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Author: Justin Su-Wan Yang

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'COURTS IN CONFLICT' by *Nicola Palmer*

Book Review

JUSTIN SU-WAN YANG

Courts in Conflict employs meticulous empirical research to analyse why concurrent courts operating with complementary mandates may in practice encounter miscommunications and failed cooperation. It is argued that how legal practitioners within each court understand their institutional objectives shapes how that court perceives and interacts with other courts. Interviews of 182 practitioners and participants are used to uncover a 'thick description' of the concurrent transitional justice mechanisms in post-genocide Rwanda. Palmer finds that underneath the façade of overlapping complementary mandates, the United Nations International Criminal Tribunal has prioritised the development of international legal order, the Rwandan state judiciary has enshrined the strengthening of its domestic legal infrastructure, and the localised *Gacaca* courts have endeavoured to undercover a holistic 'truth' of the genocide. These diverging objectives are partly attributable to how institutions have attempted to self-legitimise their existence, often at the expense of its counterparts. The book concludes by noting that being aware of this phenomenon, and addressing it with inter-institutional dialogue, may ultimately alleviate the culture of institutional competition and inadvertent miscommunication between supposedly complementary courts. This timely contribution to the scholarship is made more relevant by the increasing geo-political trend of employing multi-tiered transitional justice processes in single-country contexts.

Nicola Palmer's *Courts in Conflict*[1] undertakes a multi-dimensional analysis of the three transitional justice institutions operating concurrently in the post-genocide landscape of Rwanda. The analysis is driven by empirical fieldwork, which predominantly consists of 182 interviews of legal practitioners, participants, and local actors placed throughout the UN International Criminal Tribunal for Rwanda (ICTR), the Rwandan state judiciary, and the localised *Gacaca* courts at the community level. It analyses the underlying behaviour and attitude of the courts with each other at points of formal and informal interactions, and studies how the various participants' understanding of the institutions have affected the social practices of the institutions. The perceptions of the judges and lawyers within the courts contribute to the organic internal legal culture of the courts, which shapes how the courts perceive and prioritise their objectives. Although the courts technically share overlapping mandates, and are designed to be complementary to one another, this interpretive analysis explains how each court has selected a particular objective to be guided by. Therefore, the narrowed objectives of the respective courts are often at divergence with each other, as the alignment of the courts is no longer complementary. It is through these objectives that the courts evaluate and interact with the other courts operating simultaneously in the shared social space. This analysis is driven by the employment of Clifford Geertz's 'thick description' of culture.[2] This provides a valuable insight. Unlike previous conceptions of judicial institutions being a fixed and static entity

[1] N. Palmer, *Courts in Conflict* (Oxford University Press 2014).
[2] C. Geertz, 'Thick Description: Toward an Interpretive Theory of Culture' in C. Geertz, *The Interpretation of Cultures: Selected Essays* (Fontana Press 1993).

essentially fulfilling a given mandate, this analysis brings these institutions to life. It demonstrates the importance of the formative role of agency of the judges and lawyers within the institutions, which can shape the practice and perception of the institution. This understanding also exposes the underlying tensions that can exist between complementary institutions, which can lead to a culture of competition between the courts and failures at effective coordination. In addition to improving institutional cooperation and healthy dialogue, the book calls for a deeper contextual awareness of the locality it wishes to serve. The central contribution of *Courts in Conflict* is particularly intriguing as it provides the existing scholarship a fresh interpretive and transferrable perspective to re-evaluate other situations of concurrent judicial institutions, as well as contribute to the designing of future employment of multi-tiered justice processes.

The book provides the underlying ethnographic foundations of Rwanda, specifically focusing on the particular historic role of the centralised state and the political use of ethnicity as the basis of power. It analyses historical developments leading up to 1994 to demonstrate that the divisive tensions framing the genocide had long been set in place. It also serves perhaps as a reminder to the reader that the shifting power imbalance along ethnic Hutu and Tutsi lines has since been legally abolished, yet still persists as a relevant issue in the country. The Tutsi-dominated Rwandan Patriotic Front (RPF) has been in power since the genocide, and has since been moving towards an authoritarian rule, rather than democratic governance as presupposed by transitional justice models.

Within this landscape, the book turns to a detailed analysis of the ICTR, the Rwandan state judiciary, and the local *Gacaca* courts respectively. It is important to keep sight of the fact that these complementary courts are addressing the same conflict in the same locality. How the legal practitioners within each institution have understood what their court is trying to achieve, however, both reflects and constitutes the internal legal culture of that institution, which explains how it interacts with the other courts. In undertaking a multi-tiered analysis of the international, national, and the local level justice mechanisms, Palmer adds another dimension of the internal and the external for each of the institutions. Internally, the formative role of the agency of judges and lawyers affects how the institutions view its work and objective. Through factors such as practical constraints of the operation of the courts, objectives are significantly narrowed from the initial mandate of the courts. Although it is unclear exactly how this selection process takes place, the end result is logical and rational, consistent with the underlying foundations and historical background of the institution. Externally, this newly narrowed objective is then used as a central standard to evaluate the compatibility and cooperativeness of the other supposedly complementary institutions. In other words, a court can only perceive other courts through its own understanding and objective priorities, which may lead to inadvertent friction points and disputes as these new objectives are, in fact, not complementary. This institutional phenomenon of narrowing down and prioritising the objectives is present in throughout the three courts, and poses an interesting inquiry for future scholarship. It perhaps exposes the divergence of expressive ambitions of international criminal law from the realistic limitations encountered in practice.

