

How did Gacaca combine elements of both retributive and restorative justice and how effective was it in reconciling Hutus and Tutsis in Rwanda after the 1994 genocide?

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Abstract

In a post-conflict environment, a government can approach transitional justice in a number of ways. This includes providing reparations to victims, reforming institutions, establishing the truth about events or putting people on trial in war crimes tribunals (Farell and Seipp, ix). In post-genocide Rwanda, an essential part of the government's approach to transitional justice was to institutionalize Gacaca, a traditional community-based method of conflict resolution, to form public genocide courts. This essay seeks to address the question: how did Gacaca combine elements of both retributive and restorative justice and how effective was it in reconciling Hutus and Tutsis in Rwanda after the 1994 genocide?

By examining the process of Gacaca this paper will show Gacaca was grounded in retribution, as it aimed to speed up genocide trials and end the culture of impunity through conducting trials and enforcing punitive measures. However, Gacaca also encompassed restorative elements through its aims of establishing the truth about the genocide and rebuilding Rwandan society.

In this paper I will measure the effectiveness of Gacaca in terms of how well it carried out its aforementioned retributive and restorative aims. I will conclude that Gacaca was more successful in carrying out retributive justice than restorative justice, ultimately hindering the process of true reconciliation in Rwanda. However, I argue that Gacaca was a Rwandan solution, which made it the responsibility of Rwandans to participate in establishing their own justice and truth, marking a significant transition away from a traumatic past.

Table of Contents

INTRODUCTION.....	4
CONTEXTUALIZING GACACA.....	5
THE PATH OF GACACA: WORKINGS OF RETRIBUTIVE AND RESTORATIVE JUSTICE.....	6
ANALYSIS OF THE EFFECTIVENESS OF GACACA.....	9
MEASURING THE EFFECTIVENESS OF GACACA’S RETRIBUTIVE AIMS.....	9
MEASURING THE EFFECTIVENESS OF GACACA’S RESTORATIVE.....	12
CONCLUSION.....	14

Introduction

April 7th of this year marked the 20th anniversary of the Rwandan Genocide. Neighbors and family members, who since the genocide have had to face coming to terms with their past and rebuilding Rwanda, commemorated Tutsi and Hutu victims. Extensive media coverage reminded the world of the mass slaughtering that took place and the failure of the international community to intervene to protect the lives of hundreds of thousands of Tutsi and the failure to safeguard human rights standards. The revitalization of discussion about the genocide and the evident wound that it left on a nation lead me into wanting to understand if and how Rwandans have reconciled after living through the systematic and widespread participation in killing a targeted ethnicity. It is significant to study approaches to post conflict transformation and more specifically to transitional justice as every nation that goes through civil conflict is faced with clearing up the destructive aftermath and reconciling a fractured society.

Post-conflict transformation refers to the steps taken in response to the end of direct violence, such as war or genocide. The goal of these changes is not only to maintain negative peace but also to confront the underlying issues of the conflict and its effects in order to build positive peace. Johan Galtung defines negative peace as the "absence of war" and positive peace as the "absence of war and structural oppression", meaning that there are high rates of equality and human rights. Galtung states that there are two things that threaten the "equity and harmony" of positive peace, which are "trauma and unresolved conflict". He describes trauma as "violence of the past" which can only be resolved through reconciliation. Lederach defines reconciliation as "the place truth, justice, mercy and peace meet" (29). The post-conflict measures targeted towards "addressing past human rights abuses and reforming society" are part of a nation's transitional justice process (Farell and Seipp, ix).

In pursuing transitional justice, countries have chosen approaches ranging from "vengeance to forgiveness" (Minow, 10). At one end of the spectrum are retributive processes such as conducting trials and punishing perpetrators and on the other, there are

restorative methods such as setting up truth commissions, providing reparations to victims, and building memorials (Minow, 14). The first part of this essay will explore Rwanda's unique approach to transitional justice, which combined retributive and restorative elements through Gacaca. Gacaca, which means "justice on the grass" (Mironko, 13), was a traditional method of conflict resolution. In post genocide Rwanda, it took on the form of punitive genocide courts, which aimed to bring about retributive justice by speeding up genocide trials and ending the culture of impunity. At the same time it aimed to bring about restorative justice by establishing the truth about the past and rebuilding Rwandan society. Its ultimate goal was to foster reconciliation (Mironko, 18). The second part of this essay will evaluate the effectiveness of Gacaca according to its aforementioned aims.

