



Institut de Recherche et de Dialogue pour la Paix
Institute of Research and Dialogue for Peace
Ikigo cy'Ubushakashatsi n'Ubusabane bigamije Amahoro

Tél. (250) 57 3431
Fax (250) 57 3454
Rue Député Kamuzinzi
E-mail: irdp@rwanda1.com

THE RULE OF LAW IN RWANDA

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FOREWORD

The research carried out by IRDP is a proposal to address a situation and a need.

As a matter of fact, the study that was undertaken after the most horrifying tragedy of the Rwandan history aims at putting forward some possible solutions i.e. is to know how people can catch up after violating the fundamental human right, i.e. the right to life. Can the population be able to pull themselves together, come back to reason, develop and apply protecting mechanisms of human rights and curb violations? It is also a response to Rwandan people's real need. The genocide chock continues to provoke vivid emotions and there is fear to see the crime repeated in the future in case human rights are not restored as soon as possible.

Besides, it is known that in Rwanda, the most serious human rights violations were committed by the government itself. That is why IRDP, through participatory methodology, has strived to reunite, analyze and debate on what rule of law should be in philosophy, and what it should be in everyday life, and especially how to build a rule of law in Rwanda after the genocide.

The task to build a rule of law is not the government's business only; it should also involve the citizens. If the former put into place the leading mechanisms for a rule of law, the latter will be invited to recognize it and follow it. This means that every citizen enjoys prerogatives and has duties vis-à-vis other citizens. Therefore, even when they are pushed by their leaders to violate other people's rights, they have to think twice and take the right decision between a blind obedience and a noble disobedience. What is more, the citizen looks after their own rights and assists other citizens who do not know their rights and those who cannot defend their own rights.

The IRDP research was not only limited to the study of concepts, principles, rule of law indicators. It also analyzed their implications to Rwanda. The study examines human rights since Gihanga up to the modern Rwanda, via the Middle-Ages and the acculturation period of the 9th, 14th, 15th, 19th, 20th and 21st centuries. This approach allows appreciating human rights respect within a society without a written code, a society with a written code that was brought in by foreigners and copied from an exogenous society. It also compares a written code based on partisan interests and a written code based on general interest.

While showing the huge progress made in respecting human rights during the 21st century, the study indicates tracks to follow in order to improve on what has been reached today. Perfection is an ideal our actions should strive to reach while building a rule of law.

Prof. Pierre RWANYINDO RUZIRABWOBA
INSTITUTE DIRECTOR

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INSTITUTE DIRECTOR

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I. INTRODUCTION

1.1. Context

It is very important to organize a community in order to ensure the harmony of its members. The structures and the ways of organizing the community must take into account the citizens' welfare. The Government institutions should function in such a way that some established society norms are followed. Without these norms, there will be rivalries among people who consider their own interests in trying to get power at any cost; the country will end up becoming a jungle. There must be a hierarchy in these norms in such a way that the power of every authority has limits. In other words, even the public administration must follow the law. The public administration can act while respecting a certain number of the laws and rules adopted by the citizens through their representatives or referendum.

In the modern societies, human rights and freedoms are a cornerstone of power organization and management. They are included in the Constitutions of every country. These rights and freedoms guarantee the Rule of law. In the same way, the Constitution establishes the areas of intervention of various government organs and institutions in such a way that the above mentioned rights and freedoms are respected. However, this was not the case in the traditional societies.

The great nations which claim to be the defenders of human rights and freedoms have experienced a significant development in the establishment of the Rule of law from the Antiquity up to Modern Times. From the beginning, a group of people take a region through violent means and starts to impose their order (the creation of the USA, Roman Empire...). Their legitimacy is based on "the military supremacy of the most powerful". The same logic has been experienced in other countries. In Rwanda, the expansion of the Kingdom started in the neighbourhoods of Lake *Muhazi* where the *Banyiginya* clan conquered gradually the neighbouring communities and imposed its order.

The decline of these systems is always characterized by the "violation of the Rule of law", i.e. the primacy of power and violation of individual's rights and freedoms. The subsequent religious, social and economic revolutions (Lutheran, American and French revolutions) go hand in hand with the decline of aristocracy (transfer of power through family bonds) and theocracy (transfer of power through the religion). Since then, power is transmitted by the people; justice is rendered on behalf of the people and not in the name of a Prince or God. The revolutions constitute the foundation of the subsequent human rights charters and declarations. They place the citizen in the heart of power organization and management, they establish the foundations of the Rule of law.

In this line, the Rwandan historical development has similar experience with what has just been described. For instance, while these Western societies have experienced to some extent slavery, serfdom, feudality and vassalage which are somehow similar to *ubuhake*, *ubukonde*, *uburetwa*...in the Rwandan context. The first Westerners who tried to write the history of Rwanda consider these practices as equivalent to feudality, vassalage and even slavery imposed by the leaders on their citizens. Some politicians made a comparison or deliberate misinterpretation

to justify ethnic killings and other human rights violations from 1959 up to 1963. These clashes, especially the 1959 clashes, are called "social Revolution" just as the previously mentioned revolutions. People do not agree on this revolution; its defenders believe that it is legitimate and gives power to the people ("*the revolution assets*") whereas those who have a different opinion believe that they were pure acts of cruelty to divide the Rwandan society instead of establishing human rights and freedoms. What happened really? Can we declare that the revolution brought new values which are likely to promote the Rule of law in Rwanda?

Since the independence, all the regimes had their own Constitutions which list clearly the human rights and freedoms. Unfortunately, they were violated.

The extremely barbaric acts committed in our country during the Tutsi in 1994 did not occur as a consequence of an abrupt reversal of human morality. They result from the government failure and lack of mechanisms to protect the citizens and a deliberate will to ignore some fundamental values of our society which can be found in various laws and regulations. The laws have always existed but their implementation has always been a major challenge.

Justice is one of the major indicators of the Rule of law and protection of human rights and freedoms. "It has always been under the impact of the executive power and corrupt", people mention. The culture of impunity, genocide and arbitrary detentions reveal to which extent Justice has failed to fulfil its role of protecting the human rights and freedoms.

Considering this fact, many questions can be raised including:

- Is it possible to declare that the rule of law existed in various regimes in Rwanda?
- What can be done when the mechanisms to protect the human rights and freedoms are inefficient and how to fight against the leaders' arbitrary decisions?
- Why does the executive power interference in the activities of other powers and how to restore balance among the powers for the establishment of the Rule of law?
- What is the main cause and what contributes to the violation of laws and regulations as well as the tendency to consider that job title is above the law and other legal norms?

Lasting peace is not possible without necessary prerequisites for the establishment of the rule of law. Within this framework, IRDP National Group has organized a broad consultation from November 7th to November 8th, 2003 and decided to undertake a deep research about the challenges of the establishment of the rule of law in Rwanda.

1.2. Research objectives

This aims of the research are the following:

- To ensure broader consultation and to promote a culture of dialogue on delicate issues relating to the the establishment of the rule of law;
- To organize a reflection and dialogue forum for various stakeholders who are interested in justice and the rule of law in Rwanda;
- To contribute to the respect, the protection and the promotion of human rights and freedoms through a better understanding of the development of the Rule of law in Rwanda;
- To contribute to the reinforcement of the rule of law in Rwanda and to suggest concrete recommendations resulting from the research.

1.3. Research rationale

The findings of this research will be useful to the public administration, the Rwandan citizens, and the national as well as international stakeholders who are committed to the promotion and the reinforcement of the rule of law in Rwanda.

The broader consultation:

- Will show the politicians what their efforts have been compared to what should be done as far as the respect and the protection of the human rights and freedoms are concerned;
- Will allow the citizens to express their views on the Rule of law and to communicate with other people using audio-visual tools;
- Will allow all the politicians to evaluate the impact of their activities and to determine the new areas of intervention taking into account what the population has expressed concerning the above mentioned questions.

1.4. Methodology

For this second phase¹, the research work has been carried out by a team. The team examined how to apply IRDP global methodology taking into account the specific characteristics of each topic. Without deviating from IRDP general methodology and after an agreement with the Institute, the team chose a sub team which established the dates for the meetings and the areas of the research, the resourceful groups and people who can contribute to the research activities. These groups include the judges of the ordinary jurisdictions at various levels, the public prosecutors, the "*inyangamugayo*" in the *gacaca* jurisdictions, the bar lawyers, the students and law and journalism lecturers, the politicians living abroad, the dignitaries of the former regime, the current political leaders, the prisoners, etc. An exhaustive list of various categories of people we met is presented in the appendix.

¹ The first phase consisted in identifying the main challenges to the establishment of a sustainable peace in Rwanda. About 14 challenges were mentioned in this phase and the National Group recommended a thorough study on 5 of them including: Tutsi genocide in Rwanda, History and recurring conflicts in Rwanda; democracy; the rule of law in Rwanda, the economic development and poverty reduction challenge. The second phase will carry out an in-depth study of these themes. This document deals with the rule of law only.

Throughout research, the consultation of the documentary data contributed to the clarification of key issues raised during the process.

An interview guide was prepared for the groups which were involved in this research. The issues that have been discussed were formulated according to the mandate given by the National Group about this topic and the recommendation made by the team.

During the consultations, a questionnaire was prepared with the aim to collect additional information relation to the research.

1.5. Scope of the research

Taking into account the relevance of the research question and the results of the first phase debates, this work focuses essentially on the contribution of the human rights and freedoms to the establishment of the rule of law. The human rights and freedoms can be studied in many ways. Research deals essentially with the civil and political rights, the economic rights and the social rights. This takes into account the concerns developed during the first phase of the research.

The present research analyses also other indicators of the Rule of law and their application on the Rwandan context. The human rights and freedoms constitute the foundation of the Rule of law and showpiece of this research. The maintenance of the laws and their hierarchy is also analyzed. The issue of power separation mentioned above is discussed in line with the signs and the causes of the violation of power separation principle.

Finally, it is important to analyse the context in which justice in Rwanda evolved and still evolve vis-à-vis its mandate of ensuring the Rule of law.

All these questions were studied throughout the main Rwanda historical events: the monarchy (pre-colonial and colonial period) and the republican era from 1961 up to now.

Before discussing about the issue of the Rule of law in Rwanda, it is important to understand this concept, its definitions, its characteristics as presented by the doctrine and sometimes by the debates organized on this topic.

II. MEANING OF THE "RULE OF LAW"

The Rule of law concept relates essentially to the concept of Nation. First of all, let us try to understand the meaning of nation in order to get a better understanding of the Rule of law concept.

2.1. Definition and features of the Nation

Nation seems to be a difficult concept. In general, it has three meanings: a geographical, a legal and an administrative meaning.

2.1.1. Classical definitions

1. In its geographical and sociological definition, the nation relates to a territory where you can find a given population.² In this the word "Nation" means an organized community whose sociological support is the country characterized by cultural homogeneity governed by an institutionalized power. In this angle, Rwanda and Burundi are Nations.³
2. From the legal point of view, a nation is something which relates to the law; it is therefore a legal entity, prone to rights and obligations.⁴ Consequently, the nation relates to public administration within this political society as well as the relationship between those who are in power and the citizens. Someone may say for instance that the government is unable to solve the problems, etc.⁵
3. The third meaning of nation relates a key element in public administration as opposed to public organizations at local, province, district, and public institutions level.⁶

From the three definitions, the word nation implies a community of people with a particular territory and an economic, social, political and legal order directed towards the public interest which is managed by an authority that has constraint powers.⁷

2.1.2. The idea of "government" by ordinary Rwandan citizens

1. Government means an organized power with a mandate to protect a vital environment where a human society lives. This administration can be called a nation, a republic or a monarchy, etc.

² Ph.Foillard, *Droit Constitutionnel et institutions politiques*, Paris, CPU, 2001, p.25.

³ André Hauriou et Lucien Sfez, *Institutions politiques et droit constitutionnel*, Paris, Montchestien, 1972, p.30

⁴ Ph. Foillard, *Op cit.* , p. 25.

⁵ Andre Hauriou et Lucien Sfez, *Op cit.* , p. 30.

⁶*Ibidem.*

⁷*Idem*, p. 31.

2. The government includes the population (*Leta ni abaturage*). People used this definition quite often during the consultations and discussions. However, the population is able to ask questions about the origin and the impact of a government. Many interpretations can be made. However, the analysis of the interventions reveal that the interpretation of the origin of a government derive from the political speeches and even the propaganda before and immediately after the independence "we are the government" to mean that we are the ones who give power. On the other hand, this definition simply means that the government includes eight million of men and women who live in Rwanda. In the latter case, this reveals the absence of almost all the elements which constitute the government in the Rwandan context.

3. The government implies the authorities (*Leta ni ubutegets, abayobozi*): it is a central power which is characterized by leaders' constraint and control over the citizens' properties and rights. This idea of the government derives from the observation. From the relationship with the leaders, citizens conclude that government implies constrain. The government implies a physical person who gives orders to the ordinary citizen. Examples or external signs to illustrate this power are there: *Uburetwa* (forcing people to work in order to improve public interest services during the colonial period), *umuganda* (Community work involving the population, it is done even nowadays), *umusoro* (*established amount of money to pay the tax*), *abamotsi, ibirongozi, Konseye, responsable* (various leaders who constrain the citizens), the *local defence forces, shiku, ikiboko, isuka n'agatebo*. Legal constraints also exist for instance the general law principle which specifies that "No one is supposed to ignore the law".

Some common characteristics are present in all the nations; they are organized according to the positive law.

2.1.3. Specific features of a regime

The government power is centralized, constraining, balanced and limited by the law.

2.1.3.1. Power

Power is the legal or conventional capacity to exercise all or part of the rights of another person and to act on his/her behalf (it is synonymous to proxy or mandate). The power is given by the people to those in power so that the latter can promote and protect people's public interests.

To promote democracy, this relationship should involve participation and collaboration rather than dependence and submission.

2.1.3.2. *A centralized power*

In most of the regimes, government power is characterized by centralization. The management is ensured by the central government while the local or or special entities carry out purely administrative duties.

The political and administrative centralization varies from one country to another: some countries can adopt power decentralization while others, including some African countries centralize their activities and even exaggerate. ⁸

2.1.3.3. *The government monopoly to ensure full control*

The government is efficient when it has full control (armed forces, police, etc...).

The need to have armed forces and police

To some extent, the authority lies in the monopoly to ensure full control. Without this monopoly, the government would be a useless institution. To some extent, the country sovereignty depends on this monopoly of the armed forces to ensure full control.

Separation between the civil and military authorities

The government power is a civil power. However, the supremacy of the civil power on the military power results from a very long development. At the beginning, the government has a very strong military power. Many African countries can be taken as an example. In Western countries, sometimes the government reveals this picture, especially during the state of siege. However, during normal circumstances, government power is organized for peace; it is therefore implemented by the civilians. In addition to the civil power, there is another power which is organized during war situations to defend the country. However, this military power is different from the civil power and depends⁹ on the civil power

Limitation of the government power by the regime

Government power can be limited by the regime only, through power separation principle. Therefore, the huge amount of public administration power exerted formerly by the Prince for a long period of time, is limited in such a way that from now on, it is possible to use Montesquieu's expression: "to limit power using power", i.e. to use the relative antagonism of various government power to oblige everyone to act according to the law¹⁰. The government is therefore organized in

⁸*Idem*, p. 43.

⁹*Idem*, p. 52.

¹⁰*Idem*, p. 63.

three separate but interactive powers: the Executive power, the legislative power and the judicial Power.

Once this first step is done, the practical problem for the judge is to ensure the legal regulations: the Constitution and ordinary laws are followed by the Executive and the Legislative power.

2.1.4. The State and the nation

2.1.4.1. The State in general

In general, "Nation" refers to a community where individuals strongly feel their unity through material and spiritual links and consider themselves as different from the members of the other community groups in the country.¹¹

The creation of the Nations is based on ethnic, racial, linguistic and religious criteria but it is important to include such aspects as historical, the public interests and spiritual links¹². The human community located in a particular territory of a nation constitutes the state. States are essentially territories.¹³

On the international scene, the national sovereignty doctrine states that the first right of the Nation is to achieve its full political and legal development; this means that every nation has the right to constitute the State.¹⁴

2.1.4.2. Historical landmarks of Rwanda as a State

The historians and others people show us the geographical framework where the negro-African, pygmies and other nilo-Saharan tribes evolved since 12000 years. The right of the people depends on the geographical and physical environment, the climate, the rain factor, the economic activities and various migrations which contributed to population intermixing in the Great Lakes region:

As far as the Rwandan population from 400 before JC up to 1.200 after JC is concerned, the historians believe that the Barenge are the first occupants of the Great Lakes region. The Basinga are the last descendants in Rwanda and Burundi. The former are real "Abasangwabutaka"¹⁵.

As far as the social facts are concerned, the population migratory movements in the Great Lakes region, the Gihanga founder myth and the supremacy of the Banyiginya Clan are the major events of Rwanda pre-colonial Rwanda.

The vital influence on our history and destiny was carried out by somehow mythic figures from Gihanga to Musinga, including Ruganzu Bwimba - Ndoli ya Ndahiro - Kigeli Mukobanya - Kigeli Rwabugiri. Moreover, before colonization, people believed in one God called "*Imana y' U Rwanda*". Ryangombe was the famous

¹¹ *Ibidem*.

¹² *Ibidem*.

¹³ *Idem*, p. 35.

¹⁴ *Idem*, p. 31.

¹⁵ First occupants

apostle and great pilgrim in the Great Lakes region. His identity is between myths and historical realities.

Nevertheless, since the creation of the Banyiginya dynasty, the latter bears the causes of its destruction and the embryo of permanent crises within the Rwandan society:

- Military domination and permanent dependence on expansion wars to ensure its survival;
- Recurrent war and peace seasons;
- Dependence of the Banyiginya clan on the so called the “matri-dynastic clans” to enthrone a new King (matrimonial alliance with the Bega and succession war whenever there is power vacancy);
- Discriminatory ideology to conquer power and to ensure a successful political career. The enemies took this opportunity to justify the fall of the Banyiginya dynasty and the genocide.

From the initial society to the Banyiginya monarchy

The Gihanga myth is the founder myth in Rwanda and the origin of the Banyiginya dynasty. KANYARWANDA Gahima, a mythical King is the founder of this myth and this nation. The following are his legacies:

- He gave a name to this country, "*Rwanda rwa Gihanga*";
- He gave a national unity ideology, uniting hutu-tutsi-twa as children of the same father, in one nation, all of them with complementary roles;
- A King, Mwami, federator or unifier: the Mwami protects the rights of all the Rwandans (political and administrative power, judicial power and moral power). Until the arrival of Lyangombe, he was the only intermediary between *Imana* and the Nation. His mission was to protect the borders of this nation and to expand the Country, to ensure peace and security of all the citizens (*Rubanda rw' umwami*) and to protect them from the foreigners. Nobody was allowed to violate their rights of other citizens.

The positive consequences of the Gihanga myth are the following:

- The creation of a State-Nation: the conquest of vital territories by Ruganzu Bwimba and his descendants, the historical bami (kings) whose founder is the famous Ruganzu Bwimba also called "umutabazi" whose sacrifice legitimated the Banyiginya dynasty and created opportunity for a new nation to the detriment of other dynasties (Bugesera, Gisaka, Karagwe, Burwi, Kinyaga, Ndorwa, etc).
- The first attempts to organize the political and judiciary system by Gihanga: The origin of Rwanda is described in Banyiginya dynasty founder myth. The first phase is composed of the "*abami b' umushumi*". Here, the nation and the King are same. Under Gihanga, the Abiru legal framework was created.
- National Unity and Patriotism ideology (the King symbolizes the Nation).
- The continuity and stability of the political power through the regulation of the law relating to the transfer of political power. From now on, the political

power will be transmitted among the heirs or successor of Gihanga and Kanyarwanda Gahima.

- The victory and supremacy of the Banyiginya dynasty over the other kingdoms has contributed to the creation and the expansion of a kingdom, a Nation, a Country.

However, this myth does not have positive aspects only:

- There were inequalities among the Rwandans noticed in the distribution of political and social positions among the hutu, twa, and tutsi. This created future inequalities and discriminations among Rwandans.
- Exclusion ideology: the supreme power was given to Banyiginya only. The Rwandan history shows that the other clans caused problems whenever a new King had to be appointed. Ambitions or opposition war were organized whenever the country needed a new King. Opposition between the Banyiginya and Bega led to recurrent conflicts focusing on the opposition to the power legitimacy. Remember that the Kings was from the Banyiginya while the Queen came from the Bega..

It is important to notice that in the history of the people and nations the inequalities and the myths constitute an unavoidable shift towards the creation of States and Nations.

Geographical limits of Rwanda during the Berlin Conference

The Berlin conference which decided upon the fate of Africa, was preceded and followed by the explorer's missions including that of 1876 in Rwanda by Stanley (he stayed in Gisaka at Lake Ihema), followed by that of 1894 by Von Götzen, Ramsay, Kandt and Bethe.

Since the region where Rwanda is located was given to Germany, in 1896, Mwami Yuhi V Musinga of Rwanda who accepted the German protectorate accepted ipso facto to lose the political sovereignty.

During the same period in 1900, Christianity was introduced in the country. The first catholic mission was created at Save by Bishop Mgr Hirth from the Missionaries of Africa (White fathers). Both institutions collaborated in a complementary way.

Before the arrival of the colonizers, the Western border of Rwanda often went beyond Lake Kivu, it included Tongo territory (Masisi), Bwisha (Rutshuru) and Gishali (Masisi) towards North West. The Belgian Congo had already taken this part secretly, whereas in the North-West, the Germans gave Bufumbira territory to the British up to Lake Rwicanzige (currently Lake Edward) and in the North-East a large portion of Ndorwa province.

This period is therefore characterized by the splitting up of the country and the influence of Christianity on the Rwandan cultural values.

One of the serious responsibilities of the international community was the splitting up of African countries during the 1885 Berlin Conference, which established the borders arbitrarily according to the free will of the participants and their colonial ambitions. They created minority groups outside many African countries including Rwanda. These minority groups encounter many problems relating to nationality.

The role of Christianity should not be minimized because the freedom of conscience, worship and religion were violated. Colonization contributed to the supremacy of Christianity as religion, culture, and even a philosophy (legal sociology). The first missionaries adopted integrism which can be compared to that of current Islamists terrorist organizations. People were forced to become Christians, Christianity became a source of income, a better way to participate or get better positions in politics. Religious intolerance was not only the cause of the expulsion and dismissal of Mwami Musinga, but also the cause of solidarity between the Church and the colonial power to fight against freedom fighters' groups during the colonial period.

The nation was somehow established and its main features were somehow determined. It is important to analyze the extent of the attention those in power gave to the people in general and every citizen in particular.

2.2. Definition and features of the RULE OF LAW

J Chevalier specifies that the Rule of law appears as "a value in itself, all the qualities of the political organization will be measured according to this value".¹⁶ We will try to define this concept and to provide important characteristics.

2.2.1. Definition of the "Rule of law"

Before developing this topic, let us clarify the concept "Rule of law", and come up with a definition which will be used throughout this document to avoid any confusion.

According to the political lexicon Dalloz, the Rule of law is a system where the public authorities follow the legal provisions through a jurisdictional control.¹⁷ It is appropriate however, to differentiate the concept "rule of law" with small letter "r" and "Rule of law" with capital letter "R".

The rule of law with small letter "r" has double meaning:

Unlike *the nature* referring to human existence condition, it can indicate a situation, which Locke calls *deficient*, because it does not have neither a positive law neither legal rules to rule, no judge nor legal power to settle possible disagreements or litigations between the members of the society. The human beings natural condition is anomic in such societies, it is characterized by the law of the jungle just as it is the case for wild animals.

¹⁶ Jacques Chevalier, L'Etat de droit, Paris, Dalloz, 1992, p.7, cite par Laurent Gaba, *L'Etat de droit, la démocratie et le développement économique en Afrique Subsaharienne*, Paris, L'Harmattan, 2000, p.30

¹⁷ Debbasch et Daudet, *Lexique Politique*, Paris, Dalloz, 1988.

The rule of law can also indicate the marital status (*status civilis*) which is characterized by the existence of legal norms whose fundamental and first aim is to prevent violence and to control spontaneous behaviors.¹⁸

The “Rule of law” with capital letter “R” introduces an institution (*civitas*): The State *stricto sensu* (*res publica*) in which a set of legal norms has a true Constitutional and administrative function. These rules are not natural, however they are positive and they are hierarchically ordered from the Constitution to the law and the regulations whose mandate is to implement or to apply the legislative texts. These norms form a system of law, a pyramidal legal arrangement which gives a legal structure to politics.

As we go on, let us remember these two meaning (*status civilis* and *civitas*) which are related: if they are not the same, they do not exclude each other, apart from the fact that *civitas* implies a set of rules which organizes and manages all the politicians; in other words, the legal rules of the government "go beyond" the moral precepts which oblige the conscience only. These are regulating norms essentially which impose appropriate legal constraint to the citizens and suitable sanction in the event of failure.¹⁹

2.2.2. Rule of law doctrines

The aim of developing the Rule of law doctrines is to place the government powers in the limits established by the law. Therefore, these doctrines express the will to reinforce the "juridicity" of the government power. This common objective introduces different points of views on the relationship between the government and the law: the Rule of law is, either the government uses the law in its actions, or the government acts according to the law or the government acts according to its law which has some intrinsic elements or values²⁰.

2.2.2.1. The indissociable Government/law

Law is defined as “a set of behaviour precepts which are established in the form of compulsory rules which will contribute to order and justice among citizens living in the same society”²¹ The government has close relationships with the law in the sense that the government has a very powerful influence on the production and implementation of the legal regulations. On the other hand, law imposes limits to the government action²².

Emphasis will be put on the close, structural, constitutive link between the law and the government to such extent that one concept implies the other and vice versa. This reality leads us to double situation:

- On the one hand J. Chevalier emphasizes the law calls for the government, in such a way that the latter is defined according to its ends (justice), its mode of intervention in the social relationships (the lawsuit) or the normative power

¹⁸ Laurent Gaba, *Op cit.*, pp. 30-31.

¹⁹ *Idem*, p. 31.

²⁰ *Idem*, pp. 32-33.

²¹ A. Hauriau et L. Sfez, *op.cit.*, p.56

²² *Ibidem*.

(the constraint), whether you like it or not, it always seems to refer to the government which is presented as the incarnation of the law, the great indispensable operator "to potentiate" the legal norm by providing its full effectiveness.

- On the other hand, J. Chevalier emphasizes the government calls for the law: not only power is expressed in/through the legal norm and passes through the enactment of compulsory regulations, still the government is impregnated by the law and seems to be shaped entirely in the legal mould: "legalisation" appears as one of the distinctive features of the government as a type of political organization.²³

2.2.2.2. Rule of law, way of classifying the political regimes

The Rule of law can still be considered as a framework of analysis which contributes to the description and identification of a political regime. It is considered as a way of classifying the political regimes (based on the principle of submission to the law). This approach is a significant step in the establishment of the Rule of law in the current context.

2.2.2.3. Rule of law, theoretical invention from the Western countries

The Rule of law doctrine evolved in time and space. Let us analyze this concept from the perspective of the current major judiciary systems: *Rechtstaat* (Germany), *the Rule of law* in France, then in Anglo-Saxon countries, *the rule of law* (the United Kingdom and the United States of America).²⁴

In Germany, the concept of Rule of law is a literal translation of the German word *Rechtstaat* which is a doctrine worked out in this country by some authors in 19th Century. In general, the aim is to use the law in order to limit the government power. The government is very powerful, strong. To prevent exaggerations, the law becomes the parapet.

In France, the Rule of law concept appeared in the 1920s. However, this concept emphasizes the need to protect the citizens' rights. What matters is the citizen; his/her rights should not be violated.

Beyond the law supremacy principle and the equality of all the citizens before the law, the *Rule of Law* in the United Kingdom implies a certain number of intrinsic qualities of the legislation comprising a set of law general principles, namely: the laws do not have retroactive effects, they must be discussed before adoption, they must be clear, they must be stable, they must foresee other things ..., and recognize the rights and freedoms of all the citizens.

²³ J. Chevalier, op.cit. quoted by L.Gaba, op.cit. pp.31-32

²⁴ For full explanations, voy. L Gaba, *Op cit.*, pp. 32-36

2.2.2.4. *The idea of "Rule of law" by ordinary Rwandan citizens*

The Rule of law means a system whereby government authorities obey the law through jurisdictional control. In this system, there is power separation (executive, legislative and judiciary power). The norms are treated on a hierarchical basis (Constitution, International Conventions, ratified treaties, laws, and regulations) and the legality is respected. This is the summary of the main ideas expressed by “uneducated people”, their understanding of this concept is very limited. Indeed, the expression "*igihugu kigendera ku mategeko*" used in Kinyarwanda language to mean the Rule of law means that the government authorities must follow the existing laws. The first observation is that the other meanings relating to the Rule of law are ignored. The Kinyarwanda expression brings more confusion if you consider various interpretations which were made although not mentioned here. Maybe the expression "*igihugu cyubahiriza amategeko*" is more meaningful due to the fact that the public administration, the government authorities must follow what is written in the laws and regulations.

The definitions, the ideas as well as the interpretations are so many and are not completed in this part; however, let us analyze the main features of the Rule of law.

2.2.3. **Features of the Rule of law**

The above definitions can help us to point out the features of the Rule of law:

- *The government should follow the national and international laws and regulations.* At national level, the Rule of law is characterized by a hierarchy of norms. On the international level, the Rule of law is characterized by the respect of the International Conventions and the ratified treaties (*pacta sunt servanda*), as well as the respect of other Nations sovereignty (avoid violating other nations borders);
- *The protection of public rights and freedoms:* in each country, there are a certain number of rights and freedoms (*bill of rights*) which must be respected. The government must ensure they are not violated;
- *Those in power should respect the Law:* the Rule of law implies the respect of the legal norms;
- *Equality of all the citizens before the law:* this is ensured by good a governance and a good administration of justice;
- *The power separation:* power separation theory implies the distribution of the tasks among independent organs of the government: power is distributed among many organs. Montesquieu distinguishes the power to make the laws (legislative power), to implement the laws (executive power) and the power to judge the crimes and conflicts (judiciary power);²⁵
- *Power balance and control by all the government institutions:* control by the judiciary power, parliamentary power and popular control through the elections, *public hearings* and referendum, Ombudsman, etc.

²⁵ Ph; Ardant, *Institutions politiques et Droit constitutionnel*, 13e edition, Paris, LGDJ, 2001, p.46.

In addition to all these characteristics, it is necessary to have a competent and well equipped judiciary system to ensure that all those who violate the law and regulations or any violation of the human rights and freedoms is sanctioned. All these characteristics would be useless if justice was not well established to ensure that they are implemented.

The analysis made in the following sections concerning their applicability in the Rwandan context shows that these characteristics will be subdivided in three categories: power separation, the legality and the hierarchy of norms and finally the human rights and freedoms. At the same time, we will discuss about the context in which justice is developing in Rwanda, the challenges to ensure the Rule of law.

When a government does not fulfill these characteristics then the Rule of law is absent. Since any country in the world can not accept to be considered as a country where the Rule of law is absent, observers should do so. In general, such countries have almost the same characteristics.

2.3. Characteristics of countries where the Rule of law is absent

If some governments can claim that the Rule of law exists in their Constitutions and other laws, the Rule of law does not exist in others which do not fulfill these criteria. Countries where the Rule of law is absent lack justice and freedom. Moreover, citizens' right and freedoms are not their major concern. Countries where the Rule of law is absent have their own ways of adopting dictatorship depending on the interests of the regime. There are many examples in the history.

2.3.1. Examples of absence of rule of law in the History

In the history, there are leaders whose behaviour did not promote the Rule of law. For instance, the military empires (Rome), the communist totalitarian regimes (Russia, Korea, Romania...), the feudality in the Middle-Ages (France: Louis XIV), colonies, single-party regimes in many African countries and elsewhere. In these countries, the leaders adopted ideological dictatorships, social dictatorships, monarchy, autocracies, or simply military dictatorships.

The power of ***the ideological dictatorship*** is based on some fascinating ideology and does not leave room to freedom of conscience and thought. The religious dictatorships are an example. Here, those who have religious power have a strong influence on their followers' consciousness.

The government power is a temporal power; this implies the separation between the civil and the religious power. When the religious power manages a country, individual freedom is likely to disappear and be replaced by a spiritual or ideological consciousness or fanaticism.

Moreover, there is not enough freedom in the social organization if the religious authority is the same as the civil power.

The power of ***the social dictatorships*** is based on social classes, such as the middle-class or the proletariat (the socialist regime in the USSR), on the ethnic groups (Kayibanda Parmehutu party dictatorship in Rwanda), on the races (Hitler Nazi regime in Germany, Peter Botha Apartheid regime in South Africa) or other particular forms such as Musolini Fascism in Italy, Jacobinism in France, etc. The proletariat dictatorship is one example of social dictatorship. It can be noticed (ideologically) as social conflicts disappear gradually until the social classes also disappear. From an economic point of view, the economy is managed by the society as all the means of production are put together in the form of public or self-managed companies.

There are many examples of ***monocracies and autocracies*** in the history. Many nations have been ruled under absolute monarchy regimes. The power of the King or monarch was divine and unquestionable (ex: Rwanda before the colonial period).

The authoritarian administration of single party regimes is a contemporary illustration of this dictatorship. The Marxist regime in the USSR was an authoritarian regime. It created confused the three powers and gave more priority to the Communist Party which was the single political party.

Finally, the ***military dictatorships***: In theory, the difference between the civil and military power lies in the way freedom is perceived. When a government is under the influence of the military regime, people do not have or have very little chances to decide freely. African countries have been ruled under military dictatorships, especially after the independence. It is true that the Heads of States immediately after the independence were considered as models to their successors. The first Heads of States had not models to follow except the colonizers. However, coming to power through violent means was and still remains the poorest example of lack of democracy. The weapons allow the strongest to impose his will and ideologies. This period has gone; the regimes which followed have always claimed to have established the Rule of law although this was not always the case.

2.3.2. Modern caricatures of the absence of the Rule of law

Since nowadays many countries claim to be democratic and protect the human rights (visible image), they have a hidden image which reveal what they are to such extent that some people call them hooligan nations, mafia nations, cowboy nations to name some expression commonly used by some Great Western powers which are openly opposed to their interests.

Some of these countries have adopted behaviour which does not promote the Rule of law. For instance, to send troops to loot citizens' properties in order to please the army; to create jobs for people who will not be paid knowing that the latter will impose bribe to other citizens for the services they are looking for, to produce chemical weapons in order to convince and to compete with powerful and hostile countries and to organize terrorism.

In other countries, there is nepotism as organized group of people develop corruption, all types of fraud and they mismanage the country resources.

Therefore, the mafia group control all the economic opportunities; those in power spend most of their time doing commerce and fraud instead of carrying out administrative duties; a group of unidentified people organize the government actions, to ensure their policy and keeping power for a longer period of time, they keep contact with outside powers. This is a kind of Maffia which tries to keep and use power for their personal interests using hidden mechanisms. Citizens end up noticing these mechanisms gradually but they cannot denounce because they fear the consequences.

Cow-boy nations swindle citizens and possibly third parties' properties. They impose their law using requisitions and nationalizations policies among others.

