A CRITICAL ANALYSIS OF BURUNDI'S TRACK RECORD IN ADHERING TO CONSTITUTIONALISM AND THE RULE OF LAW

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DECLARATION

I declare that this dissertation entitled "A critical analysis of Burundi's track record in adhering to constitutionalism and the rule of law" is my own work, except where due acknowledgement is made in the text. It does not include materials, for which any other University degree or diploma has been awarded.

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APPROVAL

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DEDICATION

I dedicate this piece of work to my parents Mr. Havyarimana Emmanuel and Mrs. Gahimbare Félicité, who have fought their deliberations to have courage and fortitude and kept struggling in spite of odds in seeing my dreams of education fully realized.

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1. Burundian Journalists Union V the Attorney General of the Republic Of Burundi of Ref N°7 of 2013.
2. Yusuf Khan V Manohar Joshi 1999 SCC (CRI) 577 (NOTE).
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9. Uganda V Dr. Kizza Besigye(constitutional reference No. 20 of 2005) [2006] UGCA 42 (25September2006)
10. Dr. Kizza Besigye & Others V Attorney General(Constitutional petition No.7 of 2007) [2010] UGCC 6 (12 October 2010)

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2. International convention on the safety and independence of journalists and other media professionals.
3. Law n°1/11 of 4th June 2013, amending law n° 1/025 of 27th November 2003 governing the press in Burundi.
4. Law n°1/36 of 13th December 2006 for the creation of the anti-corruption court.
5. The Arusha peace and reconciliation agreement for Burundi.
6. The charter on human and people's rights.
7. The constitution of Burundi, 2005.

LIST OF ACRONYMS

ACAT Burundi:	Action des Chrétiens pour l'Abolition de la Torture au Burundi.
APRODH:	Association Burundaise pour la Protection des DroitsHumainset des PersonnesDétenues (The Association for the Protection of Human Rights and Detained Persons).
ASF:	Avocats Sans Frontieres(Lawyers without boundaries)
BBC:	British Broadcasting Corporation
CNC:	Conseil National de Communication (The National Communication Council).
CNDD-FDD:	Conseil National pour la Defence de la Democratie-Forces pour la Defense de la Democratie(National Council for Defense of the Democracy-Forces for the Defense of Democracy).
F.B.I:	Federal Bureau of Investigation.
HIV/AIDS:	Human Immunodeficiency Virus/ Acquired Immune Deficiency Syndrome.
HRW:	Human Rights Watch.
OLUCOME:	Observatoire de Luttecontre la Corruption et les Malversations Économiques(Anti-corruption and Economic Malpractice Observatory).
SNR:	Service National de Renseignement(National Intelligence Service).
UN:	United Nations.
VOA:	Voice of America

TABLE OF CONTENTS

ABSTRACT

This research was focused on the role of rule of law in ensuring the adherence of Burundi to constitutionalism in particular considering its success and challenges. The work begins by giving an introduction that gave the historical background of Burundi's government from independence and defined democracy and separation of powers.

The study was carried out with an aim of establishing the extent to which Burundi has ensured the adherence to the rule of law by the different organs of the government and how it has faced challenges it is faced with, which among others include frustration of the government itself and population pressure where there is an infringement on such rights promoting rule of law in the country. The study will attempt to enlarge the scope of knowledge in the field of Administrative Law in Burundi which is of great importance due to the fact that it affects all the organs of government and especially the judiciary.

Data collection in the research study was acquired using qualitative research method using books from the library and online sources.

The research was concluded by providing findings and recommendations to address the challenges faced by Burundi's government in applying rule of law.

CHAPTER ONE

GENERAL INTRODUCTION

1.0 Introduction

This chapter gives the background of the study, the statement of the problem, the purpose of the study, objectives, scope of the duty, research questions, methodology, limitations of the study, literature review and the synopsis.

1.1 Background of the study

Burundi is a landlocked country located on the north eastern shoreline of Lake Tanganyika, is a very mountainous country with a surface area of 27,830km^2 with a population of 10.2 million earn their living from farming.

Since achieving independence in 1962 Burundi has been torn by internal conflicts arising from the ethnic divisions between the Hutu majority (85% of the population) and the Tutsi minority (14% of the population) and a neutral ethnic group Abatwa(1% of the population) which is formed by pygmies in majority.

