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Nandor Knust: Criminal Law and Gacaca. Development of a Pluralistic Legal Model Illustrated with the Example of the Rwandan Genocide**

Book Review

The author, NandorKnust, is head of the International Criminal Law Section of the Max Planck Institute for Foreign and International Criminal Law in Freiburg imBreisgau, Germany. Within the framework of the Max Planck Research School for Comparative Criminal Law (IMPRS-CC), he carried out the research project, Criminal Law and Gacaca – Coming to Terms with the Rwandan Genocide by means of a Pluralistic Legal Model. During the preparation of his thesis, he conducted field research in the Great Lakes Region of Africa and also served as legal intern at the International CriminalTribunal for Rwanda. He completed his dissertation in 2011 at the Albert-Ludwigs-University (Freiburg imBreisgau) under the supervision of Prof.Dr.Dr.h.c. mult. Ulrich Sieber, which was published in the form of the present book in 2013 by Duncker&Humblot Berlin as part of the Criminal Law Series of the Max Planck Institute.

I Introduction

Immersing himself more and more deeply in his chosen research topic, NandorKnust became aware that the vast majority of projects carried out in connection with the transitional phase of Rwanda's history tend to focus on its various selected instruments by concentrating on the legitimacy and role of the ad hoc Tribunal established by the United Nations or highlighting the rather unique method of reinventing the traditional local form of justice, the Gacaca courts[1].

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[1] Knust, p. 5. For a detailed analysis of Gacaca courts see, for example: Phil Clark,*TheGacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda*(Cambridge University Press 2010); Paul Christoph Bornkamm,*Rwanda's Gacaca Courts. Between Retribution and Reparation*(Oxford University Press 2012); for a detailed analysis of the ICTR including its case law (published after the reviewed book), see Vladimir Tochilovsky, *The Law and Jurisprudence of the International Criminal Tribunals and Courts. Procedure and Human Rights Aspects* (Intersentia 2014).

However, he had the impression that a complex matrix of instruments, which would introduce transitional justice after the mass atrocities of 1994 as an integrated mechanism to transform Rwanda into a land accepting and ensuring the rule of law principle, was disregarded. Having decided to leave the existing trends behind, Knust analysed the three immensely different transitional approaches simultaneously applied in Rwanda from a structural, legal systematic and criminal policy perspective *as a holistic system,*[2] with the aim of revealing whether a pattern of minimum standards may be designed in order for the transitional phases to achieve the goalsagreed on.

II Transitional Model of Rwanda

NandorKnust's book is divided into seven main chapters; the first two provide readers with a detailed insight into the history of Rwanda as well as the formation and development of its judicial system. As Knustrelates,[3]since state power was insufficient for centralisation, local norms had to be created and applied to establish an effective conflict resolution mechanism, usually under the direction of the eldest members of the community. Apart from delivering justice to the victims and imposing penalties on the offenders, the original form of Gacaca jurisdiction laid a special emphasis on rituals involving the whole community by carrying out symbolic acts of reconciliation,[4] similar to the matooput tradition of Uganda.

More than a century after the establishment of a centralised administration and judicial system by German and Belgian colonisers with the growing dominance of written legal norms (which era was followed by the struggle of the country to gain independence and by continuing tensions between people belonging to the Hutu and Tutsi groups even after the transformation to the*Republic of Rwanda* in 1962), the traditional Gacaca courts gained anew importance after the genocide of 1994. The Rwandan national judiciary was incapable of carrying out proper criminal investigations and prosecutions due to the large number of perpetrators who were involved in genocide, crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, or other offences punishable under Rwandan law.

As a unique transitional mechanism, a specific system consisting of three levels of judicial bodies has been created. Since the mission of the top level criminal court, the International Criminal Tribunal for Rwanda (ICTR) established by the Security Council, was to focus on the criminal prosecution of the main perpetrators, further special chambers had to be founded within the national judicial system at ordinary courts of first instance and at military tribunals by *Loiorganique No. 8/96* to investigate the cases of lower level perpetrators. The capacity of

[2] Knust, p. 3.
[3] Knust, p. 22 et seq.
[4] Knust, p. 29. Such symbolic acts are, for example,public mournings with specific prohibitions concerning all community members, or tree-planting commemorating the victims, often next to the graves, to "protect" the deceased.

these chambers was, however, still not sufficient to prosecute all offenders and this was why in 2001 the government established approximately 11.000 Gacaca courts within the country with the aim of bringing all perpetrators to justice and at the same time, to involve all members of the local communities in the long and arduous process of reconciliation.

III The Framework of the Pluralistic Model

After providing a summary of the history and the essential aims of transitional justice, Knust introduces in Chapter 3 his most important innovation: a framework for a pluralistic model of transitional justice along its three main goals, whereby he connected selected instruments to each of them in order to open the opportunity for their evaluation in the book's final chapter.

(1) *Ending the culture of impunity.* The criteria that Knust connected to impunity are twofold; first, it is related to the act of punishment itself and, second, to the establishment and exercise of an effective state power by means of proper criminal procedures to punish perpetrators. Beside its legal functions, punishment also contributes to strengthening the common values of a society, as already realised in 1895 by sociologist Émile Durkheim,[5] while the application of the rule of law principle equates to the restriction on the state on carrying out unlawful acts.

