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KONRAD ADENAUER STIFTUNG LIBRAIRIE D'ETUDES JURIDIQUES AFRICAINES

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AVANT-PROPOS

The Burundian Constitution of 18th March 2005 as well as the Arusha Agreement for Peace and Reconciliation of 28th August 2000 is the basis for the establishment of “an independent, sovereign, democratic and unitary republic in Burundi which recognises and respects her ethnic and religious diversity” (article.1). The Constitution states that “all Burundians are equal in merit and dignity (article 3), “that the government is built on the will of the Burundian people and shall respect their freedom as well as fundamental rights” (article 15). “The government respects separation of powers, rule of law and principles of good governance as well transparency in conducting public affairs” (article 18 paragraph2).

By referring to the principles and fundamental values of the government as well as on the fundamental rights and obligations of the government to the individual citizen, (article 1 to 74), the constituents want, from the Arusha agreement, to put to an end the root causes of the continuing state of ethnic and political violence in shortest period possible. They equally advocate for the creation of a political order and system of government that is based on democratic values that recognize human rights. This is simply to say a state where rule of law reigns.

Rule of law is said to be present where institutions are established and are functional and the relationship between the governors and the governed is governed by law. This aspect is applicable to all and in particular the governors.

The concept is largely acknowledged in the legal framework of Burundi at all levels of interventions. The values of justice, democracy, good governance, pluralism, respect of freedoms and fundamental rights of the individual as well as tolerance are on the lips of the Burundians. However, there seem to be a gap between what is being proclaimed and the daily experience. There is a disparity between verbatim and reality.

Young Burundian researchers took the initiative to verify, analyze and understand the integration concept of the Rule of law in different spheres of political, social and economic lives of Burundi. In their research work, they benefited from the training by the Dean of the Faculty of Law of the University of Burundi, Professor Stanislas Makoroka and Professor Hartmut Hamann from the Free University of Berlin within the framework of the Rule of Law Program for Sub-Saharan Africa from of the Konrad Adenaur Foundation.

Under the theme “Rule of Law in Burundi”, 5 articles have been selected for publication in this volume seven.

On the question of the consensus approach in the Constitution of the 18th March 2005 and its implications on the Burundian political regime, the author intends to understand the mechanism in some provisions of the said Constitution on the principle of power-sharing and its implementation. The author observes unorthodox implementation of the provisions which seem to perpetuate monolithic exercise of powers.

The article on “Municipal decentralization in Burundi: the Challenges of effectiveness” indicate multiple difficulties of political, social and economic nature in the transfer of power to local authorities. This is said to be another requirement for governance and good functioning of democratic systems.

On judicial matters, two articles, one being dedicated to the independence of the judiciary in Burundi and the other focusing on the place of criminal law in the process of transitional justice in Burundi, deals with crucial issues pertaining to the functioning of the judicial system and perspectives of restoring judicial service that reconciles populations after a major socio-political crises of more than ten years. This is intended to ensure existence of an efficient arm against impunity and re-establishing state’s confidence towards the governed.

Finally, the analysis on the “The State and Social Rights of her citizens; the case of Burundi” the authors note that the level of implementation of the right to health in Burundi remains insufficient despite some measures that bring hope to populations. They also do indicate that poverty in Burundi does not explain everything. They suggest several initiatives to be taken by the State so as to overcome difficulties related to the level of accessibility to social rights.

From the analysis of these young researchers in addition to other research work done in the past, it seems that the rule of law in Burundi has to be rebuilt. This is not surprising for a country that has emerged from a violent conflict and which has only retraced her democratic path in the recent past. But the researchers are interrogating themselves on the chosen democratic path just to make sure that there is no return to the past and that all citizens are protected and do enjoy democratic values along with human rights.

In conclusion, we would like to appreciate and acknowledge the efforts of the entire team for such an impeccable job. Our sincere appreciation and special thanks go to other research teams in the sub-region for their good work during the Butare seminar held between the 2nd and 4th November 2010 that has enriched this publication.

Prof. Dr. Hartmut Hamann

Prof. Dr. Stanislas MAKOROKA

THE INDEPENDENCE OF THE JUDICIARY VIS-À-VIS THE EXECUTIVE

By Aimé-Parfait NIYONKURU*

INTRODUCTION

“At the heart of any system based on the rule of law, there is a strong judicial system, independent and equipped with powers, financial resources, material and skills that are necessary to protect human rights within the framework of administering justice”¹.

Under the rule of law², the judiciary is the custodian of rights and fundamental freedoms of citizens. It is for this reason that the Constitution of the Republic of Burundi emphasizes that the judiciary is the guardian of these rights and freedoms³. In order to carry out this function, the judiciary must be independent.

According to a Non-Governmental Organization - Avocats Sans Frontières (Lawyers without boundaries), this independence can be construed as non-interference externally with the affairs of the court; it is the act of being exempt from all pressure emanating from a higher authority. In this line, the independence is therefore crucial for judges⁴.

Independence would require that judges make decisions with full freedom and without any external pressure or instructions⁵, from the executive power. In this regard, article 29 of the Law N° 1/001 of February 29th 2000 pertaining to the reform of the magistrate statutes⁶ provides that the judge « appreciates, in a sovereign manner, the causes that he called upon to perform and thus makes decision without any influence whatsoever». The independence of judiciary is one of the key pillars⁷ of the rule of law. It is one of the normative fundamental principles of good governance⁸ and one of the pre-requisite conditions for the establishment and maintenance of peace and security⁹.

* Assistan at the University of Burundi

¹ Report of the General Secretary on the Rule of Law and transitional justice for societies that are prone or emerging from conflict (s/2004/616), paragraph. 35).

² Rule of Law is a concept which is to be honoured. According to United Nations Organization, Rule of Law « designates governance principle virtue from which the entire individuals and public entities, including the State herself, have to observe laws that have been publicly promulgated and should be applied in an equal manner to all. The law is equally bound to be administered in an independent manner and should be compatible with international rules and standards in the area of human rights. It involves, among others, proper measures that will ensure respect of the principles of Rule of Law, equality before the Law, responsibility in regard to the law, equity in the application of law, separation of powers, participation in decision making, judicial security, refusal to arbitrary and transparency of the legislative procedures and processes» (cf. Report of the of the General Secretary on the Rule of Law and Transitional Justice in societies that are prone and emerging from conflict (s/2004/616), paragraph.6). traditionally considered as an reserve for those endowed with legal knowledge, the lawyers, the concept has not only left the arid ground of the legal dogmatic (Chevallier, J., *Rule of Law*, Montchrestien, 4th edition, 2003, page.9) but also has attained an international dimension (Voir notably Société Française for International Law, the Rule of Law in Internal Law, deed of the Bruxells colloquim of 5, 6 and 7 june 2008).

³ Article 60 of law N° 1/010 of 18th March 2005 pertaining to the promulgation of the constitution of the Republic of Burundi, B.O.B., n° 3 *ter*/2005.

⁴ Avocats Sans Frontières (Lawyers without boundaries), *Genocide crimes and crimes gainst humanity before the ordinary jurisdiction of Rwanda*, Vade mecum, Kigali et Bruxelles, 2004, p.24.

⁵ Cornu, G., *Legal vocabulary*, PUF, 7e édition, 2005, p.472.

⁶ *Voy. B.O.B.*, N° 2/2000.

⁷ Szeplaki-Nagy, « protection of independance : statutory and material protections », in AHUCAF, *the independence of the justice, decree of the 2nd congres of the association of the high jurisdiction of Appeal for countries sharing the usage of French*, Dakars, Dakar - 7 and 8 November 2007, p.115.

⁸ Arusha agreement for peace and reconciliation in Burundi, protocol II: Democracy and good governance, chapter 1, article.2, point 8.

⁹ Arusha agreement for peace and reconciliation in Burundi, protocol II: Democracy and good governance, chapter 1, article.1, point 6, *lit.d*.

In Burundi, the judiciary is personified and has got no distinction whether it is about judicial judge, administrative judge or constitutional judge. It is worth mentioning that the Burundian judicial organization has no orders of jurisdiction. In the same manner, there is no administrative and judicial order.

Certainly, the administrative courts are considered as specialized and ordinary jurisdictions dealing with civil and criminal matters. However, administrative, civil and criminal cases are dealt with at the Supreme Court of Appeal. It is at the Supreme Court that there is a unit for Burundian jurisdictional organization.

It is however necessary to make an exception of the Constitutional Court which appears as a jurisdictional institution outside the judicial orders which would be the link between the judiciary and the politics¹⁰.

The independence of the judge can be analyzed under some varied aspects : in relation to executive and legislative powers, vis-à-vis the society in general and the criminals in particular, in the hierarchy reports of jurisdiction, vis-à-vis oneself (personal independence) etc. our reflection will be limited to the independence of the Burundian judge vis-à-vis the executive.

If this article is limited to the independence of the judge (bench) vis-à-vis the executive, this is purely for methodological reasons, otherwise the issue pertains, *mutatis mutandis*, to the entire magistracy, the bench and the state prosecutors.

At once, none of them is agreeing on the troubling reality; that of minimizing or controlling executive powers on the judicial affairs¹¹. Lack of effective independence for the judge is one of the causes for the dysfunction of the jurisdictions¹².

We will not deal with the issue of the independence of the Burundian judge vis-à-vis the executive without raising the issue of the separation of powers between the judicial system and the executive.

The two main fundamental characteristic principles of the rule of law: separation of powers and the independence of the judiciary are proclaimed in the Burundian Constitution¹³ and in other legal instruments¹⁴. But like it was said by Charles de Gaulle, what is written, was on the parchment and it is only worth once put into application¹⁵. This is the reason why it is necessary to analyze the status of independence of the Burundian judiciary vis-à-vis the executive and equally to envisage the perspectives with the view of reducing, at the

¹⁰ Voy. Nzeyimana, L, «Appeal and new law on supreme court», New revue of law in Burundi, February/March edition 2006, printing MAIMO S.A, 98) on itself will be difficult to be considered as an order.

¹¹ Report of the evaluation mission concerning the creation of an international committee on judicial investigation for Burundi (Rapport Kalomoh), S/2005/158, para.47, OAG, Post-transition government, one year power : fragile advancements and authoritative attempts, August 2006, pp.14 et 48, Stef Vandeginste, *Power and law in Burundi: legal comment on the law of 5 June 2008 of the constitutional Court in the case of RCCB 213*, Anvers, le 17 juin 2008, p.18, LDGL, Magistracy in Burundi, December 2003 (see <http://www.grandslacs.net/doc/3578.pdf>: Consulted the 16 August 2010), RCN Justice and Democracy, tribunal verse the ground, *the problems of executing judgments in Mugamba in judicial and anthropological perspective*, Bujumbura, December 2007, page.72, Ministry of State responsible for good governance, privatization of general inspection of State, and local administration, diagnostic studies on governance and corruption in Burundi, survey report, Bujumbura, May 2008, p.46. .

¹² OAG, *Critical analysis of the functionality of the proximity justice in Burundi, final report*, Bujumbura, March 2007, p.25. It seems that this conclusion was drawn on the subject of the basis jurisdiction for the reason that the study was interested on proximity justice.. Nevertheless this still remain true, *mutatis mutandis*, for the higher jurisdiction.

¹³ Article. 18, 205 and 209 of the law n° 1/010 du 18 March 2005 pertaining to the promulgation of the constitution of the Republic of Burundi, B.O.B., N° 3 *ter*/2005.

¹⁴ Article. 29 of the law N° 1/001 of February 29 2000 concerning reforms of magistracy statutes, B.O.B., N° 2/2000.

¹⁵ Charles DE GAULLE, *Mémoire d'espoir- Le Renouveau*, Paris, Plon, 1970.

opportune time, the difference between the proclaimed principles and the reality on the ground.

I. Separation of powers: Pre-requisites to the independence of the judge

« if legislative power is aligned with the executive power, there is no point of freedom ; because we are afraid that the same monarchy or the same senate will make tyrannical laws and implement them tyrannically». Montesquieu, EL, XI, 6 (1689 – 1755).

An ideal judicial system that is capable of ensuring protection of human rights and guarantee lack of discrimination in the administration of justice requires firstly a State that respects, in law and practice, the separation of powers.

Separation of powers is one of the fundamental principles of the modern constitutionalism and Rule of Law¹⁶. The principle of separation of powers devotes the theory triumph of Charles de Gaulle and Montesquieu, who already in 1748 (in his writing, *the spirit of Laws*), affirmed:

«All will be lost, if the same man, or the same bodies of principles, or nobles, or people, were to exercise the three powers: the power of making laws, that of implementing public resolutions and the power to judge the crimes or disagreements of individuals».

For this philosophy

«There is no freedom, if the judicial power is not separated from the legislative and executive powers. If it joined to the legislative power, the power on live and freedom of citizens will be arbitrary; since the judge will be the law maker. If it is enjoined to the executive power, the judge will have power of an oppressor¹⁷ ».

It is not only Montesquieu who underlined the dangers of power concentration in the judicial spheres, the weak link of the « chain » of the three powers. Alexandre François Auguste Vivien cautioned that:

« If () the administration assumes the roles of the justice, it will be exposed to subordinate private rights to public interest, misjudge with the view of pleasing the state, property, freedom and this will arbitrate the place of law. The day when the justice will be in the hands of administration, there will be neither guarantee nor security for citizens to have justice »¹⁸.

This is to mean that concentration of powers in the hand of one person will translate to tyranny¹⁹.

In Burundi, separation of judicial power from other powers is guaranteed by article 205 of the Constitution. The first paragraph clearly states that «justice is rendered by Courts and tribunals on the entire territory of the republic on behalf of Burundian people».

¹⁶ Troper, M, «Separation of powers», *Dictionnaire électronique Montesquieu* [En ligne], mis à jour le : 14/02/2008, URL : <http://dictionnaire-montesquieu.ens-lsh.fr/index.php?id=286>.

¹⁷ Montesquieu, *De l'Esprit des lois*, livre XI, chap. 6, Paris, Éd. Garnier-Flammarion, 1979, tome 1, pp. 294-295.

¹⁸ Alexandre François Auguste Vivien, *Études administratives*, Tome I, Librairie des Guillaumin & Cie, Rue Richelieu, Paris, 1859, pp. 17-18.

¹⁹ Du grec *despotês* (= maître), le despotisme est la forme de gouvernement dans laquelle la souveraineté est exercée par une autorité unique (une seule personne ou un groupe restreint) qui dispose d'un pouvoir absolu. Le despotisme implique souvent un pouvoir autoritaire, arbitraire, oppressif, tyrannique, sur tous ceux qui lui sont soumis. Le despotisme est l'une des trois formes de gouvernement (avec la république et la monarchie) que Montesquieu distingue dans «L'esprit des lois». Pour lui le despotisme, qui est le mal absolu, est le pouvoir d'un seul homme, sans règle, si ce n'est celle de son bon plaisir, pouvoir fondé sur la crainte. Le philosophe en déduit la nécessité de la séparation des pouvoirs afin d'éviter le despotisme et de préserver la liberté. Les formes suivantes de gouvernement pouvant être considérées comme despotiques : Autocratie, la dictature, la monarchie absolue, l'oligarchie etc.

It is equally important to note that in Burundi, the power separation system is highly imbalanced to the advantage of the executive and dependency of judicial system (*infra*).

II. Independence of the Burundian Judicial system: the difference between what the principles aim for and the real situation.

« *Why would the justice rendered by men and women and not by heroes or saints be independent when the institutions do not advocate for that, when the political power does not want that or only wants that on very rare opportunities, when the independence annoys the carrier of a judge instead of serving*». Jean Denis Bredin, *Le Monde*, 20 November 1987.

« *The Burundian judicial system is characterized by three flaws: a serious lack of training for the staff, total lack of equipment and particularly lack of an independent judicial machine*». Peace and Justice Commission of the Belgium Francophone²⁰

« *The independence of the magistracy is only written in laws. In practice, the Magistracy is under the control of the executive and interferences of the latter in the judiciary are monetary.*

The history of the magistracy has been marked by revocation of decisions that have not pleased the executive» Observatory of the Government action²¹.

The independence of the judiciary is a principle strongly proclaimed in Burundi but it remains precarious²² just like many several regions in the world. In other words, the principle stated in almost all constitutions or fundamental laws, lacks practical translation. Beyond these good legal and regulatory predictions on the independence of the judiciary, the reality has not seen the light of the day. Exception is made to executive authorities and to the least extent of policies that are close to the coalition of parties present in the government. Citizens, human rights activists, civil society, political opposition, lawyers and law experts are of the view the Burundian magistracy is not independent from other powers and in particular that of the executive.

We are in agreement with master Laurent NZEYIMANA in recognizing that appropriate legal and regulatory mechanisms are crucial and we add to it material and professional²³ guarantee have not set up the principle of magistracy independence, «by putting aside the traditional subordination of the magistracy to the executive power (...)»²⁴.

The judicial system in Burundi is not independent from the executive power. The Arusha Agreement for Peace and Reconciliation in Burundi of the 28th August 2000 does not appear in the judicial reforms at all levels as well as reforms for the supreme council in a manner as

²⁰ Commission Justice et Paix belge francophone, *Le long chemin du Burundi vers la paix et la démocratie*, mai 2006, p.4.

²¹ Analyse critique du fonctionnement des juridictions supérieures du Burundi, Bujumbura, décembre 2007, p.8.

²² Commission des droits de l'homme, Résolution 2004/33 intitulée *Indépendance et impartialité du pouvoir judiciaire, des jurés et des assesseurs et indépendance des avocats*, point 2.

²³ Les garanties d'ordre éthique et déontologiques. L'adjectif «éthique» signifie ce qui concerne les principes de la morale. Quant au nom «éthique», il signifie l'ensemble de règles morales qui s'imposent aux différentes activités d'une profession (Cf. Dictionnaire le Petit Larousse 2008, p.391.). Les termes «éthique» et «déontologie» sont souvent confondus et utilisés comme des synonymes. Cependant ils ne le sont pas. Le terme «déontologie» désigne l'ensemble des règles et des devoirs qui régissent une profession, la conduite de ceux qui l'exercent, les rapports entre ceux-ci et leurs clients ou le public (Cf. Dictionnaire le Petit Larousse 2008, p.304).

²⁴ NZEYIMANA, Laurent, « Le pourvoi en cassation et la nouvelle loi sur la Cour suprême », *Nouvelle revue de droit du Burundi*, Edition décembre 2005/janvier 2006, Imprimerie MAIMOSA S.A, p.102. Voir aussi *mutatis mutandis* NIYONKURU, Aimé- Parfait, *La problématique de la répression des violations de droit international humanitaire dans le cadre du conflit armé burundais*, Mémoire de DEA en droit à l'Université Libre de Bruxelles (Sous la direction de M. Eric David), septembre 2007, pp.51-55.

to ensure its independence as well as that of the judicial machinery?²⁵

Like we have stated above, the independence of the magistracy is a constitutional principle which does not have the practical translation. In reality, the power separation system is imbalanced to the benefit of the executive.

III. Imbalanced separation of powers in favour of the executive

In Burundi, the independence of the judiciary is a constitutional principle and all constitutions of Burundi have subscribed to this principle. Paragraph 1 of article 209 of the law n°1/010 of 18th March 2005 of the constitution of the Republic of Burundi provides as follows:

« The judicial power is impartial and independent from the legislative and executive power. In the exercise of his functions, the judge is only subject to the constitution and the law ».

Additionally, the Arusha Agreement for Peace and Reconciliation states that the judicial power is impartial and independent and no one can interfere with its operations²⁶.

But in practice, the judicial power is dependent on executive power which often influences judicial decisions and interferes with judicial matters. According to the report of the evaluation mission concerning the creation of a judicial survey commission for Burundi:

«The judicial power is subject to political interference from the executive and legislative. Despite constitutional provisions, which guarantee judicial independence, this is seen as partial in the eyes of political opinion, carrier of ethnic prejudice and clientele of the political power»²⁷.

The professionals of this sector are complaining of lack of independence²⁸. It is against this background that judicial officers held a strike on 1st September 2003 clamouring for among other things, their independence from the executive, equality and separation of powers²⁹.

The judiciary is weak due to interference by the executive in all spheres of judicial matters. In fact, the executive manages the career³⁰ of the judges whilst the latter have no protection against « reprisals » from the executive if at all they dare to make judgments that are against the will and wish of the executive. This is to mean that they have to adhere to the will of the state. In these conditions, the justice rendered can only reflect the will of the government in power.

IV. A career that depends on the favor of the prince

«Independence means that each authority must be shielded from all forms of influence from others. Independence provides above all, absence of revocation from another authority on the other, but secondarily, an authority is also independent if it does not owe its nomination to another authority, if its budget does not come from another authority or still if judicial proceedings cannot be exercised against it by one of the authorities». Michel Troper.

²⁵ Accord d'Arusha pour la paix et la Réconciliation au Burundi, le 28 août 2000, Protocole I, Chapitre 2, Article 6.

²⁶ Accord d'Arusha pour la paix et la réconciliation au Burundi, le 28 août 2000, Protocole II, Chapitre I, article 9.2.

²⁷ S/2005/158, 11 March 2005, Letter from the Secretary-General addressed to the President of the Security Council (Report of the assessment mission on the establishment of an international judicial commission of inquiry for Burundi), § 47.

²⁸ SYSTEME DES NATIONS UNIES, Burundi : *Les défis du processus de transition, Bilan Commun de Pays (CCA)*, Bujumbura, Février 2004, p.37.

²⁹ RCN, Justice & Démocratie, *Rapport d'Activités 2003*, 10.

³⁰ Art. 14 du Décret N°100/122 du 28 novembre 2005 portant organisation du Ministère de la Justice, B.O.B., N° 11/2005.

According to madam Sabine SABIMBONA, a Burundian lawyer and former member of the National Assembly of Burundi, the Burundian judicial system is dependent on the executive for its survival and there is just to pretence of existence of real independence³¹.

At the end of article 214 of the law n°1/010 of Constitution of the Republic of Burundi of 18th March 2005:

« *In their career, magistrates are nominated through a presidential decree after being proposed by the Minister for justice and after the supreme council pronounce itself on the matter. Resident magistrates are nominated by order of the Minister for Justice following the same procedure*».

The conditions for nomination of magistrates do not naturally guarantee their independence. Recruitment criteria remain arbitrary in practice. Whilst the persons selected to fill in the magistracy positions should be selected based on the precise objective criteria considerably taking into account integrity, competence; in addition, it should include academic and sufficient legal qualifications³²; a similar selection method of magistrates is aimed at reducing the risk of abusive³³ appointments, recruitment are carried out in an opaque³⁴ manner. The ones who are recruited are not the best in terms of education, academic files and experience in relation to their previous professional activities.

While the law stipulates appointment through the basis of competitiveness of the candidates³⁵, the judges are not appointed through this procedure and the Minister for Justice Proceeds with the appointments without even consulting the Supreme Council of the Judiciary³⁶.

An opaque appointment system of judges can affect the independence of the judge who will feel indebted to the appointing authority. This will make the judge to make decisions are inclining to the appointing authority so as to please then and eventually get promotion³⁷.

The promotion of judges is not shielded from critics. Promotion of judges should be founded on objective factors notably, their competence, integrity and their experience³⁸. This is not what happens in practice.

Therefore, judges have been appointed to the Supreme Court even before becoming holders of the position. This has been done while the law pertaining to appointment to the Supreme Court is very clear:

« *Magistrates of the Supreme Court () are chosen among the career judges, and should fulfill the moral integrity criteria, professional experience, technicality, competence and professional conscience*»³⁹.

³¹ SABIMBONA, S., *La justice au service de la paix*, inédit, s. d, p.5.

³² Principes fondamentaux relatifs à l'indépendance de la magistrature, Adoptés par le septième Congrès des Nations Unies pour la prévention du crime et le traitement des délinquants qui s'est tenu à Milan du 26 août au 6 septembre 1985 et confirmés par l'Assemblée générale dans ses résolutions 40/32 du 29 novembre 1985 et 40/146 du 13 décembre 1985, § 10.

³³ Principes fondamentaux relatifs à l'indépendance de la magistrature, Adoptés par le septième Congrès des Nations Unies pour la prévention du crime et le traitement des délinquants qui s'est tenu à Milan du 26 août au 6 septembre 1985 et confirmés par l'Assemblée générale dans ses résolutions 40/32 du 29 novembre 1985 et 40/146 du 13 décembre 1985, § 10.

³⁴ Programme d'appui à la Bonne Gouvernance « GUTWARA NEZA », *Etudes organisationnelles des directions du Ministère de la Justice*, août 2008, p.17, ONU-SG- septième rapport du Secrétaire général sur le Bureau intégré des Nations Unies au Burundi du 30 novembre 2010 (S/2010/608), p.9, § 44.

³⁵ Art. 8 loi N° 1/001 du 29 février 2000 portant réforme du statut des magistrats, B.O.B, N° 2/2000.

³⁶ ONU-SG-, *Sixième rapport du Secrétaire général sur le Bureau intégré des Nations Unies au Burundi*, (S/2009/611), 30 novembre 2009, ONU-SG- *Septième rapport du Secrétaire général sur le Bureau intégré des Nations Unies au Burundi* du 30 novembre 2010 (S/2010/608), p.9, § 44.

³⁷ Avocats Sans Frontières, *Le crime de génocide et les crimes contre l'humanité devant les juridictions ordinaires du Rwanda, Vade mecum*, Kigali et Bruxelles, 2004, p.24.

³⁸ Principes fondamentaux relatifs à l'indépendance de la magistrature, Adoptés par le septième Congrès des Nations Unies pour la prévention du crime et le traitement des délinquants qui s'est tenu à Milan du 26 août au 6 septembre 1985 et confirmés par l'Assemblée générale dans ses résolutions 40/32 du 29 novembre 1985 et 40/146 du 13 décembre 1985, § 10.

³⁹ Article 5 de la loi n° 1/07 du 25 février 2005 régissant la Cour suprême, B.O.B., N° 3 quater/2005.

Despite the fact that the constitution provides for a Judicial Supreme Council⁴⁰, which assists the President of the Republic so as to guarantee independence of the judiciary, the council is dominated by the executive⁴¹.

In this manner therefore, appointment is about career advancement, promotion to some positions of responsibility, transfers and revocations etc., all this is in the hands of the executive which can sometimes lure the gains of fidelity and also sometimes brand threats of sanction in case of insubordination of a judge.

Corollary to the State's stranglehold of the judiciary, the latter has no real guarantee against the possible administrative measures of the executive as a response to decisions unfavorable to the executive.

V. Absence of guarantees against abusive sanctions of the executive

The Burundian judiciary lives in a perpetual dilemma. Sticking to the law and nothing but the law can be costly especially on some files. There seems to be only two options ; making appropriate rulings following the law and risk losing one's career and above all the survival and stability of one's family. The other option is to swear allegiance to other powers and in particular the executive with the risk of betraying his or her conscience by deliberately bending the law.

The Burundian magistracy is therefore in an uncomfortable situation due to immense power bestowed on the executive. The judiciary does not have any guarantee on effective laws. The judicial system is always haunted by the possibility of losing employment, endangering their careers and subjecting their families to precarious situations since judges, whether appointed or elected, cannot leave their area of jurisdiction before attaining the age of retirement or end of their tenure⁴².

Security of tenure is one of the most important components of the independence of the judiciary. It puts the executive in a difficult position to delay the independence of the judicial system by undeserved disgrace⁴³. By virtue of this principle, a judge can only be removed for valid reason, which must be linked to his capacity to exercise his judicial functions⁴⁴. Once a judge is appointed, he can only be dismissed, suspended or transferred⁴⁵ in accordance with the specified conditions of the law and not to the discretion of the executive power⁴⁶.

⁴⁰ Article 214 alinéa 2 de la loi n° 1/010 du 18 mars 2005 portant promulgation de la Constitution de la République du Burundi, *B.O.B* n°3 ter/2005.

⁴¹ Outre le Président de la République et le Ministre de la Justice, respectivement Président et Vice-président, le conseil est composé de 15 membres répartis comme suit : cinq membres désignés par le Gouvernement, trois juges de la Cour Suprême, deux Magistrats du Parquet Général de la République, deux juges des Tribunaux de Résidence et trois membres exerçant une profession dans le secteur privé. Soit au total 17 membres dont seulement sept sont – les magistrats- sont choisis par leurs pairs. Deux autres membres sont des membres éminents de l'exécutif: le Président de la République et le Ministre de la justice. Le reste des membres, soit huit, sont nommés par le Ministre de la Justice. Cette composition consacre un retour en arrière. Déjà en 1962, le Conseil Supérieur de la Magistrature était présidé par le Président de la Cour Suprême. Ce Conseil était composé de trois juges de la Cour Suprême, deux magistrats du Ministère Public ainsi que deux juges des Tribunaux de Résidence.

⁴² Principes fondamentaux relatifs à l'indépendance de la magistrature, Adoptés par le septième Congrès des Nations Unies pour la prévention du crime et le traitement des délinquants qui s'est tenu à Milan du 26 août au 6 septembre 1985 et confirmés par l'Assemblée générale dans ses résolutions 40/32 du 29 novembre 1985 et 40/146 du 13 décembre 1985, § 10.

⁴³ Vincent, J., Montagnier, J. et Varinard, A., *La justice et ses institutions*, 2^{ème} éd., Dalloz, 1985, p.536.

⁴⁴ Madame la juge Michèle Rivet, « *Les normes relatives à l'indépendance de la magistrature : une vision internationale pour le juge* », Colloque international sur l'indépendance de la magistrature au Maroc, à la lumière des normes internationales et des expériences régionales, Rabat, 2 au 4 février 2006.

⁴⁵ Nous soulignons.

46 Vincent, J., Montagnier, J. et Varinard, A., *Op. cit.*, p.530.

The principle of security of tenure of a judge is unknown or rather misunderstood in some of its aspects in the practical reality in Burundi. Certainly, in terms of guarantee to their careers and the independence of the magistracy, the judicial statutes of 29th February 2000 proclaim that the bench is appointed for life⁴⁷. In the same line of thought, but pertaining to other judges, article 212 of the Burundian Constitution of 2005 states that « *a judge can only be removed due to professional error or incompetence and only on recommendation by the Supreme Council of the Magistracy* ». However, the daily reality shows that this guarantee has not been adhered to. The other factor is that this aspect is not sufficient on its own to guarantee judicial independence. And in these conditions just like it was clearly said by Charles de Gaulle, « what is written, was on the parchment and it is only worth once put in application »⁴⁸.

Appointments and transfers of magistrates, including the bench or all that related to mobility, lies with the discretionally power of the executive. The executive power can therefore play around with these discretionary powers and instill sanctions to those considered as insubordinating the executive.

For instance, judges have been transferred for having made rulings that lead to temporary release⁴⁹ or acquittal⁵⁰ to characters opposing the government. Between December 2009 and June 2010, within a period of seven months, another judge was transferred three times from Kayanza to Muyinga through Kirundo and Bubanza⁵¹.

It emanates, from the article 22 of the magistrates statutes 2000, that the judge can be transferred to exercise functions of the same grade at least in a jurisdiction of the same rank. Cases of judges being transferred to carry out duties of lower category have been observed.

In brief, the fear of sanction or disciplinary transfer in the mind of the judge ruins his freedom to judge and equally his independence vis-à-vis criminals.

Whilst the judge can only be suspended or dismissed due to ineptness of carrying out his duties, incapacity or misconduct⁵², the reality is different in Burundi. Thus for example, in 1988, the president and two advisors of the Supreme Council of Burundi were dismissed from office for having made a judgment that acquitted a former minister belonging to the overthrown government⁵³. In 1995, on the eve of a judgment pertaining to the amendment of article 85 of the Constitution of the 13th March 1992 which had permitted election of President Cyprien Ntaryamira by the National Assembly was revoked by the Constitutional Court. The government was suspecting that a judgment was to be pronounced invalidating the election of Cyprien Ntaryamira as President of the Republic⁵⁴. Finally, three judges were

⁴⁷ Art. 21 de la loi N° 1/001 du 29 février 2000 portant réforme du statut des magistrats, B.O.B., N° 2/2000.

⁴⁸ De Gaulle, Ch., *Mémoire d'espoir- Le Renouveau*, Paris, Plon, 1970.

⁴⁹ L.D.G.L., *La magistrature au Burundi*, Rapport de mission effectuée du 17 au 22 novembre 2003 à Bujumbura, <http://www.ldgl.org/spip.php?article41> : Consulté le 17 juillet 2007.

⁵⁰ Deux juges ont été mutés de Bujumbura à l'intérieur du pays en mai 2009 et un troisième a été mis en disponibilité d'office au mois d'octobre de la même année. Tous les trois juges avaient, deux mois plus tôt, acquitté un opposant politique M. Alexis SINDUHIJE (Voir Ordonnance Ministérielle N° 550/687 du 29 mai 2009 portant affectation de certains magistrats auprès des juridictions supérieures et du Ministère public et l'Ordonnance Ministérielle N° 550/1329 du 16 octobre 2009 portant mise en disponibilité d'office d'un magistrat des juridictions supérieures).

⁵¹ Information recueillie auprès du Président du Syndicat des magistrats du Burundi, M. Vital Nshimirimana en date du 11 septembre 2010.

⁵² *Principes fondamentaux relatifs à l'indépendance de la magistrature*, Adoptés par le septième Congrès des Nations Unies pour la prévention du crime et le traitement des délinquants qui s'est tenu à Milan du 26 août au 6 septembre 1985 et confirmés par l'Assemblée générale dans ses résolutions 40/32 du 29 novembre 1985 et 40/146 du 13 décembre 1985, §18.

⁵³ Décret N° 100/127 du 4 avril 1988, Voir aussi NINDORERA, E., *Pas de réconciliation véritable sans justice*, inédit, Bujumbura, mars 2006, p.18, note de bas de page n° 5.

⁵⁴ NINDORERA, E., *Pas de réconciliation véritable sans justice*, inédit, Bujumbura, mars 2006, p.18, note de bas de page n° 5, Chrétien, J.P et Mukuri, M, (dir.), *Burundi, la fracture identitaire : Logiques de violence et certitudes « ethniques »*, Khartala, 2002, p.65.

suspended from their duties for a period of two months for the reasons that they had:

« *making an acquittal judgment based on article 72 while no where it states that (sic) a detainee not brought before the judge should be freed; [and] (...) in the same file, confirmed that the three evidence documents presented were obtained doctored and had not been presented to the competent authorities (experts in that area)*⁵⁵ ».

