reflecting the will of the people? If not, then the internationally agreed upon norms and procedures that are based on state accepted treaties and covenants are not necessarily reflective of the will of the different populations on the ground.

In addition to the UN, international organizations and governments have invested in justice and rule of law programming in the DRC. The European Union recently invested 18 million Euros in a four year legal reform project "Programme d'Appui à la Réforme de la Justice à l'Est (PARJE)."<sup>7</sup> This program is focused on institutional support to the administration of justice, enhancing access to justice for all, strengthening control and evaluation of the judiciary and respect for the rights of women.<sup>8</sup> These reforms are reflections of the hegemony of the rule of law orthodoxy in international interventions. On a positive note, the program also seeks to establish mobile courts in order to make justice more accessible in rural areas. This, of course, refers only to legal, state-based justice and is based on a very limited understanding of accessibility. Without widespread education in the various local languages about the laws and legal process, this effort may still leave vulnerable groups excluded or disadvantaged.

This discussion is not meant to condemn or undermine the rule of law efforts of the international community, it is simply to point out the dominance of the rule of law orthodoxy in

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<sup>7</sup> Program of Support for Reform Justice in the East ("L'Union européenne soutient," 2012)

<sup>8</sup> [http://ec.europa.eu/europeaid/documents/aap/2009/af\\_aap-spe\\_2009\\_cod.pdf](http://ec.europa.eu/europeaid/documents/aap/2009/af_aap-spe_2009_cod.pdf)

the international community and its justice programming in the DRC. Little consideration is given to local justice norms and customary justice systems, which require smaller-scale investment and resources and are readily accessible to much of the population. Baraza is an example of customary justice in the eastern DRC, with procedures and concepts that are easily comprehended and accessible to the people in the communities where it operates.

### **2.3 The Case of Baraza**

Given the tumultuous history of the DRC, outlined above, a major focus in recent scholarship on the DRC has been peacebuilding. The international community has made it clear that building the rule of law is a major focus within this field (United Nations, “Peacebuilding”). Unfortunately, rule of law programmers have suffered from a form of tunnel vision, focusing time, resources and energy on implementing what has been termed by some as the rule of law orthodoxy, a top-down reproduction of Western-style judicial infrastructure<sup>9</sup>, as I will discuss in the next chapter. However, recently there has been an academic and practical shift to examine alternatives to the rule of law orthodoxy. A large section of these alternatives can fall into the spectrum of customary justice mechanisms (Isser, 2011). Research on this topic is predominantly based on case studies of particular customary justice mechanisms. To add to this growing body of knowledge, and potentially contribute to theory development, I chose to carry out a case study of a customary justice mechanism in a post-conflict situation where this type of research is nearly non-existent. My case study of baraza in the DRC is of great relevance to rule of law debates between supporters of the orthodoxy and its critics.

I partnered with an organization, called Fondation Chirezi, for several reasons. Paluck (2009) argues that in an environment where mistrust towards the international community is widespread, such as in the DRC, connecting the research with an NGO helps gain the trust of

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<sup>9</sup> See, for example, Golub (2006).

participants. This argument was appropriate for my research as well. However, while in the field, I also realized that there is mistrust toward some local NGOs as well. Without having visited the DRC previously, I had not seen the work of Chirezi firsthand. I contacted Chirezi's director through a website that highlights local peacebuilding NGOs. This website was the best resource at my disposal for finding a community-based NGO in the EDRC. Working with a community-based NGO was important as I was seeking an NGO with little involvement from international actors. The NGOs on this website are being promoted by an international organization, Peace Direct, but they are not funded or programmed by this organization. While Chirezi did receive funding from another organization, this funding had ceased by the time of my arrival. Chirezi seeks to promote peace, non-violent conflict resolution and improved living conditions for people in the area, mainly through baraza ("Chirezi Foundation"). According to the director of Chirezi, baraza is based on local traditions of conflict resolution through meditation and reconciliation. This makes it a reasonable example of a customary justice mechanism and, therefore, a good choice of case study.

Locally (in Swahili and other local dialects), 'baraza' refers to a gathering where people in the community come together to discuss an issue, a problem or a success. The functioning of baraza was explained to me by the director of Chirezi and baraza mediators, but I also witnessed the mediation process firsthand on several occasions, in Kavimvira, Kiliba and Makobola. The director explained to me that Chirezi had conducted research in the year preceding the implementation of the baraza project. They found that conflicts occur on a daily basis in communities and are relatively small-scale. However, conflicts are known to escalate and become violent over time. The baraza program consists of three levels. The first level is the volunteer level. At this level any community member can report a conflict to either of two local

volunteer mediators who attempt to resolve minor conflicts. At this level, there is no thorough documentation of the conflicts if they are resolved. If the volunteer is unable to resolve the conflict, they send it to the next level, l'Arbre de Paix.<sup>10</sup> According to the director, l'Arbre de Paix is based on “traditional conflict management.” At this level, four mediators meet as a committee and discuss the case with the volunteer who brought it to them, and then they invite the disputants for a meeting. The conflict is resolved with the acceptance of the community, otherwise it is sent to the next level, le Cour de Paix.<sup>11</sup> My observations of l'Arbre de Paix suggest that it does not always follow this exact procedure, but is somewhat more flexible. For example, disputants sometimes go directly to the baraza office if they have a conflict and already know that the office exists. Furthermore, especially in Makobola, past disputants did not usually refer to the process as baraza or l'Arbre de Paix, but simply as going to le Bureau de Mediation.<sup>12</sup> Although the process of baraza, specifically l'Arbre de Paix, was familiar to community members, at time they were unaware of the name it had been given or of Chirezi and its work.

The final level of mediation is called the Cour de Paix. These are typically cases where there is wrongdoer and a victim and no resolution was achieved at the previous level. The director explained to me that at this level, a sincere public apology is issued to the victim who can decide to accept it or reject it. The community is also invited to agree or disagree on the ruling. Finally, if the conflict is not resolved at this level it can be taken to the magistrate court. In practice, l'Arbre de Paix and le Cour de Paix are not clearly defined and overlap in practice. I only witnessed two conflicts that could not be resolved at the level l'Arbre de Paix, one in Kiliba and one in Kavimvira. In these conflicts, there were discussions of going to the formal legal courts, with the lawyer representing the party who had agreed to baraza's terms for resolving the

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<sup>10</sup> The Peace Tree.

<sup>11</sup> The Peace Court.

<sup>12</sup> The Mediation Office.

conflict. However, due to the cost of bringing the cases to the formal courts, and the additional bribery costs that were implied, neither the disputants nor the mediators (i.e., Chirezi) could afford to take the case to the justice system. As of my departure, solutions for both cases were still being discussed at baraza.

The final component of baraza is le Symbole de la Paix,<sup>13</sup> called ‘la Rite de Reconciliation’, which is a public display of reconciliation between the victim, perpetrator and community. Technically it is only meant to be used after the apologies are accepted at le Cour de Paix; however, many disputants who had their conflicts resolved at l’Arbre de Paix also conducted la Rite de Reconciliation. This rite generally consists of sharing a soda between the disputants and mediators. In the cases where this rite was not performed, the reason was usually a lack of funds to purchase the soda.

In practice, the above description could be understood more as the general guidelines than formal rules or procedures. However, the goal of reconciliation is constant through all levels of baraza and is readily accepted by all involved. I heard a variety of complaints and outbursts at mediation sessions, but not one disputant argued that they wanted to see the other imprisoned.

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<sup>13</sup> The Symbol of Peace.

## **Chapter 3: Conceptual Framework**

This chapter consists of a focused literature review of the concepts that will constitute the conceptual lens through which I will analyze my data. The primary concepts that I will use to enhance my research analysis are the rule of law, tradition and customary justice. How these terms are defined and employed in academic literature and research remains largely disputed. In the first section of this chapter I will examine the contested definition of the rule of law and propound my own definition which I name “peace-based rule of law” in order to differentiate my concept from other conceptions of the rule of law. Peace-based rule of law (PBROL) is composed of laws based on local understandings of justice and fairness, and includes the structures and procedures used to deal with disputes, conflicts and transgressions (hereafter referred to as conflicts). However, as my concept of PBROL is not a formalistic conception, it focuses on creating (when not already existent) or reinforcing (when already present) norms, structures and procedures that use specifically peaceful means to address conflicts. PBROL emerges from an anti-colonial ethos, thus the focus on local understandings of justice and fairness stem from the recognition that the rule of law cannot be imposed by external actors. Following a more detailed examination of the rule of law and elaboration on peace-based rule of law, I will explore the concept of tradition. Tradition is a necessary concept to include as customary justice is presumed to be based on tradition, and both are often not defined or are misunderstood. Critiques of customary justice are often based on critiques of tradition, rooted in the perceived static nature of traditions; I therefore draw on conceptualizations of these ideas that dispel the myths surrounding them. I will conclude by elaborating on the inter-relationship between the peace-based rule of law and customary justice and tradition.

### **3.1 The Rule of Law Orthodoxy**

There is no standard definition of the rule of law (Kleinfeld, 2006; Stromseth, Wippman and Brooks, 2006, ch.3). It tends to be associated with a group of concepts including, fairness, justice, predictability and equal application of the law (Stromseth, Wippman and Brooks, 2006, ch.3). Broadly speaking, the rule of law suggests a system of governance based on laws. In conventional rule of law systems, laws are public knowledge, clear in meaning and equally applicable to all, arguably promoting civil and political liberties (Carothers, 2006, ch.1). The rule of law practice that has developed has been bound by Western interpretations of law and society and has been employed to support the global liberal project. Tacit support of the liberal project is visible in Carothers's (2006) reference to civil and political individual liberties; concepts associated with the liberal rights paradigm. The prevailing rule of law theories continue to reflect Western ideals of justice. At the same time, in practice, rule of law programming has been reduced to a technocratic package of 'one-size fits all' reforms strongly linked to the dominant theories; taken together, this understanding of the rule of law is labelled the 'rule of law orthodoxy.' As mentioned, the rule of law orthodoxy is based on the liberal peace thesis, examined in the following section.

#### *3.1.1 The Liberal Peace Thesis*

The liberal peace thesis is the theory that liberal market democracies are inherently more peaceful than other types of political-economic systems and that democratization and marketization will help cultivate peace in countries emerging from civil war (Paris, 2004). The liberal peace thesis is formed on the belief that market democracies rarely go to war with one another and are less prone to intrastate violent conflict (Paris, 2004). Therefore, to prevent conflict from recurring, transitioning societies must be liberalized. Paris (2004) adds that

liberalization means democratization of the political realm and marketization of the economic realm. After the initial intervention in a conflict situation, and in the wake of mass violence or human rights abuses, there is a need to reconstruct the society in question (Stromseth, Wippman and Brooks, ch.3, 2006). Due to the current liberal hegemony, reconstruction is usually undertaken with an end goal of creating a liberal society (Stromseth, Wippman and Brooks, 2006, ch.3). Arguments for liberalization are linked to certain theories of war and violence. As Jahn (2007) notes, proponents of liberal market democracies would argue that “it is this economic, political and cultural ‘backwardness’ – just as in modernization theories – which causes domestic and international instability and war” (p. 214). The conclusion being that modern (as opposed to ‘backward’) market economies are stable and peaceful. This argument, by liberal peace theorists, is specious and superficial. It fails to recognize the current and historical role of so-called ‘peaceful’ modern states in creating the economic and political ‘backwardness’ of states experiencing violent conflict<sup>14</sup>. Furthermore, labelling another culture as ‘backward’ is inherently Eurocentric and essentializing, which Galtung (1996) might argue is itself a form of cultural violence as it utilizes ideology to justify structural violence. I argue for a different understanding of peace, which is elaborated on when I discuss peace-based rule of law below.

Critiquing the liberal peace thesis, Duffield (2001) compares and contrasts liberal power and imperial power. While he claims that the two forms of power are exerted differently, they are both nonetheless coercive, with liberal power being based on the control of economic, political and social processes of the post-conflict country. Furthermore, the ‘liberal’ component of the liberal peace thesis is questionable. Jahn (2007) explains the liberal tension as being

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<sup>14</sup> For examples and a discussion of the role of the international community in creating instability in war-torn countries, see Orford, A. (2003).

between “the ideal claim that all people can govern themselves and the assumption based on the liberal philosophy of history that, in reality, only those who endorse the market democracy model demonstrate sufficiently mature reason to be endowed with the right to self-determination” (p.102). The relationship between the rule of law, liberal peace, democratization and marketization is examined in the following paragraphs.

Having described the liberal peace theory, I have laid the foundations to explain the rule of law orthodoxy; fundamentally based in the belief the liberal states are more peaceful and should therefore be reproduced abroad. Golub (2006) summarizes the rule of law orthodoxy as “the dominant paradigm followed by development organizations seeking to promote the rule of law in developing countries” and that “it concentrates on the reform of laws and legal institutions, particularly judiciaries” (p.105). Not only does the rule of law focus on institutional reform, but its supporters often seek to replicate Western style justice systems. Stromseth, Wippman and Brooks (2006, ch.3) critically note that the rule of law ‘standard menu’ simplistically focuses on structures and institutions in a cookie-cutter way. This ‘one size fits all’ model explains why the term ‘orthodoxy’ has been employed to define it. The term orthodoxy suggests an understanding of an idea, belief or concept that conforms to an approved doctrine or ideology, especially in religion, and is often based on convention (Merriam-Webster, 2012). The definition of orthodoxy suggests that ideological orthodoxies may be dogmatic, as the approved doctrine to which they conform is likely based on convention or belief rather than rigorous critical analysis. The following sections will demonstrate that the rule of law orthodoxy does not stand up to rigorous analysis. One complication resulting from the dominance of the rule of law orthodoxy is that, due to the normalization of the rule of law orthodoxy, it is often referred to as the ‘rule of law,’ without recognition that it is reflecting the *dominant* paradigm,

not the only paradigm. It is necessary to take note of this conceptual leap, as often the rule of law is not thoroughly defined.

Barnhizer and Barnhizer (2009) argue that the American Bar Association's Rule of Law Initiative views the rule of law orthodoxy as a panacea for all the social problems of developing countries. Two of the common 'ills' associated with developing countries in the rule of law and peacebuilding scholarship are lack of democracy and lack of economic development. Building the rule of law has been advocated for creating democracy and encouraging economic development (Carothers, ch.2, 2006). Both of these goals are also strongly linked to the liberal peace theory.

### *3.1.2 Democracy and the Rule of Law Orthodoxy*

Carothers (2006, ch.1) observes that the 'West' prescribes the rule of law in order to consolidate democracy and promote a well-functioning market economy. As noted above, marketization is a key component of liberal peace. Newman, Paris and Richmond (2009) articulate that the rule of law is a major sphere within the realm of peacebuilding. Within the liberal peacebuilding and security sector reform framework, the concentration, as it relates to the rule of law, is on top-down institutional reform,<sup>15</sup> especially of formal justice institutions, thus propagating the rule of law orthodoxy (Kleinfeld, 2006; Harper, 2011). Newman, Paris and Richmond (2009) suggest that these reforms, along with ideals of law and order are the prerequisites for democracy and peace (Newman, Paris, and Richmond 2009). Carothers (2006, ch.1) elaborates by adding that the rule of law makes possible individual rights, which he defines as the "core of democracy," and, I would add, the liberal project. These reforms are implemented through rule of law programming because they are deemed necessary for

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<sup>15</sup> See, for example, Newman, Paris and Richmond (2009). For a brief overview, see box 1.1, *Components and Goals of Peacebuilding* on pgs.8-9.

(re)constructing democracy. However, it is difficult to fathom that imposing these reforms in a top-down manner, with few modifications based on contextual differences, will promote democracy. This is a perfect example of the liberal tension described above by Jahn.

### *3.1.3 Economic Development and the Rule of Law Orthodoxy*

The second sphere of support for the rule of law orthodoxy is the economic development paradigm. Carothers (2006, ch.2) states that there is a concern that without the rule of law there will be no foreign direct investment and, therefore, no development. Golub (2006) observes that the rule of law orthodoxy is assumed to create a favourable business climate. The World Bank is a major international institution that propagates the outlined beliefs about the rule of law in underdeveloped countries (Upham, 2006). The World Bank claims that the rule of law, which it defines as rules supported by state institutions, is the key to good governance and the exclusive path to development (Upham, 2006). Although arguments for economic and democratic liberalization have been taken as truths by many scholars, organizations and practitioners throughout the world, critiques and questions of these assumptions have been developed and will be explored in the following section.

## **3.2 Critiques of the Rule of Law Orthodoxy**

In this section, critiques of the rule of law orthodoxy will be considered. Despite billions of aid dollars being devoted to rule of law programs, results have been mixed and often disappointing (Stromseth, Wippman and Brooks, 2006). The rule of law orthodoxy is the dominant paradigm and has remained highly impervious to practical and analytical critiques. However, more recently, the rule of law orthodoxy has been scrutinized for failing to achieve the stated objectives for which it is employed: to contribute to peace, democracy and economic development. There are three strong critiques that I will examine in the following sections. The

first critique is of the development of the rule of law based predominantly in Western philosophical thought and practice, a critique that will be referred to as “neo-imperialism.” Second, the state-centric, top-down nature of the rule of law has proven limiting. As Golub (2006) remarks, focusing on state institutions ignores other channels of change, such as focusing on the poor in order to improve the delivery of justice. The third critique questions the assumptions of the rule of law promoting economic growth and poverty alleviation. The three critiques are all, to some degree, related to critiques of the liberal project.

### *3.2.1 Neo-imperialism through the Rule of Law Orthodoxy*

Certain commentators have labelled the rule of law project an imperialist or neo-colonialist enterprise, as it is typically based on the intervention of foreign administrators to govern societies ‘unready’ for self-government and ‘develop’ them into modern liberal societies (Stromseth, Wippman and Brooks, 2006, ch. 3). Furthermore, the rule of law dogma is based in Western liberal tradition, to the exclusion of all other traditions, and is imposed on post-conflict countries by external actors. Stromseth, Wippman and Brooks (2006) add that due to international condemnation of imperialism, the ‘new imperialists’ undertake peacebuilding, reconstruction and building the rule of law to maintain their global credibility. One may argue that the rule of law has become the *lingua franca* of the ‘new imperialists.’

Barnhizer and Barnhizer (2009) argue that the rule of law is not a universal truth; it is a value-laden ethos, reflecting the conditions of a particular culture. They note the focus on classically liberal ideals, such as liberal autonomy, individualism, and non-instrumentalist approaches to law. I would refine their arguments by specifying their application to the rule of law orthodoxy. Critical rule of law theorists, including those researching customary justice, do not understand the rule of law to be limited to these liberal Western ideals, this has simply been

the hegemonic interpretation. However, I will return to this question in the Conclusion chapter where I re-evaluate the usefulness of the term ‘rule of law.’

Kleinfeld (2006) undertakes a thorough delineation of the five ends of the rule of law orthodoxy. The goals outlined by the author are: ensuring the state abides by the law, guaranteeing equality before the law, providing law and order, supporting efficient and impartial justice and sustaining human rights. Kleinfeld (2006) firmly roots each of these ideals in various times and spaces of Western political thought and history. She further argues that these ends are historically and culturally determined; therefore, they are more relevant to certain societies in particular periods. However, Western governments and organizations have attempted to reproduce their own rule of law ends in other countries. This is problematic because this strategy typically focuses on institutional reform, and ignores the importance of wider social factors, such as values, politics and culture (Kleinfeld, 2006).

Another means of imperialism through the rule of law is the focus on expert knowledge, thus subjugating other forms of knowledge. The rule of law orthodoxy often creates a system ruled by lawyers, to the exclusion of others, thereby limiting the input of other factors and actors in affecting the development of the legal system (Golub, 2006). Factors that are potentially ignored include poverty, education levels and accessibility; actors that may be ignored include non-legal development workers, local officials, traditional authorities and vulnerable or marginalized populations. Many of the lawyers who advise on rule of law programming are American, thus a portion of the money being invested in the rule of law actually ends up benefitting Western lawyers (Brooks, 2003). These lawyers, regardless of where they originate, are typically trained in ‘law’ and, based on their expertise, Western-style legal justice is reproduced abroad. Other forms of justice such as mediation or reconciliation practices, that

might be locally relevant, are greatly ignored. Alternative forms of knowledge are thus marginalized or subjugated by the hegemonic legal discourse of the powerful actors, lawyers, in order to support the liberal project. The imposed reproduction of Western justice models that have led to mixed or negative results is a clear demonstration of the imperialistic and Eurocentric tendencies of the rule of law.

Recognizing the history of the rule of law orthodoxy is in no way meant to suggest that certain values, such as justice, are not present across cultures or political ideological traditions; it is simply to acknowledge that the set of ideals propagated in the dominant rule of law paradigm does not explicitly attempt to incorporate other understandings of these values. The rule of law orthodoxy works on an assumption that Golub (2006) dubs ‘build and they will come.’ This suggests that once the justice system, created in the image of Western models, is established, the population will use and support it. This further speaks to the international community’s belief that the justice system need not be rooted in tradition, history, or culture and that Western style justice models are universally applicable because they are superior; therefore, only an irrational person or community would not accept them.

Barnhizer and Barnhizer (2009) observe that some theorists define the rule of law based on neutral descriptions, procedural and formal aspects, attempting to make it exportable. The ostensible exportability of the rule of law has come under intense scrutiny in recent years. Through case studies of Bosnia and Iraq, Chandler (2006) problematizes the potential for exporting the rule of law. He notices that laws have been imposed without popular support or consent because internationals believe them to be the basis of post-conflict reconstruction. This imposition has functioned to undermine the political process, rather than reinforce it (Chandler, 2006). Once again, this problem speaks to the liberal tension defined by Jahn (2007). Chandler

(2006) argues that rather than supporting projects that would help strengthen the political system of these countries, the imposition of particular laws has weakened the political system, leaving it vulnerable and exploitable. Chandler (2006) articulates the political nature of rule of law programming, but points out that few rule of law practitioners openly acknowledge the political realities. One reason that the rule of law is seen to be apolitical is the belief that it consists of universal rules, uniformly applied (Upham, 2006). The rule of law rules, however, are not universal truths, but the outcome of historical and political processes. It is necessary to acknowledge the history of colonization and the continuing unequal international power relations that have been maintained since colonies gained independence, and be aware of the potential to reproduce or reinforce inequality through rule of law programming. Furthermore, it must be explicitly understood that ‘democracy’ can take various forms, is not limited to liberal market democracy and cannot be coerced.

### *3.2.2 Critique of Top-Down, State-Centric Rule of Law*

Related to the imperialist imposition of the rule of law is a critique based on the top-down, state-centered theory and implementation that is advanced by legal professionals (Golub, 2006). These top-down strategies are also highly technocratic (Stromseth, Wippman and Brooks, 2006). Golub (2006) outlines some questionable assumptions that are propagated in the rule of law discourse, including the focus on state justice institutions. Golub problematizes the focus on state institutions and reforming the judiciary when, in most developing countries, disputes are predominantly resolved outside the formal justice system. Resolving disputes through other channels can be a normative or practical choice, as discussed later in this chapter. Golub’s point calls into question the focus on reforming the formal justice system, instead of incorporating or building on the popular forms of justice that are more habitually used.

