THE INVENTION OF GACACA: A LOGIC OF INSTITUTIONAL CHOICE

Jens Meierhenrich

Assistant Professor
Department of Government and Committee on Degrees in Social Studies
Harvard University
1737 Cambridge Street
Cambridge, MA 02138
jmeierhenrich@gov.harvard.edu

Revise and Resubmit at Comparative Politics

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Abstract

This article analyzes the institutional choice of gacaca jurisdictions in post-genocide Rwanda. The invention of the gacaca jurisdictions represents an innovative attempt by the Tutsi-led government of Rwanda to come to terms with the legacies of the 1994 genocide, which claimed the lives of more than five hundred thousand Tutsi and “moderate Hutu.” This article examines the evolution of this institutional choice. It demonstrates that the invention of gacaca jurisdictions involved the structural differentiation of a preexisting institution. The structural differentiation of gacaca was achieved in a series of stages. Three early stages are singled out for analysis. I have termed these stages (1) deliberation, (2) modernization, and (3) legalization. In conjunction they form an evolutionary sequence of judicialization, an emergent theme in the new institutionalism. By illuminating the dynamics of this sequence, the article contributes to a growing literature in the study of comparative politics.
Before we saw ourselves as through a glass darkly,
But now, as we are—face to face.

First Corinthians 13: 12

INTRODUCTION

This article analyzes the institutional choice of gacaca jurisdictions in post-genocide Rwanda. Ten years ago, the landlocked country was the site of radical evil. Incited by elements within their government, Hutu soldiers, militia, and ordinary peasants roamed the countryside for three months with the intent to destroy, in whole or in part, the Tutsi “ethnical group,” as such.¹ The invention of the gacaca jurisdictions represents an innovative attempt by the Tutsi-led government of Rwanda to come to terms with the legacies of the genocide, which claimed the lives of more than five hundred thousand

¹ Defining and interpreting the use of the category “ethnical group,” as enshrined in the 1948 Genocide Convention and the Statute of the International Criminal for Rwanda (ICTR), has proved difficult in the context of Rwanda. In Prosecutor v. Jean-Paul Akayesu, the ICTR Trial Chamber noted that “the Tutsi population does not have its own language or a distinct culture from the rest of the Rwandan population.” See Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 170. This notwithstanding, the Trial Chamber found “that there are a number of objective indicators of the group with a distinct identity.” Ibid. This paved the way for the influential yet controversial genocide conviction of defendant Jean-Paul Akayesu in his capacity as bourgmestre of Taba commune for “having ordered, committed, or otherwise aided and abetted in the preparation or execution of the killing of and causing serious bodily or mental harm to members of the Tutsi group.” Ibid., paras. 168, 705, 734.
Tutsi and “moderate Hutu.” This article examines the evolution of this institutional choice.

In the language of Kinyarwanda, gacaca means “justice on the grass,” and originally described an informal method of dispute resolution used (in a variety of guises) to settle civil disputes over property rights, family matters, and other community matters. In the wake of the 1994 genocide, the government recast gacaca into a formal method of dispute resolution. This method has evolved into a codified institution for the settlement of criminal disputes as well as civil disputes related to the genocidal campaign. More than 250,000 lay judges, together with their communities, have since been involved in the adjudication of genocide.

In this system of people’s courts, “villagers and neighbors congregate in outside locations throughout Rwanda in order to hear cases brought against accused killers and criminals. Sets of judges who have undergone informal legal training are present to oversee the cases, but everyone in attendance is free to speak out. Attendees may voice corrections or additions to the information being presented, and [alleged] criminals are

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permitted to either defend themselves or admit guilt. There is no requirement for physical evidence, and testimony alone is enough to decide a verdict.”

This article is not concerned with the question of whether or not the gacaca jurisdictions can contribute to the reconciliation of Hutu and Tutsi (i.e., the effects of institutions). The existing literature has extensively covered this dimension. Instead the focus of this article is on the emergence of the gacaca jurisdictions as an institution of transitional justice (i.e., the evolution of institutions). The remainder is organized as follows. Part I situates the analysis in the literature on institutional choice. Parts II-IV investigate the evolution of the gacaca jurisdictions during three stages of invention. Part V concludes and considers implications for the study of institutions.

A LOGIC OF INSTITUTIONAL CHOICE

The invention of gacaca jurisdictions involved the structural differentiation of a preexisting institution—an institution that I will hereinafter refer to as “traditional gacaca.” Neil Smelser defined structural differentiation as “a process whereby one social role or organization […] differentiates into two or more roles or organizations.” Structural differentiation is the product of three constitutive processes: specialization, differentiation, and bureaucratization.

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4 On the history of “traditional gacaca,” see my OMITTED REFERENCE.

Specialization entails the development and demarcation of “roles.” Instead of being fluid, the roles of participants in dispute resolution become fixed. Roles turn into positions. Differentiation connotes the development and demarcation of “tasks.” As part of the process, a division of labor is introduced. Tasks are distributed and assigned on the basis of roles. Bureaucratization lastly refers to the elaboration of organizational “hierarchies.” It also involves the introduction of formally rational norms and procedures. All three processes are interlocking and mutually reinforcing. The structural differentiation of gacaca was achieved in a series of stages. Three early stages warrant particular attention. I have termed these stages (1) deliberation, (2) modernization, and (3) legalization. In conjunction they form an evolutionary sequence of judicialization, an emergent theme in the new institutionalism. By illuminating the dynamics of this sequence, the article contributes to a growing literature in the study of law.

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7 For a more comprehensive analysis of these—and later—stages of invention, see my OMITTED REFERENCE.

The Effects of Institutions

This approach ties in with important advances in the new institutionalism, especially the literature on the origins of institutions, or institutional choice. The issue of institutional choice, as Catherine Boone writes, represents “a second-generation research problem in this literature.”9 During the first generation, the effects of institutions were taken more seriously than their evolution. “New institutionalism’s original innovation was the argument that humanly devised rules of the game go far in explaining political processes and outcomes. In most of the empirical work done in both the historical and the microanalytic variants of this approach, the problem of institutional origins was not an issue: rules or institutional configurations were taken as a given, as ‘independent variables.’”10 The neglect of institutional choice in the new institutionalism demarcated the limits of institutionalism as a methodology:

Historical and rational-choice institutionalism ran into trouble when it came to dealing with questions that were not only about institutional origins, but also about change and failure. Analysis that started from a given set of institutional parameters was hard pressed to explain where the parameters came from in the first place. In models that specified no source of actors’ preferences other than institutional structures themselves, where did the actors find the incentive to alter institutions, or create new ones?11

