

# The 2005 Constitution of Burundi

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## I. Origins and Historical Developments of the Constitution

Burundi is a former colony of the Kingdom of Belgium. It attained its independence on 1 July 1962. Since that date, Burundi has undergone multiple constitutional developments due to its political instability. The first post-independence constitution was promulgated on 16 October 1962. Four years later, it was suspended on 8 July 1966 when King Ntare V (formerly known as Charles Ndizeye) toppled his father, King Mwambutsa IV. The regime of Ntare V lasted for less than five months because Captain Michel Micombero, then the Army's Chief of Staff, staged a military *coup d'État* against the monarchy that had ruled the country for centuries.

Burundi became a republic on 28 November 1966. The last King of Burundi, Ntare V, was deposed and later killed in mysterious circumstances.<sup>1</sup> The new regime adopted a law of a constitutional nature<sup>2</sup> that organized power structures in the period during which the constitution was abrogated. A new constitution was adopted and approved by Burundi's citizens through a referendum in 1976. However, this new constitutional framework did not have a chance to be implemented. Four months after its enactment, Colonel Jean Baptiste Bagaza ousted his

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<sup>1</sup> Last year, a forensic team, led by Professor Jean-Jacques Cassiman from Leuven University, went to Burundi for the exhumation of the remains of King Ntare V (Charles Ndizeye), but the mission proved unsuccessful: see "KU Leuven forensics team searches for royal DNA in Burundi", at [http://www.kuleuven.be/english/news/Burundi\\_DNA\\_expedition](http://www.kuleuven.be/english/news/Burundi_DNA_expedition) (last visited 12 May 2013).

<sup>2</sup> *Décret-loi No 1/6 portant organisation des pouvoirs législatifs et réglementaires* [Law Decree No 1/6 on the Organization of the Legislative and Statutory Powers], B.O.B., 1967, p. 4.

predecessor in a military coup. Again, the existing constitution was suspended and replaced by a governmental law decree organizing the exercise of power.<sup>3</sup> In 1981, a new constitution was adopted by a popular referendum. In 1987, the Bagaza regime was ended by a *coup d'État* orchestrated by Major Pierre Buyoya who, in his turn, suspended the 1981 constitution and replaced it by a law decree issued by his new government.<sup>4</sup>

Two important remarks are worth noting with regard to this practice of *coups d'Etat*. During these military regimes, political and administrative powers were mostly held in military hands under the ultimate supervision of a governing council that was generally composed of high ranking officers.<sup>5</sup> Presidents Micombero, Bagaza, and Buyoya all came from the same Tutsi ethnic group, the same Commune of Rutovu, and the same southern Province of Bururi. This would have a significant impact on the governance of Burundi, which was characterized by the political exclusion of other ethnic groups, particularly the Hutu, but also Tutsi from other provinces.

In 1992, a democracy and rights-friendly constitution was adopted. Free, fair, and transparent elections were organized the following year. For the first time in the political history of Burundi, the ruling authority was an elected president from the Hutu ethnic group, under the banner of the *Front pour la démocratie au Burundi* (FRODEBU), a new Hutu-dominated political party. Unfortunately, the new President, Mr Melchior Ndadaye, was assassinated on 21 October 1993 during a military coup, after only three months in office. The coup was

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<sup>3</sup> *Décret-loi n° 1/186 du 26 novembre 1976 portant organisation des pouvoirs législatif et réglementaire* [Law Decree No 1/186 of 26 November 1976 on the Organization of the Legislative and Statutory Powers].

<sup>4</sup> *Décret-loi no 1/31 du 24 octobre 1988 portant organisation des pouvoirs législatif et réglementaire* [Law Decree No 1/31 of 24 October 1988 on the Organization of the Legislative and Statutory Powers].

<sup>5</sup> The Revolution National Council (composed of 22 members under President Micombero), the Supreme and Revolutionary Council (composed of 22 members under President Bagaza), and the Military Committee for National Salvation (composed of 22 members under President Buyoya).

meticulously planned; the Speaker and Vice-Speaker of the National Assembly (Parliament), who were constitutionally entitled to replace the President should he be unable to assume his functions,<sup>6</sup> were also killed, along with the Minister of the Interior and the Chief of National Documentation (intelligence services).

The coup led to an unprecedented constitutional deadlock. Unlike previous *coups d'État*, the 1992 constitution was not suspended. Therefore, the replacement of the assassinated officials was to proceed in accordance with the provisions of the constitution. For instance, in the event of death or resignation of the President, elections were to be organized in the three months after the presidential seat had been declared vacant by the Constitutional Court.<sup>7</sup> However, the security environment at the time rendered general elections impossible.

In order to find a solution to this institutional deadlock, a constitutional amendment to Article 85 allowed the election by the National Assembly of Cyprien Ntaryamira as the new President of Burundi on 13 January 1994. Later, in a very controversial ruling, the Constitutional Court decided that the amendment was unconstitutional and invalid.<sup>8</sup> However, the same Court had previously declared the presidential seat vacant following the sudden passing of President Ntaryamira.<sup>9</sup> The two rulings seem to be contradictory because, on the one hand, the latter 'vacancy decision' was premised on the assumption that President Ntaryamira had been legally occupying the seat. Otherwise, there was no point in the Court declaring the seat vacant only after the death of its occupant. The ruling further complicated the institutional situation. The Constitutional Court was itself dismantled afterwards because it was perceived by the

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<sup>6</sup> Law N°1/ 010 of 18 March 2005 on the Promulgation of the Constitution of the Republic of Burundi, 1992, art. 85.

<sup>7</sup> Ibid.

<sup>8</sup> Constitutional Court, Judgment RCCB/40, 18 April 1994.

<sup>9</sup> Constitutional Court, Judgment RCCB/43, 12 April 1994. President Cyprien Ntaryama was killed in a plane crash along with President Juvenal Habyalimana of Rwanda in Kigali on 6 April 1994.

FRODEBU regime to be a political actor in favor of the opposition Tutsi political parties.<sup>10</sup> Eventually, the Court was reinstated after a political deal between the majority and the opposition.

During President Ntaryamira's tenure, political violence targeting prominent Hutu figures plunged Burundi into further political instability. This culminated in a civil war between the *Forces pour la défense de la démocratie* (FDD), mainly dominated by the Hutu, and government forces, mainly dominated by Tutsi. Numerous attempts to end the crisis have generated sophisticated constitutional arrangements. For instance, legal instruments of a constitutional nature, such as the Government Convention,<sup>11</sup> were signed by both opposition parties and the FRODEBU-led coalition. The Convention claimed to have supra-constitutional status, because it stated that "the Constitution remains valid only insofar as it is not contrary to this Convention".<sup>12</sup> In fact, the Government Convention was the institutional translation of the October 1993 coup,<sup>13</sup> because the civilian President and the elected Parliament were significantly deprived of their constitutional powers. It also created powerful new unconstitutional institutions, such as the National Security Council, which was dominated by members of the Tutsi opposition parties.

After the death of President Ntaryamira, the Speaker of the National Assembly, Sylvestre Ntibantunganya, became the President of the Republic of Burundi pursuant to the Constitution. His regime experienced many challenges in terms of governance and security for the population. The President was caught in the middle of the crossfire between the FDD and the governmental

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<sup>10</sup> The court was at that time composed of 5 Tutsi and 2 Hutu judges.

<sup>11</sup> The Government Convention was signed on 4 September 1994.

<sup>12</sup> Government Convention, art. 6.

<sup>13</sup> Filip Reyntjens, *Constitution Making in Situations of Extreme Crisis: the Case of Rwanda and Burundi*, 40 *Journal of African Law* 242 (1996).

forces. He was criticised by both parties for either doing nothing to support the FDD or for complicity with the rebelling government forces.