This is a proof that despite the principle of separation of powers and consequential independence of the judiciary, the executive has the power to control the application of the law by the judge and the judges are promoted by that virtue. The executive equally takes disciplinary sanctions on those judges who apply the law different to the will of the executive and more precisely that of the Minister in-charge of Justice.

If the laws in force claim that judges are appointed for life, they do not exclude at the same time, the possibility of dismissal as a disciplinary sanction⁵⁶ or sanction due to incompetence⁵⁷. Certainly, dismissal of a magistrate due to professional error or incompetence only happens on recommendation by the Judicial Supreme Council, which in its current composition, is chaired by the President of the Republic and assisted by the Minister for Justice, is dominated by the executive⁵⁸.

VI. The Judicial Supreme Council or a player disguised as an arbitrator

It emanates from article 209 of the Constitution that the President of the Republic, head of State is the guarantor of the independence of the judiciary assisted in this mission by the Judicial Supreme Council. Following Lyon- Caen, one would interrogate «how the leader of the executive could protect judiciary from the infringement, a tendency that is known with the executive or basically how can the State double as the Judiciary?»⁵⁹

Among the attributes of the Supreme Council, there is that of guaranteeing the respect of judicial independence⁶⁰. On the first instance, among the perpetrators of undermining judicial independence is the executive power.

To be able to assume efficiently this role, the Judicial Supreme Council must itself be independent, in particular from the executive power. This does not seem to be the current case.

Already in 2000, « Judicial Supreme Council reforms so as to ensure its independency and that of the judicial machinery» was factored in the legislative, judicial and constitutional reforms intended in the Arusha Agreement⁶¹.

The composition of the Judicial Supreme Council is characterized by State's domination. Besides the President of the Republic and Minister for Justice as Chairman and vice-Chairman respectively, the council is comprised of fifteen members distributed as follows: five members

⁵⁵ Ordonnances Ministérielles N° 550/1235, 550/1236 et 550/1237 du 14 septembre 2009 portant clôture du dossier disciplinaire ouvert à charge des magistrats P.N, M.N et P.D. (initiales des noms et prénoms des magistrats), matricules respectives xx xx et xx.

⁵⁶ Art. 21 de la loi N° 1/001 du 29 février 2000 portant réforme du statut des magistrats, B.O.B., N° 2/2000.

⁵⁷ Art. 212 de la constitution burundaise de 2005.

⁵⁸ Au sujet de la composition, cf. note de bas de page N°40.

⁵⁹ Lyon- Caen, cité par Lagneau Devillé, A, «Influences du pouvoir exécutif sur les prérogatives du juge en France», Gérard, Ph., Ost, F. et Van de Kerchove, M (dir.), *Fonction de juger et pouvoir judiciaire : transformations et déplacements*, Facultés Universitaires Saint- Louis, Bruxelles, 1983, p.480.

⁶⁰ Art. 210 de la loi N° 1/010 du 18 mars 2005 portant promulgation de la constitution de la République du Burundi, B.O.B., N° 3 ter/2005, art. 121 de la loi N° 1/001 du 29 février 2000 portant réforme du statut des magistrats, B.O.B., N° 2/2000.

⁶¹ Protocole I, art. 6 et 7 (par. 18) et Protocole II, art. 17.

appointed by the Government, three judges of the Supreme Court, two magistrates from general public prosecutor's office of the Republic, two judges from the resident tribunals and three members from the private practice. A total of seventeen members out of which we find only seven judges being chosen by their colleagues. Other two members are eminent members of the executive, the President of the Republic and the Minister Justice. The rest of the members, eight in number, are appointed by the Minister for Justice.

The Council adopts its decisions through voting by simple majority of the members present. In case of vote tallying, the president's vote is supreme. We can see clearly, the composition of the Judicial Supreme Council and conditions relating to the adoption of its decisions that no legal decision that can be made in contradiction to the executive authority.

This composition is a claw back. Already in 1962, the Judicial Supreme Council was presided over by the president of the Supreme Court. That council was comprised of three judges of the Supreme Court, two judges from the Public Ministry as well as two judges from the resident tribunals.

So as to carry out efficiently its role with full independence, the Judicial Supreme Council should be reformed with a view to excluding members from or appointed by the executive so that the council can be comprised of practitioners and experts in law. Majority of these members should be judges appointed by their colleagues. In these conditions, the Supreme Council can organize the career of the judges especially in areas relating to appointment, promotion and dismissal. This will guarantee the independence of the judges.

What is more is that the Judicial Supreme Council can become an instrument of the executive machinery in the subjection of the judge. This emanates from article 397 of the law n° 1/010 of 13th May 2004 pertaining to the Civil Procedure Code. After presenting the rule according to which administration along with individuals must conform to the judgments made in administrative matters and implement them. This article subordinates the judicial power in the Judicial Supreme Council which has been demonstrated by strong domination by the executive.

At the end of the said article:

«The administration considers that the decision is marred by irregularities manifested, notably if it accords exorbitant damages or interests, it is referred to the Supreme Judicial Council which can appeal to the Judicial Supreme Court in order to review the judgment in question».

Considering the provision of article 209 of the Burundian constitution of 2005 which, on one part, proclaims the independence of the judiciary from the legislative and executive power, and on the other part, states precisely in the exercise of its functions, that the judge is only subject to the constitution and the law, we can consider the doubts expressed by Gilles CISTAC pertaining to the constitutionality of this provision⁶² and its related question of the independence of the judge vis-à-vis executive power.

VII. Other related provisions on constitutionality

Relative to the objective of our work, two articles have particularly drawn our attention in what seems to be *prima facie*, contradicting the principle of the independence of the judge as proclaimed in the Burundian constitution. This refers to article 160 of the law n° 1/07 of 25 February 2005 governing the Supreme Court and law n° 1/010 of 13 May 2004 pertaining to the Civil Procedure Code.

⁶² Gutwara Neza, *Code de justice administrative, Rédaction et motivation des arrêts par les juridictions administratives du Burundi*, p.58.

The analysis of the constitutionality of each of these articles can lead to another article. This is not, at all, our interest. Only that these two articles constitute a problems relating to the independence of the judiciary vis-à- vis the executive.

According to article 160 of the law governing the Supreme Court « the revision request is addressed to the Ministry of Justice. If the minister considers that the request is admissible, he gives an order to the general public prosecutor who will in turn deal with the Court. The latter examines the substance of the matter».

The issue of constitutionality in this article is questionable. The admissibility is appreciated by the minister for justice. The Supreme Court finds itself removing part of jurisdiction's prerogatives. In reality, pertaining to a case, the substance as well as the exceptions, including admissibility, must be left to the judicial authority and should not in any way be linked to a external authority including ministry of Justice. And this is considered to be against the constitutional principles of separation of powers and independence of the judiciary.

Article 397 of the law n° 1/010 of 13 May 2004 pertaining to the Civil Procedural Code, is another example of provisions of which the constitution is subject to caution. The following is what emanates from this article:

« if the administration considers that the ruling made on administrative matter by the administrative Court is marred by evident irregularity, especially if it accords exorbitant damages-interests, the administration can appeal to higher council of the magistracy which in turn can ask⁶³ the Supreme court to review the judgment in question».

It emerges from this provision that the administration can censure the work of a judge whilst the Supreme Council of Magistrates, dominated by the executive, can give orders to the highest institution which represents judicial authority and for this matter, the Supreme Court. The later would receive orders to review judgments. The term « revising » must be understood in the sense of « reforming». Because if it is about revising as an extra appeal, it should fill in the conditions set in 44 of the law governing the Supreme Court. Furthermore, the revision is only open against some judgments or rulings made forcefully on a judged item⁶⁴.

VIII. Financial dependence of the judiciary vis-à-vis the executive

The Burundian judicial authority depends financially on the executive. It is the Ministry for Justice that not only prepares budget estimates and develops the implementation mechanisms of the ministry's budget⁶⁵ but also undertakes the integral management of the operational budget and investment of the Ministry. Within the framework of the comprehensive budget of the ministry, the ministry for Justice, according to its own judgment, provides courts and tribunals with transport means, office supplies, etc.

According to a study conducted by *Africa Label Group* on request by the Burundian government in partnership with Economic Management Support Project (EMSP), this financial independence is «still weighty in terms of operational means committed to the judiciary, at some observed instances: higher jurisdiction levels and still more blatant, at lower jurisdiction level ⁶⁶».

⁶³ C'est nous qui soulignons.

⁶⁴ Cf. chapeau des articles 43 et 44 de la loi n° 1/07 du 25 février 2005 régissant la Cour suprême, B.O.B., N° 3 quater/2005

⁶⁵ Art. 12 du Décret N° 100/122 du 28 novembre 2005 portant organisation du Ministère de la Justice.

⁶⁶ PGE, *Etude diagnostique du système juridique et judiciaire du Burundi*, Rapport final, avril 2009, p.114.

These tribunals which experience lack of basic financial autonomy depend on subsidies for their operations accorded to them by the poor localities. In very clear terms, these tribunals do not depend on budgetary allocations from their line Ministry but from the local government authority which can sometimes reduce their budget to zero if they found out that the tribunals are of lesser importance or somehow disturbing.

According to government decree n°1/17 of 17 June 1988: « () the income submitted by lower Courts is transferred in totality to the district»⁶⁷. In practice, the districts/ Administrative towns only retrocede very partially and promptly these income.

The law n° 1/009 of July 4 2003 pertaining to the modification of the government decree n°1/17 of 17 June 1988 makes a little forward step: « the income received by resident tribunals' remains in the district/administrative town. They are allocated and managed by the local structures responsible for the development of the Justice sector with the support of the district /town administration». But in practice, nothing changes, all remains just like before.

This dependence is coupled with interference from the district administration in the functioning of the basic justice to a point that the resident tribunals are reduced to simple district institutions of solving disputes⁶⁸.

IX. A fear that turns into a resignation

As has been noted, the career of the Burundian judge and the stability of his/her functions are precarious. The judge lives with the obsession of being transferred in the mobile company of the executive power "ungrateful" magistrates.

Faced with this obsession, the least daring ones would put up with it to avoid the prince's wrath. Submissiveness to the executive power is so real that it is experienced like a resignation that is even shown in broad daylight, so much so a President of a jurisdiction in the capital city felt it was a duty for him to ask for permission from the Minister of justice in order to perform his duty. In a letter that this judge addressed to the Minister of justice and keeper of the seals, we can read the following:

«I hereby would like () to ask you to allow the reopening of the proceedings so that the court can make a determination on the issue of irregularity of the detention of detainee J.C.K »⁶⁹.

A change occurs in the composition of the bench in between the time when the case was adjourned for further consultations and the day of the deliberation, the president of the jurisdiction appoints another bench whose president will inevitably order the reopening of the proceedings.⁷⁰ No legal or regulatory provisions oblige the president of a jurisdiction to ask the Minister of justice for permission to reorganize an incomplete bench and it is not for the president of the newly reorganized bench to note, if need be, that the requirements for the reopening of such proceedings are met.

⁶⁷ Art.1er du décret-loi n°1/17 du 17 juin 1988.

⁶⁸ Programme d'appui à la Bonne Gouvernance « GUTWARA NEZA», Etudes organisationnelles des directions du Ministère de la Justice, août 2008, p.17.

⁶⁹ See letter n° 552/021/358/2010 of August 9, 2010 addressed by the President of the High Court at Bujumbura Town Hall the Minister of Justice and Keeper of the Seals with as reference: «Request to reopen proceedings: Case RPC 275. In this case, the issue before - to accede to the irregularity of the detention of the accused had been raised by the defense and the court postponed the case for further consultations on the issue. The only thing is that at the end of the hearing, the President learned that he had just been promoted, which entailed a reorganization of the bench and a reopening of the proceedings under article 94 of the law n° 1/010 of 13 May 2004 on Code of civil procedure, B.O.B., N° 5 a 2005.

⁷⁰ Art.94 in fine of the law n° 1/010 of 13 May 2004 on the Code of civil procedure, B.O.B., N° 5 a 2005.

On the contrary, both the law and the judicial practice converge in vesting this prerogative to the jurisdictions. The presidents of the jurisdictions are therefore responsible for the efficiency of the service⁷¹. To this effect, they designate the judges who are supposed to be on the bench. The Minister of justice can only receive copies of the reports on the situation prevailing in the jurisdictions from the people responsible for the latter⁷².

Sometimes, the executive does not mind contradicting the court judgments in taking measures the result of which is nullifying the effect of these judgments. The office of the 2nd Vice - President of the Republic has also "asked the Minister of Justice and Keeper of the seals and the Minister of the Public Security" to instruct their services to proceed with the immediate apprehension of Mrs A-M K" who had just been acquitted by the High Court of Bujumbura. In fact, in spite of her having been acquitted, Mrs A-M K. was immediately arrested and incarcerated. This is an example of flagrant infringement by the executive on the independence of the Burundian judge.

X. An Oath of Allegiance

Burundian judges take the oath before assuming office. However, this oath has for a long time sounded like an oath of allegiance to the Chief of the executive. In the 60s, anyone supposed to work in the capacity of a judge (...) took the following oath before working as a judge: "I pledge loyalty to the President of the Republic and obedience to the laws of Burundi."⁷³.

The law n° 1/185 of 1st October 1976, the Decree-Law n° 1/24 of 28th August 1979 on the code of the organization and judicial jurisdiction and the law n° 1/004 of 14th January 1987 on the reform of the code of the organization and judicial jurisdiction did not innovate much since the oath read as follows:

« I pledge loyalty to the President of the Republic and obedience to the Constitution and Laws of Burundi »⁷⁴»

Article 12 of 2000 on the statutes of the magistrates is neither revolutionary. Before assuming office, the magistrate will solemnly take the oath in the following laconic words: « I pledge obedience to the laws and loyalty to the institutions of the Republic».

With the 2005 code on the organization and judicial jurisdiction, the legislator frees the judge from an ostensibly submissive oath that read as follows:

«I pledge to respect the Constitution and laws of the Republic, to behave with integrity, dignity, loyalty and to be respectful of the laws of all the parties and of confidentiality»⁷⁵.

Similarly, the members of the Constitutional Court would take the following oath before the President of the Republic:

«I swear before the President of the Republic and the Burundian people to respect the National Unity Charter, the Arusha Agreement for Peace and Reconciliation in Burundi and the Transitional Constitution, to faithfully discharge my duties with integrity, impartially and independently, and confidentiality of the deliberations and to constantly carry myself with dignity»⁷⁶.

⁷¹ Article 15 of the law n° 1/01 of 23 February 2000 on the reform of the statute of the magistrates, B.O.B., N° 2/2000

⁷² Art. 49 and 56 of the Ministerial Order n° 550/101/90 of 10 March 1990 on the internal regulation for the jurisdictions of Burundi, B.O.B., N° 5/90.

⁷³ Law of 26 July 1962 on the code of the organization and judicial jurisdiction, as modified respectively by the decree - law n°001/14 of 10 March 1966, the Decree-Law n°1/122 of 8 December 1967 and the Decree-Law n° 1/162 of 31 May 1968, art.80. The Oath wording results from the Decree - law n°1/4 of 19 December 1966

⁷⁴ Art.164 of the law n° 1/004 of 14 January 1987 on the reform of the code of the organization and judicial jurisdiction B.O.B., N° 4/87.

⁷⁵ Art.111 n° 1/008 of 17 March 2005 on the Code of the organization and judicial jurisdiction, B.O.B., N° 3 quater/2005.

⁷⁶ Art. 4 of the law N° 1/018 of 19 December 2002 on the organization and operations of the Constitutional Court as well as the applicable procedure before it, B.O.B., N°12 bis/2002.

Conclusion

A true judicial system that is respectful of human rights must be able to offer the guarantee of an unbiased judgment made by an independent judge at the end of a fair trial. That presupposes first a State that respects, in terms of law and practices, the principle of the separation of powers. Besides, even in a system that dedicates the separation of powers in the legal texts, the judge's independence is the essential condition for a good administration of justice. But often in the young democracies, including in Burundi, the independence of the judiciary is not a daily reality since the requirements for such independence are far from being met.

In the absence of guarantees of real independence, in particular vis-à-vis the executive, is it not too much to ask to a judge when s/he is constantly kept in check in terms of the legality of administrative and regulatory acts, constitutional laws, their role as keeper of the public rights and liberties against any offense, including the one committed by the same executive?

The principle of security of tenure for judge should be incorporated in the constitution and detailed in the magistrates' statute. In short, one would foresee that a judge sitting in a particular jurisdiction cannot be the subject of a new appointment or a new assignment, even if it is a promotion, without his/her consent. The only exception to this provision is in the case of a legal modification of the judicial organization and in that of a temporary assignment with a view to backing up a neighboring court.

The recruitment of judges should be done in a transparent manner on the basis of objective criteria that put merits first. The recruitment by way of contest as provided for in the magistrates' statute has the advantage of getting rid of political favoritism and the merit of guaranteeing skills.

The management of a judge's career, its advancement in particular, must not depend on the executive, as has been underscored by Charvin by saying that «claiming the irrevocability of the judges whilst entrusting the executive with their advancement is the destruction of their independence after proclaiming its necessity»⁷⁷.

Like any freedom, the independence of the judge cannot be offered on a golden platter. The judge must also feel and act as a major player in the fight for this independence. As one author wrote:

«History has demonstrated that irrespective of the content of legal texts, men of character have kept intact their independence despite the threats or entreaties. It has been asserted, and rightly so, that all the value of judicial power depends on them who exert it»⁷⁸.

I would be so annoyed with myself if I concluded without asking the judge to make theirs this beautiful teaching from Daniel Soulez-Larivière who said: « In a sound democracy, the judge must have the power and the strength to bite the hand that has blessed him/her»⁷⁹.

⁷⁷ Charvin, R., cité Lagneau Devillé, A, "Influences du pouvoir exécutif sur les prérogatives du juge en France", Gérard, Ph., Ost, F. and Van of Kerchove, M (dir.), *Fonction de juger et pouvoir judiciaire: transformations et déplacements*, Facultés Universitaires Saint-Louis, Brussels, 1983, p.482.

⁷⁸ Apostu, I., *The legal independence of the judges and the unitary application of the law*, s.d, p.4. <http://www.juridica-danubius.ro/continut/arhiva/A12.pdf>.

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THE STATE AND SOCIAL RIGHTS OF HER CITIZENS: THE RIGHT TO HEALTH IN BURUNDI

By Bernard NTAHIRAJA and Nestor NKURUNZIZA*

«Necessitous men are not free men». ROOSEVELT (F.D)
«The State of democratic right can only be understood in the sense of State
of Social Right». Julia ILIOPOULOS

O. Introduction

The issue of the functions of the State has always preoccupied economists, political scientists and sociologists. In a quite schematic and simplified manner, movements that appear to be liberal have always believed that the State should limit itself to fulfilling kingly functions (police, justice and army). That is the current of the minimal State, also called police State represented particularly by Adam SMITH. The principle of the type of society recommended by this school of thought is the free enterprise one where the role of the State is limited to ensuring security and freedom of its citizens⁸⁰. In addition to its kingly functions, the State could only just invest in the sectors of no interest to the market because such sectors are not cost effective in the short or medium term (particularly the infrastructures)⁸¹. On the contrary, another school of thought that is more or less socializing asserts that the stability of the economy and the maintenance of social cohesion require that the State also be a socioeconomic player. According to this school, which is represented by John Maynard Keynes and, to a certain extent, Georg Jellinek, the State must be an entrepreneur, physician, educator, etc. It must create public institutions so as to provide its citizens with the much needed education, care and even leisure. It is most of all incumbent to it to offset the existing inequalities between individuals within society, notably by handing bonuses to the unemployed.⁸²

Robert CASTEL considers this model of State as a condition for democracy. According to him, a society of individuals living without objective solidarities has a lot of difficulties in create its own legitimacy as an order of coercion if it does not ensure some continuity for places, some homogeneity in people's positions, especially matters related to security against major risks such as old age, illness and loss of employment. The mechanisms that guarantee to all a certain assurance in this area are not luxury but essential components of a society that needs to be individualistic and democratic at the same time⁸³. It is partly for this reason that this model is currently the most common in the world⁸⁴. The strictly minimal State is surely losing much of its ground.

Naturally, this political doctrine controversy had to affect the Law. Long time before the theorization of social rights, Léon DUGUIT, a French publicist, believed in the necessity of having a rule of law that forces the State to "... enact all the necessary laws to achieve social

⁸⁰ CHAWKI(Gaddes): *Cours de sociologie politique* (2005-2006), p.32, published on www.chawki.org(consulté on 25/2/2011).

⁸¹ BAILLY(Pascal): *Le rôle des pouvoirs publics en matière de consommations collectives à partir des analyses d'Adam Smith*, Lecture given at the faculty of economic and social science - Lycée A. Croizat - MOUTIERS (73).

⁸² CHAWKI(Gaddes), *op cit*, p.31

⁸³ Cited by SPITZ (Jean-Fabien), *L'Etat social et la mondialisation*, pp.6-7. Published on www.laviedesidées.fr.

⁸⁴ *Ibidem*.

*solidarity*⁸⁵. T.MARSHALL, the English sociologist, said that the recognition of a « social citizenship» is a necessity in terms of the Law simply because it extends the already acquired civil and political citizenship.⁸⁶ A legal question arises as to whether the State social security benefits to the citizens are « a right » for the latter and « an *obligation* » for the State, with all the essential attributes of these concepts (enforceability, justiciability, responsibility,...). The issue is dealt with in this article in the framework of the Burundian law, and this adds to its importance.

0.1. Importance

The purpose of this work is first of all to analyze the position of the Burundian law as regards the issue of the social role of the State. This position comes out clearly through the Constitution, the international human rights conventions of which Burundi is signatory, the laws and regulations, etc. The analysis will actually make it possible to know whether, in Burundian law, social rights are actual subjective rights that give the bearers the possibility to claim them, including in a court of law, or if on the contrary, the conventional, constitutional or legislative provisions that establish them are merely programmatic and without normative enforceability. We will try to answer this question by looking at the example of the right to health.

Moreover, social rights are frequently presented as generating positive obligations for the State. Studying their reality therefore requires to go beyond the texts and to examine the policies that the State of Burundi is implementing so as to make them effective. Burundi being classified amongst the world poorest countries and as it has emerged, if it has at all, from a long political conflict, scrutinizing its health policy reveals the importance it gives to its social sectors in its reconstruction programme.

0.2. Problem and justification of the study

The human rights doctrine has legitimized for a long time a rigid separation between civil and political laws (exemption laws, abstention laws), generating for the State the only abstention obligation, on the one hand, and the economic and social rights generating for the State the obligation to achieve some positive benefits (personal rights), on the other hand. The first were said to be *first generation laws* and the other *second generation laws*._

This classification is becoming obsolete. Today, the substantive law of human rights considers that the provisions legitimizing human rights, whatever their generation is, are likely to generate a triple obligation for the State: these are obligations to *respect, protect and implement* and they change according to the enshrined law.⁸⁷

1° The obligation to respect or observe human rights requires the States to abstain from hindering directly or indirectly the use of that particular law. This obligation to abstain concerns both 1st generation rights such as the right to life, to physical integrity... and the 2nd generation ones such as the right to health, to education, etc.

2° The obligation to protect requires the States to prevent third parties from hindering the use of that particular law. It also applies to all the rights of whatever generation.

⁸⁵ HERRERA (Carlos M.) : *Etat social et droits fondamentaux*, in CNRS : Actes du Colloque international sur l'Etat et la régulation sociale, 11,12 et 13 September 2006, p.6

⁸⁶ *Idem*, p.6.

⁸⁷ HERRERA (Carlos M.), *op cit.* pp 45-46.

3° The obligation to implement refers to the obligation for the States to take legislative, administrative, jurisdictional as well as political measures necessary to guarantee the possession and effective use of those particular rights.

The doctrine also generally agrees with H. SHUE's views according to which « *there are distinctions, but they are not distinctions between rights. The useful distinctions are among duties* »⁸⁸. It is obviously the implementation obligation that entails more problems and of which the analysis appears to be the most interesting as it requires the State to go beyond the textual legitimization of a right. The essential part of this article will focus on the aspect regarding the right to health, hence the interest to also specify the notion of right to health.

According to the first principle of the preamble of the World Health Organization Charter (WHO), "*health is a state of total physical, mental and social well-being and does not only consist of an absence of illness or infirmity. Being in the best health possible constitutes one of the fundamental rights of any human being, irrespective of their race, religion, political opinions economic or social condition.*"⁸⁹

This definition stems from an ideal and optimal vision of health. The vision is not easily transferable as such in the area of human rights. It must be translated as rights and obligations of both public and private stakeholders. One must confer to it the most legal expression as is found in article 12, ss 1 of the ICESCR: "*..... the right that any individual has to enjoy the best possible physical and mental health.*"⁹⁰. The text of this provision shows that the right to health encompasses a wide diversity of socio-economic factors that are likely to improve the conditions in which human beings can lead a healthy life and it applies to determining and fundamental health factors such as food and nutrition, accommodation, access to clean drinking water and to appropriate sanitation, good and hygienic working conditions and to a healthy environment.

The present article cannot cover all these aspects. For methodological reasons, it will be limited to the issue of access to medical care, while asking the following questions: How does access to medical care constitute a right for the Burundian and what obligations does the substantive law of Burundi holds the State responsible for in this area?

The analysis of the relevant legal sources makes it possible to answer these questions.

I. JUSTICIABILITY OF THE RIGHT TO HEALTH: IS HEALTH A RIGHT ?

I.1. LEGITIMACY OF THE RIGHT TO HEALTH : THE TEXTS AND THEIR NORMATIVE SCOPE.

The sources of the contemporary State of law are no longer exclusively internal. In nearly all the fields, especially in matters of human rights, modern States find themselves bound by the standards of which they are the sole authors (domestic law) as well as by those negotiated with other States or resulting from other modes of production of the international law (treaty, custom,...). Burundi is not an exception to this rule. Thus, it is desirable to successively study the rules of international law and those of domestic law binding Burundi in matters of right to health

⁸⁸ GOLAY(Christophe) : Vers la justiciabilité du droit à l'alimentation, Dissertation submitted for the obtention of the Higher Education Diploma (DES) in International Relations, as part of International law, Université de Genève, Geneva, September 2002, p.33, unpublished.

⁸⁹ DAVID(Eric) : *Le droit à la santé comme droit de la personne humaine*, p.64.

⁹⁰ DAVID(Eric) & VAN ASSCHE(Cédric) : *Code de droit international public*, 5^{ème} published on 1st December 2010, éd Bruylant, Brussels, 2011, p.279

I.1.1. Sources of international law

Here, we will be focusing respectively on the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights as well as on the African Charter on Human and Peoples' Rights.

I.1.1.A. The Universal Declaration on Human Rights

Article 25, paragraph 1 of the text adopted by the United Nations General Assembly on 10/12/1948 stipulates "*Everyone is entitled to a sufficient standard of living that secures their health, well-being and those of their family, notably in terms of food, clothing, accommodation, medical care as well as the necessary social services. They are entitled to security in case of unemployment, illness, invalidity, widowhood, old age or in other cases of loss of their livelihood due to unforeseen circumstances*"⁹¹. The wording of this article does not exclusively focus on the right to health. The article speaks of a "*sufficient standard of living*" to secure health and well-being of the individual and their family, notably through access to medical care. The text of the article 25, paragraph 1 has indeed the merit to bring to the fore the close link existing between the right to medical care and the other social rights such as the right to food, to decent housing, to social security, etc. The doctrine will elaborate on this link on several fronts⁹². This goes to show that the authors of the declaration had a broader vision of the right to health.

The text is not very clear as a result of this broader vision. In fact, it does not clearly indicate the obligations of the States to achieve the enacted law. This can be first explained by the context in which the declaration has been written: it was necessary indeed to have a final text acceptable to the two ideological blocks of that time (the liberal Western block and that of the Communist East).⁹³ Moreover, the authors did not delude themselves on the normative scope of this text. Whereas in the beginning, the idea was to develop a legally binding convention, it was realized that there were deep divergences that led to reducing the number of ambitions, thus considering the declaration as "*the common idea to be achieved by all the peoples and nations*".⁹⁴

However, the issue of the normative scope of the UDHR has evolved as time went by both in international law and in Burundian domestic law. In international law, it can be seen that from 1960, the United Nations General Assembly, in its declaration on granting independence to the colonized peoples declared that: "all the States must faithfully and strictly observe the provisions of the United Nations Charter, the Universal Declaration, etc."⁹⁵ However this resolution was of normative nature and would even be implemented by the ICJ in the Western Sahara case⁹⁶. Thereafter, in 1980, in the case relating to the detention of the American diplomatic staff in Tehran, the ICJ would thought that: "*the fact of abusively depriving human beings of their freedom and submitting them, in tedious conditions, to a physical constraint is obviously incompatible with the principles of the United Nations Charter and with the fundamental rights proclaimed by the universal human rights declaration.*"⁹⁷

⁹¹ DE SCHUTTER(O), TULKENS(F) et VAN DROOGHENBROECK(S), *Code de droit international des droits de l'homme*, 3^{ème} édition, 2005, Bruylant, Bruxelles, p.15.

⁹² Voir notamment Eric DAVID, *op cit*, pp. 64-65.

⁹³ BENJAMIN(Denis), *Cours de Sociologie des Droits de l'Homme*, Université du Burundi, Chaire UNESCO en Education à la Paix et Résolution Pacifique des Conflits, DESS en Droits de l'Homme et Résolution Pacifique des Conflits, A.A : 2008-2009, inédit.

⁹⁴ Paragraphe 9 de la Déclaration Universelle des Droits de l'Homme in DE SCHUTTER (Olivier), TULKENS (Françoise) et VAN DROOGHENBROECK(Sébastien), *op.cit*, p.11

⁹⁵ DAVID (Eric), *op. cit*, p.20.

⁹⁶ *Ibidem*.

⁹⁷ DAVID(Eric), *op cit*, pp.20-21.

Commenting on this judgment, the doctrine could write that by not expressing any reservations on the optional nature of the declaration, the Court had implicitly sanctioned the evolution of its provisions towards the status of customary rule.⁹⁸

In domestic law, the declaration has been incorporated in the preamble of the first constitution of the independent Burundi⁹⁹. Under the Constitution of 18 March 2005 (currently in force), there is not the slightest shadow of a doubt about the binding nature of the provisions of the declaration. Indeed, article 19 of this text stipulates that: “*The rights and duties proclaimed and guaranteed by, inter alia, the Universal Declaration on Human Rights, ... are part and parcel of the constitution of the Republic of Burundi*”¹⁰⁰. Unfortunately, no legal decisions have been made yet on the issue and this constitutes a constraint to this analysis. Nevertheless, the text seems sufficiently clear and unlikely to be misinterpreted.

The legal status of the rules enshrined in the pacts and conventions does not raise any major issue.

I.1.1.B. The International Covenant on Economic, Social and Cultural Rights

This text that was adopted on 16.12.1966 and came into force on 3.1.1976 was ratified by Burundi on 14.3.1990.¹⁰¹ It states in its article 12 that: “ 1. *the States parties to the present Pact recognize the right of any individual to enjoy the best possible state of physical and mental health achievable.* 2. *The measures that the States parties to the present pact will take to guarantee the full exercise of this right should include the necessary measures to ensure: a) The reduction of the incidence of stillbirths and infant mortality, as well as the healthy development of the child; b) The improvement of all the aspects of environmental and industrial sanitation; c) The prophylaxis and treatment of epidemic, endemic, professional and other diseases, as well as fighting these diseases. d) The creation of conditions likely to ensure medical assistance and medical care for all in case of illness.*”¹⁰². Literally, the text does not speak of the « *right to health* » but of « *right to a better state of health that the individual can achieve* ». Indeed, in spite of all the efforts made by a State and other stakeholders, some individuals can be poorly due to genetic factors, their individual natural tendencies to the illness, to the adoption (by them) of unhealthy or risky life styles or behaviors.

The Human Rights Committee had to specify the scope of article 12 with regard to the person entitled to the guaranteed right to health. Right to health is recognized for any one without discrimination based on race, color, language, religion, political opinion or any other opinion, national or social origin, fortune, birth or any other situation. Therefore, there is no condition for having this right on any State party territory. However article 2, paragraph 3 of the ICESCR recognizes that developing countries have the right to determine to what extent they will provide the economic rights recognized in this pact to non nationals, taking human rights and their national economy aspects into account.¹⁰³

⁹⁸ Idem, p.21.

⁹⁹ Voir notamment, le paragraphe 3 de la constitution du 16 octobre 1962, in BELLON(Rémi) & DELFOSSE (Pierre), *Codes et Lois du Burundi*, 1^{ère} édition, Maison Ferdinand Larcier, Bruxelles,1970, p.5.

¹⁰⁰ In *B.O.B n° 3 ter/2005*, p. 5.

¹⁰¹ Loi n° 1/008, inédit, à laquelle il est fait référence dans CEDJ, *Codes et Lois du Burundi* (mis à jour le 31 décembre 2006), Groupe De Boeck, p. 153.

¹⁰² DE SCHUTTER(O), TULKENS(F) et VAN DROOGHENBROECK(S), *Op cit*, p. 45

¹⁰³ Idem, p. 41.

Although the text is literally only aims at economic rights, we can affirm that the rationale of the capacity to allow the nationals to be the first to access the (limited) resources of the State to which they contribute the most justifies that the access be extended to all the rights recognized by the pact, including social rights. In these conditions, it would therefore not be contrary to the pact if a State, Burundi in this case, provides its national with some financial benefits specially related to the access to health care.

After its universal recognition, the right to health has been recognized at the African regional level.

I.1.1.C. The African Charter on Human and Peoples Rights

Adopted in Nairobi on 27.6.1981 and came into force on 21.10.1986, the African Charter on Human and Peoples Rights was ratified by Burundi on 28 July 1989.