Based on her fieldwork, Palmer finds that the legal culture of the ICTR has predominantly enshrined the objective of building and contributing to an international legal order. This prioritisation has allowed for that court to circumvent the domestic entanglements of the Rwanda judiciary, and distance itself from the localised and quasi-legal community

justice processes of the *Gacaca* courts. It has also led to the institutional assumption that the two other courts in Rwanda have shared the same objectives as the ICTR. This miscommunication has resulted in practical points of friction, as discussed below in the Rule 11 *bis* provisions. The Rwandan state judiciary prioritised the importance of its domestic sphere, with specific emphasis on improving the standards of its legal practitioners. Through this lens, the Rwandan state judiciary understood the existence of the ICTR to ultimately serve its domestic goals, which was at odds with ICTR's sole focus on the international legal order. Although this inter-institutional miscommunication does not result from written law or formal design, *Courts in Conflict* demonstrates that it can have significant impact on the operation and co-existence of concurrent institutions, as well as their collective capability to serve the local population affected by the crime. In the case of *Gacaca* proceedings, the overwhelming objective was on ascertaining and delivering the 'truth' of what had occurred during the genocide to the community, both at a macro-level at the centralised National Service of Gacaca Jurisdictions and at the micro level of the individual *Gacaca* courts. Therefore, it gauged the existence and performance of the concurrent ICTR and the state judiciary on these qualifications. It was axiomatically unsurprising that the *Gacaca* courts disapproved of the ICTR taking senior leaders out of the community to be adjudicated abroad, which deprived accountability for the local populace, and exercising selectivity in participation at proceedings, which ran contrary to *Gacaca* proceedings where anyone could participate.

To illustrate the practical ramifications of these internal legal cultures inadvertently leading to conflicts with one another, Palmer utilises the examples of the Rule 11 *bis* of the ICTR Rules of Procedure and Evidence (RPE) and *Brown et al.* v *Rwanda*.[3] Rule 11 *bis* facilitates the referral of an indictment of an individual from the ICTR to a competent national jurisdiction. The Rwandan judiciary, eager to demonstrate its competence and legitimacy domestically and internationally, submitted the referral requests to adjudicate the high-ranking senior officials in Rwanda. Given its fixation on developing international jurisprudence and legal order, however, the ICTR refused the Rwandan requests on the grounds that the Rwandan legal system had not yet reached acceptable international standards. Subsequent changes in Rwandan legislation, including the introduction of *lex specialis* provisions applicable solely for potential ICTR transfers, abolished the death penalty, strengthened provisions for fair trial standards, and ceased questionable practises such as 'life imprisonment with special provisions', to become consistent with ICTR's objective of international legal standards. This example identifies the institutions being guided by clearly different objectives, although within the overlapping and complementary ambit of post-genocide justice. The Rwandan judiciary had to make alterations to adopt the ICTR objectives to become eligible for the transfers. In *Brown et al.*, Rwanda sought the extradition of four men who had claimed asylum in the UK after the genocide. In the appeal, the High Court denied the Rwandan request on the grounds that "if the accused were extradited face trial in the High Court of Rwanda, the appellants would suffer a real risk of a flagrant denial of justice…"[4] What is of central importance in this anecdote is that two of the accused in the extradition request, Celestin Ugirashebuja and Emmanuel Nteziryayo, had previously been adjudicated *in abstentia* by the *Gacaca* courts in their respective communities. Furthermore, in the case of Celestin Ugirashebuja, he was acquitted of all charges

[3] *Vincent Brown aka Vincent Bajinja, Charles Munyaneza, Emmanuel Nteziryayo and Celestin Ugirashebuja* v *The Government of Rwanda and The Secretary of State for the Home Department* [2009] EWHC 770
[4] *Ibid*., 66

by the *Gacaca* courts. However, the Rwandan judiciary in this instance chose to ignore the significance of *ne bid in idem* maxim, and nullified the *Gacaca* findings. The *Gacaca* courts had focused on the impartial determination of truth and upheld the acquittal, whereas the state courts had opted for extradition to bolster its international legitimacy and domestic political considerations.

In addition to the insights afforded from these points of formal interactions between the courts, Palmer compiles the viewpoints of participants that have been processed by two or more of the post-genocide courts to provide a bottom-up perspective of the institutions. It is repeatedly found that the courts are innately compared and contrasted against one another, which has ultimately damaged the entire project of transitional justice as a whole in Rwandan society. David Beetham's theory of legitimisation is employed to analyse how the three courts have attempted to legitimise their own practices, and in the process inadvertently challenged that of the others.[5] Palmer concludes that plurality in transitional justice can be accommodated if there is better communication between the institutions to prevent the culture of competition and misunderstandings, and a deeper awareness and contextual understanding of the belief and interest of the people it is designed to serve.

Courts in Conflict demonstrates through personal accounts the organic and formative role of agency of legal practitioners and participants in institutions. It uniquely pursues a focus on the interpretation of culture to address the plurality of judicial mechanisms in Rwanda. This approach presents a promising platform for future research. While extensive scholarship exists on the respective courts, and on the cultural context of the genocide generally, Palmer's analysis specifically identifies the underlying currents within institutions, and traces their ramifications on the performance and inter-court interactions. The importance of this research remains relevant beyond the Rwandan context, and is situated to be of guidance for current and future instances of transitional justice institutions operating simultaneously. This is particularly consistent with the increasing trend of employing a multi-tiered approach to single-country contexts. In bringing to light what moves the institutions, it is hoped that future situations of misunderstandings and failures in effective cooperation can be avoided, and concurrent institutions can work together to bring coherent justice to the local society in need of justice.

[5] D. Beetham, *The Legitimation of Power* (MacMillan 1991)