lawanddevelopment.org
exploring the links between law and economic development

Restorative Justice following Mass Atrocity

The Case of Rwanda

Shehana Gomez

Global interactions increasingly rely on law to govern them. Today, numerous rules dominate the interactions between states and non-state parties. International courts and dispute settlement mechanisms are in place to ensure compliance with commonly agreed norms.

International Law, however, is complex and often lacks universal acceptance. Worse, its influence is disproportionally strong on the poorest countries and countries in crisis. It is in situations of poverty and conflict where international law has the most impact - for better or worse. International legal structures can provide security, stability and access to economic support, but they can just as easily prevent timely and adequate assistance. Development and humanitarian actors must increasingly be aware of their potential as well as their pitfalls.

Good Governance is easily prescribed, but must become a mindset of all involved to make the system work. Less and least developed countries are often governed by constitutions that are complex and inaccessible for their citizens. Without acceptance by their subjects, they weaken and cease to safeguard the nation state against failure. Development assistance must provide more than just models and institutions to move these countries forward.

Papers in the lawanddevelopment.org series aim to contribute to the understanding of the importance of these linkages and strive to support a better concept of how law can aid development. All papers are original works and are solely published on lawanddevelopment.org

---

For queries write to:

The Editor
lawanddevelopment.org
P.O.Box 1106
Nairobi 00502
Kenya

info@lawanddevelopment.org

www.lawanddevelopment.org

INTRODUCTION

"These two approaches to justice, the restorative and the punitive, reflect widely divergent views about the nature of justice and different visions of public good," states Helena Cobban. [1] Different commentators on Rwanda call for trials without really considering what retributive justice means or why it is justified. Cobban and others claim that gacaca, a system of justice introduced to deal with the aftermath of genocide, is part of a restorative approach to justice.[2] While they do give explanations of restorative justice, the term does merit further examination as it is a particular kind of process used in modern criminal justice systems. This essay explores the meaning of retributive and restorative approaches to criminal justice and then applies them to gacaca. The essay aims to show that the restorative and punitive, or retributive, whilst different, are not as widely divergent as suggested above but in fact fluid and overlapping in their goals and processes.

The essay begins with a brief history to explain the circumstances leading to the decision to adopt gacaca courts as an expedient solution to Rwanda's problems. The essay then explores the meanings of retributive and restorative justice. It goes on to assess whether gacaca is a form of restorative justice and consider that as a mechanism, it is largely not. In conclusion, however, I will argue that the meaning of restorative justice could be broadened in a situation following mass atrocity to include social and political objectives. This is restorative justice on another level, transcending the criminal justice system and including other social institutions. Gacaca could then be seen as a component of this larger notion of restorative justice.

2. THE REASON FOR GACACA

The Rwandan genocide lasted from immediately after the death of President Habyarimana on 6 April 1994 until 19 July1994 when the Rwandese Patriotic Front (RPF) took power. It was organised killing on a massive, national scale resulting in an estimated 500,000 to 800,000 dead. The planners of the genocide were extremists from the Hutu majority ethnic group and the killings were primarily of the Tutsi minority ethnic group, although Hutus perceived to be sympathetic to Tutsis were also killed. The aim appears to have been the elimination of Tutsis as an ethnic group.

The genocide had been carefully planned for months. Its planners were Hutu extremists in positions of military, administrative and political power. These planners launched a powerful anti-Tutsi propoganda campaign, drawing on their historical hatred. They used the media, most notoriously the radio, to do this. They also used Rwanda's extremely tight, many-layered administrative structure. Leaders at local levels would hold meetings to whip up hatred against the Tutsis, recruiting those who became the *genocidaires* (killers), and even making lists of those to be killed in each cell.[3] It was a "deliberate

[1] Cobban: 2002, 16
[2] For example Allison Corey and and Sandra F. Joireman; Corey and Joireman: 2004
[3] The smallest administrative unit, comprised of ten families.

choice of a modern elite to foster hatred and fear to keep itself in power."[4] What was remarkable about the genocide was the massive involvement of ordinary Rwandans: They killed, raped and looted in their hundreds of thousands. [5]

The International Criminal Tribunal for Rwanda (ICTR) was established by the Security Council in 1995. Its purpose is to try the high-level leaders of the genocide only. It has so far tried fifteen leaders, including former Prime Minister Jean Kayibanda. A further few will be tried before the Tribunal is disbanded in 2006.

The onus has been on Rwanda to deal with the vast majority of perpetrators at a national level. Although many perpetrators fled the country following the RPF victory, many remained or returned over the following years. The new RPF-led coalition government installed in July 1994 wanted to prosecute the perpetrators. The granting of amnesties or a truth commission were ruled out. In 1995, President Bizimungu acknowledged that there would be great difficulties in having vast numbers of trials and called for innovative forms of justice to to address these.[6] In 1994 Rwanda's legal system, was decimated. Hardly any lawyers, judges or magistrates remained, the vast majority having been killed or fled. Nevertheless, with a great deal of foreign aid, Rwanda was able to rebuild its legal system and by 1997 its personnel capacity exceeded 1994 levels. [7]

Nevertheless enormous problems remained. Genocide suspects had been arrested and imprisoned, since summer 1994, on often spurious grounds. No real legal challenge was available against this. [8] Prisons were bursting at the seams. It is estimated that by 1999, up to 125,000 suspected *genocidaires* were in prison awaiting trial. Trying this sort of number within a reasonable time would probably be beyond the capacity of even the most developed country's legal system. The Rwandan Government estimates that it would have taken 200 years to conduct all the trials. [9]Prison conditions were atrocious with many dying of diseases which spread easily in overcrowded, unclean facilities. Some commentators state that this incarceration was a tactic used as a threat against Hutus who