Gagnon (2011) points out that legal legitimacy is based on laws reflecting the will of the pluralist citizenry, not being imposed upon them. The top-down nature of the rule of law orthodoxy means that the population is not involved in the creation of the system, drawing its popular acceptance and legitimacy into question, potentially making it less accessible physically, financially, linguistically, and, therefore, less sustainable. Carothers (2006) notes that there is a lack of interest in non-Western forms of law by rule of law practitioners. This is relevant when considering implementation and compliance with law. He argues that compliance is based on perceived fairness and legitimacy, not force. To understand which rules and practices will be perceived as fair and legitimate, researchers and practitioners need to inform themselves about the local history, culture and context, rather than implementing a predesigned system from the top-down. Unfortunately, as the author notes, practitioners often focus on creating institutions based on pre-determined models that do not take into account the local environment.

Channell (2006), on the other hand, recognizes the importance of local ownership. Rule of law has been transplanted with little or no adaptation to the realities of a given society. He adds that this problem stems from the lack of involvement of locals in the drafting process; instead, foreign drafters implement laws and institutional changes to mimic their home country's situation. The assumption that cultural issues are peripheral to legal reform contributes to the implementation of legal system transplants (Channell, 2006). As most of the critical rule of law analysts acknowledge, culture is central to (re)creating a contextually relevant justice system.

### *3.2.3 Critique of Rule of Law as Vehicle for Economic Development*

Most post-conflict countries are also concerned with economic development, as economies are destroyed by violent conflict. Golub (2006) argues for legal empowerment as part of broader, community-driven, rights-based development strategies in developing countries.

Development agencies too often concentrate their resources on building the state legal system, which does not appear to strengthen the poor population's legal capacities. Legal empowerment, on the other hand, advances and transcends the rule of law by supporting the creation of good governance and poverty alleviation.

The myth that the rule of law promotes economic development is addressed by various academics. Golub (2006) notes that the main assumption of this myth is that the rule of law creates a favourable business climate. However, Carothers (2006) argues that weak rule of law institutions and practices do not, in fact, reduce foreign direct investment flows, and the variables may actually have an inverse relationship. Upham (2006), citing de Soto, observes that formal legal systems may actually stifle economic growth. Upham uses the example of Japan's non-formal dispute resolution traditions to demonstrate that a strong, far-reaching, formal justice system is not necessarily a prerequisite of economic growth.

Kleinfeld (2006) adds to doubts about the potential for the rule of law to promote economic development by arguing that the rule of law can be seen as a strategy for Western countries to tie developing countries to their economic system through legal reforms. Her argument suggests a continued attempt to exploit countries that have already been disadvantaged by colonization. Once again, this phenomenon raises questions about imperialist tendencies.

### **3.3 Alternative Visions of the Rule of Law**

Given the critiques of the conventional rule of law discourse and practice, one might argue that this project should be abandoned. Abandonment would be an unfortunate reaction to the outlined problems. While the rule of law orthodoxy is very problematic, the rule of law concept need not be reduced to the rule of law orthodoxy. Critics have been working to reconceptualise the rule of law in order to make it a more useful tool for post-conflict societies. I

will first discuss an ends-based understanding of the rule of law. Following that, an examination of current research focused on countering the top-down tradition by incorporating informal and customary justice mechanisms into rule of law programming will be undertaken.

### *3.3.1 Ends-Based Rule of Law*

Kleinfeld (2006) emphasizes an ends-based understanding of the rule of law. She argues that, typically, practitioners concentrate heavily on institutional reform, but miss the bigger rule of law picture. Kleinfeld (2006) argues that “because rule of law ends are so contested and historically determined, they cannot simply be stated as given. They must be understood as varying greatly by context, culture, and era” (p.35). Kleinfeld’s statement demonstrates the significance of basing rule of law on ends. Ends can be dictated differently over time and place and have the potential to include the input of local populations and marginalized groups, countering the imperialist tendencies of the rule of law orthodoxy. Ubink and van Rooij (2011) add that law and power are linked and that bottom-up justice approaches can be used as tools for marginalized sections of society. The participation of local populations in defining rule of law ends will support ends that are culturally relevant and create a situation where marginalized segments of the population will more likely have the power to participate.

Stromseth, Wippman and Brooks (2006) suggest that these ends should be based on existing cultural foundations and recognize that they may be in tension with each other at times. At the same time, they recognize the difficulty of achieving a legal system that adheres to international justice standards and ensures that those standards are accepted by local populations. This can be especially difficult in the complex situations of post-conflict societies. While the authors argue for the inclusion of a variety of experts in post-conflict legal reform, they do not mention the exact role different members of the local population will take in the building of the

legal system. Yes, they acknowledge that interveners should not impose laws, but who determines which laws are accepted? The authors recognize the challenges associated with legal system reform in post-conflict societies, but they do not go far enough in considering other forms that justice could take. Examination of non-Western justice mechanisms that may not be a part of the country's formal legal system, but have a history of legitimacy in an area need to be considered, and will be addressed later in this chapter.

### *3.3.2 Context, Culture and the Rule of Law*

Carothers (2006) argues that the failure of past rule of law interventions leads to an obvious conclusion: rule of law programs need to be appropriate for the local environment in order to be perceived as legitimate. Unfortunately, as Carothers notes, practitioners often focus on creating institutions based on pre-determined models that do not take into account the local context. Questions of legitimacy are crucial to the rule of law. Carothers (2006) argues that legitimacy is the key to compliance.

Kleinfeld (2006) argues that rule of law ends need to correspond to the particular context in which they are being implemented. Each specific context will have its own history, culture and traditions that will contribute to the creation of rule of law ends for that context. Jensen (2009) argues that to transplant rule of law programming that will function based on support by the population, one must understand why and how individuals within that population act. Jensen (2009) focuses on customs and conventions, arguing that these are the factors that order behaviour, thus rules based on these will likely be self-enforcing. Although one must not confuse the utility of culture with a reduction to culture, Jensen's point is well taken and supports critical examinations of the rule of law orthodoxy.

### **3.4 Peace-Based Rule of Law**

The above discussion outlined different tensions in the rule of law discourse and practice, but has not led to a solid definition of the rule of law on which to base my analysis of baraza. I would like to advance a conceptualization of the rule of law called peace-based rule of law.

In the discussion of the rule of law orthodoxy, the importance of the liberal peace thesis in this particular understanding of the rule of law was articulated. It became clear that the rule of law orthodoxy is strongly related to the argument that liberal democratic market economies are modern, developed and peaceful. However, this argument is problematic, and the criticisms of the rule of law orthodoxy are not insubstantial. The reality is that most rule of law programming has been largely unsuccessful for the reasons elucidated above, but not limited to these reasons. At the same time, it is accurate to argue that the underlying or fundamental goal of rule of law programming is to ensure that countries do not resume violent conflict.

‘Peace-based rule of law’ seeks to explicitly recognize the goal of building the rule of law in post-conflict societies: dealing with conflicts, disputes and transgressions in such a manner that the country does not resume warfare or violent conflict. Peace-based rule of law relies on laws based on local understandings of justice and ethics, and includes the structures and procedures used to deal with conflicts. Furthermore, everyone within the community is answerable for actions that breach the accepted ‘laws.’ This conceptualization recognizes the importance of different legal systems within any context and, thus, ‘law’ is not limited to state law, but also includes locally accepted norms that govern people’s behaviour and interactions. While this definition attempts to be malleable, so as to be easily modified to particular contexts, it is also a substantive definition (in contrast to a formalistic definition [see Tamanaha, 2001]) and makes value-based claims. In line with Galtung’s (1996) conceptualization of positive peace

and corresponding theory of violence that argues violence breeds more violence, I am arguing that resolving conflicts peacefully is important to reduce the potential for further violence and, therefore, should be consider a valuable component of the rule of law.

There are three different realms of violence: direct, structural and cultural (Galtung, 1996). Direct violence is how one may typically conceive of violence, meaning verbal or physical harm to the body or spirit. Structural violence is generally political, repressive, economic and exploitative. Finally, cultural violence serves to legitimatize direct and structural violence through religion, law, ideology, language, art, science and cosmology. All three forms of violence are further considered forms of injustice. The goal of building peace-based rule of law is to reduce and eliminate violence in these three realms thus promoting justice on a broad scale.

Peace-based rule of law must be understood as dynamic. As understandings of peace and violence are developed, the methods to promote peace will continue to be reconceptualised; dynamism is a fundamental aspect of PBROL. This characteristic draws on Galtung's (1996) argument that his initial peace concept is problematic as it is static, and he thus created a definition that is not limited in this way. The relevance of customary justice to peace-based rule of law will be examined at the end of the following section.

### **3.5 Customary Justice and the Rule of Law**

Customary justice is an important addition to the rule of law debates and practice. In this section, customary justice is discussed and a working definition produced. I also critically examine the role of colonial administrations in creating the formal justice system and shaping customary justice systems in the colonies. Next, I explore how tradition is theorized. An analysis

of the ‘invention of tradition’ will follow. I conclude by outlining how customary justice can contribute to building the rule of law.

Studying and incorporating local and customary forms of justice is one way to promote culturally relevant rule of law programming, thereby addressing some of the major criticisms outlined above. Customary justice is not a well-theorized concept; it encompasses a vast array of justice systems, making it hard to define. Isser (2011) points to some common characteristics, which contribute to the definition used in this thesis. Customary justice systems have “their origins in long-standing, localized social structures, which greatly inform their notions of justice” and “they are contested spaces subject to continuous influence and change” (Isser, ‘Introduction,’ 2011, p.7). Due to the wide array of customary justice systems, each with different procedures and structures influenced by different histories, cultures and religious/belief systems only a definition that allows the wide variety of practices to be included is pertinent. The working definition of customary justice is: traditionally-based means of addressing conflicts, disputes and transgressions. ‘Tradition’ here suggests practices and beliefs that are dynamic, political and constructed, but have a history in the area where they are practiced. Tradition will be theorized later in this section. Furthermore, history is not void of external influence, in fact, colonial policies often greatly influenced indigenous structures and institutions, but the long-standing history of customary justice systems generally means that they are accepted in their communities and that people have adhered to some similar practices, beliefs, procedures and structures.

Isser (“Conclusion,” 2011) points out some commonalities in customary justice systems. She observes that they often do not create a distinction between civil and criminal matters, they focus on the community rather than individual rights, and they emphasize restorative justice over punitive justice. I would add that they are typically accessible, popularly understood, do not

require an abundance of resources and are often flexible and adaptable. These are all components that I witnessed with baraza, except that it does not deal with cases of rape or murder, meaning it does distinguish some criminal matters.

Many different terms are used interchangeably with customary justice, including traditional justice, indigenous justice/law, non-state justice and informal justice. Isser (“Introduction,” 2011) notes that each of these terms carries particular assumptions that leave them open to specious critiques and ignore the complexity of meaning. I choose to use ‘customary justice’ as it is the term widely used in the rule of law literature. Also, customary justice does not preclude state involvement, as the terms ‘informal’ or ‘non-state’ tend to do. Below, I included a discussion of tradition as it is often used or understood as interchangeable with custom and I wanted to address arguments propagated against customary justice that suggest that it is inherently archaic and static. At the same time, the term customary justice usefully points to the reality that there exists a particular history in each particular context that influences the local justice system. I also wanted to avoid the term ‘traditional’ justice, because in discussions of the rule of law ‘tradition’ is often used to define state delivery of justice. For example, “*traditionally*, donor-led legal reform projects have emphasized formal institutions, such as the judiciary, legislators, the police and prisons, and paid less attention to customary justice systems” (Ubink and van Rooij, 2011, p.7, emphasis added). This is also a reminder that all justice systems are traditional.

Using the term customary justice was also a difficult decision because of the term ‘justice.’ Chirezi refers to baraza as a justice initiative. However, baraza disputants never referred to baraza’s work as ‘justice’ because ‘justice’ connotes ‘*la justice*’ which is the popular term for the state legal justice system. Disputants typically referred to baraza’s work as

reconciliation. However, in order to engage with slightly broader and relevant debates with rule of law, I chose to use the term customary justice. My experience studying baraza led me to feel that this was the most appropriate categorization and in line with Isser's (2010) general description of customary justice systems.

Customary justice is not inherently ‘good’ or ‘right,’ but it is often important in post-conflict societies where the state is not providing for citizens’ justice needs. In examining the rule of law in post-conflict situations, one must acknowledge that the state justice system is typically chaotic and inaccessible. However, this is not the sole, or even most meaningful, reason that customary justice is relevant to rule of law programming. Harper (2011) argues that customary justice is a normative and ethical choice, not simply a stopgap until the ‘real’ justice system is fully functional. This argument is extremely important because, as Harper (2011) notes, some rule of law programmers fear that sub-standard justice for the poor is institutionalized through customary justice practices, based on an understanding that customary justice is not a normative or ethical preference, but the result of the inaccessibility of formal justice. If it is not recognized that customary justice can be a normative and ethical choice, the rule of law orthodoxy will continue to be imposed. Furthermore, understanding customary justice as a stopgap puts it lower on the justice system’s conceptual hierarchy, an action that reinforces the idea that the Western conception of justice is superior.

Not only is customary justice a value-laden choice, but it is indeed practical. These mechanisms are often the only forms of justice that most people have access to, especially in post-conflict situations (Harper, 2011). Isser (2011) agrees that customary justice systems play an extremely important role and in some countries up to 80-90% of the population rely on customary justice systems and almost never interact with the state justice system. They also

outline some of the other practical benefits of customary justice. Ubink and van Rooij observe that customary justice systems hold a great deal of local legitimacy; they are in close proximity to those using them; they use familiar procedures and languages; dispute settlement is often quick and affordable or free; and organizers are knowledgeable about the local context. These aspects do not make customary justice perfect, but they make it worthy of research and resources.

The flexibility of customary justice is another benefit. Certain critics are concerned that the flexible nature of customary justice means that it will violate international standards of due process and equality before the law. This criticism has led some proponents of customary justice to promote the codification of the customary justice ‘laws.’ Codifying customary law into the state legislature is one potential solution to the human rights concerns (Ubink and van Rooij, 2011). Human rights issues will be addressed more thoroughly in the following chapter. However, I would like to point out the drawbacks of codifying laws. Pimentel (2010) articulates that customary justice is not static. Ubink and van Rooij (2011) argue that codifying customary justice may affect the dynamic, informal and accessible nature of customary justice. Pimentel adds that the non-written nature of customary justice rules allows them to adapt to changing circumstances and norms, ensuring its continued relevance. Codifying laws might ensure due process, but it may also reify customary justice, potentially diminishing its value. Furthermore, if not properly studied, inappropriate or irrelevant norms might be codified, limiting the effectiveness of the system (Ubink and van Rooij, 2011).

The desire to codify customary justice can be understood as another means of replicating the Western justice model and is not practical in all countries. Barfield, Nojumi and Thier (2011) observe in Afghanistan a variety of customary justice systems within the country. This is

likely the case in most countries with diverse populations. Problems arise when deciding which customary justice system gets codified. Should they all be codified? The diversity of customary justice systems that can occur within a country means that most people have access to a justice system that reflects their values; codifying customary justice would limit this positive aspect.

### *3.5.1 Theorizing Tradition*

As mentioned above, customary justice is understood as relying on local justice traditions, but what does tradition really signify? Traditions are not necessarily ancient, archaic beliefs and practices. In Africa, the colonial administration played a powerful role in inventing certain local traditions. Customary law is a perfect example. Obiora (1993) remarks that historicists understand customary law as a partially imposed, novel phenomenon with a false claim to continuity and ancient roots. Customary law reflects the values and interests created in line with the imperatives of the colonial state, as well as socio-economic transformations (Obiora, 1993). Merry (1988) also carefully considers the interaction between colonial administrators and the laws and legal system that they imposed on African colonies and the resistance and cooptation by local elites and community members. Due to these interactions it would be inaccurate to state that colonial law replaced indigenous law, instead, as Snyder notes (in Merry, 1988), a new form of indigenous law was created within the context of the colonial. Bond (2007) observes that much of the literature on African customs problematically treat customary law as regressive because it is ‘traditional’ rather than ‘modern.’

### *3.5.2 Tradition: An Invented Reality?*

Tradition typically connotes a fairly static practice with deep cultural roots and protracted popular legitimacy and importance. Often societies have been labelled ‘traditional’ if they were not ‘modern’ (Jahn, 2007). Modern was seen as synonymous with Western society, with

meaning invested in the human capability to manipulate the natural environment for economic prosperity (Jahn, 2007). Modernity was also linked with the liberal worldview, which claims that market democracies are the highest form of political and social organization (Jahn, 2007). Recalling Jahn's (2007) remarks on the liberal peace thesis, modernization theorists claimed that societies that were not governed by market democracies were politically, economically and socially backward. 'Africa' was and continues to be categorized as 'traditional.' Little recognition is given to the fact that all political economic systems are traditions, including market democracies. Furthermore, the assumption that market democracies are the highest form of political and social organization is unabashedly Eurocentric. Understandings of tradition and modernity have been repeatedly challenged, discussed, debated and even supported by a range of academics and scholars.

Even with critiques of modernization theory, 'tradition' continues to be understood as encompassing archaic and static beliefs and practices. Hobsbawm (2000) critically challenged the popular conception of tradition. He argued that "traditions which appear or claim to be old are often quite recent in origin and sometimes invented" (p.1). The term 'invented tradition' refers to a broad category of practices and beliefs that are invented, constructed or formally instituted in a certain time period (Hobsbawm, 2000). Hobsbawm (2000) argues that inventing traditions is the process of ritualization and formalization, which can happen quite quickly in societies that have had their social fabric weakened or destroyed. Both colonization and violent conflict are accurate examples of social fabric being weakened or destroyed. This understanding fundamentally challenges commonly held beliefs about the long history and static nature of traditions and raises new questions about the legitimacy of, and meanings invested in, traditions. Babadzan (2000) argues that the challenge is not to attest, or contest, indigenous 'tradition,'

representations, practices and beliefs, but to understand them as analyzable, avoiding the tendency to mystify the practices. Babadzan's argument suggests that tradition as a concept, as well as particular traditions, will likely remain disputed, but the key is to continue to discuss their meanings, histories and continued impact and influence.

Of course, arguing that traditions are invented does not clarify much. Who invented them? For what purpose? Does this detract from their meaning? In Africa, the invention of tradition has meant a re-examination of the colonial impact on, and interaction with, local traditions. Narayan (1998) argues that the sharp dichotomy between 'Western culture' and the colonized 'Other' created during the colonial era misrepresented the various 'colonized cultures' as a result of ideologically motivated stereotypes held by the colonizers, but also nationalist movements embracing and revaluing the assigned 'traditions' of their own culture. The manipulation of the colonized population's 'traditions' by both colonizer and colonized reflects the interactive and dynamic nature of traditions and how they can be invented to strengthen political goals.

The belief that customary justice and indigenous law are ancient 'traditions' reflects how both are misunderstood. Tradition is constantly created and recreated, accepted and rejected, in response to the social, political and economic conditions. Indigenous law is not a static, archaic system, but one that was modified during the colonial era and continues to be reinvented while remaining recognizable as a continuation from a past system. Spear (2003) notes that there was an academic shift towards theorizing traditional African institutions as being invented by colonial authorities colluding with African elders to ensure colonial dominance, as opposed to ancient institutions. However, traditions are not always 'pure' inventions or colonial-African elite creations. Spear (2003) argues that constructed traditions were rarely without local

precedence, from which they could easily gain their legitimacy. Local people continually reinterpret and reconstitute traditions in response to broader socio-economic realities. To assume otherwise would be to fully neglect the agency and influence of whole populations and to once again presume the superiority of colonial influences.

At the same time that colonial law was interacting with and influencing indigenous law, a more defined colonial legal system was also being imposed and is the basis for most state legal systems in the post-colonial era. Both Bond (2007) and Gagnon (2010), observe that the original constitutions of African states greatly reflected the views and assumptions of the colonial powers, leading many countries to reform them in subsequent years, while continuing to adhere to the belief that a constitution is essential. Through his examination of the constitutions of Angola, Tanzania, DRC, Algeria and South Africa, Gagnon (2010) questions the legitimacy of their constitutions as being based on imposed colonial law. Based on political theory of legal legitimacy, Gagnon argues that “law must emulate the pluralist citizenry rather than be formulated and imposed on the pluralist citizenry” (p.4). This argument is relevant to the legitimacy problems associated with imposing the rule of law orthodoxy, which mimics Western legal systems, on African societies. Gagnon adds that it is essential that the variety of individuals (and, I would add, groups) that constitute the population are the ones who formulate and implement the laws and legal structure that they will abide by, as concepts of justice and equality are defined uniquely by the population. Gagnon’s (2010) discussion speaks to the legacy of colonial imposition of laws and legal systems and how the colonial legal system persists, although it may be illegitimate based on its lack of representativeness.

The colonial legacy combined with the rule of law orthodoxy, created a situation in most ex-colonies, especially in post-conflict situations, where individuals and communities are denied

influence on the forms of justice that the state and international community's funds are investing in, yet they are supposed to abide by and trust these systems. Imperialism continues in its disguised rule of law format. But, the rule of law theory and practice are developing. Customary justice has entered rule of law debates and is playing a positive role in expanding how the rule of law is defined.

### **3.6 Conclusion: Customary Justice and Peace-Based Rule of Law**

Where does customary justice fit into these discussions? Given the nature of peace-based rule of law, I would argue that some customary justice systems will contribute to and others will detract from building PBROL. In most instances it is likely that the situation will be quite complex, with some aspects of the system contributing to building PBROL and others not. One important note on customary justice is that, in its current manifestation in any given context, it is less likely to contribute to the cultural violence associated with imposing a system on a population. Furthermore, as Pimentel (2010) argues, customary justice may be the best means of establishing and advancing the rule of law because it often operates with little resources and great public support. On the other hand, this does not necessarily mean that the public is supporting peaceful customary justice programs. The positive aspects of customary justice, such as accessibility, familiarity, affordability and popular legitimacy, make it a common choice, whether normative or practical, for people in post-conflict societies. However, particular systems need to be analyzed individually to understand their relation with PBROL. Ideally, the values and practices that give customary justice mechanisms force and legitimacy are reflections of popular values, but critically examined so as not to perpetuate violence or reproduce inequalities.

Customary justice systems are imperfect but, because they are flexible and open to modification and revitalization, are a crucial aspect of PBROL, which, as I pointed out above, requires a certain amount of dynamism and flexibility as well. A debate and discussion needs to remain open about how justice systems can be incorporated into rule of law programming, with the explicit aim of PBROL. It is clear that PBROL cannot be built by imposing the rule of law in a top-down manner. This imposition would signify a form of cultural violence, an argument that will be further developed in the Human Rights, Rule of Law and Customary Justice chapter. A further point to recognize is that most justice systems will not perfectly fulfil the requirements of PBROL, but the definition is a tool that can be useful in rule of law programming and examining the role of customary justice in these programs. My thesis is but a small contribution to this ongoing discussion.

## **Chapter 4: Methodology**

The field research component of this thesis is a case study of a particular customary justice mechanism called baraza. Baraza focuses on peaceful community dispute resolution in South Kivu, DRC. The aim of this chapter is to outline the research methods chosen for this study and explain why they were chosen. My research questions were thoroughly examined in the Introduction; in light of these questions, I will make clear my choice of methods. First, I will outline why I chose a qualitative single case study to explore my research questions and how participant observation and interviews were used to gather primary data on baraza. Second, I will introduce the particular case study that I selected for my research. Third, this chapter will elaborate on the practicalities of my fieldwork, such as ethical concerns and the fieldwork process. The final section of this chapter will consider the types of data that I was able to gather, and some of the limitations associated with it.