The contribution of the African Charter on Human and Peoples Rights in the area of economic, social and cultural rights is of paramount importance. Besides the fact that this text explicitly recognizes the right to health, education and development, it is among the first international instruments to have recognized the principle of inalienability, indivisibility and interdependence of human rights.¹⁰⁴

As regards the right to health, article 16 of this text provides that:

*"1. Every individual is entitled to have the best possible state of physical and mental health. 2. The States parties to this charter commit themselves to take the necessary measures in order to protect the health of their populations and to provide them with medical care in case of illness".*¹⁰⁵

The letter of this article differentiates the obligation to protect and that of implementing or achieving. The latter seems to be limited to establishing a medical care system in case of illness. However, the implementation of the right to health requires more than just the putting in place of a medical care system. Making the infrastructures available and keeping up with their maintenance, staff' training, quality assurance of the products and services... Contribute to the achievement of the right to health. The letter of article 16 is therefore losing ground in relation to the ICESCR.

However, this is not problematic at the practical level because the African Commission on Human and Peoples Rights, as well as the new Court, is inspired in its interpretation of the Charter, by the pact and other human rights conventions and charters negotiated in the framework of the United Nations. It also takes into account the interpretation already made by the interpretive organs of these texts¹⁰⁶.

Whether it is about article 12 of the pact or 16 of the charter, the most relevant issue regarding this work remains that of knowing what *de jure* and *de facto* effect their provisions have on the life of a Burundian.

I.1.1.D. The Domestication of International Law in Burundi

The status of the standard of international law in domestic law sets the problem of its standing and (possible) applicability. It can depend, to a large extent, of its mode of integration or

¹⁰⁴ Voir notamment le 8^{ème} paragraphe de son préambule, in CEDJ, *op cit*, p. 174.

¹⁰⁵ Article 16 de la Charte Africaine des droits de l'homme et des Peuples in DE SHUTTER(O), TULKENS(F) et VAN DROOGHENBROECK(S), *op cit*, p. 770

¹⁰⁶ Article 60 et 61 de la CADHP.

acceptance into domestic law. All these questions are settled by the Constitution of each State.

Article 292 of the Constitution of the Republic of Burundi stipulates as follows: *“Treaties come into force only after having been duly ratified and subject to their application by the other party, in the case of bilateral treaties; and the realization of the conditions for implementation as planned by them, in the case of multilateral treaties.”*¹⁰⁷ As for ratification, this falls under the responsibility of the President of the Republic, or exceptionally under that of the Parliament, all depending on the issues.¹⁰⁸

For the ICESCR and the African Charter on Human and Peoples’ Rights which are obviously multilateral treaties, the interpretation of article 292 therefore shows that two conditions are enough to produce their effects. These are the duly ratification and the realization of the conditions for implementation. The two texts have been duly ratified by Burundi as has been demonstrated above and the issue of implementation does not arise since they are already in force since 1976 and 1987 respectively¹⁰⁹. Therefore, two instruments have effect in Burundian law. However, to what extent do they bind the State of Burundi? Is the legislator obliged to take it into consideration and possibly review its copy whenever the standard that they enact is in contradiction or in incompatibility with one (some) provision(s) of the covenant or the charter? It is the issue of the standing of the conventional standards in domestic law. The Burundian constitution settles the issue indirectly while stipulating that when the constitutional court declared that an international commitment includes a clause contrary to the constitution, the authorization to ratify this commitment can only be given after the amendment or revision of the constitution.¹¹⁰ By recommending revision of the constitution in case of contradiction between a conventional standard and the constitution, the constituent has implicitly admitted the pre-eminence of the international instrument over the constitution. If they had considered a contrary solution, they would have, in the same hypothesis, requested the dismissal of the clause of the treaty that is contrary to the constitution or the formulation of a reservation on the clause.

In the light of what precedes, one can affirm that Burundi is a monistic State with international law pre-eminence. However, the special status of human rights international conventions in the Burundian domestic law raises another question. Article 19 of the constitution includes in the fundamental law the *“rights and duties”* guaranteed by international instruments (related to human rights) to which Burundi is party. Can this be interpreted that these instruments would be of constitutional standing whereas the international conventions are, in general, of a rather supra constitutional standing as can be understood from the wording of article 296? In our opinion, this would be an erroneous interpretation. On the contrary, there is no reason justifying that these instruments receive the least preferential treatment. This would, in fact, prevent or, to be precise, would stop requiring the revision of the constitution in case of contradiction between the latter and the said instruments. That would be a manner of depriving these instruments of their effects, given that one of the ways to give them effect is to review the domestic law provisions in disharmony with them.¹¹¹ The argument of the text also support our thesis, insofar as article 19 recommends to incorporate in the constitution, not the instruments but *“the rights and duties”* that it establishes. Perhaps the constituent saw in this process the means to establish more explicitly the law enacted by

¹⁰⁷ CEDJ, *op cit*, p.22.

¹⁰⁸ Articles 289 et 290 de la constitution, in *ibidem*.

¹⁰⁹ Ces conditions sont généralement liées au nombre de ratification par les Etats. Voir notamment l'article 27 du PIDESC, in DAVID (Eric) & VAN ASSCHE(Cédric), *op cit*, p. 282.

¹¹⁰ Article 296 de la constitution in CEDJ, *op cit*, p.22.

¹¹¹ Voir notamment l'article 2, al 1^{er} in fine du PIDESC, in DAVID(Eric) &VAN ASSCHE(Cédric), *op cit*, p.276.

these texts, especially as some of them are enacted by declarations the legal value of which are always prone to debates, as is the case for the UDHR.

The direct applicability of the standard establishing the right to health is a problem that is very related to the justiciability of this right and, for methodological reasons, this work is dealing with it in the second section of this chapter¹¹².

Besides the fact that it integrates international law right to health standards and regulates their status in domestic law, the Burundian constitution establishes this right directly.

I.1.2. Sources of Domestic Law

All successive constitutions of the independent Burundi established civil and political laws but also economic, social and cultural laws. The technique used was either a reminder in the preamble of the relevant international instruments binding Burundi, or the insertion of a legal charter in the very body of the constitutional text.¹¹³

Moreover, the constitution of 18.03. 2005 contains many provisions, some clearer than others, serving as legal basis for the right to health. By way of example, after recalling the commitment of the Burundian people to international instruments, of which the ICESCR, in the 4th paragraph of the preamble and integrated the rights and duties established by these instruments in its article 19, the constitution stipulates in its articles 17, 27, 52 and 55 respectively that: *“The task of the Government is to achieve the aspirations of the Burundian people, in particular to heal the divisions of the past, improve the quality of life of all Burundians and to guarantee to all the possibility to live in Burundi shielded from, discrimination, illness and hunger.”*¹¹⁴ (Article 17 which we underline). *“The State makes sure as much as it possibly can that all citizens have the means to lead their lives in conformity with human dignity”*¹¹⁵ (Article 27). The broad nature of the formula is reminiscent of article 25 of the UDHR (... sufficient standard of living). All the same, *“lives in conformity with human dignity”* necessarily supposes the possibility to have access to health care whenever needed (Article 27). *“Every individual is entitled to economic, social and cultural rights essential to their dignity and free development thanks to the national effort and resources of the country”*¹¹⁶(Article 52). *“Every individual is entitled to health care”*. (Article 55).¹¹⁷

At a merely theoretical level, the formulation of this article, the only one to speak directly of the *“right to health”* is not satisfactory. Indeed, this right is not simply reducible to the *“right to have access to health care”*. Like all human rights, the right to health actually requires the State to shoulder the responsibility of respecting, protecting and implementing, which goes well beyond organizing access to health care¹¹⁸. It's a good thing that there are other constitutional bases.

However, beyond the statement of the rule that is always relatively clear and complete be it in international as well as in constitutional law, the most legally relevant question remains the one to determine whether the Burundian citizen can demand from their State

¹¹² Voir pp 10-15 de ce document.

¹¹³ Voir notamment le paragraphe 3 du préambule de la Constitution du 16 octobre 1962 (BELLON(Rémi) & DELFOSSE(Pierre), *op cit*, p.5. et le titre II de la constitution du 18 mars 2005.

¹¹⁴ CEDJ, *op cit*, p.6.

¹¹⁵ *Ibidem*.

¹¹⁶ CEDJ, *op cit*, p. 7.

¹¹⁷ In *B.O.B N° 3 TER/2005*, p.8.

¹¹⁸ *Infra*, pp. 13-14.

to materialize their right to health. It is a issue of the justiciability of social rights in general and that of the right to health in particular.

I.2. JUSTICIABILITY OF HUMAN RIGHTS IN BURUNDI.

A right is justiciable when the person entitled to it can claim it before a judicial or quasi-judicial body. It is concretely the possibility for an individual or a group whose right is violated to refer the matter to the judge and ask him/her to set aside the offending act or to condemn the person (public or private but generally public) for the damage resulting from the violation of their right. It can also be an affecting issue, an issue of constitutionality or conventionality raise during the procedure, or an application for an order made to the authority in order to make a decision or take measures going in the sense of allowing the plaintiff to enjoy their established right.¹¹⁹ It is when the authority recipient of the judge's order is the legislator that the issue becomes more complex. nevertheless, this often occurs in the area of social rights.

Analysing social rights in the framework of Constitutional law, Evangelia Georgitsi defines fundamental social rights as "a set of permissions recognized by a standard of constitutional value to a class of C1 individuals and that implies a set of obligations for another class of C2 individuals, of which the national legislator", by considering "obligations" as "positive obligations".¹²⁰ The question that arises is then whether such a right can be justiciable, in other words, whether one can demand the national legislator to act so as to implement it. And such is the case, then one wants to know how s/he will implement it. The doctrine and the jurisprudence in comparative law are divided over this issue. However, a general tendency is gradually emerging. It is therefore desirable to look at the evolution of doctrinal ideas and comparative law regarding the justiciability of social rights before presenting the situation of the problem in Burundian law.

I.2.1. Justifiability of Social Rights : Evolution of the Doctrine and Teaching of Comparative Law.

Civil and political rights have been, for a long time, presented as radically different from economic, social and cultural "rights." It was assumed that only the first were real rights that were likely to be claimed because they only impose a non participatory duty on the State. As for the latter, they were only considered as programmes, the provisions that established them being read as giving to the State the authority to implement the policies that itself would deem appropriate to reach these" objectives ". It was therefore concluded that these rights could not be claimed judicially. In other words, where the civil and political rights (also called fundamental classic rights or rights of the " first generation") would imply for the legislator not to legislate in some given matters in order not to restrict the space of freedom granted to the individuals, the social rights would instead oblige him to do so.¹²¹

In 1975, one year before the coming into force of the 2 UN human rights covenants, Marc BOSSUYT argued that the difference between civil rights and social rights lied in the presence or the absence of a financial contribution from the State for the realization of the rights concerned. According to him, granting social rights costs money whereas the respect for civil rights does not cost any. The distinction between civil and social rights does not therefore depend at all on abstract notions but it has very concrete implications since these

¹¹⁹ GOLAY(Christophe), *op cit*, p.2.

¹²⁰ GEORGITSI(Evangelia), *De l'impossible justiciabilité des droits sociaux*, p.5.

¹²¹ GEORGITSI(EVANGELIA), *op cit*, p. 5

are of a financial nature. By way of conclusion, he states that the rights of the first category are justiciable and that those of the second are not.¹²²

H. SHUE demonstrates that social rights are not the only ones whose realization requires financial means. The rights to life, security and freedom of movement require, for example, that the State puts in place a police and judicial institutions assigned to repress the possible violations. The South-African Constitutional Court makes the same observation in the Grootboom case.¹²³ The obligation to abstain also concerns social rights. The right to health, for instance, obliges to abstain from industrial projects with abnormally higher environmental impact. That is why in one of its recommendations, the African Commission on Human and Peoples' Rights indexed Nigeria for violation of the right to the best possible state of physical and mental health because of the oil activities in the Delta of Niger, which has brought about considerable suffering to the OGONI people.¹²⁴ In a form of tripartite obligation as the one formulated above, the author comes to the conclusion that all human rights, of whatever generation, generate three types of obligation for the State to shoulder: the obligation to respect the individual's rights (*duties to avoid depriving*), the obligation to protect the individuals against those who want to undermine their rights: (*duties to protect from deprivation*) as well as the obligation to assist those who have been victims of a violation of their rights (*duties to aid the deprived*).¹²⁵

The positive right is also progressively ridding itself of the rigid conception of the separation of the civil and political rights from the economic, social and cultural ones. We only have to recall, for instance, the insistence of the 4th paragraph of the preamble to the African Charter on Human and Peoples Rights on the indivisible and interdependent nature of human rights. Similarly, the UN resolutions that confirm the indivisibility of human rights are very numerous. The most known is incontestably the Resolution n° 60/251 adopted by the UNGA on 15.3.2006 that stipulates that: "*all human rights are universal, indivisible, inseparable and interdependent and mutually complement one another, as of equal importance, and that it is necessary to avoid categorizing them or favoring some of them*"¹²⁶

The economic, social and cultural rights committee has also declared that adoption of a rigid classification of the economic, social and cultural rights that would place them, by definition, outside of the jurisdiction of the courts would be arbitrary and incompatible with the principle of indivisibility and interdependence of the two types of human rights. Besides, it would considerably reduce the capacity of the courts to protect the rights of the most vulnerable and underprivileged groups of society.¹²⁷

In international law, it was assumed for a long time that the authors of the ICESCR did not want that the established rights be justiciable, and that it is for this reason that they were not included in this covenant during the drafting of article 2 of the ICESCR establishing the right to resort to domestic law in case of violation. The same school of thoughts argues that this also explains why the committee was created only a long time after the coming

¹²² GOLAY (Christophe), *op cit*, p.22.

¹²³ *These rights are, at least to some extent, justiciable. As we have stated (...), many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability (Droit à l'alimentation, p.61).*

¹²⁴ HUNT(Paul) : *Le droit de jouir du meilleur état de santé physique susceptible d'être atteint*, Rapport 2003, sur : <http://www.aidh.org/sante/ou-droit.sante.htm> : le 20 juin 2009.

¹²⁵ GOLAY (Christophe), *op cit*, p. 33.

¹²⁶ DUMONT (Hugues), *Systèmes internationaux de protection des droits de l'Homme*, Syllabus de Cours, Université du Burundi, Chaire UNESCO en Education a la paix et Résolution Pacifique des conflits, 2008- 2009, inédit, p. 44.

¹²⁷ Amnesty International, *Projet de fiche sur l'application du PIDESC en droit interne et la justiciabilité des DESC*, p.2, inédit.

into force of the pact. About the right of redress allegedly not considered by the ICESCR, the economic, social and cultural rights committee, in its interpretation of the article 2 of this covenant in one its general observations, affirms that the State that would try to justify itself for not organizing a recourse against violations of economic, social and cultural rights should establish that this recourse does not constitute an appropriate means in the sense of article 2 of the ICESCR or that this recourse is a surplus, considering the other organized means¹²⁸. The committee concludes that it is very difficult to show and that the other means risk being inoperative if they are not reinforced or completed by jurisdictional recourses.¹²⁹.

As for the initial absence of the committee, even supposing that it is related to the willingness to prevent the justiciability of the ESCR, its creation in 1985 by the economic and social council should be interpreted as a change of course that the optional protocol confirms in the ICESCR that came into force in 2008 and enhanced the ESCRC jurisdiction as far as authorizing it to receiving individual communications and conducting investigations.¹³⁰

Finally, the preparatory work of the ICESCR sufficiently shows that the attempt to include in the pact an article excluding the possibility of a direct applicability of its provisions was rejected.¹³¹

In domestic law (constitutional), it is often said the principles of separation of powers and sovereignty of the Parliament are an impediment to the justiciability of social rights. Those who say that pretend that the judge would not "oblige" the Leader or his representative, at the risk of the fearsome and dreaded "government of the judges". This argument is unbearable in a system of state of law where all the powers are rather subjected to the law whilst sovereignty is in the hands of the Nation and the State and not in those of its temporal representatives who would even risk usurping it. If absolutely necessary, this reasoning would simply obstruct the control of constitutionality and would eventually make a void of the very concept of a constitution as a standard

The other grandiloquent principle advanced against the justiciability of social rights is the budgetary power of the Parliament, namely the power to decide on the returns and expenses of the State. Apart from the fact that the retort evoked above on the sovereignty of the Parliament in general is reportable here, it would be necessary to face the facts and to note that even in the strict framework of civil and political rights, the judge's decisions can have a non negligible budgetary impact notably when they condemn the State to redress for the damage caused by its agents on the people entitled to the rights. One cannot base the thesis of the impossible justiciability of social rights either on the supposedly vague and imprecise nature of their statements.¹³² First of all, the clarity or the precision appreciate statement by statement. In addition, the provisions establishing some civil and political rights are not clearer.¹³³

All does not depend on the text. In German law, no constitutional provision establishes any social right. Nevertheless, the constitution stipulates that Germany is a State of social right. The constitutional jurisdiction was able to deduct a directly applicable right of the individual

¹²⁸ L'article 2 du PIDESC oblige en effet tous les Etats parties à user de tous les « *moyens appropriés* » en vue d'assurer le plein exercice des droits que le pacte consacre.

¹²⁹ Voir Observation générale n°96 (1998) : DUMONT (Hugues), *Systèmes internationaux de protection des droits de l'Homme*, Syllabus de Cours, Université du Burundi, Chaire UNESCO en Education a la paix et Résolution Pacifique des conflits, 2008- 2009, inédit, p 51 .

¹³⁰ Voir notamment JAGNE(Fatou) : *Le statut des droits économiques, sociaux et culturels en Afrique*, Communication présentée à Banjul, inédit, p.6.

¹³¹ *Ibidem*

¹³² CREDOF, *Amicus curiae spontané adressé au conseil d'Etat sur l'affaire référencée Réf. N°322326 requête du Gisti et de la FAPIL c/ ministères de l'Immigration et du Logement Intervenants : Cimade, AFVS, DAL et observations de la HALDE.*

¹³³ GEORGITSI (Evangelia), *op cit*, p.19.

to livelihood. Moreover, it does not hesitate to address some injunctions to the national legislator, either to impose on them some timelines for a future normative production, or to enact temporary rules (legislation by substitution).¹³⁴

The jurisprudence of some African national legal systems is also instructive enough on this subject. In a case that has become very famous, after noticing that social rights are established by the constitution, the South African constitutional court deemed that they would not exist only on paper and that from then on, the jurisdictions have the constitutional obligation to make sure that they are respected and realized.¹³⁵

Concerning the right to health, the same constitutional court of South Africa deemed that the constitution imposed on the government the obligation to develop a global and coordinated programme in order to progressively to give effect to the right of pregnant women and their newborn children to have access to health care to fight the transmission of the mother to child HIV/AIDS.¹³⁶

What about Burundi?

I.2.2. Issue of Judicial Settlements in Order to Enforce the Right to Health in Burundi.

When seeking to know the position of the Burundian jurisdictions on the issue of the justiciability of social rights, one is struck by the extreme scarcity of the applications already recorded and by the non-existence of court judgments delivered.

Our investigation at the Constitutional Court and at the administrative Court of Bujumbura could only trace one request introduced by the first jurisdiction in 2007 invoking the right to education.¹³⁷ However, this application could not go any further, as it had been deemed inadmissible for want of qualification of the plaintiffs. As for the right to health, it has never been claimed. It is an established fact that in Burundi the applications for justice in Burundi very rarely cause any problem in terms of human or fundamental rights. In his survey on the Burundian administrative justice system, Gilles CISTAC argued that by "principle of proximity", the practitioners sometimes resort without discernment to the most immediate rules of domestic law to the detriment or without giving a single thought to international (and constitutional, we have added) sources for a better guarantee of the rights for the justiciable.¹³⁸

This is obviously far from being exclusive to Burundi. Researches on the effectiveness of human rights in Africa almost always bump into this problem¹³⁹. It obviously cannot be explained by the supposedly preference of the African for finding a solution through discussion rather than through a law suit. "More scientific" explanations such as the ignorance about the Rights, the complexity and the cost of procedures, certain mistrust in the judicial system, etc. explain this state of things. These obstacles become more and more obvious and meaningful when the right being claimed is a social one. Indeed, when we draw a picture of the situation, what we see is that the "natural" plaintiff here is a modest

¹³⁴ Idem, p.17.

¹³⁵ Le texte original en anglais est le suivant: "[s]ocio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state "to respect, protect, promote and fulfil the rights in the Bill of Rights" and the courts are constitutionally bound to ensure that they are protected and fulfilled" in GOLAY (Christophe, op cit, p.61).

¹³⁶ Affaire Ministère de la santé c/ campagne d'action pour le traitement.

¹³⁷ RCCB 209.

¹³⁸ CISTAC(Gilles), *Code de justice administrative du Burundi*, commenté et annoté, La Licorne, Bujumbura, 2008, p.121.

¹³⁹ Voir notamment Panels, p.23.

individual with little education and incapable to afford the services of legal representative. In these conditions, the survey on justiciability of social rights and the right to health in Burundi becomes unfortunately theoretical, limiting itself to a form of exegesis of the relevant provisions of the constitution.

The text of the fundamental law shows that the Constituent wanted to make Burundi a genuine State of law in which all fundamental rights would benefit from jurisdictional protection. As a matter of fact, in its article 48, it stipulates that: "*Fundamental rights must be respected in the entire legal, administrative and institutional system. The constitution is the supreme law. It has to be enforced by the legislative, executive and **judicial** powers. Any law that does not comply with the the constitution must be null and void*"¹⁴⁰ (we have underlined it). It entrusts the judicial power in general and the Constitutional Court in particular with being its guardian¹⁴¹. It insists about the latter by stipulating that its mission is "to make sure that all the State bodies and other institutions respect the constitution, including the *Bill of rights*"¹⁴².

It is important to specify here that the Burundian bill of rights comprises civil and political rights as well as the economic, social and cultural rights and that the constitution does not make distinctions between the judicial régimes of two categories" of rights; well on the contrary. Its position is comparable to that of the African Charter on Human and Peoples' Rights, which recognizes and establishes the indivisibility and interdependence of human rights. This is supported by its article 17, which stipulates, like the German constitution previously evoked, that: "*The task of the Government is to achieve the aspirations of the Burundian people, in particular to heal the divisions of the past, improve the quality of the life of all Burundians and to **guarantee to all the possibility of living in Burundi safe from fear, discrimination, illness and hunger***"¹⁴³ (article 17 and we have underlined it).

These elements make it possible to affirm that the right to health can have jurisdictional protection in Burundian law as is the case with the other subjective rights.

The jurisdictional and even constitutional **recognition** of a right cannot be sufficient. The commitment of the State is actually that of acting "*by all means appropriated*" in order to guarantee the effectiveness of the recognized right.¹⁴⁴

Therefore, the **materialization** of the latter requires that the State adopt legislation and all the necessary economic and social measures. By not doing so, Burundi would violate its international commitments as well as its constitution. Hence, we now have to look at its right to health implementation policy.

II. Effectiveness of the right to health in Burundi: Critical assessment of the actions of the government of Burundi regarding the right to health

Of course, the government of Burundi has a policy of implementing the right to health. Periodically, the government reviews this policy in order to adapt it to the context. Thus, the current National Health Development Policy (PNDS) is intended to cover the period between 2005 and 2015¹⁴⁵. But beyond design, concrete actions have been undertaken in view of

¹⁴⁰ CEDJ, *op cit*, p.7.

¹⁴¹ Article 60 et 225 de la Constitution in CEDJ, *op cit*, p. 7, p.18.

¹⁴² Article 228, 2^{ème} trait, de la constitution, CEDJ, *op. cit*, p.18.

¹⁴³ CEDJ, *op cit*, p.6.

¹⁴⁴ Art 2 du PIDESC. Voir aussi *Grootboom case* lorsque la Cour Constitutionnelle sud-africaine arrête que : « *The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive* " in *African Human Rights Law Reports 20001*, p.

¹⁴⁵ Article 228, 2nd line, of the constitution, CEDJ, *op. cit*, p.18

executing this policy. However, the major problem is to evaluate this policy vis-à-vis the law. How can we *legally* assess the social policy of a state while avoiding the risk of arbitrariness? How can we draw the conclusion that the state, given its level of economic development, meets or fails to meet its international and constitutional obligations, in our case consisting of positive benefits and whose fulfillment is, even in conventional and constitutional terms, *progressive*? This undertaking is difficult but not impossible. In order to do this, we will make use of indicators issued by specialized international organizations, in this case the World Health Organization¹⁴⁶. Thus, in paragraph 12 of its General Observation No. 14 (1998), the Committee on Economic, Social and Cultural Rights established the information necessary to evaluate the actions of the state. This includes:

1. **Availability:** This implies that health care facilities, goods, services and programs exist in sufficient quantity. In more precise terms, availability requires both adequate facilities, hospitals, clinics, medical and professional staff as well as other critical health factors such as drinking water.
2. **Access:** This has four dimensions:
 - Non-discrimination: The goods, services and programs mentioned above should be accessible to all, especially the most vulnerable and marginalized, in both theory and practice.
 - Physical accessibility: The goods, services and programs listed above should be safely accessible to all sections of the population, including the most disadvantaged or disabled and this should be the case even in rural areas.
 - Affordability: These goods and services must be affordable, especially for disadvantaged social groups.
 - Accessibility of information: The supposed beneficiaries of the goods and services listed above must have access to any information relating thereto.
3. **Acceptability:** This concerns the appropriate medical ethics and culture in all health care facilities.
4. **Quality:** The services offered must be scientifically and medically appropriate and of good quality¹⁴⁷.

Unable to assess the action of the Government of Burundi on the basis of these criteria due to both issues of time and methodology, we propose to undertake this exercise based on two criteria, which according to us, seem the most relevant for Burundi i.e. availability and affordability¹⁴⁸.

Here, we cannot fail to highlight the problem of lack of updated statistical data. Indeed, except for budgets, the most recent field data paints a picture of the situation existing 3, 4 or even 5 years back. Nevertheless, this has little impact on the reliability of the information since in this subject matter, and as shown in the sections below, changes are not significant over periods of this length.

¹⁴⁶ CEDJ, *op cit*, p.6

¹⁴⁷ See 2nd article of the ICESCR. See also *Grootboom case* where Constitutional Court of South Africa rules that: « *The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the executive* » in *African Human Rights Law Reports 20001*, p

¹⁴⁸ Republic of Burundi, Ministry of Public health and the Fight against AIDS, *National Health Policy 2005-2015*, September 2004, (unpublished work available at the Library of the World Health Organization (WHO) office in Bujumbura.

II.1. Availability of infrastructure, drugs and human resources

II.1.1. Infrastructure

In 2006, Burundi had 47 hospitals serving a population of 7,750,566 inhabitants. This represents a ratio of one hospital per 164,906 inhabitants¹⁴⁹. The WHO minimum standard, however, is 1 hospital per 100,000 inhabitants. At the same time, there were 610 health centers for the same number of inhabitants, which on average represents one health center per 12,705 inhabitants, whereas the WHO minimum standard is one health center per 10,000 inhabitants. In addition to the scarcity of health facilities is a very poor territorial distribution of existing facilities. Whole provinces as much as entire populations have only one hospital. This is the case Makamba, Muyinga, Bubanza and Bujumbura Rural provinces, while the Municipality of Bujumbura alone has a dozen hospitals¹⁵⁰. The situation regarding health centers is hardly better. As an example, the whole province of Karuzi has only 15 health centers, while the municipality of Bujumbura has 66, creating huge distortions in terms of average (Karuzi: one health center per 24,116 inhabitants, Bujumbura: one health center per 7,750 inhabitants)¹⁵¹.

One explanation for these disparities is the reluctance by private health actors to invest in rural areas. For example in 2006, there were only eight private hospitals in the whole of the country, with the Municipality of Bujumbura carving itself, as always, the lion's share with six hospitals, Ruyigi and Kirundo provinces sharing the other two. The same case applies to health centers as at that time (i.e. 2006) and only as an example, the Municipality of Bujumbura had 46 private health centers while Karuzi and Ruyigi provinces had none¹⁵². The attitude of the private sector is quite rational given the very low income of people in rural Burundi. This situation necessitates government intervention. In order to ensure real fairness in the enjoyment of social rights, the government must indeed invest more efforts in sectors and geographical areas that least interest private investors. This is one of the most basic purposes of public service.

The existence of infrastructure alone is not enough. Further, it is necessary to ensure the availability of both care and drugs.

II.1.2. Drugs

The pharmaceutical industry is almost nonexistent in Burundi. One pharmaceutical company (SIPHAR, which acquired the defunct Office Nationale de la Pharmacie) is operational but its production is insignificant. Burundi thus depends largely on imports, mainly through Central d'Achat des Médicaments au Burundi (CAMEBU)¹⁵³. Apart from manufacturing, marketing of drugs is also problematic due to insufficient and uneven distribution of pharmacies. Therefore in 2005, Burundi had only 94 pharmacies. Out of these, 62 were located in Bujumbura, 15 in Gitega and Ngozi urban centers, with the remaining 14

¹⁴⁹ The use of the General Observations of the Committee on Economic, Social and Cultural Rights is justified by two reasons: 1. Compared to other sources, the provisions of ICESCR are most relevant (articles 2 and 16), the most clear and explicit regarding the obligations of the state. 2. The provisions of ICESCR are entrenched in Burundian law by Article 19 of the Constitution of Burundi

¹⁵⁰ The Committee on Economic, Social and Cultural Rights, *General observation* No. 14 (2000) on www.unhcr.ch/tbs/doc.nsg of June 20, 09

¹⁵¹ In our opinion, the very order of enumeration of the CESCR (availability, accessibility, acceptability, quality) is not purposely. Indeed, we can only access something that exists (availability). However, leaving out luxuries, ethical (acceptability) and qualitative (quality) considerations are only in turn relevant for already existing services that are in use as they are accessible.

¹⁵² Observatoire de l'Action Gouvernementale (OAG): *Evaluation of the effects of the health care subsidy measure for children under five years and for deliveries in health facilities and the quality of care*, in April 2009, unpublished, p. 13-14

¹⁵³ Ministry of Public Health, 2007, budget review, p.22

provinces sharing 18 pharmacies¹⁵⁴.

This state of affairs negatively affects the availability of the drugs in health care facilities. Thus, the issue of stock-outs is one of the main problems facing most hospitals¹⁵⁵. A study commissioned by the Economic Management Support Programme (PAGE) and conducted by Institut des Statistiques et des Etudes Economiques du Burundi (ISTEEBU) found that health facilities are experiencing shortages of *essential drugs* (anti-malarials, painkillers, antibiotics, antipyretics, antihelminthics) for an average duration of 10 days/year, a duration that can extend up to 200 days in some provinces such as MUYINGA¹⁵⁶.

What about medical personnel?

II.1.3 Medical personnel

In December 2005, Burundi had 201 doctors, physicians and specialists included. This represents a ratio of one doctor per 47,678 inhabitants, while the WHO minimum standard is one doctor per 10,000 inhabitants. Of the 201 doctors, 46 were working as administrators in the ministry of Public Health. Of the remaining 159 doctors, the Municipality of Bujumbura had the lion's share with 91 doctors, Ngozi 14, Gitega 10, leaving the other 14 provinces with a total of 44 doctors. Here once again, the problem of distribution is acute. But what are the factors explaining the scarcity of doctors in Burundi? A study commissioned by Observatoire de l'Action Gouvernementale (OAG) shows that this is due to the low numbers of students completing studies at the Faculty of Medicine of the University of Burundi and brain drain. The last survey conducted on the extent of this problem between 1992 and 2002 (unfortunately the only period studied) revealed that out of 39 doctors who went abroad for specialized training, only 18 returned.

Unfortunately, there are no statistics at least showing the number of doctors who have left to practice in countries in the sub-region, but there is no doubt that they've been leaving in large numbers. The exodus of doctors is a widespread problem throughout Africa. According to the World Health Organization (WHO), approximately 20,000 African doctors and nurses leave the continent each year mainly for OECD countries¹⁵⁷. The departure for the North is explained by better pay and technology available in these countries. The impact of the recent review, which saw salaries for doctors increased in 2009, has not yet been evaluated. It should not however be very significant given the disparity between the salary demanded and the increment granted¹⁵⁸. The health, financial and institutional cost for Burundi and Africa is so huge that some have called for Africa to be compensated. To justify this, Mathieu Loitron, an expert on the subject, notably underlines the cost of training a doctor in Africa. For example, a country like Kenya, whose average annual income is 558 US dollars, spends about 66,000 US dollars to train a doctor and 43,000 US dollars for a nurse. OECD researchers also argue that exiled health workers represent a loss of 1 billion US dollars to South Africa alone¹⁵⁹. Therefore, Africa is in a situation where it is "subsidizing" the West in terms of medical and paramedical personnel and this is paradoxical given the levels of development of the two parts of the world.

¹⁵⁴ Ministry of Public Health, 2006, *budget review*, p.22

¹⁵⁵ Ministry of Public Health, 2007, *budget review*, p.22

¹⁵⁶ *At its inception, CAMEBU received a start-up fund of 5 billion FBI. Between 2005 and 2006, its subsidies amounted to 31 million FBI per fiscal year. Since 2007, CAMEBU has been on its own.*

¹⁵⁷ Republic of Burundi, Ministry of Public Health and the fight against AIDS, *op cit*, p.16

¹⁵⁸ ISTEEBU & PAGE, *Survey of public expenditure follow-up and level of satisfaction of beneficiaries in education, health and justice in the Republic of Burundi, March 2009, unpublished*, p.95.

¹⁵⁹ PETS Burundi, 2007, in *idem*, p. 18

However, the solution to this problem remains the training of large numbers of doctors and the creation of decent living and working conditions in Africa. This is the responsibility of each country, including Burundi.

Concerning paramedics, Burundi is doing relatively well as figures are above the minimum. In 2006, there were 2,562 nurses i.e. one nurse per 2,810 inhabitants. The WHO minimum standard is one nurse per 3 000 inhabitants. But here once again, geographical distribution is far from equitable. For example, while the municipality of Bujumbura had 1,415 nurses (which is over 53% of the total), Cankuzo province had only 22 nurses¹⁶⁰

Even where health facilities are available and functioning normally, the financial barrier prevents a large segment of the population from fully enjoying services.

II.2. Affordability of health services

According to General Observation No. 12, affordability means, as stated further above, that *medical care must be affordable, especially for the most disadvantaged.*

Health care is generally expensive, in Burundi as elsewhere, where the cost is fully borne by the patient alone or their family. This is the purpose of health insurance. We are going to examine the current state of this system in Burundi. We will also examine the free health care policy for certain population categories.