Institutional economists concur. Geoffrey Hodgson has found that “[a]t the theoretical and methodological level, there is no clear consensus among modern

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10 Boone, Political Topographies of the African State, 17.

researchers as to what would constitute and adequate or acceptable explanation of the emergence of an institution. This question is at present under-researched.”\textsuperscript{12} Itai Sened lamented that “the ‘hard core’ of this new research program [is] in disarray.”\textsuperscript{13} Or, as Kathleen Thelen writes, the issue of how institutions are shaped and reconfigured over time “has not received the attention it is due,” noting that “a good deal of comparative institutionalist work” in the 1970s and 1980s “centered on comparative statics and was concerned with demonstrating the ways in which different institutional arrangements drove divergent political and policy outcomes.”\textsuperscript{14}

Much of the literature on the \textit{gacaca} jurisdictions suffers from similar problems as the first generation of the new institutionalism. Although the growing literature on the \textit{gacaca} jurisdictions is replete with propositions concerning the real and imagined consequences of institutional choice, our understanding of the causes of this choice is perfunctory at best. Two reasons explain this state of affairs. The first reason is methodological, the second normative. The inattention paid to the invention of \textit{gacaca} jurisdictions is due to the marginal role of comparative historical analysis in the study of legal institutions. The majority of scholarship on the \textit{gacaca} jurisdictions has been written from the perspective of law rather than the social sciences. This has resulted in descriptive or predictive work (reflecting the strengths of legal scholarship), but little


\textsuperscript{14} Kathleen Thelen, “How Institutions Evolve: Insights from Comparative Historical Analysis,” in James Mahoney and Dietrich Rueschemeyer, eds., \textit{Comparative Historical Analysis in the Social Sciences} (Cambridge: Cambridge University Press, 2003), 208.
ideographic or nomothetic work, let alone a combination of both (reflecting the weaknesses of legal scholarship). The existing literature on the gacaca jurisdictions has therefore, by and large, ignored the social dynamics underlying institutional choice. This is the methodological explanation as to why we know surprisingly little about the invention of gacaca. Especially in developing areas, scholars and practitioners, from governmental agents to non-governmental activists, alike are more interested in the effects of law than its evolution. This has to do with the mandate of activists beyond borders: affecting, not explaining, change. This is the normative explanation.


In light of these shortcomings, the focus of this analysis is on the evolution rather than the effects of the *gacaca* jurisdictions.\(^\text{17}\) The dynamic analysis of the emergence of the *gacaca* jurisdictions is designed to deepen (and widen) our understanding of institutional choice. Understanding institutional choice requires “that we look closely at the intertemporal aspects of politics, rather than take a ‘snapshot’ view of political processes and outcomes.”\(^\text{18}\) As Paul Pierson writes,

> To see where functional account might come up short one needs to look not just at the moment of institutional origins, or at a current institution (deducing origins from current functioning). Instead, one must consider dynamic processes that can highlight the implications of short time horizons, the scope of unintended consequences, the emergence of path dependence, and the efficacy or limitations of learning and competitive mechanisms. This requires genuinely historical research. By *genuinely* historical research I mean work that carefully investigates processes unfolding over time.\(^\text{19}\)

This article seeks to contribute to our understanding of institutional choice through a comprehensive analysis of contemporary history—what one scholar has termed “history of the present.”\(^\text{20}\)


\(^{19}\) Pierson, “The Limits of Design,” 494.

The Evolution of Institutions

The problem of institutional evolution is a subset of the literature on institutional change. This literature has delineated three basic modes by which institutions emerge over time. According to Robert Goodin, institutions might emerge by (1) *accident*, (2) *evolution*, or (3) *intervention*.21 In the case of the first mode, no forces of natural or social necessity are involved. Institutions emerge “as a product of a spontaneous process of social interaction.”22 Institutions are contingent outcomes. In the case of the second mode, some selection mechanisms, social and otherwise, are driving things. In this mode, institutions are the product of collective action. Institutions are outcomes of structured contingency. In the case of the third mode, institutions are created by the deliberative interventions of purposive agents. Institutions are outcomes of design.23 The notion of design refers here to “the creation of an actionable form to promote valued outcomes in a particular context.”24

The first mode (*accident*) and the third mode (*intervention*) of institutional change are radically different. “The crucial difference between institutional design and the spontaneous emergence of institutions is that in the latter case the agents need not be conscious that their problem-solving activities affect other individuals. Therefore, no

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conscious collective choice is taking place in order for an acknowledged social problem,” such as the problem of radical evil (Carlos Nino), “to be solved.” 25 Instead, the social problem solved “as a side effect of the realization of individual problem-solving activities. Such explanations of social institutions are clearly of the invisible hand type, that is, they identify an ‘aggregate mechanism which takes as input the dispersed actors of the participating individuals and produces as output the overall social pattern.’” 26

Because institutional engineering frequently has unintended consequences, the second mode (evolution) and the third mode (intervention) of institutional change are closely related. In fact, any instance of actual institutional change “is almost certain to involve a combination of all three of these elements.” As Goodin notes,

The problem that groups face, the solutions they concoct, and the way that they implement those solutions are all subject to accident and error. But the accidents and errors are rarely purely stochastic; and even when they are, they nonetheless typically arise in the backwash of intentionality, through the oversights and miscalculations of purposive agents engaged in projects of their own. 27

In the case of Rwanda, the “backwash of intentionality” was particularly murky. The empirical analysis that follows bears out, in some respects, the argument that institutional choice “may be motivated more by conceptions of what is appropriate than

25 Mantzavinos, Individuals, Institutions, and Markets, 92.


by conceptions of what would be effective.” As Peter Hall and Rosemary Taylor wrote in their influential review of the “three new institutionalisms:”

[M]any of the institutional forms and procedures used by modern organizations were not adopted simply because they were most efficient for the tasks at hand, in line with some transcendent “rationality.” Instead, they […] should be seen as culturally-specific practices, akin to the myths and ceremonies devised by many societies, and assimilated into organizations, not necessarily to enhance their formal means-end efficiency, but as a result of the kind of processes associated with the transmission of cultural practices more generally.29

It is to the limits of rationality, and the oversights and miscalculations of purposive agents, that the analysis now turns.30

**DELIBERATION**

The idea of invention emerged in the immediate aftermath of the genocide. Alison Des Forges writes that in 1995 “administrators in some regions began encouraging the local settlement of claims by survivors against perpetrators of genocide through a customary

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process known as *gacaca*. She suggests that Rwandan officials “began talking in late 1998 of using the procedure also to judge persons accused of causing injury or even death to others during the genocide, an extension of customary practice which would raise questions of due process for the accused.”