The assassination of President Ndadaye Melchior in 1993 was followed by a civil war which caused over 200,000 Burundians to lose their lives and many more fled. Negotiations led to peace agreements between various parties including the Arusha Peace and Reconciliation agreement which was signed on 28th of August 2000.

General elections were held in 2005 which were won by Conseil National pour la Defence de la Democratie-Forces pour la Defense de la Democratie (CNDD-FDD) putting Pierre Nkurunziza as president. In 2014, Nkurunziza announced that he would seek for a third term in 2015 but the opposition cried foul but Nkurunziza went ahead and announced his candidacy in April 2015 and

protest broke out throughout the country and dozens of people were killed and presidential election was held in July 2015 and Nkurunziza won nearly 79% of the vote[1].

In the various concepts of law, none is as interesting as the rule of law. The concept was first seen in the thirteenth century when Judge Bracton wrote "The king himself ought not to be under man but under God and the Law, because the law makes the king", at that time it was not yet been given the name of rule of law[2].

More so, Sir Edward Coke laid down the principles of judicial review that an interpretation of the acts was to be made by the judges who can adjudge them null and void if found in contradiction with existing principles of law and justice[3]. Rule of law according to dicey means that law is supreme and there must not be any room for arbitrariness[4].

Rule of law cover essentially the doctrine of separation of powers which explain that the main arms of the government which are the judiciary, executive and the legislature should be independent from one another. Rule of law and separation of powers are closely interconnected in the view if separation of powers is applied correctly the rule of law is promoted.

The doctrine of separation of powers goes hand in hand with the principle of government known as checks and balances in which the different branches of government should share power and not comply with another branch action against it or other branches of the government in order to avoid tyranny which be caused by one branch over the other branches. Checks and balances is in other words a good source of accountability and transparency, the origin of checks and balances

[1] www.infoplease.com/world/countries/burundi accessed on 25 June 2019, p.2-3
[2] L.J.M Cooray, www.ourcivilisation.com/cooray/btof/chap180.m accessed on 25 June 2019, p.1
[3] The Case of Proclamations [1610] EWHC KB J22
[4] Albert Venn Dicey, *An Introduction to the study of the Law Of The Constitution*, (10th Edition Palgrave Macmillan 1985) p.110

is attributed to James Madison who stated that "the great security against a gradual concentration of these several powers in the same department, consists in giving to those who administer each department the necessary constitutional means to resist encroachments of the others"[5].

Democracy is defined as a "form of government in which the sovereign power resides in and is exercised by the whole body of free citizens, as distinguished from a monarchy, aristocracy or oligarchy and according to the theory of a pure democracy, every citizen should participate directly in the business of governing and the legislative assembly should comprise the whole people.[6]

Human rights are the rights given to each and every human being without regard of his nationality, religion, color or any other status such as the right to life, freedom of expression and values like fairness, respect and independence[7].

1.2 Statement of the problem

Twenty six years have lapsed since popular democracy was introduced in Burundi, legal and political institutions are in existence for the promotion and respect of the rule of law but a coup d'état caused by the assassination of President Ndadaye Melchior in 1993 was followed by a civil war which caused over 200,000 Burundians to lose their lives and many more fled[8] destabilized the country leading to the increase of the ethnic clashes in other words there was a civil war which caused a breach or infringement of the rule of law. Furthermore, the

[5] James Madison, *The federalist*, The Gideon edition 1818, p.268
[6] Blacks' law dictionary, 4th Edition, p.518-519
[77] United Nations, www.un.org/en/sections/issues-depth/human-rights accessed on June 25,2019
[8] www.infoplease.com/world/countries/burundi accessed on 25 June 2019, p.2

ArushaPeace and Reconciliation Agreement for Burundi facilitated by Julius Nyerere but signed after his death as Nelson Mandela was appointed as the new facilitator[9].

In spite of such reforms, the respect of democracy has not been maintained as the power ought to be in favor of the people but instead challenged the human rights as there was disregard for human rights by repeated instances in which hatred and violence have been advocated by the authorities including the head of the state and members of CNDD-FDD which is the ruling party and by an overall context of impunity exacerbated by a lack of an independent and properly functioning judicial system[10].

