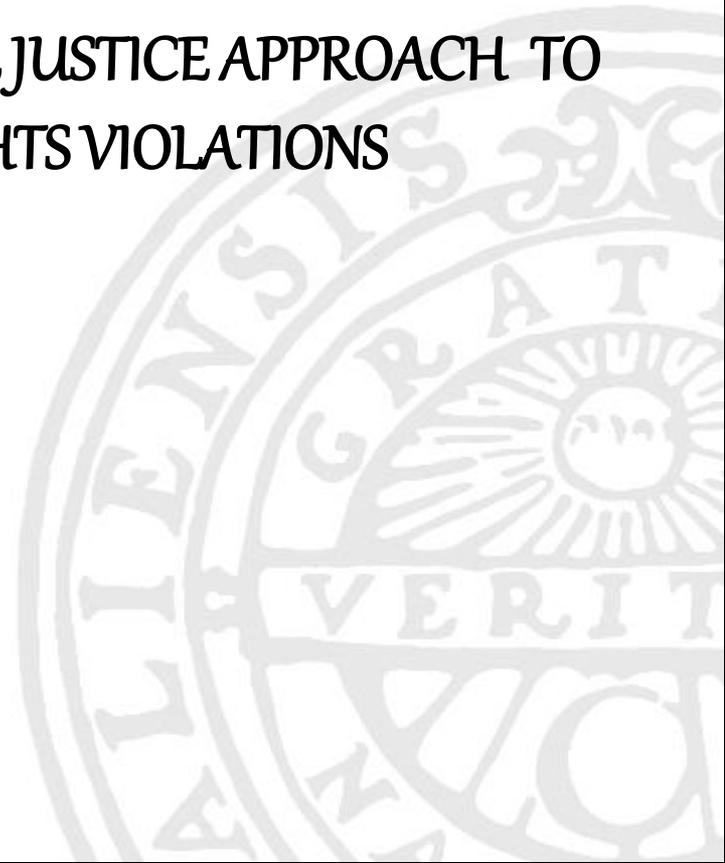




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RESTORATIVE JUSTICE
AS AN ALTERNATIVE CRIMINAL JUSTICE APPROACH TO
GROSS HUMAN RIGHTS VIOLATIONS

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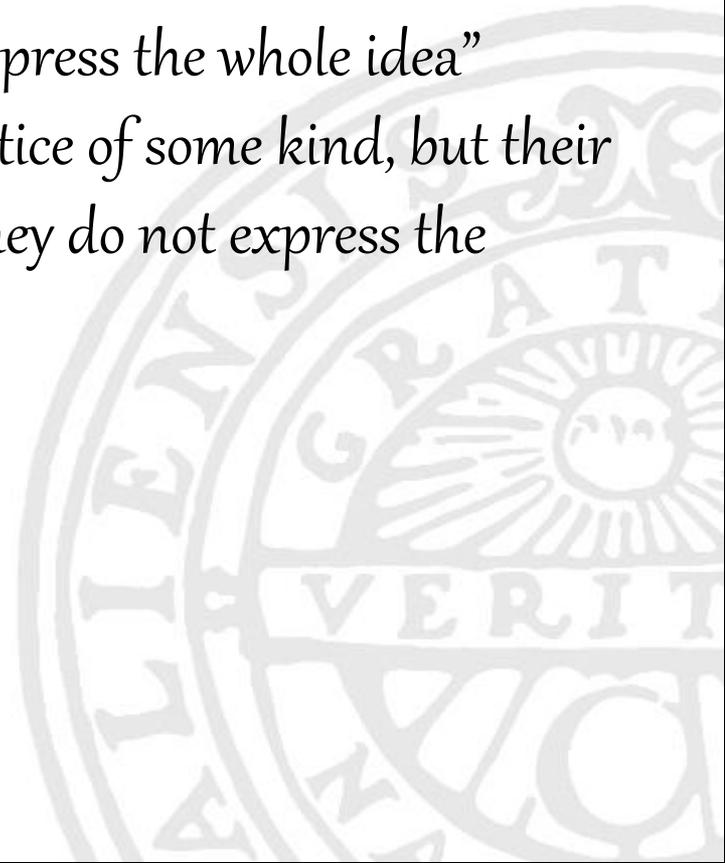