Peter Uvin believes that “[f]rom late 1998 onwards, the Government of Rwanda has begun thinking about an unprecedented legal-social experiment of transforming a traditional community-based conflict resolution mechanism (mainly used for land conflicts and other local disputes) into a tool for judging people accused of participation in the genocide and the massacres.”

And the late Elizabeth Neuffer reported that the idea of reinventing *gacaca* “was under discussion in Rwanda since 1998.”

Yet contrary to the aforementioned accounts, the idea of reinventing *gacaca* had already been under discussion in government circles one year earlier. On August 20, 1994, the Ministry of Justice and Institutional Relations (MINIJUST) presented a confidential “plan de rehabilitation.” Although it is unclear whether the drafters of the

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32 Des Forges, *Leave None To Tell The Story*, 761.


34 Elizabeth Neuffer, *The Key To My Neighbor’s House: Seeking Justice in Bosnia and Rwanda* (New York: Picador, 2001), 398. Most likely both Uvin and Neuffer relied on the very influential Human Rights Watch report authored by Des Forges in pinpointing the temporal beginnings modern *gacaca*. Erin Daly, yet another analyst who marks 1998 as the commencement of official deliberation about *gacaca*, acknowledges Des Forges directly as her influence. See Daly, “Between Punitive and Reconstructive Justice,” 356, Fn. 5.
1994 rehabilitation plan intended to turn gacaca into the formal institution that it would ultimately become, they recommended to “revaloriser l’institution d’agacaca pour le règlement pacifique des differends.”

The 1995 Kigali Conference

A critical juncture in the creation of gacaca jurisdictions was the “International Conference on Genocide, Impunity and Accountability” convened by the Office of the President of the Republic of Rwanda in Kigali from November 1-5, 1995. During the conference, the idea of a gacaca revival was for the first time debated in public. The Kigali conference was the unofficial birthplace of what would become the gacaca jurisdictions. As one conference participant and founding father of the jurisdictions recalls, “Gacaca was proposed in 1995 at the conference that we organized to discuss how to respond to the genocide.”

During the conference, plenary sessions discussed five themes of retroactive justice in the National Assembly building. These sessions were complemented with


36 Interview with Gerald Gahima, Prosecutor General of the Republic of Rwanda, Kigali: July 4, 2002. The identifying information reflects the positions of respondents at the time of the interview.

37 The five conference themes were as follows:
Group I: “Causes, Roles, and Responsibilities for the Genocide in Rwanda”
Group II: “The Management of the Social and Political Consequences of the Genocide”
Group IV: “Addressing the Problems of the Victims of Genocide”
more in-depth and technical discussions on each of the themes in specialized working
groups, convened at the Hotel des Mille Collines. A final plenary session debated and
amended recommendations from each of the working groups. The Office of the President
published a final set of recommendations in December 1995.\textsuperscript{38} The relevance of the
conference for coming to terms with Rwanda’s genocidal past cannot be overstated. It
brought together Rwandan representatives from government and other organizations
with experts from abroad, including representatives from countries that themselves had
recently emerged from violent pasts.\textsuperscript{39} What is more, the conference produced tangible
results. It gave the impetus to a series of institutional innovations other than \textit{gacaca}. First,
the proposal of forming \textit{chambres spécialisées} for the prosecution of alleged \textit{génocidaires}
found its way into legislation upon recommendation of the plenary. Up until the launch
of \textit{gacaca} jurisdictions in 2002, these \textit{chambres spécialisées} administered transitional justice
in Rwanda. Second, implementing another recommendation from the conference, the
interim government established a fund to assist despondent survivors in such areas as

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\textsuperscript{38} Republic of Rwanda, \textit{Recommendations of the Conference Held in Kigali from November 1st
to 5th, 1995, on: “Genocide, Impunity and Accountability: Dialogue for A National and
International Response”} (Kigali: Office of the President, December 1995).

\textsuperscript{39} As one participant recalls, “The meeting brought together several dozen foreign legal
experts, as well as leaders of Rwandan society, including most cabinet ministers and
senior military officials, along with representatives of local NGOs and genocide victim
associations.” William A. Schabas, “Justice, Democracy, and Impunity in Post-genocide
528-529.
education, health care, and housing. Third, the conference spawned IBUKA (“Remember”), the influential organization of victims associations that would come to adopt a critical stance vis-à-vis the gacaca jurisdictions.

Of particular significance for the invention of the gacaca jurisdictions was the work of Group III.B, a small working group primarily comprised of lawyers. The group was charged with the deliberation of legal responses to the genocide. Gerald Gahima, Rwanda’s present Prosecutor General and former Deputy Minister of Justice, served as the chairman and facilitator of Group III.B. Allan A. Ryan, Jr., formerly in charge of prosecuting Nazi war criminals in the U.S. Department of Justice and at the time of the conference General Counsel at Harvard University, acted as rapporteur. The working group also included Richard Goldstone, then Prosecutor at the International Criminal Tribunal for the former Yugoslavia and the ICTR, and additional members from Rwanda (thirteen members), USA (four members), Ethiopia (one member), Germany (one member), France (one member), the Netherlands (one member), Canada (one member), and Israel (one member). In its report to the plenary, Group III.B made two contributions to the invention of gacaca jurisdictions. It advanced two interlocking ideas. First, it


41 Letter of Dr. Charles Murigande, Minister of Transport and Communications and Conference Coordinator, to all Participants of the Conference on Genocide, Impunity and Accountability held in Kigali on November 1-5, 1995, Kigali: January 1996.

42 Interview with Allan A. Ryan, Jr., Cambridge: August 29, 2002. The conference program presented the task of Group III.B under the heading “Bringing the Perpetrators of Genocide Before Justice: Classical Judicial Systems and Alternatives.” The wording suggests willingness, even determination, on the part of the Office of the President to break new ground in the pursuit of retroactive justice in Rwanda.
elaborated what would become the foundation of all retroactive justice in Rwanda: the idea of categorizing genocide suspects. Second, it debated the revival of *gacaca* for the first time in a public forum, introducing tradition into the debate over modern forms of accountability.