In 1996, he was toppled in another military coup by former President Pierre Buyoya, who suspended the operation of the Government Convention. A new constitutional arrangement, which instituted a partnership between Buyoya and the FRODEBU, provided for the constitutional architecture of the country until 2001.<sup>14</sup> Due to pressure from various internal actors (such as the rebelling FDD) and partners (the international and regional community), the Buyoya government was forced to negotiate a political agreement with different political parties and movements. Lengthy political negotiations were held in Mwanza and then Arusha (Tanzania) under the mediation of former Tanzanian President Mwalimu Julius Nyerere. After his death, he was replaced by former South African President Nelson Mandela. On 28 August 2000, in Arusha, all the parties signed the Arusha Peace and Reconciliation Agreement (Arusha Peace Agreement, APRA), albeit with some reservations from the political parties that were of Tutsi obedience. The Agreement was adopted as such by the Parliament.<sup>15</sup>

According to its terms, a transitional constitution was promulgated in 2001.<sup>16</sup> The existing government was reshuffled so that opposition parties could be represented. The transitional constitution was abolished and replaced by an interim constitution in 2004, which remained in force until the promulgation of the current Constitution on 18 March 2005. This legal instrument should be understood in this context of political and institutional instability. It is

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<sup>14</sup> Transitional Constitutional Act, Republic of Burundi, 6 June 1998.

<sup>15</sup> Law n° 1/017 of 1 December 2000 on the Adoption of the Arusha Peace and Reconciliation Agreement for Burundi.

<sup>16</sup> Law N° 1/07 of 28 October 2001 on the Promulgation of the Transitional Constitution of the Republic of Burundi.

intended to remedy the situation and pave the way for the development and restoration of the rule of law in Burundi.

This report highlights the key fundamental principles enshrined in the 2005 Constitution governing the rights regime, the separation of powers, the administrative structure and organization, constitutional adjudication, international law, and regional integration. Some concluding remarks will be made on the status of two particularly important documents: the Arusha Peace Agreement and the Charter of National Unity.

## **II. Fundamental Principles and Values of the Constitution**

The 2005 Burundian post-transition Constitution was adopted in the aftermath of a civil war which had ravaged the country for more than ten years. The war was officially put to an end after the conclusion of the Arusha Peace Agreement and other separate ceasefire agreements.<sup>17</sup> The post-conflict Constitution mirrors, almost *in extenso*, the principles, values, and goals set up in the Arusha Peace Agreement.<sup>18</sup> In a nutshell, the Constitution recognizes the following principles.

### **A. Unity in diversity**

Burundi is multi-ethnic nation. Three ethnic groups (Hutu, Tutsi, and Batwa) have lived side by side for centuries, with many episodes of violence, especially between the first two major groups. Similarly, it is a multi-faith nation, the main religion being Christianity. The multi-ethnic and multi-faith reality of the country has been captured constitutionally. Although religion has

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<sup>17</sup> Global Cease-Fire Agreement between the Government of Burundi and the CNDD-FDD, 16 November 2003, and the Comprehensive Cease-Fire Agreement between the Government of Burundi and the Party for the Liberation of Hutu People – National Liberation Forces (PALIPEHUTU-FNL), 7 September 2006.

<sup>18</sup> Arusha Peace Agreement, Protocol II, arts. 1 and 2.

not yet been a source of conflict in Burundi, as was ethnicity, the Constitution affirms the secular character of Burundi and obliges the government to respect ethnic and religious diversity.<sup>19</sup>

### **B. Sovereignty of the people of Burundi**

The 2005 Constitution clearly affirms that the government shall be based on the will of the Burundian people and shall be accountable to them.<sup>20</sup> Hence the only means by which one may gain access to political power or be deprived of it should be through democratic elections. These provisions are very meaningful given the history of a country that has been ruled by unelected military men for about four decades, with very few instances of democratic government as occurred in 1993.

### **C. The possibility of reviving the monarchical system of governance, after a duly conducted popular referendum<sup>21</sup>**

The inclusion of this provision in the Constitution, despite the fact that Burundi aspires to a democratic regime,<sup>22</sup> is connected with an activist political party (the *Parti pour la Réconciliation du Peuple*) under the chairmanship of the late politician Mathias Hitimana, who actively campaigned to bring the rights, interests, and concerns of royal descendants back to the floor. The party was one of the main political parties involved in the peace negotiations in Arusha. It is worth mentioning that previous constitutions had never provided for such a possibility, for obvious reasons. They were adopted under military regimes; the abolition of the monarchy was an objective even for the first coup led by Michel Micombero in 1966.<sup>23</sup>

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<sup>19</sup> Constitution, art. 1.

<sup>20</sup> Constitution, arts. 6-7.

<sup>21</sup> Constitution, art. 4. In the APRA, the status and revival of the monarchy was to be a matter for Parliament alone: see APRA, Protocol II, art. 2(4).

<sup>22</sup> Constitution, art. 6.

<sup>23</sup> See Law Decree No 1/6 on the Organization of the Legislative and Statutory Powers, *supra*, note 2..

#### **D. Upholding Kirundi as the national language and as one of the official languages<sup>24</sup>**

This principle is appropriate because the majority of the population is illiterate and can only speak Kirundi. Moreover, it has a unifying nature. By promoting Kirundi to this higher status, the Constitution clearly took into account this reality, but it also reaffirms Burundi's cultural ascendancy. However, practice does not point towards the achievement of this objective. Although Kirundi is spoken by every Burundian, French is used predominantly in schools and in most administrative structures, except at a local level. As a consequence, the education system produces individuals who are not able to draft laws in Kirundi, the national language. The concepts, the way of thinking, and the philosophy underlying different legal principles and norms have been taught in French, with very few translations or even comparisons to traditional Burundian legal concepts and norms. This is rather concerning, given that most members of Parliament are not very fluent or conversant in French.

Consequently, laws are drafted in French, despite the constitutional requirement that legislative acts have their original version in Kirundi,<sup>25</sup> and the fact that some prominent members of Parliament have campaigned in the past regarding this provision. For instance, the Honourable Léonard Nyangoma, the founder of the *Conseil national pour la défense de la démocratie* (CNDD), has been vocal in this respect to the point that he has refused to vote upon laws which have no Kirundi version. On 14 June 2005, he seized the Constitutional Court alleging violation of Article 5 of the Constitution by the Electoral Code of 2005, which was tabled before and analysed by Parliament only in its French version. The Court dismissed the case on the basis that the CNDD Party and its chairman had not met the test by demonstrating a personal interest in the litigation. In fact, according to the Court, the applicant had failed to show

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<sup>24</sup> Constitution, art. 5.

<sup>25</sup> Constitution, art. 5.



how CNDD members—not all Burundians, as alleged—had been disadvantaged by the publication of only one, French, version of the law.<sup>26</sup>

**E. The protection and inclusion of minorities in the general governance system.**<sup>27</sup>

Throughout the country's history, its political and socio-economic life had been based on exclusion on the grounds of ethnicity, region, gender, and so on. The entire system had played in favor of one minority ethnic group—the Tutsi—to the extent that an ethnic majority (the Hutu) had become a minority in the country's institutions and other public life. Under the 2005 Constitution, the protection of minorities is constitutionally guaranteed. For instance, minority political parties which have obtained one-fifth of national suffrage, as well as ethnic groups, should be represented in the government.<sup>28</sup>

**F. Upholding a right to peace and security**

The constitutional recognition of this right demonstrates, again, the post-conflict spirit of the Constitution, the main objective of which is to ensure a peaceful and stable state. In order to ensure peace and security for all Burundian citizens, institutional reforms of the judiciary and the security forces were provided for and effectively carried out to ensure better representation of different ethnic groups—especially the Hutu, who historically have been excluded from these institutions.

Therefore, the Constitution provides for quotas of Hutu (50 per cent) and Tutsi (50 per cent) in the army, while the composition in the judiciary is to be 60 and 40 per cent, respectively, for Hutu and Tutsi. In the past, the army was almost exclusively composed of Tutsi, who are

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<sup>26</sup> Constitutional Court, RCCB 126, 11 July 2005.

<sup>27</sup> Constitution, preamble, para. 11.