Determining the effectiveness of Gacaca is very difficult because the process has been controversial. Although the Rwandan government claims Gacaca was successful in accomplishing restorative and retributive justice, this essay will show that on the one hand Gacaca was successful in meeting its aims of speeding up trials of genocide crimes however on the other hand it was only successful in establishing truth and ending the culture of impunity to varying degrees; ultimately skewing the possibility for true reconciliation.

Contextualizing Gacaca

It is hard to paint the picture of what post-genocide Rwanda looked like for someone who was not present in 1994, but numbers can tell us something of the devastation that was left behind: an estimated 800,000 people killed in a period of 100 days, "millions of Rwandan refugees in neighboring countries", 130,000 suspects accused of genocide crimes overflowing Rwandan prisons, and "only 36 judges and 14 prosecutors available in the country" (Mironko, 3). So how does a nation begin to reconcile, if it neither has the mechanisms nor the resources to establish justice?

Although the international community failed to intervene during the genocide there was international assistance provided in post-genocide Rwanda. The United Nations set up the

International Crime Tribunal for Rwanda (ICTR) in Arusha, Tanzania, that would try the most serious violators of International Humanitarian Law (IHL). Although this was the best-equipped and financed tribunal to trial genocide crimes in Rwanda, its function was only to deal with the main organizers of the genocide, out of the thousands of suspects that sat in prisons. France offered to send judges from Francophone countries to equip Rwandan courts with more judges, but the Rwandans refused to have foreign involvement in their justice process. Without access to any means of a functioning judicial system, “people spontaneously resurrected the pre-colonial form of Gacaca [...] independent from any national or local governmental oversight”. Although this form of Gacaca did not deal with genocide crimes, it administered “issues such as theft of goods and cows, fights, looting, family abuses, field distributions and debt” (Mironko, 15). Seven years after the genocide, under President Pasteur Bizimungu, the solution to carrying out transitional justice in the context of an overrun justice system became institutionalizing Gacaca to deal with genocide cases.

The Path of Gacaca: Workings of Retributive and Restorative Justice

As a method of transitional justice, Gacaca had both a retributive and a restorative function. In its retributive form Gacaca punished those who committed war crimes during the genocide, treating crime as done against the state (Borland). However in its restorative form it also acknowledged “crime as a violation of a person by another person” (Borland) and focused on efforts to reconcile communities through dialogue between the perpetrator and victim, and uncovering the truth about the past in order to move on to the future (Farell and Seipp, ix).

Like many other post conflict countries, which have set up truth commissions, Rwanda aimed to establish a collective and individual clarity of the human rights abuses that took place during a period of mass violence (Brahm). However establishing truth was not Gacaca’s only aim. It sought to end the culture of impunity by enforcing punishments to suspects guilty of participating in the genocide. This is where Gacaca differed from a truth

commission, as the objective of a truth commission is not to enforce legal punishments, for fear of potentially creating further divisions and dissent between groups, but to “rehabilitate perpetrators and victims and reestablish relationships based on equal concern and respect” (Crocker, 103).

The process of Gacaca was split up into two phases. The first being the pre-trial phase, which played a restorative function as it dealt with fact finding and establishing the truth. The second was the trial-phase, which was retributive as it consisted of appropriating punishments to perpetrators on trial.

In the pre-trial, *Nyumbakumi*, local leaders at the cell level, were responsible for gathering information from people in their cell in order to reconstruct the events during the genocide in a short period of time (Bornkamm; Republic of Rwanda). Information was collected in lists and covered three main areas: “showing how the genocide was planned, how it was [executed] and its effects and the role of perpetrators and their charges” (Republic of Rwanda). The first group of forms consisted of documenting the names of people living in the Cell in 1990 and in 1994, pinpointing the ringleaders in the Cells and who the distributors of deadly weapons were. The second category of lists recorded confessions and apologies made by genocide suspects, the names of victims of genocide (both Tutsis which were targeted and Hutus that refused to participate), where their bodies were thrown, and property that had been destroyed in households. The third category of forms were filled by *Inyangamugayo*; people who were elected based on their “high moral standards” and the conventions that they had never been accused of participating in genocide nor been a part of the former government, to act as judges. These forms stated the alleged crimes an individual was suspected of committing and categorized their charges according to the guidelines of the Organic Law (Mironko, 5).