---

[4] Eltringham: 2004, xii, quoting Human Rights Watch and Federation Internationale des Ligues des Droits de L'Homme. '*Leave none to Tell the Story': Genocide in Rwanda* , 1 (Human Rights Watch, New York: 1999)

[5] The motivation can only be understood in looking back to Rwandan history. Rwanda was a Belgian colony and the Belgians, as part of a divide and rule policy, actively kept Tutsis in power. This led to retaliatory massacres of Tutsis by Hutus in 1959, 1962 and 1963. Each time more and more Tutsis were also driven into exile. Exiled Tutsis formed their own armed groups. The RPF in Uganda became the main one and in 1990 invaded Rwanda, beginning a civil war which continued until 1994. A peace agreement signed in 1993 was not honoured by the Habyarimana government. However, its blueprint for sharing power with the RPF engendered further resentment on the part of powerful Hutu extremists, probably being the final straw in the decision to plan the genocide.

[6] At at an international conference in Kigali entitled "Genocide, Impunity and Accountability", Shabas: 1996, 529.

[7] Vandeginste: 1999, 10

[8] Many suspects were not formally charged and their case files were missing or incomplete. Legislation passed in 1996 legalised this state of affairs and prevented it from legal scrutiny. See further Schabas: 1996, 526; Vandeginste: 1999, 9.

[9] Official website of the Republic of Rwanda.

were launching incursions from neighbouring Democratic Republic of Congo throughout the 1990s.[10]

Other problems include high absentee rates of judges and lack of evidence against perpetrators due to witnesses having been killed or fled the country. Trials are expensive, especially as there was considerable international pressure for them to conform to international human rights standards and contain full safeguards for defendants. There were important competing economic goals: refugee resettlement, healthcare, compensation to victims and general investment in a war-torn country. Building up the legal system to its full capacity was also obviously a priority and vast numbers of genocide trials would probably have counteracted this, putting too much pressure on a fragile, still nascent system. For all these reasons it was decided to adopt a system of community gacaca courts which would enable suspects to be released from prison and processed through some sort of judicial system at a much faster rate.[11]

The system of gacaca courts became law on 26 January 2001. A pilot of the system began in 2002. The operation of its first two stages began in 2003. [12] The third stage, the gacaca hearings themselves, are intended to begin in 2004, this having been set back a number of times. [13] To relieve pressure on the prisons, detainees have been released into the community in batches since January 2003, starting with the elderly, infirm and children. Gacaca will be described in section four of this essay. Before assessing its restorative value, however, the next section explores in some depth the meanings of retributive and restorative justice.

3. RETRIBUTIVE AND RESTORATIVE JUSTICE

Restorative justice is seen as the alternative to retributive justice. I will first look to the justifications for retributive justice: just deserts, vengeance and Jean Hampton's theory to show that this last, the strongest justification of today's system, bears similarities to restorative justice. Modern restorative justice is in many ways a response to the failures of the retributive model and so the drawbacks of the modern retributive process will be considered before then going on to describe restorative justice. What follows far from comprehensively cover theories of criminology and penology as that is outside the scope of this essay. [14] The aim is to provide a basis for analysing the situation in Rwanda.

The definitions in this section are in relation to the ordinary criminal justice system, not to a mass atrocity situation, but will concentrate on those aspects which are most relevant

[10] Gerard Prunier, a long-term Rwandan historian has said, "The government doesn't care if they are guilty or not. They are jailed in order to keep pressure on the Hutus. That's all." Cobban: 2002, 20; See also Schabas: 1996, 548.
[11] Speed is one of the reasons given by the Rwandan government for the adoption of Gacaca. Op.Cit. N10
[12] These are, collecting information from each household on who was murdered and who the alleged perpetrators were; and then collecting information regarding the elements of the offences. Penal Reform International (1)
[13] Penal Reform International (3)
[14] Cragg, Hampton, Von Hirsch are good starting points for a greater exploration of these.

to Rwanda. I argue later in the essay that the definition of justice needs to be further refined to take into account the post-mass atrocity situation.

Justifications for Retributive Justice

What marks out retributive justice is its focus on punishment of the offender. The notion of "just desert" is the modern, popularly held view of the reason for punishment. [15] The offender has broken one of the rules by which society lives, and which is necessary for its proper functioning, and deserves to be punished for it. He gets what he deserves, the foreseeable (because the crime and punishment are public knowledge) consequence of his action. The punishment would be proportionate to the offence rather than varying from offender to offender, and could thus be administered by an impartial legal mechanism. This impartiality makes the system just and appeals to our modern desire for rationality.

The reason for punishment is that the law broken reflects a moral principle upheld by society. Ordinary criminal offences do not always reflect public morality, which in any case diverges greatly. But even if this is accepted, redress by means of punishment is not a given, a necessary or automatic next step. Retributivists seem to say that it is demanded by crime without really breaking down this chain of logic and examining why. Their view appears to derive from the ancient Hebrew lex talionis of "an eye for en eye, a tooth for a tooth." The theory of just retribution seems centred on proportional punishment. Braithwaite states that this idea of proportionality does not make explicit why punishment is necessary. Just retribution imposes punishment "for no better reason than to impose positive proportionality." [16] As Cragg says, the deliberate infliction of suffering on an individual by society must be justified to a very high degree as in any other context, it is unacceptable. He concurs that just retribution does not really say why punishment is necessary, it simply seems to assume that it is.