### **4.1 Methods**

Developing a research problem is an important first step to any research project (George and Bennett, 2005). The basis for my fieldwork and thesis are the questions: 1) Can customary justice contribute to building peace-based rule of law? 2) As a customary justice mechanism in the eastern DRC, does baraza play a role in building peace-based rule of law in the communities where it operates? What is its role? A subsidiary purpose of my research is to examine how baraza, as a customary justice mechanism, fits into broader debates between notions of formal and customary justice. As these debates also fall within the purview of the rule of law literature, the secondary purpose of my research flows from my research questions and can contribute to the practical and discursive debates about the rule of law orthodoxy and more critical conceptualizations of the rule of law.

#### *4.1.1 Case Study Research*

In order to best investigate my research question, I have strategically determined the most appropriate methodology. Noor (2008) articulates that the methods chosen by the researcher must be particularly suited to the research problem or question. To best engage with my research questions, I have chosen to conduct a case study. The primary data sources for this case study include interviews, participant observation, and written documents detailing baraza proceedings, provided to me by Fondation Chirezi, the organization with which I was partnered. There are a variety of benefits and drawbacks to all research methods. In the following paragraphs I will outline my choice of methods, the methods most appropriate for answering the research questions that I developed.

Qualitative research was required in order to explore the relationship between customary justice and the rule of law in the eastern DRC and to contribute to related academic debates. Reflecting the importance of the social construction of knowledge, qualitative research, typically associated with post-positivism, is a preferred method for exploring the subjectivity of social phenomena (Noor, 2008). Baraza is a context-dependent phenomenon. Gaining insight into baraza, and its role in building peace-based rule of law (PBROL), required accumulating data about how this mechanism functions and why it is used by the local population. Accessing this information required interviewing and interacting with the local baraza mediators and disputants. It is essential to recognize that the dialogic aspect of this research means that the information gathered is subjective, making quantitative research inappropriate. Ideally, quantitative research requires objectively observing and documenting facts (Noor, 2008). Critics problematize the focus on objectivity. Obiora (1993) points out that all social science research requires a degree of interpretation, therefore it is never purely objective. Ignoring the inherently subjective nature

of social science research is problematic. Haraway (1988) argues for grounded knowledge that recognizes the power positions and the interaction between researcher and participants as crucial to the production of knowledge. Qualitative case study research creates an interactive space for researcher and participants to create ‘knowledge.’ However, as noted by Haraway, recognition of the power dynamics in these interactions is crucial and will be discussed throughout this chapter. Quantitative research clearly would not have allowed for as profound and nuanced data on baraza as qualitative research has. Quantitatively documenting the number and type of conflicts that passed through baraza is important, but alone, that data would not have contributed to building an understanding of what gives those proceedings meaning in the eyes of the population participating in them; hence it would be difficult to gauge if and how baraza could contribute to building PBROL.

Citing leading scholars on case study research, Noor (2008) articulates the *raison d’être* of the case study. The case study is employed to examine why and how things happen, and requires studying the phenomenon in its real life context (Noor, 2008). George and Bennett (2005) define the case “as an instance of a class of events” (p. 17). Based on George and Bennett’s (2005) typology of case studies, my research could be categorized as a ‘building block’ type of case study. A building block case is one which examines a type or subtype of a phenomenon in order to identify patterns or serve a heuristic purpose (George and Bennett, 2005). Baraza is an example of a justice mechanism subtype: customary justice.

Although case study research has been deemed an appropriate method for studying events in their real life context, it is a method that has garnered numerous criticisms (George and Bennett, 2005). Flyvbjerg (2006) outlines certain critiques of case study research, such as: the context-dependent knowledge produced through case studies is less valuable than context-

independent knowledge; one cannot generalize from one case, therefore the study of a particular case is not overly useful; the case study is not conducive to generating hypotheses; a bias to verification is inherent in the case study; and it is difficult to generate theories based on case studies. George and Bennett (2005) also note concerns about generalizability and bias to verification and add the inability to attain conclusions about how much a particular variable affects the outcome in a particular case.

Flyvbjerg (2006) responds by demystifying the criticisms of case studies and turning them into strengths. Flyvbjerg highlights the nuanced understanding that develops from the closeness to the real-life situation and the wealth of details that stem from the in-depth nature of the case study. Echoing Haraway and Obiora, he argues that predictive theories cannot exist in social sciences due to the complexity of phenomena and the subjective nature of knowledge creation; therefore, all knowledge produced in the social sciences is contextually dependent. Flyvbjerg adds that, due to this reality, “context-dependent knowledge is more valuable than the vain search for predictive theories and universals” (p. 224). Undertaking fieldwork that examined the case of baraza allowed me to observe the real-life phenomenon and gather detailed information that I would not have been able to collect had I used another method. Given the scarcity of academic research on customary justice in post-conflict eastern DRC, this contextually dependent research will be able to make a small contribution to research on customary justice systems in the DRC, and ‘post-conflict’ situations more generally. This case study cannot be widely generalized, but that does not diminish its importance to building knowledge.

Flyvbjerg (2006) argues that while a single case study may not be formally generalizable, it can be crucial to scientific development as a supplement or alternative method and for testing

and generating hypotheses. But, more importantly, he also argues that formal generalizations hold too much weight in scientific research and that the ‘force of example’ is not enough. As mentioned above, the case study of baraza is not meant to be generalizable, but can be considered a building block adding to the research and theorization of customary justice and the rule of law.

Flyvbjerg (2006) notes that concerns about the bias to verification are relevant to all research methods. This can be useful in making researchers more self-critical; however, arguing that bias to verification is only a concern in case studies demonstrates a lack of understanding about case study research. Both Flyvbjerg (2006) and George and Bennett (2005) argue that often case study researchers actually dismiss their preconceived notions, because working so close with a particular phenomenon makes some ‘realities’ of the phenomenon difficult to ignore. Certain researchers will be more effective at case study research than others, but that is true of any type of research, qualitative or quantitative. The understanding of baraza I held prior to my arrival in the DRC was immediately challenged when I arrived in the field. Although Chirezi’s director had informed me that his organization conducted transitional justice work, the original topic of my thesis, I discovered that our understandings of transitional justice were quite different and baraza would not be an appropriate example of a grassroots transitional justice mechanism for my thesis. In the words of George and Bennett (2005), this case study led me to find that my “preliminary knowledge of the values of the independent and dependent variables was incomplete or simply wrong” (p.24). This revelation was difficult to accept, as it meant re-evaluating my research question and my entire project; but, working closely with baraza, I knew I could not portray it as an example of grassroots transitional justice in the way I had planned. Although this example does not address bias to verification in my results, it does demonstrate

that the researcher can remain critical and not succumb to assumptions or preconceived beliefs, even if conducting a case study.

Flyvbjerg (2006) argues that case studies are difficult to summarize and should be read as narratives. He states that difficulties summarizing case studies are not due to the case study method, but the complexity of the phenomenon being studied. This complexity might be missed if another method is used. This relates to George and Bennett's (2005) concern about underdetermination and the inability to draw conclusions from case studies. George and Bennett point out that case studies are stronger at assessing whether or how a variable matters, rather than how much. Reading case studies as narratives allows the complexities of the phenomenon to be explored and, while they cannot give a quantity of impact, they can help to assess whether or how a variable mattered. This understanding supports my use of a case study to examine my research question. Through my case study of baraza I do not aim to determine *how much* customary justice contributes to building PBROL, but *whether* and *how* baraza, as a case of customary justice, contributes to the PBROL. Understanding how baraza may contribute to PBROL entails understanding if and why it is seen as legitimate and whether it supports the values associated with a PBROL. This information requires the detail and nuance achievable through case study research. Furthermore, my research aims only to understand whether customary justice can be what George and Bennett (2005) label a 'contributing cause,' rather than a 'necessary condition.' George and Bennett argue that case studies are an appropriate method for determining 'contributing causes.'

The strengths of a case study's conceptual validity and deriving new hypotheses are important when examining concepts such as 'justice' and 'reconciliation.' George and Bennett (2005) note the case study's strength in the heuristic identification of new variables and

hypotheses. The experience of baraza allows for some insight into customary justice and the rule of law. This was appealing in light of the rule of law orthodoxy, which thus far has greatly ignored customary justice in the DRC, as is argued in various sections of this thesis.

I conducted a single case study. The single case study promotes a nuanced, context-specific research on the particular case (Flyvbjerg, 2006). The context-specificity is crucial for gathering information to counter the top-down nature of the rule of law orthodoxy. Although research on customary justice and the rule of law has become more popular recently, a well-founded theory of customary justice and PBROL still does not exist. My case study adds to other case study research on the topic and is therefore a building block in creating a theory of customary justice and the rule of law. A single case study allowed me to gain more comprehensive information about this one particular case in order to contribute to other case study research in different countries and of different customary justice mechanisms and their relationship to the rule of law. Participant observation and interviews were the means employed to gather detailed information on baraza.

The single case study was also an important choice for practical reasons. Given the short amount of time and limited resources available for my fieldwork, it was the only realistic option for attaining an in-depth understanding of baraza. Had I attempted multiple case studies, they would have been much less nuanced and, to a great extent, superficial. These problems would have countered the benefits associated with case study research, as outlined above. However, the single case study was chosen for strategic reasons as well.

Acknowledging the legitimacy of the debates surrounding case study research was an integral component of choosing to use this method. The literature discussed in this section outlines some important strengths of case study research. Case studies can lead to in-depth,

nuanced, and context-dependent examination of a particular phenomenon. Case studies can contribute as building blocks to existing research. In case study research the researcher's closeness with the phenomenon being studied can be a factor to counter bias to verification. Also, in case studies the complexity of the phenomenon is recognized and detailed. After some deliberation it became evident that, based on the aforementioned strengths, a case study was the best means to examine my research problem.

#### *4.1.2 Participant Observation*

One of the main methods used in this research was participant observation. The goal of participant research is to collect data through observing and taking part in the common and uncommon activities of the people being studied (DeWalt and DeWalt, 2011). There are varying degrees of participation. One extreme is non-participation, which includes gathering cultural information from outside the actual context, for example through documentaries or newspapers (DeWalt and DeWalt, 2011). At the other end of the spectrum is complete participation, which involves temporarily becoming a full member of the group being studied (DeWalt and DeWalt, 2011). My level of participation was near the middle of the spectrum, labelled moderate participation. Moderate participation includes being present at the scene, being identifiable as a researcher, and occasionally interacting with the people there (DeWalt and DeWalt, 2011). This meant being present at and observing baraza proceedings, but not directly participating in them. Outside of observing baraza my level of participation in the community was also moderate. I interacted with community members on a daily basis; however, due to security risks, I was limited in when and where I could be present in the community. My volunteer work with the organization allowed me to build a strong rapport with the students I was teaching. They were extremely useful in aiding me to understand local norms and behaviour.

Volunteering with the organization was my means of entry into the community and gaining access to participants. In making the choice to volunteer with the organization I had to consider how this may impact the power dynamic between myself and participants. Initially, I was uncertain which volunteer position the organization would ask me to fill. I had concerns that if it included resource distribution participants might feel compelled to participate because of the perceived control I would have over relatively scarce resources. A couple weeks prior to my departure, the director requested that I teach a course on human rights and conflict. The organization's university is entirely separate from its other projects, such as baraza, and the students that I taught did not include potential participants. Volunteering is an important part of my research strategy. DeWalt and DeWalt (2011) observe that to build a rapport with participants, researchers need to learn appropriate behaviour, be good listeners, be respectful, and answer questions truthfully. For me, building rapport through the outlined techniques was facilitated through my interactions as a volunteer, which promoted my knowledge of appropriate behaviour and local norms. Chirezi staff members in Uvira were exceptionally helpful. They were always willing to answer questions about the local politics, history and conflict. Interacting with the university students<sup>16</sup> also helped deepen my understanding of local political and social dynamics and norms.

I recognize that partnering with a local organization as a means of accessing participants has potential downfalls. There was a possibility that my association with this organization might have led to distrust from community members if they were not supportive of Chirezi's initiatives; however, I did not find this to be the case. The baraza disputants who I had the opportunity to interact with were open and willing to be interviewed. The staff from various NGOs and other

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<sup>16</sup> The NGO provided university courses at a reduced tuition fee to make them more readily accessible to the general population. However, the university was not yet accredited.

community members were eager to inform me about the problems they were facing (as an NGO or local inhabitant). Therefore, it would appear that my loose affiliation with Chirezi did not affect my research negatively. Volunteering was definitely the most appropriate entrance point to the community and means to gain access to participants.

Participant observation was a crucial component of understanding how conflict resolution functions through baraza, as well as which issues are addressed and which are not, who is involved and who is not. Merriam (2009) outlines a list of things to observe when starting fieldwork, which I have found useful. The list includes the physical setting, the participants, activities and interactions, conversation, subtle factors, and my own behaviour. Merriam's list includes important points that should be taken note of in field notes. DeWalt and DeWalt (2011) distinguish between jot notes and proper field notes. Jot notes are words, phrases and sentences written throughout the day, and are useful tools for remembering the day's events when creating proper field notes. DeWalt and DeWalt (2011) advise reserving one hour of proper field note writing for every two hours of fieldwork to ensure enough time for a high level of detail and analysis, as well as documenting impressions, thoughts and concerns. To a large extent I followed the suggestions outlined by Merriam and DeWalt and DeWalt.

#### *4.1.3 Interviews*

Interviewing was another method I used. I conducted semi-structured interviews with individuals involved in conflicts being mediated through baraza, or those who had participated in baraza in the past. DeWalt and DeWalt (2011) place interview styles along a scale. The interviews I conducted could be considered structured to semi-structured. In these types of interviews, the interviewer creates a list of questions and prompts in an attempt to ensure that all the topics are covered in all the interviews (DeWalt and DeWalt, 2011). The semi-structured

interview was appropriate as it allowed me to ask all the questions I wanted to cover, but it also left room for the interviewees to express themselves and bring in new information that might add to the research and potentially new lines of questioning. In instances where further lines of questioning did not arise, the interview could be considered structured.

Access to interviewees was attained through my partnership with Chirezi. Chirezi staff introduced me to baraza mediators who in turn introduced me to disputants, as well as other important figures in the community, such as local chiefs. Given this method of recruiting participants, a brief discussion of power is warranted. I had concerns that, in an attempt to ‘help’ with my research or gain favour with me because of assumptions of privileges that I may be able to provide them with as an educated Westerner, Chirezi staff and baraza mediators may explicitly or implicitly pressure people to participate. The organization and mediators are in a privileged position vis-à-vis baraza disputants, as they organize baraza and make the rulings in baraza proceedings. Although there is no way I could guarantee that people would not be pressured into participating, I articulated to Chirezi staff and mediators that this was not the expectation and that potential participants should be allowed to freely choose to participate. I also made it clear that there would be no compensation for Chirezi staff, baraza mediators or participants.

It is important to note the role of interviews in knowledge production. Obiora (1993) points out that both the interviewer and the interviewee interactively participate in the knowledge that is created. Interviews do not objectively uncover information, but actively create it (Obiora, 1993). Since both the interviewer and the interviewee participate in knowledge production, it is important to consider the power relations between the two. I will continue to consider the power

relations inherent in my research; it is an issue that will be meditated on throughout the rest of this chapter.

## **4.2 Fieldwork in the Eastern DRC**

### *4.2.1 Ethical Considerations*

The continuous violence and conflict in the region complicated the fieldwork. Ensuring that my fieldwork was conducted in an ethical manner was crucial for the security of participants. I did receive ethics clearance from the Carleton University Research Ethics Board. In this section, I first describe some of practical difficulties that arose during my fieldwork, such as changing my research question, transportation and communication difficulties, and safety issues. Next, I examine the ethical measures that I undertook to ensure the safety of participants, such as working with an interpreter, informed consent, honesty with participants, retraumatization and revictimization, and storage and use of information collected. The power dynamics of my research is another ethical issue. I address power relations where necessary throughout the discussion of ethical considerations, as well as in the subsequent section on positionality and reflexivity.

I lived in Mulongwe, a “quartier” (or neighbourhood) within the town of Uvira, South Kivu from 1 September 2011 to 23 November 2011 (just prior to the DRC elections). I conducted my research in three locations: Kavimvira, Makobola and Kiliba. Makobola and Kiliba are both approximately 45 minutes by motorbike from my place of residence, Kavimvira is approximately 20 minutes. Makobola and Kiliba are more rural than Kavimvira. I conducted nine interviews in Kavimvira, ten in Makobola, and eleven in Kiliba. Each of these interviews was with a disputer over eighteen years of age. I also gathered useful information from Chirezi

staff and baraza mediators, but this was mostly through participant observation based on my numerous meetings with them rather than through formal interviews.

The initial difficulty I encountered was a need to change the research question. My research proposal and preparation was focused on examining baraza as a grassroots transitional justice mechanism. Within a few days, it was clear that baraza could not be precisely classified as a transitional justice mechanism. It is indeed a justice mechanism functioning in what could be labelled a transitioning society; however, it does not specifically deal with harms or atrocities perpetrated during violent conflict. On the other hand, some of the disputes could be understood as corollaries of violent conflict, for example, land disputes resulting from returning refugees, or economic disputes linked to the high poverty level that violence and instability have perpetuated. There was indeed still potential for me to consider baraza as some form of transitional justice, but I did not find this to be the most appropriate way of analyzing its work. As I learned more about baraza I discovered that it was a conflict resolution mechanism that focuses on reconciliation, which is filling a void left by the state justice system, but is also the revitalization of a conflict resolution system that had functioned historically in the region.

The complications that led me to change my research question stem from the inherent difficulty of communicating over the internet from two fully different contexts. I found Chirezi Foundation on a website dedicated to promoting the work of local ‘peacebuilders.’ Little information is provided on the website, but I was able to contact the director. The information that the director provided me with was accurate in his understanding of the terminology and questions I had asked. However, our understandings of certain concepts differed due to our different educational backgrounds and cultural influences, and therefore the lens through which we understand certain ideas. I clearly do not live in a society that has recently experienced mass

violent conflict so my understanding of transitional justice is solely based on academic literature, rather than experience. Although our communications were as clear and honest as possible, it was only upon arrival that I realized our different understandings of transitional justice. It was through a reconsideration of baraza's work that I developed my new research question.

It is also pertinent to remark on power relations at this point. My power as researcher is evident in my choice to define and research baraza not as a transitional justice mechanism, even though that is how the director of Chirezi defined it to me. My aim was not to simply ignore how Chirezi defines baraza, but to ensure that my research would be relevant to the academic literature as well. As mentioned above, our difference in understanding of baraza relates to differences in our cultural and educational backgrounds; however, my power to choose how baraza is conceptualized is evidence of my power as researcher.

There were numerous practical issues related to conducting fieldwork in the eastern DRC. Communication and transportation are extremely problematic. Cell phone networks functioned intermittently. In order to set up interviews I would contact baraza mediators, who would have to physically visit most participants, as few had cell phones, and then try to contact me. This method often failed, especially in Makobola, as networks rarely functioned for extended periods. When there was no cell phone reception, I, with the interpreter, would often have to visit baraza mediators the day before the interview to confirm the time and location. This meant coordinating times with the interpreter and Chirezi, so that we could make use of the motorbike, as I did not have other means of transportation. This method did allow me to interview various participants and observe baraza meetings, but it also meant a lot of 'wasted' time. Furthermore, because baraza meetings were often *ad hoc*, we were sometimes unable to arrive in time.

Security was a concern while undertaking fieldwork in the eastern DRC. I had to consider participants, the interpreter, and my own personal security when conducting this research. The ethical considerations were crucial to ensuring the safety of participants and are outlined below. As for my own personal safety, I resided in a guarded, fenced-in house. I also ensured that I was home before dark. I registered with the local authorities and informed them of my research, as official protocol deems necessary. I also followed the security advice provided by Chirezi staff.

Working with an interpreter is a major consideration when ensuring that research is conducted ethically. I do not speak Swahili so working with an interpreter was essential. I contacted Chirezi prior to my arrival to find a multilingual translator. Although necessary, an interpreter added another dimension to my research. I was concerned that participants may feel less comfortable speaking about sensitive issues in front of more people, and that this apprehension may be amplified with an interpreter present. When I started my fieldwork I thought a woman translator would be ideal and worked with a woman translator from Burundi. I changed translators after approximately three weeks for various reasons, one being that it was difficult to coordinate with her in Burundi. The other reasons are outlined in the section Positionality and Reflexivity. The second translator I worked with was a local man. Finding a local man to employ as a translator was far easier than finding a woman. Women often have duties in the home and fields that they must fulfil, often leaving them less available for other forms of work. Furthermore, my acquaintances in the region were limited and did not include women with strong French skills, which was a skill necessary for the translator. Of course, I was worried that female participants may feel uneasy talking with a man about gender inequality. I discussed this concern with the interpreter beforehand. Even though we had different

understandings of gender equality and women's rights in the region, he acknowledged my concern and agreed to always be respectful, sensitive and accurate in his duties as interpreter. His knowledge of local realities was extremely useful. Also, his full 'insider' status was beneficial. It appeared to me that participants were comfortable speaking with him, especially because he knew all the local languages. His awareness of local norms and languages was important to gaining the trust of participants and I sensed a greater ease during interviews than I did with the first translator. For these reasons he was a better choice of translator.

To guarantee the ethical conduct of this research, I received informed consent from all participants. I prepared an informed consent sheet and an information sheet in both French and English. Typically, baraza mediators would approach potential participants and provide them with information and the reasons I was requesting an interview or to witness the baraza mediation process, and then ask if they were willing to participate. If the individual agreed, baraza mediators would contact me to let me know when and where I could conduct the interview or mediation. Immediately prior to interviews, the information was provided to the participant orally. All information about informed consent was explained and discussed with the translator in advance to ensure accurate translation. In all but one interview I read this information in French or English and the interpreter I was working with translated it to Swahili. In the case of the other interview, the interviewee was fluent in French and agreed to participate after the information was read in French. At this point, participants were also informed that they may withdraw until the date of my departure from the DRC, 23 November 2011.

Also, through the informed consent process, I made it clear to all potential participants, that my volunteer time with Chirezi was not in exchange for participants. Even though participants were not directly benefiting from my volunteer role I did not want them to feel

pressured to participate. There was still the possibility that individuals would feel pressured to participate purely because of my status as a foreign researcher. I made the effort to explain that this was not my expectation and that there would not be any negative consequences for not participating. I made sure to explain my concern that participants might feel pressured to participate to Chirezi staff and mediators so that they would not try to pressure participants in order to ‘help’ me with my research.

Explaining the information on the informed consent sheet orally was a crucial aspect of conducting ethical research, given the low literacy rate. Most participants gave some form of written consent. Based on local norms, I accepted thumbprints as written consent. Many participants were illiterate, but chose to give written consent in this manner, which I accepted as it was common practice. A minority of individuals did give oral consent, which they agreed could be recorded on an audio-recorder. All participants agreed to have their interviews recorded.

DeWalt and DeWalt (2011) point out that people have a right to know that they are research subjects. To avoid any sort of deception I enlisted the aid of Chirezi staff to explain to all those participating in their projects that I am conducting research. I requested that this explanation occur prior to my arrival, so that individuals may decide whether and how they wish to participate. The information was reiterated once I arrived and before baraza proceedings. All participants were informed that they would remain anonymous. Thus, in my thesis, pseudonyms are designated to each participant. Attaining informed consent through providing the information before my arrival was very helpful; however, because of this method, I found it difficult to have participants at baraza meetings sign the appropriate forms. Most were content not to go over the consent information again, but rather to begin with the baraza proceedings.