The above description of the Rule of law and the absence of the Rule of law arouse the need to think about the relationship between the primary sovereign (the constituents, the people) and the government authorities (leaders) in Rwanda.

In general, all the people who were interviewed admit that the legal framework in Rwanda is well designed (from the Constitution to the ordinary law), very few refused to make comment about the applicability of the law. Indeed, many people agree that the problem lies in the weakness of the practical aspect, in the sense that some authorities do not take into account what the Constitution and the law have established. For instance, a mayor who imposes his decisions on the district council under the pretext of ensuring discipline, security, orders from the hierarchy, etc.

As we discussed about the central administration, interviewees noticed that the country has adopted decentralization policy; efforts are made to give more decision-making power to the people. Many believe that the impact of the central administration on the local administration at the grassroots level is rather moral and through the provision of necessary resources to run the activities.

The real context of the Rule of law will be discussed in the following sections. Let us first of all determine the basic principles and concepts which contribute to the emergence and establishment of the Rule of law.

These principles will be used as Rule of law indicators. They will be used to evaluate the government institutions and the Rwandan society. Here are the principles:

1. Power separation,
2. Legality and hierarchy of norms,
3. Human rights and freedoms, and in a special way
4. Distribution of justice in Rwanda.

III. THE PRINCIPLE OF POWER SEPARATION IN RWANDA

Power separation is a law principle whereby the legislative, executive and judiciary powers are independent from one another. According to Montesquieu, power should limit power, i.e, it is necessary to use the relative antagonism among the three powers in order to oblige each party to act according to the law.

The absence of power separation leads to the violation of citizens' fundamental rights. The agreement, the complicity among the powers or the fact that a small group can control power is inevitably done to the detriment of unspecified citizens' rights. Effective power separation prevents the domination or subjective decision by one power or one person. The latter should not control all the elements which constitute the government power, the national sovereignty. These are granted by the people only.

This theory of the power separation was stated in the 17th by a philosopher named Montesquieu. His inspiration came from the fact that during the period where he lived, power was centralized in the hands of the Prince who made arbitrary decisions. This declared that the three government powers should be separated and there should not be any interference.

The only way to involve people in the management and organization of public affairs is to organize elections. People themselves will appoint their representatives who will make the laws (legislative power). Another structure called the executive power has to be put in place in order to implement the decisions. Finally, since the implementation of these norms creates conflicts which oppose the the executive power and one, two citizen or two organs, it is wiser to leave these conflicts be examined by another structure whose duty is to judge (judicial power) which is different from the legislative and executive power.

This concept of power separation is examined throughout all the most important periods which have influenced the Rwandan politics, namely the period before colonization or ancient Rwanda, the colonial period, the first republic, the second republic, the transition period which include the government of national unity and finally the contemporary period.

In ancient Rwanda, this power separation principle can be seen through the various types of administrative and social organization.

3.1. Types of social and administrative organization in the ancient Rwandan society

The Mwami is the incarnation of power organization in the the Rwandan society: he rules as an absolute Kingi. However, he shares power among the chiefs who are loyal and obedient to the King. Power is distributed as follows:

Military organization: Rwanda is subdivided into military districts managed by one military chief ("*Umutware w' ingabo*"). The management of land affairs is subdivided in two categories: someone in charge of cattle ("*umutware w'*

umukenke"), and another one in charge of farming activities ("*umutware w' ubutaka*").

The relationship between the Mwami and these chiefs (*abatware*) is hierarchical. Every "*Umutware*" has the deputy chiefs (*ibisonga, abamotsi, ibirongozi*) who manage local administrative entities. He is free to dismiss them anytime. The family and the clan constitute the foundation of the Rwandan society. They are managed by a chief who shares the responsibilities among the members (E.g: the recruitment of the soldiers, supplying food at the royal court and the army during expeditions).

Power distribution depends on the arbitrary decisions and discretion of the Mwami. According to Alexis Kagame, there is no hutu-tutsi ethnic discrimination in the appointment of the Chiefs. The Batwa could be appointed deputy chiefs in charge of specific responsibilities relating to hunting etc. According to some revelations, this was due to discrimination tradition ("*kunena* ") and the Batwa were victims.

3.2. Implementation of the power separation principle during the colonial period

During this period, power separation was a very complex issue. On the one hand the colonial power with the three powers had a very strong influence on the management of public affairs in Rwanda, on the other hand the administrative and political structure of Rwanda before the colonial period remains. The current study clarifies the separation between the colonial and the traditional power. The separation among the legislative, executive and judiciary powers is visible in the capacities and characteristics of the colonial power.

In general, the colonial period is characterized by the absence of power separation since the administrative chief was the chairman of the various traditional jurisdictions. The colonial administration encourages the executive power to interfere and to control the judiciary power. There is mismanagement and incoherence in the judiciary system. Human resources resources are not trained.

In 1948, power separation principle was emphasized with the creation of a powerful prosecution service which was capable of canceling the decisions taken by lower jurisdictions.

3.2.1. Characteristics of the colonial executive power

In this period, the administration of the territory is characterized essentially by the creation of the offices for the traditional administration which managed the whole sous-chefferie. The main activities were: the fusion of the traditional chefferie (*umutware w' ubutaka, w' umukenke*) into a single territorial district managed by one chief, one deputy chief and capitas (*ibirongozi, abamotsi...*).

The main activities carried out during this period include special schools at Nyanza and Butare-Astrida which trained administrative assistants; salary payment to

traditional administration employees; the suppression of the ibikingi according to letter 5395/org of 04/12/1930.

During the same period, Rwanda was subdivided into 10 territories: Kigali-Nyanza-Astrida-Kibuye-Gisenyi-Kabaya-Ruhengeri-Byumba-Gabiro-Kibungu-Rukira. Gabiro was removed in 1935 and Gitarama was created in 1959 (by decree n°26/AIMO of March 17th, 1932) then the gradual reduction of the number of chefferies :(from 65 chefferies in 1933 to 45 chefferies in 1959).

3.2.1.1. Organization of the German colonial administration

As far the administration is concerned, the Germans simplified the administration by adopting the indirect administration principle. The protectorate remained in charge of the indigenous administrative and political organization. In 1907, Doctor Robert Kandt inaugurated the German colonial administration based in Kigali. The German colonial administration created military stations throughout the country.

As far as the promotion and protection of human rights and fundamental freedoms are concerned, the major contribution was the abolition of slavery. The introduction of a new currency was very important for the country.

The German colonial policy has two stages: The 1st stage is dedicated to the study of the Rwanda-Urundi population: geographical exploration, ethnography, anthropology and the 2nd stage relates to the establishment over 110 years with very limited personnel i.e. less than 5000 men.

Their strategic plan was not achieved because the First World War put an end to their protectorate and established the Belgian mandate.

3.2.1.2. The mandate followed by the Belgian supervision

The League of Nations entrusted the Belgian mandate in Rwanda to the Belgians' King through the Versailles Treaty signed on 28/06/1919. Its legal framework focuses on the following principles (Art 22): The mandate applies to the people who are unable to rule; the mandate is entrusted to the people who have a great colonial experience and a notorious financial prosperity; finally, the country which has got the mandate must consider civilization as one of the missions.

This mandate focusses on the principle of no-annexation. Since the Germans have renounced to their colonies, Rwanda was supposed to get its independence just as Ethiopia did. However, since Rwanda was unable to ensure its autonomy, sovereignty will be in the hands of the colonialists and they will use it on their behalf. Consequently, the borders intangibility principle acquired from colonization and negotiated by Belgium apply.

The country which has received the mandate must comply with the guidelines of the League of Nations (to civilize); to submit an annual report; to help the International Justice Permanent Court settle the disputes. The country which has

received the mandate must also convey the people's requests to the League of Nations.²⁶

The Belgian colonial administration

The Belgian occupation policy in Rwanda-Urundi was established by Mr. Renkin, Minister of the colonies in a memorandum to General Tombeur. He wrote: "There is no point of establishing a regular administration in the conquered territory on the model of the colony (Congo), the country will be under the military system".²⁷ This domination implies the total loss of national sovereignty as well as the power of Mwami Yuhi V Musinga and contradicts the decisions of the article 43 of the Hague Conference held on 18/10/1907 which insists on: the need to respect the laws and the customs of the colonized country.

The Rwanda-Urundi District is managed by: the Governor of Belgian Congo; the Deputy Governor of Rwanda Urundi (Bujumbura); the District commissioner or the Resident; Mwami; the Territory Administrator; indigenous Chiefs.

Establishment of the colonial administration

The administration was in the hands of military dictatorship. The Minister of the colonies appointed a high Royal Commissioner and delegated all the powers (executive, legislature and judicial). All these powers were in his hands, he imposed military dictatorship even against the Mwami.

The first high royal commissioner for Rwanda Urundi is called Jean Pierre Malfeyt, who had two military zones: Gisenyi and Kigali managed by Zone chiefs. However, with the decree n°02/5 of 06/4/1917, the royal commissioner restores the former administration to save the unity of the country which is threatened by several raids. In 1917, he subdivided the country in four territories which were managed by military chiefs (Rubengera, Ruhengeri, Nyanza and Kigali).

In 1920, Belgium still believed in the indirect administration and protectorate. This is confirmed by a declaration made by Mr. Leon Frank, Minister of the colonies to the governor of the colonies: "in Rwanda and Urundi, we will practise colonial protectorate policy. This policy will keep the indigenous institutions. This method does not only respect the indigenous institutions and use them; its aim is to develop them taking into account their values in order to adapt them gradually to the needs of colonization and economic progress".²⁸ "The Belgian administration will maintain the King's authority (*Mwami* of Rwanda) and will strengthen it according to the customs whenever it is weakened. However, it will ensure that this authority needs our help. On the other hand, it will ensure the role of the great feudatories (chiefs) is not reduced". This declaration establishes the European as a guide and a teacher. In the same letter, it is possible to understand the intention of the colonizer to weaken all the stakeholders in order to maintain his influence and

²⁶ P. Ortz, "Le système des mandats dans la société des nations", in *Revue de l'Université de Bruxelles*, pp. 506-507, cité par F. Reyntjens, *op.cit.*, p.42-43.

²⁷ Quoted by Filip Reyjens, *Pouvoir et droit au Rwanda*, p.36

²⁸ Letter of 15/6/1920, archives africaines AE/II 1849 (3288) date de Buta, quoted by Filip Reyntjens, *op.cit* 65-68

his role, by applying the famous: "*divide et impera*". They believe in negative indirect administration to keep the interests of colonization.

Outstanding facts of the Belgian colonial administration

The mechanisms to bring civilization to the indigenous people consist in taking away the sacred aura of monarchy and to prohibit some customs practices to the Mwami. These mechanisms were established from the legal, administrative and cultural point of views.

From the legal point of view, the legal capacity of the Mwami to impose sanctions to the criminals is taken away (Major Declerk 1917). The colony and the Resident add two people each to assist the Mwami in his judiciary duties. The concept of the private property and the protection of private property are also introduced.

From the administrative point of view, the Mwami can not appoint or dismiss province governors (1923).

Cultural changes also occur. Through the Edict of July 1917, Mwami proclaims the freedom of worship in accordance with the Berlin act and Saint Germain en Laye Convention. This freedom is not bad as such but its aim is to allow the expansion of Christianity.

From the cultural point of view, some ritual practices such as *umuganura*, *ubwiru*, etc are prohibited, others practices which are considered as taboos are violated, for example obliging the Mwami to cross Nyabarongo River. Traditional reasons do not allow the Mwami to cross Nyabarongo River in order to reach Kigali. The King was forced to let his children wear European clothes; customary cows sharing between *the umugaragu* and *shebuja* were removed (1924) as well as the gifts given to the newly appointed Chiefs (*kurabukira*).

The suppression of the provincial traditional administration and unification of the traditional power (1926: removal of the chiefs-*umutware w' ubutaka*, *umutware w' umukenke*, *umutware w' ingabo*). In 1929, the governor suggested the abolition of monarchy but Belgium (Minister of the colonies) refused for prudent reasons, especially because the myth around the Mwami was still strong (main idea: European will to fight or banish the local customs through this mission which consists in bringing civilization to the indigenous people). Finally in 1931, Mwami Musinga was dismissed because he refused to become a Christian.²⁹ On behalf of the colonial power, Deputy governor Voisin and Bishop Mgr Classe decided to enthrone Rudahigwa without consulting the abiru who were the traditional institution in charge of enthroning a new King³⁰. This was the end of the traditional divine right monarchy; from now on the Mwami was appointed by the colonial power. This enthronement concluded the role of the "*abiru*" institution.

²⁹ Bishop Mgr Léon Classe wrote to the Deputy governor VOISIN in Bujumbura : « Musinga is afraid of anything which is related to christianity, we caught him stepping angrily on images and the cross... » He added that « Musinga is against the Europeans and will remain opposed to the Europeans despite all the efforts to change his ideas (...) » (Voy. LUGAN, *Histoire du Rwanda*, p.338-339).

³⁰ Ibidem.

Alliance between the Catholic Church and the colonial administration

As a mission, bringing civilization to the indigenous people goes hand in hand with the triumph of Christianity. Christianity appears as a moral and cultural value (for example since this period, polygamy was abolished), then as a political power through the implication in the colonial power and destiny of a country. This power is visible through the intervention of the Church in the appointment and enthronement of Mwami Rudahigwa. As soon as Governor Charles Voisin appointed the King, Bishop Mgr Classe added: "You will rule under the name of Mutara as prescribed in the dynastic rule". Bishop Mgr Classe replaces the great "*umwiru*" because he was the one who gave the new name to the new King.

In less than 10 years before independence, while the Belgians were busy putting in place discriminatory institutions in Rwanda, elsewhere in the world, the idea of self-determination and independence resulting from the Bandoeng Declaration (Indonesia) prevailed. This idea also came in Rwanda. Instead of preparing the country towards a peaceful independence, the colonizer became a catalyst of a so-called revolution, whose main principles were intolerance and discrimination. The latter were the premises of the 1994 genocide.

3.2.2. Characteristics of the colonial legislation

The colonial power introduced the statute law to replace or cohabit with the traditional laws and regulations.

As for the organs of the legislative power, legal norms and regulations, the Belgian presence can be subdivided in three phases: the military occupation period 1916 to 1925, the mandate period followed by the Belgian supervision from 1925 to 1960 and finally, the period of internal autonomy from 1960 to 1962.

3.2.2.1. The military occupation period

This period corresponds to the occupation of Rwanda by Belgium after chasing the Germans. The military occupation is based on the royal decree of the 22nd /11/1916 followed by the decree law of the 5th /12/1916. These decrees constitute actually the fundamental law or the Constitution of the Belgian conquests in the Eastern region of Africa. They establish a royal commissioner who has the legislative power and executive power. The legislative power is exercised through the decree law in the event of urgency (see: ORU n°36 of the 2nd /6/1925 establishing the decree of 26/03/1915 relating to the exhumation and the repatriation of the remains of people who died in Rwanda).

This period was extended even beyond the date the League of Nations gave the Rwanda-Urundi mandate to Belgium. Belgium was able to provide a "constitution" related to the above mentioned mandate in August 1925 only.

3.2.2.2. The period of the mandate followed by Belgian supervision

This period begins with the adoption of August 21st, 1925 law on the government of Rwanda Urundi by the Belgian Parliament. This law refers to the legislative and

executive powers and the law of October 18th, 1908 on Belgian Congo Government commonly called "colonial Charter".

These texts give the legislative power:

- to the Belgian Parliament through the law (see the law of 14th July 1959 on the equivalence of secondary school certificates ... and degree, and ranks issued in Belgium, in Congo, in Burundi and Rwanda);
- to the King of the Belgians through the decree law (see decree of February 25, 1959 on public markets);
- to the Governor General of Belgian Congo and the Deputy General governor of the vice-government of Rwanda-Urundi, through the legislative decree (Ord. législ n°81/381 of 24th /12/1952 establishing the creation of military zones or Ord.législ. n°R/60 of 28th /6/1962 relating to the publication of the official decisions of the public authorities in Rwanda).

These texts give the executive power (or power to make regulations):

- to the King of the Belgians through the royal decree or administration and police regulations (see AR of 26th /6/1959 relating to public markets);
- to the concerned member of the Belgian cabinet through the ministerial decree (see AM of 25th /02/1943 relating to the sale and hiring of lands);
- to the Governor General of Belgian Congo, Deputy governor general of Ruanda-Urundi and the Resident of Rwanda through an order; ³¹
- to the Governor General, Deputy governor general of Ruanda-Urundi and the Resident of Ruanda through "compulsory regulations made by the general administration and police"; ³²and
- to the Administrators of territories through compulsory regulations made by the general administration and police in the form of "decision" (see decision n°1/59 of the administrator of territory of Kisenyi of 25 April 1959 relating to the lake Kivu snow area).

3.2.2.3. Internal autonomy period

This period begins with the promulgation of the temporary decree of the 25th /12/1959 on the political organization of Ruanda-Urundi and the legislative orders of the 15/1/1961, 10/5 and 08/6/1962 relating to the Rwandan institutions. These orders have been adopted respectively by the General Resident of Ruanda-Urundi then by the Top representative of Belgium in Rwanda on behalf of the General Resident.

The establishment of the traditional organs constitutes the only innovation that has been introduced during this period. The aim of these organs is to assist the colonial administration but also the capacity to suggest some regulations.

³¹ Some time, the order of the governor general were called "decrees of the governor general" see (p.e AAG of 8/4/1898 relating to capital executions

³² Some regulations established by the Resident of Rwanda were called "decree" (see p.e decree n°2/60 of the Special resident of 2nd May 1960 relating to ibikingi and ibisigati

The above mentioned temporary decree and legislative orders give legislative power:

- to the Belgian Parliament, the King, the Governor General of Belgian Congo, the Deputy General governor of the Deputy general government of Ruanda-Urundi and the Resident of Rwanda(see supra);
- to the legislative parliament through the edict (see the edict of 25/4/1962 relating to non profit making organizations.) ;
- to the President of the Republic through the decree-law (apparently, this power has never been exerted before).

In addition to the organs mentioned in section 2 which exert the executive power, the President of the Republic through the Presidential Decree for matters relating to regional interests mentioned in a decree or at least in the royal decrees and orders – see AP n°46/A.E. of 27/12/1961 establishing the prohibition to export indigenous food products).

The sources of the colonial laws are therefore heterogenous; sometimes the orders are taken by the executive power, sometimes by the legislative power. Moreover; the law is above the customs and confuses the citizen because it is beyond their understanding. The laws allow the executive power and judicial power to take arbitrary decisions. In this power superposition and confusion, some decisions which characterized this colonial period could be positive or negative.

3.2.2.4. Positive decisions of the colonial legislation

Family life legislation

The colonial administration through the decree of July 9, 1936 introduced policies to protect indigenous girls who have not yet reached puberty age. This law prohibits marriages at early age, forced cohabitation with an indigenous girl who has not yet reached the age of 14.

Moreover, polygamy was prohibited by the decree of April 4, 1950; and polyandry by the decree law n° 37/AIMO of January 30, 1947. Moreover, the decree of July 5, 1948 protects the indigenous monogamic marriage and punishes adultery and bigamy.

Taxes

The established tax policies include the replacement of the payment people used to make to the Mwami (*ikoro*) by one franc capitalization tax (service order³³ n° 2678/org of 24th /12/1931). What was paid in kind is now paid in currency. This reform was introduced by Mwami Mutara in his enthronement speech. The bureaucratic and general aspect the tax replaces the personal relationship which existed between the Chief and the citizens.

³³ Service order is the resident's letter

During the same period, the colonial administration introduced another poll-tax equivalent to 3.5 francs per adult and healthy man. This amount will reach 46 francs in 1945. On the other hand, the introduction of the poll-tax becomes a burden to the peasant every year and leads to frequent arbitrary detentions.

The advantages of the Taxes are no longer appreciated since the introduction of the poll-tax.

Socio-economic measures

The colonial administration took a number of measures to improve the living conditions and the standard of living of the population, especially through the introduction of formal education system in schools (edict of July 1917 establishing the freedom of worship and the right to have access to education (whoever violates the law is punished and spends thirty days in prison). Such measures include the introduction of modern medicine and the fight against chronic epidemics such as variola, the cattle plague, leprosy, etc.

To fight against recurrent poverty and famine some coercive measures were taken. The aim was to involve people in ensuring food security. Precisely, they were obliged to cultivate food products on 35 ares minimum (administrative rule n°89 of 17th /8/1931); Obligation to keep food reserves: "At a given date established by the resident, every indigenous male adult is obliged to keep cereals and leguminous plants for family consumption" (legislative order n°07 of 10th/8/1927 approved by the decree of 3rd /12/1927); and finally Obligation relating to afforestation and fight against erosion and the destruction of the noxious animals (Order n°070/AIMO of 20th /11/1944).

3.2.2.5. Negative decisions in the colonial legislation

Discriminatory measures

This period is characterized by a discriminatory legislation against the people who could not afford to pay the traditional taxes (*ikoro, imponoke, indabukirano, ibihunikwa, uburetwa, akazi*). The colonial policy considers that this situation is unfair and therefore suggests positive discrimination measures. Under the pretext of fighting against this arbitrary decision, the colonial administration introduced legislative measures and discrimination which does not relate to the traditional social organization. The following measures were mentioned in the circulars:

"A Tutsi who will confiscate the crops belonging to a Hutu will pay back the double"; and "a tutsi whose cattle will destroy the crops in a Hutu field will be back the double of the damage that has been caused".³⁴

There is confusion between the leaders and the Tutsi in general. Positive discrimination should occur between shebuja and umugaragu.

³⁴ Circular of the Resident n°791/A/53, Deforges quoted by Filip Reyntjens, *op.cit.*, 131

Arbitrary measures

Measures relating to the regulation of work

Since 1933, the colonial administration spares some people including government officials, the workers of the Europeans, catechists, pupils, rich Tutsis and seasonal immigrants from traditional services known as "uburetwa".

Measures relating to communal work

In 1924, the colonial administration introduced a form of compulsory communal work called "akazi". It was imposed on any native belonging to a particular local community (ord. of 7th /11/1924). Finally, in 1943 this policy was introduced in the whole country, every family had to provide compulsory communal work 60 days a year (Order of 4th /10/1943) for the construction of the road for example.

On the one hand these measures contributed to the promotion of the economy (creating more access instead of keeping the country isolated and landlocked). However, they have some negative consequences:

- Some people became very poor as a consequence of very many compulsory communal work;
- Compulsory communal work caused immigrations in Uganda³⁵ in spite of the Decree of 17th /7/1926 which reduced consecutive exodus after the other one caused by uburetwa. Towards the 1920s: about 50,000 Rwandans immigrated in Uganda, they reached about 350,000 in 1959.

3.3. Power separation during the first Republic

As soon as the Parmehutu leaders proclaimed the revolution to abolish the monarchy with the help of the colonial power, the Republican system put an end to the principle of power heredity. From now on there is a written Constitution which includes this principle.

3.3.1. Principle of power separation (Article 45 of the Constitution)

Article 45 of the Constitution describes the principle of the power separation. However, the authorities seem to ignore this principle because the President keeps too much power in his hands and ends up becoming a dictator. This fact is noticed at various levels.

From the bottom up to the top, Parmehutu comprised an oligarchy which adopted a kind of bourgeois life every day, accumulating all the top authority and administration positions which reproduced the former roles of a chief who was administrator, judge and supreme legislator at the same time ". Favouritism and clanism did not allow Parmehutu to carry out self-criticism.

The military and police power was in the hands of one ethnic group. The majority came from one region: Gisenyi and Ruhengeri. The ambition obliged the President

³⁵ Voy. F Reyntjens, *Op cit.*, p. 138-142.

to modify articles 53, 69 and 97 of the Constitution, so that he can seek a third term in office and eventually become a life president.

The judicial power was not free because the executive power had very many privileges and immunity. For instance, Circular n° 253/Just of March 22nd, 1967 requires that any complaint against the public authority be submitted to the communal council and to the Interior Minister. This circular prevents some freedom and reflects the will of the political power to control and prevent accountability. It encourages arbitrary decisions.

3.3.2. Reinforcing the Head of State's power

This reinforcement was introduced by Kayibanda's letter n° 1319/03.04 of July 25, 1964, ordering an investigation on the country situation. Investigations carried out after two years of intervals by the parliamentary committees (July 25th, 1964 and July 4th, 1968) as ordered by letter n° 1319/03.04 of July 25, 1964. The parliamentary committees pointed out that human rights violations had worsened and the personal power of the President had been reinforced. Reacting to the contents of the report, President Kayibanda dismissed 14 members of parliament and militants from his political party.

Following this exclusion Kayibanda becomes prisoner of the Gitarama group for ever. The conclusions of the parliamentary committee report and the sanctions imposed on the perpetrators revealed the dictatorship of the single party. The third Parmehutu Parliament (1969-1973) became a plotters' chamber.

The power separation principle contained in article 45 of the Constitution had never been applied. Power concentration prohibited by article 56 of the Constitution became a reality. This situation contributed to several power abuses. From the administrative point of view, the public administration was characterized by political, regional and clan bias, incompetence, favouritism and waste of resources. As for the Police, it was characterized by brutality and arbitrary decisions inherited from the Belgian Masters (voy. Filip Reintjens, Op cit.). Corruption and nepotism became ordinary practices.

3.4. Power separation principles during the second Republic

The separation and collaboration of the executive, legislature and judiciary powers are theoretically mentioned by article 34 of the 1978 Constitution. Actually, it is an interconnection between the single Party and its allies including the army, the central information service, the Parliament, the judiciary system. The initiator and architect was the President of the Republic. Apart from this byzantine structure power separation, balance, control and independence mentioned in the Constitution are mere wishes.

3.5. Power separation during the Government of National Unity July 19th, 1994 to June 4th, 2003

The Power separation principle is managed by the forum of the political parties. The latter appoint the judges, the members of parliament and senior administration officers. All the powers are "... transitional", their activities should focus on post genocide context. The major concerns are the following: to overcome the social and political consequences of the genocide and the efforts to prevent it and the lack of a strong political system. The need to strengthen the "national unity" has an impact on all the powers and all the institutions to such extent that someone can believe that unity is experienced in normal contexts.

The government of national unity is chaired by the Rwandan Patriotic Force, RPF-Inkotanyi. The mandate is still going on even after the elections resulting from the Constitution of June 4th, 2003. The debates on the Rule of law do not establish a break between both periods, it is a continuation. Therefore, the following analysis relating to the contemporary period is valid to a great extent to this transitional period.

3.6. Power separation in contemporary Rwanda

Power separation principle is mentioned in article 60 of June 4th, 2003 Constitution: "the government power are the following: the legislative power, executive power and judicial power. These three powers are separate, independent and complementary...".

However, the supremacy of the executive power on the judicial and legislative power has been reminded in almost all the discussions on this research topic. Is this supremacy a fact or something which is legal? What are the signs? After a close analysis of the three powers, it is possible to analyze the legal provisions or the attitudes which denote this supremacy. Although the Constitution reveals some differences between the mandates of the three powers, the major problem is interference, inequality or factual supremacy. Interference is a matter of fact more than a legal matter.

3.6.1. Signs of executive power supremacy

The executive power is vested in the President of the Republic and the government. This is specified in article 97 of the Rwandan Constitution of June 4th, 2003. Under article 98 of the same Constitution, the President of the Republic guarantees the territorial integrity of the country, the continuity of the State, and the respect of international treaties and agreements. The Rwandan Head of State has a very important and fundamental responsibility: "... he is the guardian of the continuity of the State". Since the scope of this responsibility is not specified, it can contribute to the justification of any behavior, even arbitrary decisions of the Head of the State. For example, whoever expresses his disagreement or denounces his/her actions can be accused of attacking the continuity of the State. In some African countries, these errors were noticed. Remember that in their Constitutions or

fundamental laws there were provisions with the same content as the above mentioned article 97. Within this framework, Laurent GABA reminds article 2 of the Central African Republic Constitution of 4th/12/1976: "sovereignty belongs to the Nation and the Emperor incarnates the Nation". The same applies to article 6 and 8 of the Constitutions of Gabon and Ivory Coast which mention that "the Head of State incarnates National unity".³⁶

3.6.1.1. The role of the President of the Republic in strengthening or weakening power separation principle

Power separation can be effective if the President of the Republic respects the independence of the judiciary system and the Parliament. Some aspects of the official power should normally be denied to the President of the Republic. For instance, he/she does not have the power to create the laws, he cannot give orders to the jurisdictions and the prosecution service (*unlike Art. 162 of the Constitution which allows it*), he cannot dismiss an elected representative: however, people are astonished to see some elected representatives who are really dismissed but their dismissal is disguised in so called "personal reasons". People's reaction is expressed as follows: "Kuki bakuraho abantu twitoreye, will bakabikora batatubajije. Twabwirwa iki impamvu babarega zaba zifite ishingiro "(Why our elected representatives are dismissed, how can we know if the accusations are true?). Behind this major concern, there is a danger of arbitrary decision. People believe that nothing is done without the request or the consent of the President of the Republic. Is it true? Is it a way of considering the role of the Head of State as sacred or a myth?

In many African countries, "the President rules and nobody can contradict his/her final decision ... The African Head of State can accept to be relieved from some of his duties and allocate them to a Vice-president or a Prime Minister (extremely rare cases) but it can not be a matter of power sharing. According to a popular saying: there can not be two male caimans in the same backwater'. For the time being, a chief is in a better position as a crowd of followers sing for him and praise him, he attracts the crowd around a national hero, around his projects and dreams. He is the point of reference in official institutions as well as in the media. He is the one who gives life to the institutions which have copied blindly many things from abroad. These institutions are his efficient instruments of political strategy ".³⁷ "...The style of one person becomes the style of the whole nation" ³⁸ In Rwanda, the executive power does not belong to the Head of State alone. The latter collaborates with the Cabinet chaired by the Prime Minister.

³⁶ GABA L, l'Etat de droit, la démocratie et le développement économique en Afrique Sub-saharienne, UE, l'Harmattan, septembre 2000, p.74

³⁷ GABA L. Op cit p 76

³⁸ CONAC G quoted by GABA L CSOp cit. p 76

3.6.1.2. The role of the government in strengthening or weakening power separation principle

The separation of the executive and legislative power is not rigid. The government can legally make some decisions which can have an impact on the activities of the parliament and the judicial power.

The executive power is the only organ which can suggest to the Senate the names of candidates in the positions of Supreme Court President and Vice President. Isn't it an obstacle to power separation? (Article 113 & 147 of the Constitution of June 4th, 2004). The cabinet is involved in the recruitment of the magistrates, the members of Parliament (electoral commission), and decides financial resources for the judicial power and the Parliament through the national budget. Many people believe that this intervention of the executive power in other powers justifies the wait-and-see policy of the same executive power. How come that this wait-and-see policy is present in Rwanda and even in other African countries and not in the developed Western countries where these procedures are present?

In general, the cabinet has an impact on the other two powers in various ways, people have mentioned unequal privileges among the civil servants who have the same rank. For example, a magistrate who has the rank of a "secretary-general or minister" does not have the same privilege as any secretary-general or minister; A district Mayor and a district judge do not have the same privilege: the former represents the executive power while the latter represents the judicial power.

Article 162 of the Constitution allows the Minister having Justice in his or her functions to "issue written instructions to any prosecutor, obliging him/her, in public interests, to investigate and prosecute or refrain from investigating and prosecuting an offence. The innovation in this Constitution is that these orders must be written. They have always existed and condemned. However, they have never been proved by people who condemned them. The cabinet could constantly deny these orders. During an interview with the Secretary-general in the Ministry of Justice³⁹ we learned about another new form of instruction whereby the public prosecutors should not expect orders to investigate and prosecute or refrain from investigating and prosecuting an offence. It is up to the public prosecutors to make a decision when all the necessary elements are available. This reveals that the prosecution service waits for the Minister of Justice's decision in order to launch the legal proceedings. It is quite normal for the prosecution service to receive orders from the Minister because the prosecution service depends on the Executive power. However, the people believe that this practice is a kind of interference in justice matters simply because the Ministry is also part of the judiciary system.

3.6.2. The impact of the executive power effect on the legislative power

According to Article 62 of the Constitution, "the Parliament deliberates on and passes laws. It legislates and oversees executive action in accordance with the procedure determined by this Constitution". The danger of the interference of the

³⁹ Interview of 26/10/2005 at the Headquarter of the Ministry of Justice

executive action in the legislative matters can be perceived as we examine both legislative functions acknowledged in the Constitution and through the analysis of the executive power interference in the appointment or the activities of the legislative power.

Concerning the role of the executive power in the process leading to the election of the members of Parliament, it appears that the National Electoral Commission which prepares, organizes and supervises the elections is under the executive power. This is a weakness because there is a danger of influencing the structure of the Parliament. We recommend the full autonomy of the National electoral commission. This Commission should not be under the executive power.

The Parliament needs human and material resources to run its activities more efficiently. If the Parliament is not able to carry out its duties, it is quite often due to the lack of sufficient resources. Indeed, the parliament resources are provided by the executive power through the annual budget. It is true that the cabinet can allocate some funds to another power (legislative or judicial) in order to minimize the latent disagreement between both powers. It is quite normal to notice that the Parliament lacks sufficient resources because this situation is experienced in all the government institutions. However, one can not ignore the discrepancies in the national budget where the amount allocated to one Ministry only is higher than the budget of one of the Parliament chambers.

To get a better understanding of the impact of the executive power on the legislative power, you need to analyze how the Parliament fulfills its two missions: to deliberate on and pass laws and to legislate and oversee executive action

As far as the deliberation and passing the laws is concerned, the right to suggest the laws belongs jointly to both powers. However, in reality, the cabinet is the only institution which suggests the bills. Of all the laws adopted by the members of Parliament from 1994 up to 2003, the members of parliament have never suggested any.

If you take into account the arguments of many intellectuals who make a critical analysis of this situation, they believe that this is due to the fact that members of parliament lack self-confidence, the absence of a strong opposition and the fact that the politicians in the cabinet are more dynamic and stronger than the politicians in the parliament.

In Rwanda, the fact that someone has occupied higher political positions does not ensure a strong political career. Nowadays, people who have never been involved in politics have become members of Parliament. Of course, it will take time to become mature as politician and member of the parliament but for the time being they do not understand what is going on. If there were a real competition of political agendas during the election of the members of parliament, every Member of Parliament would constantly think about the promises he/she made during his/her campaign.

The second argument that has been raised relates to the fact that any bill which is presented to the Parliament will certainly be approved by all the Members of Parliament or a greater majority. This is because everything is planned by the political parties executive committees whose leaders are essentially cabinet

members. Once they have adopted something, it is difficult for the Members of Parliament to disagree. This automatic consent results from several factors including the absence of a real opposition and the fact that the executive power has technicians who can dedicate their time to prepare the bill. The danger lies in the fact that the Parliament adopts imperfect bills which have not been well prepared by these technicians. Somehow, the Parliament can be considered as a chamber which approves the bills prepared by the executive power. This situation should not continue because citizens expect that their "representatives" to take time and necessary means to control the activities of a strong executive power.