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INTRODUCTION

*"For all men cling to justice of some kind, but their conclusions are imperfect and they do not express the whole idea"
Aristotle*
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In this presentation I make two basic arguments using examples from Rwanda

- (a) Punishment for gross human rights cannot be
 - fair
 - proportionate to the crime committed
 - cannot change attitudes of victims and offenders
- (b) There is urgent need to challenge the belief in the utility of punishment (notions of proportionality and deterrence to crime committed)
- (c) There is need to interrogate the prevailing criminal justice model: is punishment the most appropriate response to gross human rights violations?



- This paper is based on extensive research that I have conducted on justice, peace and reconciliation processes in Rwanda and more recently on the Kenya case
- However, will also I rely on several scholars, especially Ezzat Fattah, whose views on crime and punishment are well known
- Modern criminal justice is an achievement of 18th century enlightenment, associated with reformers like Cesare Beccaria with his landmark publication "On Crime and Punishment" in 1766
- The idea of equal punishment for equal crime regardless of social gained currency



- Modern criminal justice model has been conceived at two levels:
 - (a) Conceptual – involves development of notions of separation of powers, individual rights, due process, distinction between criminal and civil law, the ideal of rule of law
 - (b) Practical level – involved abolition of torture, requirement of confession, prison reform, elaboration of penal codes, adversarial criminal prosecution (*Encyclopaedia of crime and Punishment*)



- By the 20th Century this criminal justice model had become dominant in the west, hence earlier forms of communal criminal justice were considered primitive, without proper criminal law procedures and dismissed as not meeting 'international standards'
- Criminal justice came to mean formalized due processes and adversarial prosecution in courts of law
- Criminal justice was personified by advocates and judges wearing strange looking robes and speaking in a jargon unfamiliar to victims and offenders



Is punishment the most appropriate response to gross human rights violations?

- Modern criminal justice hinges on concept of retributive justice as expressed in the law of retaliation: 'an eye for an eye and a tooth for a tooth' – the notion of proportional punishment in the Near-eastern law codes
- Using example of *Gacaca*, I will illustrate that punishment can never be an appropriate response, equal and proportionate to the harm caused



'Frozen' in era of retaliation

- Historically communities practices retaliatory justice, but then it proved detrimental to society's wellbeing and they moved to compensation
- Fattah reminds us that in spite of the technological advancement of our time, we are "frozen" in the era of retaliation – determined to do justice by making the offender pay for the crime by inflicting pain and suffering on him/her



- Through reward and punishment, children are socialized about the usefulness of punishment as a deterrence and these ideas are inculcated in their minds.
- The result is a society that cannot imagine functioning without punishment – prisons for criminals to experience deprivation of freedom and pain for causing harm to others
- Therefore, "advocating for and gaining acceptance for an alternative, non-punitive justice paradigm becomes extremely difficult because the theological notion of punishment that must follow the fault, the wrong doing, is too deeply anchored in the minds of most individuals (Fattah 1999:162)



What is wrong with punishment approach to criminal justice?

- Punishment is "destructive with nefarious consequences"
- It is not constructive
- Inflicting pain does not :
 - solve the problem
 - repair the broken relationship
 - restore the loss suffered as a result of the crime
 - eradicate the pain suffered by the victim



What about the contradictions of punishment itself?

- (a) see debate on death penalty big perpetrators living like lords in ICC detentions and other perpetrators living in inhuman prison conditions
- (b) compare criminal justice (10 year jail term) meted to a rebel leader who recruited 30,000 child soldiers and used them to inflict unspeakable violence on innocent civilians and a small robber sentenced to hang for violently taking \$ 5.000 in a house robbery
- (c) line between criminal and non-criminal behaviour often thin – if you kill and a motive can be established, it is murder, but if motive cannot be established, it is manslaughter??