Various cases on arbitrary deprivation of life, disappearance, torture and other cruel, inhuman or degrading treatment or punishment for example Jean Bigirimana who was arrested on 22nd July 2016 by the National Intelligence Service(SNR) and has been missing from that time[11].

But also, the judicial interpretation of the law must be reviewed as it seems to be influenced by the decision of the executive while the powers should be independent from each other as it was illustrated by the vice president of Burundi's constitutional court which was about to decide on the legality of a hugely contested third term and senior Judge Sylvere Nimpagaritse received death threats from senior figures of the which he refused to name rubber-stamp the disputed candidacy of Nkurunziza[12].

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[9] Nantulya Paul, 'Burundi: Why the Arusha accords are central',(Africa center for strategic studies, august 5,2015) www.africacenter.org/spotlight/burundi-why-the-arusha-accords-are-central accessed 19 June 2019, p. 2

[10] Human Rights Council, *Report of the Commission of Inquiry on Burundi*, 39th session,8 August 2018

[11] Rachel Nicholson, Amnesty International's Researcher on Rwanda and Burundi, *Burundi: Two years on and no word on forcibly disappeared journalist Jean Bigirimana*, 31st July 2018

[12] www.google.com/amp/s/amp.the guardian.com/world/2015/may/05/senior-burundi-judge-flees-rather-than-approve accessed on 25 June 2019

1.3 Purpose of the study

The purpose of the study is to show the applicability of the rule of law in Burundi and if it operates within its theoretical account and evaluates whether there are possible weakness in the powers exercised by the arms of the government and thus making the rule of law unforeseeable.

The rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations[13] but a clear distinction has to be drawn between the two as Mr. Annan in his 2004 reports on the rule of law defined rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.

It requires as well measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency[14] while democracy is a form of government in which the sovereign power resides in and is exercised by the whole body of free citizens, as distinguished from a monarchy.

According to the theory of a pure democracy, every citizen should participate directly in the business of governing, and the legislative assembly should comprise the whole people. But the ultimate lodgment of the sovereignty being distinguishing feature, the introduction of the

[13] United Nations, 'Declaration of the High-level Meeting of the 67th session of the General Assembly on the Rule of Law at the National and International Levels' 19 September 2012, www.un.org/ruleoflaw/high-level-meeting-on-the-rule-of-law-2012accessed 19 June 2019

[14] United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict societies*, 23 August 2004, Para 6

representative system does not remove a government from this type. However, a government of the latter kind is sometimes specifically described as a representative democracy[15].

1.4 General objective

The principal objective is to find out whether the rule of law is applied in the view of promoting independence of organs of the government, the respect of human rights and democracy.

1.5 Specific objectives of the study

The objectives of the study include:

i. To examine Burundi's legal and institutional framework and how effective they have been with upholding constitutionalism and the rule of law.
ii. To identify the independence of organs of government in Burundi.
iii. To examine the track record and applicability of the principles of rule of law in Burundi.
iv. To show the findings and the recommendations.

1.6 Research Questions

This study will be guided by research questions to establish the extent to which rule of law has been promoted in the Republic of Burundi:

i. Does Burundi have an adequate legal and institutional framework?
ii. Are the organs of government independent in Burundi?
iii. Is the doctrine of rule of Law applied in Burundi's judiciary?
iv. Are there findings and recommendations for an improvement on the applicability of rule of law?

[15] Blacks' law dictionary (4th Edition 1968), p. 518-519

1.7 Scope of the study

The study was carried out within the scope of the constitutional court which is the court that has jurisdiction to hear constitutional matters[16], decide on the constitutionality of laws, the respect of the constitution and the interpretation of the constitution on the request of president of the Republic, president of the National Assembly president of the Senate, or a quarter of parliamentarians[17].

I chose this case study because of a need of adjustment of the laws so that justice and good governance may be promoted. The study will mainly cover separation of powers, checks and balance and democracy.

1.8 Methodology

1.8.1 Introduction

This point will mainly show the methods which the researcher will use to gather the information concerning the topic of the research. It mainly gives the process of employing the data collection for the study to be carried out in the most appropriate way.

1.8.2 Research design

The research will be carried out from the library and the use of books and websites and the study will be made by the researcher.