<sup>28</sup> Constitution, art. 129.

actually a minority in Burundi (less than 14 per cent),<sup>29</sup> while the Hutu majority (85 per cent) was excluded, along with the tiny minority of Batwa (1 per cent). In fact, the composition of the former security forces was not the problem; rather, the political manipulation and suppression of members of ethnic groups other than Tutsi and the silence of their claims for human rights protection were the main concerns. Members of the army had been involved in the major instances of serious human rights violations in Burundi, the victims of which were generally the Hutu.<sup>30</sup> In order to remedy this situation, it was agreed between the belligerents and the political parties that the army should be inclusive, and a consensus was reached as to the composition of the post-conflict defense forces. The Hutu are to be represented in equal numbers with the Tutsi (50-50). This delicate balance answers the Tutsi's fears of the risk of being knocked out by the Hutu if they attain a majority representation in the army.<sup>31</sup> Thus, according to the terms of the Constitution, the right to security should not only be enjoyed by individual Burundians, but also by groups, namely the ethnic minorities.<sup>32</sup>

For the first time in the history of the country, quotas were provided for in the Constitution—not only for the army, where numeric equality is the norm, but also in other public institutions and services, where Hutu shall make up no more than 60 per cent, and Tutsi 40 per cent. Surprisingly, representation of the Batwa minority is not constitutionally guaranteed, except in the Senate and the National Assembly, as will be shown later.

### **III. Fundamental Rights Protection**

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<sup>29</sup> At the time, the army was nicknamed the “Tutsi mono-ethnic army” (TMA) within the Hutu populace.

<sup>30</sup> Amnesty International, *Burundi: Impunity / fear of further extrajudicial executions*, AFR 16/006/2003 (London, 25 February 2003); Human Rights Watch, *Proxy Targets - Civilians in the War in Burundi*, 1 March 1998; Human Rights Watch, *Emptying the Hills: Regroupment Camps in Burundi*, 1 July 2000.

<sup>31</sup> APRA, Protocol II, art. 10(1)

<sup>32</sup> Constitution, preamble, para. 11.

The regime of human rights protection in the 2005 Constitution is detailed and broad in scope.

### **A. Spectrum of rights**

The Constitution provides for a real charter of rights, as will be highlighted briefly below, after the following general remarks.

The regime of human rights protection sets the tone, with a proviso according to which all the major international and regional legal instruments are part and parcel of the Constitution.<sup>33</sup> This generic provision, usually found in most civil law jurisdictions, offers a constitutional basis for the domestication of the rights and duties provided for in major international legal instruments. It also provides a strong safety net of protection when the Constitution is not exhaustive or is silent on some rights that are recognized in international human rights law. It also allows courts to take into consideration new rights and norms of international law without necessarily amending the Constitution.

Two observations should be made in this regard. First, although the Constitution only lists some specific instruments, it is worth noting that it incorporates all international and regional human rights instruments to which Burundi is a state party. The drafting of the provision is clearly intended to be non-exhaustive, because of the use of the expression “particularly” placed before the actual list of international and regional instruments. Therefore, although it is not specifically mentioned, and no reason has been provided, some instruments that are of great importance in international human rights law, such the Convention against Torture and the Additional Protocols to the African Charter, such as the Maputo Protocol,<sup>34</sup> should also be

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<sup>33</sup> Constitution, art. 19.

<sup>34</sup> Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003.

considered to be part of the Constitution of Burundi. Basically, all rights enshrined in regional and international instruments are constitutionally guaranteed and are directly enforceable before Burundian courts. For instance, human rights that are guaranteed by the African Charter can be enforced in Burundian courts. This is very important given the existence of ethnic groups, such as the Batwa indigenous group, which has very strong affiliations and also fears extermination by other groups. Their collective rights can then be enforced beyond the rights of individual members of the ethnic groups.

Second, given the quasi-exhaustiveness of the instruments referred to above, was it then necessary for the Constitution to proceed to list different rights in subsequent sections? It is not entirely clear why the legislator decided to do so. In any case, this has been the practice in most of the constitutions of former French and Belgian colonies, which usually mimic the provisions of the constitutions of their former colonial states.<sup>35</sup>

The Constitution provides for the rights and duties of both individuals and citizens. While the category of “individuals” comprises all persons living on Burundian territory, including foreigners, “citizens” hold Burundian nationality. However, the divide is not water-tight, as both categories enjoy most of the rights enshrined in the Constitution, except for some political rights that are available only to citizens. This practice is in conformity with the current trend in regional and international human rights law binding on Burundi, which affords protection to every individual living on the territory of a state party.<sup>36</sup>

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<sup>35</sup> Constitution of Niger, 2010, art. 10-45; Constitution of Cote d’Ivoire, 2000, art. 1-28.

<sup>36</sup> African Charter on Human and Peoples’ Rights, art. 2; see also Communication 292/04: *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v. Angola*: “Rights under the

The notion of duties in a constitutional text is not new for Burundi; it is in accordance with Burundian culture, where duties are necessary pendants of rights. This contributes to the tightening of bonds and links between family or community members in the sense of interdependence, solidarity, harmony, and contribution to the welfare of the family, the community, or the state. Each individual is required to carry out some duties towards his or her family, the community, and the state. The notion of the individual's duties is also a shared African value, as it has also been incorporated in the African Charter on Human and Peoples' Rights.<sup>37</sup>

Gender-sensitive language has been used in the 2005 Constitution for the first time.<sup>38</sup> This may be construed as recognition and a strong resolve to remedy and redress the historical systemic imbalances and injustices against women.

Finally, it is important to note that constitutionally-guaranteed rights are not absolute; they can be restricted in accordance with a law, but the restriction must be justified by the general interest or the protection of the rights of others and, in any case, must be proportional to the objective pursued.<sup>39</sup>

## **B. Scope of Rights**

As previously mentioned, the 2005 Constitution provides for a charter of rights and duties. Fundamental human rights include civil and political rights (Articles 21 to 51); social, cultural, and economic rights (Articles 52 to 59); and collective rights. As the scope of this study will not

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African Charter are to be enjoyed by all, without discrimination, by citizens and non-national residents alike. Although some rights, like the right to vote and to stand for election are reserved for citizens of the particular State, human rights are in principle to be enjoyed by all persons", para. 80.

<sup>37</sup> African Charter on Human and Peoples' Rights, arts. 27-29.

<sup>38</sup> Constitution, arts. 24, 25, 28. For instance, art. 24 stipulates that "every woman, every man has the right to life".

<sup>39</sup> Constitution, art. 47.

permit a commentary of each section of the Constitution, it will only list the relevant rights under each category, with commentary on particular Articles where warranted.

### **1. Civil and political rights**

The 2005 Constitution provides for an impressive number of civil and political rights. Most of the civil rights protect the core rights to life, liberty, security, and dignity. These include the right to human dignity, the right to equality and equal protection of the law, the right to non-discrimination, the right to life for all men and women, the right to personal liberty, the right to privacy, the right not to be subjected to slavery, the right to get married and to freely choose one's partner (although same-sex marriage is constitutionally prohibited),<sup>40</sup> freedom of expression, freedom of assembly and association, and the right to move and settle freely anywhere in the country.

Also incorporated in the Constitution are fair trial rights, such as the right of the accused to be presumed innocent, the right not to be arbitrarily arrested or detained, the right to defend oneself, the right to non-retroactive application of laws, and the right to privacy, including the right not to be arbitrarily searched and the right not to be extradited, except when the accused faces charges of genocide, war crimes, or crimes against humanity and when the extradition is requested by an international criminal court.

With regard to political rights, Burundian citizens enjoy the right to participate freely in the government of their country, either directly or through freely chosen representatives in accordance with the provisions of the law; the right of equal access to the public service of the country; and the right not to be deprived of or compelled to change their nationality.

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<sup>40</sup> Constitution, art. 29.

Finally, the Constitution provides for the rights of children, including the right to special protection and treatment by the family, society, and the state; the right to special measures for the child's care; prohibition against their use in armed conflict; and fair trial rights, including the right not to be detained, except in exceptional circumstances, and the right to special treatment in detention, including separation from older prisoners.

## **2. Economic, social, and cultural rights**

According to the Constitution, every person is entitled to the realization of the economic, social, and cultural rights that are indispensable for his or her dignity and the free development of his or her person, through national efforts taking into consideration the resources of the country.<sup>41</sup> Fundamental rights in this category include the right to property; the right to form and affiliate with trade unions, including the right to strike; the right to equal access to education and culture; the right to work; the right to access health care; and so on.