The Parliament mission is to oversee the executive action. This control is necessary because it helps the executive power not to adopt arbitrary decisions and to misuse the public funds or resources. During the discussions held with the "people's representatives", the latter declared that the control of government action is done regularly: whenever there is a situation which requires explanations, the Members of Parliament or the Senators invite the concerned Cabinet minister to clarify the matters. During the transition period, there were serious controls and people were informed about the results. Some ministers had to resign simply because their explanations did not convince the Members of Parliament. The current Members of Parliament believe that quality control is not inevitably the one which makes noise and alert people. What matters for them is to create appropriate conditions for the control to take place and to correct what has been done wrongly. In theory, this control should reveal all the leaders who misuse the public funds or resources and incompetent ones who do not fulfill their duties. How far is this control efficient when we know that some cabinet members have been asked to resign and the Members of Parliament have been unable to denounce these cases which were not secret matters? Some authorities have been accused of conspiracy against the national security. They have been invited to provide clear explanations to the Members of Parliament but the latter were not convinced. Few days later, these people were maintained in higher position as if nothing had happened. Someone can believe that the Members of Parliament are not responsible for their decision; they do not care about the impact of the behaviour of people who were summoned in the Parliament and for their decision to extend the mandates of these people.

If some higher authorities are not controlled by the Members of Parliament, it is not because the latter lack sufficient information. Apparently it is due to other reasons which are not specified officially including fear, the fear of getting involved, incompetence, etc.

Collaboration between the executive and the legislative power requires the absence of conflicts between both powers which are likely to violate the human rights and freedoms. Moreover, the mutual agreement or confusion between both powers leads to the inefficiency of power separation mechanisms. Finally, the general interests and the citizen's in particular are violated.

3.6.3. The impact of the executive power effect on the judicial power

The judicial powers in African States encounter many problems which does not contribute to the fulfillment of their missions and meet people's expectations to build a society where justice prevails. There are many obstacles: some are related

to country poverty therefore, they are common to all the three powers. Others are found within or outside the judiciary system. The exogenous factors include the interference of the executive power in the management of the judiciary system. In addition to the autonomy of the judge, the latter must have intrinsic qualities such as competence and responsibility, which enable to feel safe all the time.

The interference of the executive power in the administration of justice aims at controlling the judiciary system and not its effective administration. Why is the justicial power controlled? The executive power manages daily activities in the country. In carrying out its mission, the executive power is tempted to violate the human rights and freedoms. To protect itself against possible criticism over its actions, the executive power controls the judges and the jurisdictions.

The control of the judicial power expresses the executive power superiority complex. For instance, the district Mayor who is the supreme authority in his autonomous administrative entity, feels confident to solve any problem arising in his/her district. The majority of district mayors do not understand that some problems expressed by the local population, should be settled by the district court judge.

The structure of the organs which contribute to justice is such that it is difficult to avoid the control of the executive power over the judiciary system. The public prosecution service is under the supervision of the Ministry of Justice and as stipulated in the Constitution, the Minister of Justice can give orders to the public prosecution service to prosecute or withdraw court cases. When people think of justice, it involves all the people. When they notice that there is no lawsuit against some criminals, they think the Minister of Justice and therefore the executive power has decided so.

The prosecutor general should decide the fate of these ministerial orders and the Rwandan society needs some explanations.

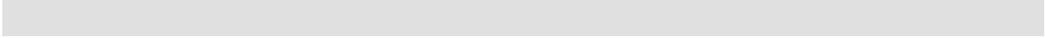
In military court, it is also difficult to imagine that the judge is free because in this category of people, the hierarchy and the chief's absolute order are respected. Although the court chairman has a higher military rank compared to that of the suspect criminal, sometimes the court chairman is likely to receive orders from his senior officers instead of following the law. Under these conditions, it is difficult to declare that justice has been rendered.

Moreover, the fifth protocol position of the President of the Supreme Court after the President of the Republic, the President of the Senate, and the Speaker of the Chamber of Deputies and the Prime Minister respectively, is also very significant. Many changes can be foreseen but all of them will certainly raise criticisms. With a bicephalous executive power and a bicameral Parliament, it is normal to notice that the representatives of these powers follow one another in the Executive, legislative and judiciary order. The protocol seems to give priority to the members of Parliament.

Justice should be the linchpin of the Rule of law. It is impossible to expect justice when the judiciary system is not independent, when the political, the social and the

economic environment are not appropriate. Given the relevance of this issue, a full chapter has been dedicated in the following sections.

Legality is among the indicators of the Rule of law. Both the citizens and the authorities are concerned. Legality means that it is necessary to avoid arbitrary decisions or personal impulses; it also means that the hierarchy of norms must be followed.



IV. THE LEGALITY AND HIERARCHY OF NORMS

The legality of the administrative acts is defined as *their compliance with the law*, particularly the Constitution, the international treaties and agreements, the government laws and regulations.

Legality implies laws enacted by an authority. Here, legality includes the hierarchy of norms which will be discussed in the following section.

Legality also refers to the motivation of an action. It requires the legal provision or regulations which dictate an action. The relevance of the motivation can be perceived when the regulations allow the administration to give its appreciation. In this case, the administration exerts discretionary powers. Normally, its power is limited by the law or the regulations. When the administration has full powers to act, legality will be judged according to the motivation behind such or such decision of the administration which should normally relate to the general interest. Any administration which has full powers to act can do so with the aim to fulfil its mandate, otherwise, it is misusing the power.

The aim of legality is to relate the decisions of the administration with the preestablished rules and the general interest.

4.1. Historical background of legality in Rwanda

4.1.1. Legality before the colonial period

The traditional Rwandan society is characterized by the lack of written norms and procedures. This is very dangerous for presumed criminal, the right to appeal and to submit a case to a court.

4.1.2. Legality during the Belgian colonial period

During this period, legality was characterized by the mixture of the traditional and written norms, as well as the introduction of a legal and structural dualism. It was also characterized by a disorder in the judiciary system at the grassroots level, therefore preventing the courts and the judge to fulfill their mission.

4.1.2.1. Introduction of the statute law in cohabitation with the customary law

As far as criminal law is concerned, the German criminal law and the Belgian military criminal law are applied, but article 9 of order n° 02/5 of 6th /4/1917 stipulates that in the event of absence of text or bench marks, the colony representatives are authorized to refer to the regulations and traditions established by the German administration.

As far as the civil law is concerned, the decree law n° 13/59 of 11/3/1919 relating to the inheritance stipulates that the courts apply the provisions of the royal governor order of 4th /11/1893 to Europeans and the "black people". Discrimination based on the colour of the skin is introduced among people living in the same territory. Later

on, the Congolese civil code will be applied in Rwanda, but will govern the European nationals, the metis and the rare indigenous people only. The remaining population followed the customary regulations.

4.1.2.2. *The hierarchy of norms*

As far as the hierarchy is concerned, the Belgian colonial authority is based on:

- The mandate entrusted to Belgium by the League of nations (Article 119 of the Versailles Treaty and the Ortz-Milner Agreement signed on May 30, 1919)) and the Trusteeship agreement of the United Nations;
- The Belgian Constitution;
- Various treaties and International Conventions (German Saint en Laye Convention; The Versailles treaty of 28th June 1919 establishing the League of nations; The United Nations Charter; The universal human rights declaration; Convention on the prevention and punishment of genocide crime which was ratified by Belgian Congo and Rwanda Urundi on March 13th , 1952).
- The law on the Belgian Congo government, the law on Rwanda Urundi government and the temporary decree of 25/12/1959 on the political organization of Ruanda-Urundi;
- Laws and regulations⁴⁰

4.2. Legality during the independence

4.2.1. Right to self-determination: premises of the independence and 1959 revolution

On the international level, the 2nd World War revived the need for independence and self-determination right among the colonized people. This awareness began in the French colonies located in the South-Eastern region of Asia and spread until it people claimed for it during the Bandoeng Conference.

The United States, the USSR and Popular China encouraged the United Nations to consider people's aspirations for emancipation and independence. The other colonial powers did not accept easily this historical change; they adopted policies to react against the new claims and led to new colonial wars in Algeria, Vietnam, Angola, etc.

⁴⁰ The Belgian Constitution of 17/2/1831 on Belgian Congo government as amended on 15/10/1921 ; the law of 18/10/1908 as amended and completed by the laws of 29/3/1911 and 10/8/1921 up to law of 29/7/1953 ; the law on Rwanda Urundi government of 29/10/1924 ; the law of 25/4/1949 on the approval of the the trusteeship agreement; Saint Germain en Laye Convention of 5/7/1920 on the approval of the 10/9/1919 Convention on the revision of the Berlin general act of 26/2/1885 and the general act and Brussels declaration of 2/7/1890. The United Nations Charter of 26/6/1945; the Declaration of 10/12/1948; the law of 26/6/1951 on the approval of the Convention on the Prevention and Punishment of the Crime of Genocide adopted in Paris on 1/12/1948

4.2.1.1. Decolonizing the country in a context of East-West confrontation (cold war)

The international policy framework was established for the cold war and the struggle for hegemony between Judeo-Christian capitalism and atheistic communism. The cold war encouraged the European countries to adopt a policy which consists in putting together and demonizing emancipation movements which claimed independence. In Congo and Rwanda-Urundi, the nationalist parties (MNC, UNAR and UPRONA) suffered and were the main target of Belgium reaction policy. In Rwanda, this policy had negative impacts on the establishment and development of the institutions, the reconstruction of the nation and the re-establishment of national sovereignty.

As for France or Great Britain, the future of the relationship was clearly defined by the creation of the Commonwealth and French Union.

During the Brussels or Ostend round tables, Belgium tried to encourage the former colonies to determine the type of relationship which was likely to protect the economic interests and to maintain its political influence in the colonies and territories under its mandate. Belgium failed to convince the former colonies to keep the existing relationship and started to put pressure on the Belgian government in order to save the economic interests. Efforts were made to establish the political parties which were ready to protect the interests of the colonizers and to fight against the political movements which claimed independence. The major events are the following: Katanga secession war in Congo and the assassination of Patrice Lumumba; the death of Mwami Mutara III Rudahigwa and the 1959 revolution in Rwanda; the assassination of Prince Louis Rwagasore who was UPRONA leader in Burundi. The independence movement constrained Belgium to take a hasty decision and grant independence to an unprepared colony. The collapse of the Belgian colonial empire generated political chaos and destabilized the institutions. The negative reaction of the unprepared administrative authorities also contributed to this situation.

Rwanda got its independence in this context of chaos and civil war organized or perpetrated by Mr. Jean Paul Harroy, Governor of Rwanda-Urundi under the supervision of Colonel Logiest who was the field operation commander. Before granting the independence, the Belgians wanted to dismantle the traditional power for ever and to establish a more obedient and flexible political structure which would welcome the new colonial policy described by General Janssens one day before the independence of Congo: "Before the independence equals after the independence...".

The preparation of the independence depended on the future relationship between the colonizer and the former colonies. Depending on the contexts, the independence was granted after the suspension of the relationship or after protests.

4.2.1.2. Decolonizing the country in a context of social and political clashes

On the national level, this period was characterized by social and political clashes due to the emergence of political parties and the claim for independence. They include the conflict between the Mwami and the colonial power, the emergence of the political parties fighting for independence or protecting ethnic interests and the state of exception declared by Colonel Logiest. All these contributed to rising tensions in the country, social clashes and the dismissal of monarchy system.

Confrontation between the colonial power and the traditional power

Before the burial of Mutara III, the abiru, led by Rukeba and Kayihura, decided to enthrone Mwami Kigeli without consulting the colony representative. This situation inaugurated the first confrontation between the Belgian authority and the traditional power.

From the legal point of view, the enthronement of Mwami KIGELI V NDAHINDURWA by the Biru at Mwima was done according to the legislative order N° 347/A.I.M.O of October 4th, 1943 as modified and supplemented by article 15 of July 14th, 1952 decree stating that Mwami is chosen according to the customs and he is enthroned by the governor. This order is organic. It has legalized the occupation right created by the decree law N° 2/5 of 6th April, 1917 as supplemented by the instructions of the royal commissioner ("under the resident's management, the sultans exert their political duties as established by the traditional customs and the instructions of the royal commissioner"). This provision determines the Rwandan public order as a political organization based on the traditional customs under the supervision, the control and the censure of the occupying power.

Violation of the supervision system by the colonial authority

The supervision mandate obliged Belgium to ensure the political, economic and social development in accordance with article 73 of the United Nations Charter while respecting the culture of indigenous people. As mentioned earlier, the colonizers have started to destroy the customs, to annihilate the traditional monarchy in order to impose the Catholic faith and a republic based on ethnic discrimination, including PARMEHUTU: created to put an end to the social and political hegemony of the tutsi. The support provided to this mono-ethnic political party contributed to the eradication of multi-party system and the establishment of President Kayibanda dictatorship and Parmehutu.

As far as the press is concerned, the colonial authority created the first government media (Bujumbura Radio station and Imvaho) to propagate discriminatory ideologies, wrong information and to oppose the Rwandans. The government media provides wrong information and encourage people to kill.

The Hutu-Tutsi problem and the right to self-determination

Through the ministerial decree of April 16th, 1959, the colonial power set up a committee to analyze the political problem in Rwanda-Urundi, to know what the people's expectations are and to report the suggestions. The mission was carried out from April 22nd up to May 7th, 1959.

Concurrently, the Political Affairs Committee of the National Higher Council had suggested a Rwanda emancipation plan in preparation for the independence through the internal autonomy in 1960.

The hutus and the colonial administration rejected this proposal as well as the council representativeness. They suggested the following counter-proposal: Democracy first, independence will follow.

The committee suggested the following:

- (3) To avoid yielding power and independence to Tutsi oligarchy;
- (4) To respect Rwanda and Burundi values;
- (5) To remove the combination of the African and colonial administrations.

The temporary decree of December 25th, 1959 stipulated the gradual transfer of power to the Hutus following the arrests, exile, the transfers, the resignations or killings.⁴¹ Colonel Logiest considered that the support to the Hutus contributes to public order.⁴²

The illegal and arbitrary decision of Colonel Logiest is clear. It encourages impunity and the violation of the administration civil servants' rights. The latter include dismissed, imprisoned or assassinated chiefs and deputy chiefs. This decision destroys the monarchy because Mwami has no more power to appoint people. This role is ensured by the Belgian administration only.

Within this context, the colonial administration organized communal elections by ORU N° 221/73 of 10 March 1960 as modified by ORU n° 221/134 of June 3, 1960. Concurrently, the new council suggested strategies to establish peace and the abolition of some symbols such as the abiru and Kalinga. The Mwami refused and his decision resulted in the cancellation of the relationships between Mwami and the provisional Council, and the split of the Council in two opposed groups.

This situation encouraged RADER, PARMEHUTU and APROSOMA to resort to King Baudouin and the Minister of the colonies. UNAR reported the situation to the UN and refused to take part in the elections. The elections were organised from July 26th to 30th, 1960. Thanks to the support of the colonial Administration, the Parmehutu political party won the elections.

⁴¹ F. Reyntjens, op.cit., p.267, n° 329.

⁴² Idem, pp. 329-330.

4.2.2. Constitutional and institutional framework of the first Republic

4.2.2.1. The Republican legality

The Constitution of November 24th, 1962 established the foundation of the political and administrative organization of Rwanda as an independent country. The new Constitution abolished the monarchy and dismissed Mwami Kigeli V.

This Constitution as well as the various texts that were promulgated reveal somehow the modern ideology and meaning of the Rule of law. For example, the Constitution does not mention the International Conventions ratified by the Colonial Administration.

In spite of the mascarades, legality is not applied in the government decisions because the law applies a series of discriminatory laws which reveal inequalities, namely the amnesty law (amnesty law of May 20th, 1963), violations of human rights and fundamental freedoms during the 1959 revolution, the prohibition to pay the the properties despoiled by the population (the presidential decree n° 25/01 of February 26th, 1966), etc. Moreover, the application of the criminal law (code of criminal procedure) was not fair to all the criminal suspects who belonged either to PARMEHUTU or UNAR.

4.2.2.2. Violation of the Constitutional and legal guarantees and the violation of legality

The discriminatory aspect of the legislation during Kayibanda regime is illustrated by the following example:

The only reason to maintain Ubukonde which is inherited from serfdom in a democratic nation is that the beneficiaries are from the Hutu clan who are great landowners in the North of the country.

The similarity with Ubuhake does not seem to have preoccupied the leaders of a democratic regime who have rebelled in the Parliament on several occasions. The problem does not have solutions because the legalized text is still in our civil code.

4.2.2.3. The end of the first Republic

The first Republic managed by President Kayibanda experienced its decline in an impasse context. The causes of the fall of his regime are so many; however they can be summarized in the following points:

On the one hand, the context includes regional, ideological, clan conflicts and individual intrigues. Sometimes, they are encouraged by clan or ethnic solidarity within the cabinet, Parmehutu and even within the Supreme Court. On the other

hand, too much power lies in the hands of the President. The resulting effect is dictatorship, the army and police include one ethnic group only.

Finally, the genocide and permanent violation of human rights and fundamental freedoms have created institutional disorder and the absence of the Rule of law; the modification of articles 53, 69 and 97 contributed to the re-election of the President of the Republic for a third term in preparation for a life mandate.

Since the causes of the decline of a regime justify the cause of their fall, the first republic was victim of its mismanagement of the public affairs. Unfortunately, its fall occurred through illegal ways.

4.2.3. Legality during the 2nd Republic

4.2.3.1. Military coup d'etat

In April 1972, the coup d'etat organised by the Bahutu in Burundi failed. As a consequence, a bloody repression was organised under pretext of revenge. President Kayibanda and the presidential guard trained Hutu militia to kill Tutsi students and civil servants from February to June 1973.

There was chaos throughout the country, General HABYARIMANA organised a putsch and toppled President Kayibanda and set up a military peace and unity committee.

4.2.3.2. Legality

The second decision of the military junta was the creation of a martial court to judge the dignitaries of the former regime through the decree-law of June 9th, 1974. On June 29th, 1974, the Martial Court judged and condemned KAYIBANDA and his seven companions for death penalty. During the proclamation of the Coup d'etat, General HABYARIMANA and the putschists "July 5th, 1973 comrades" expressed their deep esteem to the ousted President Kayibanda.

The sentence was not implemented publicly. The sentence was transformed into a life imprisonment by the presidential decree of July 19th, 1974. The presidential Decree n° 17/01 of January 8th, 1978 granted leniency; however the majority had died in prison as a consequence of the ill treatments.

Once in power, all the military regimes reveal their policy, their will to break all democratic inclinations.

The creation of MRND and the 1978 Constitution annihilated officially the multi-party system and public freedoms.

4.2.4. Legality between 1990-2003

This period is characterized by political upheavals caused by various events on the national, regional and international level. On the national level: the state-party was weakened by ethnic, regional, sectarian and clan divisions and all the consequences

of bad governance and the dictatorship policies. The government and the state-party failed to suggest a political agenda and to solve the problems generated by the 1959 revolution, the Putsch of July 5th, 1973 and other social and economic problems such as overpopulation, endemic hunger etc... The state-party dictatorship introduced discrimination in the public service, in schools, in the army, the mismanagement of national resources, the arbitrary decisions, corruption and impunity.

At the regional level: the country has Rwandan refugees whose integration problem is an issue of major concern for the people who welcome them as well as the relationship among nations and political leaders (in Congo, Burundi and Uganda).

On the international level: the speech of the French President François Mitterrand during the Franco-african Conference at Baule in 1989 denounced the dictatorships of the state parties in disarray.

All these social events obliged President HABYARIMANA to follow the example of other presidents and to attempt a solution to the crisis.

4.2.4.1. Political framework of the changes

On October 1st, 1990 a war was launched at the Rwandan borders. The Rwandan refugees from the Rwandese Patriotic Force (RPF) decided to prepare their destiny and to come back in their country through armed struggle. In reaction to the war that has been launched and to ensure his survival, President HABYARIMANA created the militia and other political parties related to the single party. He adopted repression policies; he brought back the discriminatory and ethnic ideology to create terror to ensure all the Bahutu extremists are his followers.

All over the country, crime, violence, repression were organised since October 1990. In October 1991 the Bagogwe were killed in Gisenyi and Ruhengeri Province. Organised terror, repression, genocide and crime became the only method used by President HABYARIMANA to rule. The President HABYARIMANA, MRND, CDR and the militia prevented democracy and multi-party system.

The first negotiations of the Arusha peace agreement occurred under this political context and war. The Arusha peace agreement establishes a transition period which ended with the promulgation of 2003 Constitution and the inauguration of the 3rd Republic.

To prevent a brutal fall, President HABYARIMANA promulgated the June 10th, 1991 Constitution while confirming the decisions of the 1959 social revolution as the foundation of the new political order.

4.2.4.2. Constitutional framework

The the legal point of view, the legal framework of this period can be subdivided in 4 consecutive periods: from October 1st, 1990 to August 4th, 1993, from August 4th,

1993 to April 6th, 1994, the liberators' regime (y' abatabazi) from April 7th, 1994 to July 19th, 1994 and finally the Government of National Unity from July 19th, 1994 up to the promulgation of the June 4th, 2003 Constitution.

The regime in place between October 1st, 1990 up to August 4th, 1993

The 1991⁴³ Constitution establishes a regime which is dominated by the President of the Republic. The latter appoints and dismisses all the cabinet members, he determines and manages the country policy, he controls the Public administration and the Armed Forces.

The President of the Republic controls the judicial power; he appoints and dismisses the magistrates.

Once President HABYARIMANA announced the suppression of the Single Party he tried to keep all the country management opportunities for himself and left other figurative roles to others.

On November 17th, 1991, the main opposition political parties (that is, MDR, PSD and PL) sent a common memorandum to the President; they expressed the major obstacles the government put in place to prevent democracy (harassing the militants, confiscation of radio and television programmes in favour of MRND (D) candidates, the party propaganda, and so on). In spite of the legislation establishing the multi-party system, the local authorities who were all MRND militants were not free to give opportunities to other political parties. It was not easy for them to choose between joining other political parties and to follow the state party.

This Constitution contained the signs of latent conflicts which were the root cause of the insecurity within the country and the impossible cohabitation between MRND and other the political parties in the transitional institutions.

The transitional period under the government of national unity: Arusha Peace Agreement between August 4th, 1993 and April 6th, 1994

From the social and political point of view, this period is characterized by chaos. Indeed, the "fourth republic" derives from the disorder and confrontation among all the political stakeholders struggling to get power after the chaos left by the state party. Civil disobedience became a normal practice. This period is characterized by the decline of the public administration: *kubohoza abayoboke*; training the militia and party youths: Interahamwe, JDR, JL, etc.

The army and police imposed the law of the strongest, made arbitrary decisions and impunity prevails. Political assassinations were organized: the killing of Minister Gatabazi from the Democratic Social Party was followed by the murder of CDR Chairman (Coalition for the Defense of the Republic). This retaliation was

⁴³ The Constitution of 10th June 1991 as amended by law n° 18/93 of August 3rd 1993

organized by the members of the Democratic Social Party. Finally, all these signs reveal the preparation of the 1994 Tutsi genocide.

On the external level, there was an awareness of the problems which motivated the war launched by RPF. The international community tried to bring peace negotiations (Arusha, N'Sele, Arusha, Kinyira) which did not succeed. Human rights and fundamental freedoms were violated; the Arusha peace agreement was violated as soon as Habyarimana died and worst of all, Tutsi genocide occurred.

Liberators' regime (abatabazi) between April 7th, 1994 to July 19th, 1994

The liberators' regime "abatabazi" reveals chaos and anarchy in the organization of the state and the protection of human rights and fundamental freedoms:

On the legal point of view, the creation of this government did not follow any democratic rule, because it was established by the military power to implement genocide plans.

Power separation can not be mentioned because neither the judicial power nor the parliament are operational (it is the jungle).

From the point of view of human rights and fundamental freedoms, this government coordinated and implemented the genocide plan under the supervision of the government authorities and country security services whose mandate was to protect people and their properties from Kigali to Mugunga where infiltrators attacked Rwanda through the turquoise zone. The genocide perpetrators found refuge in the turquoise zone where they used to plan possible attacks.

In short, this government is characterised by massive violation of human rights and fundamental freedoms (Genocide, violation of the humane right, generalized impunity).

Gouvernement of National Unity from July 19th, 1994 up to June 4th, 2003

From the point of view of the formal legality, the organization of the institutions is based on the laws established by the former state party and a conventional regime managed by the RPF while the transitional national assembly works under both modes: the 17/7/1994 RPF declaration and the 1991 Constitution.

4.3. Legality and hierarchy of norms in contemporary Rwanda

The hierarchy of norms principle is established by the following provision: "An organic law may not contradict the Constitution. Neither may an ordinary law or decree-law contradict an organic law. A decree may not contradict an ordinary law." (*Article 93 Constitution of 4/6/2003*).

4.3.1. Legal administration and norms

The Rwandan legal norms are enacted by the legislative power and the executive power. The latter is carried out by the President of the Republic and the cabinet with the assistance of the public administration. All these institutions and organs enact legal provisions and regulations which enhance government actions. The public administration remains very closer to the citizens in the implementation of various provisions.

The 2003 Constitution tries to specify the mandate of the President of the Republic and the cabinet mandate. However, it does not provide enough details about public administration (Article 126). Remember that every administration is managed by a Minister whose mandate determines the mandate of other administrations under its authority. The main mission of the public administration would be:

- The legislator should specify the law enforcement modalities through the regulations (Article 120, Al. 1 of the Constitution);
- To regulate some aspects of the economic, educational, security and social life etc. in order to bring more justice or efficiency in the efforts to meet the needs;
- To organize and manage public services which contribute to the implementation of the national policy as well as the laws and regulations.

All these mandates oblige the administration to develop an intense normative activity and provision of services in all the domains. The arising issue is to know whether the regulations enacted by the administration must be in conformity with the legal organization established by the political or administrative authorities. The aim is to show the collective will, to protect the public interest and to maintain equality of all the citizens. It goes without saying that the administration will not be able to modify this legal organization on its own, especially when it will be a matter of defining the concrete modalities to apply the laws. The administrative authority should therefore comply with the existing high value set of laws, whether they emanate from the political authorities (Constitution, laws and International Conventions) or from the hierarchically higher administrative authorities who manage very important interests.

The legality principle means that at any level, the administration is ensured within the framework of its normative mission, to follow very important rules on the one hand and to follow someone's own regulations of general interest when it comes to take a special decision on the other hand.

4.3.2. The order of the Rwandan legal norms

4.3.2.1. The Constitution

The Constitution is valid when it comprises ideas expressed by the Rwandans themselves (see n°12 Constitution preamble). In the current legal order, the Constitution remains the supreme norm to which all the other norms including the international agreements must conform. Indeed, any statement of a treaty or an international agreement can contradict the Constitution. It means that if Rwanda

signs a treaty or an international agreement comprising an element which contradicts the Constitution, the treaty will not have any effect in Rwanda as long as the Constitution is not revised or adapted.

4.3.2.2. *International Treaties and Agreements*

If the international treaties and agreements were regularly ratified or approved and published in the Official gazette, international treaties and agreements which have been conclusively adopted in accordance with the provisions of law shall be more binding than organic laws and ordinary laws except in the case of non compliance by one of parties (*Art.190 Constitution of June 4th , 2003*). Two new and significant elements arise here. Indeed, no international treaties and agreements can be valid in Rwanda as long as it contains a provision which contradicts the Rwandan Constitution. Moreover, Rwanda cannot sign a committing treaty or agreement when it does not offer any advantage. However, when an international treaty and agreement is already signed it is more binding than the organic and ordinary laws. If by any mistake, the treaty is signed and ratified when it contains some provisions which contradict the Constitution, the treaty will not be implemented.

4.3.2.3. *Organic Laws*

Hierarchically, the organic law is between the Constitution and the ordinary law. However, it is not as important as the international treaties and agreements. The role of the organic laws among others is to organize some government institutions. They are valid for matters which are stipulated in the Constitution as well as others which require related special laws.

(Constitution Article 93, paragraph 1). They are subjected to specific procedures such as the adoption by a majority of 3/5 of the members present while an ordinary law requires the absolute majority.

4.3.2.4. *Ordinary laws*

The law contains legal provisions and it is not applied to a specific domain. It applies absolutely in any matter except some which are related specifically to more important norms. The laws are voted by the Parliament, they can also be subjected to a referendum on a proposal from the president of the Republic after considering that it is an issue of general national interest (see art. 109 Constitution of 4/6/2003). Example: In Ivory Coast, the President of the Republic and the opposition political parties discussed for a long period of time about the need to call or not to call a referendum on nationality law contained in the Constitution. Once this article was adopted, citizens who have only one Ivorian parent could become presidential candidates.

Are there laws which require a referendum in Rwanda? Are there laws which have never been adopted through a referendum? After all, there is no legal obstacle because paragraph 3 of article 2 of the Constitution stipulates that National sovereignty belongs to the people who shall exercise it directly by way of referendum or through their representatives.

Article 109 of the same Constitution stipulates that the President of the Republic may call a referendum on issues of general national interest or any bill.

4.3.2.5. Regulatory acts

In Rwanda, the administrative actions are essentially the presidential Decrees, the Decrees of the Prime Minister, the Ministerial decrees, and the decisions taken at various levels of the administration.

A regulatory act is a general rule which is applicable to all. This rule is enacted unilaterally by the executive power, without the approval of the Parliament. Moreover, the individual administrative decisions relate to one or more people.

The regulations are more important than the individual decisions made by the same administrative authority. In other words, an administrative act taken in favour or against someone by an administrative authority cannot contradict an administrative regulatory act even if the latter has been taken by the same administrative authority. This principle is known as "*patere legem quam ipse fecisti*" (follow the law you have made yourself).

In short, the legal norms constitute a coherent order: the most detailed norms specify the most general ones, but the former cannot contradict the latter. This hierarchical organization, from the top to the bottom, allows us to determine the detail which fits to each norm in order to avoid the danger of allocating everything to the higher norms. Therefore, the set of rules is ordered and contributes to ensuring human rights and fundamental freedoms. Indeed, a norm cannot ignore more important ones. Therefore, a regulation must follow the law, the international treaties and the Constitution while an individual or collective decision must follow the rule made by the same authority.

4.3.3. Legality control

Legality control is one of the main tasks of the adjudicator. All the administrative acts are subject to action for cancellation. This reveals the amount of legality control power of the administrative decisions. The right of action can lead to the cancellation of the administrative act. This can have significant impacts on the administration responsibility.

This control can focus on the competence of the person who acted, on the compliance with the rules, their content and procedure as well as the aim of the act. The analysis of the competence and procedure should come before the content analysis. The analysis of the content encourage us to check whether there are no error of law (major legal error, application of a text which has already been repealed etc...), mistake of fact (for example: decision based on inaccurate facts) or misuse of power (for instance: the policing powers are used in favour of the person who acted, or the decision is taken for another purpose other than what the author had in mind).

4.3.4. Causes of law infringement among the citizens

"The laws and regulations are available. In general they are very well done. The problem is that they are not followed". This assertion has been mentioned during all the consultations around the theme of legality. The main reasons of this lack of legality are: people are not involved in the preparation and development of the laws, no contact between the members of parliament and their voters after the election, ignorance of the existing laws, lack of interest in the laws among the educated people as well as the peasants.

4.3.4.1. Citizens are not involved in the development of the laws

Since the citizens are not involved in the law preparation and development process, they do not feel concerned and consequently, they do not consider the law as their own property. Although it is true that there cannot be a referendum for any law, people should be consulted whenever there is a law which relates to their daily life. For example: the land legislation, the inheritance laws and other repressive provisions...

4.3.4.2. No communication between the members of parliament and their voters:

The members of parliament who are supposed to vote the laws which protect people's interests do not care about knowing the opinions and wishes of their voters.

4.3.4.3. Ignorance of the existing laws

The ignorance of the existing laws is mainly due to the inefficient means and procedures to disseminate the laws. Moreover, the oral tradition predominates whereas the law is published in the Official gazette. People can not afford to buy an official gazette due to its price which is relatively high, the purchase procedures are not common and the number of published official gazette is very small. People suggest that the most important laws be published in the newspapers such as "Imvaho" which is very cheap and many people can afford to buy it.

4.3.4.4. A lack of interest in the laws

The lack of interest in the laws among educated people as well as peasants is due to the following aspects:

- They are interested when the laws relate to their lives;
- No need to know the laws because they are constraining: people are not free to do whatever they want;
- The language used in the law is appropriate to people who are acquainted with legal terminology;
- The laws simply exist but they are applied differently to different people;
- Some important laws do not take into account the interests of the concerned population. For example, the decision to match the academic year with the

calendar oblige children to study in June, July and August under unfavourable climate conditions for young students and their parents.

4.3.5. Causes of law infringement among some authorities

During the consultations, participants dared to say: "*Abashinzwe gushyira amategeko mubikorwa nibo batayubahiriza!*" to mean that those who are in charge of law enforcement, the leaders in fact are the ones who violate them. The reasons behind such behaviour are so many but the main ones are: the confusion among the leader, the authority and the law, the fact of feeling that you are above the law, personality worship, power usurpation, incompetence, the absence of legality and even normative instability.

4.3.5.1. Confusing the leader with the law

Why do people feel that they are the source of the rules and norms to such extent that they ignore the existing statute laws? First of all, it is because they think their position allow them to do this or that. Once they are in a particular position, they think about their duties and start giving priority to their own mechanisms and the orders from the hierarchy. The appointment context contributes very much because the leader tries his best not to disappoint those who appointed him or her. When the influential powerful person is very strong, the leader feels comfortable instead of remembering that his or her authority comes from the law. The leader believes that his/her authority comes from his/her position and his/her influential powerful person. There is confusion between the leader's position and his physical personality. Under these conditions, the latter feels that he has all the powers in his/her hands to impose the law, to decide its implementation and to judge any matter within his/her administrative entity. According to him/her the law is made by his/her free will. Such a leader feels he/she is above the law.

4.3.5.2. Authority Worship and fear

Many Kinyarwanda proverbs, sayings and other expressions describe what Rwandans consider as appropriate behaviour vis-à-vis a leader. The saying: "*Irivuze umwami*" means may the will of the leader be done automatically; "the leader never sins"; "the leader's opinion is always the best"; "the leader is never late, something prevents him/her from being on time", etc.

In Rwandan mentality, this behaviour is not something which has been acquired randomly. It has been acquired through experience. There must have been people who dared to contradict their leaders and who have paid the price. Therefore, there is the tendency to apply the law in such a way that higher authorities are pleased though you are aware that what you are doing violates the law or citizens' interests. This behaviour reveals the lack of freedom of thought and expression.

The relationship between the various levels of the administration is characterized by fear (*Gutinya*): there is a lack of trust among the various levels of the central administration. For example an authority in a lower position is afraid of deciding according to the law because he/she is not sure that his/her decision will be approved by another authority at higher level. In theory, the former should not rely

on the protection of his/her senior authority; he/she should rely on the law. The lack of trust among various levels of the government creates trauma which is almost congenital among the authorities at grassroot level and the citizens. This is a factor that fragilizes the law implementation process among the authorities at grassroots level. Law enforcement becomes selective and discriminatory in favour of higher authorities.

The authority at a lower level fears the consequences of his/her conformism to the law which could be considered as insubordination. However, there is still no clear answer about personality worship: does it come from the leader himself or from the people who report to him, who cajole him, people who convince him that he is most intelligent person in the world, that he is always right, that his point of view is always the wisest. A leader who is used to such praises will never tolerate anyone who contradicts him. To illustrate this, a peasant gave the following example: "the only cow I have is not allowed to trample the edge of the road; the cows of our local authority spend the whole day grazing on both sides of the road ". For this peasant, the government (Leta) enjoys making the laws but it does not bother how they will be implemented correctly by everybody including the local authorities.