II.2.1. Health insurance

Based on the categories of beneficiaries, there are three health insurance schemes in Burundi:

- 1) The first category is for public employees and the like. It is organized by government decree No. 1/28 of June 27, 1980 on the establishment of a health insurance scheme for public officials and related workers¹⁶¹. It is managed by a body known as *Mutuelle de la Fonction Publique* created by government decree No. 100/107 of June 27, 1980 establishing *Mutuelle de la Fonction Publique*¹⁶². The beneficiaries of this system are the insured (civilian personnel working for public legal entities, members of the armed forces, their legal dependants, beneficiaries of a state widow's or orphan's pension plan as well as the beneficiaries of survivor pension plans administered by Institut National de Sécurité Sociale (INSS). To this, we can add the current and future beneficiaries of retirement pension schemes administered by INSS or the State due to incapacity or physical disability (Article 3.7 and 10 of government decree No 1/28 of June 27, 1980). This insurance covers both preventive and curative medical care (article 14 and 18). In addition to the low coverage which we will examine later, this system has several shortcomings in particular due to the virtual absence of pharmacies of the insurance scheme or jointly established ones in rural areas, something that deprives its legal beneficiaries of these services.

It should equally be noted that for some drugs, coverage of the insurance scheme is reduced to almost nothing due to a policy aimed at encouraging the consumption of local or generic pharmaceutical products¹⁶³.

¹⁶⁰ See SYMEBU list of grievances, unpublished.

¹⁶¹ Loitron (Matthieu), *op cit*, p. 2

¹⁶² Observatoire de l'Action Gouvernementale(OAG) : *Evaluation of the effects of health care subsidy policy for children below 5 years and deliveries in health facilities and quality of health care*, April 2009, unpublished, p. 13-14

¹⁶³ BOB No. 9/80 p. 264-273

- 2) Formal private sector: There is still lack of a general insurance system for the private sector. Government decree No. 1/17 of July 28, 1983¹⁶⁴ on the provision of care to private sector and industries as well as parastatals workers, who do not fall under the Public Service, has quickly fallen into disuse. The decree forced these companies to entrust the Ministry of Public Health with the task of providing care based on the payment of a basic rate of 350 BFI per month per worker. This rate was reduced to 250 BFI (Article 10) for employers with health clinics, who had a further right to a temporary physician (Article 5). Note that in theory, there should be no problem for workers in the private sector. Indeed, under Article 301 of government decree No. 1/037 of July 07, 1993 amending the labor code, the employer is required to bear the entire cost of medical care for its employees pending the establishment of a private sector health insurance scheme¹⁶⁵. In practice, however, few employers comply with this provision. Alleging that the health care bills are too high, which is often the case, they decline to pay.

The single greatest remaining issue of concern is the size of the population that really benefits from the two systems described above. Indeed, Burundi is a country where over 90% of the working or able-to-work population has no employer and is supposedly composed of “independent” farmers and craftsmen.

- 3) Independent workers: Ordinance No. 620/57 establishing a health insurance card¹⁶⁶ (CAM) was published on March 20, 1984. It instituted a system of insurance scheme conferring medical, surgical and other benefits (article 4). The cost of the card was 500 FBI for farmers, 1,500 FBI for artisans and small traders and 3,000 FBI for registered traders.

Initially, proceeds from the sale of CAM were kept in the Treasury. In 1988, a reform ordered the payments to be deposited in commune funds¹⁶⁷ Representing 9% of their total revenues, these funds were perceived as a windfall by most communes. Thus, they were not allocated for health services. This has led to drug shortages and poor reception in the health centers¹⁶⁸. This explains why 8 years after its launch, i.e. in 1992, only 20-25% of Burundians are using CAM despite the benefits it was supposed to provide.

This system has also been criticized for being inconsistent with the policy of ensuring management autonomy for hospitals and health centers.

It is a well-known fact that it is only a small fraction of public and private sectors employees that benefit from health insurance in Burundi, in both law and practice. A survey conducted in 2007 indeed found that 90% of Burundi's population directly and fully paid for health care¹⁶⁹. The same case applies for most sub-Saharan African countries. Thus, in some countries like Burkina Faso, farmers have decided not to rely on themselves but to form micro-health insurance groups¹⁷⁰. This could be an inspiration for rural areas in Burundi. In turn, the Government should facilitate and support the creation of these structures.

¹⁶⁴ *Idem.* p. 274—282

¹⁶⁵ See the practice known as the “supplements” undertaken particularly by Mutuelle de la Foction Publique where the latter declines to assume more than 80% of the cost of a generic drug, where the client chooses to consume an “original” drug, leaving the subscriber to pay the difference between the price of the original and the generic.

¹⁶⁶ *BOB No. 5/84*, p. 199-200.

¹⁶⁷ *BOB No. 9/1993*, p.537

¹⁶⁸ *BOB No. 5/84*, p. 212-213

¹⁶⁹ Republic of Burundi, Ministry of Public Health and the Fight against AIDS, *Health Sector Development Policy, major guidelines, 1996*, p.21.

¹⁷⁰ *Idem.*, p.23.

Still in regard to health insurance, we should note that on February 29, 2000, a law establishing a maternity health insurance for the private sector was enacted¹⁷¹. Its article 2 states that any private legal entity may create a formal private sector maternity insurance agency. There is, however, to date, no such organization in operation.

Maternity care was rightly a central concern for policy makers who have gone ahead to offer free, just as in the case of care given to children under five.

II.2.2. Focus on health care subsidy policy for children under 5 years and childbirth

On June 16, 2006 decree No. 100/136 on health care subsidies for children under 5 years deliveries in public and similar health facilities was signed¹⁷². According to article 3 of this decree, the provision of this care is funded in whole or proportionally to co-payment for those already benefiting from a third-party payer. Thus, in the budget estimates for 2007 and 2008, amounts equivalent to 1,800,000,000 BFI and 4,250,000,000 BFI were allocated for the implementation of this measure¹⁷³.

The effect of this decree has been undoubtedly positive. A look at the number of consultations for children under 5 years and hospital deliveries attest to this fact.

For example, in Cankuzo province, in 2006 (the measure was not yet in force during the first half), 71,118 children under 5 years visited health facilities, while the figure rose to 141,023 in 2007, an increase of over 90%. In terms of hospital deliveries, the figure was 265 in Makamba in

2006 but in 2007, this figure rose to 554, an increase of over 100%¹⁷⁴. It immediately becomes apparent that ease of access to care for children and women giving birth can help to achieve the objective of article 12.2, a) of ICESCR which is “the reduction of stillbirths and infant mortality as well as the healthy development of children”¹⁷⁵. It also leads to the realization of the 4th and 5th Millennium Development Goals which respectively are to “reduce the mortality of children under 5 years” and “improve maternal health”¹⁷⁶.

But all is not rosy regarding the effects of this decree. Several voices were raised to underline, with good reasons, the fact that the decree was not well-prepared to anticipate its potential effects, particularly on the functioning of health facilities. For example, the slow payment of bills by the state has led to liquidity problems which have in turn led to shortages of essential drugs. An opinion poll conducted in 2007 revealed that the non-repayment of benefits accorded to health insurance cardholders or those entitled to free health care and the consequent lack of resources were considered by managers of health facilities as the most fundamental problems in 2005 and 2006¹⁷⁷.

Overcrowding in maternity and pediatric facilities has equally led to a deterioration of hygienic conditions. Thus, at the Kamenge Teaching Hospital, the bed occupancy rate for

¹⁷¹ Republic of Burundi, Ministry of Public Health and the Fight against AIDS, *Profile of the health system in Burundi*, August 2007, p.23.

¹⁷² *Ibidem*

¹⁷³ BOB No. 3/2000, p. 163-170

¹⁷⁴ A yet to be published document available at Centre d'Etude et de Documentation Juridiques (CEDJ)

¹⁷⁵ ISTEEBU & PAGE, *op cit*, p. 69

¹⁷⁶ Observatoire de l'Action Gouvernementale (OAG): *Evaluation of the effects of the health care subsidy for children under 5 and deliveries in health care facilities and quality of health care*, April 2009, unpublished, p.16

¹⁷⁷ Observatoire de l'Action Gouvernementale (OAG): *Evaluation of the effects of the health care subsidy for children under 5 and deliveries in health care facilities and quality of health care*, April 2009, unpublished, p.16

children increased from 44% in 2006 to 111% in 2007, thus forcing the hospital to make patients sleep on the floor. At the same time, the maternity occupancy rate moved from 63.2 to 95%¹⁷⁸ We would also not fail to point out that increasing the workload of medical staff without any special incentives cannot fail to affect the quality of care.

The inventory of resources and their accessibility by beneficiaries does not meet the criteria of the Committee on Economic, Social and Cultural Rights. The question that we ought to ask ourselves is whether these deficiencies are explained by poverty in Burundi, a country that, in addition, is emerging from a long political crisis. The importance of this question is that it allows us to distinguish between failure related to lack of political will and that emanating from lack of resources.

However, the committee has already clarified that this provision is not meant to allow poor countries not to comply with the Convention, regardless of their level of economic development. Lack of resources does not absolve states from their minimum obligations in terms of the implementation of economic, social and cultural rights¹⁷⁹. The most appropriate thing to do is to analyze the share of resources that the government allocates to the health sector.

II.3. Financing Health Care in Burundi

The national budget is undoubtedly the most important macroeconomic policy instrument of any country. Indeed, its content reflects the broad government guidelines in terms of growth objectives and social priorities.

The following tables show the evolution of the budget allocated to the health sector, first from 2004 to 2008 and thereafter between 2009 and 2011.

Table 1: Evolution of the health sector budget from 2004 to 2008

| Year | Total National Expenditure | Ordinary Health Budget | Extraordinary Health Investment Budget | Percentage of health expenditure (%) |
|------|----------------------------|------------------------|--|--------------------------------------|
| 2004 | 227,483,161,035 | 4,888,485,610 | 489,000,000 | 2.4 |
| 2005 | 326,195,409,243 | 5,113,206,587 | 519,311,000 | 1.7 |
| 2006 | 417,804,791,249 | 19,061,862,630 | 3,471,460,000 | 5.4 |
| 2007 | 445,345,226,204 | 15,467,444,801 | 2,972,000,000 | 4.1 |
| 2008 | 520,412,233,257 | 19,938,810,288 | 4,784,854,801 | 4.8 |

Source: Finance Act 2004 - 2008

¹⁷⁸ See the list of MDGs at www.undp.org (accessed on 30/1/2011).

¹⁷⁹ ISTEERU & PAGE, *op. cit.*, p. 69.

Table 2: Evolution of the health sector budget from 2009 to 2011

| Year | Total National Expenditure | Ministry of Health Expenditure (BOF and BEI) | Percentage of Health Expenditure (%) |
|------|----------------------------|--|--------------------------------------|
| 2009 | 826,141,240,165 | 40,523,583,362 | 4.90% |
| 2010 | 863,059,645,685 | 63,512,077,128 | 7.36% |
| 2011 | 1,026,173,387,730 | 72,364,365,043 | 7.05% |

Source: Finance Act 2009, 2010, 2011.

These budget tables highlight two facts:

1. The government of Burundi allocates insufficient resources to the health sector.
2. Funding decreases in some years, instead of increasing continuously.

The assertion that Burundi allocates insufficient resources to the health sector is based on its international commitments and guidelines of international organizations to which it belongs. These directives are tools for the interpretation of the convention. Indeed, the WHO "standard" requires each country to allocate at least 15% of its annual budget to the health sector. The standard overlooks the claim that Burundi is under-developed as it does not speak of absolute amounts. It simply prohibits governments from treating health care as the least of their worries, calling on them to allocate it a relatively significant share of the national budget compared to other national sectors. Moreover, according to the Committee on Economic, Social and Cultural Rights, allocation of insufficient funds to this sector or misallocation of public resources in such a way that it becomes impossible for certain individuals or groups to enjoy their right to health¹⁸⁰ is a violation of this right.

Another issue of concern at this level is the allocation of funds already given to the health sector. Indeed, except in very rare cases, over two thirds of the budget is allocated for administrative services, mainly the payment of staff salaries, at the expense of buying drugs or equipment necessary for the provision of satisfactory quantitative and qualitative care. The following table represents a small illustration of this situation:

Table 3: Distribution (in %) of the ordinary operating budget of the ministry of health

| Indicators | Year | | |
|---|-------|-------|-------|
| | 2005 | 2006 | 2007 |
| Allocation to administrative operations | 62.9 | 86.5 | 76.1 |
| Allocation to autonomous hospitals (%) | 19.8 | 7.3 | 11.7 |
| CAMEBU subsidies (%) | 0.6 | 0.2% | 0.0 |
| Allocation to programs and projects (%) | 16.6 | 6.0 | 12.2 |
| Total | 100.0 | 100.0 | 100.0 |

Source: Finance Act 2005, 2006 and 2007.

¹⁸⁰ Observatoire de l'Action Gouvernementale(O.A.G) : *Evaluation of the effects of health care subsidy for children under 5 and deliveries in health care facilities et quality of health care, April 2009, unpublished, p. 16*

As for the reduction of resources allocated to the health sector in fiscal years 2005, 2007, 2008, 2009 and 2011, it clearly goes against the principle of progressive realization of economic, social and cultural rights. The obligation of progressive realization indeed includes not taking or authorizing regressive measures. This is the obligation widely known as the “standstill effect” or “ratchet effect”. The Committee on Economic, Social and Cultural Rights has in fact already clearly laid down the rule that “if an economic or social right cannot be fully guaranteed, it must be to the fullest extent possible. The partial fulfillment of the right under these conditions is not a violation of the Convention, but a regression compared to a higher level of enjoyment of rights, partial or total, may constitute a violation”¹⁸¹ The Committee seems to have wanted to indicate that when a state reduces, without any apparent justification, public spending on programs intended to ensure the realization of economic, social and cultural rights, it might be considered as being in breach of its obligations under the Convention¹⁸².

Internal funding of the health sector is therefore not beyond the scope of obligations imposed on Burundi in this area.

CONCLUSION

This work has enabled us to demonstrate that effective recognition and realization of social rights is not a luxury but necessary to ensure the legitimacy of the rule of law in the modern and full sense of the term.

The obligation to guarantee social rights including the right to health is, for Burundi, based on international instruments that it has ratified and its constitution. These are full rights. Jurisprudence in human rights increasingly recognizes their justifiability.

The implementation of the right to health remains insufficient in Burundi as the health sector is not yet receiving enough resources. Burundi’s poverty does not explain everything as illustrated by the budget allocated to the health sector.

In light of our findings, we would like to suggest:

1. Training of legal practitioners in order to enable them to make use of international and constitutional standards relating to human rights and especially social rights in their pleadings and judgments.
2. Sensitization of the populations to make them aware of their rights and opportunities to exercise the same.
3. Establishment of a rational health insurance policy for all.
4. Continued efforts geared towards the allocation of at least 15% of government expenditure to the health sector as this is one of its commitments.
5. Reconstruction of health infrastructure.
6. Design and implementation of a training and incentive policy for medical and paramedical personnel.

In this manner, rights will cease to be mere proclamations to the greater benefit of the dignity of Burundians.

¹⁸¹ See paragraph 52 of the general observation No. 14 of CDESC

¹⁸² United Nations High Commissioner for Human Rights, *Economic, social and cultural rights*, Manual for human rights institutions, In ESCR panels, United Nations, New York et Geneva, 2004, p. 13, at www.unhcr.org/consulté on 30/01/2011).

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MUNICIPAL DECENTRALIZATION IN BURUNDI: THE CHALLENGES OF EFFECTIVENESS

By Désiré NGABONZIZA*

PRINCIPAL ABBREVIATIONS

1. § : Paragraph
2. Par : Paragraph
3. Art. : Article
4. BINUB : United Nations Integrated Office in Burundi
5. Ed / ed. : Edition
6. Etc. : Et cetera (so forth)
7. BIF : Burundian Francs
8. Ibid : Same book, same author, same page
9. Idem : Same book, same author
10. Infra : Below, further below
11. Kg : Kilogram
12. LGDJ : Librairie Générale de Droit et de Jurisprudence
13. No. : Number
14. OAG : Observatoire de l'Action Gouvernementale
15. NGO : Non Governmental Organization
16. Op.cit. : Opere citato (Already cited work)
17. P. : Page (s)
18. PCDC : Communal Plan for Community Development
19. Supra : Above, further above

MUNICIPAL DECENTRALIZATION IN BURUNDI: CHALLENGES TO EFFECTIVENESS

Introduction

According to the Hachette dictionary, decentralization is defined as the transfer of powers from a central agency to regional or local institutions¹⁸³. In general, we can say the term refers to the process involving the transfer of powers from a central level to a local level, from the central government to various institutions.

The definition adopted in law is no different from the one explained above. According to Raymond Guillien and Jean Vincent, decentralization is an administrative system that permits a human community (territorial decentralization) or a department (technical decentralization) to govern its affairs under the control of the state by according it a legal status, its own authority and resources¹⁸⁴.

As shown above, there are two types of decentralization: Technical decentralization and

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¹⁸³ Hachette, *Le dictionnaire couleurs* (sous la direction de MOINGEON, M.), Paris, 1992, p.401

¹⁸⁴ GUILLIEN (R.) and VINCENT (J.), *Legal Terms*, 10th ed., 1995, Paris, Dalloz, p. 178.

territorial decentralization. Communal decentralization, which is the subject of our analysis, falls under this latter category.

In Burundi, it has been provided for under the Basic Law as well as the Law. Indeed, the Basic Law stipulates that “the commune is a decentralized administrative entity”¹⁸⁵. The Communal Law on the other hand defines the commune under its first article as “a decentralized local authority, endowed with a legal status, organizational and financial autonomy”

The constitution and the law have conferred powers to the commune. Communal decentralization is designed as an integral part of the democratization process under the rule of law. On the one hand, the main issue is the political management of transition from a system of an all powerful state to a system of sharing power and resources between the state and other state organs, including local authorities such as communes, to a point where one cannot conceive the rule of law without the involvement of decentralized entities.

A commune is characterized by:

- A name, a population and a clearly-defined geographical area within the national territory;
- An elected council;
- Its own resources;
- A specific mandate and powers granted by the Constitution and the Law;
- A legal status, administrative and financial autonomy as well as administrative freedom, which gives it power to take legal action¹⁸⁶.

Thus, the Constitution explicitly recognizes the legal status of communes by giving them administrative and financial autonomy, which is one of the attributes of a legal personality.

Since communes are run by people elected through direct universal suffrage, the legal status granted to them implies administrative freedom and free exercise of their powers. However, this autonomy in taking decision and action, whatever its size or scope, can only be exercised within the framework of the constitution and the law.

The constitution and the law are thus good starting points in the decentralization process. They are signs of significant progress compared to previous legislation. But the question that we need to ask is whether such this mode of government provided for under the law is operational. Are the necessary guarantees for the fulfillment of the objectives of any decentralization sufficient to promote real local development based on the proper functioning of communal councils and local development structures? This is the question that we are going ask ourselves and attempt to answer.

To investigate this issue, we will first try to briefly understand the key concepts before examining the evolution of decentralization in Burundi. Finally, we will end by analyzing the strengths and weaknesses of this system. It is based on these weaknesses that we will try to make our contribution with a view to improve the current situation.

¹⁸⁵ Art. 263 of the constitution of the Republic of Burundi of 18 March 2005; in the same sense, art. 1 par.1 of law no. 1/02 of 25th January 2010 on amendment of law no. 1/16 of 20th April 2005 on the organization of communal administration

¹⁸⁶ OHNET (J.-M.), *History of French decentralization*, Librairie Générale Française, Paris, p.57.

I. Concept of decentralization and its purpose

I. 1. What is a commune?

I.1.1. Some doctrinal definitions

A. de Tocqueville defines a commune as a self-forming association of men. According to him, the society exists among all people, regardless of their customs and their laws. If men create Republics, the commune seems to come straight out of the hands of God¹⁸⁷.

G. Melleray agrees wholeheartedly with him when he writes that a commune is a natural community, a genuine solidarity, a basic unit, which offers the advantage directly being in touch with the citizens¹⁸⁸

As for Maspétiol and Laroque, a commune is territorial entity, which is not born of the law, but rather of the nature of things, and which is endowed with a number of prior rights that are different from those of the State¹⁸⁹.

There are three elements appearing in these definitions:

- A community or a supportive fellowship of men;
- A territory;
- Own interests separate from those of the state.

Therefore, in order to talk of a commune, there is need for a population with shared interests, a geographical area serving as a territory. The authors cited above emphasize on the fact that a commune is not a creature of statutes, but is rather born of the nature of things.

However, H. Roussillon notes, with reasons, that legislative action is necessary to legalize this factual situation, a situation that may change depending on the will of the legislature¹⁹⁰
What is the situation in Burundi?

I.1.2. Constitutional and legal definitions

I.1.2.1. Constitutional definition

The Law No. 1/010 of March 18, 2005 promulgating the Constitution of the Republic of Burundi is the main basis of decentralization. It devotes six articles to the decentralization process, including Article 263 which states that “the commune is a decentralized administrative entity”.

The provisions of this article do not explicitly show the conditions necessary for the implementation of decentralization. These conditions were specified in an organic law which appeared in the communal law enacted the following month and again later through the amendment of the same law on January 25, 2010.

¹⁸⁷ De TOCQUEVILLE (A.), *Democracy in America*, Book 1, Paris, Flammarion, 1984, p. 122

¹⁸⁸ MELLERAY (G.), *State Oversight over Communes*, Paris, Sirey, 1981, p. 24

¹⁸⁹ MASPÉTIOL and LAROQUE, *Administrative oversight*, Paris, Sirey, 1930, p. 114

¹⁹⁰ ROUSSILLON (H.), *Territorial structures of Communes*, Paris, L.G.D.J., 1972, p. 225

I.1.2.2. Legal definition

Article 1 of Law No. 1/02 of January 25, 2010 on the organization of the communal administration or the communal law stipulates that “the commune is a decentralized local authority, endowed with a legal personality as well as organizational and financial autonomy”.

In this definition, there are three conditions for the realization of decentralization:

- Legal personality;
- Organizational autonomy;
- Financial autonomy.

To these three conditions, we need to add the existence of specific interests (Article 5 of the communal law).

After explaining the concepts, we need to ask ourselves the rationale behind decentralization.

I.2. Need for decentralization or why decentralize?

Decentralization is necessary both in terms of administrative and political perspectives. It facilitates the participation of citizens and increases the efficiency of the administrative machinery.

In its purest form, centralization means that the state as the “only public entity for the entire country, entirely assumes, on its budget, through its officials, the responsibility of meeting all the requirements of the general public”¹⁹¹.

Negligible when the state intervened less, disadvantages of centralization appear too heavy to bear when its intervention is extended. Overwhelmed with issues, the central government can no longer make timely decisions, or if it does, it only endorses proposals from its external departments without real knowledge of the problem as they are overwhelmed by other tasks that they are incapable of handling properly. In this way, they are unable to fulfill their general guidelines¹⁹².

Thus, centralization poses major drawbacks that some analysts have been quick to point out: “The power of decision never directly involves the people who benefit or suffer as a result of the decision”¹⁹³. This organizational model is based on this simple mechanism that we can caricature by putting emphasis on its first immediate consequence: Those who have the power to decide do not have the necessary information and those who have the necessary information have no power to decide and have no incentive to make their contributions¹⁹⁴.

Therefore, there is need to reexamine the centralized system. The desire to decongest the central government, to allow for rapid and more efficient decision-making and to facilitate

¹⁹¹ MELLERAY (G.), *op. cit.*, p.34

¹⁹² DEBBASCH (C.), *Institutions and administrative law*, Paris, PUF, Thémis, 1976, p.199

¹⁹³ *Idem*, p. 21.

¹⁹⁴ MELLERAY (G.), *op. cit.*, p.21.

relations with those who are governed requires that the level at which decisions are made corresponds as much possible to the level where they apply¹⁹⁵.

A system where the state is “inflated” and “local democracy asphyxiated” is an essential characteristic of the neoliberal state, which has experienced phenomenal growth since the Second World War¹⁹⁶.

Decentralization and participation are ways of ensuring the involvement of wider segments of the population in decision-making.

Increased participation in decision-making in the public domain is a good thing in itself as it can improve efficiency, equity, development and resource management. By bringing government decisions closer to the citizens, decentralization increases accountability in the public sector, and thus its effectiveness.

One of the main goals of decentralization is to achieve one of the central aspirations of a good political administration, i.e. the fact that individuals have a say in their own affairs. In this sense, decentralization is a strategy of governance brought about by external or internal pressures in order to facilitate the transfer of power closer to those most affected by the exercise of that power¹⁹⁷.

II. Communal administrative structure in Burundi and its historical background

III.1. Organizational framework of territorial administration in Burundi

The territorial administration of Burundi includes:

- 17 provinces whose head of the executive (the Governor) is a senior appointee of the central government. Here, we need to recall that the City of Bujumbura (which covers almost the territorial surface area of the city of Bujumbura, the capital) is equivalent to a province¹⁹⁸ and is administered by a Mayor;
- 129 communes run by an elected council of 15 members including a communal administrator who is responsible for the implementation of the deliberations of the council. He/she sits on the council as the Secretary¹⁹⁹;
- 375 zones, which is an administrative district devolved from the commune;
- 2 908 Census hills or neighborhoods, which are the basic administrative units in rural areas (Census hills) and urban areas (neighborhood), are governed by an elected council.

Of all these subdivisions, the commune is the only decentralized entity.

¹⁹⁵ Idem, p.30

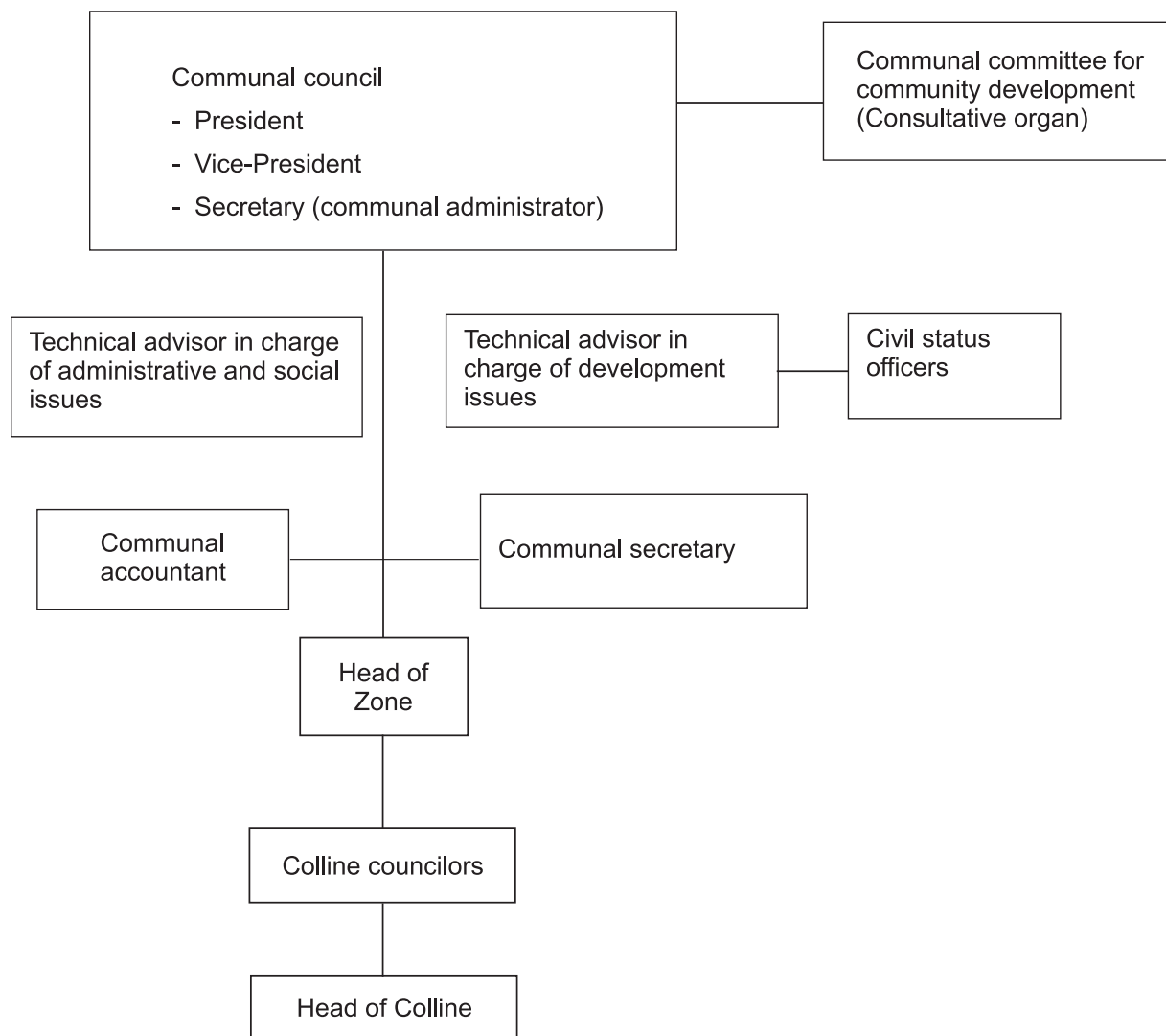
¹⁹⁶ DEBBASCH (C.), *op. cit.*, p 198

¹⁹⁷ Agrawal, A. and Ostrom, E., 1999, Collective action, property rights and decentralization: comparing forest and protected area management in India and Nepal (Ebauche polycopiée).

¹⁹⁸ See communal law (art. 111)

¹⁹⁹ Communal law, art.11 par.1

Table 1: Organizational chart of the administrative structure of communes in Burundi



II.2. Historical overview of the communal institution

The analysis of historical records does not show any trace of the existence of the commune as an administrative unit in Burundi during the pre-colonial period²⁰⁰ In fact, throughout this period, Burundi was a monarchy headed by a monarch, the Mwami (King). The Mwami was assisted to administer the country by Chiefs (who administered chiefdoms) and Sub-chiefs (who administered sub-chiefdoms).

Communes were established in Burundi towards the end of the colonial rule. Their introduction was contained in the Decree of December 25, 1959 on the political organization of Rwanda - Urundi²⁰¹.

This decree stipulated that urban districts as well as eventually expanded sub-chiefdoms would be converted into provisional communes, the only decentralized units, while chiefdoms would remain as simple decentralized districts.

²⁰⁰ GAHAMA (J.), *Burundi under Belgian administration: The period under the mandate (1919-1939)*, Paris, harmattan, p.105

²⁰¹ BELLON (R.) and DELFOSSE (P.), *Codes and laws of Burundi*, Brussels, Maison Ferdinand Larcier ; Bujumbura, Ministry of justice, 1970, p.287.

The merger of these administrative districts into communes was based on two main elements including:

- The number of inhabitants required to make communes financially viable;
- The fact that in order to ensure better administration, the population was not to be too far from the administrative center.

Later, through Legislative Ordinance No. 02/43 of February, 3 1961, the term “provisional commune” was replaced by “commune” governed by a burgomaster assisted by a communal council elected for a three-year term. The councilor obtaining the most votes became the burgomaster who was replaced by a communal administrator in 1965.

Over time, this democratic practice has declined given the fact that successive regimes after independence, while acknowledging the commune as the basis of local development, did not in reality recognize its prerogative and its administrative and financial autonomy, the oversight authority having always been transformed into hierarchical power.

It was not until the Arusha Agreement, which was signed between the Burundians on August 28, 2000, that the situation changed.

In effect, the Arusha Agreement proposes a series of reforms based on good governance. These included decentralization²⁰². The agreement stated that “communes are decentralized entities, which form the basis of economic and social development”. At the same time, it states that the Administrator may be dismissed or suspended by the central government or the communal council (though we need to recall that the communal council was nonexistent at the time of the signing). However, this agreement is silent regarding the manner of appointment stating that provincial governors are appointed by the President of the Republic and confirmed by the Senate.

Although the Arusha Agreement does not have the standing of the constitution, it has, since its inception on August 28, 2000, informed the creation of the institutions of the republic, including under the chapter on decentralization of communes.

It is within this framework that the transitional constitution of Burundi of October 28, 2001 provides, in respect of local authorities, that the administrator is appointed by the President of the Republic in consultation with the Vice-President and after confirmation by the Transition Senate.

It is the constitution promulgated on March 18, 2005 (now in force), as well as the Communal law of April 20, 2005, which sets out the contours of the new devolved administration and transforms the commune into the only level of the local community endowed with a legal personality and financial autonomy²⁰³. As noted earlier, the Communal administrator was a central government appointee until the 2005 elections.

Indeed, it is this constitution that stipulates that the commune is governed by a Communal Council elected through direct universal suffrage and an administrator elected by the council from among its members²⁰⁴, with competition between political parties.

²⁰² Arusha Agreement, Protocole 2, article 8, point 2.

²⁰³ Art. 263 of the March 18, 2005 constitution supplemented by communal law of April 20, 2005 (art.1 par.1)

²⁰⁴ Art. 28 of law no. 1/016 of April 20, 2005 on the organization of communal administration (repealed in 2010)

Previously, however, grassroots democracy was conceived independent of the political party system. Article 178 of the 1992 constitution drawn up in the midst of the democratization wave that swept across Africa indeed stipulates: "The commune is administered by the communal assembly, the communal council and an Administrator elected by the communal assembly. These institutions are elected as provided for by law. The election of these organs is based on the spirit of integrity (Ubushingantahe) independent of competition between political parties".

This arrangement was the result of the context at the time as we have to recall that the 1992 constitution was born in an environment marked by ethnic violence and it was designed to avoid a situation where the election of local officials resulted from partisan political competition with the risk that some people would not trust the authorities with which they were in direct contact almost on a daily basis.

The provision will be changed in the early hours of democratic change in 1993 (October 20, 1993) but will not be applied due to the war that broke out on October 21, 1993 following the assassination of President Melchior Ndadaye.

II.3. Powers of a commune

Under Article 5 of the Communal law, "the commune is responsible for managing the local interests of the people under its jurisdiction. It provides public services, which meet the needs of this population, but which do not, by their nature, their size or determination under law, fall under the direct responsibility of the state. The state may delegate the management or execution of some of its tasks to the local authority. In such a case, it makes available the necessary human, material and financial resources."