## **3. Collective rights**

The Constitution provides for some collective rights, such as the right of parents to educate their children, and the right to development. The latter is not provided in affirmative terms; it indirectly flows from the obligation on the state to promote the country's development, especially rural development.<sup>42</sup>

## **C. Enforcement**

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<sup>41</sup> Constitution, art. 52.

<sup>42</sup> Constitution, art. 52.

The 2005 Constitution provides for a human rights enforcement regime. The judiciary is constitutionally entrusted with the task of protecting and ensuring respect for human rights. It is actually presented as the guardian of human rights and civil liberties.<sup>43</sup> Moreover, given the Constitution's precedence in the normative hierarchy, the human rights provided within are binding on all the state's institutions.<sup>44</sup> Public institutions and officials in the executive, administrative, legislative, and judicial sectors are all bound by the Constitution. Legislative and executive orders or judicial decisions must be compatible with the Constitution, or they will be declared void. Although the entire judiciary has been tasked with the protection of human rights, a special role is devoted to the Constitutional Court, which has to ensure compliance by state bodies and other institutions with the charter of fundamental rights.<sup>45</sup> In this regard, Stef Vandeginste suggests that the Constitutional Court is equivalent to a human rights court.<sup>46</sup> In addition, the Office of the Ombudsman can also contribute to the enforcement of the rights that are constitutionally guaranteed. Article 6(1) of the Constitution entitles the Ombudsman to investigate human rights violations alleged to have been committed by public service staff, the judiciary, the state's corporations, and local entities.<sup>47</sup>

#### **IV. Separation of Powers**

The separation of the three main branches of the state is guaranteed in the 2005 Constitution. As will be shown below, the type of separation enshrined in this fundamental legal instrument is not

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<sup>43</sup> Constitution, art. 60.

<sup>44</sup> Constitution, art. 48.

<sup>45</sup> Constitution, art. 228.

<sup>46</sup> Stef Vandeginste, « *Pouvoir et droit au Burundi: un commentaire (principalement) juridique sur l'arrêt du 5 juin 2008 de la Cour Constitutionnelle dans l'affaire RCCB 213* » [hereinafter, Commentary] 11 (2008).

<sup>47</sup> See also Pacifique Manirakiza, « *La nouvelle institution d'Ombudsman au Burundi : potentialités et défis* », 4 *Revue juridique et politique des États francophones* 488-389 (2012).



very rigid. There are instances of interaction between different powers, especially between the executive and the other organs (the legislature and the judiciary).

## **A. The Executive**

The executive branch is incarnated by the President, the Vice-Presidents, and the Cabinet. The President, who is the head of the executive, is directly elected by the population, while the other Cabinet members are appointed by him.

### **1. Elections**

Conditions for elections to the presidency are not so complicated compared to similar francophone countries. Presidential candidates must be citizens of Burundi at birth, aged at least 35 years, qualified voters, and residents of Burundi at the time of nomination.<sup>48</sup> Candidates undertake to comply with the Charter of National Unity along with the Constitution, and they must enjoy civil and political rights. Until now, none of these conditions have proved to be controversial. However, the criterion of citizenship at birth could potentially be challenged through constitutional litigation on the basis of discrimination against foreigners who have acquired Burundian citizenship and who have a legitimate right to participate in the political life of their country of adoption, including becoming President. In any case, this condition is actually a differentiation from the stipulation in the Arusha Peace Agreement, which did not add the “birth” criterion,<sup>49</sup> as well as the regional and international law binding on Burundi.<sup>50</sup>

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<sup>48</sup> Constitution, art. 97; Electoral Code, art. 94.

<sup>49</sup> Art. 20(11). Protocol II of the Arusha Peace Agreement stipulates that presidential candidates should be of Burundian nationality aged 35.

<sup>50</sup> African Charter on Human and Peoples’ Rights, art. 13.

The President is elected through universal suffrage for a five year term, renewable only once.<sup>51</sup> However, in the first post-transition presidential elections, the President was exceptionally elected by Parliament in accordance with the provisions of Article 302 of the Constitution.<sup>52</sup> Security concerns could provide an explanation for this exceptional modality of electing the President in 2005 and the rationale behind Article 302 of the Constitution, which was inspired by the Arusha Peace Agreement.<sup>53</sup> At the time of, and even years after the signing of the Agreement, armed groups that were left out of the peace negotiation process (the CNDD-FDD and the Palipehutu-FNL) were still at war in Burundi and there was widespread insecurity throughout the country. Even after the signing of a cease-fire agreement by the CNDD-FDD,<sup>54</sup> the other armed group (Palipehutu-FNL) remained active in the bush. The conduct of fair and free general elections would not have been feasible at the time.

Today, the scope of Article 302 is generating great debate in Burundi. The current President, Pierre Nkurunziza (the first post-transition President), was elected for the first time through indirect suffrage in accordance with Article 302. He was re-elected for a second term through universal suffrage in 2010. As the 2015 presidential elections are looming, some people argue that the current President will still be eligible in 2015, since he was indirectly elected by Parliament for his first term. They base their argument on Article 196 of the Constitution, which limits the terms of presidential office to two terms of five years each for Presidents directly elected by the population (universal suffrage). This literal interpretation is well warranted, according to Vandeginste, especially when Article 302 is read as a pure derogation of the

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<sup>51</sup> Constitution, art. 196.

<sup>52</sup> Article 302 stipulates: “Exceptionally, the first President of the Republic of the post-transition period is elected by the elected National Assembly and the Senate sitting together, by a majority of two thirds of the members. If this majority is not obtained in the first two rounds, there shall immediately be other rounds until one candidate obtains the same two-thirds vote of the members of Parliament.” (author’s translation).

<sup>53</sup> APRA, Protocol II, art. 20(10).

<sup>54</sup> Global Cease-Fire Agreement, 16 November 2003.

modalities of election.<sup>55</sup> However, an historical and contextual reading of Article 302 justifies a different approach. Historically, the intention of the legislator can be discovered by a reading of the 2005 Electoral Code.<sup>56</sup> Although the Code has now been repealed, it is still relevant for this analysis because it was adopted (on 20 April 2005) only a month after the adoption of the Constitution (on 18 March 2005). Former Article 190 of the Code, read cumulatively with its Article 186,<sup>57</sup> directly alludes to terms of office. Article 186 stipulates that the President is elected for a five year term, renewable once. The text of Article 190 is compelling: “As an exception to the principle laid down in article 186,<sup>58</sup> the first president of the post-transition period is elected by the Assembly and the Senate (...)”. Therefore, Article 302 of the Constitution (which is equivalent to Article 190 of the Electoral Code) can be interpreted as an exception to the modalities of election, and not to the terms of office. It does not then lay a solid foundation for a third term for the current President Nkurunziza.

Contextually, Article 302 mirrors several articles of the Arusha Peace Agreement. The spirit of these provisions is to limit the terms of presidential office. In this sense, both presidents of the transitional period have been constitutionally barred from becoming candidates for post-transitional elections.<sup>59</sup> If we follow through with this interpretation, the post-transition President was a full President, with full constitutional powers and privileges. The only limitation was that he could not dissolve Parliament during his five-year presidential tenure. This was understandable, given the fact that sovereignty was delegated to Parliament in order to elect him. Therefore, Article 302, which was understandable given the exceptional circumstances at the

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<sup>55</sup> Vandeginste, Commentary, n.46, p. 11.

<sup>56</sup> Law n° 1/015 of 20 April 2005 on the Electoral Code (B.O.B., 2005, n° 4, p. 1).

<sup>57</sup> Article 186 stipulated that the President is elected for a 5 year term, renewable once. Art. 190 states that “as an exception to the principle laid down in article 186, the first president of the post-transitional period is elected by the Assembly and the Senate (...)”.

<sup>58</sup> Emphasis added.