1.8.3 Data collection

Concerning the data collection, the researcher will use primary data collection. The primary data collection will be based on the previous literatures on the same topic which will give me an overview on how to adjust the way the research is carried out and concentrate more on the topics not expounded by researchers in and outside Burundi.

[16] The Constitution of Burundi, article 231.
[17] Ibid, article 234

1.8.4 Data analysis

The data analysis shall essentially be based on the fact found from the research which will be reviewed and the result which is presented by the researcher in the final part of the research.

1.8.5 Time frame

The time of carrying the research was not favorable mainly because the research was carried out during school days and required the researcher to attend classes and make the research at the same time.

1.9 Limitations of the study

The study was limited in the period from 2010 to 2018 since a large numbers of violations of laws and human rights have been reported in that period. The researcher faced some challenges in the course of the research which was mainly based on previous literatures in the library of the institution and online books accessed and articles accessed through the library's internet connection.

First and foremost, there was an interruption of internet which was abrupt while researching and becomes challenging to the researcher whose research was partly based on online books which cannot be accessed without access the internet connection.

Among other challenges, the researcher faced is that the research was supposed to be done concurrently while pursuing classes of the second semester of fourth year which cause the researcher not to settle very well as his doing his research.

1.10 Literature review

This point shows the research made in the past about the area of research by reviewing various literatures on rule of law, democracy and separation of powers.

1.10.1 Rule of law

Rule of law originated in England and is the principal characteristic of their constitutional system. This doctrine stands for a view that the law must be respected and nobody even the government cannot act against the law which will be qualified as acting ultra vires making it supreme.

1.10.1.1 Montesquieu and the rule of law

Montesquieu's influenced the rule of law by bringing the aspect of separation of powers. The judiciary in particular should be separated with the executive power and the legislature as the following concept of the rule of law.

When the legislative and the executive powers are united in the same person there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again there is no liberty, if the judicial power be not separated from the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor[18].

And that view influenced the makers of the American constitution like James Madison; also, Montesquieu emphasized on the rule of law in despotic government which have a tendency of having simple laws so that the offender can easily bypass those laws.

1.10.1.2 Dicey's theory of rule of law

Albert Venn Dicey who was a British jurist developed the concept of rule of law in his book " Introduction to the Study of the Law of the Constitution" as consisting of three concepts which concerned the mostly England as there was absence of supremacy of the law which means that

[18] Baron De Montesquieu, *Spirit Of Laws*, Editions Gallimard 1995, p. 202

no one can be made lawfully to suffer except after passing before the courts of law, nevertheless the government in place should not punish a person when the actual person did not commit an act punishable by law or provided for in the statutes.

Dicey defined rule of law as "the absolute supremacy or predominance regular law as opposed to the influence of arbitrary power and excludes the existence of prerogatives or even wide discretionary power on the part of government"[19] and that if there are discretionary powers there must be a room for arbitrariness which leads to legal insecurity of citizens.

Another aspect of the rule of law by Dicey is about the equality before law that class of people by courts of law which influenced most of the Constitutions of the world and asserted that the French "Droitadministratif" is a bad law as it suggested that specific matters shall be heard by specifics courts of law. The broad principle of rule of law was accepted by almost all legal systems as a constitutional safeguard[20]. Among the principles of Dicey, supremacy of the law which is taken as a cardinal rule of democracy and that each and every government must subjected to the law and not vice-versa.

The second principle which is equality before the law is also important and based on the maxims "however high you maybe law is above you" and "all are equal before the law".

Dicey's last principle emphasize on the role of the judiciary in the enforcement of rights of individuals and personal freedoms regardless of their inclusion in a constitution. He was right when he asserted that laws can be amended and fundamental rights be abrogatedas we have

[19]Albert Venn Dicey, *An Introduction to the study of the Law Of The Constitution*, (10th Edition Palgrave Macmillan 1985) p. 198

[20]*Yusuf khan V Manohar Joshi 1999 SCC(cri)577* (note)

witnessed such a situation during the referendum of 2018 and realized that without a powerful judiciary, written statutes are meaningless.