(2) *Reconciliation.* This term basically aims at recreating the peaceful life of a community. Its material content lies in the examination and declaration of the individual criminal responsibility of perpetrators, from a procedural point of view, it refers to the application of fair criminal procedures including the participation of victims and witnesses.

(3) *Truth.* Knust divided the truth component into four subcategories: the *factual truth* requires objectivity and scientific evaluation and is hence the basis of criminal trials; the *narrative truth* is the one perceived by the individuals affected directly by the conflict and which enables them to disclose their personal experiences and to reveal their harms suffered. More importantly, *social truth* is created through the interaction between the members of a community and serves as a basis for *restorative truth,* the imminent element of which is hence consensus, and it aims at intentionally creating a record of past abuses as a foundation for the establishment of a common and peaceful future.

IV Comparative Analysis and Evaluation of the Three-Level Transitional Model

Chapters 4 to 6 display a detailed comparative analysis of both the material and the procedural rules to be applied by the ICTR, by national courts and by the Gacaca courts. Starting with the international conventions up to local unwritten traditions, Knust provides an exhaustive list of

[5] Émile Durkheim, *The Rules of Sociological Method* (The Free Press 1982, New York) 101 et seq.

sources of both international and Rwandan criminal law. Chapter 6 consists of a summary of the findings of the analysis in form of a table that allows readers to briefly and easily understand the main differences between the three systems regarding their material, legal and procedural rules.

Chapter 7 is the most complex part of the book; it evaluates the three-level judicial system of Rwanda in line with the criteria defined by Knust under Chapter 3. The aim of the closing chapter is hence to examine whether the main goals of transitional justice, namely ending the culture of impunity and finding reconciliation and truth could be realised via the three-level judiciary. At this point, Knust raises crucial questions. *Is it really the end of the era of impunity if justice turns a blind eye to the crimes perpetrated by members of the Tutsi minority? Is it a merit of the remembering policy that it affects all spheres of society, from criminal law through public debates and memorials up to the shortest books written for children, or is it just a disguised return of the traditionally strict and overwhelming social control?*

As Knust reveals, even if the transitional government happened to rebuild the effective state power, it cannot be regarded as an unbiased executive organ promoting equality, due to the asymmetrical ending of the culture of impunity.[6] Regarding reconciliation, one may suppose that this goal would be best realisable through direct interactions between community members, as in the course of locally held Gacaca trials. The personal interviews carried out by the author in Rwanda however pointed out that the neo-traditional Gacaca courts are often perceived as top-down created institutions,[7] which gives the aim of reconciliation a rather forced nuance instead of being a voluntary and honest step towards forgiveness. The realisation of the truth component is also problematic, since the trial procedure of the ICTR and of the special chambers are contradictory; furthermore, the procedural rights of the defendants are very poorly defined at the level of national courts and criminal trials are mainly based on the findings of the prosecutor's office, rarely even collecting information in favour of the defendants.

V Conclusions

The approximately 100 days of mass violence of 1994 led to the death of nearly 1 000 000 people; many others were seriously injured or incapacitated for life and still have to carry those scars that remind them of the appalling forces that carried out the process of genocidal violence. After laying down their guns, Rwandan society had to face the same challenges as experienced by other countries following the end of ethnic conflicts reaching the level of mass violence, the overthrow of military dictatorships or the collapse of autocratic regimes. These goals are nowadays widely recognised as the essential aims and components of transitional justice: ending the cul-

[6] Knust, p. 338. No offences committed by the Tutsi dominated Rwandan Patriotic Front and Rwandan Patriotic Army have been prosecuted.

[7] Knust, p. 73.

ture of impunity, reconciliation, re-establishment of justice, investigating and recording the truth and the creation of a stable peace.[8]

The establishment of an effective state power had to be the starting point for ensuring the restitution of social order, which was necessary to acknowledge the legitimacy of the judicial bodies of all three levels and to enforce the judgments they delivered. There are, however, significant differences to be found regarding the success of achieving the selected goals on the three different judicial levels; the ICTR was incapable and was not even originally created to end the culture of impunity completely by prosecuting all perpetrators, but it had a more important role than other forums, to make a precise record of the atrocities with its large bureaucratic infrastructure (however, bearing in mind the selective punishment-related criticism). The courts of the two further levels proved themselves to be more effective at promoting the process of reconciliation by laying higher emphasis on the role of victims and witnesses and not only involving them formally in the trials, even though there were heated debates in connection with the legal competence of the judges and prosecutors in the proceedings. In spite of the previously mentioned problematic components and their negative effects, Knust concluded that none of the court levels on its own would have been able to prosecute all perpetrators of the 1994 genocide, to record all past abuses, promote the process of open discussions and reconciliation and therefore completely fulfil the essential goals of transitional justice. Each of the judicial levels realised these goals to a different degree and only their simultaneous application and the combination of their strengths could contribute to the healing process of that divided society.

[8] Knust, p. 57. See further the definition applied by the International Centre for Transitional Justice,which also includes the components of reparation and institutional reform, and by the United Nations Rule of Law initiative further adding the element of national consultations.