<sup>59</sup> Constitution, art. 301.

time,<sup>60</sup> should be read in this context. Otherwise, the first term could be seen as a prolongation of the transitional period, which was not reasonably meant to be the case and runs contrary to the entire “Arusha spirit”, as explained above. I am of the opinion that the first post-transition term satisfies the constitutional conditions of a presidential term. The current term of President Nkurunziza (2010 to 2015) should be considered to be his last, as long as the current Constitution stands as it is (unless there is a constitutional review, which is inadvisable as far as presidential terms are concerned). In brief, a cumulative reading of Article 196 and Article 302 of the Constitution, as shown above, supports my opinion.

## **2. Appointment, Law-making and Special Powers of the President**

The 2005 Constitution institutes a presidential regime. Hence the President is entrusted with important powers inherent to that regime. He or she exercises statutory powers through decrees that are counter-signed by the Vice-President and the Minister in whose jurisdiction the matter lies. He or she promulgates ordinary and organic laws, once they have passed the constitutionality test, and ensures their enforcement. He or she may declare a state of emergency by decree and take all measures required by the circumstances, after having formally consulted the government, the bureaus of the National Assembly and the Senate, the National Security Council, and the Constitutional Court.<sup>61</sup> The President (except when he or she is a presidential candidate) has the power to dissolve the National Assembly under an impeachment procedure (Article 118), under the first post-transition tenure (Article 302), or in times of a declared emergency (Article 115). During his or her tenure, he or she enjoys immunity for his or her actions and he or she can invoke inviolability for acts committed before taking office.

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<sup>60</sup> Security reasons justify the provision of art. 302 as presidential general elections were not possible right after the transitional period.

<sup>61</sup> Constitution, art. 115.

Nevertheless, he or she can be impeached in the event of high treason before a special court which is not yet in place—the High Court of Justice.<sup>62</sup>

In discharging his or her mandate, the President is assisted by two Vice-Presidents (VPs). The first VP is in charge of political and administrative matters, while the second VP oversees economic and social affairs. This configuration has been motivated by the desire to ensure representation of the predominant and often rival ethnic groups (Hutu and Tutsi) at the head of the executive. Therefore the post of Prime Minister, which was in force from independence until the political arrangements of the post-1993 *coup d'état*, has been abolished.

Vice-Presidents are appointed by the President after the approval of both the Senate and the National Assembly, voting separately. It is important to mention that VP candidates can only be drawn from elected officials. This is a major innovation, as this has never been a criterion for the selection of VPs or Prime Ministers. It reinforces the legitimacy of the heads of the executive, especially since the President is an elected person. However, VPs can be removed from office by the President of the Republic alone. The President does not have to seek the approval of both Houses of Parliament for their dismissal. This latitude establishes room for presidential manoeuvring for action in the interest of efficiency of the government. Again, this is an indication of the great magnitude of the position and powers vested in the President of the Republic. One might have expected that the principle of parallel formalism<sup>63</sup> would be followed in the process of the removal of VPs from office.

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<sup>62</sup> Constitution, art. 233.

<sup>63</sup> The principle of parallel formalism (or the principle of parallelism of forms and procedures) is an important principle of public law in most civil law countries; it stipulates that the enactment and repeal of legislative or executive measures should follow the same procedure; see for instance Becqué-Ickowicz Solange, *Le parallélisme des formes en droit privé* (Paris, Panthéon-Assas, 2004).

Finally, the Cabinet is the last component of the executive. It is composed of Ministers appointed by the President. Constitutionally, the government must be open to all ethnic groups.<sup>64</sup> However, it is curious to note that although there are three ethnic groups in Burundi, the same Article prescribes that the government should be composed of no more than 60 per cent of Hutu Cabinet members and no more than 40 per cent of Tutsi, among which at least 30 per cent should be women. The third ethnic group—Batwa—is not mentioned. This exclusion can be explained by the fact that political crises and armed conflicts have historically opposed the Hutu and the Tutsi. Also, representatives of these two ethnic groups were present in Arusha when the allocation of power was being negotiated. As the spirit of the Arusha Peace Agreement and the Constitution is to ban exclusion, there is no objective explanation as to why the Constitution does not guarantee governmental representation for the Batwa.

The government deliberates on the general policy of the country and Ministers can issue ordinances in order to implement presidential decrees and orders from VPs that are relevant to their jurisdiction. It can suggest amendments to parliamentary-initiated bills, as long as the amendments do not have a major impact on public funds.<sup>65</sup>

Ministers can be removed by the President and also through a vote of defiance by Parliament in the event of blatant incompetence, action, or omission that is prejudicial to the general interest or in violation of the laws.<sup>66</sup>

## **B. The Parliament**

### **1. Composition and electoral/appointment process**

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<sup>64</sup> Constitution, art. 129.

<sup>65</sup> Constitution, art. 194.

<sup>66</sup> Constitution, art. 194.

The Parliament of Burundi is bicameral and consists of the National Assembly and the Senate. Members of the National Assembly are elected, except for three members of the Batwa ethnic group and other members who are co-opted by the Independent National Electoral Commission in order to ensure respect for the constitutional quotas for ethnic groups and gender.<sup>67</sup> The term for members of the National Assembly (Lower House) is five years. Members of the Senate (Upper House) are, in their majority, elected by an electoral college of local representatives sitting in municipal councils. Each province is entitled to two senators representing the two main ethnic groups (Hutu and Tutsi). This equal representation is meant to achieve substantial equality and also to ensure a proper representation of minority groups and prevent their potential exclusion and possible annihilation by the majority. In addition to the elected senators, three members are co-opted from the Batwa group and former Presidents of Burundi sit *ad vitam aeternam*. In any case, at least 30 per cent of senators are women.

The eternal “senatorship” for former Presidents did engender heated debate in Arusha. Some (especially Hutu-dominated political parties) were of the opinion that only democratically-elected Presidents were entitled to be senators for life. This was deemed unacceptable by the Tutsi-dominated parties, because former President Jean-Baptiste Bagaza, who was himself present at the negotiation table, and the then President Pierre Buyoya, who came to power through *coups d’État*, were left out. A consensus emerged to the effect that every former head of state would sit in the Upper House for life. Later, a special law was enacted that excluded non-democratically elected heads of state; they will not benefit from the advantages provided for by this special legal regime of life senatorship.<sup>68</sup> This institutional arrangement was meant to be a

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<sup>67</sup> Constitution, art. 164.

<sup>68</sup> Law n° 1/020 on the Status of the Head of State at the expiration of his functions, 9 December 2004 (B.O.B., 2005, n° 2, p. 1), art. 1, lit. 2.

guarantee of non-recurrence of unconstitutional changes of government, as well as a sign of national reconciliation.

Members of the National Assembly and Senators enjoy immunity for their statements or votes expressed during a regular session of their respective Houses. During the session period, they cannot be arrested, detained, or prosecuted without the authorization of the Bureaus of their Houses or in the case of *flagrante delicto*. Outside the session, legal actions are possible after the authorization of the Bureaus, except in the case of *flagrante delicto* or an existing authorized prosecution or a previous judicial decision. In any case, they are accountable to the Trial Chamber (*Chambre judiciaire*) of the Supreme Court of Burundi.

## **2. Law-Making Powers of the National Assembly and the Senate**

Parliament exercises the legislative power. The Constitution sets out a broad range of areas of legislative intervention, from citizens' basic rights to the national budget.<sup>69</sup> Draft bills originate from the executive power and Parliament.<sup>70</sup> In reality, the real legislative power of Parliament is triggered by the executive. Most draft bills come from the government and very rarely from within Parliament. Moreover, they are placed and discussed in priority on the agenda of Parliament. This situation confirms the presidential nature of the Burundian political regime, which features a powerful executive with a *de facto* subordination of other powers. Also, the majority of members of Parliament are not really politically and technically well-prepared for the task, either due to a lack of proper training or to allegiance to their political parties. In fact, the current electoral system allows very little chance for independent candidates to enter Parliament.

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<sup>69</sup> Constitution, art.159; art. 177.

<sup>70</sup> It should be noted that, following a civil law tradition, draft bills take different names in French. They are called "*projets de lois*" when they originate from the executive and "*propositions de lois*" when they emanate from Parliament itself.