The organs of the commune shall constantly promote community development on all fronts. The state has an obligation to help these organs, including by meeting gaps in terms of human and material resources²⁰⁵ _

In addition, the State shall ensure harmonious and balanced development of all communes in the country based on national solidarity. In order to promote the economic and social development of communes, the communes can cooperate through an inter-communal system²⁰⁶.

Therefore, it is clear that the powers of the communes are not well defined as there is lack of a clear demarcation. Thus, this is a situation to be rectified through the introduction of legislation clarifying the devolved powers of both the state and the communes.

III. Analysis of the current state of decentralization: Strengths and weaknesses of communal decentralization in Burundi

III.1. Successes

As far as successes are concerned, one may note:

- The existence of a legal framework for the functioning of decentralized institutions²⁰⁷.
- The existence of an appropriate institutional framework including a ministry of

²⁰⁵ Art.6 of the communal law

²⁰⁶ Art.7 of the communal law

²⁰⁷ See Ministry of the interior et and communal development, *A collection of texts on decentralization in Burundi*, Bujumbura, August 2008 (collection published with the support of the United Nations Integrated Office in Burundi: BINUB).

decentralization and a funding structure for communes i.e. the National Communal Investment Fund, also known as FONIC.

- Buy-in by development partners through the decentralization policy.

All these points show how a national decentralization and development framework was provided early by the authorities. This is especially evident through the legal reference texts developed since the pre-independence period.

However, a careful examination of the reality shows that this legal-institutional arsenal has not led to the emergence of a genuinely decentralized local administration in Burundi and it is important thus to analyze the various problems encountered in the following section.

III.2. Major problems facing communal decentralization in Burundi

III.2.1 A series of elections headed by communal officials, which hinders the establishment of effective communal councils

Among obstacles to effective decentralization in Burundi, we need to point out the manner in which local authorities are established. Indeed, the constitution and the communal law specify that communal administration is the result of direct universal suffrage²⁰⁸ with candidates coming from political parties.

However, since 2005, these elections are held together with a number of other elections, including legislative, presidential and senatorial as well as elections for members of Colline and neighborhood councils²⁰⁹. The fact that these elections are held at the same time, or better still only a few days apart, places the Burundian voter in a difficult position. The voter is no longer aware of the issues at stake. This is compounded by the fact that it is political party leaders who control campaigns in the run-up to these elections. This is due to the fact that local elections are held first and determine the outcome of subsequent elections. As a result, competing political parties take all steps necessary to influence the voter in the next polls.

But the downside is that these elections, at least the campaigns for these elections, leave little room for candidates in these elections to present their agenda for the development of their respective communes. Civil society activists and political party leaders strongly criticized this during summer 2010 elections. Generally, candidates had gradually eclipsed political party leaders during these elections. However, the campaigns were almost coming to an end at that time.

Thus, the voter, who often lacks the capacity to understand all the issues involved in the various elections, chooses the party rather than the individual (candidate), let alone their agenda. In effect, we can only, as some authors have pointed out, understand politics by having a well-developed critical sense to discern what to believe and what to reject from political statements, or what to treat with caution until further information is available²¹⁰.

III.2.2. Poorly-trained communal administration and insufficient, poorly trained and unmotivated communal staff

In the preceding point, we have seen that communal administration is established through direct universal suffrage²¹¹. Article 193 of the election code equally stipulates that “the

²⁰⁸ See art. 265, point b of the constitution of Burundi of 18 March 2005 as well as art. 9 of the communal law

²⁰⁹ See art. 1 of law no. 1/22 of 22 September 2009 on the amendment of law no. 1/015 of April 20, 2005 on the electoral code

²¹⁰ SKIDMORE (M.J.), *American democracy: Governing in the United States*, 4th ed., Editions Odile Jacob, Paris, 1988, p. 2.

²¹¹ It should be noted here that it is rather the communal council that is elected by direct universal suffrage with the Administrator being elected by

President, the Vice-President of the Communal council and the Communal administrator shall have at least a lower cycle diploma in humanities or its equivalent". Elsewhere other than in Burundi, this diploma is not given at the end of the lower humanities cycle, and we do not, in our opinion, see the reason that pushed the Burundi legislature to provide for such a low level of education. If it is true that the level of training is not a measure of competence, it has however been shown that where the level of training of councilors, particularly the President and the Vice-President, is a bit high, the local council functions well, even where there are no attendance fees.

We should also remember that Burundi has only 129 communes. Therefore, it would not be difficult to recruit 129 university-trained administrators to manage all the communes in the country. It is saddening to see that the various political party leaders always put forward the less trained candidates while there is no shortage of well-trained people who could contribute to a better administration of Communes. It should also be noted that not long ago (during the 90s) almost all the administrators in the whole of the Republic were at least educated up to the degree level. In our opinion, the current communal law, as far as this matter is concerned, represents a step backwards and we believe that it should be amended in order to impose the degree level.

This condition is necessary especially when it comes to preparing Communal Plans for Community Development (PCDC) and one can think that the fact that they only exist in extremely rare cases²¹², the level of training of members of communal councils, especially the Presidents and Vice-presidents, has something to do with this. Nevertheless, the existence of such a plan is a legal requirement²¹³.

The Communal Plan for Community Development sets out the financial contribution of the commune as well as the contribution of institutions charged with supporting communal development. However, this must be approved by the minister whose functions include development planning²¹⁴.

In addition to officials who can be described as political, another category of officials who can be described as technical are provided for (under the communal law). In addition to the heads of zones, this latter category (at least) includes a technical advisor responsible for administrative and social issues, a technical advisor responsible for development issues, a communal secretary, a civil status officer as well as an accountant²¹⁵. These advisers are seconded state officers and are therefore paid from the state budget.

Although the law provides for these officials, practice has not kept pace and several functions are held concurrently by the same official in some communes; for example the communal secretary also acts as a civil status officer²¹⁶. In other cases, the positions of advisers have remained vacant between the 2005-2010 legislature²¹⁷ until February 2011.

Nevertheless, there is need to acknowledge that these officials are very inadequate in view of the scope of tasks entrusted to the communes under the communal law. Moreover, with

the same Council from among its members (art.181 of the Electoral Code, in the same manner as art. 9 of the communal law).

²¹² Observatoire de l'Action Gouvernementale (OAG), *Responsibilities of institutions and public representatives in Burundi: Legal mechanisms and realities*, Bujumbura, June 2009, p.56

²¹³ Art. 108 of the communal law

²¹⁴ Art. 109 of the communal law

²¹⁵ Art. 42 of the communal law

²¹⁶ Example of the urban commune of Musaga in Bujumbura

²¹⁷ Examples of the commune of Bukemba in Rutana province in the east of the country In the same vein, OAG, op.cit., P.65

the exception of two advisers whose qualification is generally equivalent to a degree, the rest rarely exceed the humanities level and the majority of them are below the lower cycle. This is compounded further by lack of adequate equipment and we can clearly see how it is difficult to expect satisfactory performance from communal officials and staff.

This staff shortage coupled with lack of motivation for members of staff who, in addition to low wages, virtually lack any social benefits as they are not members of social schemes in the vast majority of the cases or simply because the communes are unable to submit their contributions as employers to these organizations²¹⁸.

This lack of motivation also stems from lack of staff grading in most communes. The grading system used is that of public service and the few administrators, who grade communal staff, recognize the fact that they are not adapted for it. The grading thus does not adequately reflect the merit of each member of staff.

Finally, there is need to underline lack of motivation among councilors and other grassroots elected officials. According to the administrators, the lack of motivation for advisers is both due to "the disillusionment of some advisers who had perceived communal councils as parliaments and the inability of many communes to pay them attendance fees"²¹⁹. This lack of interest manifests itself in absenteeism during meetings, which leads to operational difficulties for Communes.

III.2.2.a. Lack of financial resources

The first article of the communal law stipulates that the commune is endowed with financial autonomy. This is one of the major challenges to effective communal decentralization in Burundi. Indeed, it appears that the communal budgets rarely exceed operating requirements due to the following reasons:

- Most communes depend on rural economic activities and therefore the contributive ability of the citizens or populations remains weak;
- The socio-political crisis experienced by the country in the recent past has greatly seen increased poverty levels;
- The weakness of the tax base falling under the jurisdiction of the communes.

Furthermore, in Burundi, at present, communal administrators have tasked elected colline officials with the responsibility of collecting revenues. We have equally seen how we cannot expect much from these officials as they are not very motivated for the reasons discussed above.

When asked about the relatively low income levels in most communes, communal administrators essentially give reasons such as leakages, lack of motivation among officers and personnel responsible for collecting taxes, poverty among the populations and scarcity of economic activities²²⁰.

According to a survey conducted by a local NGO, Observatoire de l'Action Gouvernementale (OAG), by taking 2008 as the reference year as it appears to be the year in which all communes

²¹⁸ OAG, *op.cit.*, p.62

²¹⁹ *Idem*, p.65

²²⁰ OAG, *op.cit.*, 69.

registered the highest revenues, it should be noted that out of the 16 communes visited, five communes had annual revenues of below 20 million BIF, three communes had revenues of between 20 and 40 million BIF, a commune had an income of between 50 and 70 million BIF, 1 commune exceeded 125 million BIF while two communes had revenues of between 220 and 300 million BIF²²¹.

Apart from the almost non-existent resources in rural communes, urban communes, which do not face the same financial difficulties, have problems of a different nature. Urban communes have neither financial nor organizational autonomy. If it is true that the communal law has always stipulated that “pending the establishment of urban communes, the city (of Bujumbura) is regarded as a province and its zones treated as communes”²²², in reality, it is the communes that fund the budget of the city council and this latter allocates operating expenses to the communes. As a result, this does not fail to raise a stir among administrators of urban communes²²³.

III.2.2.b. Overbearing oversight authority

The oversight authority, in terms of administrative law, is institutional control exercised by the State over decentralized authorities not least in their interest but, above all, to safeguard public interest or ensure conformity with the law. The state may have authority over decentralized authorities (such as suspension or revocation) and their actions (approval, cancellation, substitution).

Although the commune is, at least in theory, a decentralized local authority²²⁴, in practice, it remains largely dependent on central authority and the oversight authority for the following reasons:

- Lack of independent decision-making: For decentralization to be effective, local elected officials must have sufficient powers in order to make decisions freely. But if we closely analyze the communal law, there is very little power given to the communal council as almost all its actions are controlled by the oversight authority in conformity with article 96 of the communal law²²⁵.
The Administrators interviewed, especially those from the City of Bujumbura, complained that the powers conferred by the law had not been transferred to them.
- The Administrator, though elected, has to wait for an appointment decree from the President of the Republic before taking office in accordance with Article 11 paragraph 2 of the communal law²²⁶. The decree may sometimes take months or even more than one year before signature as there are no fixed signing timelines.

Under Article 102 of the Communal law, the oversight authority may dissolve the communal councils or strip the administrators of their powers and the communal council may only object with a three-quarter majority of its members under the Article 103 paragraph 2 of

²²¹ Idem, p.59.

²²² Art.111 par. 2 of the communal law already cited.

²²³ See the interview with the Administrator of Buterere (one of the urban communes in Bujumbura) in the journal IWACU-Voices of Burundi No. 59 of April 16, 2010, p.10

²²⁴ Article 1 of the communal law states: “the commune is a decentralized local authority endowed with a legal personality, organizational and financial autonomy. It is created by an organic law which determines the name, the administrative centre and its limitations.”

²²⁵ Article 96 of the communal law states: “Oversight over the actions of local authorities is exercised first by the Provincial governor or the Mayor depending on whether it is a rural or an urban commune and secondly by the Minister in charge of territorial administration. It is exercised through: approval, suspension, substitution.”

²²⁶ Similarly, see Article 195 of the Electoral Code

the Act. This means that even where unfounded accusations are made by the oversight authority, it is almost impossible for the administrator in question to gather the required three-quarter majority of the members of the council, i.e.11 out of 15 members, to oppose this decision.

III.2.2.b.1. Oversight over the actions of local authorities

In Burundi, supervision over the actions of communal authorities is first exercised by the Provincial governor or the Mayor, depending on whether it is a rural or an urban commune, and secondly by the Interior minister.

It is exercised through:

- Approval or authorization: the actions of communal authorities are only subject to approval in the cases provided for under the communal law or other laws. Approval is deemed to have been given one month after receipt of the request by the competent authority, unless there is a good reason on the part of the latter to extend the timeline.
- Suspension: the provincial governor or the mayor may suspend all regulations or other resolutions made by communal authorities that fall under his/her responsibilities or are contrary to the law or public interest²²⁷;
- Cancellation: The Interior minister may cancel all regulations or resolutions of communal authorities that fall under his/her duties or are contrary to the law or to the general interest²²⁸;
- Substitution: When local authorities fail to implement measures that are incumbent upon them under the laws and regulations, the Interior minister or the Provincial governor or the Mayor may, after issuing two successive warnings, replace them and take the necessary measures²²⁹ to rectify the situation.

III.2.2.b.2 Oversight over communal organs

Oversight over the organs of communal authorities is exercised through:

- Dissolution or suspension: "The Minister in charge of territorial administration may, for compelling reasons and in the best interests of the commune or the state, issue an order suspending or propose the dissolution of the communal council to the President of the Republic"²³⁰;
- Deposition: The deposition of a communal administrator can result from the initiative of either the Communal council or the oversight authority.

An oversight mechanism crafted as such represents a major handicap in the eyes of administrators and communal councils and forces them to act as if they were heading a centralized or a decentralized agency.

Thus, there is some resistance to change. The departments charged with oversight and technical matters have difficulties accepting changes resulting from decentralization reforms. Accustomed to commanding and making decisions, they have poorly accepted

²²⁷ Art.98 of the communal law

²²⁸ Art.99 of the communal law

²²⁹ Art.100 of the communal law

²³⁰ Art.102 of the communal law

this new advisory status that they perceive as low and behave as supervisors. Decentralization is indeed a relatively new way of managing local authorities and key stakeholders are not yet steeped in practice and tend to behave as if they were under the command of the oversight authority. It is necessary here to point out that changing attitude is not done overnight but over time.

For a newly elected administrator, the fact that certain council decisions require the authorization of the oversight authority, as well as the fact that they are graded by the same authority, does not mean anything else other than that they are under the orders of the said authority. This is compounded by the fact that they are paid from the national budget, unlike the rest of the communal staff with the exception of seconded staff who, it must be said, are almost non-existent in some communes.

➤ **Veto power over the deliberations of the council**

All deliberations of the communal council, whether they are subject to approval or not, must be submitted within two weeks to the oversight authority²³¹. This transmission has a double effect: first, it affects their entry into force as this marks the beginning of the period after which they become binding; on the other hand, this allows the relevant authority to verify and veto them.

The doctrine, as supported by the law, has spelt out some of the causes of nullity. Thus, these deliberations are null and void²³² where:

1. The deliberations of the Communal council are based on a foreign object beyond its mandate or discussed out of its statutory meetings;
2. Decisions taken in violation of the law or of public interest.

Nullity of law can thus result from both the modalities as well as the object of the deliberations. For a Communal council meeting to be legal, the Council should be convened regularly by its chairman at least five days prior to the meeting and two thirds of the members should attend the meeting physically and the meeting be held in public, except in cases where the council decides, under Article 19 of the Communal law, to meet behind closed door, mainly where discussions touch on individuals²³³.

IV: Challenges to effective decentralization

On this point, we intend to offer some solutions or actions that could be undertaken to address the problems identified in the preceding paragraph. These actions would include:

Despite their limitations, elected authorities are essential elements in the management of local authorities. The government should transfer and strengthen local authorities to serve the people through the decentralized entities, in this case the communes (see point II.3).

IV.2. Revision of the current electoral code

The current electoral system (Closed party list) has led to a situation where political party leaders put emphasis on activism rather than professionalism in preparing lists of candidates.

²³¹ Art.21 of the communal law

²³² Du BEZIN (G.), *Authorization and approvals in administrative oversight*, thesis, Toulouse, 1906, p.57; similarly, article 99 of the communal law

²³³ Art. 19 of the communal law; also, see DEBBASCH (C.), *Decentralization for the renovation of the State*, Paris, PUF, 1976 p.7.

Indeed, the aim is to reward activists who did their best to ensure electoral victory. But as we have seen, the disadvantage of the system is that voters are asked to elect candidates who probably do not care much about interests. On the other hand, the ultimate goal was actually to promote the interests of the communes, which by definition, may differ from one commune to another.

That is why, in our opinion, the current electoral code should be amended in order to space elections. In this way, the current five elections would not be held a few months apart or worse still a few weeks apart, but after a few years so as to avoid confusing the voter. The voter will go into communal elections fully aware of what is at stake. This is not possible today as these elections are combined with presidential or parliamentary elections. Yet, these elections should ensure the involvement of all voters as the candidates elected will make decisions that will affect their everyday life.

IV.3. Encouraging the establishment of local institutions

These institutions may take the form of committees, associations as well as non-governmental organizations fighting for the interests of the community. Indeed, under the current communal law, it is difficult to know who could sue the communal council in case of civil liability for damages sustained by the commune. In case of a violation, this issue does not arise as in our opinion the public prosecutor should play his/her role fully. We are in particular thinking of cases of economic mismanagement, corruption... etc.

These institutions should always be accountable to the representative authorities, especially through the rendering of accounts. Today, the system is organized in such a way that the citizen has no say except to wait for the legislative mandate to end in order to punish or reward the politicians by renewing or declining to renew their mandate. But in the meantime, five years would have gone and an irreversible evil committed.

In our opinion, the communal council having been designed like a board of directors of commercial enterprises, it would have been good to establish a supervisory body to oversee the work of the communal council. To date, such a body is nonexistent.

IV.4. Conduct an economic and social viability study

The fragmentation of communes is perfectly justifiable if this better meets public needs. It is indisputable that a less extensive commune is easier to manage, especially when the Administrator does not or no longer has means of transport to visit all the corners of his commune wherever there is need. However, given the resources of the most communes in Burundi, there is a problem of viability of some communes.

The majority of communes being rural where the only resources are taxes collected on market days, there is need to consider, in terms of ensuring the viability of communes, a new administrative division of some communes is required to ensure return on resources. The following tables provide information about the main resources of communes that are considered as the wealthiest²³⁴.

²³⁴ See ministerial order No. 530/540/059 of January 29, 1997 determining the rate, mode of collection as well as management arrangements for communal taxes imposed on some industrial crops, art.1.

Table 2: Communal tax rate applied to certain commercial crops

| | |
|--------------------------------|------------|
| 1. Fully washed Arabica coffee | 6.5 BIF/kg |
| 2. Washed Arabica coffee | 6 BIF/kg |
| 3. Robusta coffee | 6 BIF/kg |
| 4. Green tea leaves | 2 BIF/kg |
| 5. Dried tobacco leaves | 10 BIF/kg |
| 6. Sugar cane | 4 BIF/kg |
| 7. Cinchona | 6 BIF/kg |
| 8. Rice | 3 BIF/kg |
| 9. Palm oil | 5 BIF/kg |
| 10. Cotton | 2 BIF/kg |

As shown, these are taxes on industrial crops and vary from one region to another. These crops are a source of income in certain communes where they are found. But all the communes in the country do not have them and thus experience difficulties raising revenues to fund their budgets. They thus finance their budgets primarily through taxation of food products on market days.

To a connoisseur of the situation in Burundi, it is not difficult to notice that communes, which solely depend on these products as an essential source of revenue, are the ones that can hardly fund an operating budget, much less an investment budget. That is why an "equalization fund", which is essentially a portion of certain incomes of "rich" communes, has been established to assist "poor" communes as shown in the table below.

Table 3: Distribution of communal taxes between communes and the Equalization Fund

| Product | Communal share in % | Equalization Fund in % |
|---------------------------------------|---------------------|------------------------|
| 1. Coffee | 65 | 35 |
| 2. Cotton | 65 | 35 |
| 3. Sugar: Industrial products | 10 | 90 |
| 4. Sugar: Village production | 65 | 35 |
| 5. Tea: Industrial production in bulk | 20 | 80 |
| 6. Tea: Village production | 65 | 35 |
| 7. Rice | 50% | 50% |
| 8. Palm oil | 50% | 50% |
| 9. Cinchona | 65 | 35 |
| 10. Tobacco | 65 | 35 |

As we have observed, there are communes, which are not viable, due to lack of resources, and could benefit by merging to become larger and more viable. The communes of Ryansoro (Gitega province, central Burundi) and Kayokwe (Mwaro province, also in the centre of the country)²³⁵ have been cited as examples.

For this, a prerequisite condition is to carry out a study to determine the conditions of the new administrative divisions.

²³⁵ OAG, *Responsibility of institutions and public representatives in Burundi: Legal mechanisms and realities*, op.cit, p.65.

IV.5. Strengthening the communal public service

If local authorities should be led by representative political officials, the administration should normally be composed of competent technical experts. It is therefore necessary to urgently resolve the issue of capacity of communal employees including through training and/or development.

IV.6. Promoting civic education

The behavior of elected communal officials is puzzling. This raises the question of whether they were elected to serve or to serve their interests. There is need to find a way to instill in them a minimum of ethical norms and a greater sense of civic integrity to be able to work for the common good.

To achieve this, it is necessary to have criteria for evaluating these elected officials, including through periodic action plans since currently there is no objective criteria for assessing the performance of elected local representatives. The only recourse is to wait for the next election.

We could try searching for traditional values derived from the Burundian culture that can be popularized. Of course the results are uncertain on the one hand, but on the other, even if they will be achieved, they would be realized more or less in the long term.

Among these values one might think, by way of example, of *Ubushingantahe* in Kirundi. Traditionally, a *Mushingantahe* is the man who cares little for his own interests and finds pleasure in serving others diligently. The tale of this ideal man, which was once taught to young Burundians, should be used to inspire local councilors and be instilled in elected officials today and even tomorrow. This concept also contains many other values such as integrity, patriotism, good governance, which is now in vogue (but which actually existed in the traditions of the country), and many other values.

IV.7. Better defined oversight authority

In principle, oversight is aimed at ensuring legality and protecting the public interest. If only it was implemented as just stated, there would be nothing to worry about. But, in this case, we see provincial governors and/or the Mayor of Bujumbura, as appropriate, hiding behind oversight authority while exercising hierarchical power. This distorts decentralization.

Oversight, such as it is currently organized, should be reviewed, at least some points. Consider, for example, the fact that communes are obliged to pay money to the oversight authority, and this is done without any legal framework. And here there are two options: Either the provincial budget remains the responsibility of the state in which case the province ceases to ask for money from the commune (which never refuses where the communal administrator wants to remain in good terms with the Governor) or the commune is obliged to fund the operating budget of the province (or city). In such a case, this obligation should be enshrined in law together with its implementing modalities.

Nevertheless, it is difficult for communes to meet this requirement because, as we have seen²³⁶, almost all the communes in Burundi are unable to meet their needs through their own budgets and are instead supported in this regard as stipulated by the communal law²³⁷.

²³⁶ See further above, point III 2 C)

²³⁷ Art.78 of the communal law

Conclusion

As we have seen, decentralization is a mode of governing communes in Burundi and it is in practice. However, the country has certainly been faced with operational difficulties due in part to the novelty of this system. Indeed, like a child who is born and learns to walk with great difficulty, the system is working and evolving.

This system, which is the subject of our study, has without a doubt registered some successes in Burundi. As an example, one could cite the willingness of state authorities to introduce legislation geared towards the implementation of effective decentralization. Equally, we could cite support from donors, both bilateral and multilateral.

However, as we discovered, there are still some issues that continue to prevent or hinder the implementation of effective decentralization. By way of illustration, one might mention the manner in which authorities charged with implementing decentralization, through communal councils, are going about their tasks such as the organization of a series of elections in a short period of time. In our opinion, communal elections should be held separately from other elections. Of course, such an election would present a number of challenges but a solution should be found. For example, a solution may include the extension of the term of the current elected officials by a few months.

We would also like to see people from various communes in Burundi getting more involved in safeguarding their interests. In this way, they can bar those who care little about their interests before it is too late.

Finally, we would like to beg the indulgence of the readers of our humble work to excuse us for any imperfections (which we would be quite happy to rectify) and instead to recognize our contribution, however small it may be.

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ROLE OF CRIMINAL LAW IN THE TRANSITIONAL JUSTICE PROCESS²³⁸ IN BURUNDI

By Didier Berry Nibogora²³⁹

INTRODUCTION:

Lying south of the equator, on the borders of East and Central Africa, the Republic of Burundi is situated between south latitude 2° 20' and 4° 27' and between east longitude 28° 50' and 30° 53'. The country is bordered on the west by the Democratic Republic of Congo (formerly Zaire) on the north by Rwanda and on the east and south by Tanzania²⁴⁰.

Formerly the territory of Urundi, administered by mandate from 1916 and later based on the Trusteeship Agreement for the Territory of Ruanda-Urundi, it became independent on July 1, 1962 after successive colonization by Germany and Belgium²⁴¹

After independence, the situation did not get any better. Indeed, ethnic massacres took place in 1965 following the proclamation of the Republic. Subsequent killings would follow in 1972 leading to the departure of Hutus into exile. The country will once again be overshadowed by the bloody events of Ntega-Marangara in 1988.

However, subsequent regimes that came into power, through force, attempted to bring about reconciliation but with little success²⁴².

The advent of multiparty politics in 1991 and democratic elections in 1993, the first ever, did not prevent the country from descending into an orgy of violence after the outbreak of a civil war sparked by the assassination of President Ndadaye Melchior on October 21, 1993. He had come to power through the ballot box on July 1 of the same year.

Characterized by serious human rights violations and waged without the slightest regard for humanitarian law²⁴³, this conflict ended after numerous negotiations²⁴⁴ that led to the signing of a cease-fire agreement by the last rebel movement in 2006 through the Arusha Peace and Reconciliation Agreement²⁴⁵ and various other cease-fire²⁴⁶ agreements.

During the peace negotiations, the issue of past crimes was discussed under the chapter on impunity. The Arusha Agreement had already described the fight against impunity as

²³⁸ There is currently a debate on the use of the terms "transitional justice" and "transitional justice". The latter is considered the original English and does not accurately reflect the idea of justice in societies in transition. This discussion is entirely based on speculative terminology that this paper deliberately ignores by using the two terms interchangeably.

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²⁴⁰ J. E., BIDOUE and al., Geography of Burundi, Hatier, Paris, October 1991, p. 4.

²⁴¹ Ibid

²⁴² The President of the 2nd Republic Jean Baptiste Bagaza had set up a commission to deal with the issue of land left by the exiles of 1972. His successor Pierre Buyoya initiated the charter on national unity and introduced multiparty politics in a bid to reconcile Burundians.

²⁴³ See International Human Rights Law Group, The provisions of the Arusha Agreement on transitional justice and the protection of human rights, an annotated guide, p. 6

²⁴⁴ Several negotiations took place to bring the conflict in Burundi to an end, from San Egidio to Arusha via Pretoria and Dar es Salaam.

²⁴⁵ This agreement forms the backdrop for the resolution of the conflict

²⁴⁶ Before the overall cease-fire agreement that was signed in November 2002, there were many agreements between the Government of Burundi and the various rebel movements

a sacrosanct political principle²⁴⁷. Through what is described as transitional justice, this agreement provided for a triple mechanism²⁴⁸ to fight against the scourge of impunity almost unanimously regarded by the protagonists in Burundi as one of the main causes of the said conflict²⁴⁹.

Thus, it is in the context of transitional justice that the fight against impunity in Burundi is being undertaken. Nevertheless, it seems that the debate around the issue of transitional justice has not left sufficient room for criminal law and consequently for retributive justice.

The aim of this paper is to highlight the importance of criminal law in the transitional justice process in Burundi. Indeed, criminal prosecution is not always easy to undertake in a country that is still smarting out of a violent conflict and where stability remains fragile. We can logically wonder whether this legal reality has created divisions in the current political leadership where, thanks to the position of strength enjoyed by the main suspected perpetrators, the need to punish past crimes has been relegated to the background.

Indeed, doesn't the fact that former rebel and military leaders are now in power through a controversy-laden election²⁵⁰ require that people against whom there are serious suspicions of involvement in heinous crimes be removed from office and made to answer for their actions? Based on the current power relations in Burundi's political scene, isn't it right to conclude that the era of systematic punishment of crimes committed during past conflict has not yet arrived?

Divided into four main sections, this paper will attempt to address the issue of the role of criminal law in the transitional justice process in Burundi.

We will start by examining the legal framework for transitional justice in Burundi, its origin and the role of criminal law from its inception.

Afterwards, we will focus on the need to punish past crimes as an absolute necessity to end the cycle of impunity and restore not only the victims but also the minimum core reference values in a society where people from diverse backgrounds are called to live in harmony.

We will also recall that criminal proceedings against the perpetrators of crimes are an intrinsic component of transitional justice mechanisms.

In the last section, we will single out for criticism the role of criminal law in the transitional justice process in perspective, the constant problem of politicization that makes the threat of impunity more and more real with each passing day.

A note of conclusion will be given at the end of the paper while at the same time trying to leave the debate open.

²⁴⁷ The Arusha Peace and Reconciliation Agreement, Article 6, paragraph 1.

²⁴⁸ In sections 6-8 of its first protocol, this agreement provides for the establishment of an international judicial inquiry commission, an international criminal court in case the commission concludes that crimes of genocide, war crimes and crimes against humanity were committed and a national truth and reconciliation commission.

²⁴⁹ Eugene Nindorera, no genuine reconciliation without justice, Bujumbura, March 30, 2006, p. 1 – See http://arib.info/Nindorera_30032006.htm (visited July 23, 2010).

²⁵⁰ Challenged by a section of the political class, the recent elections in 2010 only served to confirm the strong position of former rebel leader

I. Genesis and legal framework for transitional justice in Burundi and role of criminal law

1. Genesis

The issue of transitional justice was introduced for the first time in Burundi during negotiations for the Arusha Peace and Reconciliation Agreement. Indeed, the protagonists in the Burundi conflict agreed to recognize that impunity is one of the main causes of conflict and agreed to set up a triple mechanism to ensure transitional justice. The Arusha Peace and Reconciliation Agreement signed between the Burundian protagonists on August 28, 2000 provided for the establishment of an international judicial inquiry commission, a National Truth and Reconciliation Commission (TRC) and an International Criminal Tribunal for Burundi if its inquiry concluded that crimes of genocide, war crimes and crimes against humanity²⁵¹ were committed in the country.

The first two mechanisms are designed to shed light on the cycles of violence that Burundi has experienced since its independence in 1962 while the last mechanism is essentially repressive against those who are guilty of genocide, war crimes and crimes against humanity.

To this day, the mechanisms initially planned mechanisms are yet to be established and the changing domestic and international environment has made it necessary to adapt the shape of transitional justice mechanisms in Burundi to the prevailing circumstances²⁵² while taking lessons from other experiences²⁵³.

Thus, in accordance with resolution 1606 (2005)²⁵⁴ of the United Nations Security Council, negotiations were initiated between the UN and a government delegation with a view to implementing transitional justice mechanisms. Two negotiation rounds took place in 2006 and 2007 and progress was recorded on some issues while there were bottlenecks on others.

On the issue of the Truth and Reconciliation Commission (TRC) and the setting up of a special court as part of judicial response to deal with serious crimes, there was agreement in principle.

However, disagreements persisted on the issue of amnesty, independence of the Prosecutor and the relationship between the TRC and the special court. Nevertheless, there was agreement to consult the population in advance in order to ensure that its views are taken into account in the implementation of these mechanisms²⁵⁵. The report of the steering committee of these national consultations was completed in April 2010 and publicly handed over to the President of the Republic of Burundi and the Representative of the Secretary-General of the United Nations on December 7, 2010²⁵⁶.

Throughout these developments, there has been constant concern regarding the fate of past atrocities vis-à-vis the imperative to fight against impunity identified as one of the leading principles of the Arusha Agreement. This overriding imperative would nevertheless be

²⁵¹ Arusha Peace and Reconciliation Agreement, Protocol II, articles 6 to 8.

²⁵² Negotiations and peace agreements with the various rebel movements have influenced the political will with regard to the implementation of these mechanisms, due to the need to safeguard the balance between the protagonists in the Burundi conflict that was obtained through tough negotiations.

²⁵³ The experience of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) has reduced the momentum of the international community vis-à-vis the establishment of a new ad hoc criminal jurisdiction.

²⁵⁴ This resolution asked the Secretary-General of the United Nations to start negotiations with the Government of Burundi and all parties concerned with the issue of the establishment of transitional justice mechanisms.

²⁵⁵ The tripartite steering committee (Government-United Nations-Civil Society) for national consultations was established in November 2007.

²⁵⁶ Immediately after the report was finalized civil society and the media pushed for an official handing over (and publishing) of the report, but the Government declined saying that the electoral process had taken all its attention. An advocacy campaign continues to be led by the civil society for the resumption of negotiations on outstanding issues and the establishment of the TRC.

diluted by the political need to preserve stability based on compromise as well as political amnesty and immunity measures²⁵⁷.

However, just like in other countries²⁵⁸, the UN delegation has put emphasis on the inalienable and unpardonable character of war crimes, crimes against humanity and other crimes against international humanitarian law²⁵⁹, thus largely furthering the issue of retributive justice, at least in principle, within the legal framework of the transitional justice process in Burundi.

1. Legal Framework.

The original legal framework for transitional justice mechanisms in Burundi is defined by the Arusha Peace and Reconciliation Agreement for Burundi (AAPRB).

Indeed, in its first Protocol, which deals with the *"nature of the Burundi conflict, issues of genocide and exclusion and their solutions"*, the AAPRB provided for, on the one hand, the establishment of an international judicial inquiry commission whose conclusions²⁶⁰ will lead to the establishment of an international criminal tribunal for Burundi²⁶¹. On the other hand, the same procedure provided for, in Article 8, the setting up of a Commission known as the *"National Truth and Reconciliation Commission"* charged with clarifying and establishing the truth regarding the serious acts of violations committed during cyclical conflict which grieved Burundi from independence to the date of the signing of the Arusha Agreement²⁶².