**The Idea of Categorization**

An important innovation elaborated in Group III.B was the categorization of genocide suspects. In its report to the plenary, working group III.B introduced three separate categories of genocide suspects, proposing to demarcate “[t]hose who are complicit in the crime of genocide in Rwanda […] according to their degree of responsibility.” The categorization proposal of working group III.B formed an important step in the process of invention. It was the basis for the amended categorization (featuring four categories instead of three) promulgated in Organic Law No. 08/1996. The idea of categorization

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Category I, as elaborated at the conference, included “[t]hose who acted on the national or regional level to instigate, organize, incite, or supervise the execution of genocide.” Category II comprised “[t]hose whose participation in the crime demonstrates one or more aggravating factors. Aggravating factors include, but are not limited to, the following: a. supervision at the local level of those who carried out the crime; b. the issuance of orders or encouragement to carry out the crime; c. the imposition of threats or duress to bring about the execution of the crime; d. the commission of crimes that were particularly atrocious or extensive; e. the betrayal of positions of trust or responsibility. Such positions include, but are not limited to, police, gendarmerie, clergy, spouses, and parents.” Category C, according to working group III.B, should include “[a]ll others who took part in the crime of genocide or crimes associated with the campaign of genocide.”

forms the backbone of the *gacaca* jurisdictions. A simpler categorization had been proposed by President Pasteur Bizimungu in his opening address at the Kigali conference. On October 31, 1995, Bizimungu proposed the following:

In my view, the criminals [who perpetrated the genocide] can be put into *two categories*: the first one is made of the planners and organisers of genocide who were fully aware of the macabre design they hatched. For these the classical system of justice with a Jury court arrangement could handle their cases. ‘Mass killers’ also belong to this category. The second category comprises the masses who were mobilised and driven into the implementation of the plan of genocide. They must be made to realise that those crimes committed and violations made cannot be done with impunity [sic]. Hence, *alternative forms of justice* could be thought out for them and emphasis would be laid on education. For these solutions to be successful there must be generalised acknowledgment for the crimes committed and violations made against invaluable human rights.\(^{45}\)

In other words, the RPF-led interim government had been deliberating the idea of categorization and the pursuit of “alternative forms of justice” already *prior* to the Kigali conference. This notwithstanding, both ideas underwent a critical transformation in Group III.B. The idea of categorization was deepened and widened, and the proposal of seeking alternative forms of justice for the first time associated with the institution of *gacaca*.

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\(^{45}\) Speech by H. E. Mr. Pasteur Bizimungu, President of the Republic of Rwanda at the Opening of the International Conference on “Genocide, Impunity and Accountability” held in Kigali from 1st to 5th November, 1995, 3-4. Emphases added.
The Idea of Gacaca

The working group recommended that “customary Rwandan procedures such as agachacha be used, or adapted, to the extent feasible.” Yet the recommendation was received with trepidation—both at home and abroad. As Gahima recalls, “Gacaca was floated as an option in 1995, but it was never seriously considered because it received stiff opposition.” Inside Rwanda, genocide survivors, led by IBUKA and other associations, were convinced “that the government has a political approach to the prosecution of genocide crimes that works against the interests of justice.” The fear that the idea of revitalizing gacaca was an attempt to disguise mass releases of genocide suspects was widespread. As one survivor observes, “Gacaca is essentially an exercise in political opportunism: it will not help the survivors see that justice is done.” Another survivor

46 Ryan, Jr. (fn. 43); Ryan Interview (fn. 42).

47 Gahima Interview (fn. 36). It is noteworthy that Gahima remained skeptical regarding the revitalization of GACACA, at least in the early years. “My personal view has changed. Karugarama [the Acting President of the Supreme Court and Chairman of the Law Reform Commission] was one of those who was supportive of the concept of GACACA from the beginning. I was on the other extreme, among people who were slightly pessimistic. I was not very keen on GACACA to begin with. My own option would have been to determine the number of people that ordinary courts could try and grant an amnesty for the rest. … [But] [y]ou cannot deal with the genocide outside a consensus that you are able to build in society. What we do is what is politically possible. In 1995, and now, an amnesty, for example, is out of the question. Because you would never be able to create the consensus necessary.” Ibid.

48 African Rights, Confessing to Genocide: Responses to Rwanda’s Genocide Law (Kigali: African Rights, 2000), 130. The interview responses sampled in this section were elicited in the late 1990s. No information is available for the early stages of invention. This notwithstanding, the responses are indicative of earlier attitudes. See below for an analysis of survey data.

49 African Rights, Confessing to Genocide, 131.
shared this perspective: “Not one survivor accepts gacaca. I don’t see why we need to use it. Isn’t the Rwandese legal system capable of dealing with these cases? It should be given all the necessary resources and personnel. Unfortunately, the government lacks the political will. It wants to win over the génocidaires and their families. The survivors don’t count as far as the government is concerned.”  

Few survivors had faith in the planned people’s courts: “Gacaca will never, in a million years, bring us justice in a case of genocide. Gacaca will not work and that is why there should be no categorisation, nor confession and guilty please under the old system. Everyone must admit complete responsibility for their [sic] actions. Gacaca must come later. Once a prisoner has served his sentence, he will go home and be reintegrated in society. Then, if any problems arise between survivors and released prisoners, gacaca could be used to facilitate an agreement and to establish individual responsibility. That would promote social cohesion. Gacaca should deal with minor problems after justice has been done in the courts. The government should punish the guilty instead of preaching about reconciliation.”

Revitalizing traditional justice for the purpose of transitional justice was also deemed risky by national experts who carried out a feasibility study under the auspices of the Office of the High Commissioner for Human Rights in 1996. While the group of

50 African Rights, Confessing to Genocide African Rights, 131.

51 African Rights, Confessing to Genocide, 132.
experts conceded that elements of *gacaca* might be useful to facilitate reconciliation in Rwanda, it found the institution not competent to hear crimes against humanity.\(^{52}\)

The idea for *gacaca* jurisdictions was born during the deliberation stage. Yet institutions, as Kenneth Shepsle and Mark Bonchek remind us, “are rarely born whole in the first instance and they rarely stay undisturbed over long stretches of time.”\(^{53}\)

**MODERNIZATION**

The modernization stage took account of the concerns raised during the deliberation of *gacaca*. It involved the formalization of the informal. A series of norm entrepreneurs promoted an overhaul of existing *gacaca* norms. From the logic of consequences, a norm entrepreneur “offers new norms because he anticipates that over time he will receive a flow of benefits that will outweigh (in present-value terms) the various costs he will incur while acting in that role.”\(^{54}\) From the perspective of the logic of appropriateness, a norm


entrepreneur offers new norms in response to “salient symbols that resemble the attitude objects to which similar emotional responses were conditioned earlier in life.”

Norm Entrepreneurs

An influential norm entrepreneur during the invention of gacaca jurisdictions was Tito Rutaremara, the former President of the Legal and Constitutional Commission of Rwanda. He was instrumental in the early stages of invention. “We [in the RPF] were all taking initiatives. I took initiative with gacaca. [...] The President of the RPF asked me to study the problem [of coming to terms with the genocide]. Rutaremara set the stage for a discourse about the revitalization of gacaca. His advanced age and experience in exile predisposed him to the task. Rutaremara, who had lived in refugee camps throughout the region before becoming a “Parisian Left Bank intellectual” and later the “resident philosopher” of the RPF, served as the senior RPF representative on a UN-sponsored study feasibility study of gacaca in Rwanda.