Perhaps this leap in logic between just desert and punishment can best be explained by what Murphy calls the "retributive emotions." Harm, and particularly extreme harm such as took place in Rwanda, generate intense emotional responses: anger, hatred, pain, resentment, grief, outrage. These are completely valid as emotional responses are what make us human. However, as Murphy rightly states, in modern society we are uncomfortable with acknowledging these intense emotions and that is why we do not want to endorse vengeance as a reason for punishment. [17]It seems to be yielding to primeval instincts which as civilised beings we are above and that is why we seek to justify retribution in purely rational terms. As I have suggested, this cannot be done. It would seem that the fundamental objection of the retributivists to restorative justice is emotional: that the anger, hurt and other feelings caused by the harm are not vindicated by restorative justice.

It is interesting therefore to look at the meaning of retribution in the ancient world where the process was designed to deal with intense emotions. Ancient and pre-modern

[15] Cragg: 1992, 19.
[16] Braithwaite: 2003, 18
[17] Murphy: 1988, 2-3

conceptions of guilt differ significantly from juridical guilt, the pronouncement of guilt by a court, which exists in the legal system today. The ancient conception is a feeling on the part of the perpetrator, "akin to a private sense of badness for a wrong action, of pollution…Guilt…is palpable, it looms. Perhaps the guilty party is as much a sufferer as the victim. "[18] The process of retribution through ritual and/or punishment is a process of expiating this enormous sense of guilt, and is bound up inextricably in spiritual belief. It is a kind of catharsis for the offender. As the spiritual became separated from the legal, this psychological sense of guilt which was essential to the idea of retribution became obsolete. Mackay argues that retributive justice has lost a key function as a result of this. The symolism and ritualism of punishment was a way of releasing not only guilt on the part of the offender but also of the powerful "retributive emotions" of the victim and/or his family. It could thus lead to forgiveness on the part of the wronged.

It is not possible to explore pre-modern versions of retribution in depth in this essay. It is mentioned because as will be seen in section four, traditionally gacaca co-existed in Rwanda with retributive punishment. I suggest that form of retribution was in fact of the pre-modern variety briefly described above, in other words it had a ritualistic and symbolic meaning which allowed for forgiveness and expiation. This understanding helps to explain why Rwandans may wish to retain punishment for perpetrators of genocide, that it would carry resonance for them not because of the modern retributive legal system but through being deeply rooted in their culture.

With the shift towards rationality and objectivity in the legal system, the objection to vengeance too is rational. The desire for vengeance can be felt to different degrees by different victims. Therefore if a criminal justice system were based on vengeance, the penalties for offenders may vary greatly, even though they had committed the same offence. This variation would be seen by society as unfair and would also remove certainty from the system. Therefore, this justification is too arbitrary and indeed our criminal justice system would be unrecognisable if it were based on this. It is more suited to an informal type of justice where individuals settle their own scores.

The most coherent justification for modern retributive justice is that put forward by Jean Hampton and echoed by Wilson. This starts off with the principle that all human beings are equal and have equal worth and dignity. When an offender commits a crime he upsets this equilibrium. He demeans the victim and effectively asserts that his worth and dignity are greater than those of the victim. Punishment is a public censure of the offender. Through punishment of the person who has demeaned the victim, society expresses the value of the victim. It is a way in which the victim's dignity is reasserted. This redresses the distorted equilibrium and restores equality between the victim and offender.

This theory which is the best justification of modern retributive justice also highlights the similiarities between retributive and restorative justice. Hampton gives retribution more force by grounding it firmly in a theory of the equal value of all individuals in society which, interestingly, also seems to underpin restorative justice. Restorative justice theories emphasise the relationship between victim and offender and the fact that this

[18] Mackay: 2002, 254. Mackay is also quoting from Calosso in this extract.

relationship is brought into disequilibrium by crime. The aim of restorative justice is to repair this relationship, not through punishment or public censure but by mediation, as will be seen later in the description of rstorative justice.

Murphy, essentially a retributivist, argues for a modern day version of ritual which also has strong resonances with restorative justice. Tthe offender, by apologising, humbles himself and so brings himself to the level of the victim: this is necessary to make genuine amends for a moral injury

Both restorative and retributive justice have ancient roots and at their most fundamental level, are both concerned with the restoration of social order, of bringing balance and harmony. Retributive justice as exercised through a modern legal system does not in fact bring this about for reasons which will now be gone into.

Drawbacks in the Process of Retribution

There exist significant drawbacks in the process of retributive justice. The most widely cited by critics of the retributive model is the exclusion of the victim from the criminal justice process. The harm was done to the victim but the victim has no agency within the criminal justice system except in making the initial complaint. The police do not keep her informed of the progress of the case. She would be called as a witness in court but even there does not really have any control, the process is monopolised by the lawyers and other professionals. In some modern jurisdictions, victims are given the opportunity to put forward their stories in their own words. [19]In others, such as the English model, their testimony is elicited through examination in court by lawyers only and the victim may feel that his or her side has been inadequately or inappropriately expressed. There is no way within the criminal justice process itself to express his or her emotions surrounding the crime, which are likely to be more complex than just anger.

Even the accused is to some extent simply "processed" through a system with no real control. Although he can plead guilty and apologise in court, he is not given the opportunity to apologise or make amends directly with the victim if he wished to do so. This institutionalisation can take the "human" element out of the process, it depersonalises it.

To go further, if punishment is an expression of public censure, as has been suggested by Jean Hampton and other commentators writing in favour of retributive justice, then its effect on the offender is immaterial. It does not matter if the offender feels any remorse for what he has done. Mackay states, with reference to Nietzsche: "[p]unishment, so far from developing a sense of guilt in the contemporary sense of pangs of conscience or remorse, in fact retards it. He [Nietzsche] further observes, and this has a strong intuitive resonance: 'True remorse is rarest among prisoners and convicts: prisons and

[19] The victim has more opportunity to do this in European civil law jurisdictions where interrogatory magistrates take the victims' evidence directly.

penitentiaties are not the breeding grounds of this gnawer."[20] Prison hardens the offender rather than puhing him towards remorse or repentance.