However, Dicey's theories were criticized, his first principle has been challenged due to the fact proposed that rule of law excludes wide discretionary power of the government while the modern governments are dependent on many discretionary powers and also the first principle cancel out that as a matter of essential competence statutes allow police to detain people due to suspicions

Dicey's second meaning emphasize on the subjection of all the people to the law as some people in the moderns societies are exempted from being liable for some crimes as those having diplomatic immunities as Frederick A. Hayek stated: "the rule of law, the absence of legal privileges of particular people designated by authority, is what safeguards that equality before the law which is the opposite of arbitrary government....and if the law says that such a board or authority may do what it pleases, anything that board or authority does is legal but its actions are certainly not subject to the rule of law"[21]

Dicey's third meaning of rule of law expressed a strong preference for the principles of common law relating to the protection of human rights such as freedom of expression, freedom of association and other related rights. Nowadays, the liberties may be scoured by the passing of laws by the legislature making the government a source of opposition to the rights of citizens; also common law does not assure the citizens economic and social well-being.

1.10.1.3 Busingye on rule of law

Dr. Busingye Kabumba who is a Ugandan lawyer and a lecturer-in-law, Human Rights in Peace Centre at the Faculty of Law, Makerere University and stressed in his writings such as *The Practicability of the Concept of Judicial Independence In East Africa: Successes, Challenges*

[21] Friedrich A. Hayek, *The Road to serfdom*, Routledge Press 1944, p. 50

and Strategies in which he emphasized on the importance of rule of law in a democratic nation to have an independent judiciary being the central pillar of the democratic governance[22] .

More so, he emphasized on the mode of selection or appointment of judges that must be based on merit and that persons selected for judicial office must be individuals of high integrity and ability with appropriate training or qualifications in law which is a requirement of independence of judiciary and the constitution should set out criteria for the appointment and promotion of judges.[23]

Also, in a manner of safeguarding the independence of the judicial officers, their terms of office, their security, adequate remuneration, and conditions of service, pensions and the age of retirement must be adequately secured by law[24].

There is also a need to discipline and remove of judges but fairness to the judges must be ensured and adequate opportunity for hearing and that judges must enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions[25] and such dismissal by the executive members of Judicial officers before the expiry of a term for which they were appointed without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible to independence of the Judiciary.[26]

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[22] Dr. BusingyeKabumba, *ThePracticability of the Concept of Judicial Independence In East Africa: Successes, Challenges and Strategies,* 2016, p.1
[23] Ibid, p.8
[24] Ibid, p.9
[25] Ibid, p.11
[26] Ibid,p.13

1.10.1.4 OlokaOnyango on rule of law

Joe OlokaOnyango is a Professor of Law at Makerere University where he has also been Dean School of Law and director of the Human Rights and Peace Centre. In his book *When courts DO Politics* he emphasized on Public interest lawyering which refers to court that seeks to secure human and constitutional rights of a significantly disadvantaged or marginalized individual group which is a mechanism that has been utilized to challenge legislation, arbitrary state action, or even violations by private individuals that have public implications, such as ethnic or gender-based discrimination and such legal action can be change or to encourage alliances that result in political action[27].

According to Onyango, constitutionalism in Africa will depend on the manner in which issue of constitutional reform and implementation is concretely addressed and the method or process by which this is done is as important as the eventual outcome. In other words, the biggest challenge confronting those involved in the struggles for constitutional reform around the continent is how to strike a balance. The balance in question is that between ensuring that the paths forward such reform is a participatory and inclusive one, and that it comprehensively addresses both the large and the small issues of social, political and economic concern[28].

Also, every African political system has continued to walk the tight rope between too much government and too little. At some stage an excess of government becomes tyranny; at another, too little government becomes anarchy. Either trend can lead to the failed state. Anarchy produces more displacement and more refugees than tyranny. Yet it is easier to get political asylum if one is a victim of tyranny than if one is a victim of anarchy. A basic dilemma

[27] Professor Joe Oloka Onyango, *When courts DO Politics,* Cambridge Scholars Publishing, 2017, p.10
[28] Prof. Joe Oloka Onyango, *Constitutionalism in Africa :Creating opportunities, facing challenges,* (Fountain Publishers, 2001), p.12

concerning too much government versus too little hinges on the party system. Nigeria has never experimented with one-party states tend towards too much government. This has been the case in most of Africa, though Mwalimu Nyerere's party *Chama Cha Mapinduzi*was relatively benign. On the other hand, multiparty systems in Africa have often degenerated into ethnic or sectarian rivalries resulting in too little control. This tendency was illustrated by Ghana under HillaLimam, Nigeria in the first and second republics and the Sudan under Sadiq EL-Mahdi in the 1980s[29].