- The point of these examples is that punishment can only be arbitrary, unjust and difficult to ethically defend
- Is deprivation of freedom in prison equal to the moral guilt of the offender or to the harm done?
- Also effect of imprisonment differs for individual offenders even when charged with same crime and incarcerated under similar conditions
- Fattah concludes that "to continue to accept punishment that poses such insoluble ethical, fairness and equity problems is, sad to say, a clear indication that we are more committed to the justice principles of the 18th century than we are to the egalitarian and human rights principles of the 20th century"



Advocating for a paradigm change

- Need to emphasize on the
 - Futility of punishment - cannot reverse the impact of gross harm
 - Failure to function as a deterrence
 - Detrimental effects of punishment approach
 - Paradigm shift from the hitherto unshakable faith in the need for punishment



An unconventional alternative criminal justice approach

Restorative justice

'Restorative justice' was first coined by Albert Eglash in 1975 – using it to refer to a type of criminal justice that focuses on effect of perpetrator's actions; and effective participation of both victims and offender in a process of restitution and rehabilitation

NB. No dominant restorative justice process – it depends on peculiarity of each case of human rights violations



- Restorative justice is a response to standard notions of proving guilt or innocence of offender as charged in criminal justice
- Restorative justice sees crime as involving violation of people and relations rather than offender vs. state. Hence all need to be involved in restorative justice: victim, offender, affected community/families
- The emphasis in restorative justice is on the harmful consequences of offender's actions



Need for justice in Rwanda

- In Rwanda, reconciliation presents serious challenges - reconciliation is inherently encumbered with multi-layers:
- national
- inter-community
- intra-community
- individual
- What about justices for survivors/victims?
- Perpetrators and victims have to live together again – how can this be made possible?

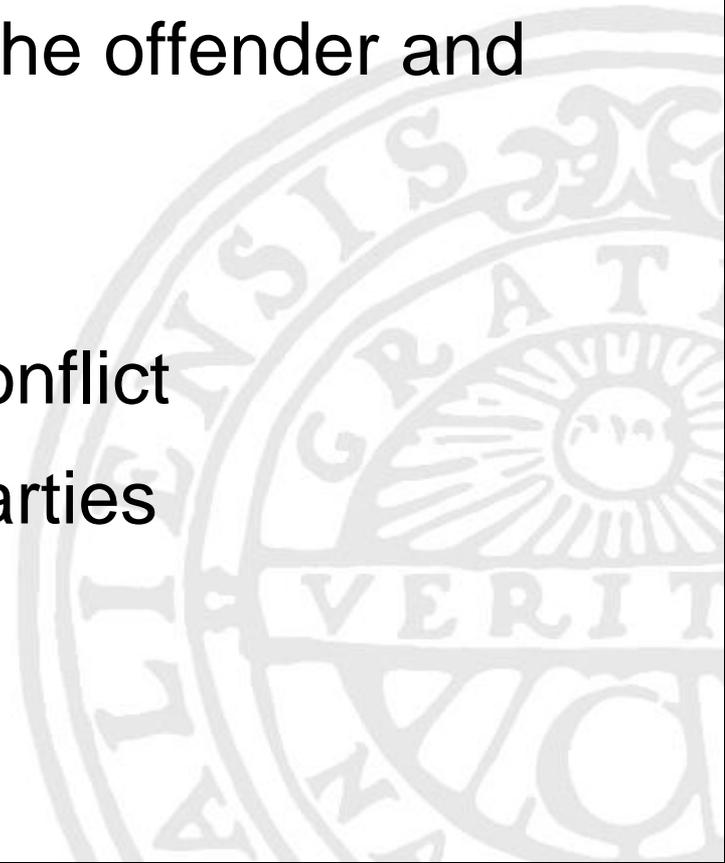


- Do perpetrators need justice?? Yes, but how can it be achieved?
- If only survivors get justice, then we are back to square one: one-sided justice which implies only justice for the Tutsi victims
- Finding balance between justice and reconciliation or between retribution and forgiveness is delicate process, a major challenge for Rwandan government
- Rwanda turned to indigenous communal criminal justice system- re-invented, formalized