Furthermore, people often came or departed throughout the proceedings. My impression is that the informed consent process, though necessary for ethical research, was a bit formal in the eyes of participants. I attained written or oral informed consent for all interviews, but with participant observation I accepted consent derived through mediators and Chirezi staff who had provided the information to the participants. One other important point to mention is that I made clear that participants were free to ask me questions about my research and that I would answer truthfully. I also agreed to send Chirezi Foundation a copy of my final thesis, as both mediators and staff requested that I do so.

Another ethical concern was that participants might feel retraumatized by discussing in interviews the conflict they had experienced, or that they may be revictimized. My original understanding of baraza as a transitional justice mechanism led me to be concerned that I would be speaking to survivors of war crimes and sexual violence. However, after arriving in Uvira and learning more about the types of conflict that baraza mediates I discovered that they do not deal with conflicts over murder or sexual violence, although sometimes they are asked to by community members. The conflicts that are mediated through baraza are typically not violent conflict and not directly related to the wars or violent conflict in the region; furthermore, the goal is reconciliation between disputants, not punishment. This, however, does not preclude the possibility of retraumatization.

I took certain steps to ensure that disputants were not retraumatized. First, all interviews were conducted in a location chosen by the interviewee. Second, Chirezi agreed to provide counselling and debriefing resources to any participant who requested these services. Not one participant requested these services after the interview. Third, all participants had already publicly engaged in baraza; thus, my research did not attempt to involve individuals who had not

already come forward to publicly discuss a conflict or an experience of victimization. In other words, all participants were people who, through baraza, had previously publicly disclosed their experiences. In a couple of cases where the conflict was related to domestic violence I was exceptionally concerned that the women might be revictimized by their partner because they spoke with me about the abuse. I discussed this concern with the translator and asked that if they indicated any such fear we should not proceed with the interviews. Both women still wanted to be interviewed and the same measures were taken to reduce the potential for retraumatization.

I was concerned that individuals may feel vulnerable if they were uncertain how information would be used or protected. I addressed this issue by informing people of how the information will be used, that it will not be shared with others, that they will remain anonymous, and that all recorded and written information will be kept locked up. In the field, I did not find participants to be fearful about sharing information, but were interested to know how it would be used and why I wanted to learn about their conflicts. In reference to fieldwork in conflict situations, Paluck (2009) identifies a tension between providing participants with a sufficient amount of information for them to make an informed decision and a need to avoid demonstrating the researcher's political or ideological associations and biases. I generally answered participants' questions by telling them that I was interested in learning more about baraza and that I will be writing my MA thesis about justice and baraza. Although this response was rather vague, baraza disputants did not ask for more details, whereas some baraza mediators did. I responded honestly to their questions and this led to many interesting discussions about the political, economic and social situation in the DRC, as well as the role of NGOs and the international community. There is certainly a tension between the need to be truthful with participants and not providing too much information about the research so as to influence the

participants' responses. For example, I did not want to share my previously held beliefs about customary justice because I would not want participants to feel any sort of pressure to agree with or support my beliefs or assumptions about baraza.

### **4.3 Data Sources and Analysis**

The primary sources of the data I collected were interviews and participant observation. I conducted thirty interviews and observed baraza proceedings on numerous occasions. I interacted with Chirezi staff on a daily basis and took notes of everything that I thought may be relevant to my research. These methods allowed me to collect vast amounts of data. In order to analyze this data, I had to begin by coding the information.

Initially, I read through my data and determined some major themes. The major themes that I identified were customary/traditional justice, reconciliation, gender roles and (in)equality, poverty, and witchcraft. Coffey and Atkinson (1996) argue that through assigning labels to data based on our concepts, researchers are able to condense the data into analyzable units. I chose the topics to code based on the aforementioned themes. The topics I coded for are tradition, justice, reconciliation, forgiveness, women's rights, conflict, witchcraft, poverty, religion, 'la justice' (the common term for the state justice system), corruption, and trust. Coffey and Atkinson (1996) note that the analytic work lies not in coding, but in determining links and relationships between the various themes, topics and concepts, then interpreting and drawing conclusions based on one's analysis. Delamont suggests examining the coded data for themes and patterns, as well as paradoxes and irregularities (Coffey and Atkinson, 1996). The themes and topics that I have derived from the coding exercise will be analyzed based on my theoretical framework, which combines theorizing tradition and the rule of law.

#### *4.3.1 Limitations*

Although certain case study myths have been debunked (see section on Case Studies) it would be unwise to ignore the real limitations of my case study. My study is limited by a variety of factors, including a limited scope and language difficulties.

George and Bennett (2005) pointed out that case studies can lack representativeness, meaning that they do not represent diverse populations, and cannot make broad claims that the results are applicable to such populations. These issues are relevant to my research due to its very limited scope. First, I conducted a total of thirty interviews, divided between three towns. I observed the phenomenon of baraza in its contextual setting; however, I only did this for three months. The overall generalizability of this case study is quite limited. However, as George and Bennett (2005) note, case study researchers sacrifice broad applicability in order to “develop cumulatively contingent generalizations that apply to well-defined types or subtypes of cases with a high degree of explanatory richness” (p.31). Therefore, although my case study is limited in general applicability, it is not without purpose. My study of baraza gives insight into this customary justice mechanism and can contribute to developing a theory of customary justice and the rule of law when combined with the other case studies conducted on the topic.

Another limitation is interpretation/translation. Translating between French, English and Swahili meant that some nuances were likely lost in translation, no matter how accurate we attempted to be. Furthermore, my being an outsider has to be taken into consideration. While I tried to learn as much about the local culture and customs as possible, my identity as a white, foreign researcher was always an evident difference. One example of this problem became quite obvious during fieldwork. Participants often denied their beliefs in witchcraft during interviews, even when witchcraft was a major factor in their dispute. The second interpreter informed me

that because both myself and the first interpreter were outsiders some participants did not trust us with information on this particular subject.

#### *4.3.2 Positionality and Reflexivity*

In light of social science research's recognition of the difficulty and appropriateness of achieving objectivity in fieldwork, no methodological analysis of fieldwork is complete without the consideration of positionality and reflexivity. Rose (1997) points out that the researcher is not all-knowing and she should situate herself and her interpretations of interviews by examining her own positionality. Merriam et al. (2001) note that positionality is determined by where one stands in relation to the other, and that this can change throughout the fieldwork. Positionality is based on a variety of aspects of one's identities, such as age, gender, race, ethnicity, and sexual orientation, combined with one's personal biography (England, 1994). Merriam et al. (2001) also complicate the understanding of positionality by problematizing the insider-outsider binary through an analysis of all groups or cultures as heterogeneous rather than monolithic. While one may be an outsider in some respects, s/he may be insider based on other aspects of one's identity, and these relations will change over time and between participants.

Merriam et al. (2001) also argue that all researchers go into the field with certain assumptions about the phenomenon and population that they are studying. It is undeniable that research participants hold assumptions about the researcher as well, based on certain aspects of their identity, and overall identity as an outsider. My positionality is based on a combination of my assumptions about the situation and the phenomenon I was studying and my relative status as an outsider. Previous research that I have conducted has focused on conflict in the Great Lakes region and sexual and gender-based violence, war and justice. Based on my previous studies of these topics, I hypothesized that local, grassroots initiatives would be important. The

international community's interaction with African countries retains neo-colonial tendencies, which are evident in the rule of law orthodoxy, augmenting my sympathies to local, contextually appropriate initiatives. This is an argument I will elaborate on throughout my thesis.

In my research it was relevant to consider a variety of power dynamics that were at play. The power associated with being an educated Westerner was exemplified in my interactions with baraza mediators. I frequently attended baraza meetings and mediation; at times I was asked to give my opinion about a particular conflict and how it should be resolved. In these instances I declined participation and reminded baraza mediators that I wanted to learn their usual processes for resolving disputes. The respect I was immediately afforded likely stems from my nationality and education level. My status as foreigner was also associated with wealth. Although it was made clear to all participants that there would be no compensation for participating, a few did request money or goods at the end of the interview. No one was compensated for participating.

In my interactions with locals my status as educated Westerner appeared to supersede the diminished power associated with my gender. However, my gender is still an important part of understanding my interactions and interviews, especially with men. Linda McDowell's assertion that because women may be perceived by men as "unthreatening or not 'official,' confidential documents (are) often made accessible, or difficult issues broached relatively freely" (England, 1994). My relative youth also likely contributed to the perception that I was not a threat. However, this was in tension with my status as educated and foreign or as a cultural outsider.

As I am a cultural 'outsider' in the DRC, I am a cultural 'insider' elsewhere. The culture of which I am an insider is not exactly definable, but could be defined as 'Western,' 'European,' 'Canadian,' 'American,' or some combination of all of these. Like all in-groups, outsiders are

portrayed in a manner that is perceived as accurate by those within the group, but this is often based on assumptions and in-group cultural reproductions of those assumptions. The media and popular culture portrayals of Congolese men, and African men more generally, tends to be racialized imagery of a ‘backwards savage.’ The violence associated with patriarchy elsewhere is always portrayed as graver than within ‘Western’ culture. Although I do not subscribe to these generalizations, false representations and romanticizations of the ‘backwards’ African male ‘other,’ these would appear to be the dominant beliefs in Western culture, and therefore have been part of what I have been socialized to believe. I wish to actively demystify our culturally ingrained misrepresentations of the ‘other,’ but I cannot pretend that they have not shaped my beliefs and assumptions, even if only tacitly. Reflecting on these assumptions is a way to explicitly recognize that they have impacted my general belief system. Acknowledging this will help me to remain cognizant of the potential to reproduce them, and instead focus on engaging with and demystifying these culturally-based assumptions.

Other issues potentially influencing my interviews with men stem from the well-documented level of sexual and gender-based violence.<sup>17</sup> I readily recognized that not all men are complicit in sexual and gender-based violence in the region. However, the reality of the high level of sexual violence and gender inequality in the region likely influenced my expectations and interactions with men.

At times I questioned the sincerity of male participants’ call for increased gender equality. My concern being that, with the proliferation of women’s and human rights NGOs in the region, individuals are aware that internationals advocate gender equality, and that expectation is superficially internalized, leading participants to iterate the expectation, but not necessarily believe it or act on it. On the other hand, my questioning of their sincerity may stem

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<sup>17</sup> See, for example, Baaz and Stern (2010).

from my own standpoint being one that is acutely aware of the sexual and gender-based violence in the region, leading me to be predisposed to assuming most men complicit in its perpetuation. In reality the most accurate portrayal is probably an amalgamation of both my expectations, as female researcher, male interviewees' assumptions about my expectations, and participants' real actual support for gender equality.

I must also consider the positionality of my interpreters. When I started my research I worked with a young woman. It became evident to me that this situation was not ideal. First, she was not local, she was born and lives in Burundi and is Anglophone. Certain language difficulties arose from her not being of local origin. Although communication occurred predominantly in Swahili, the nuances of the mixture of Swahili, French and participants' primary languages were often lost on my interpreter. Furthermore, she accepted the job, but she did not feel comfortable in the town or around the participants. Often after baraza sessions, the interpreter would quickly depart, without accepting that taking part in the ensuing informal discussions of a particular case was relevant to the research, how the particular conflict would be resolved, and the participants' impressions of us. Due to these difficulties, I reconsidered my choice and decided to work with a local male interpreter. As noted in the section Ethical Considerations, my decision to work with a male interpreter was both strategic and practical. He was local and understood local realities and languages. I considered that some women would not feel as comfortable speaking with him about gender-based violence or gender inequalities, but, as previously noted, we discussed how we could best address this issue. I decided that his sensitivity to the local context outweighed the possibility that some women would be less open with him because of his gender and the power associated with being male in the eastern DRC.

The second interpreter was well accepted by participants. My status as outsider limited access to certain information. For example, the issue of witchcraft was raised repeatedly, but few were willing to talk openly about it with me and my first interpreter. The presence of my second interpreter at interviews encouraged participants to speak more openly about issues surrounding witchcraft. He functioned as a cultural mediator between myself and participants. Due to his insider status, his acceptance of me generally meant I was not a threat.

The power dynamics between mediators is likely to have impacted the results of mediation cases. I am ambivalent in my understanding of the gender-based power dynamics of baraza mediators. Due to the societal gender inequalities that are evident, I surmised that women mediators would not be as influential in the mediation process. All baraza proceedings were conducted in Swahili, making it difficult for me to understand all the nuances, even though I was working with an interpreter. In some cases women appeared to be more influential in the proceeding than in other cases. However, this cannot be understood as reflective of broader gender-based power dynamics, as both men and women mediators were chosen because of their leadership roles in their communities.

#### **4.4 Conclusion**

Defining the research question and determining the best methods to examine it are an elaborate undertaking. I chose the case study as it is the most appropriate way to analyze baraza's role in building a PBROL in the eastern DRC. I contextualized baraza in the DRC's history of colonization, corruption, instability and conflict. The methods employed had to be implemented in an ethical manner. Anonymity was of crucial importance to conducting ethical research. Interviews and participant observation allowed me to gain a wealth of information, which then had to be coded and analyzed. Given the nature of my fieldwork in a foreign setting,

it was necessary to be aware of my own positionality and to reflect on some of the power dynamics between myself and the participants. In a difficult situation to undertake fieldwork I did my best to ensure the safety of all participants and myself, while gathering information that would lead to some insight into customary justice and the rule of law in the DRC.

## **Chapter 5: Peace-Based Rule of Law and Baraza**

In the Conceptual Framework chapter I outlined certain problems associated with the rule of law orthodoxy. After reflecting on these problems I developed an alternative conceptualization of the rule of law, ‘peace-based rule of law’ (PBROL). This chapter is a substantive exploration of PBROL using the case of baraza and examining how it adheres to and deviates from the characteristics and goal of PBROL. In the first section I will outline the characteristics that I attribute to PBROL. This breakdown of PBROL will lead to a further examination of the goal of advancing structural and cultural peace (combined, also referred to as positive peace). In the second section I use the case study of baraza to materially or substantively ground the abstract concept of PBROL. As such, I analyze baraza’s relationship to the elements and goals of PBROL. Finally, in the third section I will examine certain problematic concepts that arose throughout my data analysis: reconciliation, choice and trust.

### **5.1 Peace-Based Rule of Law**

As with all conceptualizations of the rule of law, certain characteristics define PBROL. I explicitly acknowledge that PBROL makes value claims and is not advanced by all forms of justice, customary or otherwise. In the following paragraphs I breakdown PBROL and articulate its various features to facilitate an analysis of how baraza does, and does not, adhere to them. Specifically, I argue that PBROL is principally defined by its contribution to positive peace, which refers to structures and cultures of peace. Positive peace can be understood as the overarching principle that constitutes PBROL. Following from its role in contributing to positive peace, PBROL is also defined by the following characteristics: (1) an anti-colonial ethos that precludes the external imposition of one size fits all programming, (2) legal pluralism, including the recognition of different arbiters of justice, and (3) social responsiveness.

As explored in the Conceptual Framework chapter, the goal of PBROL is to promote positive peace, a strong step toward preventing the recurrence of hostilities in the future.

Structural and cultural violence are visible in most societies and cultures. A violent structure is one with exploitation at its core, meaning ‘top dogs’ get more than ‘underdogs’ through participation in the structure (Galtung, 1996, p. 198). Structural violence, therefore, includes social structures characterized by poverty and inequality, including racism and gender inequality (Farmer, 2004). Structural peace requires the questioning the root causes of certain disputes, specifically those arising from inequality that can be based on a variety of differences.

Cultural violence includes “those aspects of culture, the symbolic sphere of our existence—exemplified by religion and ideology, language and art, empirical science and formal science (logic, mathematics) — that can be used to justify or legitimize direct or structural violence,” and cultural peace as “aspects of a culture that serve to justify and legitimize direct peace and structural peace” (Galtung, 1990, p. 291). A key distinction to be made is that cultural violence is not equated with a violent culture. All cultures have practices, beliefs and values that can be considered violent or peaceful. In the discussion below, when I refer to cultural violence, I am not suggesting that the local culture or Congolese culture is violent, but that specific practices or beliefs are violent.

Galtung (1990) notes that one of the fundamental difficulties of peace research is the temptation to institutionalize peaceful aspects of certain cultures globally. This, he notes is problematic as it entails imposing culture, which he considers to be direct violence, but I would argue that imposition could also be considered cultural violence. Critics<sup>18</sup> have pointed out that Eurocentrism played a role in the reproduction of liberal structures globally, particularly in states with less power. This phenomenon is visible from the colonial era to the present, through

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<sup>18</sup> See, for example, Petersen (2010).

modernization projects, structural adjustment projects and post-conflict reconstruction founded on the liberal peace thesis, including the rule of law orthodoxy. Even if the tenets of liberal peace thesis were accurate (see critique in Conceptual Framework chapter) the goal of institutionalizing liberal market democracies in post-conflict states would still be considered violent, with Orientalism<sup>19</sup> being the cultural form of violence legitimizing this process.

Based on the theory that violence breeds more violence, PBROL seeks to promote justice practices and values that do not strengthen or reinforce any form of violence. It seeks to promote justice-related cultural norms that support and legitimize structural peace. As mentioned above, this is an ideal that will not be perfectly realizable in practice. It is, however, a tool designed to improve the way in which rule of law programming is implemented in post-conflict situations.

Following from the goal of positive peace at the heart of PBROL, several other characteristics define this concept. First, PBROL represents an anti-colonial ethos in the sense that it rejects the cultural violence of externally imposed justice practices. The anti-colonial ethos in which PBROL is based is reflected in three of PBROL's characteristics. First, PBROL is defined by a local history and tradition. This means that most justice practices that conform to PBROL will differ by location. Cookie-cutter rule of law programs will inevitably not conform to PBROL because they will not be grounded in local history. This does not mean that justice practices remain static over time, but that they have a foundation in local history, making them familiar. Second, and related to the first component reflecting the anti-colonial ethos, PBROL requires justice practices which are founded in local conceptualizations of justice and fairness. The third way in which PBROL reflects the anti-colonial ethos is through the characteristic of non-imposition. There is a fine line between imposing and collaborating or consulting in which the power dynamics of the groups in consultation must be considered. While I cluster together

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<sup>19</sup> See Springer (2011) for a critical discussion of Orientalism, neoliberalism and the geography of violence.

these interrelated features under the rubric of ‘anti-colonialism,’ these features do not necessarily signal a resistance to colonialism by participants in PBROL. Rather, I use the term ‘anti-colonial’ to reflect PBROL as a lived reality of justice practices that are in competition with the rule of law orthodoxy as an iteration of neo-colonialism, as I explored earlier.

Second, legal pluralism, meaning the co-existence of multiple law-based systems in a particular space and time, is another major characteristic of PBROL. In keeping with the principle of positive peace, legal pluralism also resists the cultural violence of external cultural imposition by recognizing the possibility of multiple legal systems co-existing. Legal pluralism creates complex regulatory dynamics. Tamanaha (2008) notes that the different systems “may make competing claims of authority; they may impose conflicting demands or norms; they may have different styles and orientations” (p. 375). Part of the ongoing complexity of situations of legal pluralism is coordinating different justice processes in a manner that people can easily understand and manoeuvre; this is a difficulty that PBROL researchers and programmers must tackle, but is not the primary interest of this research.

A corollary of legal pluralism is recognizing the variety of legal justice arbiters. Golub (2006) articulates the problem of rule by lawyers in orthodox rule of law programming. PBROL recognizes that ‘knowledge’ of justice does not belong exclusively to the professional sphere, i.e., lawyers, judges or other trained legal professionals. Instead, ‘knowledge’ of justice may be gained through experience accumulated outside of formal education or training. This does not preclude formally educated and trained individuals from being arbiters of justice, but recognizes that wisdom is understood to develop differently in different contexts and can be based, for example, on life experience or rooted in religious and other belief systems.

Social responsiveness represents the third major characteristic of my concept of PBROL.

While PBROL is based in local history and tradition, it also recognizes the *dynamism* of tradition and society. In this sense, it is responsive to social change. In keeping with the principle of positive peace, social responsiveness aims to build structures of peace, including equality. As awareness is raised and views changed about social justice and equality issues, systems of law must be responsive. Social responsiveness also suggests that justice mechanisms can lead to positive norm change (to reflect internationally agreed upon standards) in response to social needs while maintaining local relevance. This aspect can be more problematic as it can be interpreted as advancing external norms, but it would be unrealistic to understand justice mechanisms and beliefs to exist in isolation of broader national and international politics. Therefore, it is possible for local PBROL programmers to promote internationally recognized norms by making them contextually relevant. This social responsiveness that connects custom with international norms reflects what Merry (1996) refers to as ‘vernacularisation,’ in that it combines indigenous concepts and values with state and global law.

The goal of positive peace is a ‘limiter’ on the other characteristic of PBROL (anti-colonialism, legal pluralism and social responsiveness) in the sense that it places restraints on the other characteristics. Specifically, the goal of positive peace means that not all forms of customary justice will constitute PBROL. For example, forms of customary justice that use direct violence or perpetuate inequalities do not qualify as PBROL. For example, an informant explained a locally-accepted justice practice that existed in certain areas that had been controlled by a rebel group called Rally for Congolese Democracy (RCD). This justice practice involved RCD officials physically harming the offender to an extent comparable to the offence committed. Although accepted by some, this practice would not adhere to the principles of PBROL. Positive

peace also gives this concept the title ‘peace-based’ rule of law. The ‘limiter’ makes PBROL idealistic and contributes to filling gaps in other conceptualizations of the rule of law that are critiqued for not addressing structural forms of violence, especially in post-conflict situations. For example, Mani (2005) states that there is a tendency for peacebuilders to use the rule of law to restore order rather than address justice issues.<sup>20</sup> She adds that rule of law efforts by national and international organizations may lead to short term negative peace (cessation of hostilities) at the expense of long-term positive peace. Given that the goal of peacebuilding is to achieve long-term peace, the recognition of positive peace is lacking from many rule of law programs. In the following section, I will explore how baraza adheres to, as well as deviates from, PBROL.

## **5.2 Exploring PBROL through an Analysis of Baraza<sup>21</sup>**

The analysis in this section gives substance to the abstract concept of PBROL through an examination of baraza. This is an important undertaking because, as Isser (2011) points out, customary justice mechanisms are often measured against Western rule of law templates, thus obscuring the reality on the ground. Measuring baraza against PBROL standards, which are based on the principles of positive peace, will provide a different understanding of this particular customary justice mechanism. I will examine each of the three major characteristics of PBROL, then turn to the overarching principle of positive peace. First, I will explore whether baraza adheres to the anti-colonial ethos. Second, I will examine baraza’s relationship to legal pluralism and the professionalization of justice ‘knowledge.’ Third, I will consider whether baraza is socially responsive and dynamic. Fourth, I will return to the overarching principle of positive peace and evaluate the complex relationship between baraza and violence: direct, structural and

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<sup>20</sup> The description of the rule of law used in this article conforms to the rule of law orthodoxy; it is technocratic, ‘one size fits all,’ top-down and not contextually meaningful.

<sup>21</sup> In this section I draw heavily on particular interviews. The interviewees cited at length tended to provide more in depth responses regarding the theme in question. If, however, their statements are divergent from the majority of other interviewees, I make note of this divergence.

cultural. Fifth, I will briefly examine violent justice practices in the DRC and how baraza can be understood to perpetuate structural and cultural violence.