The description of retribution given above is of what is termed backwards-looking retribution, because it looks backwards towards the crime to prescribe the punishment. Penology has evolved in modern times to include forward-looking theories which do not look backwards to the crime but forward to how society can most benefit by sentencing the offender. Their two main goals are deterrence and rehabilitation or reform of the offender. These are addressed by probation, community service and other types of progressive sentences aimed at reforming the character of the offender. Although they are aimed at the offender, their concern primarily seems to be that of society, not the individual offender or victim. The offender needs rehabilitation or reform in order to protect society. Their success is mixed. Perhaps the most important point to make is that it is only if the offender chooses to take responsibility to reform himself will this be achieved. With regards to deterrence, criminal sanction undoubtedly has an effect but it has not eliminated crime.

Both backwards-looking and forward-looking theories may miss an important point, that the propensity to commit crime is closely related to poor economic and social conditions. It is of course not a condition of all crime. A major criticism of the criminal justice system is that it does not tackle this root cause and so releasing an offender back into his old socio-economic conditions will not break the cycle of crime. In relation to Rwanda, this means that social and political conditions leading to the genocide should be addressed in order to prevent any recurrence. This point will be addressed later in the essay. [21]

Restorative Justice in Theory

The exploration of restorative justice (or RJ) below is drawn from the writings of western scholars in relation to RJ as it is used in the criminal justice system in the west. There are differing strains of RJ and its aims can be unclear. As Braithwaite argues, different models of restorative justice are appropriate to different societies and different types of crime. For example in terms of violent crime, juvenile street crime would warrant a different approach to domestic violence. [22] This fits in with the general thesis of this essay that a different model of restorative justice would therefore be necessary in a post conflict society than in an ordinary criminal scenario. However, it is still worth identifying what the main elements of RJ are in order to reach a working definition that would be relevant to evaluating the situation in Rwanda.

RJ in the west was inspired by indigenous forms of justice. RJ is used in the UK mainly in respect of youth justice although it is being experimented with for adults as well. It should be stressed that it is far from being the norm and is used when both offender and

[20] Mackay: 2002, 256.
[21] For a more detailed critique of forward-looking theories of retribution, see Cragg: 1992 Chap. 2
[22] Braithwaite: 2003, 7

victim opt for it. [23]Therefore it exists within the broader framework of the retributive criminal justice system. Unlike a court, the RJ process not a forum for fact-finding or the establishment of guilt. It can begin either after a guilty verdict by a court or without a trial if the offender accepts his or her guilt. The offender has to acknowledge responsibility as a *prerequisite* for the process, it cannot start without this. He or she also has to agree to the main facts of his offence, although peripheral facts may be in dispute. Coming to a single narrative about these peripheral facts is not part of RJ as it concentrates not on the definitive establishment of all the facts but on the process of mediation. This can allow for diverging narratives between offender and victim providing the central facts are agreed.

Some commentators refer to restorative justice as the healing of broken relationships. The idea of a relationship to be repaired has been criticised because there is usually no pre-existing relationship to "heal" between offender and victim. In Rwanda, however, there often is, as many perpetrators and victims were neighbours, they came from the same communities may have been well known to each other. Therefore in relation to Rwanda, but not generally, the restoration of a personal relationship would be part of the definition of RJ. Related to this is the restoration of victim, offender and community as individual entities. This is referred to below under "reintegration."

Restorative justice advocates such as Graef and Wright commonly conceive of the process as a form of conflict resolution between the offender, victim, and sometimes others who have an interest such as family and witnesses. They say that when a crime is perceived as a conflict between (at least) two individuals then it falls within the same realm as other conflicts which we experience on an everyday level, for example within the workplace or in the family. Similar techniques of conflict management or resolution can be utilised to solve it.

In the context of this essay, I do not favour the conflict approach. It may be appropriate for the ordinary crime scenarios which Graef and Wright are concerned with. However, it is not appropriate for Rwanda. It takes away from the important fact that the victim has been wronged. A conflict implies equality between victim and offender but in fact there is an acute moral inequality between them in the context of the heinous acts of the Rwandan genocide.

I go on now to identify the main elements of RJ.

i) The Process

RJ can involve non face-to-face methods such as the offender writing a letter of apology to the victim. However, "full" RJ is is a form of mediation between the victim and offender, normally with a professional person officiating. It is a form of negotiation between victim and offender which they both would have consented to beforehand. This

[23] For all first offences by youth offenders in the UK, courts are obliged to make Referral Orders which incorporate RJ type measures. However I use RJ to refer to wholly restorative processes, usually centred around a restorative justice conference.

encompasses several things. Firstly, negotiation is preferably in the form of a meeting or meetings (although in a domestic violence situation this may well be inappropriate). This would include the victim, offender, often at least one of their family members - victims especially may take them for support - and sometimes witnesses of the crime. Inclusiveness is important to the process. Negotiations also mean the active involvement and some degree of control on the part of victim and offender. These factors address two of the problems identified in the retributive model. Moral inequality is mentioned above. However, there would be procedural equality between the victim and offender. The negotiations would be conducted on an equal footing, it is important that neither party dominates. Braithwaite states that often one party tries to dominate during the process and it is vital to try and counter this when it happens.[24] Hand in hand with this is that the parties pay due respect to each other, particularly in terms of hearing each other out, what Braithwaite terms "respectful listening".