Although these provisions have defined a role punitive justice, there are some discrepancies. Under principles and measures relating to justice, the agreement stipulates *"... All complaints and appeals regarding assassinations and political trials will be submitted to the National Truth and Reconciliation Commission..."*²⁶³

From these provisions, it appears that complaints and appeals against judgments issued in criminal matters would be brought before the TRC. However, the latter being an extra-judicial body – and, moreover, a political creation²⁶⁴ – should not look into decisions of a technical body (a court or tribunal) without jeopardizing the fundamental principles of independence and impartiality of the judiciary as well as the sacrosanct principle of separation of powers.

However, as many other provisions of the Arusha Agreement, these articles will take quite a few years before implementation. It is thus in accordance with the Agreement that chapter XIII of the transitional constitution of October 28, 2001 required the Transitional Government to *"...call for the creation of an international commission of inquiry, and finally an international criminal court..."*²⁶⁵.

This commission, long sought²⁶⁶, is yet to see the light of day.

²⁵⁷ The issue of amnesty for political prisoners and the immunity of heads of armed groups was an essential prerequisite for the cessation of hostilities and the signing of a cease-fire agreement

²⁵⁸ It is currently enshrined in UN practice that punishment of crimes against international law is an obligation *jus cogens* and that transitional justice mechanisms put in place in different countries must provide for mechanism to punish these crimes.

²⁵⁹ This character has been consistently emphasized in documents signed between the UN and the Government of Burundi

²⁶⁰ Declaration to the effect that genocide, war crimes and other crimes against humanity were committed during the conflict.

²⁶¹ AAPRB, Protocol I, Article 6, paragraphs 10 and 11

²⁶² AAPRB, Protocol I, Article 8

²⁶³ AAPRB, Protocol I, Article 7, paragraph 18, a).

²⁶⁴ Stéphane Leman-Langlois, *Reconciliation and Justice, Operation, Successes and Failures of Truth Commissions*, Report of Frederick Oqueteau, Athena editions, sp.

²⁶⁵ Law No. 1/017 of October 28, 2001 promulgating the Transitional Constitution of the Republic of Burundi, Article 228 in BOB 10/2001.

²⁶⁶ The desire of establishing an international judicial inquiry commission had already been expressed in the Government Convention of September

Moreover, in line with the Arusha Agreement, a law punishing genocide, war crimes and crimes against humanity was promulgated on May 1, 2003²⁶⁷. In its transition section, the law explicitly refers to an international inquiry commission.

Still on the implementation of the provisions of the Arusha Agreement, a law on the mandate, composition, organization and functioning of the National Truth and Reconciliation Commission (NTRC) was promulgated in December 2004²⁶⁸. With a two-year mandate that may be extended by one year if necessary, the commission consisting of 25 personalities of high moral standing is charged with arbitration and reconciliation²⁶⁹. It should quickly be noted here that this law, even though it stipulates that the TRC can make decisions touching on political crimes for which an amnesty law may be passed, excludes genocide, crimes against humanity and war crimes²⁷⁰ from the list of pardonable crimes. The law has quickly fallen into disuse as its implementation was not anchored on extensive consultation, a prerequisite for any transitional justice mechanism²⁷¹.

The normative transitional justice framework in Burundi is also the end result of documents whose nature is rather political than legal, including the cease-fire agreements. Indeed, issues such as the release of political prisoners, amnesty and provisional immunity that are emphasized in these agreements are necessarily based on criminal prosecution, a component of transitional justice mechanisms, which is either suppressed or postponed in the least.

Nevertheless, it has become a UN practice, when called upon to assist countries to implement transitional justice mechanisms, to insert a clause requiring the government to "declare that any amnesty measure that could have been granted in respect to acts of genocide, crimes against humanity and war crimes will be null and void..." This clause deals with the evolution of the fight against impunity from the systematic practice of amnesties in peace agreements and other transitional arrangements to their prohibition by international law²⁷².

In an evolutionary context, the model originally provided for by the Arusha Agreement is reviewed and adapted by a mission charged with assessing conditions necessary for setting up an international judicial inquiry commission for Burundi sent by SG/UN from 16 to 24 May, 2004 led by Mr. Tuliameni Kalomoh, Assistant Secretary-General of the United Nations for Political Affairs.

Based on the findings of this mission, the SG/UN submitted a report to the UN Security Council²⁷³. Known as the "Kalomoh Report", its recommendations largely inspired resolution 1606 of the said Council. The resolution "requests the Secretary-General to initiate negotiations with the Government and consultations with all concerned Burundian parties on the implementation of its recommendations"²⁷⁴. These recommendations consist of the setting up of, instead and in place of the triple mechanism stipulated in the Arusha agreement, a joint truth commission and a special court within Burundi's court system²⁷⁵.

10, 1994 which stated in article 36 that "...30 days after the formation of the Government, an international judicial inquiry commission will be constituted..."

²⁶⁷ Law No. 1/004 of May 8, 2003 on the Punishment of the crimes of genocide, crimes against humanity and war crimes, in BOB No. 5/2003, p.136

²⁶⁸ Law No.1/018 of December 27, 2004 on the mandate, composition, organization and functioning of the National Truth and Reconciliation Commission

²⁶⁹ Article 2 b), 3 and 6 of Law No. 1/018 of December 24, 2004

²⁷⁰ Idem, art. 4

²⁷¹ Report S/2005/158, submitted by the Secretary General to the Security Council of the United Nations on March 11, 2005, paragraph 28, p. 12.

²⁷² Ndikummasabo M. and S. Vandeginste, *Mechanisms of justice and reconciliation in Burundi in perspective*, p.126

²⁷³ See S/2005/158

²⁷⁴ See Resolution of the Security Council of the United Nations S/RES/1606 (2005) adopted on June 20, 2005

²⁷⁵ See S/2005/158, paragraph 53, p. 18

The tough negotiations²⁷⁶ that took place between the UN and the Government of Burundi regarding the establishment of the mechanisms proposed by the Kalomoh Report led to a lot of progress, including the need for extensive prior consultations with the aim of ensuring the involvement of the populations in the definition of these mechanisms. It is in this perspective that a framework agreement was signed establishing and defining the mandate of the tripartite steering committee in charge of national consultations on transitional justice in Burundi²⁷⁷. It is also on the basis of these discussions that the legal framework for the double mechanism was defined by a national law and an agreement reached between the UN and the Government of Burundi. The national law would focus on the status of the mechanism in question while the agreement would set out the terms and conditions of cooperation with the United Nations²⁷⁸. As at this point, dialogue is still underway between the two parties²⁷⁹.

Finally, it should be noted that negotiations aimed at implementing the recommendations of the Kalomoh Report, pursuant to resolution 1606 (2005) of the UN Security Council, have not yet succeeded as blockages have been experienced in some areas. This is particularly the case with issues of amnesty²⁸⁰, relationship between the TRC and the special court and the independence of the prosecutor of the special court²⁸¹ where there is lack of agreement to set in motion the mechanisms required to shed light on the dark periods in the history of Burundi and to address past atrocities.

I. Imperative of punishment: retributive justice as an inevitable response to cyclical crimes in Burundi

II.1. Dangers of impunity

Deeply rooted in the Burundian society, which has undergone massive violations of human rights for long periods of time, impunity can lead to a feeling of lack of social order and a collapse of the core values underpinning social coexistence. From this state of affairs, there is the impression of the destruction of the very notion of the State on the part of the victims who are in the thousands and counting.

This general feeling is a harbinger of the emergence of a vacuum and conditions necessary for balkanization and radicalization²⁸². It is not excluded that, at a time when the terrorist threat is ever more real, Somali extremists of the Al-Shabab movement could exploit this situation to recruit from among the victims long frustrated by impunity with a view to satisfying a desire for vengeance against the presence of Burundian troops taking part in a peacekeeping mission in Somalia.

It may begin as a simple robbery but evolve rapidly into an ideological phenomenon where the Islamic fundamentalists of Al-Shabab movement, backed by their financiers, would exploit the vacuum left to impunity.

²⁷⁶ Through Order No. 120/VP1/01/05 of October 26, 2005, the Government of Burundi set up a delegation to negotiate with the United Nations on the implementation of transitional justice mechanisms. Two rounds of negotiations were conducted between the government delegations and the UN in 2006 and 2007

²⁷⁷ Framework Agreement between the Government of the Republic of Burundi and the United Nations on the creation and definition of the mandate of the tripartite steering committee in charge of national consultations on transitional justice in Burundi

²⁷⁸ Ndikumamasabo M. and S. Vandeginste, *op. cit.*, p. 123

²⁷⁹ Although it has been willing to continue with negotiations, the UN delegation had in the first place made a concession on the establishment of the Truth and Justice Commission

²⁸⁰ The UN delegation stressed the unpardonable nature of crimes under the jurisdiction of international law to the extent that this prohibition has been inserted in the current Burundian penal code, see article 171 of Law No. 1/05 of 22 April, 2009 amending the Penal Code

²⁸¹ A/HRC/12/43, Report of the United Nations High Commissioner for Human Rights on the situation of Human Rights and the Activities of her Office in Burundi, p. 21

²⁸² Interview with Alain Chouet, former head of French security services, Interview on RFI, on 30/07/2010

On the one hand, we need to recall that the cycles of violence that have been experienced and continue to be experienced by Burundi are largely due to the persistence of impunity as pointed out during the Arusha negotiations²⁸³. Some people have even started to suggest that the victims (or their descendants) of past violence are at the heart or are at the least playing a major role in the crimes that have continued to shake the country over the last two decades²⁸⁴. On the other hand, it is worth noting that cases of lynching, mob justice and extrajudicial executions reported by the media and civil society organizations express a distrust of the justice system by the people as a result of persistent impunity.

The certainty of punishment, indeed, is a crucial element in the protection of social order²⁸⁵. Indeed, if there are several ways of assigning responsibility, there is only one form of justice: one based on respect, protection and promotion of the right of the victims to justice, truth and reparations²⁸⁶.

Thus, the act of establishing the truth and accountability for abuses committed through judicial procedures, regardless of their "supposed"²⁸⁷ legitimacy is not enough to wage an effective war against impunity. This imperative must necessarily include the "examination of legal facts by the justice system because it is important that victims are heard, taken seriously and compensated"²⁸⁸.

II.2. Punishment of perpetrators of crimes: An absolute necessity.

In the strict sense of the word, retribution involves a desire for revenge²⁸⁹, an obligation to answer for one's actions. Indeed, it is imperative that the society and victims of an offense are bestowed their rights by the perpetrator of an act that violates the basic tenets of human decency as contained in any social coexistence contract.

It is in line with this logic that damage done to victims and the society by the violation of rules protecting fundamental rights creates an obligation on the part of the State to prosecute and punish perpetrators²⁹⁰. This is a basic need that is fulfilled by retributive justice by attempting to enforce the established law as a basis for reaffirming the legal basis of human decency and dignity.

Retributive justice is as much necessary as restorative justice – which we tend to use as a substitute²⁹¹ – cannot restore the situation prevailing before the conflict. No amount of reparation or compensation can ever restore an individual or a community to the situation prevailing before a child was killed, a spouse murdered, a beloved one raped or property of a family destroyed²⁹².

²⁸³ AAPRB Protocol II, *op. cit.* art. 6

²⁸⁴ Nindorera Eugene, *op. cit.*, p. 16

²⁸⁵ Angèle Kremer MARIETTA, *The philosophical foundations of criminal law*, revised version of an article published in *The Law in Trial*, Jacques Chevallier (ed.), Paris, PUF, 1983, 2000

²⁸⁶ Amnesty International, *Commissioning justice, truth commissions and criminal justice*, April 2010, p. 57

²⁸⁷ It is referred to as 'supposed' as the legitimacy of a process does not necessarily require acceptance by groups of citizens (whether it is a representative sample) chosen to represent other national consultations

²⁸⁸ G. B. Kodou, "Amnesty and impunity for international crimes", in *Human Rights* No. 4, January-December 2004, p.67. See <http://www.Droit-fondamentaux.org>, visited on July 14, 2010

²⁸⁹ Revenge discussed here is not private condemnation but public: a reaction to a society that criminalizes behavior

²⁹⁰ Eric SOTTAS, *op. cit.*, sp

²⁹¹ Olivier Kambala wa Kambala, *Transitional justice in all its forms: case study, South Africa* in *Transitional Justice in the Francophone world: State of affairs*, Conference paper 2/2007, Federal Department of Foreign Affairs (DFA), 2007, p. 95

²⁹² Institute for Justice and Reconciliation, *Pieces of the puzzle: Keywords on Reconciliation and Transitional Justice*, p.42

Moreover, if the issue of liability should take into account the issue of crimes that continue to be committed – such as the massacre of Gatumba in August 2004²⁹³ and more recently Rukoko in 2010 – the problem of the *ratione temporis* and *ratione materiae* remains fully in place.

Indeed, on the one hand, the Kalomoh Report showed that Burundians wanted to see *ratione temporis* competence extended to cover events that occurred after 2000 – contrary to the provisions of the Arusha agreement that limited the jurisdiction of the International Criminal Court to the date of signing of the AAPRB (August 28, 2000) – in the contrary, the mandate of the special court would be biased and this limitation will result in a skewed and biased vision of the Burundi conflict²⁹⁴.

On the other hand, the special court will prosecute past crimes since independence. At this point, it is important to closely scrutinize the application of the all important principle of criminal law: The legality of criminal offenses and penalties. The legal question that arises here is whether the prosecuted crimes constituted wrongful conduct under the country's criminal law at the time of their commission. If this is the case, will they be punished based on legal provisions available at the time they were committed?

It is evident that the Burundian law had no provisions against genocide, war crimes and crimes against humanity before 2003²⁹⁵. The issue remains to know whether and when crimes under the jurisdiction of the special court became part of the international customary law. If the answer is less controversial regarding the crime of genocide and crimes against humanity that were already incriminated under the Statute of the Nuremberg International Military Tribunal and recognized by the AG/UN as part of the international customary law²⁹⁶, doubts arise however when it comes to the issue of the extent to which acts committed in a non-international conflict fell under international customary law in 1962.

Indeed, at least two conditions must be met:

1. There must be a customary rule prohibiting this behavior;
2. Any violation of the law must have been previously prescribed and criminally penalized from both the point of view of the acts as well as the penalty.

Thus, common article 3 of Geneva Conventions already stipulated the minimum rules applicable in such conflicts. On the other hand, the 2nd Additional Protocol of 1977 providing for rules applicable is subsequent to the period under review and, moreover, does not oblige states to punish violations of its provisions. Thus, the Conventions do not require the criminalization of acts falling within the scope of this article²⁹⁷.

The Statute of the ICTR is the first instrument to formally criminalize “serious violations” of Common Article 3 of the Geneva Conventions²⁹⁸.

The jurisprudence of the ICTR and the Special Tribunal for Sierra Leone on war crimes committed during internal conflicts currently affirms that these crimes have crystallized and

²⁹³ Approximately 150 Banyamulenge refugees were killed by the FNL and the families of the victims were still waiting for forensic investigations before even the UN Security Council issued demands to bring the perpetrators of these massacres to justice

²⁹⁴ Mathias Goldmann, *Does peace follow justice or vice versa? Pre-printed version of original article in Fletcher Forum of World Affairs*, Vol. 30:1, Winter 2006, p.137

²⁹⁵ It is in this year that a law on the Punishment of the crimes of genocide, war crimes and crimes against humanity was enacted

²⁹⁶ A. General Assembly, Resolution 95 (1). Statement of International Law Recognized by the Charter of Nuremberg Tribunal published on Dec. 11, 1946

²⁹⁷ Goldmann Mathias, *op. cit.*, sp

²⁹⁸ Statute of the International Criminal Tribunal for Rwanda, Annex to Resolution 955 (1994) CS/ECE, November 8, 1994, article 4

evolved into international customary law. However, this trend dates back to 1990. Thus, if the special court is not limited to acts of war crimes committed after 1990, its status would contradict the principle of non-retroactivity of criminal offenses and penalties.

However, it is a fact that these acts were punishable by the legal system in Burundi, not as crimes of genocide, crimes against humanity or war crimes, but at least as crimes of homicide, plunder, theft, assault, etc. as appropriate²⁹⁹.

III. Criminal prosecution: A component of transitional justice mechanisms

Transitional justice mechanisms are mainly, not exclusively, made up of truth commissions, search for accountability for acts constituting serious violations of human rights (prosecution), and reparations for victims as well as institutional reforms to prevent the recurrence of these atrocities³⁰⁰.

As far as accountability is concerned, the Arusha Agreement provided for the establishment of an international judicial inquiry commission and, if evidence of genocide, crimes against humanity or war crimes is adduced, the setting up of an international criminal court³⁰¹.

We therefore see that legal mechanisms are considered at the very beginning of designing of transitional justice mechanisms. This cannot be any different if one keeps in mind the assertion of the principle of the fight against impunity by the protagonists during the Arusha peace negotiations³⁰². But, one cannot fight against this vice without establishing liability for past atrocities, identifying the perpetrators and making them answer for their actions.

Moreover, if truth mechanisms seem to gain more sympathy and tend to undermine the issue of law enforcement³⁰³, it is nonetheless true that the ultimate objective of the search for truth is to establish liability and punish perpetrators³⁰⁴ to prevent recurrence. A comparative analysis also shows that criminal proceedings have always been part of procedures established by countries to deal with a painful past. Although approaches are different depending on societies and their history, retributive justice is essential to heal the past wounds of a society. The prosecution of crimes is, moreover, increasingly becoming a requirement in contemporary international law³⁰⁵ that is evolving more and more towards international customary law.

²⁹⁹ See Decree-Law No. 1/6 of April 4, 1981 on the Reform of the Penal Code and the Decree of 30 January, 1940 on the Criminal Code, made mandatory in Burundi by ORU No. 43/just. of May 18, 1940.

³⁰⁰ For a definition of transitional justice, see:

- a) Alex Boraine, http://www.idrc.ca/uploads/user-S/10899187131/Discours_d'Boraine.dco Alex, Alex Boraine, President of the International Center for Transitional Justice "Transitional justice: a new field," Symposium "Repairing the effects of the past. Reparations and transition to democracy" Ottawa, Canada, March 11, 2004.
- b) Marc Freeman and Dorothy Marotine: <http://www.ictj.org/images/contents/7/5/752pdf> "What is Transitional Justice?" International Center for Transitional Justice, November 19, 2007.
- c) The reflections of Juan Mendez in the Amicus Curiae submitted to the Colombian Constitutional Court on the Law of Justice and Peace 975 analyzing, from a variety of experiments, the requirements of transitional justice, January 17, 2007, <http://www.Americas/Colombia/colombia.justicebrief.spa.pdf>, quoted by Eric Sottas in *transitional Justice and punishment*, available at <http://www.icrc.org/Web/.../irrc-870-Sottas-web-fra> final.pdf, accessed on September 24, 2010.

³⁰¹ See above, paragraph I, 1

³⁰² Ibid

³⁰³ Sandrine Lefranc, "The professionalism of a law reform activism: the invention of transitional justice," *In Law and Society*, Ed related legal, 2009/3/n 73

³⁰⁴ Stéphane Leman-Langlois, *Reconciliation and Justice: Operations, Successes and Failures of truth commissions*, Ed. Athena, p.2

³⁰⁵ The obligation of states to investigate crimes against human rights and international humanitarian law is derived from the various international conventions whose provisions have a customary value such as the Convention for the Prevention and Punishment of the Crime of Genocide, the Rome Statute establishing the international Criminal Court, the four Geneva Conventions and two Additional Protocols, etc

However, if prosecution should be initiated against all the crimes committed at all levels of responsibility, the task would most likely become unbearable and chances of success greatly reduced. It is for this reason that in most cases, charges are brought against those who have come to be known as the “big fish”, a term used to describe people bearing the highest responsibility for the crimes committed³⁰⁶.

Thus, the problem of the selectivity of perpetrators and crimes against which proceedings may be initiated arises. This issue is the subject of the next section of this paper.

III.1. Selectivity of perpetrators and crimes to be prosecuted

From the Nuremberg Tribunal to the International Criminal Court through the ad hoc ICTR and ICTY tribunals, an effort to fight against impunity has been made and a warning sent to those inclined on committing criminal acts that they may one day be held to account regardless of their status at the time of committing such acts³⁰⁷. However, these prosecutions have always been limited to a few people and few crimes for reasons that are both practical and legal³⁰⁸.

In the context of transitional justice, there is generally agreement to limit the prosecution to perpetrators of human rights violations who have assumed a certain level of responsibility and criminal acts of a particular size³⁰⁹. The *ratione temporis* limitation does not require special mention as it is based on the definition of these mechanisms and can be implied on the other side of the same word “transitional”.

III.2. Scope of *ratione personae* in legal prosecutions

The experience of transitional justice in the world shows that, in societies transitioning from authoritarian to democratic rule or from conflict to post conflict situations, it is not easy to initiate legal proceedings against all the potential perpetrators of atrocities committed. The case of Burundi does not escape this general pattern, but it nevertheless has its own particularities.

This selective prosecution relies primarily on the following reasons:

1. The period from which the society in question is trying to emerge is characterized by massive crime and shared responsibilities in such a way that investigating all those involved in human rights violations to some degree will be both an endless and a fruitless task;
2. The dropping of charges against protagonists in a conflict is usually an explicit condition for the signing of both cease-fire and peace agreements.

Implementing the transition process (indeed the peace process itself) is often costly as the parties to the conflict or dictators will only adhere – or at least not constitute an obstacle – to the process if they are guaranteed immunity or amnesty, as is the case in Burundi³¹⁰. We will revisit this issue later.

³⁰⁶ Moral perpetrators, instigators and/or people who led, supervised and encouraged the commission of the crimes in question

³⁰⁷ The senior or junior status or merely receiving orders from a superior does not constitute grounds for exemption from criminal liability for the one who invokes it. See the jurisprudence of the ad hoc criminal tribunals

³⁰⁸ International prosecutions are limited to international crimes due to their requirements in terms of resources but also due to statutory or contractual limitations. There is also the complementary nature of international criminal courts that give importance of the primacy of state courts to prosecute, justice being an area of state sovereignty in principle

³⁰⁹ Usually, it is crimes against international law are prosecuted, ordinary crimes being left to the ordinary courts if they are not exempt from prosecution in exchange for the truth as was the case in South Africa and political crimes are often pardoned.

³¹⁰ Les mouvements rebelles armés exigeaient systématiquement l’amnistie des membres de leurs mouvements et l’immunité de leurs leaders

3. During the transition period, the state of the judiciary does not lend itself well to such prosecutions. Indeed, the justice system is emerging from this period weakened both in terms of its legitimacy as well as its capacity in terms of human and material resources. One only needs to think of the prison population whose majority is in preventive custody and the manipulation of the judiciary by the executive to know the weakness of the judicial system existing in Burundi³¹¹.

If it is true that these choices are informed by a dose of realism, this choice is still open to criticism where it involves the principles of equality and fairness in the administration of justice, while giving prominence to new objectives over the initial objectives of compensation for harm done to the society through punishment and deterrence as well as prevention of recurrence of crimes in the future.

The issue of selective prosecution of perpetrators gives rise to the problem of responsibility and raises questions about the legality of the selection criteria. Indeed, it is difficult for the victim who does not generally understand the chain of responsibility to accept that the neighbor, who killed their spouse, raped their child, destroyed their house and stole their cattle will walk away scot free for the sake of reconciliation.

Under the traditional criminal law procedure, criminal prosecution may be stopped or overlooked by the public prosecutor due to lack of sufficient evidence to support prosecution or the fact that the crimes in question do not disturb public order or even the issue is of no interest to a society whose memory of the crime is no longer alive. The atrocities committed during the conflict in Burundi are too serious to lack evidence or to be harmless to the public order as their impunity has always been a justification for cyclical violence³¹². It should also be noted that selective prosecution is also reflected in the nature of the violations that are the subject of investigation.

*III.3. Scope of *ratione materiae* in prosecution*

As already mentioned above, transitional justice can tolerate exceptions to the ideal application of punitive justice. This is often informed by the fact that peace and democracy are ensured by a much more peaceful way of life than a strict application of the winner/loser traditional justice. From this situation, a 'pseudo-conflict' between the values of justice and peace³¹³ has been born.

As such, judicial mechanisms for transitional justice are increasingly being used to deal with the most serious of past crimes: summary executions, forced disappearances, arbitrary detentions, attacks against civilian populations, torture and other cruel, inhuman, degrading forms of treatment etc. Thus, this approach is primarily focused on violations of civil and political rights.

politiques pour la poursuite des négociations. Cela fut le cas lors des négociations de cessez-le-feu entre le Gouvernement du Burundi et les mouvements CNDDFDD de Jean Bosco NDAYIKENGURUKIYE, le CNDD de Léonard NYANGOMA ou avec le CNDDFDD de Pierre NKURUNZIZA ou encore avec le FNL d'Agathon RWASA

³¹¹ Dans le cas du Burundi, le pouvoir judiciaire a été utilisé comme un arme contre les opposants politiques et a ainsi joué un rôle considérable dans le passé douloureux auquel tend à faire face les mécanismes de justice transitionnelle

³¹² See above

³¹³ Published works which have multiplied in recent times have tended to oppose peace to justice. Prominence has been given to the need to advance the peace process at the expense of criminal proceedings against leaders of armed elements involved in gross violations of human rights. We share the opinion of those who argue that there's rather need for a sequencing other than having to abandon either of these transitional justice mechanisms. For illustration purposes, see Refugee Law Project, *Peace First, Justice Later: Traditional Justice in Northern Uganda* Working Paper No. 17, 2005

But the question here is whether, as part of a comprehensive way of dealing with the past, it is wise to overlook massive violations of other categories of rights including economic, social and cultural³¹⁴ rights. Should we ignore violations against the right to housing, to food and to property?

We do not think so given the fact that we are, for example, aware of the importance that Burundians attach to land. Indeed, violent conflict represents a serious threat due to the ethnic nature of the violence involved in the political conflict³¹⁵ from which the country is emerging. This is why Burundian authorities have always demonstrated continued interest in finding a solution to the issue of land and other property rights.

It is therefore important to deal with all violations whether they were committed against civil and political rights or against economic, social and cultural rights. It is true that the enforceability of certain rights in this latter category is still the subject of debate³¹⁶. Nevertheless, it is also true that any right loses its meaning if it cannot form basis for legal action.

In concluding this point, which is related to the issue of selective prosecution, we can see that although practical reasons may justify the dropping of charges against certain people and certain criminal acts, it should be noted that material and personnel limitations in investigation dilute the principle of legality of crimes and penalties and somehow calls into question the essence of the principle of individual criminal responsibility, yet it is fundamental to the understanding of the rule of law³¹⁷ and even the establishment of the rule of law itself.

Thus, even if there are very few people calling for the prosecution of the perpetrators of violations of human rights according to the report published by Cyrus Samii³¹⁸, this situation can be explained by the precarious state of the country's security and fear of retaliation by a population whose memories of violence of war are still vivid³¹⁹.

Moreover, if it is true that the trend of Burundi as most countries emerging from civil war is to avoid the pursuit of retributive justice in their country as they believe that such a path may pose threat to stability³²⁰. It is fundamentally important to remember that the development of high accountability standards demands that people in each country pursue such justice at all times. In this manner, transitional justice mechanisms will become fair and gain more respect in eyes of the victims.

IV. Prospects of criminal law in the transitional justice process in Burundi

By excluding war crimes, crimes against humanity and genocide from the list of pardonable

³¹⁴ It is only as a result of the adoption of two separate human rights instruments namely the International Convention on Civil and Political Rights as well as the International Convention on Economic, Social and Cultural Rights. In this regard, see Katrina Yvonne Killen, *Transitional Justice and the Marginalization of Socioeconomic Issues*, Unpublished dissertation, Faculty of Social Sciences, University of Ulster, 2010, p. 9.

³¹⁵ The conflict in Burundi has been described by the Arusha protagonists as "fundamentally a political conflict with extremely important ethnic dimensions" (AAPRB, Protocol I, Chap. 1, Article 4)

³¹⁶ L. Scott, *Another Step Towards Indivisibility: Identifying the key features of Violations of Economic, Social And Cultural Rights*, 1998 p. 20 *Human Rights Quarterly*, vol. 81, p. 88 quoted by Christopher Mbazi, *Litigating Socio-Economic Rights in South Africa, a choice between distributive and corrective justice*, Pretoria University Law Press, 2009, p. 27

³¹⁷ Institute for Justice and Reconciliation, *Pieces of the puzzle. op. cit.*, p. 77

³¹⁸ Cyrus Samii, *Who wants to forgive and forget? A Civilian Appreciation of Transitional Justice and Truth in Burundi*, Columbia University, New York, United States, March 2009, p. 21.

³¹⁹ The former rebel leaders of the main armed movements being in power, populations prefer to maintain the existing semblance of calm instead of seeking prosecution at the risk of returning to conflict

³²⁰ Vandegiste Stef, *Burundi: between the consociational model and its implementation*, in Marysse, S. and al. (eds.), *The African Great Lakes. Yearbook 2007-2008*, Paris, L'Harmattan, p. 19.

crimes³²¹, Burundi's judicial system has left sufficient role for retributive justice and thus aligns itself well with the existing international laws.

Nevertheless, the will of the government to give the Truth and Reconciliation Commission authority to determine the crimes that may be prosecuted by the special court falls short of the basic principles of independence and impartiality that are fundamental to any judicial body.

Indeed, through this pre-eminence of the TRC over the special court, the latter would be left in the mercy of an extra-judicial body whose motives cannot be detached from the considerations of expediency which fundamentally distort the technical requirements of a fair trial.

It has become an established practice in international law dealing with transitional justice that exemption from prosecution of perpetrators of crimes falling under international law is only acceptable in exchange for the withdrawal of the perpetrators from politics or for the establishment of the rule of law³²². However, apart from the fact that this is not the case in Burundi, the fact remains that the prosecution of heinous crimes required by international law would only be postponed with a clear understanding of the inalienable and unpardonable nature of these crimes for which the imperative of prosecution is currently part of *jus cogens*³²³.

However, the risk of having a situation where the Government of Burundi seems to cooperate when there is pressure from the international community only to turn and do the exact opposite when the agenda of the UN Security Council is focused on other hot spots³²⁴ is great. It seems that the participation of the government in negotiations seeking to establish transitional justice institutions is a well calculated move.

In another words, and to corroborate what has been said above, the prospect of punitive justice is measured by the extent and nature of legal prosecutions provided by transitional justice mechanisms. However, it is on the issue of amnesty, which necessarily restricts the application of criminal justice, in terms of scope and validity, that discussions between the two sides³²⁵ have hit a snag.

Indeed, the government stands by the Arusha Agreement to demand a wide application of amnesty³²⁶ in that, in the opinion of the Government of Burundi, the TRC should "*formulate or propose measures to promote reconciliation and forgiveness*" by determining "*cases for which amnesty could be issued*"³²⁷.

However, the UN side has noted a contradiction between the text of the Arusha Agreement and the various other texts touching on the issue of amnesty. Thus, it has underscored the fact that, if genocide, crimes against humanity and war crimes, are systematically excluded from amnesty, it is difficult to see exactly what other crimes would be covered by amnesty.

³²¹ See above Point I.2

³²² This was the case in South Africa for example where the choice was made in favor of seeking the truth and institutional reforms aimed at establishing the rule of law instead of taking legal action against the crime of apartheid, yet it has been listed as a crime against humanity by the Convention against the said crime

³²³ See above, paragraph III

³²⁴ Observatoire de l'Action Gouvernementale, ASBL, *National consultations in Burundi, experiences, challenges and strategies for the implementation of transitional justice mechanisms*, Bujumbura, February 2009, p. 76

³²⁵ The government party and the UN party

³²⁶ At the end of §65 of the Memorandum of the government delegation, "*no act, no facts established by the commission is ruled out in the advancement of the reconciliation process.*"

³²⁷ Memorandum of the Burundian delegation, (...), March 26, 2007, *op. cit.*, paragraph 27, h

Indeed, "if the acts falling within the jurisdiction of the National Truth and Reconciliation Commission were 'serious acts of violence committed during cyclical conflicts' and were likely to 'cause grief' in Burundi, it is difficult to argue that these constitute crimes of genocide, crimes against humanity and war crimes"³²⁸.

Moreover, if the Government had initially reaffirmed its commitment to exclude cases of genocide, crimes against humanity and war crimes from amnesty³²⁹, this willingness will be put in doubt by the letter of the Minister of Foreign Affairs and International Cooperation dated June 15, 2006, which proclaimed that for the sake of reconciliation, we should "let the truth and reconciliation commission, which will be composed of both national and international personalities, to look into the issue of amnesty as provided for by the Arusha Agreement (...)"³³⁰.

In addition, the Government's support for the establishment of a TRC with wider-reaching powers to the detriment of a judicial mechanism is obvious. Following a Council of Ministers meeting held on February 2, 2006 to discuss the issue of the TRC and the special court, a clear government position emerged: "The general direction of the mandate of the commission should be the search for truth with overriding objective being national reconciliation, with justice only coming into play where forgiveness is deemed impossible"³³¹.

If we add, to this press release, massive government release of political prisoners, there is a thinly veiled desire to overshadow legal proceedings against perpetrators of heinous crimes, which have been deliberately transformed into political or politically motivated crimes.

This attitude is clearly contrary to international law on human rights, international humanitarian law and the requirements of international criminal law whose belabored development has led to the creation of the ICC³³². No society can claim to be free or democratic without strict adherence to the rule of law. This is particularly true during periods of war or dictatorship as rebel leaders and chiefs are quick to throw out the rule of law at the first opportunity³³³.

However, the return to legality and fair administration of justice is characteristic of the end of conflict or dictatorship and deserves deeper respect. Although the construction or reconstruction of a just society requires more than mere punishment³³⁴, a truth and reconciliation commission should not be considered as an alternative to prosecution, but rather as a complementary mechanism³³⁵.

Ultimately, and without being too pessimistic, some stages in the evolution of the reconciliation process in Burundi are indicative of the high risk of the persistence of impunity in the country following the political considerations that have been carefully introduced into the debate on transitional justice. Moreover, the limitations of the formal and informal justice system in Burundi have greatly reduced the capacity of criminal justice to ensure that perpetrators of violations account for their actions.