In the trial phase, the information collected by the *Nyumbakumi* prior to the trial was assessed in court (Human Rights Watch; Republic of Rwanda). The President of the Court, whose role was to convene and facilitate trials, would share the records that were collected and the claims would be examined through dialogue between the accused, victims and

witnesses. Everyone above the age of 18 living in that cell was allowed to be present and contribute any relevant information to the trial. This truth-seeking process of Gacaca relied on suspected *genocidaires* to take the initiative of confessing their crimes as well as victims and witnesses to come forth with testimonies in court. After the truth about the details pertaining to the crimes committed by a perpetrator was established, *Inyangamugayo* determined his or her sentence (Mironko, 17).

Gacaca drew upon the conventions of the Organic Law, issued by the Rwandan government in 1996, to enforce punitive measures. This law categorized genocide crimes and their punishments to make it easier to organize and delegate the imprisoned suspects who awaited trial in the overrun domestic justice system. The most serious offenders were classified into Category One and put on trial outside of the Gacaca system. These were the “genocide planners, organizers, supervisors, rape offenders” and “were sentenced to life imprisonment” (Human Rights Watch, 18/74). Category Two offenders were the “instigators and perpetrators of serious attacks with intention to kill” (Mironko, 5) and “received sentences ranging from five years to life imprisonment” (Human Rights Watch, 74). Category 3 suspects were accused of “killing or inflicting bodily harm without the intention to kill” (Human Rights Watch, 18). And lastly, people charged with “looting or destroying property” (Mironko, 5) fell under Category 4 and “were expected to pay civil reparations in the amount of damage caused” (Human Rights Watch, 74). *Inyangamugayo* were responsible for categorizing the accused within the guidelines of this law.

There were roughly 12,000 Gacaca courts functioning across all administrative levels in Rwanda and 254,000 elected judges, to trial the suspects that were imprisoned and the countless suspects that were exposed through confessions. After 10 years of operating Gacaca courts officially closed in 2012 (Human Rights Watch, 13).

Analysis of the Effectiveness of Gacaca

Gacaca was in some sorts an experiment in transitional justice, as combining the retributive function of a judicial court with the restorative elements of a truth commission had seldom been done before. It posed controversy among experts. Paul Christoph Bornkamm, a law scholar, claimed: "Gacaca's punitive elements may defeat its restorative objectives and prove to be an obstacle to sincere truth telling, reconciliation, and reintegration". However the Rwandan president, Paul Kagame, explains the reality of having no other applicable alternatives when he says that in post-conflict Rwanda "we had three choices: first was the more dangerous path of revenge, or secondly, grant general amnesty, both of which would have led to further anarchy and destruction. But we chose the third and more difficult course of dealing with the matter decisively and restoring the unity and integrity of the nation" ("Rwanda Closes 'gacaca' Genocide Courts"). From this perspective, enforcing punitive measures was the appropriate course of action because something had to be done to reprehend the genocide; the most serious violation of human rights (Loizides and Megwalu, 4). In contrast to Bornkamm's claim, Matha Minow suggests that a balance between "vengeance and forgiveness" is the best response to collective violence instead of dichotomizing the two. In this way, retribution gives value to the truth and forgiveness reasserts the dignity of victims (Minow, 15). As discussed above, Gacaca was structured to do this. However the effectiveness of Gacaca in terms of carrying out its goals of retributive and restorative justice is disputed among international organizations and experts.

Measuring the Effectiveness of Gacaca's Retributive Justice Aims

Gacaca sought to carry out retributive justice by speeding up genocide trials in order to facilitate a foreseeable end to the culture of impunity which prevailed for years leading up to the genocide and reached its height during the months of killing. Gacaca sought to end impunity by enforcing punitive measures to hold those accountable of committing human rights violations during the genocide.

By looking at the number of trials conducted by Gacaca over the 10 years it was in place, we see that Gacaca ran trials at an unprecedented rate. According to the Rwandan government "to date, 1.2 million cases were resolved at the cost of \$25 million" whereas the ICTR, set up by the United Nations in Arusha, "tried a total of 58 cases, at the cost of around \$2 billion" (Rwanda). The drastic difference in trials carried out by these two legal systems show the immense capacity Gacaca had for speedy trials at a low cost. They further suggest that a foreign legal system could not have accomplished the same number of trials at the rate of the Gacaca courts, also considering the context of the state Rwanda was in economically and socially after the genocide. These statistics show that Gacaca was highly effective in speeding up trials and suggest that Gacaca was successful in "ending the culture of impunity" as tens of thousands of people were put on trial and held accountable for their actions. However these figures do not represent the quality of the retributive justice that was enforced.