4.3.5.3. Corruption and impunity

Corruption and impunity have also been mentioned as factors which encourage most of the leaders to violate the law and other regulations. When an authority is corrupt, he violates the law and the regulations like anybody. For instance, people are not allowed to sell urwagwa banana beer during working hours. Nobody says anything to some pubs which open and sell during those hours. The reason behind is that the pub owner has bribed the policemen or the sector coordinator who monitor the implementation of the decisions taken at sector level. A leader who is not punished for violating citizens' rights will certainly repeat the same offence because he knows he will not be sanctioned. Instead of punishing them, higher authorities transfer them in another place or give them another position.

4.3.5.4. Incompetence of some authorities

The violation of the laws and other regulations is not only the lack of good will. Some leaders lack the skills to carry out their duties. Therefore, they can not interpret the law appropriately. These are leaders who got the job without any competition; they rather got it through influence peddling or political reasons. The recruitment was done on criteria other than competence (nepotism, political party membership, any form of sectarianism).

4.3.5.5. Laws are not implemented in the same way

It is true that some leaders do not abide by the law; it is also true that some laws and regulations are implemented and they are more important than others. These include repressive laws and regulations while others protecting the citizens' rights are forgotten. The police instructions are implemented rigorously while some people do not know that they have the right to be assisted in court.

4.3.5.6. Power abuse

Power abuse is the voluntary and premeditated violation of the law. It justifies the extravagant behavior of the authority. “*Munyumvishirize*”. Some authorities ignore the law (*Hari abica amategoko batayazi*) they just turn the page, but others violate them consciously (*hari abandi bayica bayazi kandi babishaka*) and this is quite serious. In the Rule of law, nobody can decide to violate the law deliberately.

4.3.5.7. Power usurpation and interference in other people’s responsibilities

To act when you do not have the necessary competence (*udafitiye ububasha*) for example a mayor who dares to judge people (*utandukira akajya guca imanza*) because there is an unspecified interest in the conflict, this is an example of power usurpation. An administrative authority who meddles in his colleague’s responsibilities interferes in his duties.

4.3.5.8. Absence of a sign of legality

Nobody worries about basing his/her decision on existing legal provision or prescribed rules. It is very rare to see an authority who is not from the judiciary power quoting an article to emphasise a decision which must be implemented. Ignorance of the laws by decision-makers may be one of the reasons or they refuse to refer to the law because their decision may contradict this legal provision.

It is very important to request every authority who makes a decision to quote the appropriate legal provision or the regulations. This will not require extra efforts apart from buying the legal texts and regulations. This can be a great step towards the promotion of the Rule of law in Rwanda

4.3.5.9. Legislative instability

The ignorance of laws and regulations is also due to the frequency of amendments of the laws in force. This frequency arouse doubts on the relevance of the law in force at a given period, it indicates the lack of analyses before making any amendment. The example which comes quite often relates to the tax laws.

Such instability does not contribute to a better understanding of the law contents and does not encourage the authorities to know the amendments because they think that the law can change any time.

Legality leads to human rights and fundamental freedoms.

V. HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Shortly after the 1994 genocide, the Rwandan Government of National Unity decided to protect the human rights and freedoms in order to avoid the re-emergence of any form of human rights and fundamental freedoms violation after the genocide atrocities. Another reason is to establish the Rule of law which has been absent from the colonial period, independence until 1994.

5.1. Understanding the meaning of “rights and freedoms”

"The words free or freedom simply show the absence of any social constraint on somebody"⁴⁴ Freedoms are called public as opposed to private ones. The adjective introduces a precision concerning the origin of the social constraint... Freedoms are perceived as objects of the legal regulation. ⁴⁵The social constraint establishes everybody's freedoms. The public administration must impose them in the form of legal norms which are called "*bill of rights*". These norms are enacted to protect essentially the individual's freedom instead of putting a limit to his freedoms.

The expression "public freedom" is not the only one to be used: "fundamental freedoms" and "human rights" or "individual's rights" are also used. The protection of some freedoms is included in the Constitution, therefore they are fundamental. The same applies for human rights. This relates either to the philosophy of public freedoms or to the international law. The idea of public freedom has an internal and international dimension insofar as the human rights and fundamental freedoms appear as Constitutional norms (articles 10 to 44 of the Constitution of June 4th, 2003). This Constitution endorses the "Universal Human Rights Declaration".

The idea of freedom emanates from the Western countries and echoes Jean Jacques Rousseau's social contract which stated that "men are born free with equal rights". However, for more clarification of the principle, "everything that is not prohibited is allowed". The traditional principle of the criminal law emphasizes, "*Nullum crimen, nulla poena sine lege*" which means, "no crime, no sentence without the law".

5.1.1. Freedom principle

From the abstract principle: "everything that is not prohibited is allowed", comes a whole series of concrete list of human rights including:

- The respect for human dignity includes:
 - Right to live including the prohibition of genocide crime and crimes against humanity;
 - The prohibition to violate human dignity.
- Individual rights:

⁴⁴ Lalande dictionary quoted by Patrick Wachsmann, *Libertés publiques*, Paris Dalloz 1996, p.1

⁴⁵ Idem, p.2.

- Right to be protected people and their properties against arbitrary decisions, protection against arbitrary arrest and illegal detention;
 - Right to private life;
 - The freedom of movement: through the country or abroad, to settle where you want and to emigrate if necessary.
 - The freedom of thought, of belief, of religion, of expression. Freedom of press which protects all the others.
 - Freedom of assembly, freedom of association: to meet with anybody or any group, etc;
- Political rights: right to elect the leaders, the right to become a leader, to take part in decision-making process, to control power.
 - The freedom of economy: from a typically Western vision, the principles of political liberalism are found in the economic domain: freedom, equality, competition, i.e. pluralism. The Western countries believe and declare that with pluralism the production means are in the hands of private individuals, private sector is the best, free market ensures the economic development and capitalism brings prosperity and individual's development.⁴⁶

Remember that liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights someone's freedom stops where his/her fellow human being's begins. Freedom thus consists in being able to do all that does not harm others.⁴⁷ The main freedoms in Rwanda are presented in the following section.

5.1.2. Principle of equality before the law and equal opportunities

The foundation of human rights philosophy is the recognition of human dignity. Freedoms that are acknowledged to some people and denied to others are called privileges, not rights⁴⁸. Article one of Universal Human Rights Declaration stipulates that all human beings are born free and equal in dignity and rights (...)"'. The same principle is mentioned in article 11, paragraph. 1 of the 2003 Rwandan Constitution: "All Rwandans are born and remain free and equal in rights and duties. This nuance brought by the Rwandan Constitution does not contradict the content of the Universal Human Rights Declaration. It can be understood as a will for Rwanda as a State to remind all the Rwandan citizens about their rights and duties or behaviour within the community. The Constitution imposes equal rights and recognizes equal duties for all the citizens. The individual and the citizen do not have rights and freedoms only, they also have duties including:

⁴⁶ For more details, see P. Wachsmann, *Libertés publiques*, Paris, Dalloz, 1996, pp. 287-441; see also D. Breillat, *Libertés publiques et droits de la personne humaine*, Paris, Gualino éditeur, 2003 and J. De Waal et al., *The Bill of rights*, handbook, Western Cape, 2001.

⁴⁷ Article 4 of the French Human Rights Declaration.

⁴⁸ P. Wachsmann, *Op cit.*, p. 217.

To abide by the laws: " In all circumstances, every citizen, whether civilian or military, has the duty to respect the Constitution, other laws and regulations of the country." (Article 48, Al. 1 Const.);

- To respect other citizens rights: "Every citizen has the duty to relate to other persons without discrimination and to maintain relations conducive to safeguarding, promoting and reinforcing mutual respect, solidarity and tolerance" (Article 46 Const.);
- To love, serve and defend the motherland: "All citizens have the duty to participate, through work, in the development of the country; to safeguard peace, democracy, social justice and equality and to participate in the defence of the motherland." (Article 47, paragraph. 1 Const.).

If 2003 Constitution insists on the fact that "All the Rwandans are born and **remain** free and equal in rights and duties..." it is because some Rwandans were denied their rights in Rwanda in the past. If the Rwandans are born equal, it is the same throughout their existence. The public administration cannot guarantee rights and freedoms to some and deny them to others.

Exceptionally, the Rwandan Constitution suggests an exemption to the equality principle as it grants immunity to some high authorities (cfr art. 145-6^o of the Constitution as revised). Moreover, article 69 of the Constitution recognizes the parliamentary immunity in some cases. This Constitution has reduced considerably the categories of people who enjoy these privileges and immunities because the former Constitution included all the ministers, all the members of parliament, the Supreme Court advisers, the senior officers, etc. If all the higher authorities enjoy these privileges and immunities, the ordinary citizens remain the only ones concerned by the provisions of the various laws particularly the repressive ones. A fatalistic mentality is established gradually in the minds of the people who believe that a higher authority cannot be sued for his or her criminal acts or he/she can not be judged by ordinary jurisdictions.

Why such privilege and/or immunity for an authority? According to some people, it is part of the spirit of 2003 Constitution which reduces the number of people who shall enjoy the privileges and immunity prescribed in the law. Leaders must play a key role in giving a good example of abiding by the law. All Rwandans, leaders and ordinary citizens are equal before the law.

5.2. Human rights in Rwanda before the colonial period

The supremacy of the Banyiginya have contributed to the inclusion of cultural values and the creation of the Rwandan customary law in various matters relating to social life including married life, the right to ownership, the protection of fundamental rights, fight against crimes and offences, etc.

5.2.1. Bodily security and the right to live

As mentioned above, the Mwami was the only person who could judge the committed crimes including crimes against bodily security and life. Nevertheless,

the absence of the written penalty in the traditional criminal law allowed the Mwami to decide personally the sentence upon a guilty person. The political crimes were sanctioned by the dismissal or death penalty, whereas summary executions were done without any legal lawsuit. Moreover, there was no legality and organized judiciary system. As a consequence, people resorted to revenge (*guhoora*).

Perhaps this exclusive competence of the Mwami and exercised without any judiciary system was perceived by the ordinary citizen as a way of protecting him against the abuses of powerful people in the Kingdom. However, it created unacceptable situations and practices:

- This absolute power was the root cause of the abuses and serious violations against the members of the politicians: whole clans were decimated without judgments;
- The danger of sanctioning differently the same infringement depending on the judge's mood or the circumstances;
- The lack of prisons prompted the following penalties: death penalty, torture (*ingoyi*), drowning (*kuroha*) and smothering (*kuniga*), hanging..., principal forms of sorrows inflicted to the delinquents;
- Euthanasia for old people including the Mwami (*kunywa*), euthanasia for undesirable births (malformation, physical disabilities, albino, children born from incest), etc. Old people had to agree with the penalty or they were forced to agree with the penalty.

5.2.2. Actions which are detrimental to bodily security

Some cruel practices against the bodily security include:

- Tortures (Inkoni, *ingoyi*, *gutobora amaso* (Kayijuka case));
- Physical torture and inhuman treatments on children by their parents and women by their husbands;
- The clitoris elongation (*gukuna*): some people think that this practice is a violation of the bodily security; it has no negative impact on the bodily security. It can be classified in the same category as to pierce the ears (*gutobora amatwi*) before wearing the earrings, etc.
- The punishment for adultery and rape crime was not the same and depended on the social condition of the criminal: adulterous men were castrated.
- Criminals who were guilty of *abduction had to pay a fine or compensations*.

5.2.3. Family Right

The Rwandan traditional marriage is subject to precise and solemn rules aiming at preparing the marriage procedures (preparing the girl: *gukuna* for example), marriage celebration (*Gusaba*, *gukwa*, *kurongoranya*, *kurongora*), and even abduction (*guterura*), the spouses' common life (*imibanire*, *guharika*), separation and divorce (*kwahukana*, *gusenda*), the widows' rights (*kwirabura*, *kwera*, *kwezwa*), etc.

The traditional Rwandan society is characterized by the supremacy of the husband who is above of the nuclear family. He is the head of the family, whereas the woman and the children can not decide anything when he is there. This woman incapacity is due to the fact that family perennality is ensured by men.

Heredity is ensured by the male. Men must have children in order to ensure family continuity (*kugirango umuryango utazima*). This responsibility has impacts on family and inheritance rights. The male line prevails whereas women have no right to inherit family heritage. Consequently, a barren woman is an opportunity to request for divorce whereas male sterility is a legitimate reason for authorized adultery (other men in the family or clan had to compensate for the procreation deficiency caused by the sterile man. Even the father-in-law had to compensate for this procreation deficiency if necessary). This gives situation created such practices as allowing the widow to marry her husband's brother (*guhungura*), allowing the widower to marry the sister of his wife, polygamy, *gukazanura*, etc.

The head of family had also other responsibilities including religious practice to ensure the family welfare and good collaboration with the ancestors (*kubandwa, guterekera*), he was supposed to maintain the good relationship within the family, to advise or reprimand family members. Moreover, he had the right to own a privative portion of land (*itako ry' ubutware*), and keep another portion to be distributed to women and girls who have divorced their husbands and returned back home (*ingaligali*).

This traditional family right includes a whole series of inequality principles whose impacts are present even today:

- Inequality between man and woman, because the Rwandan society is patriarchal;
- Women's incapacity (married or not married);
- Women have not right to inheritance because the Rwandan society is patriarchal and the prevalence of the male line to ensure the clan perennality;
- Women barrenness is the cause of divorce;
- Women can not inherit his husband's property;
- The unilateral marriage settlement in favour of the husband and male descendants.

5.2.4. Ownership and contracts rights

The customary law had many legal procedures relating to property, the precarious possession, the lease of livestock (*ubuhake*) or land (*kwatisha, ubukonde*), securities (*kugwatiriza no gukomera ihembe*).

5.2.4.1. The establishment of ubuhake

Definition and characteristics

Ubuhake can be defined as a lease of livestock contract whereby the donor gives cows to Umugaragu in exchange for goods or services. The Ububuhake contract is a contract of an unspecified duration. The contract can be passed on to the heirs as long as both parties are committed to follow the terms of the contract.

The mutual services depend on the positions of both parties in the social hierarchy. Ubuhake is a traditional organ which regulates the relationship between Shebuja and Umugaragu.

This relationship has a social, an economic and sometimes a political connotation depending on the position of the Shebuja in the political hierarchy.

The traditional Rwandan cow had an economic and social value. It was social when it reinforced the links among the individuals, the families, and the clans in the form of dowry (inkwano), gifts given in various circumstances of the social life: death, marriages, births, visits; civils servant expressed their allegiance when they got promotion or transfer.

The traditional Rwandan cow had an economic value when it was used as money or currency or source of wealth.

When the Europeans arrived, there was a clash between the traditional culture and the African and European civilizations. The Europeans who have just experienced feudality and French revolutions (1788-1930), Russian (1905-1917) reacted negatively against the Rwandan culture which they portrayed as evil and pagan. They decided to destroy it with the help of the civilizing mission and to replace it with the Jewish-Christian civilization. The way they handled this social contract is similar to the way they handled other organs of the traditional society. However, the most targeted were the monarchy, the worship of Ryangombe, the traditional religion (worshipping Imana) and worshipping the ancestors.

To destroy the monarchy, it was necessary to destroy the solidarity bonds among the Rwandans which is expressed through ubuhake first of all then to remove the sacred aura surrounding the Mwami who was a respectful intermediary between the citizens and the supernatural powers.

The first action carried out by the church and the colonial authorities is the violation of the cultural rights and freedoms of conscience and religion of the colonized indigeneous people.

Article 4, paragraph 2 of the October 18th, 1908 law on the government of Belgian Congo states that the indigeneous people enjoy the civil rights recognized by the colony and their custom only as long as these practices do not prevent the colonial law and order.

We will see that Mwami Musinga was dismissed because the Catholic Church believed that he was an obstacle to the success of the civilizing mission and to the violation of the cultural rights.

Abolition of ubuhake

In 1930, Deputy Governor Voisin expressed the need to kill some cows so that the remaining cows in the country may have enough grass to graze.

In 1941, the introduction of the money for exchange and as a means to become rich encouraged some Bagaragu to violate their obligations. With the support of the national higher council, Mwami Mutara Rudahigwa suggested the abolition of ubuhake in 1945. Governor Jungers rejected this proposal and ordered a survey in the society. It revealed that the majority of Rwanda citizens wished that ubuhake be abolished.

Through circular n° 33/52 of April 10th, 1952 Mwami declared once again the abolition of ubuhake. Circular n°38/53 of 11 November 1953 obliged the indigenous courts to put an end to the fanciful sharing procedures between Shebuja and Umugaragu.

During Council meeting held from the 21st to 24th February, 1954 Mwami insisted on the need to abolish ubuhake which was considered as an obstacle to country development. The council agreed and supported the abolition.

Through the decree 1/54 of April 1, 1954, Mwami declared the abolition of ubuhake contract and ordered the sharing as follows: ¼ for Shebuja and ¾ for Umugaragu (Article 4).

N.B: We felt that it was necessary to present the development of ubuhake abolition in details because the role of Mwami Mutara III was manipulated by the Belgian administration for political reasons including the fact of considering ubuhake as a means to impose Tutsi supremacy and to justify the abolition of monarchy, the genocide of the tutsi and the ethnic and political ideology of the colonial administration.

5.2.4.2. The establishment of ubukonde

Ubukonde is based on the law imposed by the first occupant. The head of the clan is the first person who cleared the forest. He enjoys the first occupant's rights. He can rent, sell, exploit, and pass it on to his heirs. He can also give it in to an Umugererwa in exchange for services or goods. Ubukonde is more or less similar to the British common law relating to property.

With the expansion of the central power towards the West and North of the country, Mwami did not abolish ubukonde in order to benefit from the allegiance of the head of clans. The royal officials from other regions who were appointed or transferred respected the ubukonde tradition. They received portions of lands belonging to the bakonde. Therefore, they became political bagererwa. The 1959 revolution and the first Republic did not abolish ubukonde because the Parmehutu political leaders from this region refused.

On the legal point of view, ubukonde and ubuhake are a concession contract insofar as it creates perpetual obligations between two parties, the obligations can be passed on to the heirs.

From the social point of view, the contract creates unclear obligations in addition to the traditional services and taxes. The latter prevent the peasant from meeting personal needs as well as the needs of the family.

Ubukonde is a barrier to the acquisition of the right of ownership and economic progress, because it prevents the umukonde to sell the land.

Through the edict n° 530/1 of May 26, 1961, the National Assembly established ubukonde control mechanism and prohibited its expansion in other places in the country. The lands occupied by the political bagererwa were rented and they could get land after paying a certain amount to the mukonde. On the other hand, the edict suspended the contributions of the traditional bagererwa and replaced the contributions in kind or in the form of work by an annual rent which was agreed or determined by the court decision. Ubukonde is still present nowadays and is included in the penal code. The new land law abolishes ubukonde and transformed into ownership right.

5.2.4.3. Mwami's power relating to the acquisition and the loss of ownership right

Mwami represents the nation and for this reason, he exercises absolute power on all the citizens and their properties. He can expropriate, concede, and get services and contributions for his court to organize the armies and to support war efforts. In the event of supreme sanction (the bannishment), the properties of the criminal and his position are given to his successor and no allowance is given to him. To use the modern terminology, this is confiscation. Moreover, the King controls properties obtained from the war. He distributes them to his courageous warriors, including the conquered or annexed territories.

Although Mwami has personal properties composed essentially of the royal strongholds, and pastures where his cows called inyambo are managed by a chief called umutware w' inyambo, people in general had the right to exploit their properties and not to own them. This introduces the modern legislations which declares that "all the lands that have not been acquired through the statute law (...) belong to the Government"⁴⁹ - to limit the rights of the owners, all the expropriation for public interest, requisition, domanial royalties prerogatives, etc.

5.2.5. Freedom of worship

The Rwandan traditional or primitive religion is based on the worship of God or "*Imana y' U Rwanda n'abanyarwanda*" characterized by humanism which makes man (dead and alive) the center of the universe, in the second position after God. The worship of the ancestors had considerable advantages, namely:

- To help the descendants become more responsible and acquire the sense of solidarity vis-à-vis the family, the clan, etc;
- Social solidarity is based on bonds that have been strengthened by the worship: *igihango, kunywana, kubandwa...*;
- Social protection against the enemies and the natural disasters, etc;

⁴⁹ See for instance art 1 DL n° 09/76 of 4 March 1976 on on land purchase, selling and occupation

- Cannibalism never existed in the Rwandan society. However, it was present among neighbouring societies;
- Human beings were not killed and sacrificed to god. This kind of criminality was present among neighbouring societies; (*nangayivuza* in Burundi...);
- Tolerance vis-à-vis other religions or forms of worship;
- Duties related to the worship of the ancestors.

The worship has an important role in the traditional Rwandan society: *kubandwa, kwatura, gusubizaho, kurongoza umwishywa, guhanisha, guterekera, gucura inkumbi, kuraguza, kuragwa umuhango, kugwatiriza, gukoma ihembe*. Some people would like to come back to such practices and believe that they can improve the relationships among the members of the traditional community. They could be re-established and contribute to fight against all types of intolerance in our current society.

5.2.6. Armed conflict period and humane rights

During the armed conflict period, the following practices reveal the lack of Rule of law in Rwanda: banishment (*guca*) from the country, collective massacre of the war prisoners, castration (*gushahura*), violence (Rutshunshu war). This period is also characterized by the lack of prisons. Therefore, prisoners became slaves, their properties were confiscated and used (*iminyago*); death is decided upon them, people are disarmed, the lack of humanitarian law which was developed by that same period in Europe (Henri Dunant and the Geneva conventions).

5.3. Measures to protect the rights and freedoms during the colonial period

5.3.1. Protection against the crimes and offences

The colonial legislator established a judiciary system which determined the sanction against the crimes and offences committed by the White people as well as indigenous people, applying the imported legal provisions from Europe. However, the duplication of the judiciary system does not contribute to a better implementation of the laws.

5.3.2. Individual rights

The abolition of slavery is an application of the principles of slave trade international law since human beings could no longer be treated as objects or animals.

Contrasting these principles, the Resident introduced a traditional practice called "*uburetwa*" in favour of the government, the workers of the Europeans, the catechists, the students, Wealthy tutsis and regular immigrants. This practice was the same as slavery. The only difference is the name.

Moreover, the system contributed to a kind of discrimination since the Europeans and the few registered people were the only ones concerned with the statute law.

Remember that although the coloured people were first to be registered, the first Rwandans were registered towards the 1950s (the advantages of the registration were extended to Rwanda Urundi citizens by D-L 1951 amended by decree 17/5/1952 made compulsory in Rwanda Urundi by legislative order n°11/123 of 10/9/1952 confirmed by the decree of 14/02/1953). This registration system had impacts on people's behaviours, the first signs of frustrations appeared when some citizens considered their fellow citizens as deprived from civic rights. The superiority and inferiority complex was developed very much by the colonial system. It also had an impact on interpersonal relationships between Rwanda-Urundi citizens, some of them who worked with the colonial administration tried to imitate the European attitudes while others found themselves caught in the system.

5.3.3. Private property protection

Through the regulations, the Resident abolished the traditional practices found in the customary laws whereby umugaragu could be deprived of his property by his shebuja (master). Later on, to ensure the right of every citizen to acquire land, the right to own large plantations (ubukonde) or pastures (ibikingi) was abolished by letter 5395/org of 04/12/1930.

5.3.4. Compensation right in the event of damage

The colonial legislator established compensation for the destruction caused by the animals (namely, cattle).

5.3.5. Freedom of religion

Although the colonial power established the freedom of worship⁵⁰, it supported Christianity which was its heir apparent in the effort to abolish cultural religious practices (*kubandwa, guterekeru*, etc), calling the latter satanic practices and bannishing in the name of god anyone who is interested in such practices. The conversion of the Mwami was considered as a good example for the people to follow. However, since these practices were not abolished at the administrative level, they could not be abolished completely by the church. Today, these practices have survived though still secret.

5.4. Human rights during the post-colonial period

The tendency of self-determination reveals that all the indicators of the Rule of law are not present and the opportunities for clashes are always present. This period was characterized by massive violation of human rights and fundamental freedoms, which culminated in the 1994 genocide.

⁵⁰ The edict of July 1917: Mwami declared the freedom of worship in accordance with the Berlin Act and Saint Germain en Laye Convention

5.4.1. The 1959 Revolution and the violation of other rights of freedoms

5.4.1.1. *Bodily security, the right to live, the right to be protected against the arbitrary in someone's being and properties*

Many books present the 1959 revolution as an uprising of popular mass claiming the abolition of social injustices. They claim that they are victims of social injustice imposed on them by a higher social class. The aim of the social revolution is to ensure the citizen's interests and to establish such democratic principles as equality, freedom, human rights etc. However, this was not the case, because the popular mass was involved in subversive acts including hunting for the tutsis. Rather than considering it as a fight between social classes, the revolution became a fight between ethnic groups. There are many the cases of violation of the bodily security rights, the right to live, the right to be protected from arbitrary decision in someone's being and properties. Some of them are mentioned below:

The death of Mwami Mutara III Rudahigwa who was assassinated in hidden circumstances was badly interpreted by the people and manipulated for subversive purposes;

The case of Dominique Mbonyumutwa who was beaten at Gitarama by rioters and the assassination of sous-chef Nkusi and two village elders from the tutsi ethnic group were a good opportunity for the colonial authority to get rid of all the administrative staff who disliked Belgium policy and claimed independence;

Political manipulations were transmitted in all the media including the press. The aim was to hunt for the tutsi and to confiscate their properties;

Many were forced to go in exile others were deported in some regions of the country such as Bugesera where the sanitary conditions are not good so that the tsetse fly can kill them;

Arbitrary and illegal detentions: during the same period, the prisons were full. Many of them ignored the reason of their detention without judgements. They had neither food nor health care. Only 20 % of them went to court.

However, the political manipulations shows to which extent the Hutu population was not convinced of the need to kill their Tutsi neighbours: the proof it is that some hid them and protect them; they protected Tutsi properties and those who can afford to come back from exile can get their properties.

5.4.1.2. *Political rights and freedoms*

Creation and support to sectarian and ethnic political parties

The 1959 revolution was characterised by extreme political turmoil with the creation of political parties and independence movements. Through order n°11/234 of May 8th, 1959 published in Rwanda–Urundi by O.R.U n°111/105 of 15/06/1959, the colonial power had authorized the creation of the political parties. Unfortunately, they were created on ethnic and sectarian criteria in Rwanda against the citizens' equality and national liberation principles. Here are the political parties:

- *Ethnic political parties:*
 - 09/10/1959: the PARMEHUTU (Hutu Emancipation Party);
 - AREDETTWA (Batwa Emancipation Party): The only party member of this party is called Munyankuge. He shifted to PARMEHUTU in February 1962;
 - MOMOR: Monarchists Movements;
- *Sectarian parties:*
 - APADER (Nyanza Democratic Christian Party);
 - UAARU (Rwanda African Stockbreeders Union);
 - UNINTERCOKI (Kinyaga public interests Union);
 - ABAKI (The Bakiga alliance).
- *Political parties with a national vision. Legally speaking, considering their name they do not have a sectarian or ethnic connotation:*
 - APROSOMA (Association for Social Promotion of the Masses) created on 15/02/1959;
 - UNAR (Rwandese national Union) created on 03/09/1959: Party with unity vision;
 - RADER (Rwandese Democratic Rally) created on 14/09/1959: multiethnic party;
 - UMAR (Rwandese masses union).

The bad leaders of the discriminatory political parties have categorised the political parties on ethnic or regional criteria. Therefore, APROSOMA was identified as a political party whose activities are restricted to Butare. UNAR and RADER are in favour of the Mwami.

The involvement of the colonial administration and the church in the creation of the political parties is very significant because they have contributed and supported them. Such political parties include:

- RADER, from the collaboration between Father Dejemeppe from Kabgayi diocese and a deputy resident named Régnier. Their aim was to unite people from Astrida (Butare natives) and the Hutus in a multi ethnic party which could welcome the Belgium policy; and

- PARMEHUTU, created by the collaboration of canon Ernotte and Father Enduatis. Their aim was to put an end to the social and political hegemony of the nyiginya-tutsi.

Electoral manipulations

The democratic process was manipulated by the colonial power. Through a coercive decision, Mr. Jean Paul Harroy who was Governor of Rwanda-Urundi, wrote the circular n°2210/495 of October 10, 1959 where he forbid the Rwandan administration civil servants to become members of the political parties which are hostile to the colonial administration and Belgium. The same day the governor imposed a disciplinary transfer to Chiefs Michel Kayihura, Mungarurire and Rwangombwa.

The process of self-government as well as people's representativeness had been recommended by the Trusteeship Council and adopted by the decree of 14/07/1952. Article 28 states the preparation of the electoral lists taking into account "people's preference". However, this provision allows the deputy chiefs, the chiefs and the administrators to modify the electoral lists as they wish.

Art. 41 of the legislative order N° 02/16 and 02/334 stipulated that the general resident could limit the vote to male voters only. The circular letter n°211/06763/3307 of 04/08/1956 of Governor Harroy invited all the indigenous adult male people to prepare the electoral lists. These provisions are discriminatory, they violate women's rights and they contradict the United Nations Charter.

5.4.1.3. Freedom of press

This period was characterised by the creation of the first government media in the name of Imvaho. Its mission was to disseminate the political opinions of the regime in place. Moreover, the right to get information is used as political tool in the same way as the propaganda against the monarchy system which was made through the distribution of the leaflets by the army helicopters.

5.4.2. Enjoying the rights and freedoms during the first Republic

The first Republic established the ethnic ideology and the violation of equality principle. All these mechanisms had major effects on the social and economic and political rights, etc.

5.4.2.1. Enjoying the civil laws

During the colonial period, the Belgian Congo Government established discrimination through the law of October 18, 1908. This law stipulates that the indigenous people from the Belgian Congo who are not registered will enjoy the

civil rights recognized by the colonial legislation. The Belgians and the foreigners enjoy all the civil rights. The 1962 Constitution modified the law and declared that all the Rwandans should enjoy all the civil included in the civil code. Since then, the registration was no longer necessary to enforce the civil code.

5.4.2.2. *Bodily security and right to live: Genocide and state sponsored terrorism*

During the first Republic the right to live was violated and the perpetrators have never been brought to court. Since December 1963 the attack organised by a group of refugees gave the regime an opportunity to exterminate the members of parliament from the opposition political parties and to put an end to multi-party system. The implementation of ethnic cleansing policy obliged Munyankuge Paul, the only representative of the Twa ethnic group in the Parliament to shift in Parmehutu party in February 1962. After accomplishing its mission, Parmehutu ruled as the only absolute master until the July 5, 1973 military coup d'etat.

After the July 4th, 1963 communal elections which established Parmehutu party as the single party and the repression against the opposition political parties, the country was attacked by the inyenzi at Gako camp on 21/12/1963. The security department ordered the arrest of the majority of UNAR and RADER leaders and all the Tutsi intellectual working in Kigali. The categorization was ordered by the Belgian officers Pilate and Turpin with the collaboration of Rwandan security personnel. The main UNAR leaders were executed in Ruhengeri the same night. Concurrently, there were arrests and assassinations of the members of parliament as well as Tutsi intellectuals living in Kigali.

President Kayibanda sent ministers in other provinces to organize what they called self-defence committees in charge of organizing Tutsi genocide. Collective massacres were organised in Gikongoro and Bugesera regions around 1963-1964. These crimes were not known by the international community which was preoccupied by the cold war. They have never been denounced, that is why impunity encouraged the crime. UNO sent Mr. MAX Dorsinville but his report revealed that the regime was not responsible. The human rights violations were revealed the following years (see investigation missions of July 25, 1964 and July 4th, 1968 carried out by parliamentary committees).

5.4.2.3. *Political rights and freedoms*

Prohibition of the multi-party system

The multi-party system adopted during the independence lasted until 1963 only. Since then, Parmehutu became the single party after the assassination of the members of Parliament from other political parties: Burabyo, Rutsindintwarane, Mpirikanyi, Rwagasana, Munyanziza, Ndazaro, Bwanakweri, etc). The communal elections of July 04 1963 established Parmehutu as a single party: *These elections were characterized by massive frauds, intimidations and the ballots of the*

opposition political parties were burned. The assassinations and forcing the members of other political parties to join Parmehutu party were done to secure personal, ethnic, sectarian, regional interests of Parmehutu leaders. Almost all the prominent leaders of PARMEHUTU party are from Gitarama.

Discrimination against women who are election candidates

Although the principle of equality between man and woman is recognized by the Constitution; article 9 of the Constitution allows women to vote but article 54 forbids women compete as presidential candidate. This provision discriminates women.

5.4.2.4. Freedom of press

A repressive against private newspapers was organised: Kinyamateka newspaper was suspended; Félicien Semusambi who was a journalist and chief editor was arrested. Father Enzo Maïda was chased from the country after denouncing the malpractices of Kayibanda dictatorial regime from 64-68.

The banning of the newspaper and the arrest of the chief editor raised a written question in the national assembly but the Speaker refused to launch the debate.

- On the legal point of view, there is violation of the freedom of press recognized by article 18 of the Constitution;
- The fact of refusing to organize a debate violates the prerogatives of the assembly and violates article 96 of the Constitution.

5.4.2.5. Right to unionization

The unionization right is exercised under restricted conditions because article 43 of the Constitution states that the civil servants as well as the public administration employees do not have the right to go on strike.

5.4.2.6. Freedom of thought, freedom of association and freedom of conscience

Despite the adoption of the freedom of thought, of association and conscience, the 1962 Constitution, under the influence of the church, seems to show some negative attitude towards communist ideologies. Therefore, article 39 prohibits any communist activity and propaganda. In reality, the aim of this provision is to destroy UNAR which is considered by the catholic clergy as a communist party. Paradoxically, article 38 forbids religious communities and institutions to interfere in the government mandate and political matters. This provision is somehow inaccurate because during that period, all the faithful politicians of the regime had to go to Kabgayi as pilgrim Muslims go to Mecca.

5.4.2.7. *Social and economic rights: exaggerated discriminations*

Exclusion is one of the characteristics of the post-colonial period including ethnic discrimination in schools. There was no private school, no secondary school nor institution of higher learning, the only accessible schools were public or subsidized schools. Education access was controlled systematically to prevent equal access to all the Rwandans. The right to education access as one of the main pillars of social rights was violated. To get access to quality formal education, many Rwandans left the country and went to study in neighbouring countries. It is true that everybody had no means and most of the discriminated people had to find their own ways of survival. The access to the administrative positions and jobs was controlled in the same way.

5.4.3. Human rights and fundamental freedoms during the second Republic

The first action of the military junta was the suppression of the political rights and freedoms and the suspension of the Constitution, the creation of the state-party in 1975 which was legalized by the 1978 Constitution.

There is confusion between the management of government affairs and the management of the political party as stipulated by article 7 of the Constitution December 20th, 1978: “the Rwandan people are politically organized within the National Revolutionary Movement for Development. No political activity can take place outside MRND the state party”. The contents of this provision were included in MRND statutes adopted by the party congress held on June 29th, 1983 (Article 9) (Baratera bakikiriza)

The country is managed by party leaders from the grassroots up to the top level, through specialised cells, prefectoral councils, the congresses, the central committee and the national congress. Prefects, members of parliament, ministers etc...are chosen among these party leaders. The government and the single party form one family whose father is the Founder President. There is no vacancy; there is no opportunity for the citizens to express their rights freely.