ii) Restitution

This would include at the very least an acknowledgement of fault by the offender. Some writers incorporate apology as a vital part of this [25] Remorse and apology by the offender are very much to be welcomed. However, these cannot be inherent components of the process because they must arise out of genuine feelings of the offender or they would be pointless and, I would suggest, even offensive to the victim. "Remorse that is forced out of the offenders has no restorative power."[26]

It needs to be noted that forgiveness too is not integral to a restorative system. It is very much to be hoped for and perhaps would make the process fully restorative. Like remorse and apology on the part of the offender, forgiveness by the victim cannot and should not be demanded as it can only be expressed if it genuinely arises in her.[27]

Reparation would seem to be an important aspect of restitution. It could be an action by the offender which directly repairs the harm caused by the offence, or contributes to the victim in some other way. This is usually by way of community service. RJ is criticised for "fudging" the issue of punishment as this is a form of punishment of the offender[28]. This is true but the important distinction is that is a negotiatied outcome between the victim and offender, not one imposed on them by an authoritarian source.[29] Van Ness

[24] Braithwaite: 2003, 9

[25] Von Hirsch, Ashworth and Shearing include apology in their amends model, (Von Hirsch, Ashworth and Shearing: 2003), 25

[26] Braithwaite:2003, 13.

[27] There is some interesting literature on the subject of forgiveness. Forgiveness is linked to the emotions encouraged by religion - love and compassion. Murphy suggests that in line with religious or moral traditions, the retributive emotions (he is talking specifically about resentment) can be overcome or transcended "in the pursuit of deeper feelings of love and compassion." This is however, a personal journey for individual victims to make should they wish and be able to do. I would not include it in a definition of restorative justice. Murphy: 1988, Chapter 1. Desmond Tutu is of the view that forgiveness is necessary to fully move on from the past and to restore the humanity of both victim and offender. Tutu: 2001

[28] Mackay: 2003, 253.

[29] As pointed out in Von Hirsch et al. :2003, 25.

cites change in the behaviour of the offender as a component of restitution, without which a system would be minimally restorative. [30] I suggest that this is crucial in gacaca.

iii) Reintegration

I would argue that a restorative approach entails the reintegration of both victim and offender. The victim may find it very difficult to return to a normal life after the harm done to him or her and of course this would be extremely so in Rwanda. Both she and the offender should be given the moral and material assistance they need to become part of and function fully in the community. [31] Although the offender may make reparation, he may not have the financial means to pay for whatever material support the victim requires, and so the state should be able to step in to do this. Moral support may include counselling or therapy, the latter if the harm was particularly grievous as in Rwanda.

Support for the offender, in the context of ordinary criminal justice, would hopefully address at least some of the reasons for his or her offending behaviour and so go a long way to preventing recidivism. Lowering the rate of re-offending is a key outcome of restorative justice as it is the one of the main reasons given for adopting it.

Braithwaite develops this idea further by advocating that full restoration of the offender involves supporting individuals to develop their capabilities to the full. [32] Offending individuals in ordinary criminal situations invariably have not had the family and emotional stability, or the educational encouragement or opportunity to have developed their potential. This is a way of correcting social injustice. However, it should be emphasised that the criminal justice system, because it deals with individuals, can only correct social injustice in relation to particular individuals. It should be part of wider national policies which include other state institutions. This will be developed in relation to Rwanda in section five, where I argue that wider social and political considerations need to be brought into the concept of restorative justice in Rwanda.

4. EVALUATING GACACA AS RESTORATIVE JUSTICE

As modern forms of restorative justice are inspired by indigenous legal traditions and therefore it is not surprising to see many of its elements displayed in the process of traditional gacaca. However, as part of an overall system, traditional gacaca co-existed with punishment-based justice. Post genocide gacaca is differs significantly from the traditional version in containing more retributive elements in its process. Traditional gacaca will first be looked at before considering the modern version.

Traditional Gacaca

The very meaning of gacaca – lawn – indicates its informal nature. It was traditionally a meeting of members of the community who assembled on the grass in order to discuss

[30] Van Ness: 2002
[31] I draw here on Van Ness, Op. Cit., 9.
[32] Braithwaite: 2003, 12.

how they would resolve a given situation. The "law" applicable was traditional, shared community values, unwritten and informal.

Vandeginste describes traditional gacaca a form of conflict resolution[33] and as has been pointed out above, this is a conceptualisation often used by RJ writers. The offending act or problematic situation would be deemed to have disrupted the harmony of the community as a whole and therefore all members had an interest in its resolution. All who wanted to could participate on an equal basis with no distinction between judges, witnesses, victim, accused and audience. Thus the inclusive, egalitarian negotiation process of RJ is a feature of traditional gacaca.

The aim of traditional gacaca was the restoration of social order and balance. This was identified above as common to the philosophy (but not the practice) of retribution, as well as to RJ. "The objective is, therefore, not to determine guilt not to apply state law in a coherent and consistent manner but to restore harmony and social order in a given society, and to re-include the person who was the source of the disorder."[34] Finally, the sanction was not imprisonment but some form of compensation decided upon at the meeting. This compensation would often be some sort of payment to the victim. Vandeginste uses the example of a theft of a goat being repaid by two goats – both compensation for what was taken and reparation. "The sentence has a double objective: it should be a sanction which allows the person concerned to better understand the gravity of the damage caused, but, at the same time, it should allow the same person to reintegrate in the local community." [35] Thus restitution and reintegration of the offender, both identified above as key to RJ, are also present.

Crucially, however, traditional gacaca mainly dealt with what modern law would classify as civil matters: rights to property, non-payment of debt, marriage, damage to property and the like. It also dealt with relatively minor theft. Serious theft or offences against the person, including murder, would go before *mwami(king)*. It is not clear what would happen in cases of assault and other offences against the person.