The bar is set too high for them. The same threshold required for political parties' lists (2 per cent of national suffrage) also applies to the independents' list.<sup>71</sup> Only the nominated candidates of political parties are elected. In this regard, chairpersons of the different political parties play a very instrumental role in the nomination process, which has sometimes been criticized and denounced as a corrupt system since most of the nominees are people who are able to pay money to get nominated or have a certain affiliation with the leader of the party.

It is finally important to note that the legislative jurisdiction of the Senate extends to amendments to the Constitution and laws, the control of the implementation of constitutional provisions on ethnic and gender representation in state and administrative institutions, and laws concerning the delimitation, jurisdiction, and powers of territorial entities, and so on.<sup>72</sup>

### **3. Parliamentary Control of the Government**

The Parliament controls the action and policies of the government.<sup>73</sup> In this regard, Members of Parliament can address oral or written questions to Cabinet Members, who are duty-bound to respond.<sup>74</sup> An oral hearing is reserved to members of the government at least once a week during parliamentary sessions. A no-confidence motion can be moved against Cabinet Members for their failure to respect their obligations, poor performance, or for contempt of Parliament. In that event, the individual accused Minister must resign from office. Likewise, Parliament can vote for an impeachment of the entire government. In any case, given the importance and the overreaching effects of these parliamentary decisions, a majority of two-

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<sup>71</sup> Constitution, art. 169. The 1992 Constitution required independents to score 40% of the total suffrage within their constituencies (as opposed to 5% of national suffrage for political parties' candidates) for them to gain a seat in Parliament (Constitution of 13 March 1992, art. 104).

<sup>72</sup> Constitution, art. 187.

<sup>73</sup> Constitution, art. 158.

<sup>74</sup> Constitution, art. 202.

thirds (2/3) of votes is required to dismiss an individual Minister or the entire government. However, the President of the Republic may retaliate by using his constitutional power to dissolve Parliament.

Finally, both the National Assembly and the Senate are entitled to investigate governmental action or omission through a parliamentary commission of inquiry, in the event of suspicion of wrongdoing. When the report is ready, Parliament can take appropriate decisions and measures in order to redress the situation.

However, constitutional measures and guarantees for parliamentary control of the government may not be effective and efficient, at least for the moment. In fact, the main political parties represented in Parliament are constitutionally and effectively part of the government. Moreover, the ruling party, the CNDD-FDD, is predominantly represented in both Chambers of Parliament to the point that it controls all of the institutions,<sup>75</sup> which gives rise to fears of the return of a mono-party system. These two factors have a great impact on the independence of Parliament and its ability to effectively control the government's policies and conduct.

## **V. The Judiciary**

The judicial organizational structure is composed of ordinary and specialized courts. The ordinary judicial system is pyramidal. At the bottom, residence courts are established at each administrative communal level. In total, there are 123 courts that are competent to hear civil cases, land cases, small claims of less than 1,000,000 Burundian francs, and minor criminal cases. The relatively high number of residence courts stems from the policy of localizing justice

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<sup>75</sup> International Crisis Group, *Burundi: From Electoral Boycott to Political Impasse*, Africa Report N°169, 7 February 2011, p. 8.

by placing it closer to communities. High courts sit at the provincial level; they constitute appellate bodies for decisions handed down by the residence courts. In addition, they hear criminal cases, including international crimes, civil cases of a certain importance, as well as orders implementing foreign decisions.<sup>76</sup> Three courts of appeal cover the entire country. Decisions from high courts can be appealed before these courts. Apart from the appellate function, they hear criminal cases involving senior appointed officials, including judges.<sup>77</sup>

The specialized court system is composed of labor tribunals, commercial courts, administrative courts, the Constitutional Court, and an anti-corruption court. Labor tribunals deal with issues concerning labor relations as well as social security insurance for employees and public servants. Commercial courts have jurisdiction over business-related issues. Administrative courts deal with administrative matters; they oversee administrative action through judicial review of administrative decisions. The Constitutional Court is the unique court that has exclusive jurisdiction over constitutional matters. Finally, the government has set up an anti-corruption court in order to deal with a huge number of allegations of corruption of senior officials and other public servants.<sup>78</sup> The Supreme Court of Burundi is at the apex of the judicial pyramid. It ensures a proper application of the law by the inferior courts. It consists of three chambers: a judicial or trial chamber, an administrative chamber, and a highest chamber of appeal (*chambre de cassation*). Finally, in the event of presidential impeachment or criminal responsibility of the Speaker of the National Assembly, the Speaker of the Senate, or the Vice-

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<sup>76</sup> *Code de l'organisation et de la compétence judiciaires* [Law on the Organization and the Jurisdiction of the Judiciary], Law n° 1/08, art. 26, B.O.B., 2005, n° 3 quater, 17 March 2005, p. 19.

<sup>77</sup> *Ibid.*, arts. 32 and 36.

<sup>78</sup> *Loi n° 1/36 sur la Cour anti-corruption* [Law No 1/36 on the Anti-Corruption Court], 13 December 2006, B.O.B., 2006, n° 12.

Presidents for alleged crimes committed while in office,<sup>79</sup> a special court—the High Court of Justice, composed of the Supreme Court and the Constitutional Court sitting together<sup>80</sup>—is to be established. It will be presided over by the Supreme Court Chief Justice.

In order for the judiciary to discharge its duties independently, the Constitution provides for the High Council of the Judiciary to be entrusted with the task of ensuring a proper functioning of justice as well as the independence of judges.<sup>81</sup> The High Council plays an important disciplinary role against judges and can also assist the government in policy-making on justice and human rights issues. Members of the High Council are appointed by the President after approval by the Senate. The Senate oversees the appointment process in order to ensure that the High Council is well balanced on ethnic, regional, and gender bases. It is important to mention that contrary to previous constitutions pursuant to which all the members of the High Council were government-appointed, seven of the fifteen members of the Council are judges and prosecution counsel who are elected by their peers. This was decided in Arusha in order to enhance the High Council's independence. But even with this innovation, there are still allegations of lack of independence of the judiciary. For instance, civil society organizations suggest that the entire High Council should be elected by the judiciary in order to minimize government interference and promote its effective independence.

## **VI. Decentralization/De-concentration**

According to the Constitution, Burundi is a unitary state. However, public services are decentralized from Bujumbura, the capital city, by the creation of administrative entities throughout the country. For instance, the country is divided into 17 provinces, the role of which

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<sup>79</sup> Constitution, art. 234.

<sup>80</sup> Constitution, art. 233.

<sup>81</sup> Constitution, art. 210.

is to ensure dispensation and de-centralization of public services. For this purpose, the governor, as head of the province, is an executive delegate.<sup>82</sup> He is not an elected official. Despite the doctrine of delegation of power, the governor cannot be parachuted from anywhere, as was previously the case. He must be a civilian native or a resident of his province.<sup>83</sup> These requirements ensure sensitivity and closeness towards the local people and familiarity with their particular needs and interests.

Apart from the provinces, local entities can be created by organic laws. The Commune is the great example of such entities. Communes are governed by elected councils, which constitute local governments. Communes' councils must reflect the diversity of the population for the sake of inclusiveness. If the results of the local elections disproportionately favor some groups over others, the Independent National Electoral Commission can co-opt individuals from the under-represented groups. In any case, no ethnic group should be represented by more than 67 per cent of the entire council.

Communes are engines for local development. To that end, the enabling law grants them a legal personality which entitles them to administrative and financial autonomy.<sup>84</sup> They provide to local populations public services other than those that are in the remit of the state. The state can also delegate some missions to communes, but it must provide the resources needed to discharge them.<sup>85</sup>

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<sup>82</sup> Constitution, art. 138.

<sup>83</sup> Constitution, art. 139.

<sup>84</sup> *Loi n° 1/02 du 25 janvier 2010 portant révision de la loi n°1/16 du 20 avril 2005 portant organisation de l'administration communale* [Law No 1/02 of 25 January 2010 on review of Law No 1/16 of 20 April 2005 on Organisation of the Communal Administration], art. 1.

<sup>85</sup> Law n° 1/02 of 25 January 2010, art. 5.

De-concentration through the establishment of provinces and decentralisation by communes ensure a proper dispensation of public services and participation of the population in the decision-making process, especially at the local level where their interests lie the most.