The population is controlled; the single party holds its destiny. Article 39 of December 20, 1978 Constitution said: "the President of the Republic is the chairman of the cabinet" and article 40 specifies that the Chairman of MRND is the only presidential candidate (.....); he can be re-elected willingly. In the event of resignation, death or any other reason which prevents him to carry out his duties, the President of the Republic is replaced by the Secretary-General of MRND, until the new President is elected 90 days later.

The government press and media praise the Father of the Nation Founder of the state-party. Every citizen is obliged to read, to listen and to meditate everyday the words, the thoughts of Founder President included in MRND manifesto since the

only existing media include: radio, television, newspapers, the State–Party publications, the administration documents, circulars.⁵¹

The Single thought prevails. The activities and the propaganda of the Single Party are implemented and developed through the integrated organization within the government structures.

The army, the presidential guard, the security department and justice ensure the discipline of the party members as well as the personality worship.

There is no job, no wealth, and no salvation outside MRND. The human rights and fundamental freedoms depend on the order established by the state party in its organs and government institutions.

Since the putsch of July 5th, 1973, the Constitution reduces human rights and fundamental freedoms until the situation becomes worse by the end of HABYARIMANA regime. The single party which is also the state-party has become more powerful that it has replaced the public service and introduced dictatorship, bureaucracy, corruption and embezzlement. The President of the Republic became a despot and usurper of the absolute power.

5.4.4. Violation of human rights and fundamental freedoms during the transitional government of national unity

Human rights within the armed conflicts and the violation of the Geneva Convention by the parties in conflict

Concerning the killings perpetrated against non armed civilians during this period, none of the parties in conflict had war prisoners (except those who were shown to the media for propaganda and intoxication purposes).

For the first time, RPF was accused of atrocities. When Ruhengeri town was captured on February 8th 1991, RPF forces shoot eight civil servants and nine members of their families including children. Thadée GASANA, the mayor of Kinigi commune was among the people who were shot. He was accused of ordering some massacres of the BAGOGWE a few days before. It is very hard to understand the reason behind the killing of women and children because they have never been involved in the conflict. Probably, the victims were killed to revenge the recent massacres. Other killings occurred elsewhere although we do not have enough information about Ruhengeri only. Are these killings premeditated or caused by the anger of some combatants following the recent massacres? They tarnish the image of the RPF among the liberal Hutu opposition in Kigali and have serious consequences.

The French reaction to RPF attack is rather sharp: Paris calls it an unnecessary aggression. The ambassador George Martre told a French citizen, member of the International Human Rights Commission, during his recent visit in Rwanda that the massacres in the North-West are only "rumours". The General Directorate for External Security (DGSE), the French secret service, accused Uganda of helping

⁵¹ Government press and media

RPF, and the latter of burning the villages, killing civilians and putting the bodies in mass graves found in the territories under their control.

No explanation is provided concerning how the mass graves were discovered by the government troops in the territory under RPF control. Sometimes the rebels withdraw from their territory. The DGSE continued to provide wrong information which is published in various versions in French newspapers. The main point of this campaign presents the war as a new fact, a foreign invasion of RPF combatants who are disguised Ugandans, some days later, and the massacre perpetrated by the RPF was discovered by chance. Misinformation plays an important role in the conflict.

During this period, the right to life and bodily security were violated by the genocide and massacres. The right to own properties was also violated.

5.4.5. Human rights and fundamental freedoms during the Government of National Unity from July 19th, 1994 to June 4th, 2003

The violation of human rights and fundamental freedoms can be justified by effort to ensure national security, the protection and peace, the lack of material and human resources to ensure a better management of the administration and the institutions.

Finally, everybody should think about the issue of responsibility or the responsibility of the government and international community vis-a-vis all these human rights and fundamental freedoms. We believe that all these parties should learn from these mistakes in order to prevent any recurrence of the human rights and freedoms.

5.5. Human rights during the contemporary Rwanda

To ensure the human rights and freedoms, the Rwandan Constitution has a good number of articles which describe these rights and freedoms. The Rwandan Constitution includes also international and regional documents which promote various human rights and fundamental freedoms. Moreover, the same Constitution establishes a system to ensure these rights are not violated. That is why the National Human Rights Commission, the Ombudsman office have been created.

The protection of human rights and fundamental freedoms in Rwanda can be observed by analysing some important ones including the right to live, the individual rights, the women's rights, the children's rights and vulnerable people's rights, the economic rights and political rights.

5.5.1. Right to live and the bodily security

The right to live in a country like Rwanda remains an important issue to emphasize. Throughout the Rwandan political life, citizens' life was violated. Instead of establishing the principle of human rights and fundamental freedoms,

the government has always played an important role in inciting the citizens to violate the right to live.

For instance, during the ancient Rwanda:

- Revenge (*guhoora*) was a sign of arbitrary decision vis-à-vis the right to live, because the victim was not necessarily the guilty person, he/she could be someone from the extended family.
- The King had absolute power on the life of all the citizens. He could give orders to kill someone. This practice was called "*gutanga umuntu*". Once an individual noticed that his fate is in the hand of an arbitrary decision, he had to choose to die or flee the country.
- Colonialism brought the statute law, including the criminal law, which stipulates that any guilty person must be punished. This notion introduces the idea that an individual has to be punished for the crime he has committed. This notion has replaced the principle of *guhoora*. However, this code mentions death penalty, which violates the right to live. Therefore, article 26 of the Rwandan criminal law includes death penalty among the main sentences. Death penalty has always been implemented.
- Through various recurrent killings that have taken place until 1994, the first and second Republics have established mechanisms to organize the killing of some Rwandan citizens by their fellow Rwandans.

Today, much effort has been made to to put an end to the violation of the right to live.

5.5.1.1. Prohibition of genocide and crimes against humanity

On the international level, the conventions were ratified in order to prevent the genocide and crimes against humanity. The United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide on December 9th, 1948. This convention came into force on January 12th, 1951. Rwanda ratified this convention on February 12th, 1975 through the decree n° 8/75, expressing some reservations about article 9 relating to the disagreements on the role of the government as regards genocide. It implies that the Rwandan government planned genocide or knew it would occur one day and considered how to escape from criminal prosecution.

The United Nations General Assembly, through its resolution 3074 (XXVIII) of December 3rd, 1973, adopted the principles of international co-operation for the detection, the arrest, and the prosecution of war criminals and perpetrators of crimes against humanity.

International criminal tribunal courts were established to prosecute war and genocide criminals, including the Rwandan genocide. Currently, there are three international criminal tribunal courts whose mandate is to prosecute perpetrators of genocide crimes:

1. The International Criminal Tribunal Court for former Yugoslavia established in The Hague. It was created by the 808 United Nations Security Council resolution, on February 22nd, 1993.

2. The International Criminal Tribunal Court for Rwanda (TPIR) established at Arusha was created by the 955 United Nations Security Council resolution, on November 8, 1994.
3. The statutes of the International Criminal Court established at The Hague were adopted on July 17th, 1998, after a United Nations Conference organized in Rome. However, this agreement came into force on July 1st, 2002.

The genocide as an element of the international criminal law is special to Rwanda and the Rwandans who experienced the 1994 genocide. Genocide is not only an international law crime; it is condemned by all the governments. However, the Rwandan experience has urged the Rwandan policy-makers to adopt effective legal decisions not only to fight the already committed genocide crimes but also to prevent genocide to happen again in Rwanda.

Therefore, the preamble and article 9, 1^o, of the 2003 Constitution express the commitment of the Rwandan government and Rwandans in general to fight against genocide ideology. Moreover, the crime of genocide, crimes against humanity and war crimes do not have a period of limitation (article 13 first paragraph of the 2003 Constitution, quoting the Convention of November 26th, 1968 on the non applicability of statutory limitation to crimes against humanity, already ratified by Decree Law N^o 8/75 of February 12th, 1975). Efforts are made to fight against impunity in Rwanda as genocide perpetrators are prosecuted in Rwandan courts as well as in the International Criminal Tribunal Court for Rwanda. The gacaca courts were put in place to cope with the incapacity of the judiciary system to judge all the genocide suspects. The gacaca jurisdiction can classify the genocide suspects into categories. It can judge genocide suspects of the second and third category. The genocide suspects of the first category are judged by the ordinary courts (see gacaca jurisdictions below).⁵²

5.5.1.2. *The death penalty and right to die*

- *Death penalty*: The international criminal law does not allow death penalty any more. Many countries have abolished this penalty. International legal policies were taken including: *Safeguards guaranteeing protection of the rights of those facing death penalty*.

Rwanda has not yet abolished this punishment. Death penalty is included in the Rwandan criminal law. For example, in the Rwandan criminal law⁵³, articles 151-154-155-158 (violation of national security by external factors, treason and espionage), article 164 (violation of national security), article 312 (premeditated murder), 313 (patricide), 317 (murder preceded or followed by another crime), article 72 on the law on gacaca jurisdictions...consider death penalty as one of the acceptable punishments in the country. Is it impossible to imagine the suppression of this punishment in a country where people can dare to violate other people's

⁵² The organic law n^o16/2004 of 19 June 2004 on the organization, competence and activities of the Gacaca jurisdictions endowed with full power to prosecute and judge genocide suspects and perpetrators of other crimes against humanity committed between October 1st 1990 and 31st December 1994, in *JOOR*, 2004 special n^o of 19th June 2004

⁵³ Decree law n^o21/77 of 18th August 1977 establishing the Criminal law as modified, *J.O.*, 1978, N^o13 bis.

right to live once the government reveals some weaknesses. People wonder why death penalty has not been implemented since 1996 when the first public execution of genocide criminals was implemented. While some consider this case as a lesson and others do not consider it that way, death penalty has helped many people to understand that the law is not only something written on a piece of paper and everyone can be punished when you kill innocent human lives.

Death penalty is also required for people who rape young persons under the age. There are cases where the criminals acknowledge their crimes on the radio or television. Sometimes, rape is committed on young girls under the age of 5. The Rwandan society condemns strongly these crimes and requests death penalty on rape criminals. Others who are more lenient request castration as a punishment for rape criminals.

This restorative justice philosophy which is advocated by the majority of Rwandans is based on the principle of full compensation of damages through a punishment which is more or less proportional to the crimes committed on the victim. However, it is important to reconcile it with the social philosophy of the crime aiming at the social reintegration of the criminal. Indeed, the antisocial behavior of the criminal results from social, emotional, environmental factors in such a way that the factual and psychological analyses of the crime are always necessary. These prerequisites are essential to prevent and to heal. Rwanda lacks sufficient human and material resources to achieve these goals. Therefore, death penalty is still valid. Efforts to identify the crimes must be done to create collaboration mechanisms among various institutions.

- *The right to die* is another issue discussed very much in the world, especially with regard to euthanasia and the right to destroy physically someone's body through suicide or excessive drinking, smoking and drugs.

Rwanda has never encouraged people to destroy physically their body. Doctors are not allowed to help people put an end to their lives. Therefore, the criminal law condemn the excessive consumption of narcotics and drugs, as well as public alcohol intoxication (see. art. 271-277 CP). The most radical form of voluntary self-destruction is suicide which is condemned by the Rwandan criminal law.

The Rwandan Government has not yet adopted euthanasia. Euthanasia was imposed on old people in ancient Rwanda once they were in critical state. Death was imposed on them through asphyxiation, to spare them with very atrocious sufferings. This practice has disappeared nowadays because the modern criminal justice system condemns all forms of homicide. Moreover, many health institutions provide the necessary medical care to some diseases which were incurable in ancient Rwanda.

5.5.1.3. Disappearances and summary executions

Some forms of homicide have appeared in Rwanda in the form of non organized summary executions. Apparently, they were organised with the help of the government intelligence. These include the massacres of communities (the case of the bagogwe in Gisenyi...) and even targeted people such as the assassinations

which were not followed by investigations such as the murder of Mr. Gatabazi Félicien, former Minister and political opponent under the 2nd Republic. Others appear in the form of revenge and disappearance.

The cases which were often mentioned after the genocide period include the killing of the civilians towards the end of the genocide and during the war against the infiltrators from the Democratic Republic of Congo. Quite often, there are targeted assassinations or people who disappear especially among political opponents.

It is true that a certain period, some important people have disappeared or were killed in a professional way. No serious investigations were carried out. The lack of official investigation does not allow people to declare or to deny the accusations against the regime which is suspected of organizing such crimes. We therefore recommend that whenever someone is killed or disappears investigations and even counter-enquiries be organized and the conclusions be published.

5.5.1.4. The prohibition of abortion

In spite of the abortion depenalization norms all over the world, Rwanda has never adopted abortion and considers abortion as a reprehensible crime (Article 325 CL). The problems relating to the right to abort remain an important issue in Rwanda when they deal with unwanted pregnancies. This leads to induced abortions. These are sometimes carried out with the assistance of accomplice doctors and unqualified medical practitioners who try to save the life of the young lady. Those who are afraid of carrying out an abortion or those who did not decide on the right time wait until the child is born to throw him/her in the dustbin bags or other hidden places. The national police as well as public and private radios and newspapers publish abortion cases.

The punishment of abortion crime has a religious connotation which has been codified throughout the world. A liberal trend has questioned this logic and raised a debate on the possibility to depenalize abortion following the requirements of modernism to such extent that some countries ended up accepting the will of people who want to keep their freedom to abort. Theories have been developed for this purpose, their aim was to legalize abortion from the conception period up to three months, so that it may not be legally considered as a murder. Although many Rwandans think that prohibition remains the best solution for our society which is undergoing legal and religious change, it is important to remember that there are exceptional contexts in which the prohibition of abortion would be much more prejudicial to the society and the mother. In such cases, the right to carry out abortion would be adopted under exceptional conditions determined and analyzed by an ad hoc committee approved by the government.

5.5.1.5. Prohibition to carry out experiments and taking away human organs

According to Article 7 of the International Covenant on Civil and Political rights, no one shall be subjected to medical or scientific experimentation without his free

consent. This article expresses the idea that human beings shall not be subject to the fulfilment of scientific research interests. Scientific research should contribute to the improvement of human life.⁵⁴

In Rwanda, such experiments are prohibited if they are not carried out under the modalities which are accepted by the law: "No one shall be subjected to experimentation without his or her informed consent" (Article 15 Const.).

The medical and legal experience are also required by the law to determine the evidence of a crime, in the event of sudden death, a crime or when the crime derives from another hidden crime. In this case, the penal code suggests a medical autopsy on the victim.

However, the modern medicine can take away an organ which is sensitive to the disease for scientific research purpose, in order to discover the causes of the development of an unknown disease which is killing people. In many countries in the world, the sick person must agree in writing beforehand. This need to carry out research also exists in our country; however, this practice is done secretly. If such is the case, in order to avoid problems with the parents of the dead person and to avoid dispute with the hospitals, the procedures to express the assent should be clearly defined.

5.5.1.6. Prohibition of torture and inhuman and degrading punishments

On the international level, torture and the other inhuman and degrading treatments, including torture during police interrogation are prohibited. Conventions have been signed, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the United Nations General Assembly resolution 39/46. It came into force on June 26, 1987.

Even on the level of the humane law, governments were requested to protect the prisoners of war and the civilians during war, not only against arbitrary executions, but also against ill treatments. These conventions include:

1. The Geneva Convention relating to the treatment of prisoner of war;
2. The Geneva Convention relating to the protection of civilians during war;
3. Other protocols supplementing the Geneva conventions of 12/08/1949 relating to the protection of the victims of international armed conflicts (Protocol I and II).

In spite of the existence of these conventions, cases of torture and inhuman treatments on civilians were observed during the 1994 genocide, particularly on women who were raped with an extreme brutality. This shows that although these conventions are ratified and exist, countries do not follow them during armed conflicts.

Police or criminal investigations mention cases of torture which are committed quite often to force criminal suspects to reveal the truth. To eradicate this practice, article 15, paragraph 2 of 2003 Constitution stipulates that "no person shall be subjected to torture, physical abuse or cruel, inhuman or degrading treatment".

⁵⁴ P. Wachsmann, Op cit., p. 299.

5.5.2. Individual rights

5.5.2.1. Right to be protected from the arbitrary in someone's being and properties

The right to fight against arbitrary arrest and detention

The presumption of innocence is a Constitutional principle (Article 19 of 2003 Constitution) which states that every person accused of a crime shall be presumed innocent until his or her guilt has been conclusively proved in accordance with the law in a public and fair hearing in which all the necessary guarantees for defence have been made available. Suspected criminals shall be detained provisionally under exceptional circumstances and for cases and conditions prescribed by the law. To put an end to arbitrary arrest practices which have always contributed to the violation of this principle, the new penal code (Article 89 of law n° 13/2004 of May 17, 2004) introduced the possibility for the judge to release temporarily the prisoner and to condemn immediately the person who ordered the illegal detention.

The decisions to keep people in police custody are frequent and subjective. Quite often, they are carried out by non authorised authorities. Under legal circumstances, the decision to keep a criminal suspect in police custody is taken by the official empowered to make arrests and act as a policeman. The aim is to investigate a criminal suspect who may escape or keep a criminal suspect whose identity is dubious or doubtful (art 37 of the penal code). It seems that some authorities such as the district or city council mayors give themselves power to arrest and put criminal suspects in custody in order to force people to pay the local taxes or to admit a crime that has been committed. Sometimes civilian or military authorities put people in police custody when they have some conflicts (*yansuzuguye*) or a friend has requested them to punish someone (*munyumvishirize*). These practices have been mentioned by people who were interviewed, however, they also appear in the official reports, particularly the National Human Right Commission annual reports (see report 2003 for instance).

If these practices persist, it is because they have never been forbidden up to now. This habit should be prohibited because people who have the power confuse their own will with the law and end up feeling that their own will prevails or they can do whatever they like. The current legal provisions should be applied because they prohibit these behaviours (Article 89 of the code of criminal procedure).

Defendent's rights

The defendent's rights includes a fair trial, the right to have a lawyer even during the enquiry and trial phase, the right to be informed about the case file, the right to resort to higher courts and to request the revision of the legal proceedings, etc. It is

also important to mention the right to make an appeal against a decision of a particular authority.

The decisions and acts of the administrative authority are considered as bible gospel. This is partly due to the personality worship or the fear of the consequences once the authority decision is questioned. The legal procedure is another reason because the administrative decision has always condemned someone who appeals to another higher authority. Both authorities could have family relationships; there could be complicity among authorities at various levels (*ntawe urega uwo aregera*). The State Council was the only court to judge administrative matters. It was not accessible to the majority of the citizens because it was the only court, the highest judicial institution (Supreme Court) and not widely known. The 2004 judiciary reform stipulates that the right to appeal to the administrative decision and the power to judge the administrative decisions have been decentralised up to province courts (cfr code of civil, commercial, social and administrative procedure).

Such a decentralization is likely to dissuade the enactment of abusive decisions, provided that the citizens know how they can benefit from this right which is theirs on the one hand and the adjudicator does not suffer from inferiority complex vis-à-vis the administrative authority on the other hand.

The defendant's rights are established by (Article 18, paragraph 3) of the Constitution and they are implemented in all the decision making organs. It is also implemented through the right to get the case file information (formely considered as secret matters or a private property of the public prosecutor). This right also implies the possibility for the defendant to abstain from any declaration or to confess the crime before getting the assistance from a lawyer of his/her choice. Even when he/she does not know, he/she has the right to get information from the public prosecutor or the policeman who is dealing with his case file. Many people declare that some legal procedures violate this right with the aim to force easily the suspected criminal to confess his/her crime.

The violation of defendant's rights does not contribute to a fair trial.

The right to get a lawyer is one of the aspects of the defendant's rights and any judgment by default is likely to bring opposition. As mentioned earlier, the right to appeal and to request the revision of the trials is an essential guarantee of the defendant's rights. To avoid the dilatory procedures through the right of review, the code of civil, commercial, social and administrative procedures oblige the judge to speed up the trials within a limited period of time and limits the opportunity to appeal to a higher jurisdiction, and does not give chance to be referred to the cassation.

5.5.2.2. Privacy right

Article 22, paragraph 1 of the Constitution stipulates that "The private life, family, home or correspondence of a person shall not be subjected to arbitrary interference; his or her honour and good reputation shall be respected"

Residence inviolability

Article 22, paragraph 2 stipulates that “A person’s home is inviolable”. Moreover, the same article prohibits any search of or entry into a home without the consent of the owner, except in circumstances and in accordance with procedures determined by law. The search of a home and entry into a home are subjected to strict conditions, the reasons and the search warrant.

This right is violated for example when soldiers enter in a residence house on simple verbal order of their senior officers. Other employees of such institutions as ELECTROGAZ, RRA do the same when they want to find out allegedly fraud cases.

All the citizens believe that it is good to fight against any form of fraud. They agree that the searches should be organised for this purpose. However, they think that search warrants issued by the prosecution service be shown by the head of the delegation whenever house searches are organised (Article 29 of the Code of criminal procedure). The aim is to justify the purpose of the house search so that the person who is visited may collaborate without being frustrated or feel that he/she is a victim of some propaganda.

The confidentiality of correspondence and communication

Article 22 paragraph 3 of the Constitution stipulates that “confidentiality of correspondence and communication shall not be subject to waiver except in circumstances and in accordance with procedures determined by law”. Individuals should not expose some opinions and behaviour to the public and the authorities. Private life confidentiality includes the idea of protecting someone’s intimacy and correspondences.

Correspondence involves letters and written messages whereas communication involves telephone interactions and other audio-visual means.

Many Rwandans do not point out cases where letters, faxes or e-mails are intercepted. They are not too much worried about. However, this is not the case with telephone calls. Some people believe that to intercept telephone calls is a common practice because the national security is always in search of information.

The new code of criminal procedure includes three articles (from Article 74 to 76) dealing with the issue of intercepting the mail sent through the post and telecommunication. These mechanisms subject the interceptions under rigorous conditions to reassure the citizens in a formal way. First of all, interceptions are needed when other investigation means are not sufficient to reveal the truth. Moreover, the interception can be carried out by the law officer only who is entitled to carry out a pretrial investigation of a case upon a written authorization of the Prosecutor General. Such authorization is valid for a renewable maximum three months only. The aforementioned authorization comprises all the elements to identify the connection which should be intercepted and above all, the infringement which justifies the interception.

What matters is to find out whether all these mechanisms are implemented efficiently. Moreover, the code of criminal procedure suggests that the interception decision can not be revised as if the person concerned was already informed.

The prohibition against unlawful attack on someone's honor and reputation

The Constitution also prohibits unlawful attack on someone's honor and reputation, therefore condemns defamation and insult.

5.5.2.3. *The freedom of movement*

The right to leave and to return to the country is a constitutional principle which gives to all the citizens the opportunity to move and circulate freely in the country or abroad and to settle where he/she likes and to emigrate if necessary.

Article 23 of the Rwandan Constitution states that any Rwandan citizen has the right to move and to settle freely in the country, the right to leave and to return to the country except for reasons such as the violation of public order and national security, to avoid a danger which can affect the whole community or to protect human lives in danger. Therefore, the acquisition of a passport is an inalienable right mentioned in article 40, paragraph 1 of law n° 17/99 of 16/08/1999 on immigration and emigration (in *JORR*, n° 24 of 15/12/1999), if it does not harm country security.

5.5.3. Freedom of the mind

Article 33 of the Constitution guarantees the freedom of thought, opinion on various aspects of social life or to express a personal moral judgement on some values, to choose his/her religion or to reject any religion. Freedom is expressed through the right to express freely someone's thought or opinion without being forbidden or without fearing reprisals, the right to express someone's belief (or disbelief) and the right to taking part in the gatherings and the possibility to expand them. However, the Constitution reminds that this freedom is exercised within the limits established by the law. For instance, this freedom should not contribute to the propagation of ethnic, regional, racial discrimination or any other form of division. The freedom of mind includes the freedom of thought or opinion, freedom of religion (worship), freedom of speech, and the right of access to information. The latter includes the freedom of press, the legal status of radio broadcasting, television, as well as the autonomy of the public and private media.

5.5.3.1. *Freedom of thought or opinion*

The freedom of speech includes the freedom of thought and the freedom to receive or communicate information or ideas without any interference from public authorities and without any border considerations. The opinions are personal beliefs which are not expressed; they are different from the ones that come from political indoctrination. However, the Rwandan sayings show to which extent the

Rwandans keep their deep personal beliefs and prefer to express the "official belief". For instance "*ukuri wakabwiye shobuja uraguhakishwa*" (Instead of telling the truth which can hurt your Master, it is better to transform that truth and use it to please him so that you may become the focus of his admiration). Moreover, if they have been able to keep the secret, it is certainly through their experience since another saying declares "*nyirikirimi kibi yatanze umurozi gupfa*" (It is good to speak but it is better to keep quiet because a fly can not enter a closed mouth). This has always been valid during all the regimes in Rwanda, including the pre-colonial period.

The majority of people who are not Rwandans and sometimes the Rwandans themselves tend to present the Rwandan as somebody "who always says the opposite of what he thinks", "who says things he does not believe in", someone "who lies". This can be true in some contexts and it can be the same for all the people all over the world. However, participative and interactive methodology used by IRDP proved that mutual trust is necessary for a person to express his/her deep personal beliefs once he/she is reassured that there will be no consequences once he/she has revealed his/her thoughts. Doubts prevent people from expressing their deep point of views.

Different opinion on a given issue is not a bad thing. People who are eager to implement their ideas are disturbed by this diversity because it takes time to understand any alternative. In the same way, any authority who is afraid that his point of view will be perceived as irrelevant or not convincing is an obstacle to any different opinion. His face may express it in a direct or indirect manner. This practice exists in various levels of the administration, either public or private.

5.5.3.2. *Freedom of speech*

Freedom of speech "is one of the main foundations of a democratic society, one of the paramount conditions of its progress and individuals' development" (statement from the European Court of Human Rights Handyside judgment of December 7th, 1976, quoted by Patrick Wachsmann, op cit, p. 363). The scope of the freedom of speech is one of the best indicators of freedom in a given society: any authoritarian regime imposes freedom of speech restrictions (apparently not harmful quite often). The freedom of speech is essential for a country to be called democratic.

5.5.3.3. *Freedom of press and right of access to information*

Article 34 of the Constitution guarantees freedom of press and the right of access to information which are implemented through the means of communication, including press. Press is defined as any printed or audio-visual or audio process or means which contributes to the dissemination or providing information about the facts, the opinions and other ways of expressing the thoughts, (...) with the aim of informing, educating and promoting sports and leisures (article 1 of the press law).⁵⁵ People must listen to the radio, read the newspapers, and watch the television to get information. They must also use the Internet and any other communication media. The press law stipulates that no prior authorization is

⁵⁵ Law n°18/2002 of 11/5/2002 governing press in J.O.R.R n° 13 of July 1st 2002

required for the newspapers (Article 16), however, the launching of radio and television broadcast programmes requires an agreement with the government which should control the frequencies.

Any country which intends to establish the Rule of law guarantees the freedom of press (Article 10 of the press law), which ensures other freedoms because it informs the citizens about their rights and freedoms.

However, in spite of the constitutional principle, freedom of press is not proclaimed once for all, it is a permanent search, it grows from democracy and promotes it in return⁵⁶, whatever the development level of a country. Therefore press becomes the fourth power, only when it provides informations and denounces the power abuses as well as the violated freedoms, when journalists are not threatened, especially by these wrongdoers.

Each country must therefore analyze its democratic process. Rwanda has established its freedom of press constitutional principle emphasizing the protection of public order, private life, and the youth:

- The press law has a good number of control measures to punish the violations of the press laws. Before 1994, media was used for as a tool for political propaganda, dissemination of genocide ideology and implementation of the genocide plan.
- Moreover, some category of people including the youth and children must be protected from the negative effects of the press.
- Finally, the law prohibits defamation and guarantees the right to have citizen's dignity, good reputation and individual and family life privacy protected.

The right of access to information implies two main parts: to provide and to receive information. Those who have the information should give it instead of keeping it for themselves as a private property. It happens that an authority refuses to inform its citizens on matters which relate to his mission. If all the authorities behave like this the citizens will not be informed about what is happening in the country. The population must be informed through the press in spite of the problems encountered in Rwanda.

Although we said earlier that Rwandans do not prefer to express their deep point of view publicly, they express it secretly. This behavior does not contribute to the establishment of the Rule of law. The best strategy for the Rwandan media would be to approach those who are afraid of speaking in public, those who murmur (*kwijujuta*). They should find out the reason behind the whispering and reproduce them in their respective media. By repeating clearly what the people said softly, media can sensitize the leaders. The media should be involved in finding out and denouncing what the government and the administration in general have left behind; media should identify the failures and publish them. This is a way of reminding them. However, the degrading or defamatory style or language should

⁵⁶ Luc Adolphe TIAO, "La liberté de la presse dans le contexte africain: Etude critique des textes juridiques sur la presse au Rwanda", p.1, presentation done during the seminar on *media regulation mechanisms* in Rwanda, Hôtel des Mille Collines Kigali, September 2nd 2004.

not be encouraged in the media. Journalists must follow their professional code of conduct.

"Rwanda is a country which has adopted freedom of press although it has no press"⁵⁷, for a good number of reasons:

- The Rwandan society after the genocide is still fragile, each uttered word can offend a category of people, therefore, there is need for a permanent self-censorship;
- Instead of working to improve the country, some media work hard to earn more money, hence sensational publication which does not take into account the harmful consequences on the involved person and the society in general. There are several types of information which do not appear in the newspapers which use a simple language. This does not contribute to the newspaper marketing;
- The culture of resignation is growing "because we have been obliged to keep quiet";
- If corruption appears in the various levels in the society, then corruption is also present in the media. Cases of corruption are possible among journalists who are not professional and poor in most cases.

5.5.3.4. Freedom to express a common identity

Every person has the right to express his/her opinion without fear of revenge. Every person has also the freedom of assembly; the right to meet people of his/her own choice.

Right to strike

The Constitution recognizes the right to strike for workers only. This right shall be exercised within the limits provided for by the law but the exercising of this right should not interfere with the freedom to work which is guaranteed for every individual (Article 39).

Apart from the right to strike recognized by the Constitution, the other forms of public demonstrations are not mentioned in 2003 Constitution. However, some demonstrations of this kind especially the ones exercised within the vision of the government can take place. However, the few demonstrations which tried to claim some rights have been controlled vigorously. For instance, the demonstration organised by the students from the National University of Rwanda against the bilingualism policy claimed that the duration of French courses was not sufficient to allow English-speaking student to follow other courses in French.

Freedom of association

The freedom of association is guaranteed and shall not require prior authorization (Article 35 Const.). The trade unions and employers' associations are formed within this framework (Article 38 of the Constitution), as well as the non-profit-

⁵⁷ Meeting with the journalists

making associations, the health insurance, associations, co-operatives, companies, etc. Such freedom shall be exercised under conditions determined by law.

Pursuant to this Constitutional stipulation, the laws governing the various ways of exercising the freedom of association were enacted. All of them prescribe the categories to classify the newly formed association (commercial companies, non-profit-making associations, co-operatives, etc), with a legal personality separating the association from its members. Such a legal personality is issued by ministerial decree (case of non-profit-making associations and co-operatives⁵⁸) or the registration in the trade register (case of commercial companies⁵⁹) or by simple official recognition (case of mutual benefits associations⁶⁰).

Freedom of assembly

Right to get together is one of the pillars of democracy. Through this right, people express their opinions, ideas, and even ideologies can be formed and transmitted to people easily.

The freedom of assembly includes private meetings and public meetings. In theory, private meetings enjoy complete freedom because only invited people whose names are well known are concerned, while public meetings even if they are important also enjoy some freedom. This is expressed in Article 36, paragraph 1 of the 2003 Constitution which stipulates that “Freedom of peaceful assembly without arms is guaranteed...” if it is not inconsistent with the law.

These public meetings should not be prone to prior authorization either (for instance mass) unless they are organized "in the open air, in a public place or on a public road, to the extent that such is necessary in the interests of public safety, public health or public order. (Art 36, paragraph 2). The recent experience in Rwanda shows that private meetings are suspected especially during the periods of open conflicts (*utunama*), infiltration method used by the rebels creates suspicion as well as the secret private meetings. This kind of suspicion develops as there is a growing relaxation tendency. If some people or sects have been punished due to their clandestine private meetings, it is because the country security matters and should be protected by any means and at all costs.

Freedom of worship or religious freedom

Before the introduction of current religions (Christianity, Islam...) in Rwanda, the Rwandan people had their religion or worship. Rwandans believed in one God *Imana* although there were different ways of worshipping and communicating with him.

⁵⁸ See article 10 of law n°20/2000 of 26/7/2000 on non profit making associations in JORR of April 1st 2001, p.39 and ff. see also article 9 of law n°31/1988 of 12th October 1988 on the organization of cooperatives, in JORR, 1989, p.105 and ff.

⁵⁹ See. Art. 7 of law n° 06/1988 of 12th February 1988 on the organization of commercial companies, in JORR, p. 437 and ff.

⁶⁰ See. Art. 5 and 6 of the decree of 15 April 1958 relating to mutual benefit associations in *BO*, 1958, p. 1162 and ff.

Article 33 of the 2003 Rwandan Constitution stipulates that "Freedom of thought, opinion, conscience, religion, worship and the public manifestation thereof is guaranteed by the State...". Nevertheless, the discussions with the Rwandans who know the values and the practices of the traditional worship reveal that they are nostalgic. They think that this religion is prohibited by the law or the authorities. The majority of these leaders belong to the modern religions. The traditional religion is not prohibited by the law. This way of perceiving things arise from the way this religion was replaced by Christianity, i.e., those who continue to worship God according to the traditional beliefs were despised.

However, this religion or these worships had significant unifying values: for example godfather in *kubandwa* worship could never betray or kill their godsons and vice versa. The worship could never start if all the ethnic groups are not represented. Therefore, Rwandans wish this worship is rehabilitated, those who wish to worship should not feel that it is a shameful practice.

Some people wonder if the followers of the traditional religion can worship publicly. The majority of Rwandans do not appreciate the traditional religion which some consider as archaic and anachronistic to the modern world, others are reluctant about the small churches which are constantly mushrooming everywhere (*Amadini y' inzaduka*). There are doubts on the way they lead their followers.

5.5.4. Women's rights

The human nature, the cultures of various countries have always considered a woman as a weak personality compare to the man. Many years of struggle involving men and women who are aware of this inequality have contributed to the signing of consecutive International Conventions prohibiting any discrimination against women and girls. These conventions include: the Convention on the eradication of all forms of discrimination against women; optional protocol to the convention on the eradication of all forms of discrimination against women; the declaration on the protection of women and children in the event of urgency and war; the declaration on the eradication of any form of violence against women.

Rwanda ratified these international conventions and took concrete measures aiming at promoting women participation in decision-making organs, economic sector and to protect women against any form of violence.