³²⁸ Doc 90, UN, S/2005/158, §30

³²⁹ Thematic report of discussions and negotiations between the Burundian delegation and the UN from March 27-31, 2006 in Bujumbura, § 18

³³⁰ Letter from the Minister of Foreign Affairs and International Cooperation, Ms. Antoinette Batumubwira to the Secretary-General for Legal Affairs, Nicolas Michel, dated June 15, 2006

³³¹ Government Communiqué from the Council of Ministers of 2 February 2006, Bujumbura, p.1

³³² The history of the birth of the ICC reflects the evolution of the fight against impunity in which the turning point was precisely marked by the creation of this international criminal court

³³³ Institute for Justice and Reconciliation, *op. cit.*, p. 77

³³⁴ *Ibid*

³³⁵ *Idem*, p. 100

IV.1. Ongoing specter of politicization: A threat of the persistence of impunity

The need to establish responsibility for violations committed in Burundi is to a large extent undermined by temporary amnesty and immunity measures as well as the release of the so-called political prisoners.

In terms of principles, amnesty is a legal action having the effect of extinguishing prosecution or withdrawing criminal charges or setting aside already issued sentences³³⁶.

In the context of transitional justice, amnesty is aimed at obtaining the fullest cooperation from perpetrators of crimes committed in order to get to the truth on all violations³³⁷.

This can be achieved more or less depending on whether the measure comes before or after the trial. The post conviction amnesty is less suited to encourage the collaboration of the perpetrator, already judged, in the establishment of the truth. Indeed, he/she has no much interest to cooperate with a system that could lead to new charges, as the principle of *ne bis in idem* does not cover hidden crimes³³⁸. But to remedy this, the perpetrator may base the collaboration on the condition that revelation implicating other people cannot form basis for a new trial³³⁹.

Granted before trial, amnesty would be contrary to international law if it covers human rights violations that states have the responsibility to suppress, including crimes against international law. However, for the case of Burundi which is the subject of this discussion, the exclusion of such acts from pardonable violations negates the scope of amnesty and considerably narrows its application. This is the main reason for extending the scope of this measure by introducing political considerations³⁴⁰, thus complicating negotiations related to the same.

Political haggling reached its peak when dealing with the issue of political prisoners. Indeed, Protocol II of the Arusha Agreement in Article 15 stated: *"the transitional government shall create, within 30 days from the beginning of the transition, a commission chaired by a judge, to urgently investigate and make recommendations on: (...) the existence and release of all political prisoners, (...)"*.

It was not until November 2001 that the commission was set up after which it published its report in February 2002. Nevertheless, the commission was not in a position to remove all the ambiguities surrounding the notion of political prisoners³⁴¹.

In 2004, Burundi's Government preferred to use the mechanisms provided under the Penal Code and the Criminal Procedure Code, including parole and bail, to release about 2,071 prisoners.

Subsequent to the comprehensive cease-fire agreement signed between the Transitional Government and the CNDD-FDD, a commission was set up in March 2004 to *"identify CNDD-FDD fighters, their collaborators and members of defense and security forces in custody to be*

³³⁶ Law No. 1/05 of April 22, 2009 amending the Penal Code Article 17

³³⁷ This is the case of the amnesty granted to perpetrators of crimes during the apartheid regime in South Africa

³³⁸ Institute for Justice and Reconciliation, *op. cit.*, p. 77

³³⁹ *Ibid*

³⁴⁰ See below

³⁴¹ The definition of a political prisoner was a mixture of objective and subjective elements to the extent that there was reference to acts covered under the penal code (objective criteria) while adding politically motivated acts (subjective criteria).

covered under provisional immunity measures³⁴².

After the 2005 elections, the Government released, through a decree, another wave of the so-called political prisoners. In 2006, it was also decided through a presidential decree that prisoners identified by the commission set up on November 7, 2005 would benefit from a provisional immunity; the term temporary here meaning until the establishment of the mechanisms contained in the Kalomoh Report.

In the enforcement of this decree, three ministerial orders adopted in 2006 temporarily provided for the release of some 3,300 political prisoners, without making a distinction between already convicted persons and simple defendants.

In addition to challenges posed by these releases³⁴³ and despite their impact on the prison population, these measures have “reinforced the perception that justice is administered by the executive on the basis of political rather than legal considerations”³⁴⁴.

Therefore, it becomes apparent that control measures against impunity contained in the Arusha Agreement have not been implemented effectively without distortions.

Indeed, any issue, be it technique or otherwise, is or may be currently under negotiations in view of finding a political “solution”³⁴⁵. However, the punishment of perpetrators of rape against women, targeted attacks against civilians, killings and rape of innocent children, summary and extrajudicial executions, etc. should not be subject to negotiations.

Thus, the political considerations continue to grow in importance at the expense of legal solutions that are surprisingly, in this case, likely to make an effective contribution to the establishment of the rule of law. In the name of reconciliation, the rights of victims are sacrificed at the altar of impunity and the current political context leaves little hope that perpetrators of serious violations will ever be punished and frustrations are *de facto* on the rise.

Economic criminals against whom the President of the Republic³⁴⁶ had declared total war can feign injustice while pointing fingers at the massive releases of people convicted and accused of bloody crimes as well as potential perpetrators of genocide, crimes against humanity and war crimes whose immunity- or rather impunity - is a guarantee against prosecution.

Nevertheless, the formal and informal justice system in Burundi has deficiencies that limit its ability to combat impunity. The following section attempts to develop some observations with regard to the limitations of the conventional court system as well as factors that diminish the attractiveness of the traditional system also known as *Bashingantahe*.

IV.2. Limitations of formal and informal justice systems in the fight against impunity

The use of “formal and informal justice” in this paper refers to the justice rendered by the

³⁴² Article 1 of Decree No. 100/023 of March 23, 2004 setting out modalities for the application of provisional immunity under the Comprehensive Cease-fire Agreement of November 16, 2006.

³⁴³ Three civil society organizations (OAG, FORSC and Ligue Iteka) asked the Constitutional Court to rule against the unconstitutionality of the release orders. Their merits of their application were not analyzed and it was declared inadmissible.

³⁴⁴ Method Ndikumamasabo and Stef Vandeginste, *op. cit.*... p. 117

³⁴⁵ A political response to a technical problem is not really a solution per se

³⁴⁶ In his inaugural address in August 2010, the President announced zero tolerance to corruption and economic and directors of state companies SOSUSMO (MOSO Sugar Company) and OTRACO (Office of Public Transportation) have been arrested in this regard

courts on the one hand, and justice rendered through the *Bashingantahe* institutions, on the other.

Burundi's court system has been criticized since the signing of the Arusha agreement, which already provided for its reform³⁴⁷. Many studies have examined the malfunctioning of the judiciary due to both endogenous and exogenous factors³⁴⁸.

With the current capacity of the judiciary in terms of human and material resources, the justice system in the country is far from meeting the needs of individuals given the problem of (over) crowding in prisons and the number of available judges³⁴⁹. Moreover, the courts with the material jurisdiction to deal with crimes committed during successive crisis that have hit the country since 1962, except where there is privilege of jurisdictions, are not sufficiently equipped to deal with such crimes within a reasonable time-frame. It happens that the hearing of criminal cases – which requires a president and four judges chosen in accordance with ethnic and gender balance³⁵⁰ – further reduces the capacity of criminal justice.

This situation explains the growing need for transitional justice mechanisms to address the heavy burden of dealing with crimes committed during the Burundi conflict. In addition, the high number of crimes committed in Burundi represents a serious challenge to the establishment of the rule of law and is at the heart of the fight against impunity. The Burundian criminal law brings a partial solution to this problem by providing for the punishment of these criminal acts under Chapter VI of the new penal code³⁵¹. However, the issue goes beyond cases of complicity and/or mere coercion to include the circumstances surrounding such crimes, their nature and number of people involved.

Thus far, judicial mechanisms adopted by societies in transition are still perfectly capable of providing a model that can help to bring all perpetrators of violations to account for their crimes. The evolution of the transitional justice law has demonstrated a tendency of giving importance to 'reconciliation' – desired or imposed – in the systematic prosecution of crimes. But as explained above, this model has already shown its limitations and the desire to see justice remains an essential need whose satisfaction cannot be wished away easily, whether in the short, medium or long term³⁵².

As we have seen, the focus of the judicial mechanisms for transitional justice is on the so-called 'big fish'. However, this system, which is not only costly and distant, to the victims is more symbolic than real³⁵³. Thus, as the reconstruction of the State being sought by transitional justice mechanisms continues as manifested in the coexistence of local communities, justice must be seen to be done at this same level.

This development explains the current trend towards the adoption of local justice mechanisms in Africa in line with the idea of "contextualization" (or at best domestication) of transitional justice. This is the case of the *Gacaca* system in Rwanda and the traditional

³⁴⁷ The agreement was already considering its reform as a solution to the Burundi conflict. AAPR, Articles 5 and 7

³⁴⁸ For more details, see Human Rights League in the Great Lakes Region (LDGL), *Burundi: forty years of impunity*, 2005, pp. 33-44

³⁴⁹ According to the latest statistics (2010), the total number of judges of superior courts (from the High Court to the Supreme Court) working is only 720. See Report of the General Directorate of the Judiciary, Ministry of Justice, and the Government of Burundi, December 2010

³⁵⁰ Law No.1/08 of March 17, 2005 on the organization code and jurisdiction, Article 16, in BOB 2005, No. 3c, p. 19

³⁵¹ See Articles 37-43 of Law No.1/05 of April 22, 2009 amending the Penal Code.

³⁵² Such is the case in Argentina and Spain, where several years after the end of the transition period, trials are currently underway against those responsible for disappearances under Franco (Spain) or the generals of the Argentine junta

³⁵³ See the assessment of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone compared to the financial burden posed by the establishment and operations of these courts

reconciliation system in northern Uganda known as the *Mato oput*³⁵⁴. We might have to think of adopting or choosing a similar model for Burundi where the institution of *Bashingantahe* could provide a traditional mechanism under the Burundian culture.

However, the *Bashingantahe* system deserves some observations that should be taken into account before its adoption as a complementary mechanism in the fight against impunity:

Since the colonial period, in addition to the colonizer trying to weaken the institution of *Bashingantahe*³⁵⁵, the jurisdiction of the latter has been much restricted to civil (family or neighborhood) matters to the exclusion of any criminal jurisdiction (at least formally³⁵⁶).

- a) It is therefore appropriate to know the extent to which the *Bashingantahe* system will guarantee the right to a fair trial in all its aspects³⁵⁷ once it is adopted as a complementary mechanism to the judiciary.

Of course, we could get inspiration from the model that has transformed Rwanda's *Gacaca* courts into a hybrid of customary law system incorporating both statutory aspects of the Penal Code as well as Criminal Procedure³⁵⁸, but it is important to examine the limitations of the Rwandan model already criticized by some people as "an extrajudicial mode of dealing with genocide litigation"³⁵⁹.

- b) The establishment of the *Bashingantahe* system has been the subject of criticism especially with the 'rehabilitation' attempts made in 1998 under a wave of protests and political speculation³⁶⁰. It is necessary to ask whether the system is not likely to be a means of settling local scores where there are no clear safeguards against the danger of manipulation plaguing the traditional judicial system. Indeed, the question of whether this institution independent from the interference of local elected officials and indeed the executive as a whole remains legitimate.
- c) Suspicions have been cast over this institution with a regime that tends to fill the *Bashingantahe* institutions with local elected hill "colline" officials, and in some cases the local officials of the ruling party³⁶¹. This suspicion related to the politicization of the institution since the time of a single party is so widespread that some people even refuse to be addressed as '*Mushingantahe X*' which does not refer to the institution but rather the respect due to a person in accordance with the local culture³⁶².

³⁵⁴ This is a traditional system of reintegrating a person accused of murder where a bitter drink is shared under a tree with members of the tribe of the victim. For a further description of this mechanism, see Finnstrom's, *Living With Bad Surroundings*, 297-299 quoted by Refugee Law Project, *Peace First, Justice Later: Traditional Justice in Northern Uganda*, Working paper No. 17, Kampala, Uganda, 2005, p. 23-24

³⁵⁵ See Tracy Dexter JD and Dr. Philippe Ntahombaye, *The role of informal justice systems in Fostering the rule of law in post-conflict situation: The case of Burundi*, Center for Humanitarian Dialogue, Geneva, 2005, p. 14, see also Huyse Luck and al., *Traditional Justice and Reconciliation After Violent Conflict: The wealth of African experience*, IDEA, Stockholm, 2008, p. 169

³⁵⁶ One way or another, the *Bashingantahe* continued to exercise jurisdiction over all matters (both criminal and civil) based on acceptance by the local communities, which results in the confirmation of their decision by resident courts. In this regard, see Dexter and Ntahombaye, 2005 quoted by Luc Huyse and al. *Op. cit.*, p. 176

³⁵⁷ This right includes the possibility of appeal, the right to an independent and impartial trial, and the right to defense

³⁵⁸ In this regard, see Mō Bleeker, *Transitional justice in the Francophone world: State of affairs*, Conference paper, Federal Department of Foreign Affairs FDFA, Bundesgasse 32, Bern, 2007, p. 28. Available at www.eda.admin.ch accessed on September 12, 2010

³⁵⁹ Lawyers Without Borders, *Vademecum: The crimes of genocide and crimes against humanity before the ordinary courts of Rwanda, Kigali and Brussels, 2004 p. 11*, quoted by O. Bleeker, *op. cit.*, p. 39

³⁶⁰ For more information on the politicization of this institution, see Christine Deslaurier, *Can the "Bashingantahe" help reconcile Burundi?* In *African Politics No. 92*, December 2003 p. 88-90

³⁶¹ In each hill, party houses were initially intended to serve as hill justice 'palaces' made by the leaders of the parties in lieu of the *Bashingantahe* but this system was not well received by the local populations

³⁶² Ubashingantahe is a recognized value conferred on a person of integrity, worthy of respect and likely to be promoted to sit in this body of persons of high moral standing to resolve conflicts at the local level. Regarding the customary nature of this institution, see Assumpta Naniwa-Kaburahe, *The institution of Bashingantahe in Burundi*, in International Institute for Democracy and Electoral Assistance, *Traditional Justice and Reconciliation After Violent Conflict: Learning from African Experiences*, 2008, p. 157. (Available at the site www.idea.int/rrn accessed on July 12, 2010)

- d) In cases where traditional mechanisms have been adopted as transitional mechanisms for supporting the judiciary, the system was already legally recognized in the country³⁶³ or was already practiced by communities or tribes in which reconciliation was taking place³⁶⁴. We must therefore strengthen the legitimacy of the *Bashingantahe* institution whose current legal and political context accords it a limited role³⁶⁵.

Conclusion

This overview, by no means thematically exhaustive, leads us to some conclusions:

- a. The legal framework initially planned under the Arusha Agreement has not yet been implemented faithfully both in terms of timelines and content. This situation in which the responsibility of the international community is not clear³⁶⁶ inspired the government side to conclude that eventually all aspects of transitional justice are not imperturbable.
- b. This has undermined the Arusha negotiations on issues touching on the fight against impunity in the context of post-conflict justice. All aspects of transitional justice have been put on the negotiations table both in terms of mechanisms as well as implementation sequence³⁶⁷. This state of affairs is open to speculation and political haggling which often deviates from international standards³⁶⁸.
- c. Retributive justice is still an essential response to atrocities committed in the past to eliminate the specter of impunity and restore the foundation of reference social values and enable the victims to come to terms with cycles of violence that have occurred in the country.

It is true that we have singled out many practical and legal limitations, but the most disappointing thing remains the maneuvers of the government delegation in the negotiations where it has sought to copy the South African model, imperfect as it is³⁶⁹, to extend the scope of amnesty to cover all crimes, even where they are against international law. This would result in considerable weakening of the direct role of retributive justice in transitional justice mechanisms. This commitment is reflected in the trend by the governing side to reject the independence of the prosecutor of the special court on the one hand and limiting the referral power of this tribunal only to TRC, on the other.

- d. The future of criminal law in the transitional justice mechanisms in Burundi is thus uncertain since it remains suspended at the end of negotiations where decision is still pending on many key points regarding the form and substance of legal proceedings against serious crimes.

Three scenarios are possible:

³⁶³ Case of Gacaca in Rwanda

³⁶⁴ Rituals of the Acholi tribe in northern Uganda


³⁶⁵ Section 37 (2) of the Communal law 1/016 of April 20, 2005 on the organization of the communal administration attributes a supportive function to the *Bashingantahe* within the hill or the neighborhood council which they exercise under the supervision of the head of the hill or the neighborhood

³⁶⁶ Kalomoh Report was adopted by a resolution of the Security Council, which asked the UN Secretary General to start negotiations for the implementation of the proposals contained in this report

³⁶⁷ We have moved from the International Criminal Tribunal for Burundi under the Arusha Agreement to a Special Court within Burundi's court system and it will come to fruition after the establishment of Truth and Reconciliation Commission

³⁶⁸ Models proposed by the Government are often out of step with the requirements of international law including the unpardonable nature of crimes of genocide, war crimes and crimes against humanity and the right to an independent and impartial trial

³⁶⁹ The Delegation took the example of South Africa - where the crime of apartheid, defined as a crime against humanity, was pardoned in exchange for the truth - to argue that no act can be subtracted from the reconciliation process in advance, an argument that tends to generalize amnesty

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- i. The government's position outweighs UN demands and in this case, the prosecution will be subsidiary to the truth, reconciliation and forgiveness mechanisms. The extreme situation would be that all cases lend themselves to reconciliation and that, *de facto*, the Special court would lack purpose or in any case would be a symbolic mechanism with neither substance nor powers.
 - ii. The UN position carries the day and in this case, the TRC, as an alternative justice mechanism, is put on an equal footing as the judicial mechanism of the special court. Both mechanisms would work in conjunction through the exchange of information, where appropriate, taking into account the difficulties encountered in other places such as Sierra Leone. In this manner, the punishment of international crimes committed in Burundi would be guaranteed and the conscience of mankind and victims restored.
 - iii. The middle ground is that the independence of the prosecutor and prosecutorial discretion would be limited while granting him/her full powers in cases where international crimes are concerned. This would result in optimal restriction of eligible cases over which the special court would have jurisdiction. The majority of cases would thus be submitted to the TRC as part of a restorative justice process where priority will be given to the search for the truth and reparations programs.

In addition to the weakened capacity of the formal justice system, which still needs to be strengthened and reformed, it is important to highlight the limitations of informal conflict resolution mechanisms namely *Bashingantahe* whose historical background is fraught with politicization. As a result, the institution has become discredited and this reduced its importance as it is seen to embody the country's justice system.

In any case, there will always be need to respect the inviolable principles of international law in order to promote a new culture of accountability that breaks with the culture of impunity. Thus, the legitimacy and sustainability of the process will be measured by acceptance from the victims. Similarly, the continued enjoyment of the peace depends on the effective implementation of standard accountability mechanisms necessary to establish the rule of law.

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CONSENSUS APPROACH IN THE CONSTITUTION OF 18TH MARCH 2005 AND ITS IMPLICATIONS ON THE BURUNDIAN POLITICAL REGIME

By Alexis MANIRAKIZA*

Introduction

Burundi has gone through a cycle of political violence since its independence in 1962. The most emblematic dates of this cycle of violence are the years 1965, 1972, 1988 and 1993. The explanation that has often been given to that is that the country was trapped by quasi-ativistic ethnic antagonisms³⁷⁰, a struggle for the rights and democracy, a democracy that has often been mistaken for the power of the demographic majority³⁷¹. This goes to show why all this violence has always taken the shape of inter-ethnic conflicts. The fundamental problem was actually always political (struggle for the control of political power). As Julien NIMUBONA so rightly puts it, *"the recourse to ethnicity concealed the reality of a power the objective of which was to reinforce the client-oriented approaches and prevent the periphery and the non governmental elites from participating in the management of the nation and most of all to deny them the use of the economic resources thereto related"*³⁷².

To put an end to these cyclic crises, Burundian politicians entered into peace negotiations in 1998 under the patronage of Julius Nyerere, the former Tanzanian President and under the leadership of Nelson Mandela, the former South African President, who took over after the passing of President Nyerere. A Peace Agreement entitled "The Arusha Agreement for Peace and Reconciliation in Burundi" was reached on 28th August 2000". In this agreement, the negotiating parties agreed about the genesis and nature of the Burundian conflict. With regard to the nature of the conflict, the negotiating parties acknowledged that it is:

- a) a fundamentally political conflict with extremely deep ethnic dimensions.
- b) a conflict resulting from a struggle of politicians to climb to power and /or to cling to it. (Article 4)³⁷³.

Considering the foregoing, a question arises as to what the solutions that have been proposed to come out of these crises are.

As it has been acknowledged that the Burundian conflict resulted from of tug-of-war between Hutus and Tutsis for the conquest of power, it is quite natural that political power sharing between the different ethnic components be the most preferable solution. The source of inspiration was the consensus theory generally referred to as the theory of power sharing.

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³⁷⁰ NTIBAZONKIZA, R., *Au royaume des seigneurs de la lance. Une approche historique de la question ethnique au Burundi. T.1 : Des origines à l'indépendance*, Centre d'animation/La Louvière, 1991 cité par NIMUBONA, J. « Masque ethnique, clientélisme et compétition pour le contrôle des termes d'échange politiques au Burundi. Essai d'économie politique de la corruption et des conflits au Burundi » in *Revue de l'IDEC*, p.90.

³⁷¹ MBONIMPA, M., *Hutu, Tutsi, Twa...Pour une société sans castes au Burundi*. Paris, L'Harmattan, 1993, cité par NIMUBONA, J., *ibidem*.

³⁷² NIMUBONA, J., *idem*, p.96.

³⁷³ MANIRAKIZA, A., *Essai de qualification du régime politique issu de la Constitution du 18 mars 2005*, mémoire, Fac.de Droit, 2008 p.46.

The aim of this work is to show the extent to which the Burundian constitution of 18th March 2005 has incorporated some consensus arrangements in the sharing of power.

Moreover, given that the institutions that resulted from this constitution have gone through serious crises and problems during the 2005-2010 legislatures, it would be interesting to know whether these are closely related to those arrangements of power sharing in Burundi.

We will begin with the assumptions that some pillars of the consensus approach, such as the grand coalition as well as the right of veto, would be at the cause of the political instability that Burundi experienced during the 2005-2010 legislature.

This work cannot yet draw ultimate conclusions on the current state of this system in Burundi. We think that the 5 year period dedicated to it is not conducive to such conclusions. However, we will demonstrate that the system experienced power sharing-related institutional malfunctions during that period.

I. The notion of the consensus theory

It is not our intention to go into details on consociativism³⁷⁴. We shall only try to underline its characteristics as have been developed by Arend LIJPHART³⁷⁵, who is considered to be the actual father of consensus.

He does not accept the 'traditional' belief according to which it is difficult to establish and preserve a steady democracy in a pluralistic society³⁷⁶. According to him, that is incompatible, it is pluralistic and therefore a 'majority democracy.'

That being the case, we can therefore summarize the main characteristics of consensus. Generally, a consensus approach is based on the abandonment of the principle of the majority, on the basis of which a simple political majority is enough to control political decision making. This abandonment occurs through the four following elements:

1. Cooperation of the elites through a grand governmental coalition where the executive power is shared between the opposition parties and the ruling ones in order to ensure the involvement of the all the parties representatives in the political decision making process.³⁷⁷
2. Proportionality as a principle of representation, i.e. in parliament but also in the public administration as well as in budget allocation. It is thus considered as a '*guarantee for the fair representation of ethnic minorities*'³⁷⁸. Yet, it can happen that one of the segments becomes more powerful than the others while applying a pure proportionality, especially when it represents a demographic majority.

³⁷⁴ Pour plus de détails de cette théorie, voir LIJPHART, A., *Democracy and Plural Societies. A Comparative Exploration*, New Haven, London, Yale University, 1977. Voir également LIJPHART, A., *Democracies. Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, New Haven, London, Yale University Press, 1984. Voir aussi LIJPHART, A., « Échangement et Continuité dans la théorie consociative », *Revue internationale de Politique Comparée*, Vol 4, n°3, 1977.

³⁷⁵ Né le 17 août 1936 à Apeldoorn aux Pays Bas, Arend Lijphart est un politiste spécialiste des systèmes de vote, des institutions démocratiques et de l'éthnicité considérés selon une approche comparatiste. Il est connu pour avoir travaillé sur le consociationalisme et donc sur la façon dont les sociétés profondément divisées parviennent à maintenir un régime démocratique en partageant le pouvoir politique entre des partis.

³⁷⁶ Une société plurielle est une société divisée par des clivages segmentaires et où des partis politiques, des groupes d'intérêt, des médias, des écoles et des associations ont tendance à s'organiser suivant les mêmes clivages segmentaires (Voir VANDENGISTE, S., *Théorie consociative et partage du pouvoir politique au Burundi*, Institut de Politique et de Gestion du Développement, Université d'Anvers, 2006, p.8).

³⁷⁷ LIJPHART, A., « Changement et Continuité dans la théorie consociative », cité par VANDENGISTE, S., *op.cit.*, p.8.

³⁷⁸ LEMARCHAND, R., *op.cit.*, p.3.

This goes to show why some corrections are made to pure proportionality in order to appease the minority segments³⁷⁹. The proportionality thus “corrected” can go from a light overrepresentation of a demographically minority segment up to parity³⁸⁰.

3. The segmental autonomy in some areas, including the management of areas closely related to the very identity of some segments. This generally occurs through federalization, regionalization or decentralization.

4. The right of veto or ‘minority veto’ is described as an ultimate weapon that the minorities must have in order to protect their vital interests. That is why for some matters of great importance, a right of veto nullifies the risk of seeing one minority segment being marginalized by the majority and being, *de facto*, excluded from the decision making process.

To what extent has this approach been integrated in the Burundian Constitution of 18th March 2005? This is dealt with in the next section of this essay.

II. The consensus pillars of the Burundian Constitution of 18th March 2005

By comparing the way political power is shared in Rwanda, Burundi and the Democratic Republic of the Congo, René LEMARCHAND wrote: « *Measured by the extent to which it approximates Lijphart’s consociational formula, Burundi today stands as a unique case. No other state anywhere in the continent offers a more faithful image of the ideal consociational policy*³⁸¹ ». This means that there is no doubt that the consociative approach is being used.

It manifests itself through the institutionalization of ethnic differences, the sharing off power between different ethnic groups as well as political parties, and finally through the need for big majorities in decision making. This guarantees both the protection for minority groups and compulsory dialogue and consensus in decision making.

All these elements account for the characteristics of the consensus approach, including the grand coalition, the proportionality and the right of veto (which is not even explicit). The last feature, i.e. the segmental autonomy, does not exist in Burundi³⁸².

II. 1. The Grand Coalition in the Burundian Constitution

We have already said that grand coalition guarantees the involvement in decision making of all the segments concerned. This is generally done through a governmental coalition that brings together the main major political parties.³⁸³

This kind of involvement is enshrined in the Burundian constitution with reference at the level of both the presidency and the government. The concerned segments referred to here are actually the political parties and the ethnic groups.

³⁷⁹ Les termes minorités ou segments minoritaires font ici référence à une réalité statistique et démographique.

³⁸⁰ HAVYARIMANA, L., *Analyse critique des textes législatifs et réglementaires régissant les élections au Burundi*, OAG, Bujumbura, novembre 2008. p.47.

³⁸¹ LEMARCHAND, R., op.cit, p.3.

³⁸² Les segments ethniques ne sont pas séparés territorialement et n’ont pas de caractéristique distinctive classique, à savoir la langue, la culture, la religion, etc. Scientifiquement parlant, les Burundais forment une même ethnie. Mais c’est l’auto-identification sur base de l’affiliation ethnique qui est un élément décisif pour affirmer l’existence des groupes ethniques au Burundi. (Voir pour plus de détails : CHRETIEN, J.-P., *Le défi de l’ethnisme, Rwanda et Burundi*, 1990-1996, Paris, Karthala, 1997, CHRETIEN, J.-P., et PRUNIER, G., *Les ethnies ont une histoire*, Paris, Karthala, 1989, NT IBANTUNGANYA, S., *Une démocratie pour tous les Burundais*, Paris, L’Harmattan, 1999.)

³⁸³ Voir <http://fr.wikipedia.org/wiki/Grande-coalition> visité le 27 avril 2010.

II. 1.1. The Presidency of the Republic

The Burundian Constitution of 18th March 2005 provides for a multi-ethnic and multi-political presidency. In fact, according to article 122, the President of the Republic shall be assisted by two vice-Presidents³⁸⁴ belonging to different ethnic groups and political parties³⁸⁵ whose appointment shall take into account the predominant feature of their ethnicity within their respective political parties³⁸⁶.

It is desirable to make a small comment on the above. When one reads the Constitution as a whole, they will notice that only this provision refers to the importance of the political and ethnic membership of a vice-President. It should be remembered that power was shared between different political and ethnic parties (G7 for predominantly Hutu parties and G10 for the Tutsi ones) during the transitional period. This provision is therefore a relic from this approach.

Burundi seems to have adopted an ethnic inclusiveness policy in the different political parties. Besides, article 78 of the Constitution is unequivocal. Stef VANDENGISTE says: *“ the reasoning behind this approach was that, while Burundi’s segmental cleavages must be explicitly and formally recognised at the political level, it was at the same time necessary to reduce the conflict potential of ethnicity by encouraging political parties to be ethnically inclusive”*³⁸⁷.

Despite all that, one can always wonder if it would not have been wiser if the elites representing the segments belonged to different political parties.

It can be seen clearly that the Burundian Constitution provides for a sort of ‘Grand presidential coalition’ between the different ethnic groups and the parties of Burundi.

This kind of coalition has actually been put in place since the elections that took place in Burundi both in 2005 and 2010. The current President of the Republic is Pierre NKURUNZIZA, a Hutu from the CNDD-FDD party (*Conseil National pour la Défense de la Démocratie-Forces pour la Défense de la Démocratie*), the first vice-President is TERENCE SINUNGURUZA, a Tutsi from the UPRONA party (*Union pour le Progrès National*), the second vice-President is Gervais RUFYIKIRI, a Hutu from the CNDD-FDD party³⁸⁸. Nevertheless, the presidential coalition has had its hiccups several times, thus giving rise to repeated political crises. We will elaborate on that later.

II.1.2 The Government of the Republic

Here too, the constitution establishes a coalition that is both ethnical and political at the same time (between political parties).

As for the political coalition, article 129 states that the members of the government shall come from different willing political parties that have achieved one-twentieth of the votes. The same article adds that when the President removes a Minister from office, replacement shall be made after consultations with his/her party of origin.

³⁸⁴ Loi n° 1/010 du 18 mars 2005 portant constitution de la République du Burundi in B.O.B n° 3/TER/2005, p.

³⁸⁵ Art. 124 al.1 de la constitution.

³⁸⁶ Art.124 al.2 de la constitution.

³⁸⁷ VANDENGISTE,S.,“Power Sharing,Conflict and Transition in Burundi.Twenty Years of Trial and Error”,in *Africa Spectrum*3/2009,p.75.

³⁸⁸ Voir <http://www.burundi-gov.bj> visité le 26 mars 2011.

A coalition government is thus organised insofar as the parties that have achieved one-fifth of the votes have a right to a certain percentage, rounded down to the nearest figure of the total number of ministers at least equal to the number of seats they occupy at the National Assembly³⁸⁹.

These provisions need to be elaborated on. On the one hand, the composition of a government is a major role played by political parties insofar as they can be part of the government if they so wish and if they are consulted in relation to the appointment or removal of a Minister.

On the other hand, the Constitution makes compulsory the establishment of a coalition government between several political parties without first putting in place a platform of understanding over the joint programme they have to carry out together. All that is likely to lead to crises. We will elaborate on this subject later.

The ethnic coalition at the level of the government has been provided for insofar as the Constitution states that the government is open to all the ethnic components and comprises not more than 60% Hutus and 40% Tutsis, with a minimum of 30% women representation³⁹⁰. Similarly, the Constitution specifies that the Minister in charge of national defense should not come from the same ethnic group as that of the Minister in charge of public security³⁹¹.

We are deeply concerned about the fact that the Batwa people have been ignored at the level of the government. However, the way this provision is formulated allows to make some room for this ethnic minority. The words « not more than » can help with the political will of the person who is in charge of forming the government. However, that Mutwa will have to belong to a political party for that to happen.

After the 2005 elections, the governmental coalition was quaked by a series of crises, which we will elaborate on later. The root cause of these crises was again the influence of the parties on the operation of the governmental coalition.

II. 2. Proportionality in the Constitution of 18th March 2005

We have already said that proportionality is required as a principle of representation at both the parliament and the public administration as a guarantee for the representation of the minority segments. We have also already said that pure proportionality can lead to the crushing of those minority segments and that it could therefore be corrected by an overrepresentation of these segment to the point of anticipating parity.

All these mechanisms are embedded in the Constitution. Of course, we do not have statistics on the actual number of people from each ethnic group in Burundi, it is agreed that the Hutus constitute a big majority, followed by a Tutsi minority and a tiny Twa minority³⁹².

Thus, proportionality is provided for at the level of the parliament as well as at the local one.

³⁸⁹ Art.129 de la constitution.

³⁹⁰ Art.129 de la constitution.

³⁹¹ Art.130 de la constitution.

³⁹² Les chiffres généralement donnés sont 85% de Hutu, 14% de Tutsi et 1% de Twa (Voir par exemple, VANDENGISTE,S., "Power Sharing, Conflict and Transition in Burundi :Twenty Years of Trial and Error" in *Africa Spectrum*3/2009,p.64.Voir aussi SULLIVAN,D .P, "The missing pillars. :a look at the failure of Peace in Burundi through the lens of Arend Lijphart's theory of consociational democracy", in *Journal of Modern African studies*, 43,1(2005),p.76.

II. 2.1. In the National Assembly

According to article 164 of the Constitution, the National Assembly shall be composed of at least one hundred MPs on the basis of 60% of Hutus and 40% of Tutsis, including a minimum of 30% of women elected by direct universal suffrage for a five year term of office, and three MPs from the Twa ethnic group co-opted according to the electoral code shall be elected on the basis of the closed lists of proportional representation so that for three candidates registered one after the other on the list, two only shall belong to the same ethnic group and at least one over four should be a woman.³⁹³

In case the outcome of the vote does not reflect the targeted percentage above, the imbalance shall be rectified through the cooptation mechanism³⁹⁴.