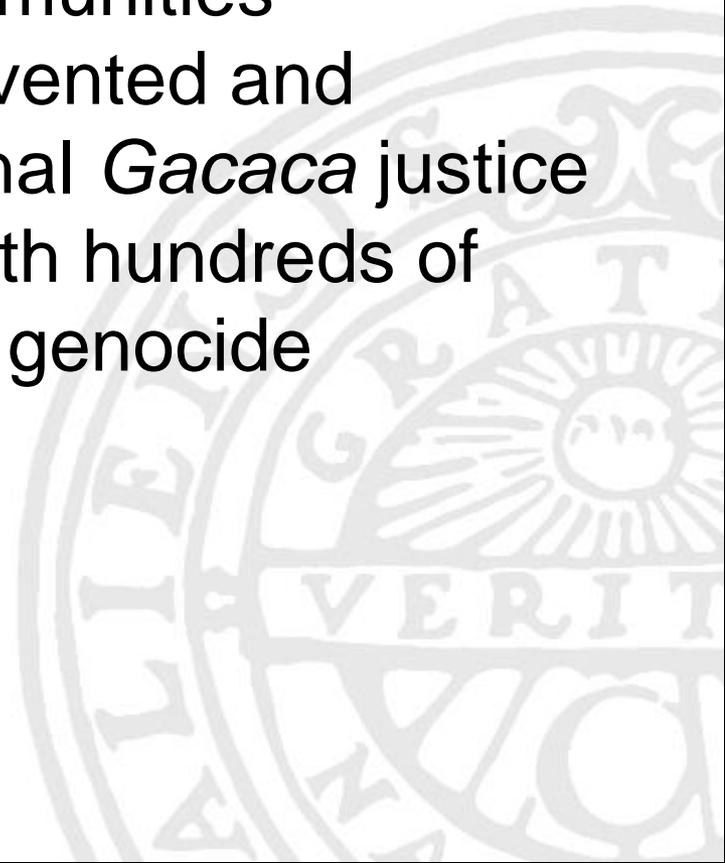
Criminal 'justice on the grass' - Gacaca in Rwanda

- Traditionally, *Gacaca* served four important functions:
 - (i) It brought together the offender and the offended
 - (ii) It sought the truth
 - (iii) It addressed the conflict
 - (iv) It reconciled the parties





- Elders and community leaders in traditional social setting would sit on the grass to hear, discuss and resolve conflicts between groups or individuals, following laid down rules and procedures well known to the communities
- Government has re-invented and formalized the traditional *Gacaca* justice system both to deal with hundreds of thousands of cases of genocide perpetrators





- The goal of post genocide *Gacaca* is to promote reconciliation by providing a platform for both victims and perpetrators to come together ‘on the grass’ – fulfilling the four functions in a post genocide context
- Under the provisions, if someone confessed before being denounced, he or she was liable for a substantial decrease in the length of the sentence
- The application of *Gacaca* criminal justice system is an unprecedented legal-social experiment in its size and scope



Gacaca as restorative justice

- Gacaca has proved that restorative justice is a better, viable, constructive and more effective response to gross harm than conventional criminal justice approach
- President Kagame said it was necessary to find "an extraordinary solution to extraordinary problems"
- Gacaca processed 1,958,634 genocide cases with a success rate of 87% at a cost of 29 billion Frw



- In 2005 we (Samset and Kubai, 2005) predicted that at least 700,000 genocide perpetrators would have to be sent to prison but this was impractical – financially, socially, and practically impossible to hold such numbers in prisons in the country
- In view of the enormity of this situation, the society embraced the Gacaca as the most viable and effective way of delivering criminal justice to all parties concerned