5.5.4.1. Participation of women in decision-making organs

Through Constitution of the 4th June 2003, Rwanda has adopted the equality between men and women, which is among the fundamental principles, in order to promote women's emancipation. This equality "reflected by ensuring that women are granted at least thirty per cent of posts in decision making organs" (art 9, 4^o). In other words, in all the decision-making organs where women do not represent 30%, the decisions should not be taken because this organ does not follow the Constitutional principle. After the adoption of this Constitution, this principle became effective during the parliamentary election held in 2003. Rwanda is the first country with the highest participation of women in the Parliament, that is,

about 48% of the members of parliament and senators. Efforts are being made gradually in other domains. Although merit, as mentioned by many people including women themselves⁶¹, was not the most essential aspect of the women representation in the parliament, we believe that the principle in good as such but it needs to be polished in the future.

5.5.4.2. *Equal rights between a man and a woman*

The Constitutional quota mentioned above may look like a positive discrimination which violates the equality among citizens in general. However, it is a logical choice made by the Rwandan Constitution in order to restore and maintain a balance between a man and a woman. The disadvantage lies in the danger of appointing women in some positions simply because the equal number of men and women is required without taking into account the necessary capacities and competence for the implementation of the tasks. For the sake of gender equality, it may happen that in a competition to get a job or another advantage where the conditions are the same, the choice of a candidate may be focused on a lady who got less marks compared to what a man got. Here, gender equality principle will be followed to the detriment of equality of all the citizens.

The equality principle is also noticeable in the management of family inheritance: The 1999 law on the inheritance allowed girls the right to inherit. Remember that the customary law never allowed girls to inherit. The right to inherit was based on masculinity principle and therefore belonged to boys only. Girls could not inherit the land when boys and male parents were still alive. Unlike the customary law which deprived women and girls of their right to inherit the land, article 50 of the new law has adopted equality principle for all the children without any distinction.

5.5.4.3. *Protection of women against any form of violence*

It is not possible to talk about women's rights without mentioning such issues as abductions, rapes and domestic violence which are common in the country. However, mechanisms to fight against these forms of violence are in place: From the criminal point of view, women are prone to domestic violence. According to a research carried out by Haguruka, an association for the defense of women and children's rights, domestic violence is carried out by the husband against his wife or and often against the children (boys and girls) by the husband and/or the woman, including sexual violence against the maid, commonly called servants, who are quite often raped, victims of unwanted pregnancies, aggravated assault, etc.⁶²

Considering the increasing criminality against women who are victims of rapes and sexual harassments, the government has taken retaliatory measures as far as criminal proceedings are concerned. According to the law of 2001, criminals who are guilty of rape committed in the genocide context belong to the first category of

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⁶² Haguruka non profit making association, *L'accès de la femme à la justice*, Kigali, 2001, p...

the genocide criminals.⁶³ Children in general and girls in particular are protected against any form of sexual violence: for instance, to avoid the sexual exploitation of young teenagers by irresponsible male adults, the minimum age to assent sexual intercourse is 18 years.

Elsewhere, mainly in Africa, there are cases of sexual mutilations. Sexual mutilations known as excision are imposed on women. Some people, including foreigners and feminists tend to compare excision with the clitoris elongation practice known as "*gukuna*" which was common in Rwanda in the past but currently the practice is disappearing. Both practices are different and have different purposes. Unlike the excision which inhibits the woman libido, *gukuna* increases the sexual satisfaction of the partner. *Gukuna* is carried out when girls are still very young and some people think that it is carried out by adult people without the young girls' consent. Beyond this younger age, *gukuna* cannot be possible even if a woman decides to carry it out. Indeed, *whether a girl decides to carry it out or not, gukuna is done among other girls and the aim is to achieve sexual satisfaction. It is a big mistake to compare gukuna with the excision of the clitoris carried out in other African regions, they are not the same.* Consequently, it is difficult to believe that *gukuna* is a form of violence against young girls.

5.5.4.4. "Gender" observatory

To ensure an effective involvement of women in the development process, the Constitution has created "gender" observatory, which is an independent organ whose main mission is to evaluate the "gender" indicators in the vision of sustainable development and to reinforce the principle of equal opportunities and equity. A draft law on the organization and management of this institution is under preparation.

5.5.5. Children's and other vulnerable people's rights (elderly people, disabled people)

5.5.5.1. Children' rights

Children's rights involve two aspects: the first one is his protection and the second one deals with his emancipation or autonomy.

Child's protection

Considering their weakness, their younger age and immaturity, children are exploited in one way or another: parents use them for various housework instead of sending them to school, the society where they live also exploit them, they are exploited as workers:

- Children exploited as domestic workers;

⁶³ See. Art. 51 of the organic law n° 40/2000 of January 26th, 2001 on gacaca courts; then art. 51 of the organic law n° 16/2004 of June 19th, 2004 (already quoted).

- Children are exploited in tea or coffee plantations especially during harvest seasons;
- There are also children soldiers.

There are cases of:

- Children who are married before reaching the legal age, when they are not yet physically mature;
- Children who are sexually abused by adults and close relatives;
- Children who are exploited for proxenetic or pornographic ends;
- Children who are sold to be adopted illegally or for various forms of exploitation; etc.

The international community under the United Nations has established mechanisms to fight against these abuses. The conventions on the protection of children are in place:

- Convention on Children's rights (1989);
- Convention on the fight against the sale of children, child prostitution and child pornography;
- Convention on the protection of the child against their involvement in armed conflicts;
- Convention (No. 138) concerning Minimum Age for Admission to Employment;
- Child labor Convention, 1999 (n° 182);
- Convention on intercountry adoption;
- Convention on the protection of children against kidnapping;
- Etc.

Rwanda has followed the example of other countries in ratifying some of these conventions acknowledging that every child is entitled to special measures of protection by his or her family, society and the State that are necessary, depending on the status of the child, under national and international law (Article 28 Const. 2003). Moreover, a special law has been promulgated to protect the children against all forms of violence.⁶⁴

Despite all the mechanisms in place, children are nowadays victims of various forms of violence. Adults rape young children. Young children are exploited as they carrying out housework when they are underpaid or as they work in tea plantations etc...

The prosecution service and the national police have put in place mechanisms to investigate and prosecute immediately criminals who commit rape. Moreover, to prevent these crimes, sensitization campaigns have been organised by Women and Children's right associations especially. However, this is not enough; more efforts are needed to sensitize people on the fight against any form of violence against children.

⁶⁴ Law on the protection of children against all forms of violence

The child's autonomy

The issue of children's autonomy has been discussed by the lawyers. According to the civil law system, children have always been considered as weak persons who need assistance and parents or adults' leadership. The issue that has been discussed by lawyers and sociologists does not relate to the weakness of a child only. It also emphasizes the awareness of the gradual acquisition of child autonomy as he/she grows; therefore no decision should be taken without his consent or without prior consultation. Many theories have been developed on this topic, but it is important to notice that at a certain age, children are able to judge, especially when his primary, secondary and tertiary education have contributed to his growth. The old traditional mentalities which considers a person as a child as long as he lives with his parents in the same house should be abandoned because they encourage passivity, the lack of initiative and eternal dependence on the parents. In general, the Rwandan parents or teachers should give some autonomy to the children, so that they can grow and develop initiative since they are young. This would be a great advantage for children and the whole country given the fact that nation is not able to give jobs to all the citizens. Every citizen should be able to use his/her creativity when he/she is still very young.

5.5.5.2. *Elderly people's rights*

In Rwanda, elderly people have always been appreciated considerably for their wisdom and discernment capacity (*ibitagira mukuru birumba ari ...*). Moreover, the African society is characterised by family solidarity. Children take care of their old parents; there is no need to follow the family law which obliges the children to feed their poor parents. Therefore, the Rwandan society is not at the stage of individualism which requires policies to assist abandoned old parents. If you look at the way things are evolving and the current cost of living it seems that old men and women will be isolated in the near future and even today in some cases as a consequence of:

- the genocide: it is possible to find an old person without an extended family or nuclear family;
- the modernity or modernization creates the rural exodus phenomenon where young people leave their parents in the countryside and move to town,
- Selfish life in town whereby neighbours do not care about the elderly people in urban areas.

All these factors show that from now on the country should prepare a legal, social and economic ground for elderly people through the creation of a strong social security fund and assistance to elderly people in accordance with the Elderly People United Nations principles⁶⁵

⁶⁵ Elderly People United Nations Principles

For the government civil servants, a compulsory Social Security Fund has been established long ago and the retired people get their old-age pension corresponding to their status. Many people believe that the current retirement pension does not meet the living conditions. Therefore, the allowances should be increased as well as the retirement pension. This is due to a kind of operation which consists in undervaluing the social security contributions and increasing the allowances (housing and transport, etc.) which are not considered by the social security fund.

This is also the case for the workers in private companies except that their allowance and consequently their retirement pension does not cause many problems.

5.5.5.3. Disabled people's rights

Every country should find enough means in order to help the disabled people get access to the services provided by the public and private sectors. For example:

- National and local roads should have discontinuous pavement which will facilitate disabled people on wheel chairs or rolling bicycles to move. Therefore, any specifications should take into account this element and any road construction enterprise should necessarily follow this requirement.
- Public service buildings such as administration buildings, supermarkets, etc. should not affect access or facilities for disabled people;
- Special schools for mentally retarded and deaf-dumb people should be created;
- Etc.

These policies belong to the social and economic rights, which are set up gradually, although some policies derive from good planning and sufficient funds (for example the construction of a road, of a building, of a school which ensures access or facilities for disabled people).

Within this framework, the United Nations have a good number of declarations with guiding principles to ensure the protection of the disabled people's rights, including:

- The Declaration on the Rights of Mentally Retarded Persons;
- The declaration of the Rights of Disabled Persons;
- Principles for the Protection of Persons with Mental illness;
- Standard Rules on the Equalisation of opportunities for the Persons with Disabilities.

Rwanda has various disabled people's centres although insufficient. The city infrastructures (roads – public service buildings) affect the access or facilities for disabled people.

Moreover, the 2003 Constitution does not mention special protection of disabled people's rights. However, it ensures their representativeness in the National Assembly (Article 76, 4° Const.). This representativeness should not be minimized because if there were laws or regulations, which protect the rights of the disabled people, this Member of Parliament, who is also a spokesperson of the disabled

people's rights, would raise them up. Of course this requires clever people who are able to discover the bad policies which do not promote disabled people's rights in order to suggest good and convincing ones.

5.5.6. Social and economic rights

The social and economic rights include a series of rights which can be set up gradually. Moreover, the government needs to implement them gradually. These include the social welfare including education, health and accommodation related rights, the rights of ownership, the rights to have access to a healthy environment, the right to development, etc.

The United Nations made a series of declarations within this framework. The aim was to remind the governments about their role in finding out the means and mechanisms to improve the social welfare, including the Declaration on social progress and development, the Declaration on the use of scientific and technological progress in the interests of peace and for the benefit of mankind and the Declaration on the right to development (n° 41/128 of 4/12/1986).

All these rights include some which have a direct impact on the enjoyment of some rights including the right of ownership and the land ownership right.

5.5.6.1. Ownership right in Rwanda

The right of ownership is one of the individual's basic rights acknowledged by the Constitution.

Ownership right

Art. 29 of the Constitution recognizes the right of every person to private property, which is inviolable. The right to property may not be interfered with except in public interest, in circumstances and procedures determined by law and subject to fair and prior compensation. However, until now, the government has not yet approved that people own land as their own properties. The government is the only owner of the land, in town as well as in the countryside. The land title mentioned in the Civil code is purely theoretical, land and house owners get the right to develop activities on the plot and not to own the land. The Constitution specifies the land law and stipulates that private ownership of land and other rights related to land are granted by the State. The land law has just been promulgated and brings solutions to this kind of obstacles to the right of ownership.⁶⁶

Expropriation for public interests

Nobody is allowed to own other people's property unless it is done for public interests in accordance with a procedure determined by the law⁶⁷ and after prior

⁶⁶ Organic law n°08/2005 of 14/7/2005 on land law in Rwanda, in JORR, n°18 of 15 September 2005

⁶⁷ Decree law n° 21/79 of 23 July 1979, in JORR, n° 14 bis, pp.11 and ff.

compensation. The expropriation procedure is determined by the law. However, the following are noticed:

- The written procedure is not followed (presidential and ministerial decrees), actions are taken before the compensation);
- The compensation is never done before expropriation;
- The compensation costs are not accepted by all the people who live on the resources from their properties;
- Etc.
-

Unfortunately, the same draft law amending this law seems to focus on the issue of compensation only.

Illegal occupation of lands or houses

For many years, the right of ownership has been used as a tool of political manipulations. The aim was to satisfy the political and economic interests some groups of people to the detriment of others. In 1959, some Rwandans were dispossessed of their properties which were owned by the population without any compensation. Up to now, there are no solutions to the errors that have been committed in the past. The Arusha peace agreement decided that repatriated people should not get back their ancestors' land so as to avoid the revival of troubles. Nothing precise was planned for these refugees. Some 1959 returnees were driven away from occupied houses as soon as their owners returned from exile (1994). Others were obliged to live in the same plot (plot and banana plantation). However, in some areas, the local administration has encouraged people to share their plot. The majority were happy while others did not appreciate it.

The 1959 refugees returned in 1994-1995. They had neither property nor house. Many houses in the cities and the countryside were empty. The returnees occupied these houses and this phenomenon was commonly called *kubohoza* (to occupy other people's house), to mean that neither the population nor the government have considered this phenomenon as a legal occupation. This phenomenon did not last because the 1994 returnees who were the owners claimed their houses. To avoid the past errors and to recognize the right of ownership once for all, the government forced those who refused to give back other people's properties and houses and of more. Solutions have not yet been found to some cases which require special attention. The government should find a final solution and give a good example to people or institutions which have not yet given back other people's properties.

The issue of land ownership right in Rwanda

The issue of land reform

Article 3 paragraph 2 and 3 of the organic law n° 08/2005 of July 14, 2005⁶⁸ establishing land system stipulates that the State has the eminent right to manage

⁶⁸ Organic law n°08/2005 of 14 July 2005 on the land reform in Rwanda, in JORR n° 18 of 15 September 2005, p.38 and ff.

the lands. Therefore, the the right to occupy and to use land is given by the state only. Expropriation for public interest can be carried out by the State only.

Article 5 of the aforementioned organic law states that the land ownership right belongs to the person or the institution to whom the State has granted permission to occupy and use the land. The State grants property titles within this framework. However, this organic law recognizes the right of ownership but under the form of long lease right (Article 5), this applies also to land inherited from ancestors.

The State manages the lands and as such the above mentioned organic law acknowledges the rights as regards regrouping (Article 20), the transfer or lease (Article 21), etc.

The issue of girls and women's inheritance

As mentioned earlier, the inheritance customary law deprived women and girls of their rights to inherit land.

The new law on the marriage settlements, liberalities and inheritance (1999) brought a solution to the problem by establishing equality between boys and girls as regards inheritance rights. The inheritance right of the surviving woman has also improved.⁶⁹ This re-establishment of the equal rights between girls and boys is an answer to a noble cause.

On the other hand, one could wonder if this new law is approved by the concerned people:

- For some people, the sharing of the inheritance as mentioned in this new law did not meet the expectations of all the parties. Instead of establishing equality, it has favoured women in the sense that they inherit both from their husbands and their parents.
- For others, the sharing of the inheritance is not a problem and does not create inequality because the husband will benefit from what his wife will inherit from her family.
- Another point of view believes that the customary law suggested a better solution. They also believe that before introducing this reform, it would be better to organize a broad consultation among the concerned people who would have certainly suggested amendments to the current reform.

Apparently the lands inheritance remains the main concern of the peasants who are against the reform. The women share their husbands' point of views, that is, the provisions of the Rwandan traditional customs.

People hoped that the organic law establishing the management of land in Rwanda has solved all the problems related to land inheritance. Unfortunately, this was not the case because the organic law n° 08/2005 of July 14th, 2005 could not replace the inheritance law.

⁶⁹ See art 70-1 of law n°22/99 of 12th November 1999 supplementing the 1st book of the civil code establishing the part relating to marriage settlements, liberalities and inheritance, in JORR, n° 22 of 15 November 1999, pp. 34 and ff.

5.5.6.2. *Right to work and social security*

Every Rwandan wishes to get a job which will contribute to a better management of his/her life, his/her family, or simply his/her survival. However, Rwanda is among the underdeveloping countries. The country wealth cannot allow all the Rwandans to have sufficient means or the government to satisfy all the citizens' needs. It goes without saying that within the framework of the promotion of the social rights established by the Universal Human Rights Declaration, the government tries its best to use its means in order to meet various basic needs including basic education for all, improved health, etc.

The right to work remains a problem insofar as the government is not able to give jobs to all the citizens who apply. There are international constraints as regards liberalization of the services and jobs. Moreover, the government must reduce the bureaucratic expenses by encouraging private companies and businessmen so that the latter may produce the goods and provide the needed services, while giving jobs to as many people as possible. The issue of unemployment can therefore be solved through an excellent economic, industrial and entrepreneurship policy only which will allow everyone to invest not only for production purposes but also for job creation purposes. Rwanda intends to move forward from this point of view, within this economic policy, Rwanda is trying to promote the rural population which constitutes more than 80% of the total population whose main activities are related to agriculture and breeding.

5.5.6.3. *Fiscal system and custom duties*

This policy of economic recovery must go hand in hand with a good tax and customs laws which promotes the entrepreneurs and the investors, the regional and international integration so that the country can import and export to the maximum the goods, the services and basic technologies, without frightening the investors. The main problem is expressed by professional traders who do not trade to invest or create the services but to earn on the spot. The latter complain about a good number of taxes which are very high. In addition to these taxes which are very high, the relationship with the tax authorities are not good due to their lack of manners and intimidation. The idea of tax harassment and establishing the periodicity of the taxpayers' contributions should be introduced in the Rwandan tax legislation. The administration should also re-examine the tax and customs policy. The discrepancies in tax contribution are noticed with regards the investments, technology and food and industrial production. All of them contribute to the development and fair and equitable distribution of wealth.

5.5.6.4. *Corruption as a major obstacle to the right to development*

Corruption remains one of the obstacles to the promotion of human rights, insofar as:

- If corruption is real, if it occurs even in a hidden way, it prevents some people to enjoy their rights which are granted to others (for instance, a corrupt judge who let a criminal win a case grants him/her a right which he/she does not deserve);
- The public property is not well used or used for personal interest rather than the public interests (for example, a corrupt tax inspector or a corrupt manager contributes to the loss of public or company funds which could be used to create the necessary infrastructures to improve the living conditions of the citizens).

Rwanda is not classified among corrupt countries because of a good and well monitored management policy. But some domains hide corruption in a direct or indirect way. For example:

- The reform of the judiciary system was due to the lack of qualified magistrates. More or less 80% were not professionally trained. Corruption is another factor (more or less 20%);
- The tax department has been reorganised in order to fight an already established corruption system. This show to which extent the tax department lost huge amount of tax income;
- Half of the local administration has been reorganized and half of the elected mayors have been dismissed because they were corrupt. This shows to which extent the rights of the citizens were violated by those who are suppose to protect them;
- A competition system has been put in place for graduates who are looking for a job. To avoid clientelism, corruption, private companies prepare the examination papers; candidates are short-listed according to their competence in accordance with that Article 45 paragraph 2 stipulates: “All citizens have the right of equal access to public service in accordance with their competence and abilities”.
- The aim of the creation of the National Tender Board is to allow procurement contracts on the basis of the offers which are published regularly and tenders which are checked technically. This shows to which extent the procurement contracts were allocated on corruption basis.
- A competition system has been put in place to find out the right person to appoint or to promote in the public service. This shows to which extent corruption was a common practice in the recruitment of the managers and staff within the public service.
- Etc.

The country tries its best to fight corruption mechanisms. Conferences are organised to discuss about this issue and to eradicate it as much as possible. The country is promoting free trade instead of encouraging the monopoly of stronger enterprises. The country has also launched the privatization process which reduces the chances of corruption to occur. There are more opportunities to provide the services or the rights to every citizen.

In addition to these political measures, there are laws and institutions which deal with corruption cases.

Therefore, a law includes measures to prevent and punish corruption crimes and related infringements.⁷⁰ This law is special because it does not deal with the public services only, as it used to be (see criminal law), it also targets private institutions, non government organization (Article 3) as well as the international institutions and organizations (Article 6). This law includes such mechanisms to prevent corruption as the tender procedure handbook, the tender committee, the tender procedure, the creation of internal audit department, the recruitment on the basis of a fair competition, etc (Article 4).

The aforementioned law gives a special mission to the newspapers to publish proven corruption facts and related infringements (Article 9). Finally, the law imposes serious punishment insofar as the envisaged punishment includes both imprisonment and fine unlike the other punishment provisions which foresee the possibility of one of both punishments (see article 10 and ff).

In addition to this law, the Constitution includes interesting measures to prevent corruption by suggesting a list of higher government authorities whose position is likely to be exposed to corruption. Therefore, the revised article 182-4° draws up the list of higher government authorities who make a faithful declaration of their assets upon taking up and on leaving office.

The combination of all these political and legal mechanisms denotes an undeniable political will and gives a hope that the level of corruption will decrease.

5.5.7. Political rights

The recent history of Rwanda has shown that the political rights were denied to a certain category of population, either through the denial of their citizenship or the prohibition of the multi-party system which are the main reason of the violation of the right to vote and the right to stand as a candidate. Therefore, it is quite normal to notice that the 2003 Constitution emphasised these rights.⁷¹

5.5.7.1. Citizenship right

The legal meaning of the word "citizenship" relates to the enjoyment and free exercise of the rights and freedoms in general, particularly the political rights guaranteed by the nation. As mentioned earlier, the first and the second Republic have not only banned the multi-party system, they have deprived some people of their citizenship right, by driving them out of their country. The 2003 Constitution includes the inalienable citizenship right and stipulates that every Rwandan has the right to his or her country. Moreover, no Rwandan shall be banished from the country (Article 24). This principle does not give a solution to the situation created in 1959 and 1994, insofar as every Rwandan citizen without any discrimination has the right to his or her country, the right to enjoy the rights and freedoms as well as all advantages offered by the country.

⁷⁰ Law n°23/2003 of 7th August 2003 on the prevention and punishment of corruption crimes and related infringements in JORR special n° of September 3rd, 2003

⁷¹ For more details on the political rights, see. J. ROBERT, *Op cit.*, p. 137 and ff.

Although the majority of Rwandan diaspora is well integrated economically and socially in the foreign countries, its main concern is to keep the relationship with Rwanda. Nobody can wish to cut the umbilical bond which unites him or her with his or her motherland. The law and the Rwandan government acknowledge this right.

5.5.7.2. Political parties freedoms

The multi-party system was launched in Rwanda immediately after the independence in 1962. This multi-party system lasted a few years because the party of the regime in place (MDR Parmehutu) swallowed or destroyed all the other opposition political parties and remained the only political party to control the political scene. The second Republic started in 1973 and the Constitution declared that the Revolutionary National Movement for Development (MRND) was the only acknowledged political party. The multi-party system was re-introduced in the 1990s and the Constitution of 1991 acknowledged the principle of democratic multi-party system which allowed the creation of opposition political parties and other “pro-government political parties” (*amashyaka yo mu kwaha kwa MRND*).

Article 52 of the Constitution of 2003 recognizes a multi-party system of government and gives and states that Rwandans are free to join political organizations of their choice. Moreover, no Rwandan shall be subjected to discrimination by reason of membership of a given political organization or on account of not belonging to any political organization (Article 53). The Constitution stipulates that the political organizations are prohibited from basing themselves on race, ethnic group, tribe, clan, region, sex, religion or any other division which may give rise to discrimination (Article 54). On the basis of this principle, all the political parties with a discrimination connotation were requested to change their political ideologies and to adopt a new political agenda which is free from any form of discrimination. The banished political parties include MDR deriving from the former MDR Parmehutu with an ethnic discrimination connotation, the Christian Democratic Party (PDC) with a religious connotation which became the Centrist Democratic Party (PDC) and the Democratic Islamic Party (PDI) which became the Democratic Ideal Party (PDI) etc. As you can notice, the changes which occurred in the last two political parties are not fundamental; it is just a matter of terminology so that they can keep their respective initials.

Many Rwandans believe that there are pro-government political parties as they existed in the past. This has been noticed during the 2003 parliamentary and presidential elections.

The divisionist ideologies of the past have inspired the Constitution to set up the parapets of the multi-party system and political ideologies. The forum is mainly responsible for facilitating exchange of ideas by political organizations on major issues facing the country; consolidating national unity; advising on national policy; acting as mediators in conflicts arising between political organizations; assisting in resolving internal conflicts within a political organization upon request by that political organization (Article 56). Some people think that with time, the political party of the regime in place will dominate and swallow other political parties which lack political maturity.

5.5.7.3. Right to vote, equality of vote, and eligibility

The right to vote implies not only the right of every Rwandan citizen to vote but also equal vote to all the citizens. An electoral law determined the modalities for the conduct of elections (see the electoral law)⁷², as well as the contexts of exercising this right as well as the electoral majority (18 years).

The right to get access to an administrative position is also related. Article 8 of the Constitution includes the principles of universality and equality of the vote, as well as the right to vote and to be elected. The law determines the conditions and modalities to be elected in various administrative positions including the presidential, the parliamentary, the local government, etc.

5.5.7.4. Decentralization and free administration of the local and territorial communities

In theory, decentralization is carried out on the level of the administration, or the territory. It involves the creation of a decentralized entity with full responsibility and management autonomy. In Rwanda, decentralization implies the involvement of the local population in the management of public affairs.

Administrative and territorial decentralization

The national policy relating to public administration is not based on power decentralization as it was the case in the past. It is rather based on decentralization of the administration and the communities, to such extent that the interior ministry is now called the "Ministry of Local Administration". The services are managed countrywide at not at the central level in the Ministries to ensure that the citizens get government services at lower costs. The executive secretary is the sector coordinator instead of the mayor; the judge of family affairs is found in the district instead of finding him/her at province level, etc.

People's participation in decision-making within the decentralized entities

Although operational and good, the administrative decentralization would not have significant results without the active role of the population. The orders, the decisions and the programmes relating to the population have always been imposed from the top. Decentralization must go hand in hand with the decision-making, from the bottom and not imposed by the top. The myth of obeying what the chief has said must be replaced by the citizens' initiatives, because the majority of programmes which have been imposed by the administration have failed. Can we assert that the local population really participate in the management of public affairs and is sufficiently informed about the management of government

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resources? The current administrative reform which is taking place does not allow us to declare anything. However, people can expect that a good local administration policy will contribute to involving people in decision making.

5.6. The protection of individual's rights and freedoms in Rwanda

5.6.1. Protection against the legislative power

Considering the fact that a Member of Parliament is the only elected representative among the three powers, he/she should not be suspected of violating the rights.

However, to avoid that the laws violate the Constitutional principles which protect the rights and freedoms, the Constitution has established the limits of the legislative power interventions. Article 9 states the fundamental principles which neither the legislative power nor all the other powers can violate. Articles 10 to 17 state the rights and freedoms which can not be violated by any institution, including the legislative power.

Finally, the Constitution establishes the limits even where it entrusts power to the legislative power. For example, Article 18 paragraph 2 of the Constitution stipulates that no one shall be subjected to prosecution, arrest, detention or punishment on account of any act or omission which did not constitute a crime under the law in force at the time it was committed. In the same way, article 23 paragraph 3 declares that the right for every Rwandan to leave and to return to the country shall be restricted only by the law for reasons of public order or State security, (...).

In short, the legislator is not sovereign, especially as regards the rights and freedoms.

Finally, the Constitution envisages the possibility of controlling the Constitutionality, to find out whether the legislative power did not go beyond the limits established by the Constitution.

5.6.2. Protection against the executive power

The executive power is undoubtedly the most exposed to the violation of the civil rights, given its missions. The only ways to avoid it is through the parliamentary control and the judiciary control as well as informal control (of the media) and the specialized organs (of the Ombudsman's office).

5.6.2.1. Protection ensured by the Parliament: parliamentary control

The Parliament has the power to establish the norms. This power is exerted through the voting of the laws which are applicable in a country. This power is backed by another power conferred by the Constitution: to adopt the finance law (Article 79) and the power to control the cabinet action. Art. 128 of the Constitution

states that the Chamber of Deputies shall employ the methods to obtain information and exercise oversight of activities of the government are the oral questions, the written questions, the hearings before Committees, the Commissions of inquiry and the interpellation. These procedures can lead to the questioning, by way of censure motion, the responsibility of the cabinet or one or many cabinet members (Article 129).

Until now, the majority of these methods of information and control have been implemented, not only for the purpose of justifying the implementation of the budget, but also for various issues. The most striking cases include the interpellation of Pasteur Bizimungu the former President of the Republic and some ministers, for the abuses committed in their respective Ministries. Some of these interpellations constrained the guilty ones to resign, including the Speaker. This means that the control is sometimes boycotted by other forms of influence of the executive power, or it can lead to the cabinet sabotage. A good control is exercised with some kind of moderation in order to safeguard citizens' interests and rights.

5.6.2.2. Protection ensured by the Judge, guardian of human rights and freedoms

The Constitution considers the judiciary as the guardian of rights and freedoms of the public ensures respect thereof in accordance with the “procedures determined by law” (Article 44). This is the main mission of the judge: to ensure the rights of every person are not violated.

Quite often, the administrative leaders have always considered themselves in a higher position compared to the judiciary power to such extent that they exerted their authority to judge people when it was the responsibility of the judge. Such power usurpation is not done against the judiciary power only, it is also done against the people in general who are used to tolerate and keep quiet.

To address this issue, the law allows the citizens to inform the judge when an administrative leader takes a decision which violates people's rights. The State Council used to deal with the appeal against the administrative decisions before the recent reform of the judiciary system. Currently, the State Council which used to cancel the decision the administration (former legislation) have been replaced by a decentralization system in each province, in such a way that from now on the citizens can appeal against the administrative decision in their respective provinces. The administrative leaders should also be accustomed to this new procedure, which will certainly control their power, in the traditional Rwandan context of the word leaders [*abategets*].

5.6.2.3. Protection ensured by the independent administrative organs

The National Human Rights Commission

Rwanda has experienced massive and recurring human rights violation organized by the State. The National Human Rights Commission was created with the aim to make a diagnosis of human rights violations in general and the violations of the executive power in particular. Its responsibilities include the following:

- educating and mobilizing the population on matters relating to human rights;
- examining the violations of human rights;
- carrying out investigations of human rights abuses and filing complaints in respect thereof with the competent courts;

Since the creation of the National Human Rights Commission, many investigations of human rights abuses have been carried out. Nowadays, annual reports are available every year.

The Ombudsman's Office

The Office of the Ombudsman as a new institution appears in the 2003 Constitution. Its main mission is to act as a link between the citizen and public and private institutions. Since the Rwandan population suffered very much from the abuses caused by the decisions of public officials or organs while the judicial power failed to fulfil its mission of ensuring the human rights and freedoms, this situation could continue if nobody or no institution is not able to bring a solution. Here is the role of the Ombudsman who is also called "*Umuwunji wa rubanda*", translated literally as people's rescuer. According to the Constitution, his responsibilities include:

- acting as a link between the citizen and public and private institutions;
- preventing and fighting against injustice, corruption and other related offences in public and private administration;
- Receiving and examining, in the aforementioned context, complaints from individuals and independent associations against the acts of public officials or organs, and private institutions and to mobilise these officials and institutions in order to find solutions to such complaints if they are well founded. (Article 182)

Many people have consulted the Ombudsman in order to find solutions to various issues relating to the violations of the rights; many of them got the right solution, others are still waiting. The problem relate to the right of ownership in the cities where the local population need to be protected against inopportune expropriation, they are under the growing development threat. Although nothing can stop the expansion of the city, preventive measures should be taken to protect innocent people. The right thing would be to follow the law on expropriation for public

interest which foresees the procedures and prior and fair compensation which will allow the citizens to organise their life outside the city.

The citizens do not know when to resort to the National Human Rights Commission and when to resort to the Ombudsman. Although this double role confuses the citizens, it does not harm their interests. It rather protects them. This double role may be a burden to the government budget; it requires a certain competition between both institutions.

5.6.3. Protection ensured by the political and social organizations

Some organizations, associations and groups play an important role in the protection of the rights and freedoms, including the civil society, the political parties, professional associations, supranational organizations...

5.6.3.1. *The civil society*

In a country which advocates freedom, the civil society plays an important role in controlling the abuses and mobilizing the efforts to promote the rights and freedoms. The civil society includes a good number of non government organizations. The majority are social and philanthropic in nature as well as other private associations. The civil society seems to cover a good number of social aspects to such extent that the intrigues and cruelties of the population in general and the administration in particular are well known. The various churches scattered all over the country organise weekly celebrations on the Sabbath day or Sunday and daily *counselling* sessions. Moreover, the various human rights organizations are committed to sensitizing people about their rights. They are always ready to denounce human rights violations as well as the independent newspapers which constitute the fourth power.

The civil society plays an important role on the political scene, either in collaboration with the regime in place or against it. Here, the civil society is accused of collaborating with the opposition political parties or foreign countries. In a country dominated by a single party system, it is obvious that the civil has to collaborate with the regime in place. This is the case with the Catholic Church in Rwanda during the first and the second republic where an archbishop was a member of the Central Committee of the only ruling party. During this period, the private press was censored; the human rights associations never revealed the atrocities of the regime in place.

Since the introduction of the multi-party system in the 1990s, the Rwandan Government gives much freedom to the associations and newspapers to carry out their activities. The Constitution guarantees the freedom of association and the freedom of press (Article 34). Moreover, the law governing the newspapers guarantees the freedom of press and the absence of censor, while safeguarding the journalist's freedom who cannot be held on preventive detention in the event of the violation of the press law, unless a court decision is taken in due form and decides the censure or detention.

Currently, the civil society cannot claim to be free vis-à-vis the political influences. The most striking case includes some human rights associations which are accused by the regime of involvement in clandestine political activities instead of achieving the objectives mentioned in their statutes. The League for the promotion of human rights in Rwanda (*LIPRODHOR*) was criticised at a certain period. On the other hand, some people believe that the government harasses and intimidates some associations or press, especially when a very important government authority is accused. The case which is mentioned quite often is *Umuseso* Newspaper.

5.6.3.2. *Political parties*

Since Rwanda got its independence, the various regimes were characterised by political self-centredness. The ruling party in the first Republic which resulted from the multi-party system destroyed the other political parties in order to impose its domination as a single party. The second republic established the single party system. The ultimate goal of the single party system is political domination. In most cases, it leads to dictatorship and the desire to keep power by all means. Dictatorship is the main source of human rights and freedom violations by the regime, because there is no organ to control the government abuses.

Today, the Rwandan government finds that the multi-party system is necessary and inevitable to establish the Rule of law and democracy. Therefore, Article 52 of the Constitution stipulates that a multi-party system of government is recognized as a principle. The political parties are the only organizations which can fight against dictatorship and violation of human rights and fundamental freedoms. According to Philippe Ardant, the political organizations are machines to conquer power⁷³, and any mistake committed by the ruling party gives an opportunity for other political parties to act. Control is therefore based on the competition to get power, and the opposition will never hesitate to reveal (*kwamagana*) the human rights and fundamental freedoms violations.