### *5.2.1 Anti-Colonial Ethos*

The first characteristic of PBROL is an anti-colonial ethos, which I have sub-divided into three components. First, PBROL relies on a local history of justice practices. Second, PBROL is founded in locally defined ideas of justice and fairness. Third, PBROL is not imposed. Based on interviews and field observations, I will analyze how baraza measures up to these standards.

#### *a. Local History*

Isser (2011) points out that a feature of customary justice is that it is highly localized with long-standing structures. The local history of customary justice mechanisms means that their processes and ideological underpinnings are familiar to the local population. Baraza was not previously (before Chirezi began this project) known to all interviewees, but its processes and goals were popularly understood as they are based on a local history of similar community-based conflict resolution strategies. Matthieu (Interview, October 11), an elderly man who was in conflict with a woman over rumours that his daughter spread about the woman's daughter, recounted, "I was born in the mountains. Before, we did not recognize the state, it was the chief. We would go in front of the mwami [king]; he would give us advice and reconciled people like that." He also added, "we treated the problems [through baraza] like we did in the old days." In this quote, Matthieu expressed the local historical relevance of the mwami in resolving disputes. The family was another means through which disputes could be resolved. Julie (Interview, September 24), whose dispute arose because her goat was grazing in another family's field, said that, in the past, "[c]onflicts were dealt with by the family." Historically, there was no expectation of a legal system to ensure justice; it was the family's duty to resolve intra-familial

conflicts and the king's duty to reconcile inter-familial disputes. Both interviewees' statements speak to the historical importance of resolving conflicts through process and structures other than the state. Although the interviewees did not mention baraza itself, they noted the process of trusted people (the mwami or family members) giving advice and reconciling people, a tradition that remains familiar to most and continues with wise elders resolving local disputes (see subsection Legal Pluralism).

Having a local history, however, is not the sole defining point of the anti-colonial ethos of PBROL. In the Context and Background chapter, I pointed out the historical role of the colonial administration in shaping justice practices; even the term customary justice is attributed to colonial authorities (Isser, 2011). Therefore, a local history could be strongly related to practices instituted by the colonial administration with the help of local chiefs, not discrediting the mechanism, but making it insufficient for ensuring an anti-colonial ethos. Local conceptualization of justice-related norms strengthens the anti-colonial aspect of PBROL.

#### *b. Local Conceptualization of Justice-Related Norms*

What encourages people to follow the law? Carothers (2006) argues that compliance with the law is based on perceived fairness and legitimacy, not force. Carothers adds that in order to understand what will be perceived as fair and legitimate, researchers and practitioners need to inform themselves about the local history (related to the above aspect of anti-colonial ethos), culture and context. Contrary to arguments advanced through the rule of law orthodoxy, the rule of law and laws themselves are not value-neutral (Petersen, 2010). Arguably, if the laws are based in local values, coercion will be less necessary to ensure that people comply with them.

Notably, law-related ideas of fairness and justice may be conceptualized differently in different contexts. Isabelle (Interview, November 3), who had a dispute with a neighbour over

land boundaries, explained why she preferred to have her conflicts resolved through mediation. “We told our respective stories. They listened and took decisions that we had to obey...In a [state legal] justice process, one party loses and the other wins. In a mediation process, the reconciliation implies a win for both parties.” To Isabelle, and others, fairness and equality stem from the space created for all involved in the dispute to tell their respective stories with the end goal of a solution acceptable to everyone involved. Also, Isabelle understands legal processes to create a loss for one side in the conflict, an idea shared by other participants. Creating winners and losers is not always viewed as fair or helpful, thus not reflecting local understandings of fairness. Although equality before the law is an internationally recognized aspect of legal justice, interviewees did not see state justice to ensure equality. They did, however, perceive baraza to promote equality through the process of hearing the various sides of the dispute without preference given to those with power or money (as is usually the case with the state system and discussed later in this chapter).

While Isabelle reflected on process, Hugo (Interview, October 16), who had a conflict related to witchcraft and gossip, commented on the outcome of the baraza process. I asked Hugo whether he thought the outcome was fair. Hugo replied, “It is good. There is no more conflict and everyone is fine.” Hugo responded that the outcome was fair because the conflict was resolved and no one had to suffer, presumably in jail. These comments, along with those made by many other disputants who told me that they thought baraza’s process was fair, suggest that the rule of law, not the orthodoxy, but as a set of principles related to justice, for example, fairness and equality, is valued even without conforming to Western interpretations of justice and the rule of law. This reinforces the need to develop alternative theories and practices of the rule

of law and reflects the importance of customary justice in the process of seeking local and cultural relevance.

Although the majority of interviewees perceived baraza to be fair, Angela did not. Angela had been given a portion of cassava to sell and was meant to pay a certain fee to the producer once she sold the cassava. However, she could not sell all of the cassava because, she argued, it was not of good quality. The baraza mediators told Angela that she was to pay the amount she had agreed to, as she had still taken the cassava. Angela (Interview, November 18), stated, “I wish that there was more fairness. A good understanding of the situation is necessary. The decision should not be emotion-based, but fact-based, taking into account all the factors involved.” When asked whether Angela was satisfied with the outcome of the baraza process, she said, “They do good things, but in my case I had not sold all the cassava. And yet, I was asked to pay the money.” Although some disputants recognized that baraza was not perfect, it was still seen as better than the official justice system. When asked if Angela thought the official justice system was fairer than baraza, she responded, “I still prefer what the baraza does as opposed to being taken to the court and eventually being put in jail. The relationship with that person would be severely damaged.” The state justice system does not have a good reputation amongst the local population, an issue on which I will elaborate later in this chapter.

Interviewees told me that they accepted and appreciated baraza’s work and would not change anything about its process, even in cases where the conflict has not yet been resolved, suggesting that there is something locally acceptable about its processes and ideological underpinnings. Participants whose cases were not yet resolved, such as Angela, still understood baraza to have a positive role in the community. The uniformity of responses raises questions as to why there was little variance. I note four possible points of concern. In the Methods chapter,

I pointed out that baraza mediators helped me gain access to interviewees, as they were aware of the community members who had passed through baraza. As travel to the various destinations was hampered by practical difficulties, mediators would contact me with the dates and times that I was able to conduct interviews with certain participants. This means mediators contacted interviewees before I met with them. It is possible that they suggested that interviewees should give a positive account of baraza as it would be in mediators' interest for a foreign researcher to have a positive view of their work (a discussion I pursue in greater detail in the Conclusion).

The second possibility is that without any coercion from mediators, participants wanted me to view this local mechanism positively, or they interpreted my research on the topic as me wanting a positive view of baraza. This reflects Haraway's (1988) understanding of the power position of researcher and participants in the production of knowledge. Based on interviewees' responses I understand baraza in a positive light; however, their responses may be 'tainted' by their perceptions of my expectations.

The third reason that possibly explains the overwhelmingly positive response of disputants is related to personal preferences. I only interviewed people who participated in baraza, therefore they may have a personal preference for reconciliation as opposed to other means of achieving justice. Or, as discussed later in this chapter, they recognize the functionality of baraza: it resolves disputes and reconciles people in order to rebuild community trust and harmony. Thus, regardless of the outcome of their case they would still see baraza in a positive light.

Fourth, participants could recognize baraza as their only viable (affordable) mechanism for them to resolve disputes and thus see its importance beyond their particular case. Participants may believe that they will need to rely on baraza to resolve future disputes, meaning they have

personal stakes in baraza's existence. It is impossible to be certain which, if any, of these explanations reflects why people would all respond positively about baraza's work, but it a phenomenon that is necessary to remark.

*c. Non-Imposition*

Mani (1998) argues that it is patronizing and counter-productive to impose a legal system without considering the people's needs, wishes, culture and history. PBROL takes Mani's argument a step further by arguing that it is patronizing and counter-productive to *impose* a legal system. According to PBROL, legal systems cannot be externally imposed, because imposition is contrary to the anti-colonial ethos as it constitutes a form of direct, structural and cultural violence in relation to the notion of positive peace. Chirezi is a local organization with local staff. Baraza's links with history, tradition and local understandings of fairness are the basis for arguing that it is not externally imposed. It must be recognized that this does not mean that practices such as baraza have not been influenced by external factors and actors, but these interactions reflect its dynamism while still maintaining a recognizable form. The key here is to gauge whether justice mechanisms have been coercively implemented by external actors.

*5.2.2 Legal Pluralism*

Baraza, although not an official legal system, is still a legal system in the sense that it reflects the 'laws' that govern local daily life. Mediators are aware of these social 'laws' and of fair responses to breaches of these 'laws.' The history, tradition and perceived fairness of baraza—realms in which it can be understood to adhere to PBROL—distinguishes it from state legal justice, which is not thoroughly or deeply linked with any of those concepts. Rule of law scholars interested in customary justice have explored how to engage with customary justice

systems,<sup>22</sup> an issue that will be briefly explored in the Conclusion. However, I must point out that Chirezi's policy is to refer conflicts that cannot be resolved through baraza to the formal justice system, suggesting an acceptance of a hierarchy of justice mechanisms.<sup>23</sup> There is nothing inherent in PBROL that suggests multiple systems cannot exist. However, Tamanaha (2010) argues that liberal rule of law programming is generally not accepting of social, political and economic interactions that do not conform to liberal ideology. He adds that "the localised, often informal and 'politically negotiated' forms of law and security that exist in conflict-affected states are at best minimised, at worst abolished" (p.532). This suggests that the rule of law programs in the EDRC should also undergo the scrutiny of PBROL to ensure their support and resourcing of the state justice system does not limit the potential of other beneficial justice mechanisms to thrive.

A corollary of this aspect of PBROL is the recognition that legal professionals do not have a monopoly on law and justice; put another way, PBROL does not rely on the professionalization of justice delivery. As noted above, the mwami and family have a long history of resolving disputes in the towns where I conducted research. In addition to the mwami and the family, disputes continue to be resolved by chiefs and wise community elders. Mathilde (Interview, October 27), who had a conflict regarding plot boundaries, explained, "Here, usually when there is a conflict, we go see the cell chief. The cell chief forwards the problems to the avenue chief, who forwards it to the quarter chief. Here, the quarter chief is a member of baraza, so he directed me to baraza." Marie (Interview, November 19), a student who had a conflict stemming from gossip and threats of physical violence with a classmate, said, "This is my

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<sup>22</sup> Engaging with customary justice practices is a theme throughout Ubink and McInerney's (2011) edited book "Customary Justice: Perspectives on Legal Empowerment.

<sup>23</sup> See Appendix IV- Interview with Moise for a case that involves baraza, another NGO's conflict resolution processes and the state legal system.

village. Our elders advise us, and they include members of the baraza. They told me they could help us to reconcile, and if the attempt failed they would accompany me to the tribunal [court].”

These two interviewees provided examples, in addition to the aforementioned role of the family and mwami (although this channel appears to be more historical than current), of the various channels through which people seek to have their disputes resolved. Mediators, elders, and family members are not trained legal professionals, but have played an extremely important role, both historically and presently, in resolving disputes and providing justice before the Congolese state was even created. Also, Marie’s comment points to the possible advantage of multiple systems—if the conflict is not resolved through one mechanism, disputants can go to another, although the state justice system does not always garner the confidence of community members (discussed below).

The importance of various justice actors has been greatly ignored by rule of law programmers keen to (re)build the state justice system from the top-down. Mani (1998) expresses concern over the lack of consultation with the local population when implementing rule of law programmes, noting also the tendency to ignore pre-existing legal structures. In the Context and Background chapter I demonstrated the international focus on the rule of law orthodoxy in the EDRC. Arguably, this focus is related to the narrow way in which law is conceived of by rule of law programmers, meaning initiatives like baraza may not be seen as ‘legal’ structures, because, among other reasons, they do not rely on legal professionals.

### *5.2.3 Dynamism: Social Responsiveness*

When asked about childhood experiences of conflict resolution Michel (Interview, November 17), who went to baraza for a land dispute, informed me that he only recently had his first conflict for which he sought mediation, but “from what I recall, when there was a conflict

between people, a wise elder would initiate a dialogue between the parties in order to reconcile them. When it succeeded, they shared drinks and sometimes food, to symbolize the re-establishment of good relationships.” The role of elders as mediators is an important aspect of conflict resolution in the eastern DRC (as noted in previous sections of this chapter); however, it has also changed over time. Through the revitalization of baraza, the NGO found a window of opportunity to make baraza more inclusive through diversifying its mediators. Mediators are no longer limited to elderly men, but can include wise women and young adults based on their positive standing in the community, which contributes to positive peace through small advancements in structural equality. Baraza is an example of the dynamic nature of customary justice; while some aspects may change in response to changing social norms, the overall process and goal remain familiar.

The social norms supported by mediators also change over time, which is beneficial when their goal is to promote peaceful conflict resolution. For example, beliefs in witchcraft have been recognized as detrimental to community relations because they often lead to violent reprisals against ‘witches.’ One informant (September 28) told me of a case in Kulunu where one woman, in anger, told another that she would die in childbirth. When this ‘prophecy’ came true, she was assumed a witch and the family of the women who died murdered and burned her. I was told a variety of similar stories. Therefore, in order to advance peaceful norms, baraza mediators, at least in their role as such, do not accept witchcraft as ‘real.’ They will still hear cases that involve witchcraft, as they recognize its relevance to local beliefs; but they attempt to help disputants recognize other factors relevant to their disputes, factors that can actually be addressed, as witchcraft is somewhat elusive. This demonstrates baraza’s adherence to PBROL through responding to beliefs that often lead to violence in a way that does not support violent

responses, but is still contextually relevant. In the next chapter I explore baraza, women's rights and gender equality and I will examine cases of witchcraft.

#### *5.2.4 Positive Peace: Cultural and Structural Peace*

Positive peace represents the overarching principle of PBROL. Moreover, the goal of advancing structural and cultural peace through the rule of law serves as a limit on the above characteristics of PBROL. This means supporting and reinforcing justice related structures, mechanisms and practices that do not marginalize people or groups or reinforce inequality; at the same time, PBROL should consist of and support norms and aspects of culture that help justify positive peace. In this section, I examine how baraza measures up against the principle of positive peace by looking at two narrow dimensions of structural and cultural peace as illustrative examples. First, I examine how baraza may advance structural peace through its organisation and participation. Second, I examine how baraza may contribute to cultural peace through restoring intracommunal trust, building community and reconciliation.

##### *a. Structural Peace: The Organisation of and Participation in Baraza*

Despite a history of colonial influence in customary justice, a key characteristic of present forms of customary justice is that they are not maintained by external imposition or coercion, but by community acceptance. However, systems of laws generated within the local context are also susceptible to power relations and coercion. Thomson and Nagy (2011) argue that traditional justice is like other legal systems in that it “embod[ies] prevailing constellations of power” (p.13). Justice norms, procedures and mechanisms are not always imposed by external forces, such as international organizations, but can be imposed from within by those with more power. This serves as a reminder that the ‘local’ or ‘traditional’ or ‘customary’ cannot be romanticized as they are also subject to power dynamics.

Those with power, seeking to maintain power, are likely to promote structures that privilege their group, or maintain structural inequality (violence). However, I argue that the organization of baraza challenges wealth-based and gender-based unequal power relations. Chirezi went to churches, schools and various community locations and asked people to list a few wise community members who could be approached for the role of mediators. To challenge gender inequality, Cherezi made clear that nominations were to be both males and females. Steps were taken to determine who was trusted by the local population, thus negating the likelihood of designating mediator positions to people bent on pursuing their own agendas. The process of mediator selection was important to creating a mechanism that does not reinforce structural equality by putting only elderly or wealthy men in the position of mediator, with the influence to reinforce their own, or group, privileged position.

Not only were mediators chosen in a manner that challenges dominant, normalized inequality based on wealth and gender, but so does the organization of baraza, which provides conflict resolution free of charge. Even in cases where resolution was very difficult or not achieved, having a mechanism to help in the process and not charge anything, was important. For example, I attended baraza meetings in Kiliba to address a conflict that arose between members of a co-operative. They had taken out a loan together, but one of the members of the co-op died, yet her husband (who was not a part of the co-op) refused to pay back her portion of the loan and the other members could not afford to. I attended four mediation sessions with this group. As of the time I left, they still had not reached a resolution, but they continued to meet because they did not want to take this dispute to the police and lose more money.

Access to the state legal system is wealth-based, meaning those who have more money to bribe (the ‘top-dogs’), tend to have privileged outcomes than those who cannot afford bribes (the

‘under-dogs’). In this sense, the functioning of the justice system clearly reinforces structural inequality (violence) (See discussion of the state justice system in the Problematic Concepts section of this chapter). Most interviewees stated that the formal justice system was too expensive (fees and bribes). Based on these points, I would argue that baraza is not internally imposed to maintain unequal power relations. On a small scale it promotes structural peace by challenging (or providing an alternative to) wealth-based access to justice (I problematize this claim in sub-section Customary Justice and Violence).

*b. Cultural Peace: Rebuilding Trust and Community through Reconciliation*

Violent conflict does not only affect communities and people through direct violence perpetrated against them, but creates a broader situation of anomie and distrust. Murithi (2008) argues,

The types of intrastate conflicts that we are witnessing today in Africa divide the population of a state by undermining interpersonal and social trust, and consequently they destroy the social norms, values and institutions that have regulated and coordinated cooperation and collective action for the well-being of the community (p.17).

Before starting the baraza project, Chirezi did research and found that, indeed, a primary affect of the war was the breakdown of social trust between community members.

Many people cited the destruction of trust and community relations because of years of warfare and instability. Evelyne (Interview, November 3) points to the way that the violent conflict has degraded relationships between community members. She told me, “What is strange about armed conflicts, and which did not exist in the Mobutu era, is the fact that a person you are in conflict with can use a brother or a friend who is armed to come and attack you during the night.” Violence is not simply perpetrated by unknown members of armed groups, but those who are members of armed groups are used by their friends and family to promote fear and uncertainty within the community. Some argue that armed groups are not very active in their

area anymore (for example, Miriam (Interview, November 19) claims, “we do not have problems with armed groups here anymore,”) but it is clear that distrust persists within the community.

While armed conflict has increased in 2012, the international community’s narrow concern with armed conflict and rebel groups in the EDRC is not always shared with locals. The breakdown of social trust has been a major result of the violent conflict that has progressed into the period of transition.

There is a clear desire to restore trust and relationships that were disrupted by years of warfare. Antoine (Interview, November 5) told me, “Today the mediation mechanisms are restoring the trust we had lost.” Referring to baraza mediators, Evelyne (Interview, November 3) stated, “If we didn’t have these kinds of people, the situation would be terrible in the community. The baraza came into being out of the need for harmony in the community.” Interviewees understand baraza as a means of improving community relations through rebuilding trust and harmony which will ideally support sustainable peace. But how can one understand baraza to build trust?

Baraza helps re-establish trust through peaceful conflict resolution, restoring relationships and reconciling disputants. These elements of baraza also promote peaceful aspects of culture, thus PBROL. Many interviewees noted the importance of renewing and restoring relationships, often citing reconciliation as an important aspect of this process. Julie (Interview, September 24), whose goat was found grazing in a neighbour’s field, spoke to the local historical importance of reconciliation. She stated, “The tradition has always favoured the family as the best venue for resolution and reconciliation. With the war the tradition vanished, until the baraza came about.” This is an interesting comment. Julie speaks to the historical focus on reconciliation and recognizes how this norm was disrupted by violent conflict. Jeremie

(Interview, November 6), who had a land dispute, explained, “They told me that things happen in life but we should remain positive and constructive. They reminded me of our tradition with regards to reconciliation...They called upon us both to open a constructive dialogue that will lead to a satisfactory solution for both of us. It was great.” The historical and traditional relevance of reconciliation suggests that it can be understood as an aspect of culture. Therefore, through its promotion of reconciliation, baraza can be understood as promoting a peaceful aspect of culture, thereby advancing the goals of PBROL.

Rule of law programming typically does not incorporate a role for reconciliation. In post-conflict situations, reconciliation tends to be associated with transitional justice, specifically truth and reconciliation mechanisms, but also local mechanisms in certain contexts.<sup>24</sup> However, in South Kivu mediators rely on this concept, because it is locally meaningful (“our tradition with regards to reconciliation”) and they solidify meaning through the Reconciliation Rite. PBROL does not necessitate reconciliation, but as it is a concept that people accept, mediators can utilize it to promote peaceful relations. Mediators from all three communities argued that reconciliation creates or promotes a tradition of peace, a belief echoed by some interviewees. When asked why he chose to bring his dispute to baraza, Matthieu (Interview, October 11) stated, “reconciliation is better to have peace.” And Evelyne (Interview, November 3) explained, “For me, the [state] justice approach leads to jail sentences and turns the parties into permanent enemies. Reconciliation leads to renewed relationships and love between parties.” This suggests that baraza, a revitalized justice mechanism that promotes reconciliation, advances peaceful cultural norms that are believed to restore relationships and promote long-term peace. Baraza advances PBROL through promoting a peaceful aspect of culture, reconciliation.

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<sup>24</sup> Examples include Truth and Reconciliation Commissions in Sierra Leone and South Africa. Well-known examples of local reconciliation mechanisms include, mato oput in Uganda and fambul tok in Sierra Leone.

A few interviewees recognized the benefit of learning from the process and encouraging empathy. Julie (Interview, September 24) told me that, “At baraza, you are required to think, not only about your own problem, but also the problem of the other party. In that way, you can listen to each other and see what can be done to resolve the issue. That’s why I prefer baraza.” Through the dispute resolution process and reconciliation, disputants are encouraged to consider their own behaviour and its effects rather than always placing blame on the other party, which can lead to continued resentment. Arguably, promoting empathy can be understood as building and reinforcing peaceful norms.

The Reconciliation Rite gave the process meaning and affirmed the end of the conflict, with the goal that positive relationships will be renewed and enmity reduced or terminated. Evelyne (Interview, November 3) explained that “[the baraza process] was fair. At the end [of the] process they both bought drinks and shared them with everybody around.” Martine (Interview, November 13) also mentioned the Reconciliation Rite, saying that, “It would be a good thing if there was money to buy [the Fanta]. The Reconciliation Rite is important as it signifies the end to the dispute and the return to positive relationships.” The ritualistic aspect of reconciliation is also an important part of how locals understood terminating disputes. Michel (November 17) said, “It is part of our tradition to share something (drink and/or food) as a sign of reconciliation.” Basing the Reconciliation Rite in tradition gives it meaning to the local population and supports PBROL anti-colonial ethos. It is a rite with which most are familiar and keen to continue.

#### *5.2.5 Customary Justice and Violence*

As previously noted, it is not useful to romanticize customary or local forms of justice. Some locally acceptable ways of addressing conflicts are violent. These violent forms of

customary justice are at odds with positive peace and thus do not qualify as PBROL. For example, Matthieu (Interview, October 11) stated, “If someone killed my child I would prefer to go and kill someone in their family.” This may be a locally acceptable form of justice; however, it would not support building PBROL because non-violence is at the core of this concept. PBROL’s legitimacy does not come simply from its contextual relevance, but its promotion of peace, particularly in post-conflict contexts seeking to avoid a resumption of hostilities. The advantage of most forms of customary justice is that they adhere to the anti-colonial ethos of PBROL, but that alone is not enough as it may allow for violent forms of justice.