- Through Gacaca, Rwanda is liberating attitudes and social behaviour towards perpetrators and the whole notion of punishment – confession and forgiveness have been built into the criminal justice system
- The emphasis in the Gacaca criminal justice is not on proving guilt and punishing perpetrators in equal measure
- Focus is on the impact of the actions of the individual perpetrators, participation of both victim and perpetrator in "revealing the truth" and fostering healing and reconciliation



Humanizing effects of Gacaca criminal justice

- Gacaca has proved that strong support for victims can be achieved thro restorative justice:
 - Perpetrators have faced survivors and asked for forgiveness and research has shown that victims who learn how to forgive and cope better, heal quicker than others
 - Forgiveness elevates victims to a higher moral level, which retributive criminal justice does not achieve
 - Compare humanizing effects of Rwanda's 'Reconciliation Villages' for both perpetrators and victims to the agonizing and antagonizing outcomes of punitive criminal justice meted through incarceration of perpetrators



- Restorative justice thro' reconciliation villages aims at restoring peace and harmony not only between individual perpetrators and victims, but also between communities, repairs broken bonds between Hutu and Tutsi which were shattered by genocide
- This type of justice enables perpetrators and survivors to come face to face, it promotes closure and facilitates healing, coping process necessary for psychological well being of individuals and families



Key features of restorative criminal justice in Rwanda

- **Reparations**: can be financially costly and logistically difficult to implement, e.g. in Rwanda, one government mobilized citizens and perpetrated genocide; another is faced with the task of trying and punishing citizens who perpetrated genocide, and at the same time compensating victims. To overcome this contradiction, Rwandans have given new meanings to the notions of restitution and reparation (explain)



- **Three forms of reparations**
 - (a) Practical confession – perpetrators building houses for survivors (reparations for crimes against property) and also acknowledgement of responsibility for the harm caused by damage to property and resultant destitution for victims
 - (b) Public works through *Travaux d'Interêt Général* (TIG): Thousands of perpetrators tried by Gacaca carry out construction work for government institutions put up buildings and public amenities. Thus they help to rebuild the infrastructure that was crushed by genocide. This form of reparations is not targeting individual victims, it serves as reparations for the whole society. It addresses the social and economic effects of the harmful actions of perpetrators



(b) Working for victims – e.g. on farms:

Some perpetrators volunteer to work on survivors' farms and this 'help' is quantified as compensation, but also accepted as acknowledgement of moral responsibility. This is a unique approach where perpetrators themselves take the initiative and survivors accept the arrangement –seen restitution rather than retribution

Thus Rwanda has developed a normative framework for reparations as approach to gross human rights violations under national and international law



- **Restitution:** In Rwanda emphasis is on reconciliation – rebuilding human relations, creating peace and harmony in society, enabling victims and perpetrators to move on with their lives
- Restitution has also acquired new meaning in Rwanda - people are aware that they cannot restore the historical pre-genocide status quo with its traditional baggage of issues. Restitution therefore, is crucial to the current process of "creating a new moral order, a new national narrative"



Conclusion

- As I said before, many people cannot imagine a society where punitive criminal justice is not the dominant approach, a system without prisons, etc.
- But I want to emphasise my point that Rwanda has proved that public resistance to paradigm change in criminal justice will decrease and new criminal justice approaches will find more acceptance if their positive outcomes and advantages over the prevailing criminal justice model are clarified and demonstrated to the public



- In the words of Braithwaite, J. (2003)
”Restorative justice, conceived as an intellectual tradition or as an approach to political practice involves radical transformation. On this radical view, restorative justice is not simply a way of reforming the criminal justice system; it is a way of transforming the entire legal system, our family lives, our conduct in the work place, our practice of politics. Its vision is of a holistic change in the way we do justice in the world.”