Article 56 of the Constitution stipulates that the political organizations officially recognized in Rwanda shall organize themselves in a consultative forum which will facilitate exchange of ideas by political organizations on major issues facing the country and consolidate national unity. Two opinions relating to this consultative forum arise:

- the first one is shared by the majority of political parties which consider that this consultative forum will facilitate exchange of ideas and debate on different point of views aiming at finding solutions on which all the parties agree instead of being imposed by the ruling party.
- The second opinion considers that the consultative forum will focus the various political parties on the aims of the ruling party. This prevents the political autonomy since the other political parties will just interpret the ideas of the ruling party.

We think that modesty should characterize the management of this consultative forum, the autonomy to the political parties must be ensured to allow an indirect control over the ruling party. This can be achieved if the chairmanship is alternated

⁷³ Ph. ARDANT, *Institutions politiques et droit constitutionnel*, 13^e edition, Paris, LGDJ, 2001. p. 253

among the political parties within the forum, the mandate should be of a very short period.

5.6.3.3. Professional organizations

To protect and claim human rights and fundamental freedoms cannot be ensured by individual people because the impact of their claim is not strong. Through the associations, the organizations which defend a common cause can express their concerns easily and without fear.

In Rwanda, there are many human rights associations:

- Human Rights in general: The League for the Promotion of Human Rights in Rwanda (LIPRODHOR), the League for Promotion of Human Rights in the Great Lakes region (LDGL);
- The Promotion of Workers' Rights: Workers Union in Rwanda (CESTRAR);
- The Promotion of Drivers' Rights: Public Transport Drivers' Association (ATRACO);
- The Promotion of Consumers' Rights: Rwanda Consumers' Association (ACR);
- Freedom of press: Rwanda Journalists Association;
- The Promotion of the Rights of underprivileged people: CAURWA aims at the protection of the Batwa's interests. However, the regime in place considers that this this association has a discriminatory connotation;
- The Promotion of vulnerable people's Rights: Rwanda Disabled people's Association;
- The Promotion of Genocide Survivors' Rights: The Genocide Survivors' Association (IBUKA).

The other organizations include workers' associations with agreed rules governing their professions (case of the medical association, the bar, etc) or associations whose aim is to defend the members' interests (case of bank associations, insurers, industrialists, etc).

There are many ways of enjoying the freedom of expression. However, they can be grouped in three categories, namely:

1^o expressing your ideas publicly through the meetings and publications derive from the Constitutional principles of freedom of thought, freedom of expression and freedom of association;

2^o addressing the claims to the concerned administrative or judiciary authorities belongs to the right to make an appeal;

3^o the right to strike is acknowledged by article 39 of the Constitution.

The creation of associations is one thing. Expressing and claiming the rights is another thing. In a dictatorial regime, these ways of expressing or claiming your rights are prevented by legal or administrative mechanisms. Rwanda has promoted the freedom of speech and the freedom of opinion as well as the Union freedom. Although there is still a long way to go, some people think that the administration has always mechanisms to prevent the claims. For instance:

- Although the right to strike is authorized once the procedures to solve the problem have no result, after the submission of a written notification to the other party four days before;⁷⁴
- The High Council of the Press, which controls the work of the journalists and their associations, is criticized for its pro-governmental tendencies because of its fastening with the Presidency of the Republic;⁷⁵
- Dishonouring the authorities in the newspapers becomes a violation of the press law. The authorities are immunized and should not be criticized by the press;
- Etc.

5.6.3.4. *Supranational organizations*

When you mention supranational organizations, you refer to the international NGOs, the UN organizations and the multinational companies which play or can play an important role in a country governance and policy. The funds provided through the bilateral cooperation support the countries in their development process. Many people believe that this assistance determine other political requirements a country must fulfill. This form of assistance has not disappeared. Since the UN has organizations which implement the process, the majority of interventions are controlled by international NGOs. Some of them such as *Amnesty International* deal with the control of human rights violation. Although others deal with social interventionsm they interfere in political matters. This is also the case for the multinational companies which can influence or give a financial support to a political party of their choice, to the detriment of the people's interest.

In spite of this observation, Rwanda has good relationships with UN organizations and international non government organizations and encourages their activities which contribute to peace and security. Moreover, RIEPA (*Rwanda Investment and Export Promotion Agency*) supports foreign direct investment in the country. Moreover, the presence of the multinationals is needed in the privatization of public enterprises. Foreign Companies manage some public enterprises that have been privatized and the country hopes that they will introduce advanced technology which will ensure a greater profitability.

⁷⁴ See Art. 189 of law n°51/501 of 30 December on Labour Code, in JORR 2002, n°5, p.70 and ff.

⁷⁵ See. Art. 73 of law n° 18/2002 of 11 May 2002 governing the newspapers, in JORR 2002, n° 13, p. 113 and ff.

VI. ADMINISTRATION OF JUSTICE

To avoid the disputes within the society; either among citizens or individuals and the public administration, the government has set up a judiciary system which prevents people to be judges of their own cause. Article 140 paragraph 4 of 2003 Constitution stipulates that “Justice is rendered in the name of the people and nobody may be a judge in his or her own cause”. The need for justice is real. Since the Constitution prohibits people to be judges of their own cause, the government should put in place a strong judiciary system which will contribute to the establishment of the Rule of law.

The reform of the modern judiciary system has been carried out; it is assisted by the mediators’ committees and the *gacaca* jurisdictions at the grassroots level.

The Rule of law requires *speedy justice*.

6.1. Historical background of the Magistrature in Rwanda

6.1.1. Justice before the colonial period in Rwanda

Power separation (between the political power and the judicial power) never existed in the traditional Rwandan Society). Consequently, there were abuses and arbitrary decisions during the trials.

On the one hand the Mwami and the chiefs decide on the violations and power abuse. On the other hand, the weak ones, the poor, and the majority of the citizens have no chance to make an appeal because the Mwami is not accessible. This has harmful consequences on the development of the society which has adopted dependence relationship and feudality. Considering the fact that the system established automatically the impunity of powerful people and frustrated a category of weak people (vulnerable people: elderly people, women, children, etc), the weak ones had to seek the protection of the powerful people (*ubuhake*).

At the family level, there is confusion between the paternal authority and the legal authority among the heads of the extended families and the heads of families, concerning family conflicts and minor offences (divorce, adultery, etc).

The system was also characterized by a lack of mechanism to rehabilitate and to teach antisocial criminals how to live in harmony in the society. Sometimes, heavy sanctions were imposed including death penalty or banishment (for example, a girl who became pregnant before marriage was drowned in the lake or banished and sent in the Bushi region especially on Idjwi Island).

Nevertheless, the social and public order is peacefully protected by the criminal sanction:

The political and sacred power of Mwami; the security of the State and the security at the borders; the family order; women and children’s protection; the victim.

There is a clear limit between the civil law and the criminal law as far as sanction is concerned. Concerning the criminal law, only the crimes are punished while the offences and the infringements require a financial compensation which can be called "damages", decided in the "gacaca" courts.

As far as the criminal law is concerned, the Mwami judged the crimes whereas the head of the extended family judged the offences and infringements. The civil conflicts were settled by the administrative authorities, heads of extended families and families.

Mwami could judge the criminals. He could decide death penalty and banishment. He could forgive and rehabilitate, he knows the appeals formulated against the decisions taken by other jurisdictions including the revision of his own decisions. In some cases, the Queen-mother could impose punishments in the event of urgency or when the King was still very young.

The Chiefs could sit together, settle civil conflicts and decide on minor infringements. Therefore:

- The head of the pastures could settle conflicts relating to the pasture. They also collect the administrative royalties and public contributions caused by the war or natural calamity (related to cattle and pastures);
- The heads of the land could settle conflicts relating to the land. They also collect the administrative royalties and public contributions caused by the war or natural calamity (related to food products);
- The Chief in charge of hunting controlled the game reserves. He regulated hunting and settled conflicts relating to hunting;
- The head of the armies (*umutware w' ingabo*) controlled the militia, the contributions for the troops and war efforts (supplies).

The head of the extended family (*umuryango mugali*) could judge all the members of his extended family mainly to ensure the family rights; He could also sanction the offences and infringements through financial compensation. The judgement and the sentence take place before all the members who are present: this was called gacaca justice. As regards the head of the nuclear family, there was confusion between the marital and paternal authority and the right to punish (to right to impose a corrective sanction on the woman and the children at any age).

6.1.2. Features of the judicial power during the colonial period

The judiciary system distinguishes between the traditional judiciary system which could judge the indigenous people and the statute law or common law jurisdictions for white people and registered people.

The colonial power created a new judiciary system and introduced the territory courts, the district courts, and the police courts which apply the statute law to the Europeans, the Belgian military criminal law for the Belgian soldiers and the "police" including the Congolese soldiers.

Indigenous courts were introduced for the indigenous people. These courts could apply the German law, the Belgian law, the Belgian Congo law or adapt justice to the needs. Here, the judge was free to choose the law to apply to a particular case.

The indigenous courts include the Court of the Mwami (high court), the Territory Court, and the Chefferie Court (Decree of 15/04/1926), whose mandate was to settle civil cases among the indigenous people⁷⁶. "the traditional courts have the right to judge the civil and criminal cases according to the custom, the traditions of the German administration and the instructions of the royal commissioner" (Decree-Law n°10 of 19/4/1917).

This power reveals some confusion because the administrative chiefs continue to judge in the courts and to carry out legal and judiciary duties and to interfere in administrative matters. The Mwami has full power over all the courts (he can chair, revise and intervene in all the jurisdictions). Moreover, the judiciary personnel as well as the administrative staff are appointed by the Mwami and should obey him.

To some extent, the mandate of these traditional courts is limited:

- They are discriminatory because they relate to indigenous people;
- They are limited to the implementation of the customary law;
- They depend on the colonial law and order and the moralities defined by the Jewish and Christian moral law;
- They are under the control of the territorial Court which is a European jurisdiction, which had the power to cancel all the judgements made by the indigenous courts.

As far as the criminal matters are concerned, the written or common law includes the police courts, the territorial court for the whole Rwanda and the Appeal Court for Rwanda-Urundi. These courts could extend their mandate as far as the civil matters are concerned: "When the matter will not be governed by a legal provision of the royal commissioner, the courts will judge the civil and commercial disputes according to the customary laws, the general principles of law and equity" (Article 55).

It is obvious that this decree creates a mandate conflict between the role of the customary courts and the common law courts which are considered as more important.

These courts were reorganized in 1948, the restructuring was a broader one and included Rwanda police court, the public prosecutor's Court, the Residence Court, Rwanda-Urundi magistrate's Court, and Rwanda-Urundi Court of appeal (Decree of July 5, 1948).

There was confusion between the executive and the legislative power on the advantage of the Administrator, the Resident, the King's Prosecutor and the deputy public prosecutors.

⁷⁶ In 1934, mediators' courts were created at Nyanza. The local chief or the head of the defendant's residence could organize the conciliation for less important matters before informing the 1st level indigenous courts

Moreover, these statute law courts disturbed the traditional courts. Crevisse describes this disturbance as follows: "The indigenous people who were used to remember instead of thinking experience the shrinking of the sources of their memories and the disintegration of the daily practices. The current judges mean nothing in the eyes of the indigenous people and they feel their illegitimacy. They recognize their right to punish, because the whites gave them the power, however, they can not blame people because they are neither chiefs nor fathers".⁷⁷

There is also a material law dualism between the statute law and the custom under the control of the colonial law and order which have become universal as a result of the triumph of colonization.

6.1.3. Justice during the post-colonial period

The historical background of the Rwandan Magistrature can be analyzed through various Constitutions the country had.

6.1.3.1. Administration of justice during the first Republic

Organisation of the judiciary system

When the Constitution of 24/11/1962 was promulgated, there was a Supreme Court composed of 5 departments including the Department of Courts, the Court of Cassation, the Constitutional Court, the State Council and the Revenue Court. This Supreme Court did not have management and financial autonomy. The magistrates were appointed and dismissed by the President of the Republic. The Supreme Court managed and organized the Courts in the whole country. The ordinary jurisdictions were: the district court (for one or two communes), the magistrate's Court (in each province), Court of Appeal, and Supreme Court. Article 99 of this Constitution included the possibility of creating the Martial court, the military Court, magistrate's courts dealing with criminal matters and commercial courts. The martial Court and the military Court were not created within this framework. The law could create other special courts.

The insecurity for the staff in the judiciary system

The then supreme court revealed unrest within the judiciary system. Examples to reveal this unrest include the dismissal of four deputy speakers by the presidential decree n° 126/13 of 17/07/1965 after unfruitful debates in the Parliament. This unrest was due to the fact that the Speaker SEMINEGA considered his collaborators as Inyenzi which is a political insult which indicates the politicization of the High Institution.

It seems that during this period, the Supreme Court had no competent people. In 1973, the judiciary system had 18,000 pending cases. This poor performance of the judiciary system was due to:

⁷⁷ Crevisse

- The lack of qualified staff as a consequence of the poor recruitment criteria;
- Lack of professional skills and training among the magistrates;
- Discriminatory criteria during the recruitment, (the first Rwandan lawyers were forced to go in exile in Burundi, Congo, Belgium, etc).
- Politicization of the magistrates
- Many arbitrary and inopportune dismissals.
- The confirmation procedures was too slow: 4 years of test to become a permanent magistrate

Legalisation of impunity

As far as the formal legality is concerned, the Rwandan government during the first Republic did not ratify the International Convention on the prevention and punishment of genocide crime (December 9, 1948), on the non-applicability of statutory limitations to war crimes and to crimes against humanity; nor the eradication of any form of racial discrimination (March 7th, 1966).

In spite of the active participation of the leaders and the citizens in the violations of human rights and freedoms during the turmoil which lead to the independence; through the killings, aggravated assault and various form of tortures, on May 20th, 1963 the Parliament declared a general and unconditional amnesty for these infringements committed between October 1st, 1959 and July 1 1962 except for the Parmehutu political opponents (article 2). This amnesty law reveals not only the impunity established by the law; it also reveals emphasize ethnic discrimination.

These violations of the right to live and the bodily security also include the violation of the right of ownership. However, through the presidential decree n° 25/01 of February 26th, 1966, the government legalised the extortions, looting and other violations of the repatriated rights to claim their properties which were taken illegally. These violations refer to the rights of the minorities.

6.1.3.2. Administration of justice during the second Republic

Legal Organisation

According to the Constitution of 28/12/1978, the President of the Republic guarantees the autonomy of the judicial Power (Article 81). The President of the Republic is the President of the Supreme Council of the Judiciary, while the Minister of Justice is the vice-president.⁷⁸ The magistrates were appointed and dismissed by the President of the Republic upon the Minister of Justice's proposal after assent of the Supreme Court. The members of the Supreme Council of the Judiciary were also appointed by the President of the Republic. The then Supreme Court was replaced by 4 autonomous high jurisdictions including the Court of cassation, the State Council, the Constitutional Court (composed of the Court of cassation and the State Council) and the Revenue Court.

⁷⁸ See Art.1 of decree-law n° 08/82 of January 7th 1982 on the composition and regulations of the high council of the judiciary

Under the Constitution of 10/06/1991, the organic law n° 07/92 of 19th November, 1992 on the organization and management of the Supreme Council of the Judiciary modified considerably the modalities for the appointment of the members of the Supreme Council of the Judiciary. Apart from the Minister of Justice, all the other members were elected by their colleagues and the Supreme Court appointed its president among the members (Article 1 & 5).

The fundamental law included 4 documents (the Arusha Peace Agreement, the Constitution of 10/06/1991, RPF declaration of 19/7/1994 and the memorandum of understanding of November 24th, 1994 among the political organizations). The fundamental law established an autonomous judicial power and a Supreme Court composed of 5 departments: the Department of the Courts, the Constitutional Court, the State Council, the Court of cassation and the Revenue Court. The Constitutional review of the 18/04/2000, created a sixth department called "the Gacaca Jurisdictions Department". The Supreme Court was chaired by a President and six Vice-presidents as well as the Presidents of the above mentioned departments. It had advisers who worked as judges.

The Supreme Council of the Judiciary included 21 professional magistrates chaired by the President of the Supreme Court. His role was to appoint, to dismiss, to monitor the activities of the judges in the Courts. The judges do not include the President and the Vice-presidents in the Supreme Court.

The Constitution of 4th/06/2003 brought deep changes as regards the organization, the management and mandates of the Courts. A judiciary reform as well as the reform of the judiciary system followed. The major reasons which justify this reform were the following:

- The structure of the Supreme Court including six departments contributed to the misunderstanding of the President and the six Vice-presidents' mandate on the administrative and judiciary level;
- The Court of cassation had no power to scrutinize the matters except criminal matters where the above mentioned Court had to judge high authorities in the country. Its main role consisted in taking the final decision with or without the possibility to resort to lower jurisdictions for case review. This contributed to the delay of the court decisions;
- The Supreme Court did not have administrative and financial autonomy. It had its own budget and the budgets of other courts were managed by the Ministry of Justice first, then by the provinces and the districts;
- The Supreme Court did not guarantee the fundamental citizens' rights because the persons subject to trial could not check before a law that has already been promulgated, violating their rights. There was only one and compulsory control beforehand;
- The lawsuit sessions included 3 or more judges (Supreme Court: all the jurisdictional sections together), when a member was absent the trial was postponed;

- The specialized chambers for administrative, commercial, tax, financial, social and children under the age matters did not exist;
- The mandate of the jurisdictions was not the same. For instance, the district courts and the Cyangugu Court of Appeal did not have enough cases to judge while the other jurisdictions had many cases and took very long time to public court decisions.

Impunity and social class justice

Article 81 of the 1978 Constitution stipulates that the judicial power is independent from the executive power. However, the regime considered actually Justice as an instrument of oppression. Justice is used to punish ambitious politicians, the wrong ideologies, all kinds of disputes in addition to the ordinary law provisions.

The second Republic did not hesitate to ratify the International Convention on the prevention and punishment of genocide crime of December 9th, 1948. However, the leaders do not take into account article 9 relating to the responsibility for a State as regards genocide crime and the violations mentioned in article 3 of the Convention (Decret-law n° 8/75 of February 12th, 1975). The same applies for the Convention of November 26, 1968 on the non-applicability of statutory limitations on genocide crimes and crimes against humanity. Rwanda did not also ratify the Convention of May 7, 1963 on the eradication of all forms of racial discrimination.

Article 38 of the 1978 Constitution extended the immunity to all the cabinet members. It was previously allocated to the Head of the State only. The cabinet members can be prone to legal lawsuit upon the majority of the ¾ of the members of the National Development Council (parliament).

Impunity is valid for the crimes and offences committed from the colonial period to date.

The current mission of the judicial power is to render justice to persons subject to trial in all equity and integrity. This will contribute to the establishment of the Rule of law which is characterized by the respect of human rights and fundamental freedoms.

The judicial power considers that vision Rwanda is a country where the Rule of law exists, with an autonomous, effective, efficient judiciary system which is very close to persons subject to trial. The court decisions are coherent and the same.⁷⁹

6.2. Guiding principles for a good administration of justice

6.2.1. Independence of the magistrature

The autonomy of the judicial power is an essential element for the establishment of the Rule of law. In a democratic Rule of law, the judicial power must guarantee the

⁷⁹ Cfr. Strategic plan of the Supreme Court, p. 12.

balance between both powers, namely the Legislative and the Executive power and among various organs and decision making institutions.

The judicial power ensures the human rights and fundamental freedoms mentioned in the Constitution are respected instead of remaining theories. They ensure that the legal principles and norms are necessarily followed by all the citizens, the leaders and the government.

In Rwanda, this principle of autonomy of the judiciary system mentioned in the Constitution stipulates that Judicial Power is exercised by the Supreme Court and other courts established by the Constitution and other laws. The Judiciary is independent and separate from the legislative and executive branches of government. It enjoys financial and administrative autonomy (art.140 Constitution). The judges are fully independent. They obey to the law only. They are independent from the legislative and executive power. They evaluate the causes of the conflicts and they decide independently upon the solution without any pressure.

The President of the Supreme Court guarantees the autonomy of the judicial power (Article 22 of law n° 06bis/2004 of April 14, 2004 on the statutes of the judges and judiciary system personnel). Once informed about the matters, the judge should avoid anything that could influence him/her in the decision making and to violate the legal procedure. In the exercise of their functions, the judges must follow the law and only the law (Article 5 of the professional code of conduct).

Considering the current state of affairs, the judge's autonomy has been fragilized by the fact that many magistrates lack professional experience and knowledge to address such challenges as the shortage of equipment and insufficient human resources. During the focus group discussions, people said that the judicial power employees are not well appreciated in the society compared to their colleagues in the other two powers, namely the executive and legislative power.

The other elements which can contribute to the autonomy of a judge include his/her appointment, irremovability, impartiality, sense of responsibility, experience, equipment and sufficient staff at his/her disposal.

6.2.1.1. Appointment of the judges

In most countries in the world, the appointment of the judges is entrusted to an independent organ, namely the Supreme Council of the Judiciary. In Rwanda, the President and the Vice-president of the Supreme Court are elected by the Senate for a single term of eight years by simple majority vote of Senate members upon the President of the Republic's proposal. The latter suggests 2 candidates in each position after consulting the Cabinet and the Supreme Council of the Judiciary. The judges are appointed by a Presidential decree within the eight days following the Senate vote. They may be removed from office on account of undignified behaviour, incompetence or serious professional misconduct upon the petition of three fifths of either the Chamber of Deputies or the Senate and a two-thirds majority vote of each Chamber. (Article 2 review n°1 of the Constitution done on 2nd/12/2003).

The Supreme Court judges are elected by the majority of Senators upon the President of the Republic's proposal. The latter suggests 2 candidates in each position after consulting the Cabinet and the Supreme Council of the Judiciary. They are appointed by the Order of the President of the Supreme Court (Article 3 of the review n°1 of the Constitution done on 2nd/12/2003 and art. 7 organic law n° 01/2004 of 29th January 2004 on the organization, management and mandate of the Supreme Court). The judges at the Supreme Court do not have a mandate. However, they are dismissed from their duties upon retirement or they may be removed from office on account of undignified behaviour, incompetence or serious professional misconduct upon the petition of three fifths of either the Chamber of Deputies or the Senate and a two-thirds majority vote of each Chamber (Art 8 of the already quoted organic law on the Supreme Court).

The judges in the other jurisdictions are appointed by the Supreme Council of the Judiciary upon written request of the President of the Supreme Council of the Judiciary, considering the vacancies and after a competition. The judges are dismissed from their duties upon voluntary resignation, removal from office, retirement, and death (Article 15 and 70 of law n° 06bis/2004 of April 14th, 2004 already quoted).

On the one hand some people think that since the Supreme Court magistrates are appointed by the President of the Republic, their autonomy is not guaranteed because they will be tempted to obey him. Others on the other hand believe that this appointment made by the President of the Republic who guarantees the three powers, gives more authority to the judicial power.

6.2.1.2. Irremovability of the judge

The judge's irremovability is a major guarantee of his/her statutes. The judge's irremovability is envisaged to ensure the autonomy of the judiciary and not the autonomy of the judge. The judge needs to know that his role is guaranteed or will not be isolated from any case file or any jurisdiction by a decision of a competent authority.

Unless the law otherwise provides, judges confirmed in office shall hold tenure for life; they shall not be suspended, transferred, even if it is for the purposes of promotion, retired prematurely or otherwise removed from office (Article 142 of the Constitution). However, this irremovability principle guaranteed by the Constitution is somehow compromised by the above mentioned article 24 paragraph 2 of law n° 06bis/2004 of April 14, 2004 which stipulates that the judges can be transferred by the Supreme Council in the interest of the judiciary only. Such a subjective appreciation annihilates the irremovability principle. On the other hand, paragraph 3 of this provision stipulates that in the event of unexpected obstacle or difficulty experienced by one or several judges or when the temporary and immediate reinforcement of the lower jurisdictions is essential to settle contentious matters, the Order of the President of the High Court of the Republic can decide to delegate temporarily the Provincial and Kigali City Court judges, the districts and Cities court judges, to carry out judiciary duties in the

same jurisdictions as the ones they work in. This is less compromising insofar as the conditions are objectively verifiable.

6.2.1.3. *Judge's impartiality, responsibility and experience*

The impartiality, the sense of responsibility and professional experience are also elements which are necessary to ensure the judge's autonomy.

The judge must be impartial, that is, he/she should not favour some people who are subject to trial and neglect the others. In other words, he/she should not be biased in his/her decision-making deliberations. Hence, he must consider all the persons who are subject to trial as equal before the law.

An independent judge has a great sense of responsibility vis-à-vis his/her great mission of judging people because his/her decisions are legal and have an impact on people's life and assets. That is why the recruitment of the judges requires very serious scrutiny.

Moreover, it is not enough to pretend that a degree in law is enough to be a good judge. A good judge needs professional experience, in law and other domains to fulfil his/her noble mission. Therefore, continuing education is very necessary for in-service magistrates.

6.2.1.4. *Human and material resources*

To ensure the magistrature autonomy, a sufficient budget is needed to get the equipment and to recruit administrative and support staff. This budget should be managed in an autonomous way. Unlike what is happening in Rwanda, each jurisdiction at all the levels should be able to work out and to implement its own budget, because the budget is allocated to the Supreme Court who manages the behalf on behalf of various jurisdictions.

Moreover, the salary of the judge should be sufficient to guarantee his economic autonomy. He should not be involved in corruption matters when he/she is in need. Daring people who are subject to trial should not try to corrupt him/her. In spite of the law against corruption⁸⁰, corruption will always exist as long as the judges' condition does not allow them to satisfy their needs.

6.2.2. Equality before the law

Are all the Rwandans equal before the law? Are they treated in the same way? In other words, is everyone prosecuted in the same way by the law or is the law applicable to the little citizens only? Is every person who violates the law accountable for his/her crimes?

⁸⁰ Law n° on the fight against corruption

The law is required to settle an unspecified situation within a community. In theory, the law has a general and impersonal aspect. Therefore, everyone should follow the law. However, it happens that some people are treated differently from ordinary citizens when it comes to applying the law in the same context. Why are people treated differently when the law does not establish categories? Here are some reasons:

- The way ordinary citizens consider their leader;
- Some leaders feel that they are above the law;
- Some leaders behave according to their position;
- The judge or the prosecutor is not free when he/she takes a decision;
- The incompetent judge or prosecutor lets the leader do whatever they like;
- The public prosecutor fails to decide the right time to prosecute;
- Immunities and privileges relating to some positions;
- The social consideration of the leaders;
- Moral corruption, and even bribe;
- Orders given by some leaders and passive obedience.

This inequality before the law contributes to the culture impunity. In other countries, the law regulates the relationship among people, everybody including the leaders and the ordinary citizens should follow the law. Citizens are not afraid of the law but the sanctions in case he/she does not follow the law.

6.3. The role of the judge in the Rwandan society

To show the role of the judge in the Rwandan society, it is important to answer the following questions: How does a judge consider himself/herself? How does the community consider him/her? What is his/her role?

6.3.1. Judge's self-consideration

To become a judge, the moral and social values are required given the importance of this role in the community. Therefore, the law n°09/2004 of 29/4/2004 on the professional code of conduct especially in its article 3 stipulates the following: "Judges are appointed in order to serve the citizens. They enforce laws in the name of the people. Their conduct should comply with their obligations and their incompatibility provided for by this law".

In the past, the judges did not have a good reputation; some were accused of corruption, drunkardness, incurring debts which exceed their salaries, etc. The current law endeavours to restore the reputation of a judge who should be considered as an honest person and a role model in the society where he/she lives. However, other mechanisms such as a good salary, excellent working conditions contribute to this goal. It is necessary to inspect and evaluate regularly the judge so as to keep the expected standard, because the majority of judges are graduate people who lack enough professional experience.

6.3.2. How does the community consider the judge?

The history of the judiciary in Rwanda shows that the latter did not have the opportunity to play its role of protecting human rights and fundamental freedoms. Therefore, the judicial power has never benefited from the social consideration as the executive power. The citizen considers that the administrative leader has full powers to solve his/her problems, without resorting to the judge. He/she even believes that the administrative leader can change the decision taken by the judge. This behavior is noticed among some authorities at the grassroots level who dare to challenge the judge's decision after being misled by their personal judgment, or corruption.

The poor and inadequate working conditions of the judges compared to the ones of public administration lead the citizens to consider the judges as people who are not leaders, neglected people who can not guarantee their rights and freedoms. Hence, the tendency to resort to the executive power which has sufficient mechanisms to ensure people's esteem and protection.

The law reform, the reform of the judiciary system and the administrative reform intends to restore a balance among the three government powers, by improving the statutes of the judge and his/her working conditions as well as his/her autonomy. However, to ensure that the reform goes hand in hand with the improvement of mentalities and behaviors, people need to be educated so as to welcome the court and judge's decisions which guarantee the human rights and freedoms.

6.3.3. The role of the judge in the society

The development of the Rule of law requires a judiciary system which is independent, transparent, accessible and impartial capable of rendering timely and inexpensive justice. This system should have a group of professional and competent magistrates who enjoy excellent working conditions. The administration of the judiciary system depends on structural measures which guarantee its autonomy, the appointment and the protection of judges who are wise, fair and able to resist to any form of pressure.

Since the independence, the Rwandan judiciary system has always encountered problems and has never succeeded in achieving its mission of ensuring the human rights and freedoms. These problems include the lack of autonomy, the lack of qualified magistrates who are not corrupt, insufficient equipment, some magistrates who were corrupt.

The reform of the judiciary system intends to bring solutions to these problems, ensure the autonomy of the judicial power and provide the courts with competent and professional judges. This appears in the following new legal documents:

- The Constitution of the Republic of Rwanda of 4th /6/2003;

- The organic law n° 1/2004 of 29/01/2004 on the organization, functioning and jurisdiction of the Supreme Court;
- The organic law n° 03/2004 of 20/03/2004 determining the organization, powers and functioning of the Prosecution Service
- on the organization, mandate and management of the prosecution service;
- The organic law n° 02/2004 of 20/03/2004 determining the organization, powers and functioning of the Supreme Council of the Judiciary;
- The organic law n° 07/2004 of April 25th, 2004 determining the organization, Functioning and Jurisdiction of Courts;
- The law n° 06 bis/2004 of 14/04/2004 on the statutes of the judges and the judiciary staff;
- The law n°09/2004 of 29/04/2004 relating to the code of ethics for the judiciary.

According to Article 3 of the law n°09/2004 of 29/04/2004 relating to the code of ethics for the judiciary, stipulates that the Judges are appointed in order to serve the citizens. They enforce laws in the name of the people. Their conduct should comply with their obligations and their incompatibility provided for by this law.... The law establishing the statute of the judges and the judiciary staff determines the general and specific conditions for the recruitment of the judges (Article 8, 9 and following) including a Bachelor's degree in Law and a professional certificate obtained from a magistrature school approved by the government.

6.4. Citizen's access and accessibility to justice

People who are subject to trial expect an accessible and fair justice with a reasonable period of time. However, there are obstacles relating to the organisation, procedure, economy and space which prevent the achievement of this objective.

Recently, there are cases which took many years without a legal decision, simply because the organization, functioning and jurisdiction of Courts were not appropriate. Many cases were referred to higher jurisdictions; some reached the court of cassation quite often they were transmitted back to lower jurisdiction, etc.

Many people who expect fairness do not have access to justice, they are not encouraged to resort to courts.

6.4.1. Obstacles to justice

The obstacles to justice include unstable organization of the judiciary, poverty and ignorance, the lack of trust in judiciary institutions as well as the geographical inaccessibility.

6.4.1.1. *The organization of the judiciary system*

The judiciary system has always been unstable and its organization has always been so complex that people who are subject to trial are confused. At a given period, the Supreme Court, representing judicial power was removed, then reorganized and rehabilitated had to fit in the new organization of the territory.

This has some impacts on the management of justice and the way people perceive the judiciary system. People expect fairness and solutions to their expectations.

To allow people to be acquainted with the organisation of the judiciary system and to encourage them to resort to justice when needed, the judiciary system should be stable and should not undergo frequent changes. These recurrent changes exacerbate such problems as:

- The persons subject to trial ignore the laws;
- Need to restructure the organization and functioning of the judiciary as well as competence of a court *ratione materiae* and the territorial jurisdictions;
- Sorting out and classifying the case files and persons who are subject to trial;
- The need to renew the infrastructures;
 - Appoint competent staff (administrative, judges and clerks);
 - Work out a realistic budget for the courts;
 - Etc.

6.4.1.2. The majority of criminals subject to trial are poor and ignorant

The launching of legal proceedings requires the plaintiff to cover a certain number of legal costs including the payment into court, the counsel fees, the transport allowance, the translation and consultancy fees when necessary, purchasing various documents which will be useful for the court hearing, the judgment expenses (per diem for the bailiff, transport allowance...), etc. Taking into account the low income of the ordinary Rwandan citizens, these fees can not be paid by any person who needs justice. However, the official charges (payment into court, purchase of a judgment copy etc.) are relatively low compared to the ones which are required by the representatives of the law and private individuals.

Some people do not know the institutions, the procedures and other laws. This prevents them from resorting to justice.

6.4.1.3. Criminals subject to trial do not trust the legal institutions

This lack of trust is due to the judgements which are usually made. In the eyes of the citizens, they are not reliable. This is due to several reasons which depend on the judge and others which do not depend on him/her. Personal reasons relates on the judge's education, corruption, etc. Other reasons which do not depend on the judge include insufficient means. All these problems which depend or do not depend on the judge delay the court procedures. Indeed, the majority of persons who are subject to trial refuse to the judge because they believe that their claims will not have a solution in a reasonable period of time, they prefer to settle their problems using mechanisms other than court process. Hence, the need to create arbitration centres.

To address this problem, the citizens should know the new laws. Moreover, the new judiciary institutions should restore the people's trust in the judiciary system through fair court decisions taken within reasonable period of time.

6.4.1.4. *Geographical accessibility*

Unlike other underdeveloped countries, the distance between the people's homes and the courts are not very long to prevent people from access to justice process. Moreover, decentralisation could bring the courts near the people.

6.4.2. Solutions brought by the reform of judiciary system

6.4.2.1. *Streamlining the procedures*

To address the issue of the delay of the trials, the law n° 18/2004 of June 20th, 2004 relating to civil, commercial, social and administrative procedure has clarified some procedures which were not clear; it has removed some procedures which contribute to the delay of justice process.

For example:

- The appeal against an interlocutory judgment is made only after the final judgment and jointly with the appeal of final judgment (Article 162, paragraph 2);
- The time limit for instituting an appeal has been reduced from three months to one month (Article 163);
- All judgments must be written and delivered within 30 days of the closing of the proceedings (Article 149, paragraph 1). Disciplinary sanctions will be imposed in case of violation of this article;
- No proof, documents in general, conclusions of the case and the document containing provision pertaining to the case can be deposited with the court after the hearing has been declared closed (Article 62);
- The deliberation of a case begins immediately or on the day following the close of proceedings (Article 143);
- All the cases should be adjudicated in a period not exceeding six months starting from the day the court received the claim (Article 11).

Moreover, the organic law n° 07/2004 of April 25th, 2004 determining the organization, Functioning and Jurisdiction of Courts and the organic law n° 1/2004 of 29/01/2004 on the organization, functioning and jurisdiction of the Supreme Court brought considerable changes relating to the jurisdiction of courts and redetermined territorial jurisdiction as well as the competence of a court *ratione materiae* to ensure equal distribution of the competences and functional relations of these courts, to bring justice closer to the people and to speed up the trials.