Unfortunately, it is also evident that, while baraza does not employ direct violence, it can reproduce structural and cultural violence. The main problem related to baraza is that it reinforces gender inequality through resolutions that do not question broader patterns of gender inequality and thus reinforce them. Chirezi has taken steps to improve gender equality by ensuring that women are also given positions as mediators. Also, baraza provides some form of justice for women, who are generally less likely to afford the costs associated with formal justice. However, mediators do often reinforce and reproduce gender inequality. In the following chapter, I will explore baraza’s complex relationship with gender inequality and women’s rights, making clear that it does not explicitly challenge unequal gender relations.

Another area where baraza does not adhere to PBROL is that it does not thoroughly challenge or address the root causes of disputes, in other words, the structures that produce and maintain inequality. While many interviewees thought that baraza was capable of dealing with almost any dispute, the reasons that these disputes develop were not tackled; this directs attention toward broader social injustice and inequality. Moise (Interview, November 19)

explained that, “hard life can be a source of conflict in the family and between neighbours.”

Elizabeth (Interview October 16) elaborated on Moise’s idea. She said,

The way that we are living—sometimes we don’t have food and sometimes the children get sick and we don’t have money to take them to the hospital. Sometimes it gives people stress when kids get sick and you don’t have the money to take the kid to the hospital. Someone can pass and say something and you are stressed and you understand the person the wrong way and then you start fighting because you had your own problem. Then you say something rude. The other thing is that people see you eating a little food and they get jealous. This kind of hate—why does she have food and I don’t have food? Elizabeth is pointing to the underlying cause of local conflicts, namely poverty.

Karine (Interview, September 24) agrees, stating, “I think poverty plays a great role in the dynamics. People are out to harm others if economic interests are involved.” Karine’s statement is meaningful to the discussion of PBROL. If sustainable peace is the goal of all rule of law programming, then poverty, as a root cause of conflict, is a structural issue that must be addressed. Although baraza does provide its services free of charge, thus not reinforcing wealth-based unequal access to justice, it does not fundamentally challenge the wealth-based inequality. Furthermore, the possibility to manipulate the formal justice system through bribes persists; consequently, those who are wealthy have more options for dealing with their disputes. This can be addressed within the framework of PBROL as it has as its goal the elimination of structural violence, of which poverty is a form, in order to promote sustainable peace. However, it is clear that baraza alone does not have the means to address broader forms of wealth (or gender) inequality.

### **5.3 Problematic Concepts**

#### *5.3.1 Trust, Choice and Reconciliation: Baraza or State Justice?*

One of the main themes discussed in interviews is why people brought their conflict to baraza rather than the formal justice system. This line of questioning and the discussions that arose created a need to problematize seemingly straightforward concepts: Reconciliation, trust

and choice. Above, I argue that, when locally meaningful, reconciliation can advance PBROL by helping to restore community relationships destroyed by war and distrust, thus promoting sustainable peace. But, is reconciliation understood as a normative preference or a necessity, due to a lack of other options? First, I explore the idea of reconciliation and why it is important. Second, interviewees often cited a distrust of the state justice system, leading them to ‘choose’ baraza. However, it was not simply distrust, but a lack of finances to afford the formal justice system that led to this ‘choice.’ As some noted, baraza is the only conflict resolution mechanism available (aside from the expensive, corrupt formal system). I will explore the meaning of ‘choice’ in this context.

Almost all interviewees cited the importance of reconciliation, some for normative reasons others for practical reasons, in their decision to resolve their conflict through baraza rather than the formal court system. The word *patanisho* was used in interviews to refer to reconciliation. *Patanisho* translates to English as reconciliation *and* agreement. When I refer to interviewees’ use of the term reconciliation, in all cases it is the English translation of *patanisho*. For Mireille (Interview, November 6), reconciliation signifies, “Bringing the parties around the same table to have a dialogue and reach a solution that satisfies both parties.” Mathilde<sup>25</sup> (Interview, October 27) explained what reconciliation meant to her. “So, for people, when there is a conflict, they can figure out a way to get along and live together. That is reconciliation.” When asked if this was also a form of justice, her husband, Hugo (interview, October 27), stated, “It is a justice, a justice of the quarter, or people.” Pierre, (Interview, November 6) explained his

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<sup>25</sup> Mathilde and Jean only agreed to be interviewed together. Most interviewees (both male and female) did not see the importance of being interviewed alone. There were often neighbours, friends and family members present until I would reaffirm the importance of conducting the interview in a more private location. At times people would arrive to greet me and the interviewee and ask about what we were doing. We would pause the interview and resume after greetings were completed. In the case of Mathilde and Jean I am unclear on why they only wanted to be interviewed together. It is possible that, because they went to the baraza together, they thought they should be interviewed about baraza together. Mathilde may have had different responses had she been interviewed alone; however, she did actively participate in this interview and took the lead in answering certain questions.

ideas of justice and reconciliation. Justice “means sentencing the presumed offender” and reconciliation “means bringing the two sides together to help them resolve the dispute peacefully and fairly.” Pierre’s statement reflects normative reasons for supporting reconciliation, expressly to resolve disputes fairly. Mathilde and Jean articulate more functional reasons for reconciliation.

The functional reason for reconciliation cited by most interviewees: bringing parties together and developing a mutually acceptable outcome to the dispute so that negative feelings would not be harboured against the other disputant. Antoine (Interview, November 5) said, “I needed to be on good terms with people and was certain that baraza would resolve the issue peacefully, in a way that enhances harmony and reconciliation.” Antoine’s statement speaks to the practical importance for reconciliation; he explicitly points to the *need* for reconciliation, suggesting it may not be a normative choice, but a practical one.

However, whether for normative or practical reasons, interviewees viewed reconciliation as an acceptable way to improve community relations and enhance peace through conflict resolution; otherwise, they could have turned to violent means with a reasonable expectation of impunity.<sup>26</sup>

In addition to the emphasis on the reconciliation, interviewees used baraza for other practical reasons—in many cases it is the only viable option. Two more themes emerged from questions regarding why people brought their case to baraza instead of the formal justice system. First, many did not trust the formal justice system. Second, many could not afford the formal justice system. This problematizes the idea that people ‘choose’ to use baraza, as sometimes they do not realistically have another option.

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<sup>26</sup> Here I am referring to legal impunity, i.e., there would be guarantee of impunity from extra-judicial forms of justice or revenge.

Edith (Interview, November 19), recounted multiple encounters with security and justice officials that reflect the corruption that is endemic in the system. In one instance, demonstrating how community conflicts can be intertwined with the broader conflict, Edith's neighbours were jealous of her crops and told soldiers that she was collaborating with militias. Edith explained that soldiers "took our harvest. We had to sell our rice and our animals in order to bribe the soldiers and have some peace." She added, "we were under arrest and were asked to pay [the bribe] in order to be released."

Another conflict experienced by Edith was a conflict over land and its use for agricultural purposes. "Edith" signed a lease to cultivate another person's land for two years in exchange for a portion of the yield. She argued that when the crops did not do well he changed the terms of the lease and went to the police who then detained Edith. A baraza mediator had to help secure Edith's release from prison by paying the police chief three bags of rice. Edith stated, "Mr. Mulunda' [the baraza mediator] helped secure my release from prison. Without him I would have suffered." When asked whether Edith trusts the justice system she informed me, "No. It is 'Mr. Mulunda' who was fair." This case reflects the well-known injustice of the legal system<sup>27</sup>. I was told by multiple participants that bribes are given more credence than evidence and are often necessary for any legal action, even if not in favour of the individual paying the bribe. It is evident from these experiences that Edith would not trust the formal justice system to resolve any problems she had. However, others, (those who had Edith arrested) did choose to rely on the police, instead of baraza, to resolve the dispute. Why? I would argue that there are two main reasons for this. First, it is possible that the other people did not know baraza existed. Second, the people who had Edith arrested knew that the police would respond to bribes and they could

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<sup>27</sup> See, for example, Davis, 2009 and Hendrickson and Kasonga, 2010.

afford to bribe the police. In other words, they were ‘top dogs’ with more wealth to dispose of in order to manipulate the justice system to their advantage.

Edith is not the only interviewee who does not have faith in the official legal system.

Here, I include an excerpt from my interview with Julie (September 24) to illustrate popular sentiment regarding the state security and justice sector:

Question: Do you think the situation would be worse if baraza was not here?

Answer: Yes. People would have no option other than going to the police or tribunal [state justice].

Question: Is going to the police a bad thing?

Answer: Oh, yes! It implies a lot of spending, harassment and violence. You need to have been there to understand. People suffer there.

Question: Does that mean that when there is a conflict, going to the police is the last option to consider?

Answer: Exactly. The police kill. The baraza brings people together by finding a solution that satisfies both parties.

The cost of bringing disputes to the formal justice system is more than most can afford. Cost and trust are interrelated in that cost does not only refer to official fees, but to the cost of bribes as well. Many did not ‘trust’ the formal system to provide ‘justice’ because rulings are often based on higher bribes, which is not seen as fair, as not everyone can afford these bribes. The formal justice system must, therefore, also be understood as reinforcing wealth-based structural inequality by privileging individuals and families with more money.

Antoine (Interview, November 5) explained, “I felt that going to the police will not resolve the conflict and will ruin me instead.” In the context of the discussion I understood ‘ruin

me' to refer to financial ruin. Matthieu (Interview, October 11) stated, "When the children are educated and with all that they have seen, I believe they will not go to the state [justice system] and lose money. They will go to baraza where they will not spend money." Moise (Interview, November 19) also spoke to the cost of the formal justice system. He said, "Most conflicts are now referred to those organizations [human rights NGOs] and they help resolve them peacefully. When they fail to resolve the conflict, it is then referred to the state justice system. It requires money, which most people don't have. Moreover, it makes the conflict worse." Cost and corruption, or perhaps more aptly the cost of corruption, is widespread and detested. Julie (Interview, September 24) informed me that, "even if I had a lot of money, I wouldn't want to burn it bribing the police or the judges when I actually have a better option." Not only does the need for bribes delegitimize the official justice system in the eyes of many community members, but the high level of poverty means that people are more affected by the required fees and bribes and therefore resent the state legal system.

Michel (Interview, November 17) links the discussion of corruption to the local ideal of reconciliation. Michel argued, "baraza should always be the starting point. If my child inflicts a wound on a neighbour's child and he goes to the police, I will be asked to pay money that I do not have. I will therefore go to jail. The reconciliation will be difficult when I come back from prison. That is why baraza should be given priority." This statement points to the prioritization of reconciliation. Michel anticipated that it would be necessary for him to reconcile with the other family, even if he has gone to jail. He added, "The police are good at taking bribes from both parties and are not interested in resolving the issue, so they continue exploiting the parties." When I asked Michel about the formal justice system, he explained, "It is the money that counts there. If you have money you will win. A complainant can be detained for days, even months,

without a trial if the offender is rich and gives money to the judges.” Furthermore, “The leaders are part of the system and it is difficult to change it. I think that only baraza can make a real difference.” Michel articulated the variety of concerns voiced by community members who brought their disputes to baraza. Based on interviewees’ condemnation of the formal justice system, both its ‘goal’ of punishment and its high level of corruption, it is clear that in its current state it does not advance PBROL.

With the corruption and cost of the formal justice system, it is clear that for many people this is not a viable option. Do people simply use baraza out of lack of options or desperation? Not necessarily. On the one hand, the norms of peaceful conflict resolution and reconciliation have a long-standing history and are still important to many for achieving sustainable peace. On the other hand, conflict resolution and reconciliation are viewed as necessary for community-level co-existence, and is therefore understood as a necessity rather than a normative choice. I argue that, in practice, dichotomizing necessity and normative choice is not necessarily useful. In both cases the goal remains long-term peace in the community and the norms of peaceful conflict resolution and reconciliation are readily accepted by many and advance PBROL.

#### **5.4 Conclusion**

The rule of law orthodoxy focuses narrowly on state provision of justice. In the EDRC, this is untenable. Locals have little faith in the justice of the so-called justice system of the state. This discredits the state justice system when analyzed within a PBROL framework. Baraza’s processes, based in tradition and locally accepted beliefs, are familiar to the local population. Baraza adheres to the three component of the anti-colonial ethos: it is based in local history; it reflects local understandings of justice-related norms; and it is not externally imposed, making it compatible with PBROL. With the history of warfare and violence, it is clear that community

trust has devolved and local norms have eroded, but interviewees understand baraza's work as helping to re-establish good intra-community relationships. Many locals cited the goal of reconciling disputants as important to restoring community trust and long-term peace. Baraza is not imposing reconciliation, but being socially responsive by advancing reconciliation, described by some as a necessity for advancing peace. Based on local ownership and the advancement of peaceful conflict resolution, equality and reconciliation, baraza can be understood to advance PBROL. Conversely, baraza does not directly address the root causes of many conflicts. The primary root cause cited is poverty, a form of structural violence; however, by not charging fees for conflict resolution, it still advances PBROL's goal of promoting positive peace. Unfortunately, in the next chapter, when I examine baraza and women's rights, baraza's ability to advance PBROL becomes much less clear.

## **Chapter 6: Women’s Rights, Gender Equality and Baraza**

In patriarchal societies, women are generally more vulnerable than men, especially in times of violent conflict and mass human rights abuses. Research by feminist scholars suggests that law-based justice measures can reproduce and reinforce gender inequality and the marginalization of women.<sup>28</sup> In addition to these problems, it has been established in this thesis that in conflict and post-conflict situations the formal justice system is greatly inaccessible and inefficient. In the DRC, few are able to access the state justice system because of cost, distance and lack of familiarity with the legal process; this is especially true for women, who tend to have less disposable income and who have responsibilities in the home, making trips out of town less feasible. Although there have been efforts to prosecute perpetrators of rape in the DRC,<sup>29</sup> international and national justice programs have been less interested in efforts to achieve justice for ‘everyday’ conflicts or disputes that arise on a local scale, including those that affect women disproportionately or in a unique manner, leaving women with few well-resourced options for resolving these disputes. Baraza is indeed a mechanism that resolves ‘everyday’ disputes; however, this does not mean that baraza resolves these disputes in a manner that promotes greater gender equality. Baraza’s outcomes are complex; it is not a perfect solution to the lack of justice in the EDRC, but it does provide a more contextually relevant means of addressing conflicts, particularly those affecting women, but not addressed through the state justice system.

To explore women and the rule of law in South Kivu, I begin with a brief vignette to demonstrate the lack of justice for women in the town of Uvira, and the state’s response to their

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<sup>28</sup> See, for example, Charlesworth and Chinkin (1991), MacKinnon (2006).

<sup>29</sup> For example, the Open Society Justice Initiative, American Bar Association Rule of Law Initiative and Open Society Institute for Southern Africa in collaboration with the Congolese government has set up mobile gender courts to try crimes, 75% being sexual crimes, in the eastern DRC, especially South Kivu. For more information see <http://thinkafricapress.com/drc/tackling-impunity-democratic-republic-congo-rape-gender-court-open-society> or <http://www.soros.org/sites/default/files/mobile-court-20110725.pdf>

concerns. The next section establishes the legal context of the DRC as it relates to women's rights and gender equality. This section consists of multiple subsections. First, I will outline some of the national laws that relate to gender equality and women's rights. Reilly (2007) articulates the gender bias of justice initiatives in post-conflict transitions. She observes that the effect of ignoring structural, social and economic inequality disproportionately disadvantages women. PBROL recognizes the variety of forms of gender inequality and has as its goal the strengthening of structures that do not reproduce structural and cultural inequality (or violence, as it is often referred to in PBROL), and questions those structures that do. Reilly notes the problem of discounting gender equality claims in the name of 'cultural' claims. This problem is also recognized in PBROL and Galtung's (1996) theory of peace, which understands cultural claims that justify inequality as forms of cultural violence. Next, I examine what rule of law reformers are doing to improve gender equality and realize women's rights. I discuss and critique the disproportionate focus on prosecuting sexual violence in the EDRC; the high rate of sexual violence has monopolized much of the reporting on conflict in the region in the past decade. Finally, I will examine how baraza deals with gender-based violence and inequality. In this section, I will also address certain conflicts that are not clearly regulated by state law; meaning customary justice mechanisms like baraza are typically the only means through which they are resolved.

### **6.1 Protests in Uvira: The Reality of Insecurity and Inequality**

According to the United Nation Human Development Report's Gender Inequality Index, the DRC ranks 142<sup>nd</sup> of 146 countries in 2011. My own observations also indicate pervasive gender inequality in the communities where I conducted research and lack of respect for women in the political, economic and social spheres. In the town of Uvira women felt so unsupported

by the state in terms of justice and security that they held demonstrations in order to have their concerns heard and addressed. Women, and other community members, organized a few small protests outside of government bureaus, which culminated in one major demonstration on 15 November 2011.<sup>30</sup> These demonstrations were precipitated by a number of local robberies where the women in the homes were also raped. In an assault that happened the night of 13 November 2011, at least five perpetrators were involved. They robbed a home and raped the woman in the house while restraining the other individuals who were present, including the survivor's son. Instead of exacting vigilante justice, and in a show of unfounded faith in the formal justice system, when one of the perpetrators was caught by local community members he was delivered to the 'chef du quartier'<sup>31</sup> who agreed to deliver him to the police. The perpetrator escaped at some point during this transfer. The popular belief is that the chief or local police released him for a small bribe, as measures had not been taken to recapture the individual, whose identity was known. On 15 November, women, men and children who were concerned with women's safety and the lack of state support gathered on the main bridge in town, blocking the road. Protestors urged the local administrator to respond to their demands for increased justice and security.

In smaller demonstrations in the days preceding this event, women sat in front of the Bureau Territoire d'Uvira waiting to meet with the local administrator to discuss improving justice and security. They were told he would meet with them the following day. When he did not follow through they moved the protest to the bridge. The protestors refused passage to all vehicles, including bikes and UN vehicles. When the administrator finally arrived, he agreed to meet privately with five men and five women from the protest in order to discuss a resolution. The outcome was that the administrator informed the protestors that if they did not disperse he

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<sup>30</sup> I witnessed and participated in this demonstration. Information gathered was through my observations and interactions with those participating in the event.

<sup>31</sup> The neighbourhood chief.

would order the military to use force if necessary. Shortly after, most of the demonstrators ran, fearing that the military might open fire. This example depicts the reality of the lack of security and justice for women in Uvira. It also demonstrates why local women lack trust in the state and the formal justice system. When serious justice concerns are met with state violence, women are made acutely aware of their vulnerable situation in society.

## **6.2 Women, Gender Equality and the Law: The Legal Context of the DRC**

This section explores two major questions that emerged from my analysis of the relationship between women and the state justice system. First, what are the laws in place that protect women's rights? Do certain laws promote gender equality or reinforce the inequality that exists? Second, which practices are not regulated by state law or in which the law is ambiguous?

### *6.2.1 State Law and Women's Rights*

The DRC has modified its Constitution to reflect the international community's changing expectations regarding women's rights<sup>32</sup>. The Third Republic's Constitution took effect 18 February 2006 and explicitly recognizes the State's duty to eliminate all forms of discrimination against women and to promote women's rights. The DRC is also a signatory to the UN's international Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). In addition to including provisions regarding gender equality in the Constitution, the DRC is a monist state, an expression of its prioritization of published international laws and treaties (Mossi and Duarte, 2006). Consequently, even if State law explicitly or implicitly reinforces gender inequality or violates women's rights, it would still be the duty of the state to follow the norms set out by CEDAW. Therefore, legally, the DRC has a fairly clear mandate to promote gender equality and women's rights within its borders.

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<sup>32</sup> See Mossi and Duarte, 2006, English translations of excerpts from the DRC Constitution (2006) that address women's rights and gender equality.

However, while the constitution may have been updated in 2006, Congolese law continues to discriminate against women. For example, there is no mention of domestic violence in the Penal Code or the Family Code (Immigration and Refugee Board of Canada, 2012). The lack of laws against domestic abuse does not reflect that it is not a severe problem. In fact, domestic violence has been described by Congolese rights activists as “so prevalent it is considered normal” (Immigration and Refugee Board of Canada, 2012). Domestic violence takes a variety of forms, including sexual violence, but the international organizations and the international media have focused primarily on sexual violence committed by rebel groups and warring factions. This focus is problematic. Peterman, Palermo and Bredenkamp (2012) found that intimate partner sexual violence is more prevalent than other forms of sexual violence against women in the DRC. While raising awareness about sexual violence as a weapon of war is necessary and important, this fixation distorts women’s experiences and the diverse manifestations of gender-based violence.

Although domestic violence is not recognized in Congolese law, rape is illegal. Unfortunately, regardless of the written laws against sexual violence, the story outlined above illustrates that these laws are nearly meaningless in practice. Furthermore, intimate partner sexual violence is not specifically addressed in the rape law, and spousal rape is not commonly considered rape and is, therefore, not reported (Immigration and Refugee Board of Canada, 2012). Locally, domestic violence may be considered banal, but the impact on women’s lives is real and can be devastating.

#### *6.2.2 Ambiguous Laws*

Another problem is that certain phenomena that can provoke or escalate conflicts are not recognized or regulated through DRC State law. Two examples are: polygamy and witchcraft.

The Family Code declares monogamy the official form of marriage. While the Family Code outlaws polyandry, it does not prohibit polygamy (Refugee Documentation Centre, 2011).

Theoretically, women who marry multiple partners are punishable by law, while men who marry multiple partners are not. I am not advancing a cultural judgement on the acceptability of polygamy; however, the lived experience of polygamy is characterized by gender inequality as men are entitled to a variety of privileges in these arrangements. Explaining why men enter into polygamous arrangements and the gender inequality in marriage, Josephine (Interview, November 20) said:

[Polygamy] is their entitlement. It's the man who brings the wife to his home and marries her. He is the bread earner of the household. A man goes out with another woman, nobody talks about it and nobody knows about it. When it's a woman, it is reported and she loses everything.

The inequality in marriage arrangements is evident from this statement. Men are able to enter into any type of relationship with women, but women are potentially prosecuted if they do the same, or stigmatized and punished at home. It would also appear that this norm is widely accepted, even though most women I interviewed see it as unfair. The sense of entitlement that men possess in their relationships with women comes, not only from men being the breadwinners, but also simply because they are men.

Polygamous arrangements can lead to problems between co-wives and within the marriage(s). Patience (Interview, November 20), who went to baraza because of ongoing disputes with her husband and his first wife, explained, "You know, when a man marries a second wife it raises a lot of problems. The co-wives can even poison each other." However, as polygamy is not outlawed or regulated, there are no formal processes to help resolve these disputes. Unfortunately, women can be more negatively affected by the lack of regulation as

they generally hold less power in their relationships with men, which is clear from statements by Josephine and Patience regarding their polygamous relationships.

The laws around witchcraft are also somewhat confusing and do not seem to reflect people's concerns about this phenomenon. Witchcraft, or at least accusations of witchcraft, is common; however, the law is ambiguous on the issue of witchcraft. Accusations of witchcraft against children are officially outlawed under Article 41 of the Constitution. Tshibanda-Baudoin (2009) points out that Article 78 of the Penal Code stipulates that an accusation of witchcraft is considered an offence if: a person is accused without basis; or, the accusation is based solely on superstitious beliefs; or, the accusation leads people to commit an offence against the person. It is unclear whether the State officially recognizes that witchcraft is 'real,' but it is clear that making such an accusation can have legal consequences. Furthermore, there are no guidelines clarifying what would be considered an acceptable basis for a witchcraft accusation, nor is the term 'superstitious belief' qualified in any way. The situation is complicated by the widespread belief in witchcraft and the perceived dangers to life, livelihood and family that can result if victimized by a witch. The major problem with the legal system is that it does not create a space for people who believe that witchcraft has been used against them to have their concerns heard; if they turn to the legal system, they themselves will likely be charged. This has forced witchcraft accusations into secrecy, where there is less chance of a peaceful resolution. However, much of this thesis argues the inefficiency of the State legal system. So, is prosecution against individuals who make witchcraft accusations really relevant? In short, yes. It is a concern because people think and believe that they will be prosecuted if they report a witch.