The memory of exile, on the part of Rutaremara and others, was of great significance during the modernization stage. The memory of informal justice dispensed in the refugee camps in Tanzania, Zaire, and Uganda left a lasting impression on leading


56 Interview with Tito Rutaremara, President of the Legal and Constitutional Commission of Rwanda, Kigali: July 8, 2002.

57 Rutaremara Interview, President of the Legal and Constitutional Commission of Rwanda, Kigali: July 8, 2002. The direct quotations are from Prunier, The Rwandan Crisis, 116.
cadres in the RPF.\textsuperscript{58} It is suggestive of the logic of appropriateness. As Michael Schudson writes in his study of \textit{Watergate in American Memory}, people do “are not invariably seeking to legitimize their present interests” by invoking the past. At times, they “seek some kind of direction when they are aimless. They seek in the past some kind of anchor when they are adrift. They seek a source of inspiration when they despair.”\textsuperscript{59} Many of the architects of the \textit{gacaca} jurisdictions experienced the trauma of exile firsthand. “I became a refugee when I was 3 ½ years old,” remembers President Paul Kagame.\textsuperscript{60} “I grew up in Uganda. I was a refugee in Uganda for over 33 years, staying in a refugee camp.”\textsuperscript{61} Gerald Gahima, Rwanda’s former Prosecutor General and Deputy Minister of Justice, has a similar biography. His father, like many others, became a victim of the Hutu Revolution of the 1959: “I had gone with my mother and our other children to my mother’s home, so, when they came to kill us, we were not at home. He died, I survived. So, we went into exile, we lived in exile for thirty years.”\textsuperscript{62} The memory of exile made influential cadres within the RPF receptive to a cultural turn. For traditionalists like Rutaremara, the experience of exile functioned as a “cultural program that orients our intentions, sets our

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\textsuperscript{58} Rutaremara Interview.


\textsuperscript{60} Interview with Paul Kagame, President of the Republic of Rwanda, Kigali: July 16, 2002

\textsuperscript{61} Kagame Interview. On Kagame’s formative years in Uganda, see also Prunier, \textit{The Rwandan Crisis}; and Mamdani, \textit{When Victims Become Killers}, Chapter 6.

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moods, and enables us to act.” 63 It is indicative of the operation of the logic of appropriateness. In the following, however, Rutaremara offers an argument form the logic of consequences. In this perspective, the limits of the chambres spécialisées made it necessaries to redraw the boundaries of law. Rutaremara presents the restoration of gacaca as a final solution to the legacies of the genocide:

Rwanda is a poor country. The human rights in our prisons are nothing to brag about. The prisoners are suffering, but what is the alternative? We cannot let them out, but we cannot really keep them in now either. To follow the western trial process would take far too long time and therefore be a violation of the human rights itself. We had to do something. 64

The UN Special Representative of the Commission on Human Rights applauded “the boldness of the gacaca proposal. Time and time again he was told that ‘justice as it is practiced in the West is not working. We need to find a major alternative’. At the same time, he would point out, as many others have done, that the gacaca plan is a major gamble. Furthermore, any Western country of Rwanda’s size faced with a caseload of these proportions would have enormous problems as well. If successful, gacaca could break the deadlock. Equally, it could create an entirely new set of problems [...]” 65


64 As quoted in The Norwegian Helsinki Committee, Prosecuting Genocide in Rwanda, 17.

A norm entrepreneur who was of marginal importance during the early years of invention, but essential to the legalization and sensitization of the *gacaca* jurisdictions was Jean de Dieu Mucyo. De Dieu Mucyo succeeded Faustin Nteziryayo, a Hutu, at the helm of the Ministry of Justice and Institutional Relations (MINIJUST) in February 1999. The UN Special Representative has credited de Dieu Mucyo as having “spearheaded the campaign [to establish *gacaca* jurisdictions] throughout the country.” In a subsequent report, the Special Representative noted that the proposal to establish *gacaca* jurisdictions “has gone from being an idea to a government policy” since de Dieu Mucyo’s appointment. Another set of norm entrepreneurs mattered in the invention of *gacaca* jurisdictions: opinion leaders. Opinion leaders “play a pivotal role in determining whether change agents succeed in triggering a cascade toward a new norm.” Opinion leaders were primarily drawn from the realm of politics. They included President Paul Kagame and other national elites, as well as representatives from lower levels of

66 On the sensitization stage, see my OMITTED REFERENCE.

67 Interview with Jean de Dieu Mucyo, Minister of Justice and Institutional Relations of the Republic of Rwanda, Kigali: July 9, 2002.


government. Also of importance were religious leaders. In some parts of the country, religious leaders successfully encouraged detainees to confess to their crimes under the confession and guilty plea procedures of Organic Law No. 08/1996 which was later incorporated into Organic Law No. 40/2000.\footnote{Loi organique No. 40/2000 du 26/01/2001 portant création des “Juridictions Gacaca” et organisation des poursuites des infractions constitutives du crime de génocide ou de crimes contre l’humanité, commises entre le 1er octobre 1990 et le 31 décembre 1994.} This set in motion a self-reinforcing norm cascade in the countryside. During the presentation of detainees to communities as part of *entraide judiciaire,*

groups of religious detainees (mostly members of one of the many protestant sects) who claim to have confessed for religious reasons, try to seduce the audience to do the same. They dance with bibles in their hands and sing about God and Heaven, but also about the necessity to speak the truth and to rebuild the country. In public they tell about the crimes they have committed and they ask the population for forgiveness. They are called the “groupes de choc”, because they also give recalcitrant detainees who are presented [to their communities as part of *entraide judiciaire*], but not liberated, an “injection”, a pep talk to confess. Although a personal initiative of the quite impressive prosecutor, the Government seems to accept this innovation, which is remarkable, given the often-difficult [sic] relationship between the quite secular state and the various religious denominations.\footnote{Klaas de Jonge, *2nd Interim Report on Gacaca Research and its Preparations (August-September 2001)* (Kigali: Penal Reform International, 2001), 6. By mid-2001, an estimated 20,000 detainees had confessed to crimes committed in the course of the 1994 genocide. Ibid., 26, fn. 13. For the most comprehensive analysis of confessions to genocide, see African Rights, *Confessing to Genocide: Responses to Rwanda’s Genocide Law* (Kigali: African Rights, 2000).}

The Union Mission of Seventh-day Adventists played a substantial role in keeping the norm cascade in motion, underwriting—intentionally or not—one core institution of the new *gacaca* jurisdictions. The Adventists even constructed a mobile baptistry to
spread evangelism in the country’s prisons. I shall return to the contribution of opinion leaders during the analysis of the sensitization stage.