Sanctions here were severe. The penalty for murder or for serious cattle theft would often be death. This falls squarely within the category of retributive justice and perhaps the restorative nature of traditional gacaca can only be understood as part of this overall system, which includes retributive justice for more serious offences.

Because of the type of matters it dealt with, traditional gacaca cannot really be equated with restorative justice in the west where it where it deals with criminal matters. The subject matter of the disputes, though overlapping, is often markedly different and so it is not really a comparison of like with like even though the aims and process do fall within the definition of restorative justice.

[33] Vandeginste: 1999, 15
[34] Op. Cit.
[35] Op. Cit.

Modern Gacaca

The Rwandan government describes modern gacaca as a hybrid of western-style justice and traditional gacaca, hence the term *gacaca courts*.[36] However, it also cites the revival of traditional modes of justice as a reason for its adoption.[37] Thus its aims fall somewhere in between the two and this lack of clarity is not surprising given that it is being used as a practical expedient. The co-existence of gacaca courts with an ordinary criminal justice system is similar to the existence of RJ within the criminal justice system in the west. However, the actual process of gacaca fails to meet the requirements of RJ.

The gacaca courts have a formal national structure similar to a normal court system, based on the cell, sector, district and province, the administrative units of Rwanda. It also applies formal criminal law, using the categories of crimes created by the 1996 Genocide Law in respect of national genocide trials. These are as follows: category one is the organisation and planning of genocide, rape and sexual violence. Category two is murder and bodily harm caused with intent to kill; category tree is bodily harm caused with no intent to kill and category four is damage to property.[38]

Category one offences can only be tried in a court, not through the gacaca system. The reason for this is presumably that the perpetrators of the worst crimes, should be punished by imprisonment or the death penalty and the gacaca courts cannot give out these sentences. A survey of Rwandese opinion was carried out by the Institut de Recherche Scientifique et Technologique (IRST) in 1996. [39] The majority of respondents wanted punishment for those most responsible for the genocide and favoured their being tried in the courts. As discussed above in the section on retributive justice, justice through punishment is deeply rooted in pre-modern versions of justice and was meted out traditionally by the *mwami* in Rwanda. Therefore this desire for punishment is probably in keeping with the traditional Rwandan worldview. It cannot be said without further research whether this popular Rwandan opinion comes from traditional culture or a belief in the modern legal system, but Vandeginste's research suggests the former.

As with any socially based phenomenon, traditional gacaca was in any event changing with the times and becoming slightly more formalised.[40] The traditional version could not have survived the enormous social upheaval caused by the genocide. Not only were enormous numbers of people killed, including elders and adults who were familiar with the operation of gacaca, but a great many also fled abroad or were internally displaced. Moreover, exiled Tutsis who had fled the oppressive Hutu regimes of the past returned, many from Uganda and neighbouring countries and as time went on, the refugees of 1994 also returned. Thus the social fabric of many local communities changed. This

[36] Expounded by Rwandan Ambassador to the U.S. to Helena Cobban, Cobban: 2002
[37] Official website of the Republic of Rwanda
[38] Category four cases are heard at cell level with no appeal. Category three matters at sector level with a right of appeal to the district gacaca court, and category two heard at district level with a right of appeal to provincial level.
[39] Vandeginste: 1999, 16
[40] Rather than being ad hoc, meetings were being held on a regular basis, and the family elders who traditionally chaired them were sometimes replaced by cell leaders. Cells were the lowest level of the administrative hierarchy. Vandeginste: 1999, 16.

undermined traditional gacaca in two ways: the sense of community was lost as strangers settled in villages; and the genocide itself also destroyed the sense of shared values based on a fundamental respect for human beings. [41]

Modern gacaca then is a much more formalised system. I now turn to a description of its process. The Rwandan government gives the revelation of the truth through participatory justice as a justification of gacaca.[42] The whole community participates in a relatively informal way. There is a judge or chair but not really any distinction betweeen audience and witnesses: anybody in the community can contribute in an effort to get to the truth. This inclusiveness and relative equality are hallmarks of RJ. The mass participation and objective of revealing the truth are not, but are aspects which are in keeping with the mass, society-wide nature of the genocide, very different to the more private nature of ordinary crime. As is elaborated upon later in this essay, mass atrocity does necessitate a response very different to ordinary crime.

The main departure from western RJ is that gacaca courts do make findings of fact and apply the law, but without any truth testing techniques such as of rules of evidence. Moreover, they make findings of guilt, defendants can plead not guilty. Also, neither the offender nor the victim have a choice as to whether to pursue the process or not. Thus they are closer to western-style courts than to any type of mediation. The judges have very little training. They are elected by their community and some are illiterate. This degree of informality again is reminiscent of the elders of traditional gacaca but contrasts with western restorative justice where well-trained professionals such as social workers often officiate.

Gacaca judges have formal sentencing powers. They can sentence category two offenders to imprisonment. Category two offenders who confess their crimes, and all category three offenders can serve half their sentence as community service. Reparation, as noted in section three, is a key element of restorative justice and the community service is aimed at rebuilding the community which would include, for example, restoring victims' homes. However, the community service programme was not yet in place by September 2003. Penal Reform International notes that the success of community service programmes is vital to the success of the gacaca courts and the delay in setting it up is a major impediment in the whole process.[43]

Judges can also order offenders to pay compensation and this has been successfully implemented. In relation to damage to property offences, offenders have been ordered to compensate for the value of the property and pay reparation on top of that. Ordering compensation is quite different to the voluntary payment of compensation featured in RJ.

