

Rwandan Gacaca Courts in Crisis: Is There a Case for Judicial Review?

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The Rwandan Gacaca Courts are far from the success story that many believe them to be. There is legitimate concern about the form and function of the Gacaca Court system in the future. Through discussion of restorative versus redistributive justice, this article concludes in the post-genocide context the Gacaca Courts were the best opportunity for Rwanda to attain some semblance of closure. The community-based courts functioned as a pressure relief valve for a society facing an impossible task by facilitating restorative justice goals. However, in the future it remains unclear whether the courts should be reformed to include a formal judicial review of process. The article will outline some of the arguments for and against implementing a more formal judicial review of process. Concluding that while it is undeniable a better system of judicial review including review of the processes may not be possible, it would certainly be desirable.

“The Gacaca Courts no longer exist. In Rwanda there is currently no legitimate legislative court outside of the national Supreme Court. The Gacaca Courts along with the judicial system in Rwanda stand in crisis.”

— Alison Des Forges,¹ senior advisor, Human Rights Watch, Africa division

Introduction

The Gacaca Courts are a judicial system in crisis. Since 1 January 2006, when the Rwandan government changed hands, new political boundaries have been delineated, redistributing 103 districts into thirty-three. With the change of districts, there was no simultaneous change in the courts’ legal jurisdiction. Without a change of court structure, the community-based Gacaca Courts, established to put the thousands accused of complicity in the Rwandan genocide on trial, have since the beginning of 2006 failed to try anyone.²

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Gacaca Court system, the nation may yet emerge from the current judicial crisis with a better understanding of how to build an overall better judicial system for Rwanda in the future.

The Rwandan Genocide

“Decimation means the killing of every tenth person in a population, and in the spring and early summer of 1994 a program of massacres decimated the Republic of Rwanda.... The dead of Rwanda accumulated at nearly three times the rate of Jewish dead during the Holocaust. It was the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki.”

— Philip Gourevitch (1998)

The Rwandan genocide is one of the most horrific acts of collective violence humanity has ever inflicted on itself. In April 1994 Rwanda became the site of massive, brutal violence. An estimated eight-hundred thousand Tutsi and moderate Hutus were murdered during a three-month period. More than two million people fled to neighboring countries. The Rwandan genocide was unique because of the popular participation of Rwandan civilians, because of the brutal method of the killings (primarily machetes), and because of the speed with which the genocide unfolded — slightly less than one million people were murdered in just one hundred days (Umugwaneza 2005, 2). The Rwandan genocide was a calculated, politically motivated act, targeting professionals and intellectuals, which completely destroyed the country’s infrastructure (World Bank 2007, 1). These mass killings included some of the most inhumane acts of violence of the modern era. For example, in Ntarama village, twenty kilometers outside of Kigali, more than five-thousand Tutsi men, women, and children were brutally cut to death inside the church in which they

After the genocide in 1994, the government of Rwanda and the international community attempted to bring justice and human dignity back to a country shattered by killing. The United Nations established the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania. This court, which was intended to uphold the highest international standards of human rights and bring the masterminds of the genocide to justice, had brought only fifty-two suspects into custody by 2002. Of these suspects, only eight were tried and convicted of genocide (Human Rights Watch 2002, 7). For many it was clear that the ICTR justice system had failed (Human Rights Watch 2002, 7).

At the same time, the government of Rwanda and its shattered justice system was ill-equipped to deal with the staggering number of accused genocide participants waiting in jail to be put on trial. As of 2002, only about five-thousand of more than one-hundred thousand jailed as genocide suspects had been tried in Rwanda (Borland 2002, 1). There were two main reasons why the existing Rwandese court system would never accomplish the necessary criminal justice and reconciliation. First, as of 1994, there was nothing about genocide in the penal code of Rwanda; it was a crime not punishable by any national law, a major omission that hindered any further formal punishment of the accused (Umugwaneza 2005, 25). Second, the courtrooms were far away from the communities where atrocities took place, and the witnesses and victims necessary for the trials had difficult access to the courtrooms, which dramatically slowed the process of justice (Umugwaneza 2005, 27). By 2002, it was clear that the challenges of post-conflict justice in Rwanda could not be faced by the government as an institution (Umugwaneza 2005, 25).

form of Gacaca adapted some of the core values of the traditional system, including community participation and the goal of promoting reconciliation and harmony. The Gacaca Courts had the dual purposes of promoting social reconstruction and greatly expediting the trials of tens of thousands of accused (Gaparayi 2001, 80).



Figure 2. Poster advertising Gacaca Courts.