Modernization was an important stage for the invention of gacaca jurisdictions. It led to the elaboration of a prototype. The organizational and logistical dimensions of the proposed jurisdictions were sketched. The task of was to “adapt and modify it [the ideal typical conception of earlier incarnations of gacaca] a bit, and make it meet some of the requirements of […] [a] fair trial.” Tradition had to be modernized if the institution of gacaca was to be used for the purpose of transitional justice. As one of the participants in the invention process recalls, “Gacaca is what we have borrowed from our past. It is the concept of getting the community to participate in justice, in getting the community be involved in dispensing justice to some of the problems [that grew out of the genocide]. But gacaca has never dealt with issues of criminal justice, with crimes of such gravity. So it is a concept, an inspiration we borrowed. We are not replicating gacaca as it has existed in the past.”

“Saturday Meetings”

Over the course of eleven months, agents of invention in the government and RPF reached a consensus about relying on gacaca in their “search for speed and


74 Interview with Tharcisse Karugarama, Acting President of the Supreme Court of the Republic of Rwanda and President of the Supreme Court’s Department of Courts and Tribunals as well as President of the Law Reform Commission, Kigali: June 20, 2002.

75 Gahima Interview.
reconciliation.”76 The legal imagination was at work at the intersection of past and present. The modern jurisdictions began to take shape. “Gacaca in its current form was borne out of meetings that the former President Mr. Bizimungu held at his office from May 1998 to March 1999.”77 The meetings involved a series of agents from various walks of life: “these would be lawyers, these would be teachers, these would be religious people, these would be traders, these would be villagers. Every aspect of our people was represented in these consultative meetings.”78 Five themes were discussed at these meetings: unity, democracy, justice, economy, and security. Altogether 164 Rwandans attended the consultative meetings, which became known as the “Saturday Meetings.”

“Three Different Sorts of Gacaca”

Tharcisse Karugarama, the Acting President of the Supreme Court of Rwanda, was a regular participant in the “Saturday Meetings.” Justice Karugarama, who also heads the Supreme Court’s Department of Courts and Tribunals and serves as the President of Rwanda’s Law Reform Commission (a commission distinct from the Legal and Constitutional Commission which was responsible for drafting the final constitution),


78 Karugarama Interview.
recalls that the modernization of gacaca involved a panoply of options: “I know of some three different sorts of gacaca that were considered.”

“Mixed Canton Courts.” One alternative was “to use the existing system, the judiciary as it existed.” The proposal was organized around a judicial two-step. In a first step, the proposal recommended to augment the benches of the country’s 153 canton courts—located below the courts of first instance (such as the union spécialisées discussed above) in Rwanda’s judicial hierarchy—with an unspecified number of lay judges so that “you could have some villagers mixing with the traditional judges” and “turn them into a court.” The idea was simple: “You don’t make a distinction between the professional and the non-professional […] [T]he judge is there because he is going to guide them [the lay judges] on the law. So the whole idea was to give competence to all these lowest courts, the competence to try genocide [cases] which is usually the primary responsibility of the courts of first instance.” However, unlike the jury system in the United States, the proposal of “mixed” canton courts foresaw a fusion of “the jury with the judge so that they become one and you collectively make a decision.”

79 Karugarama Interview.

80 Karugarama Interview.


82 Karugarama Interview.

83 Karugarama Interview. For a history and defense of the American jury, see Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy (Cambridge: Harvard University Press, 2000).
The second step of the proposal involved a system upgrade. “You know we had twelve courts of first instance and four courts of appeal, but we had 153 canton courts. So the idea was that if you [take] these canton courts, let them also try genocide, and then these twelve, you make them courts of appeal for genocide, and then the courts of appeal, you make them the Supreme Court. So the whole idea was that you have four supreme courts, twelve appeal courts, and then 153 ‘traditional courts,’ but traditional courts that already exist.” The proposed system had many merits, especially in terms of the system’s administration needs: “the structures were there, the judges were there, the people were there, all the structures were in place.” These benefits notwithstanding, the idea “did not work.”

“Mixed Cell Courts.” A second alternative shared important features with the first proposal. The overarching idea was once again “a mixture of the civil and the magistrates.” But instead of using and transforming the administration of existing canton courts, the second alternative involved adding a bottom layer to Rwanda’s judicial hierarchy. According to this proposal, a new, permanent layer of ordinary courts would be established in the countryside. The discussions of this alternative, however, quickly stalled. The precise shape of the proposed “mixed” village courts remained

84 Karugarama Interview.
85 Karugarama Interview.
86 Karugarama Interview.
87 Karugarama Interview.
unspecified. The existing evidence suggests that the objective was to “have something very close to the European jury system.”

European juries differ from juries in the United States. European judicial systems no longer rely on juries in the conventional sense. Rather they have incorporated lay judges into lower level courts. The German Schöffengericht is an example of this judicial practice. It hears minor cases at the two bottom levels of the judicial system (Amtsgericht and Landgericht) and involves combinations of one to three professional judges and two lay judges. The now defunct Geschworenengericht in Germany, formerly comprised of twelve lay judges and three professional judges, was closer to the American institution of the jury. The proposal to create a judicial institution akin to the Schöffengerichte at the level of the cell (the lowest unit in the administrative structure of modern Rwanda) in the Rwandan countryside received little support among participants at the Saturday Talks: “they didn’t want to have the court there. They thought the courts would use lawyers, would cause complications, and would delay the process.” Presumably, the country’s dire shortage of professional judges contributed to the decision not to pursue the proposal of mixed courts at the cell level. This notwithstanding, the idea of “scaling down” was prominent in the negotiations over the third alternative.

88 Karugarama Interview.

89 For a discussion, see Claus Roxin, Strafverfahrensrecht, Twenty-Fifth Edition (Munich: C. H. Beck, 1998), 26-33; idem., Strafprozeßrecht, Fifteenth Edition (Munich: C.H. Beck, 1997), 165-182. The comparison with the judicial system in Germany is fitting, for the Belgian colonial administration retained many of the legal norms and institutions put in place by the German colonial authorities.

90 Karugarama Interview.
The Prototype. The third alternative became the prototype for the gacaca jurisdictions. This proposal dispensed with the idea of relying on professional judges. However, it retained the idea of establishing courts in the countryside and at the level of the cell. The third proposal apparently originated with Justice Karugarama who functioned as an important norm entrepreneur. The “godfather of GACACA, who came up with the first proposal, is Judge Karugarama.”91 He “came up with the first proposal and drafted it for review and comment.”92 This proposal “was given to a committee of all parties.”93 The proposal served as the blueprint during the legalization stage.