Based on my observations and interviews, witchcraft accusations are gendered in that they often arise in cases of infertility. The belief is that women who cannot conceive have been

cursed. Witchcraft is understood to be applied for other reasons as well, but it is commonly relevant in cases of infertility. The woman is understood to be a victim of witchcraft because it is she who is assumed infertile; this draws out the gendered nature of witchcraft in one of its dominant uses. The conflict between interviewees John, Mary and Elizabeth was based on accusations of witchcraft being used against Mary, who was presumed infertile.

### **6.3 The Rule of Law Orthodoxy and Sexual Violence**

At this point, having remarked on the laws relevant to my analysis, I will briefly elaborate on what rule of law programmers are presently doing to improve women's rights and gender equality. In this section, I will consider a critical analysis of patriarchy and law. Next, I will outline what the international community is doing to improve gender equality and women's rights, specifically through SSR and rule of law projects. This section points out how these programs address and prioritize prosecuting cases of sexual violence against women and subordinate all other concerns regarding women's rights and gender equality.

#### *6.3.1 Prioritizing Sexual Violence*

Charlesworth, Chinkin and Wright (1991) argue that men around the world have used the state-centered legal system to establish priorities that benefit male elites, while leaving basic human, social and economic needs unmet. This is the same state-centered system that is advocated and reproduced by international and national security-sector reformers in the DRC. Manji (1999) argues that “articulating a feminine view of the (legal) world requires an engagement with legal pluralism” (p.436) because legal centralism functions to mask power relations, including those based on gender. Engaging with legal pluralism, the existence of two or more legal systems in the same society, is important for countering the dominant, legal centralist understanding of law.

The international community is not only limited by relying on the orthodox understanding of the rule of law, as discussed in the Background and Context chapter, but also by their focus on prosecuting crimes of sexual violence and medical services for survivors. Reilly (2007) observes a trend when addressing violence against women in transitioning societies. The trend is to focus almost exclusively on wartime sexual violence, ignoring wider experiences of conflict and the significance of pervasive gender inequality. The prioritization of addressing sexual violence in the DRC is visible in the international media, international NGOs and the policies of foreign governments. Autesserre (2012) outlines the dominant narrative of the cause, consequence and solution to the conflict in the EDRC. She notes that the dominant narrative of the consequence of conflict is sexual violence. She adds that sexual violence has become a buzzword that NGOs add to their project proposals in order to increase their chances of receiving funding from international donors. The efforts of international organizations and governments to achieve justice for victims and survivors of sexual violence is important, but the opportunity cost is great, overlooking other forms of direct and indirect violence, a concern which PBROL seeks to address.

Davis (2009) notes that other human rights abuses, perpetrated by security agents (and rebel groups) against women, are disregarded and downplayed. Furthermore, the focus on sexual violence ignores the other ways in which women and men experience violent conflict differently and the different needs and concerns that may arise from these experiences. Instead, sexual violence is presumed to be women's primary concern and trials and the provision of medical care are understood as the necessary responses. The international focus on sexual violence and warfare also ignores the issues and conflicts that affect people's daily lives, but are worsened during periods of conflict and instability, and the concerns that women may have about these

issues, such as domestic violence. In my interviews with baraza disputants, most said that, presently, people in their community are more affected by local and interpersonal conflicts than by armed groups or violent warfare. In the EDRC, the context seems to change quickly and, in the wake of elections and the defection of the M-23,<sup>33</sup> violent conflict may now be affecting people's daily lives more than it was when I was conducting my fieldwork. However, concerns about local-level conflict remain important in terms of gender equality and understanding people's lived experiences of both violence and transition.

### *6.3.2 The International Community's Response to Sexual Violence*

The programs designed and implemented by major organizations demonstrate the narrow scope through which women's experiences are understood in the area of SSR and the rule of law. The United Nations, the European Union and the American Bar Association are examples that reflect the broader strategy of international governments and organizations. This is not a comprehensive analysis of these programs, but it does illustrate the focus on addressing sexual violence.

The UN has a long-standing presence in the DRC. Prosecuting acts of sexual violence has been prioritized. MONUSCO undertakes a wide variety of activities in the EDRC<sup>34</sup> directed at improving access to justice, fighting impunity and improving women's rights. After over a decade in the country, these are still major problems and concerns. The United Nations Development Programme's support for (re)building the state justice system is concerned with

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<sup>33</sup> Fighting augmented, especially in North Kivu, after the 23 March, 2012 defection of former CNDP (National Congress for the Defence of the People) rebels from the national army. The CNDP had been integrated into the FARDC (the National Army) under the terms of a March 2009 peace agreement. Webb, Malcom, "Thousands Flee Renewed Violence in DRC," Al Jazeera, May 18, 2012.

<http://www.aljazeera.com/indepth/features/2012/05/2012517105421722232.html>

<sup>34</sup><http://monusco.unmissions.org/Default.aspx?tabid=10662&ctl=Details&mid=14594&ItemID=19166&language=en-US>

enabling officials to respond specifically to sexual abuse, rather than all crimes (Autesserre, 2012).

The EU's "Programme d'Appui à la Réforme de la Justice à l'Est" (PARJE) states that it integrates gender into all areas of its programs, with a special focus on sexual violence. However, more detailed information on the project is lacking. The Programme d'Appui à la Réforme de la Justice (PARJ), which focuses on reform in the province of Kinshasa, has more information available. The goals of the PARJ are to enhance access to justice for all, strengthen and develop control and evaluation of the judiciary, and strengthen respect for the rights of women. Autesserre (2012) notes that the EU has only one unit deployed outside the capital and this unit exclusively addresses sexual violence. The EU has a mandate to improve women's rights and access to justice, but the focus is on judicial reform that is not far-reaching.

The American Bar Association specifically seeks to improve women's access to legal justice in the DRC. The ABA Rule of Law Initiative focuses overwhelmingly on sexual violence prosecutions. The mobile court program attempts to increase women's accessibility to justice. The ABA states that it strives to strengthen women's rights in the EDRC.<sup>35</sup> However, this program does not adequately address other issues that women confront, does not consider other forms of justice and is bound by State law, which, as mentioned above, can reinforce gender inequality in various ways, both through existing laws and through omission of laws that promote gender equality.

Although the initiatives of the UN, EU and ABA are attempting to improve gender justice and augment women's rights, their concentration is overwhelmingly on sexual violence;

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[http://www.americanbar.org/advocacy/rule\\_of\\_law/where\\_we\\_work/africa/democratic\\_republic\\_congo/news/news\\_drc\\_addressing\\_wider\\_womens\\_rights\\_issues\\_1011.html](http://www.americanbar.org/advocacy/rule_of_law/where_we_work/africa/democratic_republic_congo/news/news_drc_addressing_wider_womens_rights_issues_1011.html)

laws that promote gender inequality, continued attacks on women and overall gender inequality persist.

#### **6.4 Baraza, Gender Justice and Patriarchy: The Messy Reality of Changing Norms**

The rights discourse has overwhelmed global justice discussions, peacebuilding and rule of law programming. In the rule of law literature, there is a rising interest in customary justice mechanisms and how to incorporate them into rule of law programming. Customary justice systems are an interesting addition to this discussion, given their reputation for perpetuating practices, beliefs and traditions that violate women's rights and reinforce gender inequality (Ubink and van Rooij, 2011). Customary justice systems are vulnerable to male elite capture on a more local level (Kapur, 2011; Clarke, 2011). The example of baraza precisely demonstrates the paradox of many customary justice mechanisms; they ensure vulnerable groups have access to justice, but at times can reinforce their vulnerability or marginalize another group. But, importantly, one must also recall the fluidity of customary justice. This section will examine baraza and issues of gender equality.

Concerns about customary justice reinforcing gender inequality have been demonstrated in a variety of contexts,<sup>36</sup> but some customary justice mechanisms have also been modified so as to not reinforce or legitimate inequality.<sup>37</sup> Notably, Grina (2011) argues that vulnerable groups like women tend to place more trust in customary justice mechanisms because they are culturally relevant and easier to understand. In the previous chapter, I explored why people chose baraza; in addition to being a familiar process, interviewees, both men and women, noted how important it was that baraza was free. Arguably, this would be exceptionally important for women who may not have access to the family resources like their spouses do. However, customary justice

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<sup>36</sup> For example, in Rwanda, see Lankhorst and Veldman (2011); in Afghanistan, see Barfield, Nojumi and Alexander (2011); in Mozambique, see Lubkemann, Kyed and Garvey (2011);

<sup>37</sup> See, for example, discussions of modifying customary justice in Rwanda, in Lankhorst and Veldman (2011).

systems often have the paradoxical position of being the preferred, and sometimes only, source of justice for women, while at the same time instituting injustice by reinforcing norms that support the patriarchal social structure.<sup>38</sup> In terms of practicality, baraza is accessible linguistically, financially and because of the familiarity of procedures. However, baraza is indeed subject to the customary justice paradox. There are two ways in which I will explore women's relationship with baraza and gender justice. First, I will explore baraza, in its present manifestation, as it reflects the tensions surrounding gender norms and expectations, women's rights and the continued hegemony of patriarchy in the eastern DRC. While some relevant changes are evident in baraza, what gender equality means to people in the DRC and how it will be manifested is still being defined. Second, I will consider how baraza is contributing to building peace-based rule of law by addressing locally relevant conflicts that are being ignored by the formal legal justice system. The conflicts explored here are ones that affect women disproportionately.

#### *6.4.1 Baraza—Transforming Gender Norms?*

Historically, in the region where I was conducting my research, the territory of Uvira in South Kivu, conflicts were mediated by local chiefs, kings, 'les vieux sages'<sup>39</sup>, or family members (Interview, Julie, 24 September). The name of this process was not always baraza, for example, in Makobola it was called lubungu, but these processes were similar and focused on conflict resolution, mediation and reconciliation (Interview, Julie, 24 September). Baraza mediators were chosen through a process where Chirezi staff went to the various communities and asked locals to recommend wise individuals or positive community leaders. Grina (2011) notes that in patriarchal societies community leaders are typically male. This was the case

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<sup>38</sup> This is a problem common to state legal justice systems and trial-based transitional justice mechanisms as well. See, for example, Charlesworth, Chinkin and Wright (1991), and Reilly (2007).

<sup>39</sup> Wise men, usually community elders.

historically in the eastern DRC and more specifically with customary justice in the region. However, when Chirezi started the baraza project in January 2011, they intentionally aimed to include women in these positions. This is a reflection of the dynamic nature of these justice traditions; baraza has been modified to include women in the role of mediator in response to the recognized need to promote gender equality and took advantage of a window of opportunity in the post-conflict situation to normalize different gender expectations. All three barazas ensured that they had female mediators and this has been accepted and respected by those disputants that I interviewed; however, I cannot speak to broader community's acceptance of this change.

Ensuring that mediator roles are reserved for women is an important step in promoting gender equality; however, in practice, including women does not necessarily lead to or reflect gender equality. Women could be included, but then unable to fully participate because of other responsibilities. It is also possible that they would be present but not be fully involved or respected in their role as mediator. Baraza in Makobola, Kavimvira and Kiliba all include women as mediators. In all the cases I attended at baraza in Kavimvira women were present and actively participating. Kavimvira is also where Chirezi headquarters is located and is less rural than the other two locations. There is a wide variety of local and international NGOs promoting women's rights, including the UN mission MONUSCO, Women for Women International, Oxfam, and local NGOs such as FADI and SOS Femmes en Danger. It is possible that more awareness about women's rights and gender equality has permeated parts of this community. Makobola and Kiliba also had female mediators, but in the cases that I witnessed they were not always present or active in the mediation process. However, interviewees told me that they saw the participation of women as positive. For example, Louis (Interview, November 5), from Makobola, said, “[women] were actively involved, asking good questions and contributing good

ideas.” And Marie (Interview, November 19), from Kiliba, explained, “We were advised by two women. They led the process.” The proliferation of women’s and human rights NGOs may not be as broad in Makobola and Kiliba, but participants felt that when women were involved in their cases they did play a constructive role in the baraza process.

Including women as mediators is a positive step but, overall, gender inequality persists. I asked participants about women’s rights and gender equality in their communities. Despite mixed responses to my inquiries, it is clear from observations and previous research that gender relations in the DRC are unequal. For example, Delphine (Interview, November 2011) explained that sometimes men will control the money to control their wives. Celine (Interview, October 2011) informed me that it was difficult for women to speak about important issues in front of men because they will shout and try to discredit the woman speaking. She stated that it is necessary to, “Make men understand that women are able to do things and speak in front of them and resolve some problems, even in the government. And they can make change in the country.”

Although I asked questions about how interviewees perceived the relations between men and women in the community at large, I found that some of their responses tended to reflect their home situation. In instances where spousal abuse was an issue, female participants would argue that men have more power. For example, Martine (Interview, November 13), who has ongoing disputes with her abusive husband, responded, “My husband does what he wants without consulting me. But as a woman, I have to obtain his consent to go out or do something that I want to do.” She also explained, “The man is the chief. He has all the rights. He is supposed to take care of the family. A woman must follow the wishes of her husband.” Evelyne (Interview, November 3) told me that the relationship between men and women was unequal, “for instance, only women do the farming work.”

In other instances, men and women argued that gender relations were equal and each helped the other, although there were gender-specific tasks, some viewed these as more fluid than others. Moise brought up a situation in which a man loses his job, his family is suffering in poverty and he has lost the respect of his wife. I asked, in this situation, what does a man do when his wife goes to the field to farm? Moise (Interview, November 19) replied, “He can go to farm too. But when the man loses his white-collar job, he cannot farm and stays at home. The wife goes to the farm alone.” It is unclear whether he cannot farm because he does not know how or because it is ‘beneath’ him. I asked, “Can he take care of the children, cook and clean the home?” Moise responded, “He can perhaps take the children to school. The rest is the woman’s responsibility.” My interview with Moise highlighted that even in difficult financial situations it is tough for some men to accept crossing the boundaries into so-called ‘women’s work’ such as cooking and cleaning. Miriam (Interview, November 19), who went to baraza because her husband’s (who had died) family did not help her take care of their children stated, “Men have their specific tasks and women have theirs.” However, she did not feel that the tasks were equally shared between men and women: “I would like to see men and women helping each other in their tasks...I don’t see any genuine change. It’s the same pattern that continues.” These remarks suggest that while men and women have tasks, they are not equally distributed and Miriam did not see a need for the gender division of labour.

On multiple occasions, mediators in Kiliba discussed how essential it is to raise more awareness about women’s rights, as few women or men know their rights and responsibilities. One mediator told me that much work still needs to be done in order to educate men and women about women’s rights and gender equality. He provided me with an everyday example of gender inequality: Women in the community are not allowed to eat with men (4 October). The

willingness to include women in baraza, but their limited practical involvement in Makobola and Kiliba reflects the complexity of understanding women's rights and gender equality in the EDRC. While women are acknowledged as being able to be leading members of the community, there are still some restraints to full participation. Furthermore, it is clear that the division of labour disadvantages women and leaves them less time to participate in activities outside of work and home responsibilities, explaining why they were not always present at baraza proceedings.

### **6.5 Baraza: Witchcraft, Dowries and Domestic Violence**

Another dimension of the discussion of women's rights and gender equality is one that is not thoroughly considered in the rule of law and customary justice literature. There are certain conflicts that are mediated through baraza that would not be considered 'real' or 'legitimate' by the formal legal justice system and, therefore, would not be addressed if there were not customary justice mechanisms. In this sense, baraza adheres to PBROL's anti-colonial ethos and legal pluralism.

My research indicates that certain of these conflicts affect women disproportionately as compared to men. However, baraza does not deal with these conflicts in a way that could be labelled empowering or beneficial to the women involved, complicating its relationship to PBROL. If baraza reinforces gender inequality it adheres to forms of structural and cultural violence. This tension is further explored below.

Of particular relevance to this discussion are: domestic abuse, accusations of witchcraft, infertility, disputes between co-wives in polygamous relationships and dowry conflicts. These issues are not dealt with in the formal legal system as they are not outlawed (polygamy and domestic abuse), not accepted as real (witchcraft), or simply something that cannot be regulated through the courts (fertility). Dowry is officially recognized as an acceptable practice, but

participants informed me that most disputes regarding dowry payment are resolved through families and other informal channels. These issues still play a major role in people's lives and they are the sources and results of conflict. Without mediation, these conflicts have been known to become violent, thus perpetuating instability in the community. The willingness of baraza mediators to hear these cases reflects the ability of baraza to respond to local problems with solutions that local people find acceptable and promote peaceful relations.

#### *6.5.1 Domestic Abuse*

Amnesty International has found that the level of domestic violence experienced by women and girls is elevated during and after violent conflict (cited in, Immigration and Refugee Board of Canada, 2006). Discussing the relationship between men and women in Kavimvira, Elizabeth (Interview, October 16) said, "...sometimes a man can just come [home] when he is drunk and start fights with the woman and insult her and just treat her like a slave." And when asked why she thinks that women are treated differently, she replied, "It makes me upset because I don't know why, but I find it horrible."

The case Martine<sup>40</sup> brought to baraza involved an emotionally abusive marriage with an alcoholic husband. She explained that they are always fighting and said, "I never attend a funeral or place of worship. Wherever I go, he will say I am going to drink or to meet other men." When asked about women's rights, she added, "My duty is to stay at home. When I go out there is always a conflict. I could say that I have a right to have children. That is all." When chased by her husband from her home, Martine was taken in by a baraza mediator who offered to see the couple for mediation. Baraza advised Martine's husband that harmony in the family was

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<sup>40</sup> Martine agreed to be interviewed and was quite open and straightforward about her home situation. Her husband was not present when she agreed to be interviewed or when we conducted the interview. I asked Martine where she thought was the best place to conduct the interview and she wanted to do so just outside of her home. I also asked if she saw any problems related to speaking publicly about her domestic situation; she said that she did not.

essential and that it was not healthy to fight with his wife. Martine said it was obvious that she was satisfied with baraza's advice as she was staying in the marriage. However, when asked if she would still stay with her husband if she had the means to support her children by herself, she said that she could not stay with him in that case. I asked Martine if she ever thought of divorcing or leaving her husband, she replied, "I thought about it, but felt that I could not leave my child and go." Although ideally there would be more supportive channels for women to resolve these conflicts or terminate relationships, customary justice mechanisms like baraza are the only mechanisms addressing these conflicts and trying to improve women's home lives. This dispute suggests that while baraza may be useful in the local context, it does not adhere to PBROL. Although baraza is adhering to local norms and not using direct violence, it does not question the structural violence of gender inequality, nor does it question the underlying (or cultural) norms that justify it, namely patriarchy. Elizabeth (Interview, 16 October), speaking to the issue of gender equality said, "Yeah, it's the culture because they honour men more than women." I argue that it is patriarchal norms, which are a part of most cultures, that justify gender inequality. Galtung (1996) made sure to distinguish between culture as a whole and certain norms or aspects of a culture that justify violence and I also wish to make that distinction. As most cultures are patriarchal, I do not want to give the impression that gender inequality is unique to the local culture in any way.

#### *6.5.2 Polygamous Arrangements*

Polygamous relationships are another serious source of domestic disputes. In a case that was mediated at baraza, the second wife, Patience (Interview, November 20), informed me, "You know, when a man marries a second wife it raises a lot of problems. The co-wives can even poison each other." The potential for co-wife conflicts to lead to violence is real, yet there is no

space in the legal justice system to work through such conflicts as these arrangements are not recognized by the state, nor are they outlawed. In a dispute that was brought to baraza between co-wives in a polygamous arrangement, there was conflict about where the husband spends his time. I use the term ‘arrangement’ because the second wife was not legally or officially married to the ‘husband.’ Josephine (Interview, November 20), the first wife, told me that he had accidentally gotten another girl pregnant and was obligated to ‘keep her.’ The wives did not live together. Josephine confided that she did not object as long as he continued to fulfill his obligations to her, but the arrangement became more difficult when he started spending more time at the second wife’s house. In this case it was the wives who were instructed to apologize and forgive each other. When I asked Patience (Interview, November 20), the other woman in this relationship, what kind of support she would have liked from baraza, she told me, “Baraza can’t do anything if the husband does not cooperate. It all depends on him.” Clearly, this is not sufficient recourse to promote gender equality; however, that is not necessarily the aim of most women when they go to baraza, often the goal is simply to cope with the particular conflict. Considering no justice is achievable through the state justice system, baraza at least provides some form of justice; however, again, it is clear that baraza does not adhere to all aspects of PBROL.

#### *6.5.3 Witchcraft and Infertility*

One particularly pertinent case was heard at baraza in Kavimvira. In this case, there was a dispute between a couple, John and Mary, and John’s brother Isaac and his wife Elizabeth. John and Mary had not been able to become pregnant and blamed Elizabeth for putting a curse on Mary, of whom she had spoken ill. Over numerous sessions mediators heard the various parties involved and then discussed what could be done to resolve the conflict. I attended some

of these sessions, but they started before my arrival. Some relevant points in this case included: First, in this conflict it was automatically assumed by all involved that it was Mary who was infertile; it was never considered that John could be infertile. Second, although baraza members state that witchcraft is not real, they still hear cases where witchcraft is a major part of the conflict and discuss with participants other possible explanations for what has been understood as witchcraft. In this case, they encouraged the couple to visit the doctor to determine whether there was a biological reason for the couple's inability to conceive. John stated that they had been to the doctor two or three times, referring to a 'traditional' doctor. They could not afford to visit a medical doctor. In this case, issues of poverty and education intersect with the conflict. The couple could not afford to see a medical doctor and were unaware of the possible biological reasons for why they could not conceive. Again, this case points to baraza's inability to address the root, or structural causes of conflict, namely poverty. But it does demonstrate the dynamic nature of customary justice. Historically, local people may have relied on 'traditional' doctors and medicine, but with globalization of medical science, mediators recognize the importance of referring to medical doctors in certain cases.

Mediators advocated seeing a medical doctor, but were aware of the local witchcraft practices and beliefs and in the end determined that witchcraft was not likely the cause of the infertility and that the conflict was more related to misbehaviour than witchcraft. The participants were advised to respect one another and not to spread rumours. It is clear that there is no way this conflict would be heard in the state courts; neither witchcraft, nor fertility, falls under the purview of state justice. However, it is clear that this conflict was impacting the lives of those involved and, with cases of witches being stoned to death, had the potential to escalate

to grave violence. Furthermore, in interviews with John, Mary and Elizabeth, they were all satisfied with the advice given to respect each other and not fight because they are family.

This case reflects issues surrounding witchcraft. Although baraza reinforced the official argument that witchcraft is not ‘real’, they still mediated the case and listened to the claims of witchcraft as they recognized how important this is for local people. An informant, Joseph, told me that often people will say that they do not believe in witchcraft because they are afraid of prosecution; there is a law in the DRC making it illegal to accuse anyone of witchcraft. However, Joseph argued that most people do actually believe in witches, adding that the baraza mediators do believe in witchcraft to some extent, this is evident through their private discussions of cases. For example, in the case outlined above, baraza found the claims of witchcraft to be unfounded because there was no ‘proof,’ whereas they articulated to the disputants that witchcraft does not exist. Mediators are aware of the potential of witchcraft accusations to be used to harm and stigmatize people and try to limit this problem. Although currently witchcraft accusations can be brought against children, women and men, they are still predominantly used against children and women.