## **VII. Constitutional Adjudication**

Formerly a chamber of the Supreme Court, the current Constitutional Court is a separate entity which deals with constitutional matters. It interprets the Constitution, controls the constitutionality of laws and administrative acts, ensures the legality of elections and referenda, and so on.<sup>86</sup> The Court is also one of the main pillars of the separation of powers and the rule of law.<sup>87</sup> Members of the Court comprise professional judges and other legal professionals appointed by the President who are well-known for their independence, integrity, and impartiality. The Constitutional Court is relatively accessible; a constitutional matter can be referred to the Court by the President, the Chairperson of the National Assembly or the Senate, by a quarter of the Members of each House, or the Ombudsman.<sup>88</sup> Moreover, apart from these political institutions, any individual or legal person, either by direct action or indirectly through a case before another court, can seize the Court regarding the constitutionality of laws.<sup>89</sup>

The consequences that attach to a court's judgment declaring a law or part of it unconstitutional depend on the status of the law in question. If the law was already in force, then the relevant section or the entire law is struck out. Prior to promulgation of the law by the

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<sup>86</sup> Constitution, art. 228.

<sup>87</sup> Vandeginste, Commentary, n46, p. 1.

<sup>88</sup> Constitution of Burundi, art. 230.

<sup>89</sup> Constitution of Burundi, art. 230. It is interesting to note that this new provision is limited. Claims on constitutionality are only for laws and not for regulations or other administrative measures. It is not clear why this was left out, as previous constitutions extended the possibility to regulations.

President, he or she can either decide to promulgate the law except for the unconstitutional provision, or defer promulgation pending a second reading of the law by Parliament, in accordance with the Constitutional Court's ruling.

The rulings of the Constitutional Court are final. No appellate body can review its decisions.

## **VIII. International Law and Regional Integration**

### **A. International law**

From the outset, the preamble of the 2005 Constitution alludes to international law in a number of ways. It reaffirms Burundian commitment to (i) the fundamental human rights enshrined in most international instruments, in particular the Universal Declaration of Human Rights, the International Covenants on human rights, and the African Charter on Human and Peoples' Rights; (ii) the cause of African Unity in accordance with the Constitutive Act of the African Union of 25 May 2002; and (iii) peace, friendship, and cooperation in accordance with the United Nations Charter.

Quite a number of provisions of the Constitution also deal with international law. For instance, according to Article 19, referred to above, human rights and duties guaranteed in international treaties are an integral part of the Constitution. For its part, Article 50 forbids the extradition of nationals except when they face charges of genocide, war crimes, or crimes against humanity and when the extradition is requested by an international criminal court. Three remarks should be made about this provision.

First, the principle of non-extradition of nationals to foreign sovereign states flows from a general rule of international law—the doctrine of *jus de non evocando*—which is still in place in

most civil law jurisdictions. According to this principle, a citizen must be tried by the courts of his or her country in accordance with the established laws and procedures with which he or she is familiar. Second, the exception to that principle provided for in Article 50 is compatible with Burundi's obligations under the Rome Statute creating the International Criminal Court (ICC),<sup>90</sup> especially the general obligation to cooperate and execute the ICC's orders and decisions.<sup>91</sup> Third, although Article 50 relates to extradition (it also appears at Article 59 *in fine*), it should be construed to include two different realities, depending on the requesting entity. While the extradition regime operates between equal sovereign states, the same reality is usually referred to as *transfer* or *surrender*<sup>92</sup> when the prosecuting authority seeking rendition of the suspect is an international or a hybrid criminal court.

The Constitution also empowers the President to be the main negotiator and guarantor for the respect of international treaties and agreements (Article 95). Military training should conform to international treaties and agreements (Article 241), international humanitarian law in particular (Article 260). Foreign intervention in contravention of international law or the use of foreign forces is prohibited (Article 254). The Constitution further prohibits the stockpiling and dumping of toxic waste (Article 293).

Regarding the domestication of international law, one should be reminded that Burundi is a monist state. All treaties to which Burundi is a state party and international law norms are part of Burundian law. Article 19 clearly stipulates that international human rights treaties are an integral part of the Constitution. However, while the direct domestication of human rights treaties may not be problematic, at least for those treaties with self-executing provisions, simple

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<sup>90</sup> Burundi became a party to the ICC on 21 September 2004.

<sup>91</sup> ICC Statute, art. 86.

<sup>92</sup> ICC Statute, art. 89.



ratification is not enough. The Constitution is not clear about the modalities of domestication of other treaties. In practice, most of the treaties have required the enactment of a law for better implementation. This was the case with the Rome Statute of the ICC. Despite ratification of the treaty by Burundi, an adjustment to existing laws, such as the Criminal Code, with the abolition of the death penalty and provisions on sentences for international crimes, were deemed necessary.<sup>93</sup> The incorporation process then depends on the nature of each treaty. For instance, some treaties, such as peace and trade treaties, are ratified and incorporated into national law by way of enabling legislation (Article 290).

## **B. Regional Integration**

According to Article 291 of the Constitution, Burundi can create international organizations in conjunction with other states, or conclude agreements of community or association with other states. In this regard, Burundi is a member of quite a number of regional and sub-regional organizations. On the regional level, Burundi is a member of the African Union (AU) (formerly the Organization of African Unity (OAU)) which it joined in 1963, a few months after its independence. This early membership is an indication that Burundi committed itself to upholding African common values and interests as outlined in the AU constitutive act (Article 3), including economic (and possibly political) regional integration, African unity and solidarity between African states and the peoples of Africa, the promotion and defence of African common positions on issues of interest to the continent and its peoples, and so on.

Burundi has also joined other sub-regional organizations such as the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of the Great Lakes States

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<sup>93</sup> *Loi No 1/05 du 22 avril 2009 portant révision du Code pénal* [Law No 1/05 of 22 April 2009 on the Review of the Penal Code], arts. 195-203.

(ECGLS), the Economic Community of Central African States (ECCAS), and recently the East African Community (EAC).<sup>94</sup> Most of these organizations are aimed at promoting stability, cooperation, and economic integration among member states. Again, this indicates that Burundi values interdependence and mutual assistance in order to attend to Burundians needs and interests. It is also important to mention that Burundi is part of other thematic organizations such the International Conference of the Great Lakes (ICGL), whose vision is to create a “region characterized by deeply entrenched values, principles and norms on democracy, good governance and observance of human rights”.<sup>95</sup> The ICGL aims at creating an environment for economic development and peaceful and democratic change.<sup>96</sup>

## **IX. Other documents of a constitutional nature?**

The Burundian constitutional landscape is complex. Apart from the 2005 Constitution, which is deemed to be the fundamental law,<sup>97</sup> there are other documents of a constitutional nature, such as the Charter of National Unity and the Arusha Peace Agreement for Reconciliation in Burundi.

### **A. The Charter of National Unity**

After the Ntega-Marangara massacres of the summer of 1988, in which Tutsi were slaughtered by Hutu machetes and Hutu were killed by the army, the government of Buyoya,

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<sup>94</sup> *Loi n° 1/42 du 30 décembre 2006 portant adhésion du Burundi au Traité portant création de la Communauté Est–Africaine* [Law n° 1/42 of 30 December 2006] on the Adhesion of Burundi to the Treaty creating the East African Community], signed in Arusha on 30 November 1999; *Loi n° 1/08 du 30 Juin 2007 portant ratification par la République du Burundi du Traité d’adhésion du Burundi à la Communauté Est Africaine* [Law n° 1/08 of 30 June 2007 on the Ratification of the Treaty creating the East African Community], signed in Kampala on 18 June 2007.

<sup>95</sup> See <https://icglr.org/spip.php?article6> (visited 15 May 2013).

<sup>96</sup> Julien Nimubona, « *De la nécessité de prendre en compte les dimensions politiques et institutionnelles dans les processus d’intégration économique en Afrique centrale et orientale* » 1 (2010).