LEGALIZATION

Eric Hobsbawm once remarked that sooner or later “a point will be reached when the past can no longer be literally reproduced or even restored. At this point the past becomes so remote from actual or even remembered reality that it may finally turn into little more than a language for defining certain not necessarily conservative aspirations of today in historical terms.”94 In the case of the gacaca jurisdictions, this point was reached during the legalization stage. The legalized version of gacaca differs in key respects from the gacaca prototype. This section reconstructs the transition from prototype to law. In the invention of gacaca jurisdictions, the legalization stage was primarily responsible for

91 Interview with Maggie Bayigana, USAID, Legal Adviser to the Minister of Justice of the Republic of Rwanda, Kigali, June 17, 2002.

92 Bayigana Interview.

93 Rutaremara Interview.

affecting the development and demarcation of “roles” (specialization) and the development and demarcation of “tasks” (differentiation). It was about the supply of law.

The Supply of Law

Legalization typically involves two processes: rationalization and codification. An inevitable (and usually desired) byproduct of legalization is state centralization. As Martin Shapiro writes, “a major function of courts in many societies is to assist in holding the countryside by providing not only an extraterritorial court to adjust relations among the occupying cadres according to their own rules but also a uniform body of national law designed to cement the alliance between conquerors and local notables and further their joint interests.”95 A similar dynamic attended the legalization of the gacaca jurisdictions. In the course of the process the concerns of lawyers began to compete with the voices of intellectuals in the discussions over the precise form—and function—of the courts.96 Norm entrepreneurs like Rutaremara embraced the idea of gacaca as a form of restorative justice.97 Most of the lawyers like de Dieu Mucyo instead modeled the idea of

95 Martin Shapiro, “Courts,” in Fred I. Greenstein and Nelson W. Polsby, eds., Handbook of Political Science, Volume 5: Governmental Institutions and Processes (Reading: Addison-Wesley, 1975), 337.
96 Rutaremara Interview.
gacaca in the image of retributive justice. Arguments based on the logic of appropriateness clashed with arguments based on the logic of consequences.

Law and Custom. Codification is the result of rationalization. Max Weber believed that “[s]ystematic codification of the law can be the product of a conscious and universal reorientation of legal life, such as becomes necessary as a result of external political innovations, or of a compromise between status groups, or classes aiming at the internal social unification of the political body, or it may result from a combination of both these circumstances.” 98 Weber observed that codification has “always been near at hand in cases of creation of a new political entity.” 99 The case of Rwanda bears out this observation. The codification of gacaca turned what once was custom into law.

In order to appreciate this stage in the invention process, it is important to first distinguish law from custom. Paul Bohannan has proposed the following conceptual distinction: “A norm is a rule, more or less overt, which expresses ‘ought’ aspects of relationships between human beings. Custom is a body of such norms—including regular divisions and compromises with norms—that is actually followed in practice

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99 Weber, Economy and Society, 851.
much of the time.”

It might be objected that the aforementioned description not only captures the essence of custom, but of law as well. Bohannan, perhaps anticipating this criticism, draws a sharper line between law and custom: “Just as custom includes norms, but is both greater and more precise than norms, so law includes custom, but is both greater and more precise.” Bohannan emphasized what he termed the “double institutionalization” during which “some of the customs of the institutions of society are restated in such a way that they can be ‘applied’ by an institution designed (or, at very least, utilized) specifically for that purpose.” In other words, law—in contrast to custom—must be “justiciable.” What does this mean for the invention of gacaca jurisdictions? In the codification phase, the architects of modern gacaca drafted norms and institutions that would make Organic Law No. 08/1996 justiciable in the countryside.

**Commissioning the Law**

The consultative meetings in the Office of the President led to the creation of a commission responsible for the production of draft legislation on gacaca jurisdictions. On

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October 17, 1998, after agreeing on a prototype in which “the people participate based on [the] gacaca heritage, and [after] giving basic ideas about that new gacaca’s structures, the reflection meeting set up a Commission and entrusted it with finalizing all problems” regarding the implementation of the prototype.¹⁰⁴ This so-called Gacaca Commission “adopted to call the new Gacaca organs GACACA Jurisdictions, which means that the new Gacaca is based on the Rwandese heritage from the former Gacaca, and that the new Gacaca has the competence of classical courts which are based on written laws, and have even the advantage of holding the competence of acting as OPJs [Officier de police judiciaire].”¹⁰⁵

The Commission was charged with finalizing the functioning of the new gacaca jurisdictions. It initially comprised thirteen, later fifteen, members and was chaired by former Minister of Justice, Faustin Nteziryayo. Jean de Dieu Mucyo, upon becoming Minister of Justice, replaced Nteziryayo as the chairman of the Gacaca Commission. Aloysie Cyanzayire, the current President of the Supreme Court’s Department of Gacaca Jurisdictions, also joined the Commission during this reshuffle. The other members were drawn from parliament and the higher echelons of the Ministry of Justice. The Commission was at the helm of what was termed “Le projet sur la loi gacaca.”¹⁰⁶

¹⁰⁴ Republic of Rwanda, Report on the Reflection Meetings Held in the Office of the President of the Republic of Rwanda from May 1998 to March 1999, Detailed Document (Kigali: Office of the President, August 1999), 66. For a list of the specific duties of this Commission, see ibid., 66-68.


¹⁰⁶ De Dieu Mucyo Interview.
Justice Karugarama recalls that “over time the consensus was that we can try this experiment using the cell level as the first unit of the gacaca trial.” This consensus was reached after deliberating a report submitted by the so-called Gacaca Commission on June 8, 1999. “After long discussions about that report, the Meeting adopted that there be new GACACA Jurisdictions at the Cell’s, the Sector’s, the Commune’s and the Prefecture’s level.” Draft legislation was released in June 1999, and a revised version of the draft law circulated in January 2000.

Formalizing the Informal. Law is never a mere reflection of custom. It is always out of step with society due to its forward-looking nature. Two solutions to this dilemma of law exist: “Custom must either grow to fit the law or it must actively reject it; law must either grow to fit the custom, or it must ignore or suppress it.” Tito Rutaremara believes that the interim government chose the latter solution as far as the gacaca jurisdictions were concerned. Albert Basomingera oversaw the invention of the gacaca jurisdictions at MINIJUST. He observed that “la gacaca n’est pas forcément la solution idéale, mais elle peut offrir une voie de sortie de la situation actuelle. Les crimes pour

107 Karugarama Interview.

108 Republique Rwandaise, Juridictions Gacaca dans les procès de génocide et des massacres qui ont eu lieu au Rwanda du 1er octobre 1999 au 31 décembre 1994 (Kigali: June 8, 1999).