Ali A. Marzui in his *essay Constitutional Change and Cultural Engineering: Africa's Search for New Directions* emphasized on the troubles between the Hutu and the Tutsi in both Rwanda and Tutsi in both Rwanda and Burundi may or may not originated in skill-differences. However, inequalities in privileges definitely developed, with the Tutsi as upper stratum for most of their mutual history. In the past, when the Tutsi were on top they tasked the Hutus to do most of the manual jobs such as digging in fields. When the Hutu prevailed, they discriminated against the Tutsi. The worst lesson in this tit-for-tat masochism was the 1994 genocide in Rwanda. Differences in skills between the ethnic groups are not, of course, peculiar to neat dual societies like Rwanda[30].

According Anthonia Kalu in the essay *Language and politics: Towards a new Lexicon of African constitutionalism* which stipulated the sudden rise of new vehicles of communication became a significant issue once the colonial era when Western interference established western style classrooms, churches and written documents in African life. To the extent that these brought about changes to indigenous socio-political, religious and educational practices, that period jeopardized African public life. Brinkley and his colleagues examine the impact of new

[29] Ibid, p.26

[30] Ali A. Marzui, Prof OlokaOnyango(Ed), *Constitutionalism in Africa :Creating opportunities, facing challenges,* (Fountain Publishers, 2001), p.25-26

communication vehicles such as the Internet on democratic practice, the individual and community. Although, the new communication vehicles Brinkley explores are internal inventions, citizens still take them seriously and are acting promptly in favor of the nation and its citizens. For Africa and Africans therefore, the colonizer's languages, which impact on the way different African groups conduct their politics as well as indigenous languages need consistent exploration and unified action. Since language and other, communication vehicles enable the transmission of values and norms; the African situation raises unique concerns about constitutionalism.[31]

Also, Tajudeen Abdul Raheem emphasized in his essay *Pan-Africanism and constitutionalism* emphasized that as Africa begins to sober up from the heady mix of optimism and the limited gains of the pro-democracy movements of the early 1990s, these issues have been given their baptism of fire. We are thus forced to return to the drawing board. There was a bland belief in democracy, pluralism and multi-partyism in the face of the totalitarian regimes, one party-dictatorships and military autocracies such that not enough attention was paid to the conditions, processes and details of the transition forced on the *ancien* ruling cliques. After initial resistance, they displayed a remarkable capacity to adapt to the new conditions to the extent that many of them were able to snatch victory from the proverbial jaws of defeat[32].

More so, Bibiane Gahamanyi –Mbaye in her essay Culture, ethnicity and citizenship: Reflections on Senegal and Rwanda in which Rwanda which had the same colonial masters as Burundi and was analyzed as they were first colonized by German territory then latterly a Belgian protectorate

[31] AnthoniaKalu, Prof OlokaOnyango(Ed), *Constitutionalism in Africa :Creating opportunities, facing challenges*, (Fountain Publishers, 2001), p.37

[32] Tajudeen Abdul Raheem,Prof Oloka Onyango(Ed), *Constitutionalism in Africa :Creating opportunities, facing challenges*, (Fountain Publishers, 2001), p.53

in East/Central Africa made up in the main adherents of the catholic religion and witnessed the evolution of an autocratic Hutu state which lasted more than 30 years. In 1994 this culminated in genocide. At the present time, we are witnessing a 'transition' that is trying to establish a pluriethnic state. As one would expect, the economic and socio-political situation in the country is still under trauma of 1994 and remains precarious. Before colonization, Rwanda already ensured that there was cultural homogeneity within different ethnic groups because of several factors described below; Rwanda witnessed the reclamation of ethnic identities, a separate and different history for each ethnic group and supremacy of one of the ethnic groups above the others in turns. All these were coupled with the execution of racist theories and the elimination of one of the ethnic groups by the denial of its national identity and by genocide and finally the on-going attempt to reconstruct the nation and the 'munyarwanda' identity[33].