Gacaca's retributive justice process was subject to criticism by international organizations such as Amnesty International and Human Rights Watch primarily for not meeting the standards of fair trial outlined by International Law (IL). Human Rights Watch claims that Gacaca violated the "right to legal counsel" by denying defendants and victims access to legal representation in court (Human Rights Watch, 28). Another violation was the "limitation on the ability of accused persons to defend themselves effectively" (Human Rights Watch, 4) as defendants were excluded from the information gathering conducted in the pre-trial phase. This meant that without professional representation, the accused risked not being aware of their rights in court and meant that they had little chance of defending themselves against "pre-fixed" charges. Victims and witnesses were also put at a disadvantage by not having access to representation in court, as in many cases people had minimal education and no guidance about how to present a cohesive statement or testimony during Gacaca. However, legal representation in court would perhaps have made Gacaca overly technical steering away from facilitating a dialogue between Rwandan perpetrators and victims. Providing legal representation would also have made Gacaca operate too similarly to the National Rwandan Courts, which lacked the capacity to carry

out the overbearing amount of trials (Kerrigan). This shows that from a human rights' perspective, Gacaca's retributive process was not fair according to international standards.

To further evaluate the effectiveness of Gacaca in carrying out retribution it is important to look at how Gacaca was received by the Rwandan people. A study done by Megwalu and Loizides in Rwanda in 2006, where 227 Rwandans were surveyed about their attitudes towards the effectiveness of Gacaca in terms of carrying out retributive justice, shows that demographic characteristics such as the level of education, residency and presence in Rwanda during the genocide influenced how people viewed Gacaca. According to the data, nearly 75% of those surveyed "agreed to varying degrees that Gacaca was doing a good job of delivering justice" (Loizides and Megwalu, 12) where, 6% absolutely disagreed. People living in rural areas as well as people with a secondary level of education or lower were more likely to support the claim and report attending Gacaca sessions weekly. In contrast, urban dwellers and people with a higher level of education were less likely to attend Gacaca regularly and were more critical of how well Gacaca delivered justice. The data also showed that of the respondents, people who were present in Rwanda during the genocide agreed less with the statement. Although there are limitations to this survey, the information collected can be used to form a picture of how local Rwandans viewed Gacaca in terms of carrying out justice. Megwalu and Loizides draw the conclusion that "overall, the survey suggests that a majority of Rwandans believe Gacaca strengthens the justice process" (13), showing that Gacaca was successful in carrying out some form of retribution. However, the data also suggests that people with a higher education challenged the Rwandan government's rhetoric of achieving "truth, justice and reconciliation" through Gacaca, which was the slogan used to encourage participation in the process (Longman).

Although Megwalu and Loizides could not ask about the ethnicity of those they surveyed because "it remains a sensitive subject in Rwanda" (9), variation in responses shows that social identity created an ambiguous perception of the effectiveness of Gacaca in delivering justice. This urges the thought that Gacaca's drawbacks in conducting fair trials, according to international standards, may have impacted Hutus and Tutsis differently. I will further support this by examining how Gacaca excluded the Rwandan Patriotic Front from trials.

Measuring the Effectiveness of Gacaca's Restorative Aims

Where Gacaca's retributive aims were more focused on accounting for the actions of perpetrators, its restorative aims were meant to address the needs of the victims. The notions of reconciliation, healing relationships and society as a whole, were embedded in Gacaca's aims of establishing truth and rebuilding Rwandan society. Through establishing the truth, Gacaca sought to achieve clarity in order to repair relationships and "offer victims a sense of closure" (Clapham). While rebuilding society was meant to draw focus to Gacaca leaving behind social harmony after genocide trials ended. The Rwandan government intended that through establishing the truth and enforcing retributive justice, Gacaca could "lay down a strong foundation for the reconstruction of Rwandan society" (Mironko, 18).

As previously discussed, Gacaca sought to compile information about the genocide through its fact-finding phase and testimonies during trials. However, the objective of Rwandans collectively establishing the truth was ambiguous in its function and outcomes. On one hand, without official documentation or records of who had participated in the genocide and how, facilitating a forum for truth telling which depended on suspects, victims and witness to contribute their accounts of the genocide, was the only way to recount the crimes committed on such a wide spread scale. On the other hand, there were factors, which minimized the participation in Gacaca and thus the accuracy of the truth it produced and "weakened the government's argument that popular involvement was ensuring fair trials" (Human Rights Watch, 85). The first was that delving into past traumas in public courts left people vulnerable as there was no guarantee of security for those that spoke out and accused offenders in court. The second was that cultural taboos of talking about rape discouraged rape victims from exposing the truth about the abuses they had suffered. Another concern was that people could come forth with false testimonies; where there were no survivors left to tell their story, offenders could lie in their confession without being exposed (Mironko, 19). Although these factors posed a threat to the validity of the truth, these are limitations, which would pertain to any legal system and not just to Gacaca.

