Gacaca Jurisdictions – Panacea or Regression?

In an attempt to reduce the horrendous backlog of cases stemming from the 1994 genocide, the Rwandan government passed Organic Law Number 40/2000 in January 2001. The law created “Gacaca Jurisdictions” based on the traditional Rwandan gacaca tribunals and empowered them to hear cases of those accused of all but the most horrific crimes. This paper assesses a narrow question—the likelihood that these courts will discover the truth—and considers how that likelihood may affect the nation’s attempts to provide justice for the victims of the genocide and reconciliation for the society as a whole. It argues that the Gacaca Jurisdictions are best suited to handling the least serious crimes that resemble those matters traditionally handled by the gacaca tribunals.¹

Discovering the Truth?

One of the primary barriers to efficient administration of the genocide cases in the ordinarily constituted state courts is the lack of access to evidence.² While some evidence of the involvement of leaders and instigators of the genocide—such as radio broadcasts, newspaper articles, and army orders—exists, there is almost no evidence to support the claims against the average citizens who killed, raped, or destroyed property.³ Most eyewitnesses were killed, or fled.⁴ As land titles were not commonly registered, particularly in rural areas, there is little documentary evidence to support claims of property conversion.

This lack of evidence makes it very difficult for any court to achieve one of the fundamental goals of a judiciary: viz., to discover the truth of what happened. The Gacaca Jurisdiction system addresses this problem by encouraging the production of evidence: it offers
reduced sentences to those who confess to their involvement in the genocide and provide evidence against others.⁵

The guilty plea procedure is highly likely to generate an increased amount of evidence. The universal availability of the plea bargain, the significant reduction in punishment it offers,⁶ and the incentive to confess before being implicated by others⁷ would all lead those who participated in the genocide to confess, and so generate evidence. The accuracy of that evidence, however, is not guaranteed.

First, only those currently imprisoned who believe they are likely to be accused of Category I or II violations have an incentive to confess to serious crimes. Those who are currently free are not likely to see any benefit in confessing. Even if it is quite probable that an individual will be accused of a serious crime, it is improbable that the individual will confess.⁸ Second, those who are imprisoned are likely to confess to the lowest crime they believe possible. A study of the plea bargain process bears this out.⁹ Of 3006 inmates who confessed to the Magistrate’s office of Nyabisindu, 80 percent confessed to Category II crimes (intentional homicide); merely .4 percent confessed to rape, a Category I crime. Given reports of widespread rape during the genocide¹⁰, this almost certainly represents a severe underestimation of the number of rapes committed and is “an indication that certain confessions are not complete.”¹¹ Use of the plea bargain process—one not familiar to Rwandans¹²—has increased with efforts of the Magistrate’s office to explain the “benefits” of the program.¹³ This strongly suggests that self-interest, not honesty, is driving the confessions. There is great reason to doubt how much truth is being produced by the plea bargain process.

**Meeting Other Goals?**

Truth is not the only goal of judicial systems, and it is frequently not the most important one. Other goals include norm inculcation,¹⁴ policy implementation,¹⁵ and creation of community.¹⁶ The Rwandan government has identified the importance of each of these goals,
stating that it seeks to “eradicate for good the culture of impunity” that allowed ethnic violence to fester, “provide for penalties allowing convicted prisoners to amend themselves,” and “reconstitut[e] … Rwandese society.” 17 Thus, the failure of the Gacaca Jurisdictions to elicit truth may not be critical if they manage to accomplish the government’s other stated goals.