PRI describes a gacaca hearing conducted during the pilot phase. [44] Here, the alleged perpetrator confessed and was loud and hasty in his apologies, they rang false and

[41] Vandeginste: 1999, 16
[42] Official website of the Republic of Rwanda
[43] PRI (2), 17
[44] PRI (1)

abrasive. It was noted in section three that apology cannot be forced and it can be offensive to and detrimental to the victim. Moreover, in the interests of reconciliation, the victim was under immense pressure to forgive. It seemed that she said she forgave for this reason, and not out of genuine feeling. Again, noted previously, forgiveness cannot be demanded and if it is wrung out under pressure, it greatly nullifies the restorative value of the process. In Rwanda there is intense pressure both on the perpetrator to apologise and demand forgiveness, and on the victim to forgive due to the intense gevernment campaign to make gacaca work and to promote reconciliation. In reality, true remorse is unlikely to be shown, or forgiveness or reconciliation is to take place in the very public realm of a gacaca court and in the course of one hearing.

The documentary film *In Rwanda They Say the Family that does not Speak Dies*[45] traces the return of a detainee to his village. He is released before any gacaca hearing takes place. It shows that reconciliation and reintegration with the community is possible but there, it was part of a slow, painstaking process assisted by an outsider (the film-maker).

The restorative value of gacaca courts cannot be properly assessed at this stage before they are fully implemented, but what is clear from PRI's research is that the way gacaca courts are conducted will vary greatly from community to community, [46] not surprising considering that the judges have had little training and no previous experience in it. It can be said, however, that its functions are much closer to a western-style court than to what would be associated with a process of restorative justice.

5. CONCLUSION: RESTORATIVE JUSTICE POST MASS ATROCITY

Section three considered the meanings of retributive and restorative justice in a situation of ordinary crime, of individual criminal incidents. In Rwanda, incidents were committed on a mass level, by a large number of perpetrators against a large number of victims. Genocide was a social phenomenon. This section attempts to guage just what the needs society are in the post mass atrocity situation in Rwanda, to see if the meaning of restorative justice needs to be redefined. If so, would it be appropriate to call this new definition restorative justice?

Both Helena Cobban, whose quote opens this essay, and Charles Villa-Vicencio do exactly this. Neither of them explore the meaning of restorative justice on an individual level to any great extent but they both talk of the need for a restorative approach in a social context following mass atrocity, specifically the Rwandan genocide. They both conceptualise this as a form of justice which transcends, is larger than legal justice administered by courts, the common notion of justice. This larger notion would address the post mass atrocity situation where more complex social needs have to be addressed.

45 Directed by Anne Aghion, USA/France 2004. Viewed by author at Human Rights Watch Film Festival, London, 20 March 2004.
[46] Penal Report International (3).

Cobban and Villa-Vicencio concede that punishment-based justice can have a place in such a larger notion. Before coming on to that, I wish to identify these social needs.

In terms of looking to the future, three main needs of society post genocide emerge: the prevention of recurrence of atrocities, peaceful co-existence of all sections of the population and nation-building.[47] The three are inter-related. They are essentially political aims. Cobban is correct in contending that the legal and political realms cannot be completely disentangled from each other. Karl Jaspers, in the aftermath of World War Two, argued that the Nuremberg trials were inherently political, being of victor over vanquished. He stated that the attempt to portray them as purely "legal" was self-deception, an idea that came from the Anglo-Saxon tradition of law.[48]

Fulfilling these needs entails a large number of things but I will identify here what I feel are the most important. Firstly, genuine democracy and political pluralism - a government that truly represents the people. The RPF in Rwanda is in many respects a minority government. Its power base has increasingly shrunk, from previously including Hutus in government to now being almost entirely Tutsi. It is a minority government and this could be seen as a form of repression by Hutus and engender further resentment, sowing the seeds of further conflict.[49]

Secondly, both Villa-Vicencio and Cobban agree that the rehabilitation of perpetrators is vital. Cobban argues that in a situation of mass participation in atrocities, the doctrine of holding individuals account for individual crimes cannot be sensibly enforced, not only for practical reasons but because legally, lines of responsibility are difficult to draw. In the definition of restorative justice in section three however, the acknowledgement of individual responsibility is crucial.

The release of perpetrators into the community does relieve the state of the economic burden of looking after them. As many are men of working age, they can work and contribute usefully to society, to their communities and to the upkeep of their families. This is particularly important to nation-building. The continued detention of large numbers of detainees in prison was seen by many as politically motivated on the part of the government, and may contribute to further resentment on the part of the Hutus.[50]

---

[47] There are other important needs such as the creation of an accurate historical record, honouring the dead and fostering memory of the past, listed by Villa-Vicencio in Villa-Vicencio:2000, 70-72.

[48] Cobban refers to correspondence between Karl Jaspers and Hannah Arendt. Cobban: 2002, 24; Wilson, writing in the context of South Africa, argues that amnesty granted by the Truth and Reconciliation Commission is not a form of restorative justice but instead fulfils a possibly more important goal of political stability. His divergence from Cobban therefore seems to be in excluding the political from the legal realm.

[49] Vandeginste emphasises the situation of ongoing conflict: that RPF troops are fighting with Hutus in its North West border region and in the Eastern Congo, and sees this lack of democracy and pluralism as a fundamental bar to promoting reconciliation in Rwanda. Vandeginste: 1999. Corey and Joireman similarly emphasise the recurring cycles of violence in Rwanda and warn of the authoritarianism of the RPF as sowing the seeds of resentment in Hutus and contributing to further violence in the future. Corey and Joireman: 2004.