<sup>97</sup> Constitution, preamble, para. 14.

under pressure from the international community and also from the Hutu,<sup>98</sup> initiated a lengthy consultation process on the question of national unity. Colloquiums and other discussion panels were organized under the auspices of the then ruling Party UPRONA. A report was adopted by an ad hoc Commission. It suggested, inter alia, the proclamation of a Charter of National Unity, which was ultimately adopted on 5 February 1990. The Charter was defined as “a kind of covenant which the Burundi would conclude with each other and a proclamation of faith in, and solemn commitment to, justice, peace, and democracy”. Not only did the Charter inspire the 1992 Constitution, given the timing and connection of both instruments, but curiously, its content is also reflected in the current 2005 post-conflict Constitution, sometimes in binding obligations towards the state’s organs, political institutions, and even individuals. For instance, presidential and Member of Parliament candidates have to subscribe to the Charter of National Unity and the Constitution.<sup>99</sup> In their solemn oath before taking office, Presidents, Vice-Presidents, and Ministers must pledge “allegiance to the Charter of National Unity, the Constitution of the Republic of Burundi and the Law (...) and (...) to ensure national unity (...)”.<sup>100</sup> Moreover, the President can be impeached for high treason on the basis of an infringement of the Charter when he or she intentionally performs an act which undermines national unity.<sup>101</sup> On the other hand, the creation of political parties must conform to Charter provisions.<sup>102</sup> Each application for registration should include a formal statement of adherence to the Charter of National Unity,

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<sup>98</sup> Daniel P. Sullivan, *The missing pillars: a look at the failure of peace in Burundi through the lens of Arend Lijphart’s theory of consociational democracy*, 43 *Journal of Modern African Studies* 77 (2005).

<sup>99</sup> Constitution, art. 97(6); Electoral Code, arts. 94(6), 101(11), 125, 131(9), 156(5), 161(9).

<sup>100</sup> Constitution, arts. 106, 127, 133.

<sup>101</sup> Constitution, art. 117.

<sup>102</sup> *Loi No 1/16 du 10 septembre 2010 portant révision de la Loi No 1/006 du 26 juin 2003 portant organisation et fonctionnement des partis politiques* [Law No 1/16 of 10 September 2010 on Review of the Law No1/006 of 26 June 2003 on the Organization and the Functioning of Political Parties] (“Law on Political Parties”), art. 24.

signed by all founding members.<sup>103</sup> The constitutions of political parties must also contain an undertaking or commitment to respect the Charter, the Constitution, and so on.<sup>104</sup> Also, Burundian citizens have a duty to preserve and strengthen national unity in accordance with the Charter of National Unity.<sup>105</sup> Finally, no constitutional amendment procedure should be accepted if it undermines national unity, i.e. the Charter of National Unity.<sup>106</sup> Moreover, according to the final provisions of the Charter, it is irrevocable and cannot be amended. No regime, institution, or law can repeal or refuse to abide by it.

The above analysis demonstrates a special status of the Charter of National Unity within the constitutional life of the country. But it is not clear whether the instrument is of a constitutional or a supra-constitutional nature. In view of the general nature of its provisions, which are sometimes formulated in non-legal terms reflecting political aspirations (despite there being some binding provisions), Professor Reyntjens suggests that the Charter should not pretend to supra-constitutional status.<sup>107</sup> However, I do consider that the Charter should at least be regarded as an instrument of constitutional status given its subject-matter, but also because most of its provisions are of a binding nature on the state's apparatus, on individuals, and on private entities, such as political parties. There may be a need for clarification of some provisions, but this in itself does not undermine its constitutional nature. In any case, every constitutional instrument is programmatic and lays out the nature of the political regime and policy orientation.

## **B. The Arusha Peace and Reconciliation Agreement for Burundi (APRA)**

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<sup>103</sup> Law on Political Parties, n102, art. 47.

<sup>104</sup> Law on Political Parties, n 102, art. 48.

<sup>105</sup> Constitution, art. 64.

<sup>106</sup> Constitution, art. 299.

<sup>107</sup> Felip Reyntjens, *L'ingénierie de l'unité nationale. Quelques singularités de la constitution burundaise de 1992*, <http://www.politique-africaine.com/numeros/pdf/047141.pdf>, p. 146 (visited 15 May 2013).

The APRA, which was the culmination of years of political negotiations, provides a frame-work for governance in Burundi that was designed to address the root causes of the conflict and to permanently resolve violence. The Agreement's legal-looking structure and legal-type language suggest an instrument of a legal nature. But its real status is not clear. Is it a simple legal instrument? Is it of a constitutional nature or of a higher standing? Neither the Constitution nor the APRA itself provides an answer.

This is different from the situation in Rwanda, where the 1993 Arusha Peace Agreement for Rwanda was explicitly recognized as having supra-constitutional status.<sup>108</sup> Apart from repealing half of the provisions of the existing Constitution,<sup>109</sup> it clearly states that in the case of conflict between other provisions of the Constitution and those of the Peace Agreement, the latter shall prevail. Similarly, the Government Convention of 1994 was elevated to supra-constitutional status in the sense that it overrides the provisions of the 1992 Constitution.

However, since that path was not followed as far as the APRA is concerned, one can look at the practice and general consideration of the nature of peace agreements. The practice suggests a higher status, as reference is made to the APRA in the preamble of every new law in Burundi, even before the actual reference to the Constitution, which is supposed to be the fundamental law. The APRA is also referred to in the preamble of the Constitution itself.<sup>110</sup> Moreover, legal

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<sup>108</sup> Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, Arusha, 3 August 1993.

<sup>109</sup> Ibid., art. 3(2).

<sup>110</sup> Constitution, preamble, para. 2.

categories aside, peace agreements tend to be viewed as transitional internationalized constitutions or peace agreement constitutions.<sup>111</sup>

In conclusion, despite the legal omnipresence of the Charter of National Unity and the APRA in the legal infrastructure, their real status is less than clear. This fact is further complicated by the substance of Article 209 of the current Constitution, which states that when discharging their functions, courts are only bound by the Constitution and the law. No reference whatsoever is made to the Charter of National Unity or to the Arusha Peace Agreement.

## **X. Conclusion**

The 2005 Constitution of Burundi emanates from the Arusha Peace and Reconciliation Agreement, which put an end to the political crises and subsequent civil war in the 1990s. It articulates human and group rights and provides for a political system that creates the enabling environment for the protection of those rights. Representation of historically marginalized ethnic and social groups is provided for. Nevertheless, some segments of the population are still unhappy; for instance the Batwa consider themselves to have been left out of the power-sharing structures at the decision-making level. In fact, as highlighted above, Tutsi and Hutu share 100 per cent of the Cabinet and other governmental or public positions; the Batwa, if any, are hardly associated with this sphere. Likewise, some Hutu are not happy with the level of their representation (50-50 within the army; 60-40 in the public service) given the fact that they outnumber the Tutsi almost five to one. That is why some (Hutu) voices are calling for a constitutional review in order to redress these ethnic imbalances. Logically, Tutsi-dominated

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<sup>111</sup> Christine O'Bell, *Peace Agreements: Their Nature and Legal Status*, 100 American Journal of International Law, 373, 392, 407-408.

parties are opposed to such a call, claiming the inalienable '*droits acquis*' from Arusha. Therefore, for the moment, the issue of a constitutional review is on hold.

The Constitution institutes a political system founded on a presidential regime with a delicate balance of powers between the three main branches of the state. Even so, the executive branch seems to have a great deal more room for manoeuvre for its decisions than the two others which, in part, depend on the executive for their proper functioning.

In summary, the 2005 Constitution has largely been implemented, especially its the “political” provisions. This demonstrates the willingness of the political leadership to overcome the root causes of the deadly conflicts Burundi went through.

Finally, it has been highlighted that the constitutional landscape of Burundi extends beyond the 2005 Constitution. The co-existence of a formal constitution and two fundamental instruments—the National Unity Charter and the Arusha Peace Agreement—warrants a determination of their real status within this constitutional regime. Unfortunately, the Constitutional Court has not yet had such an opportunity. In any case, the lack of precision and the vagueness of the provisions of the Unity Charter and the APRA are not fatal; they provide evidence of “the substantive long-term goal of finding shared notions of identity and statehood.”<sup>112</sup>

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<sup>112</sup> O’Bell, n111, p. 398.

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