In practice, these cooptation mechanisms have been used by the independent national electoral committee. In fact, at the end of the 2005 elections, the quotas of 60% of Hutus, 40% of Tutsis and 30% of women was not respected. Over 100 MPs, 65 were Hutus, 35 were Tutsis and 24 were women.³⁹⁵ That is why, in accordance with article 118 of the then electoral law, the CENI (the Independent National Electoral Committee) co-opted 15 additional MPs from the CNDD-FDD, FRODEBU (*Front pour la Démocratie au Burundi*) and UPRONA on the basis of 4 Hutus and 11 Tutsis. So, the National Assembly of 2005 was eventually composed of 118 MPs³⁹⁶.

Cooptation was resorted to again during the 2010 elections. So, the CENI co-opted 6 MPs, to be specific- a Tutsi woman, two Hutu men and three representatives from the Twa ethnic group.³⁹⁷

II. 2.2 In the Senate

It is at the Senate that the Hutu-Tutsi parity is respected, with a few exceptions.³⁹⁸ In fact, according to article 180 of the Constitution, the Senate shall be composed of two delegates from each province, elected by an electoral college composed of members of the municipal council of that province, from the different ethnic communities and elected by distinct polls. That means that each province has two senators- one Hutu and the other Tutsi. In practice, the quotas were respected here, although the senate was always predominantly CNDD-FDD.³⁹⁹

II. 2.3. At the Level of Municipalities

As for municipalities, the Constitution has not expressly provided for the quotas allocated to each ethnic group, but it gives indications as to ensuring an overrepresentation of the minority group.

In fact, according to article 266, the independent national electoral commission makes sure that the municipal councils reflect the ethnic diversity of their electorate. Where the composition of a municipal council does not reflect such ethnic diversity, the independent

³⁹³ Article 108 de la loi n° 1/22 du 18 septembre 2009 portant révision de la loi n°1/015 du 20 avril 2005 portant code électoral.

³⁹⁴ Article 164 de la constitution article 108 al2 du code électoral.

³⁹⁵ Voir VANDENGISTE, S. Théorie consociative et partage de pouvoir au Burundi, p.20.

³⁹⁶ Voir Arrêt RCCB n°136 du 4 juillet 2005 portant proclamation des résultats des élections législatives.

³⁹⁷ Voir Rapport final d'évaluation de la mission d'observation de l'Union européenne sur www.eueoem.eu visité le 26 mars 2011.

³⁹⁸ Le sénat comprend également trois sénateurs Twa et quatre anciens chefs d'Etat.

³⁹⁹ Après cooptation par la Commission électorale nationale indépendante, le Sénat était composé en 2005 de 49 sénateurs dont 32 sont du CNDD-FDD. Depuis les élections de 2010, le Sénat compte 41 membres, dont 32 sont également du CNDD-FDD.

national electoral commission may order to the council the cooptation of people from an under-represented ethnic group, provided the people thus co-opted do not represent more than one fifth of the members of the council. The co-opted people are designated by the independent national electoral commission. The Independent national Electoral Commission (CENI) can also co-opt a person from the Twa ethnic group if their names are listed in political parties and if they have not been elected.⁴⁰⁰

Although express quotas are not provided for in the Constitution with regard to the municipal council, it is however provided that no main ethnic component has more than a 67% representation as municipal administrators at the national level.⁴⁰¹

II. 2.4 .At the Public Administration Level

The Constitution also remains vague regarding the quotas required for each ethnic group. It clearly stipulates that public administration is largely representative of the Burundian nation and must therefore reflect the diversity of its components. Its employment practices are based on objective and equitable aptitude criteria as well as on the necessity to correct the imbalances and ensure a wide ethnic, regional and gender representation.⁴⁰²

However, the constitution is explicit as regards ethnic representation in public companies. The representation is provided for on the basis of not more than 60% for the Hutus and 40% for the Tutsis.

Question arises as to whether this equilibrium is respected in practice. The Constitution had provided for a control mechanism for this equilibrium and diversity of which the Senate is in charge. In fact, by the terms of article 187, it is in the competence of the Senate to:

- Conduct investigations in the public administration and, where possible, make recommendations to ensure that no region or group is excluded from the benefiting from the civil service.
- Monitor the implementation of the constitutional provisions requiring ethnic and gender representation and equilibrium in all the structures and institutions of the State, including public administration and the defence and security corps.

It is in this framework that the Senate has established a fact finding committee on the status of the compliance with the equilibrium within the public administration.⁴⁰³ That committee has given rise to a controversy from different political parties⁴⁰⁴. As far as we know, the committee has not produced any report yet.

II. 2.5. At the Level of the Defence and Security Corps⁴⁰⁵

Since independence, defence and security forces have always been associated with the crises that Burundi has experienced. So, the Arusha negotiators agreed to reform the corps and correct at the same time the ethnic, regional and gender imbalance⁴⁰⁶. The desire to correct the imbalance was thus incorporated in the constitution.

⁴⁰⁰ Article 181 du code électoral.

⁴⁰¹ Article 266 de la Constitution.

⁴⁰² Article 143 de la Constitution.

⁴⁰³ Voir sur [http : //www.senat.bi/spip.php ?article 878](http://www.senat.bi/spip.php?article=878).

⁴⁰⁴ Voir les réactions des partis CNDD-FDD, FRODEBU, UPRONA, CNDD sur <http://www.omac-afrique.org/article.php3?id-article=1052> visité le 3 juin 2010.

⁴⁰⁵ Les forces de défense et de sécurité comprennent la Force de Défense Nationale (FDN) et la Police Nationale du Burundi(PNB).

⁴⁰⁶ Voir article 7, point 17 du Protocole 1 de l'Accord.

Thus, article 258 stipulates that the defence and security corps shall not be comprised of more than 50% of members belonging to one particular ethnic group for a period of time to be determined by the Senate so as to ensure ethnic equilibrium and prevent acts of genocide and coups d'état.

Correction of imbalances within the defence and security organs is however addressed progressively through reconciliation and confidence building with the objective of securing all the Burundians⁴⁰⁷. The reason behind this was to avoid precedences of 1993. Indeed, after the 1993 elections, which brought in victory for the FRODEBU party, President NDADAYE wanted to initiate reforms in the military that had largely been dominated by the Tusti. Some people think the Coup d'état was due to fear by the Tustis who, in their own understanding, believed that they had lost their protection.

"But the greatest fear and uncertainty came from plans to reform the Tutsi-dominated armed forces, which many Tutsi saw as their only protection against violent domination by the Hutu majority. These fears helped spark the coup attempt in October 1993 which resulted in the assassination of President Ndadaye, and led to extensive violence and the ultimate failure of this attempt at peace⁴⁰⁸."

As we wrote it before, the Senate has among other tasks the control of the implementation of the constitutional provisions requiring ethnic representation in the defence and security corps. So, a senatorial fact finding committee on the status of the compliance with the balanced representation within the Burundi National Police Force (PNB) has been already set up and has even published a report⁴⁰⁹.

II. 3. The Right of Veto

The right of veto, as we already wrote, is a protection for the minority segments. It comes in different forms the most important of which are the unanimity or the qualified majorities in the decision making process.

The Burundian constitution does not provide for unanimous decision making. On the other hand, the combination of the above-mentioned ethnic quotas with the strong majorities required for the legislative work leads, at least theoretically, to a sort of 'de facto veto.'

So, regarding the National assembly, for instance, it can only deliberate validly in the presence of the two-thirds of the MPs. Legislation is passed by a the two-thirds vote of the present or represented MPs. Organic laws are voted by a two-thirds of the present or represented MPs, without this majority being lower than the absolute majority of the members composing the National Assembly.

The two-thirds majority of the present or represented MPs is also required for the vote of important resolutions, decisions and recommendations⁴¹⁰.

As for the Senate, it can deliberate validly only if the two-thirds of the senators are present. Decisions are made by a two-thirds vote of the present or represented senators.

Organic laws are voted by two-thirds of vote of the present or represented senators, without

⁴⁰⁷ Article 259 de la Constitution.

⁴⁰⁸ SULLIVAN, D., *op.cit.*, p. 78.

⁴⁰⁹ Les détails de ce rapport peuvent être visités sur <http://www.senat.bi/spip.php?article1808>.

⁴¹⁰ Article 175 de la Constitution.

this majority being lower than the absolute majority of the members composing the Senate⁴¹¹.

Finally, the draft or the proposal for the amendment of the Constitution is adopted by a four-fifths vote of the members composing the National Assembly and two-thirds of the members of the Senate⁴¹²

What is the objective of these overwhelming majorities? The objective is undoubtedly to prevent the majority ethnic group from being the only one to approve projects or bills, or to amend the Constitution in a way that could discriminate against the minority ethnic group. So, since the National Assembly comprises 60% of Hutus and 40% of Tutsis, and that the Senate comprises 50% of Hutus and 50% of Tutsis, the Hutus cannot approve decisions without the support of the Tutsis, who theoretically⁴¹³ have a minority threshold.

Besides the de facto veto provided to ethnic groups, the Constitution also provides a minority threshold to political parties. In fact, the spirit of the Constitution is to avoid that only one political party has a strong majority allowing it to make unilateral decisions. What is worth underlining here is the fact that this spirit is only valid for the first post-transitional period⁴¹⁴.

This spirit is in fact embedded in article 303 of the Constitution. By the terms of this article, a total of additional eighteen to twenty-one members shall be- exceptionally and for the purpose of the first parliamentary elections, and solely if a party has won more than the three-fifths of the seats in direct election- co-opted in equal numbers from the lists of all the parties that have reached at least the threshold determined for the election, or on the basis of two people per party in the case the seven parties have met the requirements. The cooptation modalities shall be determined by the electoral law.

This is another provision that bestows on the other political parties the power to oppose a majority party, therefore getting it to always favour dialogue and consensus. Non majority parliamentarianism has thus been established in Burundi. The impact of this system on the operations of the institutions is not open to question or review: the weakening of the government. We shall come back to this topic.

Such are the arrangements for power sharing that are embedded in the Burundian Constitution of 18th March 2005. They have been, for the most part, influenced by the consensus approach.

However, the question that one could ask is about the impact of their implementation in the general operations of the institutions. We will analyze here the impact on the Burundian institutions established after the 2005 elections. Nevertheless, we do not pretend to draw final conclusions on the viability of this system in Burundi, but we are only underlining the temporary balance of its five years of existence.

We shall begin with the assumption according to which these consensus power sharing arrangements lead to political instability.

⁴¹¹ Article 186 de la Constitution.

⁴¹² Article 300 de la Constitution.

⁴¹³ Nous disons ici théoriquement dans la mesure où la Constitution burundaise a admis que les Tutsi ou les Hutu peuvent représenter leurs composantes ethniques peu importe le parti dans lequel ils se trouvent. Or, étant donné qu'actuellement les élus sont fortement soumis à leurs partis d'origine (un élu qui est exclu du parti ou qui démissionne de son parti perd son siège), cette représentation peut rester un leurre.

⁴¹⁴ La constitution du 18 mars 2005 consacre deux périodes, la première période post-transition et la deuxième période post-transition. La première période post-transition correspond à la première législature 2005-2010 tandis que la seconde commence avec la législature 2010. Cette distinction fait d'ailleurs que la Constitution burundaise porte deux formes de régime politique (voir les détails dans MANIRAKIZA, A., *op.cit.*, pp.52-70).

III. The Consequences of Implementing the Consensus Approach in Burundi: the Repeated Institutional Dysfunction.

The 2005-2010 legislatures has been marked by a series of serious institutional crises. These were for the most part related to some constitutional consensus arrangements, including among other things the governmental and presidential coalition as well as the strong majorities required for the legislative work.

III.1. The Findings

There were crises at both the level of the executive power as well as at that of the legislative one.

III.1.1. At the Level of the Executive Power

The governmental coalition that was formed after the elections experienced some ups and downs. In fact, in accordance with article 129 of the Constitution, only CNDD-FDD, FRODEBU and UPRONA had the right to be part of the governmental coalition⁴¹⁵. Yet, in addition to these parties, the other parties such as PARENA (*Party for the National Recovery*), MRC (*Movement for the Rehabilitation of the Citizen*) and MSP-INKINZO (*Pan African Socialist Movement*) had their ministers in the government.

Since FRODEBU and UPRONA were not consulted about the appointment of their representatives, they considered that the government was unconstitutional and wanted to occupy ministerial positions as important as were their parties at the level of the government. Besides, FRODEBU submitted to the Constitutional Court a motion for unconstitutionality of the decree related to the appointment of members of the government. The motion was declared illegal⁴¹⁶,

If the governmental coalition held on until then, it could no longer go on from March 2006 when the FRODEBU decided to leave the coalition government and henceforth join the opposition. That move had an impact at the level of the legislative business. We shall come back to this topic later.

The UPRONA followed suite in July 2007⁴¹⁷. It was only in November 2007 that these two parties would join the coalition government⁴¹⁸ thanks to a new government reshuffle that took into account the wishes of these parties.

All in all, eight governments have been formed during the whole legislature, i.e. an average of one cabinet shuffle every six months⁴¹⁹.

III.1.2 At the Level of the Legislative Power

These difficulties encountered at the level of the executive power did not spare the legislative power, which also experienced a series of operational and functional crises during the 2005-2010 legislatures.

⁴¹⁵ Parce que ce sont ces partis qui ont pu recueillir 5% des suffrages au niveau de l'Assemblée nationale (voir article 129 al2)

⁴¹⁶ Arrêt RCCB 164 du 22 août 2006

⁴¹⁷ A la suite du remaniement ministériel, certains membres de l'UPRONA y ont été intégrés sans consultation du parti. Pourtant, le Premier vice-président d'alors contresigna le décret de nomination des membres du gouvernement, d'où le parti décida de le suspendre du parti et d'entrer dans l'opposition.

⁴¹⁸ Voir <http://burundi.news.free.fr/actualites/oppositionfrodebu/html>. visité le 4 juin 2010.

⁴¹⁹ Voit <http://www.ldgl.org/spip.php?article 2545>. Visité le 4 juin 2010.

The epicentre of the crisis was always the National Assembly. Its important relationship with the Senate also dragged the latter into difficulties⁴²⁰.

So, the work of the National Assembly went through some hardship since 2006. To illustrate this, the ordinary session of June 2006 was interrupted for three weeks due to the non attendance of some MPs⁴²¹. Therefore, the bills that were on the agenda had not been analyzed and adopted as the quorum was not reached.

Similarly, the National Assembly hardly worked all along 2007. In fact, during the two parliamentary sessions of February-April and June-August 2007, only 13 bills over 63 initially provided for had been adopted at the rate of 5 over 28 for the first session and 8 over 35 for the second one⁴²².

Furthermore, the crisis reoccurred in 2008 when the February session was characterized by no result at the level of the legislative function⁴²³. The situation only improved during the June session following a questionable constitutional Court judgement on the unconstitutional occupation of some seats in the National Assembly⁴²⁴. We shall later come back to this topic.

After these findings of institutional instabilities, it is important to demonstrate in the following analysis how these instabilities had been caused by some consensus arrangements that had been introduced in the Constitution of Burundi.

III.2.The Causality

III.2.1.The Grand Coalition as Cause of Government Instability in Burundi

We already wrote that the grand presidential and government coalition is established as a model of government in Burundi. It is even made compulsory if the parties having reached a certain number of MPs want it (article 129 of the Constitution). Besides the fact that this type of government favours political parties, putting in place of such a coalition inevitably leads to misunderstandings, particularly in Burundi.

In fact, the political parties that intend to form a coalition government should normally conduct negotiations in order to develop a consensual government programme that has to be implemented during the legislature. In this case, the coalition is a matter for political realism. To have one's programme supported, a political party with more votes (still not enough votes to reach the majority required to govern) sees itself obligated to agree on a common programme with other parties thus leading to the formation of a coalition government.

No such thing is provided for in Burundi where 5% of votes at the National Assembly are enough for a party to claim entry in the government without any prior understanding on a political platform to be implemented. And if CHAGNOLLAUD thinks that even a classic

⁴²⁰ A l'exception des matières attribuées exclusivement au Sénat, les projets et propositions de loi sont étudiés préalablement par l'Assemblée nationale. Le texte adopté est transmis ensuite au Sénat pour analyse et éventuellement adoption. Il arrive que les deux chambres ne convergent pas sur le texte à adopter. Dans ce cas, sous réserve des matières visées à l'art.187 al .1et 3 de la constitution, le dernier mot revient à l'Assemblée nationale (art.191 de la constitution).

⁴²¹ Renouveau n°6827 du 4 septembre 2006, p.3.

⁴²² Voir Point de presse de la Ligue Iteka à l'occasion du 59^e anniversaire de la Déclaration universelle des droits de l'homme, p.2 sur <http://binub.turretdev.com/images/articles/Iteka.pdf> visité le 16 juin 2010.

⁴²³ BIZIMANA, E., *L'impact du scrutin proportionnel sur le fonctionnement du pouvoir législatif : cas du Burundi*, mémoire, U.B, Fac.de Droit, 2010, p.69.

⁴²⁴ Arrêt RCCB 213.

coalition government (formed after an agreement) generally leads to political instability in the sense that “ the first serious difficulty will destroy it, as the majorities are forming and disbanding according to the way things develop”⁴²⁵, this risk will all the more be higher in Burundi where prior understanding on a political program is not required.

This probably explains the fact that the first government that was formed after the 2005 elections was contested by the UPRONA and the FRODEBU insofar as, on the one hand, they had not been consulted and, on the other hand, they did not have the right to more ministerial positions proportional to the results they achieved at the National Assembly, hence their resignations from the government.

In addition to this lack of understanding at the time of the formation of the government, which is likely to lead to political crises, the weight that the political parties exert is also likely to cause some difficulties at the government level. Actually, as the ministers who form the coalition government are in principle appointed after consultation with their parties of origin, these continue to exert their weight on their ministers. In fact, if a party no longer support its minister, the President should replace him/her, but this has not been the case in Burundi⁴²⁶,

We have just shown how the grand coalition consensus mechanism had some implications in the work of governmental institutions. The other mechanisms, such as proportionality combined with the right of veto, have also been the cause of the legislative function crisis through the demand of the strong majority decision.

III.2.2. The Influence of the Strong Majorities on the Parliamentary Operations

We already wrote that the Burundian Constitution, through some quotas combined to the required majorities, provides for a de facto right of veto consensus mechanism. This right of veto belongs to the ethnic groups as well as to some political parties. The great merit of this mechanism is to reassure the ethnic and political minorities against the exclusionary thinking of the majority

III.2.2. The Influence of Strong Majorities on Parliamentary Operations

We already wrote that the Burundian Constitution, through some quotas, combined to the required majorities, provides for a de facto right of veto consensus mechanism. This right of veto belongs to the ethnic groups as well as to some political parties. If this mechanism has the merit of reassuring the ethnic and political minorities against the exclusionary thinking of the ethnic or political majority, it practically leads to a chronic dysfunction of the parliamentary institution in particular and that of all the institutions in general. This can be noticed especially if no political party has a majority required for the legislative business. It will also be noticed in case of misunderstanding between the political parties forming the parliamentary and government coalition.

III.2.2.1. The Illustrative Cases

The intention of the Burundian Constitution is to avoid that only one political party becomes predominant on the political scene that is why it provides for a proportional representation

⁴²⁵ CHAGNOLLAU, D., *Droit Constitutionnel contemporain*, Tome1, théorie générale, les grands régimes étrangers, Paris, Armand Colin, 2001, p.112.

⁴²⁶ VANDEGINSTE, S., « Entre le modèle consociatif et sa mise en œuvre » in *L'Afrique des Grands Lacs. Annuaire 2007-2008*, pp 15-16.

voting procedure whose advantage is, inter alia, to favour all the political parties represented in parliament. It is certainly possible that only one party wins by an overwhelming majority, but some mechanisms are foreseen so as to dilute its power even if that means it has to work with other parties⁴²⁷.

That is why the absence of this understanding led to dysfunctions of the legislative power in Burundi.

The legislative dysfunctions noticed in Burundi can, at least in part, be explained by the requirement of the strong majority's decision.

First, the Constitution requires a quorum of 2/3 of the MPs to hold a plenary session. At the end of the 2005 legislative elections, no political party was able to reach this quorum on its own. In fact, the configuration of the National Assembly was as follows: the CNDD-FDD had 64 MPs, the FRODEBU had 30, the UPRONA 15, the CNDD 4 and the MRC 2; that is to say a total of 118 MPs if we add 3 Twa MPs. The required quorum was of 79 MPs.

This goes to show why the UPRONA and FRODEBU boycott paralyzed⁴²⁸ the parliamentary operations during the 2006 session due to a lack of quorum.

Then, the Constitution requires a 2/3 majority of MPs present or represented for the adoption of ordinary laws, resolutions, decisions and important recommendations, as well as an absolute majority of the members composing the National Assembly to the minimum for the adoption of the organic laws. If the quorum was reached, which was not always the case; the majority party (CNDD-FDD) could alone have all the laws and resolutions adopted. Actually, 53 MPs were required to vote the ordinary laws and the resolutions and 60 MPs were necessary for the adoption of the organic laws. But, it had only 64 MPs.

However, the CNDD-FDD majority crumbled in February 2007 following the split of the parliamentary group of the party. The 3rd convention of the CNDD-FDD party was held on 7 February 2007 in Ngozi and dismissed the chairman of the party, the MP Hussein Radjabu⁴²⁹. At the close of convention, the CNDD-FDD parliamentary group split into two: there was the "law-abiding group of MPs" on one side with a total of 21 MPs who officially signed the declaration of withdrawal from the CNDD-FDD parliamentary group on 7 March 2007 and the other side the group that had allegiance to the new party chairman⁴³⁰,

From then on, it has become quasi impossible to obtain the required majorities to reach the quorum as well as adopt some laws.

Several attempts have been made in order to re-establish the majority but they have all failed⁴³¹. This is so true that the Burundian constitution did not provide for management mechanisms for conflicts between the institutions. As a matter of fact, in case of break-up of the coalition or separation within a majority party, the classically admitted solution resides in the right of dissolution. As Jacques CADART puts it so well, in case of break-up of the

⁴²⁷ Comme nous l'avons écrit *supra*, pendant la 1^{ère} période post-transition, l'article 303 de la constitution faisait partie de ce mécanisme requis pour diluer une majorité renforcée d'un parti politique. Depuis les élections de 2010, ce verrou a sauté et c'est ainsi par exemple qu'à la suite du boycottage des élections législatives de 2010 par certains partis politiques, le parti CNDD-FDD détient à lui seul 81 sièges sur 106, soit 76.4%.

⁴²⁸ Théoriquement, comme ces partis étaient représentés au gouvernement, ils faisaient également partie de la majorité au parlement et devraient soutenir l'action gouvernementale. Mais à cause de leurs désaccords avec le parti CNDD-FDD, la coalition parlementaire a volé en éclat.

⁴²⁹ Renouveau n°6939, p.3.

⁴³⁰ Aube de la Démocratie n°80 du 5 au 11 mars 2005 ; p.4

⁴³¹ Signalons à titre d'exemple deux remaniements du gouvernement, en juillet et en novembre 2008.

majority for instance, “the government can only be dissolved if it does not want to withdraw purely and simply”⁴³², so the people can decide what the new majority will be.

Such being the case, the Constitution forbade the right of dissolution during the first post-transitional period. In fact, by the terms of article 302 paragraph 3, the President elected for the first post-transitional period cannot dissolve the Parliament. That is the reason why the crisis worsened and the institutional rigidity persisted.

In order to come out of this situation after the failure of the attempts to exit the crisis, the Constitutional Court decided to consider that the 21 MPs who had resigned from the CNDD-FDD party in addition to Hussein Radjabu illegally occupied the seats in the National Assembly. The judgement of the Constitutional Court, questionable in many ways, is a dangerous precedent and will undoubtedly have negative implications on the operations of Burundian institutions.

III.2.2.2. Indirect Consequence: Establishment of an Imperative Mandate

After a long period of deep crisis at the National Assembly and subsequent to failed attempts to re-establish the lost majority through political dialogue, the CNDD-FDD party opted for resorting to the Constitutional Court.

III.2.2.2.1. Time Markers

On 23 May 2008, the chairman of this party informed the President of the National Assembly that 22 MPs the list of whom was appended to his letter were no longer members of his party and asked him to let the Constitutional Court know so as to appeal for the seats occupied illegally by these MPs. He made reference to articles 98 and 169 of the constitution.

On 30 May 2008, the Chairman of the National Assembly addressed a letter to the Chairwoman of the Constitutional Court the object of which was “Motion for unconstitutional occupation of seats in the National Assembly. “ In that letter, he mentioned articles 98 and 169 of the constitution with a reminder according to which the list of independents did not totalise at least 2% of national votes at the 2005 legislative elections and that as such the group of the independents did not have parliamentarians and could not therefore be represented at the National Assembly. He concluded his letter by pointing out, on the one hand, that the MPs initially elected on the CNDD-FDD list had resigned or had been excluded from the same and were therefore illegally occupying their seats, and by requesting, on the other hand, that the Court to dispose of the possible unconstitutional occupation of the seats by those MPs.

On 5 June 2008, the court disposed of the request. After considering the legality of the referral to the court, the admissibility of the motion as well as his jurisdiction to adjudicate, the Court studied the reason for the motion and “noted the unconstitutional occupation of the seats in the National Assembly by the 22 MPs”.

III.2.2.2.2. Reflection on the RCCB 213 Judgement

In this reflection, we shall elaborate on the substance of the case to highlight that the judgement establishes a total submissiveness of the MPs to their parties, which will undoubtedly have an impact on the operations of the institutions.

⁴³² CADART, J., *Institutions politiques et Droit constitutionnel*, 3è éd. Paris, Economica , 1990, p.679.



In its motion, the office of the National Assembly referred to articles 98 and 169 to demonstrate the unconstitutional occupation of the seats in the National Assembly..

Article 98 relates to the presidential election. It provides that “ the candidates can be presented by political parties or present themselves as independent. An independent candidate is the one who is not introduced by a political party on nomination of the candidates “ .

Article 166 refers to article 98 of the constitution, the Court rightly said that “the candidates in the legislative elections can be introduced by political parties or can do so themselves as independent candidates as defined by article 98 of the constitution “ .

The Court concluded that « article 98 applies to both presidential and legislative elections ».

Article 169 of the Constitution provides that “the candidates introduced by the political parties or the lists of the independents can only be considered elected and sit in the National Assembly if their party or their list totalled a number of votes equal or superior to 2% of the vote cast nationally”.

This article sets the conditions for entering and sitting in the National Assembly. The status of an independent candidate as is stated in article 169 is considered before the election and not after.

In this regard, the reading that the court makes of this article is surprising as is shown in this excerpt: “ *Considering that according to the court and in the light of the spirit of the aforementioned article 169, one is elected before the legislature and sits during the legislature; as a result, the independent candidate who did not total 2% of the votes has not been elected and cannot sit in any case in the National Assembly;*

Considering that the MPs whose names are on the list of the motion have been elected on the basis of the lists presented by one political party to sit in the National Assembly (...) “ .

The allusion made by the Court to the independent candidates is incomprehensible since it affirms that the MPs in question have been elected on the basis of the lists presented by one political party.”

In our opinion, we think that the unconstitutional occupation is a matter for another area, such as the area related to the loss of the status of parliamentarian. And this area is regulated by both the Constitution and the electoral code.

Actually, by the terms of article 156 of the Constitution “ *the mandate of an MP and that of a senator come to an end through death, resignation, permanent inability and unjustified absence of more than a quarter of the sittings of a session, or when the MP or Senator falls into one of the cases of disqualification provided for by an organic law “ .*

And the former electoral code⁴³³ corroborates the Constitution when it stipulates in its article 132 paragraph 1 that the mandate of an MP ends before his/her normal term, either in the case of dissolution of the national assembly, or in the case of vacancy due to death, resignation, physical inaptitude, permanent inability, unjustified absence of more than a

⁴³³ Nous nous référons au Code électoral qui était en vigueur au moment de l'arrêt étant donné que le nouveau code électoral a par après inséré parmi les causes de la perte de la qualité de député la démission ou l'exclusion d'un parti(article 112 alinéa 2 de la loi n°1/22 du 18 septembre 2009 portant révision de la loi n°1/015 du 20avril 2005 portant code électoral).



quarter of the sittings of a session, or disqualification consecutive to the loss of an eligibility condition “.

And among the conditions of eligibility provided in article 145 of this electoral law, none is related to the resignation or the exclusion from a political party.

And yet the Court bases its decision on a cause that is neither provided by the Constitution nor by the electoral Code.

It argues that “*considering that these people are no longer on the list of the political party that had introduced them, that they have been excluded, or that they have willingly resigned as is indicated in the CNDD-FDD minutes of 28 January ;*

Considering that they had been elected as such and occupied the seats in the National Assembly;

Considering that they no longer fulfil this constitutional condition;

On all these grounds

(...)the Constitutional Court (...) notes the unconstitutional occupation of the seats in the National Assembly by the MPs (the names of the excluded 22 MPs are listed)”.

We can conclude that the judgement by the Constitutional Court has purposely ignored the relevant articles. It is therefore judicially ill-intentioned. It intended to settle a political problem by violating the law and establishing a principle whose consequences are numerous on the operation of the institutions. The judgement also raises the issue of respect for the State of law as well as that of the future of the consensus approach in Burundi⁴³⁴

III.2.2.2.3. Lessons to Learn from the RCCB 213 Judgements

The judgments as returned by the Court establishes an imperative mandate for the MPs in violation of article 149 of the Constitution, which stipulates that the mandate of MPs and senators is of national nature and that any imperative mandate is void.

By this provision, the Constitution grants independence of vote and position to parliamentarians and senators in relation to the ideology and guidelines of their parties. By the terms of this judgment, the Court agrees constitutionally more than ever a total submissiveness of MPs and senators to their political parties. Henceforth, an MP or a senator who would oppose the wishes of his/her party would see them purely and simply excluded from the party, and thus lose their seat in the National Assembly or the Senate. They will thus tend to be docile and timorous and not to play fully their role as representative of the people. The parliamentary institution risks being power transmission belting or a letter box for political parties. The political system would thus be party authoritarianism.

The judgment also raises the issue of the separation of power and more especially that of the independence of the judiciary. Looking closely, the Constitutional Court has been manipulated by political actors in order to solve a political problem of loss of the parliamentary majority. This is why it made a determination blatantly violating the Constitution. Here the future of the state of right in Burundi is put with acuteness.

⁴³⁴ Etant donné que notre constitution a opté pour le fait qu'une personne pourrait représenter son ethnie, peu importe son parti, il serait légitime que dans ces conditions de soumission totale de cette personne à son parti, de douter de l'effectivité de cette représentation au cas où son parti déciderait de piétiner les droits ou les intérêts de cette ethnie.

IV. Are the 2010 elections the End for the Consensus Approach?

Burundi organized a series of elections from the grassroots to the highest level of the State⁴³⁵ from May to September 2010. These votes established dominance of one political party, the CNDD-FDD, over the whole political system. As a matter of fact, at the end of the local elections won by that party, the other political parties started bandying words like all-out electoral fraud about without showing evidence of the “masquerade”. That is why they boycotted the other elections, leaving the electoral boulevard only to the CNDD-FDD, which eventually won in a canter⁴³⁶. From all this it emerged that the political landscape seemed to be a *de facto* single-party environment, as the other institutional political parties (the UPRONA and SAHWANYA-FRODEBU NYAKURI) were unable to act as a real counterbalance.

Does this political landscape seal the end of the consensus approach in Burundi? It certainly puts an end to consensus as has been implemented since the Arusha Agreements until 2010. In fact, we have already mentioned it, until the first post-transitional period, the spirit of the constituent was to avoid that only one political party is predominant on the political scene. That is the rationale for article 303 of the Constitution. As for the rest, arrangements were made to avoid dominance of one ethnic group over the political system. It is this paradigm that has been chosen by the 2005 constituent, and the institutions that followed 2010 reflect just that choice. The ethnic quotas as embedded in the Constitution are respected. If the political landscape puts an end to consensus as is experienced today, it does not however puts an end to the pillars of consensus. The grand coalition, the right of veto and proportionality are always present.

Furthermore, considering what has been said earlier that some elements of consensus have been the cause of institutional dysfunctions; this political landscape should be a pledge of stability and efficiency.

During the first post-transitional period, the CNDD-FDD party that was at the helm (because the president belongs to this party) justified its setbacks by saying that “the opposition parties were spiking its guns”. Henceforth, it will be difficult for it to allude to this alibi to conceal its failures.

Conclusion

In order to face the problems that arise in society, the State or the politicians look for the ways and means to resolve them. After agreeing that the cyclic conflicts that the country has experienced since the independence had an ethnic and political dimension, the Burundian politicians have opted for a power sharing policy between their ethnic groups. That is what led them to adopt the consensus approach, which can sum up in this formula “the good gates make good neighbors”. Arrangements of a consensus nature like the grand coalition, proportionality as well as a kind of right of veto have thus been imbedded in the Burundian Constitution of 18 March 2005 and institutions bearing the mark of these arrangements have been put in place both in 2005 and in 2010.

And yet, the implementation of these arrangements during the 2005-2010 legislatures was problematic. The political system was discredited.

⁴³⁵ Ces élections sont les communales, la présidentielle, les législatives et les collinaires.

⁴³⁶ Ce parti a gagné les élections législatives avec un score de 81,19%, le président issu de ce parti a gagné avec un score de 91,62%(voir le rapport d'évaluation de la mission d'observation de l'Union européenne).



Nevertheless, these arrangements were not void of interest. They have had at least the merit of “toning down the ethnicity” in relation to the political problems in Burundi and bringing about a relative stability between ethnic groups. On the other hand, they were the root cause of the serious institutional dysfunctions even though the latter cannot be explained exclusively by the first.

As a matter of fact, beyond the institutional aspects, the stability and efficiency of the institutions also depend to a large extent on the politicians. These politicians are also the actors, who want to hog the stage, thus making it difficult for the system to run smoothly. No matter how perfect the legal texts are, without political culture of the ruling class, without respect for nation, without respect for human rights, better still, without respect for the state of law, stability and efficiency will always be wild dreams. A capacity building project for politicians on the values of dialogue and consultations, the virtues of the respect for the state of law should be organized, and the rest will just follow.



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