[50] Op. Cit. N10

Thirdly is the restoration and rehabilitation of victims. This would go in particular to the second and third needs: rebuilding peoples' lives enables them to live together harmoniously and may help prevent grievances and feelings of being marginalised. The fulfillment of individuals' needs helps in the fulfillment of society's. Some of this would have to be tackled by national policy: building houses for example or providing large scale healthcare for survivors, particularly survivors of the mass rape that took place during the genocide, who are now suffering from AIDS. A national compensation law has been going through through the Rwandan parliament. In addition, gacaca judges can assess the losses suffered by a victim and apply to the state for compensation for this. [51]

Victims' needs could also be addressed in terms of reparation through community service by perpetrators. This could be in the form of repairing or rebuilding homes for victims. It has already been seen that reparation is a key element of restorative justice. Removing the community service element from gacaca would be a severe loss to both micro and macro-level restorative justice.

Finally, the issue of punishment. Villa-Vicencio seems to embrace the retributive approach, and lists punishment "where necessary" but does not specify exactly where it is necessary. [52]He instead emphasises that in a situation of transitional justice, punishment may need to be forgone in order to reintegrate perpetrators into society. Helena Cobban appears to have the same opinion. While in large measure advocating the release of perpetrators back into the community, she concedes, "That still leaves a possible role for punishment at the highest levels of leadership."[53]

I would conclude that this, as far as Rwanda is concerned, should be the case. The IRST survey referred to above and the working of traditional Rwandan justice shows that harsh punishment for the most serious perpetrators is what would resonate most with Rwandan people, and would be seen as "just" by them. Many Rwandans may also favour punishment for less serious perpetrators but this should probably be forgone in the interests of restoring and rebuilding their shattered country. Therefore a restorative or holistic vision can include punishment but its primary goals should be the rehabilitation and restoration of both victims and perpetrators and, through both of these and the establishment of democracy, of the country as a whole.

This broader form of restorative justice is essentially social justice and therefore operates at a different level to gacaca and the criminal justice system, which operate at the individual level. Gacaca, as part of the criminal justice system, can play a part in this broader notion of restorative justice, in conjunction with other social and political institutions.

[51] PRI (2), 13-15
[52] Cobban: 2002, 72
[53] Cobban: 2002, 29

BIBLIOGRAPHY

Braithwaite, John "Principles of Restorative Justice" Chapter 1 in Von Hirsch, Roberts, Bottoms, Roach and Schiff (eds.) "Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?" (Hart Publishing: 2003)

Cobban, Helena " The Legacies of Collective Violence" Boston Review <<www.bostonreview.net/BR27.2/cobban.html>>

Corey, Allison and Joireman, Sandra F., "Retributive Justice: The Gacaca courts in Rwanda" *African Affairs* Vol. 103 No 410 Jan. 2004, 73

Cragg, Wesley, Chapters 1 and 2 in "The Practice of Punishment: Towards a Theory of Restorative Justice" (Routledge: 1992)

Eltringham, Nigel, Preface, Chapters 1 and 4 in "Accounting for Horror: Post Genocide Debates in Rwanda" (Pluto Press: 2004)

Graef, Roger, "Why Restorative Justice?" Calouste Gulbenkian Foundation: 2001

Hampton, Jean " The Retributive Idea", Chapter Four in Murphy and Hamton (eds.) "Forgiveness and Mercy" (Cambridge University Press: 1988)

Jenkins, Catherine " The Dilemmas of Reparation and Reconstruction in South Africa" (2000) 16 SAJHR 478

Mackay, Robert "Punishment, Guilt and Spirit in Restorative Justice: An Essay in Legal and Religious Anthropology" Chapter 12 in Weitekamp, E.G.M. and Kerner, H-J. (eds.) "Restorative Justice: Theoretical Foundations." (Willan Publishing: 2002)

Murphy, Jeffrie G. "Introduction" and "Forgiveness and Resentment" Chapter One in Murphy and Hamton (eds.) "Forgiveness and Mercy" (Cambridge University Press: 1988)

Penal Reform International
(1) Research Team Report on Gacaca, Report III, April-June 2002
(2) Research Team Report on Gacaca, Report V, September 2003
(3) "Gacaca Courts in Rwanda" < <www.penalreform.org/english/frset_pre_en.htm>>

Schabas, William A. "Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems" 1996 Criminal Law Forum 7(3)_523

Tutu, Desmond "No Future Without Forgiveness" (Rider Books: 1999)

Van Ness, "The Shape of Things to Come: A Framework for thinking about a Restorative Justice System" Chapter 1 in Weitekamp, E.G.M. and Kerner, H-J. (eds.) "Restorative Justice: Theoretical Foundations." (Willan Publishing: 2002)

Vandeginste, Stef "Justice, Reconciliation and Reparation after Genocide and Crimes against Humanity: The Proposed Establishment of Popular Gacaca Tribunals in Rwanda" Paper delivered at All-Africa Conference on African Principles of Conflict Resolution and Reconciliation <<www.africanprinciples.org>>

Villa-Vicencio, Charles "Restorative Justice: dealing with the past differently" Chap 6 in Villa-Vicencio and Verwoerd (eds.) " Looking Back, Reaching Forwards: Reflections on the Truth and Reconciliation Commission of South Africa" (Zed Books: 2000)

Von Hirsch, A. Ashworth, A. And Shearing, C. "Specifying Aims and Limits for Restorative Justice: a 'Making Amends' Model?" Chapter 2 in Von Hirsch, Roberts, Bottoms, Roach and Schiff (eds.) "Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?" (Hart Publishing: 2003)

Wilson, Stuart "The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty" (2001) 17 SAJHR 531

Wright, Martin "Justice for Victims and Offenders" (Open University Press: 1991)

Other Sources

Interview with Amanda Crawford, Youth Justice Social Worker trained in Restorative Justice techniques at Haringey Social Services, London. 20 June 2004.

Official website of the Republic of Rwanda <<www.rwanda1.com>> (click on "genocide" tab)