Therefore:

- the cassation system with or without appeal is no longer practical because the Supreme Court judges matters which are in the limits of its competence and does not refer the cases in lower jurisdictions any more. This system of sending back the cases in lower jurisdictions contributes to cumbersome administrative procedures and does not allow the courts of appeal to harmonize a homogeneous jurisprudence. The restructured Supreme Court with qualified judges will make final decisions and will contribute to a homogeneous jurisprudence.
- The former departments of the Supreme Court were removed because they did not contribute to a better functioning of the Court through a multicephal organization.
- The Courts of Appeal were removed and were replaced by a High Court of the Republic with new competences. This will allow contribute to the harmonization of the jurisprudence. However, the introduction of independent chambers may hamper such unification.
- The idea of fighting transboundary crimes was introduced. It is the mandate of the High Court of the Republic (Article 90).
- The Contentious business falling within the competence of the administrative courts was formerly entrusted to the State Council only. It has currently been decentralized and entrusted to the Province Courts, Kigali City Courts and the High Court of the Republic, depending on the level where the contentious business is. In theory, the cancellation proceedings should be possible no matter the level of authority where the leader is. It was almost impossible for an ordinary citizen to accuse an unspecified leader of power abuse or violation of human rights and freedom. Nowadays, this is possible because all the decisions of the leaders from the grassroots level to the top are likely to be questioned by very close jurisdictions.

6.4.2.2. *Specialization of the ratione materiae jurisdictions*

In each province, specific departments have been created in some key social and economic domains including commercial, social, financial and tax chambers created with the aim to facilitate the speeding up of trials relating to commercial disputes, precisely, by offering a favourable ground for the investors. Moreover, to ensure a special protection to the children, children criminal chambers were created. The military courts have also been considered due to their special criminal characteristic.

6.4.2.3. *Institution of the single judge*

To ensure the judge is responsible of his/her decision-making and to reach the maximum number of judgments, the single judge system has been established in ordinary courts in first instance with the exception of the Supreme Court. In

reality, the advantage of the system of collegial administration was to keep the court decisions secretly and to allow the judges to share their point of views. It had also a double disadvantage: it contributed to hiding incompetence, corruption, it did not allow people and senior officials to evaluate the judge. The judge did not also have opportunity for self-evaluation. Moreover, under the system of collegial administration, the absence of a member of the jury contributed to the postponement of the trial, the courts were crowded and there were many pending court cases.

This system of single judge borrows some procedure elements from the *the common law* countries, as opposed to the collegiality system adopted by *the romano-germanic* system, which has always considered *the single judge* as *iniquitous judge*. The advantages of the collegial structure have been maintained at the level of the Court of appeal to allow court decisions resulting from various opinions in a bid to promote justice. Moreover, to ensure the judge's welfare and to promote the legal science, the idea of nonconformist opinion was introduced together with the idea of collegiality. The "nonconformist opinion" allows a member of the jury who does not consider that the point of view of the majority is the best, to express his point of view in the same judgment although it does not influence the point of view of the majority. This point of view which is not read when the court decision is published allows the losing party or any other citizen to be aware of the way the deliberations were made and can be helpful to launch an appeal.

6.4.2.4. Bringing justice closer to the people

Philosophy of a conciliating traditional justice

The traditional justice could reconcile the persons subject to trial and reinforce social unity based on ancestral cultural values.

With the introduction of the statute law, this aspect of conciliation disappeared from the aim or orientation of justice. A judiciary system which is closer to the people is necessary nowadays to solve minor conflicts among neighbors, to rebuild a country which has already been shaken by the genocide tragedy and to restore the national the unity destroyed by the aforementioned tragedy and to cope with the exile phenomenon caused by the past divisionnist policies.

The modern justice also known as restorative justice renders verdicts very far from the place where the concerned people live. Quite often, it does not meet the citizens' expectations. The punishment does not correspond to the criminal's resources. This situation does not encourage the criminal to acknowledge his/her crime immediately and to ask for forgiveness. His/her tendency is rather to feel that the judgment has not been fair and not to feel guilty about the crime he/she committed.

The justice rendered by the mediators

Mediation committees are responsible for mediating between parties to certain disputes involving matters determined by law prior to the filing of a case with the court of first instance (Constitution Article 159). According to law n° 17/2004 of the 20/6/2004, the powers of mediation committees are the following:

- As far as civil matters are concerned, the mediation committees deal with land related and other conflicts relating to real property, cattle, movables, as well as the contracts whose value or the value of the litigation does not exceed three million Rwandan francs, as well as family conflicts other than the ones relating to the marital status and the legacies (Article 7);
- As far as the criminal matters are concerned, the mediation committees deal with such matters as shifting the boundary stone, destroying the crops, insulting other people, slander except the one done by the press organs, murder attempt threats, stealing the crops, stealing, extortions between spouses, aggravated assault, adultery, to abandon the family and to neglect the children, breach of trust, obtaining things by threats, swindling, fraud, hurting or killing small animals and domestic animals, destroying other people's properties (Art 8).

The mediators' committee is established in each Sector (administrative entity at the grassroot level) and is composed of twelve residents of the Sector who are persons of integrity and are acknowledged for their mediating skills.

They are elected by the Executive Committee and Councils of Sectors from among persons who are not members of decentralized local government or judicial organs for a term of two years which may be extended. Art. 4, 5 and 6 of the PO n° 16/01 of 2nd July, 2004 establishing the modalities for the elections of the community mediators determine the categories of ineligible people including the authorities at the grassroots level and the judiciary personnel.

The Minister of Justice shall determine the organization, functioning as well as the professional code of conduct of the mediation committee. Operating expenses shall be provided by the district or the municipality; however, the Government supports the activities of the mediation committee.

Parties to a dispute shall choose three of the mediators to whom they shall submit their case for mediation. The decisions are made by consensus or by the majority vote. Any party to the dispute who is dissatisfied with the settlement may refer the matter to the Courts of law.

Before settling the disputes, the mediators try to reconcile both parties. When the mediation fails, they decide consciously the next thing to do in accordance with the Rwandan laws and customs provided that the decision does not contradict the statute law.

As far as the criminal matters are concerned, the mediators cannot give a verdict included in the criminal provisions. Once they have managed to reconcile the

perpetrator and the victim, conciliation puts an end to the public action (Article 16).

The decision of the mediators which is adopted by both parties stands for an agreement between both parties. However, it is void as against third parties (Article 18). It can be implemented voluntarily or by force, at the request of the interested party unless it is against the public order. In this case, the President of the district or municipality court refuses to sign the binding resolution of disputes and informs the mediators' committee of his/her decision so that the latter may cancel its decision in accordance with the violated public regulations (Article 19).

An appeal against the decision of the mediators can be made within a period of time not exceeding thirty days. The agreed points can not be included in the appeal and the court to which the appeal is made examine other elements of the decision which have motivated the appeal and have not been agreed during the mediation process (Article 21).

Since the creation of the mediators' committees in 2004, some minor conflicts have been settled; others have been transferred to other courts. Some think that these committees have a competence of a court *ratione materiae* (to deal with cases not exceeding three millions) which is beyond the legal power of the mediators. Others consider that the government, particularly the police, has abandoned its mission of protecting the citizens against crimes (aggravated assault, stealing, etc.); all these can lead to revenge, impunity and insecurity.

Other problems relating to the organization and functioning of the Conciliation Committee include:

- The lack of permanent offices where people can find them when they are needed;
- They are not paid, therefore they can be corrupt easily;
- Instead of mediating, the mediation committee meetings look like a court;
- They lack a code of procedure or professional code of conduct;
- Many community mediators do not know the laws in force;
- The community mediators are under the executive power, they can easily be confused with the Ombudsman's departments.

To address these issues, some people believe that the law governing the mediation committees should be revised, by reducing the competence of a court *ratione materiae* and clarifying it as far as the criminal matters are concerned, so as to avoid the interferences of the police and to establish clear mediation procedures. Moreover, community mediators should be trained first. Training for the citizens should follow.

Justice in gacaca jurisdictions

Gacaca as a legal institution

The gacaca jurisdictions are charged with the prosecuting and trying the perpetrators of the crime of genocide and crimes against humanity, committed

between October 1st, 1990 and December 31st, 1994 or other crimes provided for in other jurisdictions (Article 1 of the organic law n° 16/2004 of June 19, 2004 already quoted), i.e. the ordinary jurisdictions and the International Criminal Tribunal for Rwanda.

The aim of these jurisdictions is to speed-up the genocide trials, the search for truth on genocide crimes, unity and reconciliation of the Rwandans, the fight against impunity, etc.

Challenges encountered in these jurisdictions

- The implementation of the defendant's rights

In practice, the parties in conflict do not have the right to defence which is acknowledged by the Constitution (Article 18). According to this article "The right to be informed of the nature and cause of charges and the right to defence are absolute at all levels and degrees of proceedings before administrative, judicial and all other decision making organs." This article does not recognize explicitly the right to be assisted by a lawyer but article 19 of the Constitution mentions a fair trial where all the necessary guarantees for defence have been made available to the criminal suspect. Is the right to be assisted by a lawyer included among these guarantees?

- Challenge of knowledge of the truth

Some people protect each other because they have family or blood ties. They develop a negative solidarity aiming at hiding the truth. For example, a Tutsi woman who is married to a Hutu is a witness for the defence instead of being a witness for the prosecution. Her aim is to ensure her stability in the family in law. Sometimes, the criminals protect each other.

Moreover, there are some cases of killings committed after the genocide "to revenge or in retaliation". They are considered as genocide crime and they are used as pretext to refuse to provide a testimony on what occurred really during the genocide. During the closing of Kibeho refugee camp, armed militia killed people. Those who are interested in the investigation ignore the fact that this camp was a refuge for killers who escaped from time to time to kill innocent citizens living in the neighbouring hills. The killing of these innocent citizens was not denounced by those who condemned the closing of the camp.

The post genocide situation has brought people to make a retrospective look in the past while others preferred to inhibit the past. Some criminal suspects and even some genocide survivors prefer to keep silence when public testimonies are made in gacaca courts. The reasons of these behaviors include:

- The families of criminal suspect are afraid of possible retaliation (*ndishakira abandi banzi*);
- Fatality attitudes (*Ni hahandi ntacyo mvugira, ntacyo bimarira*) due to the atrocities committed during the genocide and some religious beliefs;
- Perpetrators' denial of genocide and revisionism, the lack of trust in the judiciary system (no compensation, bail granted to the prisoners), etc;

- People who are neither perpetrators nor implementers do not want to provide testimonies so as to avoid hostilities.

- *Participations in the meetings of the gacaca jurisdictions*

There is a low participation rate in some regions, especially in urban areas. The reason which is most commonly mentioned is that the citizens (the prisoners were not included) did not understand the aims of the gacaca jurisdictions before the launching of the gacaca courts.

- *The high number people who took part in the genocide:*

The system of pleading guilty has contributed to revealing some truth which has been hidden until now. This has contributed to increasing the number of criminal suspects.

- *Training the "inyangamugayo" judges*

The *inyangamugayo* judges were not trained enough before starting their new job. Their lack of training and experience causes delays and even errors during the gacaca court procedures.

- *The issue of genocide survivors' compensation:*

The need to compensate genocide survivors affect many people because it is almost rare to find a Rwandan who has not been affected by the genocide.

The first category of people who are concerned with the issue of compensation include the genocide survivors who need moral and financial support for their family members whose properties were destroyed during the genocide. During the first trials of the genocide criminal suspect, the damages were imposed on the government and all the people who were condemned for genocide crimes. The compensation involved huge amount of money the civil party associating in a court action with the public prosecutor could not find. Although the compensation mechanisms do not exist, it does not mean that compensation should not be granted. The idea of creating a compensation fund has been mentioned several times. This idea should be maintained and revived.

The Rwandans are aware that this compensation is necessary. However, the majority of genocide criminals were ordinary people, as poor as most of the Rwandans, some of them killed their compatriots in order to inherit their properties. However, they mention: "*Kuko abishe bari "abatirigi"(abakene), ntacyabavaho. Kubera izo mpanvu ni hagurishwe biriya bya étages maze uwaburaye, cyane cyane uwacitse ku icumu, abone icyo ararira*" (since those who killed their fellow Rwandans are also poor people, it is necessary to sell the properties of rich people in public auction. These properties include their buildings. The money which will be obtained from the sale of their properties will be distributed to the poor, especially the most vulnerable genocide survivors.

6.5. Role of the executive power in the administration of justice

6.5.1. Lawsuit and sanction

6.5.1.1. The management of the Prosecution service

The prosecution service shall comprise the Parquet General of the Republic as well as the Military Prosecution Department. Its mandate is to ensure prosecution service in Rwanda⁸¹.

The Parquet General of the Republic is a unified body headed by the Prosecutor General of the Republic. It is under the authority of the Minister having Justice in his or her attributions. It enjoys administrative and financial autonomy.

The prosecutor General of the Republic and the Deputy Prosecutor of the Republic shall be elected by the absolute majority of votes of the members of the Senate. Their term of office shall be of 5 years renewable only once. They shall be appointed by a Presidential Decree, which can suspend or remove from their offices.

The Prosecution service includes the following career prosecutors: the prosecutor general of the republic, the deputy prosecutor general of the republic, prosecutors with jurisdiction over the whole country, prosecutor of province and of the City of Kigali, the prosecutors at the level of the provinces and the city of Kigali. The prosecution service includes the following auxiliary prosecutors: the military prosecutor general, the deputy military prosecutor general, the military prosecutors, the criminal investigating officers appointed as such, who assist the prosecutor of a province or that of the City of Kigali who are based at the district and town levels.

In ordinary courts, the function of public prosecution shall be performed by the Office of the Prosecutor General of the Republic, Prosecution offices in provinces and the City of Kigali and by the prosecutors who are based at the district or town level. Public prosecution before military courts shall be supervised by military prosecutor general.

The Prosecutor General of the Republic may give written instructions to any Prosecutor. However, he or she has no power to give instructions to a Prosecutor at the Province and City of Kigali levels to refrain from prosecuting any person and to defer the matter to himself or herself.

The prosecution shall act under the principle of discretion in the exercise of its functions. In the exercise of their functions, Prosecutors may replace each other in the same action.

⁸¹ Article 1 Organic law n°03/2004 of 20/3/2004 determining the organization, powers and functioning of the prosecution service

Whenever the prosecution decides not to prosecute, it closes and puts away the case file but must inform the complainant or victim of the decision taken so that, if necessary, such party can institute civil proceedings in a civil court.

The Prosecution service has a Supreme Council of the Prosecution chaired by the Minister having Justice in his or her attributions who is responsible for the follow up of the activities of the prosecution service. The Supreme Council of the Prosecution shall have the duty either on its own motion or at the request of any other authorised party to provide opinion on the general performance of the Prosecution including any disciplinary measures that may be taken against career prosecutors with the exception of the Prosecutor General of the Republic and the deputy Prosecutor General of the Republic (Article 24 organic law n° 03/2004 of 20/3/2004 on the organization, mandate and functioning of the Prosecution service).

Prosecutors shall be independent from judges and parties. They shall not receive from them, neither instructions nor injunctions in the exercise of their duties. In prosecution matters, the Minister having Justice in his or her attributions may, in public interest, issue written instructions to the Prosecutor General of the Republic ordering him or her to undertake or refrain from investigations and prosecution of an offence. He or she may also, in case of urgency and in public interest, give written instructions to any prosecutor ordering him or her to investigate and prosecute or refrain from investigating and prosecuting an offence and inform the Prosecutor General of the Republic of such instructions.

The Minister having justice in his or her attributions in collaboration with the Prosecutor General of the Republic shall determine general guidelines of the policy governing public prosecutions. Such guidelines shall be communicated to all prosecutors in writing. The Prosecutor General of the Republic shall submit the reports regarding to the performance of the Prosecution service.

The Prosecution shall inspect detention facilities so as to ensure strict observance of the law.

- *Attitudes of the public prosecutors vis-à-vis the accused person*

In addition to what the investigation mechanism prescribed in the law, there have been cases of violations as far as the preventive detention is concerned. In most cases, these violations are due to corruption, incompetence and the fact that public prosecutors obey blindly to leaders' suggestions. The following cases can be mentioned:

- Detention beyond the fixed hours;
- The violation of the presumption of innocence principle;
- Blows, inhuman and degrading treatments and tortures to force criminal suspects to confess a crime;
- Delay in the transmission of case to the courts;
- People are not treated as far as criminal action is concerned;
- Inopportune detentions as a consequence of the leaders' power abuse.

Remember that the reform of the judiciary system was initiated in order to improve the functioning of the prosecution. Therefore:

- The prosecution service represents the society. It is in a better position compared to the defendant. This position is reinforced by the fact that the prosecutor was in session wearing the same gown. Believed that the prosecutor took part in the decision-making or its development process. He appeared not to part of the trial in the same level as the defendant. The change brought by the reform is that for the time being, the prosecutor appears on the same level as the defendant, some of the prosecutor's advantages have been shared with the suspected criminals. Article 155 of the Code of the Penal Procedures stipulates that: "When a person who has been duly summoned does not appear, judgment can be passed in his or her absence. When the prosecution does not appear without any justified reason whereas the accused is detained, the latter is released on bail. If the prosecution is summoned for the second time and it fails to appear, the court renders its judgment".
- Provisional detention has been revised to protect individual freedom, any unlawful imprisonment can entail punishment to responsible officers (Article 88-89 of the Code of criminal procedure).
- An accused person or his or her counsel can at any time apply for bail to the public prosecutor charged with the preparation of the case or to a judge or magistrate depending on the stage of investigation. This release on bail can be granted considering the cause and some conditions the accused may be ordered to respect. These conditions which can be imposed on the accused include: obliging or forbidding someone who has been released on bail to live in a given area where the prosecutor charged with the preparation of the case file works, to report regularly before a public prosecutor who is charged with the preparation of the case file or a public servant or before any such other officer as may be determined by the magistrate or judge, to present persons of integrity who can stand for his or her surety. Article 103 stipulates that the bond guarantees the appearance of the accused whenever required in court as well as payment of damages arising from the offence, property to be restituted and fines (the amount of bond paid is refunded once the accused is acquitted). No bond shall be admitted in respect of felonies (Article 105).
- If the search involves residential premises, it cannot be carried out before 6.00 am to and after 6.00 p.m., unless there are serious reasons to suspect that the evidence sought is likely to disappear. Visits to scenes of crimes and search are conducted in the presence of the suspect or the owner of the house and in the presence of administrative authorities in the area. They occur for serious matters to ensure the evidence is not interfered or disappear. The Judicial police officer who has been entrusted with the duty to search and visit suspected scenes of crimes should prove their authority and show warrants which have been signed by competent people, authorizing them to carry out such activities. A copy of the warrant is given to the suspect (art.68).

- The interception of the correspondence transmitted through posts and telecommunication can be ordered by the Prosecutor General of the Republic only, when all the procedures of obtaining evidence to establish truth have failed (Article 74 and ff).
- The judge can put an end to the Prosecution passivity when he or she notices an opportunity to prosecute a case file in progress.
- The prosecution of juvenile offenders is special: a child who is aged 10 and above cannot be detained in the custody; for exceptional reasons, a child who is aged between 10 and 12 years against whom there are undoubted reasons to suspect that he or she has committed an offence can, for the purposes of investigation, be detained by a judicial police for a period which can not exceed 48 hours. A court chamber is competent to try children; the judge must foresee the measures to protect the child, to provide assistance, supervision or education (Article 190 of the Code of Criminal procedure).

The Prosecution service encounters many challenges relating to the means and qualified personnel compared to the people's needs and the procedural requirements.

6.5.1.2. Sanction which is proportional to the infringement

The issue of sanction relates to a series of punishments which are not proportional to the committed infringements, simply because they are considered as minor or extremely rigorous compared to the magnitude of the committed infringement.

For instance, some people do not believe in justice considering the magnitude of the genocide crime compared to the benefits from confessions, guilt plea, repentance and apologies procedure. The punishment of genocide crimes is special, insofar as it applies to a category of atrocious crimes, committed by a great number of people who were encouraged by the regime, in such a way that to punish all these people is another way of forcing the society to apply the retaliation law (Talion law), this can not contribute to social unity. At this level, punishment brings a solution to another issue and explains various repressive measures.

Another category of infringements, whose philosophy is diametrically opposed to the previous one includes the infringements the society is ready to condemn at all costs. For example, corruption is strongly condemned. It is sometimes condemned in a different way depending on the magnitude of the infringement if you consider the means of some people who are tempted because they are in need.

Some punishments in the Criminal law are obsolete, particularly the ones dealing with fine. Moreover, some infringements relating to new information technologies were not mentioned. The criminal law requires urgent revision.

The taxes and fines enacted by the local authorities reveal some disorder and do not often meet people's expectations. It is necessary to apply the same taxes and fines.

6.5.2. Implementation of administrative penalties

6.5.2.1. *Obstacles to the implementation of administrative penalties*

Although efforts are made to improve the judiciary, a delicate problem relating to the implementation of administrative penalties by various courts is raised. Indeed, the implementation of the judge's decision is the mandate of the executive power, and not the judge's. The citizens do not distinguish between various powers. Citizens believe that justice is not rendered and the judge is discredited because some people do not believe in these judgements.

Although there is a will to implement administrative penalties, some judgements, including the ones which involve the government, are not implemented because the "government properties can not be confiscated". Some citizens fail to accuse the government because the trials have no positive end.

However, considerable efforts can be noticed in law n°18/2004 of 20/6/2004 relating to the civil, commercial, labour and administrative procedure. Concerning the government and its entities including the local administrations and their decentralized services, the new civil, commercial, labour and administrative procedure establish the following:

- When a quasi-judicial decision is final and binding against the government, a District or Town, or a government agency for the payment of a sum of money fixed by the decision, the amount must be paid within a period of 6 months from the time of notification of the decision (Article 350);
- Reminds the responsibility of the administrative authority in charge of implementing the court decision in the sense that it can be summoned to the court that issued the decision to show reasons of the no-compliance. If the reasons are without merit, the court that rendered the decision may impose a penalty for no-compliance to an administrative authority for as long as the judgment remains unexecuted (Article 351);
- Foresees administrative penalties
- Foresees the possibility of issuing an order to do or an injunction restraining it from doing a given action or operation, and may prescribe a penalty for the non compliance with a determined date (Article 346 and ff.);

These administrative penalties have been put in place to facilitate and contribute to the implementation of administrative penalties against the government. They will contribute to fight against influence peddling among organs and staff who are in charge of the ensuring the implementation of the court decisions.

The citizens do not quite agree with the implementation channels. This is a big challenge. Some people do not approve some of these channels, they consider them as dehumanizing or dishonouring. Any litigation involves consequences, which are not conflict of rights only, but social also. The lack of consideration of the social consequences obliges the citizens to neglect the social role of justice, including all

the consequences of the court decisions on the judges' reputation. The judges are sometimes criticized and considered as corrupt or incompetent. A debate on the positive aspects and negative aspects of the judiciary system can be organised.

6.5.2.2. Cost of justice to the nation

The citizens spend substantial amount of money to get a fair trial. The costs include the introduction of a case to the court, travel expenses, various costs. Moreover, to improve the judiciary system, the Government also spend huge amount of money to build the courts, equip them, train the staff... As far criminal matters are concerned, the following have to be organized: investigations, expert investigations, field visits, etc. All these require the modernization of the infrastructures and equipment, to train the magistrates permanently, to ensure a better organization of the prisons, etc.

VII. CONCLUSION AND RECOMMENDATIONS

As we conclude our research, it is important to make a summary of recommendations which were formulated from various point of views of the interviewees about the reinforcement of the Rule of law in our country.

The current work dealt with a number of important issues which constitute the structure of the research. The characteristics of the Rule of law were analysed throughout the main periods of Rwanda political and judicial history. Many lessons can be drawn from Rwanda political and judicial history. They will contribute to the formulation of practical recommendations.

Some political and legal decisions which were made for selfish purpose have complicated Rwanda efforts to achieve the Rule of law. The main public and political events reveal to which extent efforts to establish the Rule of law were annihilated by the colonizer's manipulation and the incapacity of the Rwandan political leaders to promote human rights and freedoms.

When the colonizers and missionaries arrived, some Rwandan fundamental cultural values were distorted and disappeared slowly. For example, although the traditional religious beliefs and practices united all the Rwandans, they were considered as evil and they were replaced by Western beliefs which were not adapted to the local context. The latter did not ensure social harmony. They contributed to massive and recurrent violation of human rights instead of preventing them. People without culture are likely to disappear. The acculturation phenomenon contributes to the disintegration of a community. It is true that culture evolves but its essential elements remain. A debate is necessary to identify these cultural values and the mechanisms to restore them. The first thing is to identify the values relating to conflict management within a society, relating to spiritual dimension which ensures social cohesion and the promotion of human rights.

The family authority in decline nowadays was very important in Children's education and development as well as the society in general. All the countries and international organizations must protect children because they are vulnerable and lack discernment. During the consultations, the focus groups the lack of consistency in ensuring child education. The Rule of law is based on the individual, the protection of his/her rights and his/her responsibility to protect other people's rights. The child is the beneficiary of these values which are valid for many generations. He must be protected by the family and the community. Both must establish an order and the limits to determine what can be done and what is prohibited.

The parents' authority does not deal with young children's education only. It strengthens the relationships among the members of a family which is more or less broad. It also plays an important role in conflict prevention and resolution within a society. The idea of strengthening the parents' authority started in 2004 with the introduction of the "mediators committees" (abunzi). The consultation of parents was a compulsory stage before addressing a family conflict (divorce, inheritance conflict) to the third parties.

Throughout the main Rwandan historical events, the fundamental characteristics of the Rule of law were violated continuously. The fundamental characteristics of the

Rule of law include the promotion of human rights and freedoms; to abide by the law and the hierarchy of norms; power separation and ensuring the management of the judiciary system. Formal legal procedures did not exist before colonization. However, the traditional values guided the people. It is therefore easy to understand that the arbitrary decisions prevailed as far as the organization of the judiciary system is concerned. Nevertheless, the traditional structures and community established some procedures to manage the conflicts. The Mwami was the last person to decide on the fate of any citizen, there was no possibility to make an appeal once his verdict was expressed.

During the colonial period, the white people had written laws. However, they did not apply them to the indigenous communities. Indeed the colonizers worked hand in hand with the traditional leaders but the real power until the independence was in the hands of the colonial administration and the Church. Here also, the characteristics of the Rule of law were not promoted.

During the independence, there was a massive violation of human rights, particularly the right to live and the ownership right. Many people were killed and properties were spoiled; no sanction was imposed on criminals. This culture of impunity was adopted by various regimes and culminated to the genocide which is the greatest violation of the right to live. The legal mechanisms and the structures of the judiciary system existed officially. The three powers existed in theory and according to the Constitution they were separate. It is important to note that very few politicians resorted to the written law to make decisions relating to the citizens life. Until now, informal decisions are more important than formal ones.

Taking into account what has been said earlier, several recommendations can be made but the most important ones relate to the need to promote and protect human's rights and freedoms, to fight against the arbitrary decisions of the leaders and the respect of the balance and autonomy of the three powers (executive, legislative and judicial power).

7.1. Human rights and fundamental freedoms

It is true that efforts are made continuously to ensure human's rights and freedoms in Rwanda. However, efforts should be made in some areas. The human rights and fundamental freedoms are included in international treaties and agreements as well as in the Rwandan legislation and statutory instruments. Their existence is not enough if the citizens are not informed. The consultations reveal that the citizens do not know their rights. Therefore, it is impossible to encourage a citizen to claim his rights which are violated simply because he/she is ignorant. The consultations revealed that quite often, the political authorities violate the human rights and freedoms and yet they are the ones who should protect them. The focus group discussions insisted on the fact that the government can not bear this responsibility alone. It is important to involve the citizen through various channels. He or she should denounce the abuses and promote the fundamental human rights.

For the sake of promoting human rights and freedoms, it is necessary to design appropriate tools, then, it is necessary to ensure easy dissemination and accessibility of these tools. Concomitantly to this education and dissemination, it is necessary to

fight against impunity. Precisely, the following actions can be taken by the public administration, the civil society and the local communities at the grassroots level.

7.1.1. To design training modules according to the needs of the target population

All the categories of citizens should be targeted. Concerning the youth, school education must go hand in hand with family education "uburere bwo ku ishyiga" because it is crucial. Therefore, the comic strips, cartoons can be prepared to teach the youth in general; the plays and audio-visual tapes can be prepared to teach the people in general. In schools and universities, special programmes should be worked out and taught in all the schools and institutions of higher learning. The contents and the methodology of these subjects can be suggested jointly by the civil society, the national human rights commission and the ministry having national education in its attributions.

7.1.2. To fight against the culture of impunity

Despite the quality of education and sensitization, both are not enough to protect and to promote the human rights and freedoms. Punitive strategies are necessary in the current Rwandan context. Since 1959, the human rights violations perpetrated by the public authority have never been punished. This situation has culminated in the genocide and involved the greatest massive participation ever experienced in the history of humanity.

7.1.2.1. Death penalty

The Rwandan society is currently discussing about the relevance of death penalty. This issue was mentioned several times during the debates. Can death penalty prevent the culture of impunity? Is death penalty a violation of the right to live? The official statement of January 1st, 2003 from the Office of the President and 2005 granted a presidential pardon to tens of thousands of prisoners. The majority had acknowledged their involvement in the crimes during the genocide. After being released, some denied their involvement and committed again the same genocide crime. Those who were found guilty returned in jail, they expect to be released one day or start again the same process.

In a post genocide context, it is not easy to think about giving up capital punishment. After many discussions on this issue, the following can be suggested:

- *Capital punishment should be imposed on persistent offenders who commit genocide related crimes, death penalty should not take too long to be implemented;*
- *Capital punishment should be imposed on those who are found guilty of raping and killing young children.*

In both cases, public execution is necessary to educate the people and to prevent the crimes.

Apart from these special cases, a discussion on capital punishment can be organized with the possibility of abolishing it in the medium term.

7.1.2.2. *Everybody to abide by the law*

It is quite common to notice that some authorities consider that they are above the law as a consequence of their greater influence. This relates to the fact that the informal decisions are more important than the formal ones. Although the law is clear in a given context where the law is violated, the order coming from the top will determine the outcome of this situation. This behaviour contributes to the culture of impunity.

In this context, it is better to set up a mechanism where the people will be informed about the authorities who have been accused of embezzlement and human rights violations. Their list will be published every year. This list will include the crime, the sanction and the corresponding law which has been violated.

7.1.3. To create "uruvugiro" a forum in order to ensure the human rights and freedoms as well as the observance of the laws

As mentioned earlier, citizens should be involved in ensuring their rights and freedoms are promoted instead of being violated. "Uruvugiro" should be a forum which needs to be managed professionally. In a culture of rumours or hearsay, to condemn any violation would be very easy. A structured research on clear violations of human rights and freedoms should enrich this forum. This research dynamics must collect various opinions from many people in order to guarantee the credibility.

At local level, communities should be encouraged to protect the rights and freedoms of each member. The gacaca process has created a forum which should be operational beyond its mission relating to the genocide crimes. For instance, when someone is killed on a village hill, the community should discuss within this forum that has been created and take the responsibility of knowing the causes. This is another useful mechanism whereby the responsibility of protecting the human rights is not in the hands of the local authorities only.

7.2. Fight against the leaders' arbitrary decisions

It is very important to punish the authorities for their arbitrary decisions, abuses and power abuse, by resorting to clear and ruthless laws which establish individual responsibility.

7.2.1. To create new dissemination channels for the laws and regulations.

The research has proven that citizens' ignorance of the laws is one of the reasons which justify the violation of the laws by the citizens and their leaders. The existing methods of disseminating the official documents are poor. The Official Gazette of the Republic of Rwanda which is the only newspaper containing these texts is produced in insufficient number; the production cost is higher than the selling price. Quite often, authorities at the grassroots level lack these legal documents which relate to the issues they encounter in their daily activities. If a district mayor does not have these legal documents, can we expect to find them among ordinary citizens?

In spite of the general principle of law which stipulates that "No one is supposed to ignore the law" the public authority should put in place mechanisms to ensure that the laws relating to everyday life are distributed to the citizens. Actions which can be taken include:

- *To publish these legal documents in most accessible media which can reach many areas in the country at an affordable price,*
- *Since the language used in the legal documents are quite often difficult and accessible to intellectuals, it is necessary to reproduce these documents and to add explanations and comments likely to help the ordinary Rwandan citizen to understand. If possible, useful illustrations can be used.*
- *To train local trainers so that they can continue explain the laws.*
- *The booklets brochures produced for this purpose can be distributed during the training;*

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This work will require the intervention in various phases, of the Parliament, Ministry of Justice, civil society and other relevant stakeholders.

7.2.2. To develop a legality reflex

Apart from the judges and very few authorities, it is rare to find a leader who bases his verbal or written decision on an article of the law or an unspecified regulation. This is due to many factors including the ignorance of the law, the fact that he/she does not have the legal documents or he/she does not consider the law/the regulation as something essential. This behavior can be tolerated only when the matter is not included in the law. In general, to reinforce the legality and the Rule of law, it is necessary:

- *To create an ordinary law which obliges civil authorities and military officers to justify their decisions, by quoting the legal documents especially when their decisions have an impact on human rights and freedoms. The same law would require that any official decision dealing with the people's interests or human rights and freedoms be written.*

7.3. Respect of the balance, autonomy of the powers and institutions

The description of power separation principle throughout the history has revealed that there is a development.

The 2003 Constitution recommends the power separation principle. Concerning the judicial power, the legal reform and the reform of the judiciary system which took place in 2004 brought significant innovations in the principle of autonomy of the judiciary. Although the principle of autonomy is included in the law, it is not yet efficient. The Supreme Court receives and manages a budget allocated to the various jurisdictions.

It is better to adopt the principle of autonomy, by allowing each jurisdiction to manage its own budget. Therefore, the preparation of the budget will be under their responsibility as well as to defend it in the Ministry having finances in its attributions. The Supreme Court would ensure the coordination.

However, the autonomy of the judiciary depends on the maturity of the judge. It is not obvious to suggest the paths which lead to this maturity.

The gacaca jurisdictions whose main responsibility is to deal with genocide crimes need special attention. Unlike other ordinary offences and crimes, the majority of citizens are concerned.

It would be very useful to carry out an external and serious evaluation based on a broad and participatory research. This would contribute to the revision of the law taking into account the results which would have been validated by all the concerned groups: genocide survivors, the families of genocide criminal suspects, law experts, opinion leaders.

Concerning the legislative power, the following recommendations can be made:

- Every year the cabinet presents to the Parliament the budget for the following year. The cabinet defends it seriously. *This example must be followed every year when trying to justify the implementation of the budget of the previous year, showing clearly what has been achieved compared to the budget estimates.* This will help the cabinet to feel more accountable to the citizens as regard the management of the public funds.

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5. University students
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8. Diaspora

- a) America: Canada, United States,
- b) Europe: France, Belgium, Switzerland, Germany.
- c) Africa: Zambia, Mozambique, South Africa, Uganda, Kenya, Senegal.

- 9. Gacaca Courts,
- 10. Ministry of Justice
- 11. Political parties
- 12. Political Parties Forum
- 13. RPF Secretary General,
- 14. Senators,
- 15. Members of Parliaments
- 16. Local NGOs
- 17. Etc.