On a broader scale, this conflict still reflects the gender norms that maintain inequality. Motherhood continues to be perceived as the dominant value of women. If a woman cannot bear children, she cannot live up to locally determined gender expectations and is thus stigmatized. This obviously maintains gender inequality as women are not innately valued, but are valued based on their ability to fulfill their expected role. This is not a form of inequality found solely in the eastern DRC and it is important to recognize that baraza does not actively counter this value system. Instead, mediators mentioned that if she were confirmed ‘barren’ they would

introduce her to other mamas<sup>41</sup> in the community with the same ‘problem’ that she could live with. Therefore, while baraza provides an accessible justice mechanism to mediate conflicts that affect women disproportionately and in a unique manner, it does not necessarily do so in a manner that promotes gender equality or women’s rights. However, without this mechanism, women would have little recourse to justice.

#### 6.5.4 Dowry Payments

Dowry payment is another reason for disputes that reflect the broader gender inequality. The government argues that the dowry payment has symbolic value (Mossi and Duarte, 2006); however, in reality, the value goes far beyond symbolism. One interviewee, Pierre, spoke to me about a conflict that was not yet resolved. Pierre (Interview, November 6) said, “My daughter got married and her husband died a few years later, leaving her with a child. She remarried and now has two other children. Now, the family of the deceased husband is claiming my daughter and all her children on the ground that they paid the dowry. Till now, the issue is unresolved.” This is not the conflict for which Pierre went to baraza, but it does speak to how complicated dowry issues can be.

Another dowry case was sent to baraza after a different NGO attempted to resolve the issue but, according to Moise, made it worse. An interesting component in this discussion of dowry payment is the language used. Moise explained: “I am the one who went to talk to the other NGO. My father-in-law was claiming the dowry that I hadn’t paid when I got married to his daughter. I had *gotten my wife on credit, and hadn’t paid since*. The other NGO transferred my case to the baraza after having made the conflict worse.” I asked Moise what he thought his wife’s feelings about this situation are, he said, “She is like a prisoner. Her will was to be with me and her children. She feels bad when she sees the children. I am stuck and wish to see the

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<sup>41</sup> Term used to refer to adult women.

case resolved at last.” Of course, I cannot be certain how his wife felt, but this situation suggests that dowry and dowry-related conflicts can reinforce gender inequality. Moise’s case was complex; he did pay the dowry, but his father-in-law said that it was not sufficient to make up for his late payment. What became clear throughout this interview was that the dispute was between the men and the payment of the dowry, not what the woman wanted. In this situation baraza, and the other mechanisms referred to, reinforced the legitimacy of dowries, and thus the value of women as a commodity, rather than a person, and therefore does not conform to PBROL. This case also clearly suggests that dowry payment holds much more than just a symbolic significance.

## **6.6 Conclusion**

The complexity of these realities makes it difficult to argue that baraza is either advancing women’s rights and gender equality or, conversely, reinforcing patriarchal norms and inequality, complicating the analysis of whether it conforms to PBROL. It is clear that baraza is responding to conflicts that are taking place presently, that are affecting people’s daily lives and that have the potential to escalate to violence if not peacefully resolved. What gender equality and women’s rights will look like in the DRC is an ever-changing reality and possibility. It is unclear how norms surrounding gender equality will be modified in the coming years, but baraza’s ability to respond to them and its accessibility to local women means it is and will continue to have a role to play in building peace-based rule of law.

These cases reflect the abuse that women can suffer and for which they do not have recourse to justice through the state justice system. In addition to the lack of legal justice, patriarchal norms limit women’s access to social and economic justice. The reason that women are encouraged to stay in abusive relationships is tied to societal norms and expectations of

women's roles and other practices surrounding family lineage and land inheritance. If a woman leaves or divorces her husband, she has no rights to shared property or wealth, would lose custody of her children, would be required to repay the dowry given upon marriage, and would be shunned by the community (Immigration and Refugee Board of Canada, 2012). Gender inequality in law and society creates a situation where women feel obliged to stay in abusive and polygamous relationships. Although baraza does not challenge this inequality ideologically, it does give women a channel through which they can attempt to improve their domestic situation. As demonstrated by the inclusion of women as mediators, baraza is fluid and responsive to local changes in women's rights and struggles for gender equality. It would be realistic to argue that as these changes occur on a broader level in the community, baraza will be responsive to them. This example again reveals the tension between women's rights, patriarchy and justice that currently exists in baraza.

## **Chapter 7: Conclusions and Recommendations**

Contrary to the rule of law orthodoxy, peace-based rule of law is a concept that takes into account and recognizes the importance of history and power relations, and is based on a theory of peace that acknowledges the real impact of structural and cultural violence. I have argued that liberal peace, the foundation of orthodox rule of law programming in post-conflict situations, is highly problematic, both in theory and practice. The rule of law orthodoxy is typically implemented in a top-down manner, is state-centric and technocratic, and tends not to take into account local history, politics and norms. The one-size-fits-all model of the rule of law orthodoxy, combined with a disregard for local politics, history and culture, often means that its programming is contextually irrelevant. PBROL is an alternative that addresses some of the recognized problems underlying the rule of law orthodoxy. PBROL does not claim to be value-neutral (as the rule of law orthodoxy does), but it attempts to draw on the positive aspects of cultures to advance justice that promotes sustainable peace and equality.

The first four chapters of my thesis were used to set up my research in the context of history, theory and practice. I addressed how my research fits into academic discussions of customary justice and the rule of law. Critical rule of law scholars have noted the contextual irrelevance of the orthodoxy and thus have questioned what role customary justice systems may have in rule of law programming. Given the wide variance of customary justice systems, this exercise has relied greatly on case studies. My research includes a case study of baraza, but attempts to move beyond that case study and explore the relationship between customary justice and the rule of law through the conceptualization of peace-based rule of law.

To give context to this case study, I have provided background and current information on the situation in the DRC. The background information outlines how the legal structure has

been influenced by colonization. The present situation in the DRC is clearly unstable and violent; the state appears incapable of regulating activities in the eastern region. The international community has made efforts to improve the situation through security sector reform, under which rule of law programming is undertaken, but, as of yet, has seen little concrete results. In this chapter I also described baraza's foundations and processes as explained to me by the director of Chirezi and baraza mediators. Finally, I elaborated on baraza's structure and procedures.

Through the Conceptual Framework I elaborated on the most relevant concepts to my research: the rule of law orthodoxy, peace-based rule of law, tradition and customary justice. I explore a range of problems associated with the rule of law orthodoxy and its basis in the liberal peace theory. I also elaborate on the concept of PBROL. I also clarify that I understand tradition to be dynamic, as are customary justice systems. Additionally, I remark that customary justice systems can be problematic, particularly by reinforcing inequality based on local-level power dynamics. These are the conceptual tools that I employ throughout my thesis to address my research questions: 1. Can customary justice contribute to building peace-based rule of law? 2. As a customary justice mechanism in the eastern DRC, does baraza play a role in building peace-based rule of law in the communities where it operates? What is its role? In other words, how can it be understood to contribute to or detract from peace-based rule of law?

I began this research with the hypothesis that many customary justice systems will contribute to building PBROL, but recognized that some situations will be quite complex, with some aspects of the system contributing to building PBROL and others not. Baraza has demonstrated precisely this point. Baraza demonstrates that it adheres to the anti-colonial ethos that is a primary characteristic of PBROL. Baraza has a local history based in conflict resolution

and wise community members as mediators. Baraza also relies on local conceptualizations of justice-related concepts, such as fairness and equality, through hearing both sides of the dispute. Some interviewees also cited that it was important to them that the result did not lead to winners and losers, which they argued was unfair. Central to the anti-colonial ethos is non-imposition by external actors. Chirezi is a local organization that revitalized a local customary justice mechanism; therefore, baraza was in no way externally imposed.

It also adheres to other tenets of PBROL, such as being socially responsive and dynamic. Customary justice systems are imperfect, but because they are flexible and, if socially responsive, they have an inherent potential for improvement. This can mean modifying its processes or ideological foundations to reflect changing norms, as was demonstrated in baraza through the inclusion of women mediators. It can also mean mediating conflicts based in social realities that are not officially recognized, for example witchcraft. Baraza recognizes the local importance of these witchcraft claims and helps resolve disputes so that people do not feel the need to turn to violence. Finally, baraza also responds to articulated social needs, for example a need for peace and harmony at the community level. Baraza uses familiar values, such as reconciliation, in order to improve trust and relationships within the community with the goal of promoting long-term peace by reinforcing these norms.

Importantly, baraza does not preclude the existence or use of other justice systems, official or otherwise. In this sense it adheres to PBROL in that it recognizes the legitimacy and importance of legal pluralism. Of course, this factor can lead to confusion and complications as to what system takes precedence, seen in Moise's case - a case that has not yet been resolved. As many researchers who examine customary justice and the rule of law have noted, further

examination of how to productively engage with customary systems is important for long-term sustainability and making use of their local importance.<sup>42</sup>

Baraza's relationship to structural and cultural peace, the goal of PBROL, is complex. Baraza does not condone direct violence, which is culturally acceptable in some cases, or at least has been normalized because of years of violence and instability. By rejecting justifications for violence baraza clearly advances PBROL. Baraza also relies on familiar and acceptable ideas of reconciliation and restoring trust and relationships to promote and build better community relations with the goal of advancing long-term peace. However, baraza's response to gender-specific disputes, for example domestic violence and conflicts between co-wives, actually indicates that it reinforces, rather than questions, gender inequality, a form of structural violence. At the same time, it is responding to these conflicts in a way that is recognized and accepted locally and reflects local norms, thus conforming to certain aspects of PBROL. As with many customary justice systems there is a paradox of being accessible to vulnerable groups, but at the same time reinforcing their vulnerability by not challenging the structures and norms that maintain inequality.

It is evident that baraza's relationship to PBROL is complicated. It adheres to certain characteristics of PBROL, but falls short on advancing positive peace because it reinforces gender inequality through not challenging the customary beliefs through which it is justified. This suggests that rule of law programmers (orthodox and otherwise) must continue to question the relationship between customary justice and gender equality. However, as state legal systems arguably also reinforce gender inequality, baraza's perpetuation of unequal gender norms does not lead me to conclude that it should be abandoned as a justice system. Baraza does adhere to

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<sup>42</sup> Engaging with customary justice systems is a theme explored throughout Ubink and McInerney (2011) edited book "Customary Justice: Perspectives on Legal Empowerment."

various aspects of PBROL and because of its social responsiveness, as gender norms change in response to awareness being raised about women's rights and local rights activists undertaking educational campaigns, baraza will likely modify the way it resolves certain conflicts.

### **7.1 Recommendations and Areas of Further Research**

- *Partnerships/information sharing across sectors:* Poverty has been articulated by many participants as the root cause of conflict. Rule of law and justice programming needs to be coordinated with other sectors, such as development. A key element of this relationship is sharing information. Promoting structural and cultural peace cannot solely be the venture of the justice sector, even though the negative outcomes of this inequality may be apparent to justice workers. PBROL is supported by those justice initiatives that promote positive peace, but in and of itself does not have the ability to address all forms of structural and cultural violence. This is why I recommend information sharing with other political and economic organizations, official and non-official.
- *Legal pluralism and rule of law programming.* A debate and discussion needs to remain open about how justice systems can be incorporated into peace-based rule of law programming. I argue in favour of examining how the various justice systems can be divided to achieve particular goals. For example, perhaps the national justice system should focus on regulating international arrangements and agreements with other states and crimes perpetrated by state officials or on a mass scale. It is clearly important that a national justice system is maintained for certain purposes, particularly on an international scale. Local and customary systems can concentrate on regulating dispute and conflicts within the community. This is not a definitive solution to justice problems in the DRC, but it warrants further consideration.

- *Women's Rights and Gender Equality:* As baraza mediators pointed out, more awareness about women's rights needs to be raised. Creating a space for dialogue about gender inequality within the community is recommended. As I previously mentioned, I argue that patriarchy and gender inequality cannot be understood as simply a cultural phenomenon; it is a global reality, found in most cultures. Discussions about women's rights and gender equality are not attacks on culture but on patriarchy itself. However, recognizing the use of culture to justify gender inequality, I recommend supporting internal movements to advance women's rights. Local groups and leaders are the most likely channel for advancing gender equality locally, as they are not threatening to local culture. Providing these groups and leaders with resources and access to information is essential in order for them to be able to fulfil this function. Baraza, which has already made changes to be more inclusive, can begin to question the norms associated with gender inequality and maintained through claims of culture and tradition. This is obviously a long term project, but mediators are eager to advance women's rights, so it is not a project that is untenable.

- *Funding of customary systems:* The stated benefit of baraza is that there is no cost associated with bringing disputes for resolution. Interviewees could not overstate how important this was given the situation of extreme poverty, but what does this mean for mediators, who are also community members, thus living in abject poverty as well? When I discussed internal power relations I noted that mediators were recommended from within the community based on their wisdom; they did not attain their positions because of a higher standing in the community related to wealth. Dispute resolution is a time-consuming endeavour. Assuming the position of mediator while working other jobs, such as farming, teaching, and selling produce is overwhelming. The baraza project has not received funding since June 2011, making the

simplest tasks difficult. Limited basic resources, such as pens, paper and photocopying were provided by Chirezi after multiple requests. In various discussions mediators spoke of being ‘worn out,’ a problem I also recognized through my observations and presence at many baraza proceedings. International donors should conduct further research on local and customary justice systems to determine how best to support these projects. That is not to suggest abandoning other rule of law programming, but small-scale funding can make a huge difference in these local customary initiatives’ ability to maintain their processes.

- *Other Local and Customary Justice Initiatives:* I recommend further research on local and customary justice in the eastern DRC. It is clear that there are major problems of corruption in the state justice system that have created and reinforced distrust in this system’s ability to achieve fair justice outcomes. However, little research has been conducted on other options. Advancing information on local and customary justice in the DRC will help create a more meaningful discussion of legal pluralism in the DRC.
- *Expanding baraza:* Broadening baraza’s reach was advocated by many participants. “Antoine” (Interview, November 5), for example, said, “They do a fantastic job in promoting reconciliation in the community. My wish is to have this approach popularized throughout the community.” Other participants also cited a need to increase the scope of baraza. Interested in transitional justice issues, I asked participants if baraza could help address wrongs related to the war? Interviewees argued that there was great potential for baraza to expand in the community and address a wide variety of conflicts, including those related, directly or indirectly, to war. Hugo (Interview, October 16) suggested that, “Baraza can help with crime, conflict and war because of the way they make people reconcile is a better way.” Julie (Interview, September 24) agreed. “Yes, conflicts stemming from the war can be successfully resolved at baraza.” She

also provided an example of a common war-related problem that she believed could be resolved through baraza. Julie recounted, “During the war, armed groups used to come and take people’s chickens or goat. And those were the sons born and raised in the community. Now some of them have been demobilized and are back in the community. Their actions are still remembered. Those crimes can be brought to baraza for resolution.” An important element of resolving conflicts is that there must be willingness to do so on both sides. I asked if there were other places to go to resolve problems related to the war. Julie said, “No, except the tribunal [formal courts].”

Due to a lack of transitional justice mechanisms, customary justice mechanisms address war-related transgressions, I recommend further exploration of how local customary systems can help fill that void.

- *Questioning the Discourse:* A final recommendation is for critical rule of law programmers and academics to fundamentally question the Eurocentrism inherent in the rule of law discourse. Notably, the term ‘rule of law’ suggests a history thoroughly entwined with Western political and philosophical thought<sup>43</sup> and a functioning and democratic state system. This is not to suggest that other cultures and religions do not have meaningful justice traditions, the point is precisely that they do. However, through continued reference to the rule of law, we are implicitly limiting the scope of what we are referring to. Rule of law connotes a Western-style law; this is partially why the rule of law orthodoxy has encountered so little resistance—it is doing precisely what one would imagine it to do based on a basic understanding of the rule of law. This is problematic because different cultures have different justice traditions, not all of them related to law as it is commonly understood. The variety of justice traditions are undermined in rule of law programming unless explicitly brought to the forefront of analysis.

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<sup>43</sup> See Barnhizer and Barnhizer, 2008, for a history of the rule of law.

Therefore, my question for future debate is why the term ‘rule of law’ continues to be perpetuated, even by critical scholars, when it does not reflect the reality of diverse justice systems on the ground. Is there a practical reason? Or, should scholars more thoroughly examine other ways of talking about justice systems in diverse contexts?

## APPENDICES

### Appendix I



**Carleton University Research Office**  
Research Ethics Board  
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1125 Colonel By Drive  
Ottawa, ON K1S 5B6 Canada  
Tel: 613-520-2517  
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#### Ethics Clearance Form

This is to certify that the Carleton University Research Ethics Board has examined the application for ethical clearance. The REB found the research project to meet appropriate ethical standards as outlined in the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* and, the *Carleton University Policies and Procedures for the Ethical Conduct of Research*.

New clearance

Renewal of original clearance

Original date of clearance:

Date of clearance	<b>11 August 2011</b>
Researcher	<b>Holly Dunn</b>
Status	<b>M.A. student, Department of Political Science</b>
Supervisor	<b>Professor Augustine Park, Sociology and Anthropology</b>
Funding status	<b>Non-funded</b>
Project number	<b>12-0282</b>
Title of project	<b>Grassroots justice initiatives in the Eastern Democratic Republic of Congo: A case study of baraza in South Kivu</b>

Clearance expires: **31 May 2012**

#### All researchers are governed by the following conditions:

**Annual Status Report:** You are required to submit an Annual Status Report to either renew clearance or close the file. Failure to submit the Annual Status Report will result in the immediate suspension of the project. Funded projects will have accounts suspended until the report is submitted and approved.

**Changes to the project:** Any changes to the project must be submitted to the Carleton University Research Ethics Board for approval. All changes must be approved prior to the continuance of the research.

**Adverse events:** Should any participant suffer adversely from their participation in the project you are required to report the matter to the Carleton University Research Ethics Board. You must submit a written record of the event and indicate what steps you have taken to resolve the situation.

**Suspension or termination of clearance:** Failure to conduct the research in accordance with the principles of the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* and the *Carleton University Policies and Procedures for the Ethical Conduct of Research* may result in the suspension or termination of the research project.

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Antonio R. Gualtieri, Chair  
Carleton University Research Ethics Board

## Appendix II- Interview Questions

I introduce myself, explain the purpose of my visit and provide the relevant information (as detailed in the Ethics package) to interviewee. I ask if they have any questions and to sign the Informed Consent form, then I proceed with the interview.

### Questions:

1- Can you tell me a little about yourself? I would try to attain the following information: Name, age, level of education, marriage status, number of children, number of people living in your home, profession/job, ethnic group.<sup>44</sup>

2- How long have you lived in this community?

3- Have you noticed any conflicts in the community?

3-a) What types of conflicts have you observed?

3-b) Have the type or frequency changed over the years?

What do you think explains the increase/decrease/different types?

4- What mechanisms are available to resolve conflicts?

4-b) Have these changed over the years?

5-What role do you understand baraza to play in the community?

5-a) If mention reconciliation, ask how they understand reconciliation.

6- I have been informed that you brought a conflict to baraza. Would you mind telling me about what happened?

7- Why did you decide to bring this conflict to baraza?

8- How did baraza address your conflict?

9- What do you think about baraza's process?

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<sup>44</sup> I asked various informants whether it was acceptable to ask interviewees their ethnic group. All confirmed that it was an acceptable question to ask and would not cause any problems for me or discomfort for the interviewee.

a) Was it fair?

b- Were you satisfied with the outcome?

10- Did you perform the Rite de Reconciliation?

a- Was this important for you? Why?

\* Typically by this point interviews mentioned the police or formal justice system and I would continue a line of questioning inquiring as to what they think about the formal justice system, why they did not bring their conflict there to be resolved, which conflicts would they bring to the formal justice system

11- When you brought your conflict to baraza, were their women mediators?

12- How did the women mediators contribute to resolving your conflict?

a) What did you think about having women mediators participate in baraza?

13- What are some ‘normal’ roles that women play in the community? And men?

14- As a woman, what do you understand your rights to be? And men’s?

15- Do you think that there is equality for men and women?

a) How/why are they unequal/equal?

16- Have you seen any changes over the years regarding women-men roles (at home, work, etc...?)

17- Would you like to see any change in regards to women-men roles?

Thank Interviewees and ask if I can contact them in the future if I have any follow-up questions.

Do they have any questions?

Appendix III. Interviewee Information

Table 1-Kavimvira

Pseudonym	Date	Age	Education	Employment	Conflict
Eline	September, 2011	50	N/A	N/A	N/A. Mediator
John	October, 2011	35	N/A	N/A	Witchcraft and no children
Mary	October, 2011	30	N/A	Farmer(occasionally)	Witchcraft and no children
Elizabeth	October, 2011	25 (approximately)	N/A	Farmer (occasional)	Witchcraft and no children
Celine	October, 2011	38	N/A	Farmer	Debt/bad produce
Martine	November, 2011	30 (approximately)	None	Farmer	Domestic
Angela	November, 2011	37	N/A	Selling agricultural produce	Debt/bad produce
Josephine	November, 2011	29	None	N/A	Domestic/cowives /witchcraft/gossip
Patience	November, 2011	19	Secondary 1	None	Domestic/cowives

Table 2- Kiliba

Pseudonym	Date	Age	Education	Employment	Conflict
Mathieu	October, 2011	N/A	N/A	Farmer and fisher	Rumours about his daughter
Mathilde	October, 2011	50	None	Selling oil (food)	Land boundaries
Jean	October, 2011	51	Secondary two	Farmer and guard	Land boundaries
Avril	October, 2011		Secondary two	Farmer	N/A. Mediator
Evelyne	November, 2011	Approximately 40	None	Farmer	Husband attended. Witchcraft
Isabelle	November, 2011	35	Primary three	Farmer	Land Boundaries
Marie	November,	18	Secondary	Student	Witchcraft

	2011		4		
Michel	November, 2011	N/A	Primary 4	Demobilized ex-combatant	Land cultivation agreement
Edithe	November, 2011	43	None	Farmer	Land cultivation agreement
Moise	November, 2011	35	Secondary 6	Farmer	Dowry payment
Miriam	November, 2011	41	Secondary 2	Farmer	Child support from husband's (deceased) family

Table 3- Makobola

Pseudonym	Date	Age	Education	Employment	Dispute
Simon	September, 2011	52	N/A	N/A	Goat is grazing in neighbours field
Julie	September, 2011	N/A	N/A	N/A	Goat grazing in a neighbour's field
Karine	September, 2011	35	N/A	None	Goat grazing in her field
Louis	November, 2011	56	Primary 5	N/A	Payment for time worked
Pierre	November, 2011	53	Secondary 2	Butcher	Debt repayment
Jeremie	November, 2011	36	Social Work Diploma	Teacher	Land Inheritance
Mireille	November, 2011	25	None	Farmer	Violent dispute related to purchasing fish
Marceline	November, 2011	50-60	None	Work for others	Dispute over a jerry can for making local alcohol
Danielle	November, 2011	Older than 50	None	Farmer	Dispute over a jerry can for making local alcohol

Delphine	November, 2011	39	Secondary 2	N/A	Violent dispute related to purchasing fish
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