And so, 12,102 (Umugwaneza 2005, 28) Gacaca Courts were set up throughout the country with four levels of jurisdiction: starting from the lowest political and administrative level of the cellule to those of the sector, district, and, at the highest, provincial levels (Gaparayi 2001, 82). The implementation of the Gacaca Courts underwent four phases: the first dealt with raising awareness and increasing knowledge about the law; the second was concerned with election of judges from the community; the third addressed confession testimony and reconciliation; and the final phase involved the reintegration of some prisoners back into society through a work program.

The operation of the Gacaca Courts was community-driven and participatory, with the accused standing trial before a group of judges selected by the community. A unique

2002, 1). The Gacaca Courts have allowed some modicum of justice to exist despite these unbelievably limited judicial resources. Furthermore, the Gacaca Courts facilitated an expedited process that brought more than one-hundred thousand accused, waiting in jail, to trial. A government survey of 751 Gacaca Courts found that from 2002 to 2004, 68,447 cases had been put on lists by Gacaca jurisdiction; of those cases, 38,896 had files that had been concluded, and, even more positive, 2,883 confessions had been delivered (Umugwaneza 2005, 44). In both its ability to increase the number of accused tried and to bring quick justice to a nation in desperate need of healing, Gacaca has been successful.

The Gacaca Courts have also increased the level of accountability to the public since the community courts are operated by an institution external to government control process. The national government, despite what its detractors say, does allow for the autonomy of decisions made within the Gacaca Courts. Gacaca has also increased accountability because the accused stand before the community and tell their story before witnesses who can correct accounts that are inaccurate.

The Gacaca Courts were designed to avoid the colonial systems many Rwandans believe were the true cause of the genocide. There is a lot of distrust among Rwandans today regarding the French and Belgian colonizers, whom the Rwandans blame for originally making the cultural classification of Hutu and Tutsi.⁵ The Gacaca Courts are culturally rooted and communally sensitive, providing a modern take on an ancient form of African tribal justice. Moreover, in the eyes of some, the courts have proven that Rwandan society has the capacity to settle its problems through a self-initiated system of justice and dispute settlement based on Rwandan traditions and customs.⁶

progressed, Rwanda continues to be a polarized country, one still not ready to overcome the tragedy of the 1994 genocide. Some of the courts even had trouble bringing in enough community members (the minimum required is 100) to hold court sessions.¹⁰

Another telling story of the limitations of the Gacaca Courts in the period from 2002 to 2005 was a survey by Penal Reform International (PRI) that found that penalties imposed on the convicted were far harsher in the Eastern region of Rwanda than in the Western region (Penal Reform International 2006). This is largely due to the fact that in the West there has arguably been far more tolerance in the post-genocide era, as many of the communities are still largely intact, with many survivors of the genocide. This stands in contrast to the Eastern part of the country, which has many returning refugees apart from other Tutsis, and there are far fewer sociocultural linkages with past communities to temper the severity of punishment. These realities raise concerns over the uniformity of justice the Gacaca Courts provide.

The Gacaca Courts are subject to few procedural safeguards against error or abuse in the justice process. There is concern over the low level of participation by community members, the hesitancy and fear of witnesses to testify, and questionable attempts for impartiality. Human Rights Watch reports that there is limited or no testimony against members of the Rwandan Patriotic Front, the ruling political party. This raises an important question: Is it possible to have even restorative justice in a system in which only one side receives justice? Is it possible that a system supposedly built on popular legitimacy does not in fact have popular legitimacy?¹¹

A more serious indicator of the lack of faith in the system is the recent outflow of some twenty thousand refugees to Burundi and other neighboring countries in 2005. Many

right to a defense. The Gacaca Courts fail to meet due process obligations under the International Covenant on Civil and Political Rights. There is no guarantee that the Gacaca Courts allow open and free-flowing information during the hearings, whether all parties will be heard impartially, and whether the presumption of innocence until proven guilty will be respected (Amnesty International 2002). Any good lawyer trembles at the thought of a justice system without the individual rights that are so central to the Western understanding of justice.¹³

Should Gacaca Courts Provide Restorative or Retributive Justice?

The challenge for the Gacaca Courts lies in the tension between the intended goals of justice the courts are meant to provide. The courts are charged with the dual challenge of retributive justice — the punishment of the perpetrators of horrendous crimes — and restorative justice — the restoration of durable peace, cooperation, and order to a nation that wishes to acknowledge its past while struggling to move forward in a positive direction.