However, the government dealt with the barriers to participation by making it mandatory to attend Gacaca weekly, fining people if they did not show up (Human Rights Watch, 86).

Some also view the truth telling component of Gacaca as being limited by the fact that only the truth of Hutu perpetrators was exposed and not the truth of crimes committed by the RPF. The RPF is the Tutsi rebel group, which established military control in 1994, ending the genocide. In doing so, they committed revenge crimes, killing “thousands of people in the massacres and summary executions after taking office” (Longman). The government’s role in implementing Gacaca meant that they could shield themselves by making Gacaca only deal with crimes committed during the genocide, therefore excluding crimes committed by the RPF. According to Human Rights Watch this meant “some victims would never see justice or even be recognized as victims” and established the narrative that “only Tutsi can be victims in Gacaca and generally only Hutu can be perpetrators”. Lars Waldorf explained this as creating “a collective guilt on most Hutus”. For this reason Longman argues that “Gacaca served not so much to bridge the gap between perpetrators and victims as to reinforce the very ethnic divisions that were at the heart of the genocide”. Although Gacaca was successful in establishing more clarity about the events that took place during the genocide and providing survivors with information about the death of their relatives, the lack of acknowledgement of Hutu victims serves as counter productive to the restorative aim of establishing the truth by in fact obscuring it; fueling tensions between both sides instead of reconciling them.

One of the ways Gacaca contributed to the “physical rebuilding” of Rwandan society and offering a form of reparation to victims was by replacing prison sentences with community service. According to the Organic Law, suspects could receive a reduction in their prison sentence and serve part of their time doing community service if they confessed their crimes committed during the genocide, told who their victims were, revealed any accomplices and provided a formal apology to the victims (Republic of Rwanda). Community service entailed the rebuilding of houses and roads done in neighborhoods where those convicted were from or completed in work camps. It served as a form of

restorative justice as it was used as a way to both reintegrate perpetrators into society and enable some form of compensation to their victims (Bronkamm).

The confession procedure was meant to contribute to establishing the truth, relieving the overcrowding of prisons and initiating the healing of relationship between Hutus and Tutsis through offenders openly repenting their wrongdoings. However, Bornkamm states that " the institutionalization of apology and forgiveness by the Gacaca Law has almost trivialized the concept" which made the confessions "little more than a means to an end". He argues that the failure of Gacaca to provide proper compensation to victims devastated by the genocide limit the process of reconciliation because victims were expected to forgive without receiving reparations for their losses while accused were granted with reductions in their charges. This speaks to a lack of balance in restorative justice between rehabilitating participants in the genocide and redressing the victims.

Conclusion

Ultimately, Gacaca was a Rwandan solution implemented to reprehend the crimes committed during the genocide and was used as a tool for reconciling Hutu and Tutsi. It was an approach to transitional justice, which was rooted in retribution as it sought to end the culture of impunity through punitive trials but encompassed restorative elements through its aims of establishing the truth and rebuilding society. Whether Gacaca has brought about true reconciliation between survivors and genocide participants on an individual level cannot be measured by a survey or represented in numbers. However I evaluate the effectiveness of Gacaca in bringing about reconciliation by how well Gacaca carried out its retributive and restorative aims.

In the years of its operations Gacaca could not "reconstruct Rwandan society", nevertheless, it facilitated a transition away from maintaining negative peace and contributed to building positive peace. Despite criticism from the international community, Gacaca was successful in carrying out retributive justice as it completed roughly 1.5 million

genocide trials and held people accountable for their crimes by sentencing punishments, which ranged from life imprisonment to community service. However, Gacaca was limited in terms of carrying out restorative justice. Although Gacaca was successful in creating more clarity about what happened during the genocide through its truth-telling component, it only established a partial truth. It is argued that the exclusion of RPF members from trials ultimately enhanced ethnic divisions instead of healing them. Community service was an additional restorative element in the workings of the court and contributed to reconstructing society by reintegrating perpetrators and providing reparations to communities. However, the confession procedure provided limited healing between victims and perpetrators, as the victims in a material sense did not receive compensation for their losses.

Despite the drawbacks of Gacaca, it was an innovative approach towards a better foreseeable future for Rwanda, which other post conflict countries can learn from. That it accomplished addressing the genocide and facilitating the means of reconciliation in the context of post genocide Rwanda is quite remarkable and indicates Rwanda's efforts to reorient away from its past by confronting it.

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