Peter Mukidi Walubiri in his writings like *Liberating African Civil Society: Towards a New Context of Citizen Participation and Progressive Constitutionalism* in which he explained the aspects of constitutionalism as that the government should derive its powers from the constitution. The limit and content of that power was not an issue at this page nor was it seriously contended that power should be derived from the people themselves and not from the constitution[34].

However, in this century the concern shifted to the desire to democratize government by controlling the extent of governmental powers.The demand shifted to limited government. In this vein, Professor Vile argued that western institutional theorists have concerned themselves with

[33]Bibiane Gahamanyi –Mbaye,Prof Oloka Onyango(Ed), *Constitutionalism in Africa :Creating opportunities, facing challenges*, (Fountain Publishers, 2001), p.67

[34]Peter MukidiWalubiri, Prof OlokaOnyango(Ed), *Constitutionalism in Africa :Creating opportunities, facing challenges*, (Fountain Publishers, 2001), p.84-85

problems of ensuring that the exercise of their societies should be controlled in order that it should itself be destructive of the values it was intended to promote[35].

The concept of constitutionalism has now developed to become a critical ingredient of the boarder process of human development. Human development is the process of enlarging people's choices. The choices are created by expanding human capabilities are to lead to long and healthy lives, to be knowledgeable and to have access to the resources needed for a decent standard for living.[36]

Jean Marie Kamatali in his essay *Constitutionalism in Post-genocide Rwanda* which emphasized on the road to the independence of Rwanda was violent and resulted in turning Tutsi supremacy to Hutu supremacy. The Hamitic theory long supported and perpetrated by the colonial power and Tutsi elitism became a serious threat to Tutsi dominance when in the late 1950s the colonial power suddenly shifted its support to the Hutu. With this shift, Hutu leaders began to reject the Tutsi elite as 'foreign invaders'.

The opposition by the colonial administration against the Tutsi elite and a corresponding increase in support to the support to the Hutu elite became widen in 1957, when the mostly Tutsi dominated National High Council addressed a note, mise au point, to the visiting UN mission demanding immediate independence. In addition to the above escalation in tensions, the mysterious death of King Rudahigwa in Bujumbura in neighboring Burundi and the peasant uprising ignited by the beating of Mbonyumutwa one of the few Hutu sub-chiefs which led to abrupt and violent end of Tutsi rule. It also signified the beginning of Hutu domination. It has

[35] Professor Vile, Constitutionalism and the separation of powers, (2nd Edition Liberty Fund ,1998), p.11
[36] Peter MukidiWalubiri, Prof OlokaOnyango(Ed), *Constitutionalism in Africa :Creating opportunities, facing challenges*, (Fountain Publishers, 2001), p.85

been asserted that following the termination of Tutsi rule in 1959 and at least ten thousand Tutsi were killed.[37]

Sylvia Tamale in her writings *Gender and Affirmative Action in Post-1995 Uganda: A New Dispensation, or Business as Usual?* Which emphasize on constitutionalism applied to the Uganda society which is characterized as a patriarchy operating under a form of under-developed capitalism collectively produces and maintains sexism in Uganda. Male dominance or patriarchy existed in Uganda even prior to the coming of the British colonialists in the late nineteenth century. However, the subtleties and inner workings of pre-colonial system of patriarchy reveal some differences from what one may refer to as classic patriarchy. The cultural differences from what one may refer to as classic patriarchy. The cultural and gendered relations in most Ugandan societies during the pre-colonial era offered women some degree of autonomy and allowed for them to indirectly informally participate in the decision-making process of their societies. Uganda women, like elsewhere in Africa, were never confined to the private/domestic sector. Rather, their lives were also shaped by their participation in the economic and political-juridical spheres. However, with the advent of colonialism, clear policies and structures were put in place that removed such limited autonomy and excluded women from decision-making, thereby entrenching their total subordination to men.[38]

1.10.2 Democracy

Democracy is a system of governing a country in which political leaders are chosen through free, fair, regular elections by the people. According to John Stuart Mill in his classical text Utilitarianism in which he stated that democracy methods are better as they force decision-

[37] Jean Marie Kamatali,Prof OlokaOnyango(Ed), *Constitutionalism in Africa :Creating opportunities, facing challenges*, (Fountain Publishers, 2001), p.116

[38] Sylvia Tamale, Prof Oloka Onyango(Ed), *Constitutionalism in Africa :Creating opportunities, facing challenges*, (Fountain Publishers, 2001), p.215

makers to take into account the opinions of society and more so the people can vote for their leaders as they can also participate in the leadership of their government but some scholars were not in favor of democracy as Plato in his book Republic who stated that some form of monarchy were superior to democracy in the view that experts in elections will have more chances to win political elections and that will result to the state being governed by manipulation experts.