Retributive justice, the dominant paradigm for dealing with human rights abuses since World War II and the Nuremberg trials, reinforces the belief that the primary road to justice is through criminal prosecution (Bolocan 2004, 357). Retributive justice deters future human rights abusers and fosters respect for the rule of law and new democratic order (Bolocan 2004, 358). Moreover, retributive justice, by dispensing justice through criminal trials, may also favor reconciliation between victims and offenders. If dispensed through international forums, post-genocide retributive justice would likely have a broader, more powerful impact than domestic processes (Bolocan 2004, 359).

A good example of retributive justice is the United Nations International Criminal Tribunal for the former Yugoslavia, which attempts to bring justice to thousands of victims

sacrifice certain elements of criminal justice in order to address the horrendous events that involved overwhelming numbers of people, both as victims and perpetrators of the genocide and violence.

The setup of the Gacaca Courts is modeled after the South African Truth and Reconciliation Commission — a semi-judicial body established in 1995 to investigate apartheid era crimes that expressly emphasized restoration of peace and order in its mandate (Bolocan 2004, 364). The commission was not a traditional Western court and had its failings, but it did effectively address an overwhelming problem without an easy solution. However, it should be noted that the commission dealt with apartheid crimes rather than genocide, which somewhat dilutes the analogy. The problems created by the Rwandan genocide may be even more complex than those resulting from South African apartheid. Nevertheless, South Africa's experience proves that countries may need to take shortcuts in order to respond to the ramifications of devastating national experiences like apartheid or genocide. In Rwanda the goal should be achieving restorative justice. This will lay the foundation for a society built on respect for human rights and dignity in the future. Classic forms of criminal or retributive justice do not suit the needs of Rwanda for reconciliation after a horrific genocide.

Fair Trials and the Importance of Judicial Review

The Gacaca Courts exhibit many shortcomings in the way of due process and fair trials. The two most important features of any just court system are judicial independence and judicial review. Judicial independence means that the courts are independent of other branches of government, political parties, prior beliefs, peer pressure, and other parts of the judiciary.¹⁴ Judicial review is founded on the inherent jurisdiction of the superior courts to

outcomes and certainly no formal review of process. The Gacaca Court system plan does not include review by regular Rwandan courts at any level.¹⁷

The Gacaca Courts draft laws from 2002 outlined some limited guarantees of judicial review through the right to appeal. The right to appeal court decisions is determined by the category in which the defendant is classified and by the level at which the verdict is made (Bolocan 2004, 389). Defendants tried at the level of the cellule can appeal to the Gacaca jurisdiction at the sector level — the next level up. Likewise, those tried at the sector level can appeal to the level of the district, and those tried at the district can appeal to the level of the province.¹⁸

Only category-two defendants¹⁹ have the right to appeal their sentence to official Gacaca Courts of appeal. Review of judgments pronounced by Gacaca Courts are allowed in the following cases: (1) when an individual was acquitted in a judgment passed in the last resort by an ordinary court but is later found guilty by a Gacaca Court; (2) when an individual was convicted by an ordinary court but is later found innocent by a Gacaca Court; and (3) when the sentence pronounced against a defendant contradicts the legal provisions of the offenses for which he or she was convicted (Bolocan 2004, 389). No defendant is permitted to appeal a verdict to an ordinary criminal court. This is particularly problematic in the case of category-two defendants, some of whom are subject to severe sentences involving long prison terms (Bolocan 2004, 389).

Even if the Gacaca Courts were set up as outlined in the draft law, the trials would hardly meet basic international standards for a fair trial (Gaparayi 2001, 98). In reality, the Gacaca appeals court, which was supposed to function at the sector level, does not. There is a lack of trained judges and resources to make the courts functional. While there have been

review for such distinctive courts. Indeed, in some western European countries there is no right to appeal, so it is clearly not a necessary feature of a functional court system. While appeals are enjoyed in the American judicial system, they are not necessarily a “component” of a country that enjoys rule of law. Thus, if Rwanda establishes a sound rule of law, it need not include a more formal system of judicial review as practiced in America.

Also, consider that judicial review may require that judges undertake additional tasks for which they may not have been trained or for which they may have received insufficient training. Judges generally are also not particularly adept at monitoring the process by which decisions are made.²³ Judges are trained to make decisions based on the law, not to assess the process by which decisions are made. These points are particularly important in Rwanda’s case since judges receive minimal training and have no formal legal training. Placing the burden of judicial review upon an already strained judiciary is undesirable and impractical.

Judicial review could also be troublesome from the perspective that judges and other branches of government are supposed to be separate and courts lack the competency to engage in politics or law making.²⁴ Judicial review could create a system by which judges act as agents of law creation and not just law interpretation. Judicial review could encourage judges to take on tasks outside the important duty of protecting the nation’s citizens by upholding and defending the law in court. In Rwanda, with the heavy burden of post-genocide justice, this may have additional negative consequences.