111 Bohannan, “The Differing Realms of Law,” 49.

112 Rutaremara Interview.
lesquels les suspects sont poursuivis ont été commis le plus souvent en plein jour, au vu et au su de tous. Nous disons donc: pourquoi ne pas faire contribuer la population au processus judiciaire, particulièrement en fournissant des preuves.”

In the transition from custom to law, politics functions as an intervening variable. As Eric Posner writes, “The politicization of behavior occurs with the creation of a law that requires people to engage in some behavior in which previously they had engaged voluntarily.” Even though the modernization stage had produced a consensus “that we can try this experiment using the cell levels as the first unit of the gacaca trials,” according to Justice Karugarama, “some people thought that going to this lower level would create too many courts and [that] there were not enough people to supervise them.” In this context, another problem arose. Some of the architects of the gacaca jurisdictions realized that “politicization destroys important social meanings by legally compelling behavior that derives its meaning in part from the fact that it is not required by law.” Early and pivotal norm entrepreneurs like Tito Rutaremara, the Chairman of the Constitutional and Legal Reform Commission, who had propagated the idea of revitalizing the custom of gacaca had misgivings about the process of legalization: “I was against making it the way it is. [...] It used to be informal. It is the idea of it being a


115 Karugarama Interview.

tribunal [that is problematic]. They call it a tribunal. We are no longer talking. We write.”

In the remainder of this section, I map the legalization of *gacaca* jurisdictions along a continuum. I take *centralism* and *traditionalism* to represent the extreme positions at the ends of this continuum. On the basis of the proposals for “three sorts of *gacaca*” discussed above, a cleavage became detectable within the core group of participants during the “Saturday Meetings.” Participants who during the consultations located themselves near the “centralist” end of the continuum apparently included Gahima, the Prosecutor General, and de Dieu Mucyo, the Minister of Justice. More seasoned participants like Rutaremara, the President of the Legal and Constitutional Commission, by contrast, have defended distinctively traditionalist positions in the deliberations over the revitalization of people’s courts. Justice Karugarama situated himself between the extremes all the while displaying a strong appreciation for the folkways of the past. The preferences of these norm entrepreneurs appear to reflect the division between the logic of consequences on the one hand and the logic of appropriateness on the other. It is telling that the *Gacaca* Commission was constituted by a younger generation of lawyers, including Gahima, de Dieu Mucyo, and Cyanzayire. While the traditionalists largely

117 Rutaremara Interview.

118 What is herein referred to as “modern *gacaca*” or “*gacaca* jurisdictions” was discussed under the label “new *gacaca*” during the presidential meetings. See Republic of Rwanda, *Report on the Reflection Meetings Held in the Office of the President of the Republic of Rwanda from May 1998 to March 1999*, 61-78.

119 Rutaremara Interview; Interview with Tito Rutaremara, President of the Legal and Constitutional Commission of Rwanda, Kigali: July 1, 2002.
carried the day during the modernization stage, and remained critical during the
sensitization stage (which is outside the scope of this analysis), the centralists left a strong
imprint on the nature of the people’s courts during the legalization stage. This documents
the rise and decline of different sets of norm entrepreneurs in the process of re-inventing
gacaca. Entrepreneurs committed to the future (modernity) eventually won out over
entrepreneurs committed to the past (tradition).

CONCLUSION

This article has reconstructed the evolution of gacaca jurisdictions in post-genocide
Rwanda. The recently created jurisdictions are not in any sense restorations or even
revivals of an earlier institution. Agents involved in the invention of the jurisdictions
have conceded that the institutional past is being interpreted loosely in the present.120
The foregoing analysis has demonstrated that the gacaca jurisdictions are innovations
using or purporting to use elements of a historic past, real or imaginary.121

During the three stages of invention analyzed in this article, an intellectual
standoff ensued between centralists and traditionalists. It is impossible to determine in
retrospect with any precision the membership of each camp, or the exact fault lines
dividing these camps. This has to do with the concept of the political in Rwanda and the
historical fact that politics—and society—have never been very transparent in Rwanda,

120 Kagame Interview; Rutaremara Interview.

55 (May 1972), 9.
or in any of the neighboring countries. As Jan Vansina, the eminent historian of the Great Lakes, notes,

the actual core evidence [pertaining to the 1994 genocide and its aftermath] is not available. Most practical documents—those that contemplate or order actions to be taken, and those that report on actions taken and evaluate them—are not accessible. Such sources from central governments or comparable agencies, including internal discussions, policy decisions, official instructions, internal military and civilian documents, intelligence reports, and records of diplomatic activity, all remain secret.¹²²

The same is true for the invention of the *gacaca* jurisdictions. Much of the internal debate within the (then) interim government remains shielded from view. Officials are extremely wary of being associated with the invented tradition. Fears of victimhood loom large in the minds of many. “Just as many Hutu fear the current RPF-dominated government, so, too, do many Tutsi fear that they may face retribution from Hutu in the future.”¹²³ Anyone associated with the *gacaca* jurisdictions—and anyone who reveals an association—could become the target of reprisal attacks in the future—initiated by friends and foes alike. A number of respondents interviewed for this study believed that such attacks are likely should the *gacaca* experiment unravel, or the distribution of power in the landlocked country alter radically in the future. Respondents present at the creation of the *gacaca* jurisdictions, who were interviewed for this study, were frequently reluctant to admit an association with the *gacaca* jurisdictions, and to reveal dynamics of


contention during the invention process. Where an association was acknowledged, or agents of invention agreed to talk more openly, it was often difficult to determine agents’ preferences, and the consistency of these preferences over time.

This notwithstanding, the analysis has revealed, for the first time, the dynamics of contention during the foundational moments of one of the most extraordinary solutions to the problem of radical evil yet attempted. It has found shifting involvements of the logic of consequences and the logic of appropriateness during the stages of invention. These data have implications for the study of institutions. To paraphrase Hodgson, the findings detailed here

point to a more open-ended approach to the evolution of institutions, downplaying static comparisons in favor of more processual, algorithmic analyses. In considering an open-ended evolution of both institutions and individual preferences, such arguments are redolent of the “old” institutionalism, although a detailed specification of the mechanisms of “downward causation” was often lacking in that literature.”

In light of the limits of explaining all institutions “from individuals in an original, institution-free ‘state of nature,’” the constructed boundaries between the old and new institutionalism might, at last, be eroding.


125 Hodgson, The Evolution of Institutions,” 123.