A violation of social obligations tears a hole in a community and threatens its stability—traditional African models of law recognize this, and aim “to promote an amicable settlement between the parties…ensuring the cohesion of the group.”18 This is distinct from Western legal models, where violations (private delicts or crimes) are rectified through binary, frequently adversarial procedures. During the post-colonial period in Rwanda, where both models were available, Rwandans used the gacaca tribunals to settle disputes “between family members or neighbors, whereas they were more likely to seek out state tribunals for disputes with strangers.”19 Crimes on the scale and of the severity of the 1994 genocide are unlike anything traditional Rwandan society knew, however—and in an important sense, to torture and slaughter as many of the genocidaires did is to make oneself a stranger to one’s community. It is in these cases, further, that the truth is most necessary to norm inculcation, policy implementation and creation of community. If a man who raped or incited genocide uses the plea bargain process to confess to a lesser crime, and so wins a light sentence, then the norm that is inculcated (partial or total impunity) is the exact opposite of that which the government is explicitly seeking (eradication of the culture of impunity). Further, a man who is not receiving the punishment that fits his crime is not amending himself, but evading his duties—and so the stated policy is frustrated. Finally, a community is unlikely to accept a man who has killed and not appropriately paid for his crime, making the creation of community (the reconstitution of Rwandan society) impossible. The foregoing all suggests that, where suspects are accused of very serious crimes, the failure of the Gacaca Jurisdiction system’s plea bargain process to produce truth is likely to translate into a failure to accomplish the other, more important goals.
The Gacaca Jurisdictions seem ideally suited, however, to handle Category IV cases pertaining to offenses against property. These offenses are most similar to the matters traditionally brought before the gacaca tribunals, and in their adjudication, failure to discover the truth does not significantly impair attainment of the system’s other goals. Truth is not a primary goal of the traditional gacaca tribunals. It could not be. The primary aim of traditional gacaca is to resolve disputes. Naked truth nettles, often exacerbating rather than calming, and so “a legal process aimed at maximizing the goal of dispute resolution cannot simultaneously aspire to maximize accurate fact-finding.” The Gacaca Jurisdiction system recognizes this, granting complete amnesty from prosecution to those Category IV suspects who reach a settlement with the victims of their crimes. Settlements reached in these cases are more likely to seem just to the community as a whole, since the likely reparation—return of identical or similar property, or money damages—is more nearly commensurate with the harm done than in the case of more serious crimes, where murder may be “repaid” by a stint in prison. Further, crimes against property do not rend the community as rape, murder, and torture do, and the act of repaying them may actually strengthen community. In an economy not dominated by cash, where goods are not fungible, a piece of property carries with it the history of its previous owner, and relationships are strengthened through exchange.

Conclusion

Because the plea bargain process does not produce satisfactory truth, and because truth is most critical to the judicial system’s other goals where serious crimes are at issue, the Gacaca Jurisdictions are not likely to succeed in eradicating the culture of impunity, amending prisoners, and reconstituting Rwandan society if used to prosecute those accused of rape, murder, and manslaughter. However, because truth is not integral to the resolution of disputes arising from less serious crimes, the Gacaca Jurisdictions are likely to succeed in these contexts.
Throughout, I use the term “Gacaca Jurisdictions” to refer to the courts constituted by Organic Law 40/2000 and “gacaca tribunals” to refer to the traditional courts existing from “time immemorial.”


Organic Law 8/96 on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes against Humanity Since October 1, 1990, passed in August 1996, established four categories of suspects. Category I suspects are those were in a position of power and fomented the genocide; Category II suspects are those who committed intentional homicide or serious assaults that resulted in death; Category III suspects are those who committed serious assaults without causing death; Category IV suspects are those who committed offenses against property.

By confessing fully, Category I suspects may move from the death penalty or life in prison to 25 years to life in prison; Category II suspects, from 25 years to life to 12-15 years in prison (7-12 years in some situations, see note 7, infra, and accompanying text); Category III, from 5-7 years to 1-3 or 3-5 (see note 7).

Confessions are only effective for Category I crimes if they are made before the confessing party is placed on the Category I list; confessions for Category II and III crimes that are made before the confessing party has been identified as a suspect bring greater reductions in sentence. Thus, there is a strong incentive for a guilty individual to confess and implicate his cohorts before they do the same and implicate him.

This is due to the cognitive bias known as loss aversion. Studies have shown that, for example, a person who pays 20 dollars for a sweater will be highly unlikely to accept merely 20 dollars to give up the sweater. In the present, much more serious context, a person who currently has freedom, “purchased” at the risk of future incarceration for a serious crime, is unlikely to give up that freedom in exchange for a lesser, certain prison sentence. See Tversky & Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 Science 1124 (1974), which spawned a new field of research into cognitive biases.


PRI at 10.

PRI at 7.


PRI at 19.