In Rwanda, a court of appeals would face an incredibly high volume of cases with minimal resources. The pressure of the workload would impede the appellate courts from carrying out the legal development and clarification functions that are necessary to a court of

review, judges would be inclined to pursue selfish gains by appeasing the desires of the majority even if it meant making an unjust decision. On the other hand, if a system of monitoring were introduced and a review agent had the choice to review or not review the process by which the decision of the court was made, the mere fact of imposing a credible threat on the decision makers in the Gacaca Courts could induce the courts to produce more just, socially optimal decisions for all.

Finally, judicial review might be necessary for the Gacaca Courts simply to prevent the failure of the entire process of justice itself in Rwanda. Courts of appeal are critical to the functioning of an effective democratic process (Ely 1980, 105). Constitutions and courts appropriately exist for those situations where private interests and representative government cannot be trusted (Ely 1980, 183). Judicial review therefore is a necessary buffer to ensure that the individual liberties that allow for a functioning judicial system are properly implemented.

Recommendations

The arguments for and against a better system of judicial review of the Gacaca Courts in Rwanda are both strong. It would be impossible to draw clear policy conclusions or recommendations about how the Rwandan justice system should adapt in the future. However the following is a list of some recommendations that those concerned with the future of justice in Rwanda should consider in order to improve the system of judicial review.

- The Gacaca Courts should focus on their restorative potential, seeking truth, order, and cooperation in a shattered society, and not on retribution against the accused.

trial including strong judicial review. Perhaps justice systems with international standards of fair trials and judicial review are not intended to cope with such destructive phenomena as genocide. Maybe they shouldn't be.

What is clear is that the Gacaca Courts, despite their shortcomings, could still be the appropriate solution to post-genocide justice in Rwanda. The Gacaca Courts function as a pressure relief valve for a society facing an impossible task. What is less clear is what form the courts should take and whether they should have any judicial review of process. Anyone who has a commitment for ensuring a better future for Rwanda should take the question of judicial review seriously. This article outlined some of the arguments for and against implementing a more formal judicial review of process of the Gacaca Courts. No conclusions were definitively drawn, but it is undeniable that while a better system of judicial review including review of the processes may not be possible, it would certainly be desirable.

Acknowledgments

The idea for the paper that inspired this article came from a trip I took in the spring of 2005. I went to Rwanda for a work assignment, but while I was there had the opportunity to learn more about the Rwandan genocide and post-genocide justice. During that trip I visited some of the genocide memorial sites, witnessed a Gacaca Court trial, had some wonderful conversations with Socrate Mwege, a lawyer with the United Nations, and spent a very emotional afternoon with Henriete Mut, a guide at the Rwandan Genocide Memorial Centre. I want to thank them for the inspiration to learn more about the troubled justice system in Rwanda and the very difficult task of dealing with a society after a horrific genocide. I would also like to thank Frederick Schauer, my professor at the Kennedy School of Government, for encouraging and allowing me to write my final paper on the Gacaca

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¹ From a personal interview with Alison Des Forges, author of *Leave None to Tell the Story: Genocide in Rwanda* (Human Rights Watch, 1999), 18 April 2006.

² Ibid.

³ From a personal interview with Geraldine Umugwaneza, 19 April 2006.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ See Amnesty International Report 2002: Rwanda (<http://web.amnesty.org/report2002/afr/rwanda!Open>).

⁹ From a personal interview with Alison Des Forges, 18 April 2006.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ From a personal interview with Drew White, International Criminal Tribunal on Rwanda, 23 March 2006.

¹⁴ From notes during Professor Frederick Schauer's class (API-461: Legal & Political Institutions) on 3 March 2006.

¹⁵ See the judicial review entry in Wikipedia (http://en.wikipedia.org/wiki/Judicial_review).

¹⁶ See 14.

¹⁷ From a personal interview with Alison Des Forges, 18 April 2006.

¹⁸ Article 84 Draft Gacaca Law.

¹⁹ This means those guilty of voluntary homicide, of having participated or been complicit in voluntary homicide or acts against persons resulting in death, or of having inflicted wounds with intent to kill, or those who committed other serious violent acts that did not result in death.

²⁰ Positive social rights are rights that are obligations of the state to provide such as the right to education, health care, and so on.

²¹ From a personal interview with Drew White, 23 March 2006.

²² See 14.

²³ See 14.

²⁴ See 14.