More so, the process of debate and compromise gives the public an opinion of who the candidate is and his or her views on the points of interests of the public and democracy's strength and as Russell stated "It is not the act of a passionless man to throw himself athwart the whole movement of the national life, to urge an outwardly hopeless cause, to incur obloquy and to resist the contagion of collective emotion"[39].The essence of democracy is that people represents all the different interests which make the state and as Gandhi stated in the Young India that democracy disciplined and enlightened is the finest thing in the world. A democracy prejudiced, ignorant, superstitious, will land itself in chaos and may be self-destroyed[40].

1.10.3 Separation of powers

According to dicey who saw the rule of law as a central feature of the British Constitution in the regard of separation of powers, one can at least say that the concept of rule of law is usually intended to imply (i) that the powers exercised by politicians and officials must have a legitimate foundation; they must be based on authority conferred by law; and (ii) that the law should not conform to certain minimum standards of justice, both substantive and procedural. Thus, the law affecting individual liberty ought to be reasonably certain or predictable, where the law confers wide discretionary powers there should be adequate safeguards against their abuse.

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[39]Bertrand Russell, *Principles of social reconstruction*, London G. Allen &Unwin Ltd 1916, p. 22

[40]*Young India*,30 July 1931,p.199

The doctrine of separation of powers just as the concept of rule of law was referred as one which must be added in a system of government; Montesquieu and his followers were of the view that there are three main arms of government known as the legislature, judiciary and the executive; there are three main classes of governmental functions known as the legislative, executive and the judicial; and the concentration of more than one function in any arm of government is a danger to the liberty of the individuals. For example the executive should not act on behalf of the legislature and make laws; the executive shall be limited to the executive functions.

More so, G.W Kanyeihamba in his book; "constitutional law and government in Uganda" critically analyzed the doctrine of separation of powers from a wide perspective which is of a general nature as he stated that the doctrine emphasized on the three arms of government whose powers are spelled out clearly and that no organ of government shall be allowed to perform the task of another and no organ shall exercise an influence on the other.

C.H. McIlwain in his book "constitutionalism: Ancient and modern" which emphasizes on what a good government is; and outlines the need of separation of powers and the need to provide for checks and balances so that one organ of the government does not act ultra vires and impose a domination on the other organs.

According to Peter A. Oluyede in his book "Administrative Law in East Africa" in which he supports the doctrine of separation of powers but also shows the extent to which its application is concerned. However, he goes further and discusses the constitutions of some East African Countries and advocate that they must practice separation of powers.

1.11 Synopsis

Chapter I: General introduction.

Chapter II: The legal and institutional framework of Burundi's government.

Chapter III: The independency of the organs of government in Burundi.

Chapter IV: The applicability of rule of law in Burundi's judicial system.

Chapter V: Findings and recommendations.

CHAPTER TWO
THE LEGAL AND INSTITUTIONAL FRAMEWORK OF BURUNDI'S GOVERNMENT

2.1 Legal framework

The constitution is defined as the organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and manner of the exercise of sovereign powers.A charter of government deriving its whole authority from the governed[41].

The constitutionof Burundi provides for three organs of government which are respectively the executive[42], the judiciary[43] and the legislature[44].

2.1.1 The powers of the executive branch

The executive branch is the organ exercising authority by assuming the responsibility for the governance of the state. In a state characterized by the doctrine of separation of powers, powers are distributed among three branches which are the executive, the legislative and the judicial powers. In such a system, the executive is tasked only to enforce the law which attempt is made to prevent the concentration of powers in one body or group of people.

However, the executive can be the source of certain types of law, such as a decree or executive order. The head of the executive branch is the president of the republic as provided by the constitution of Burundi that: "The president of the republic is the head of the state, embodies

[41] Blacks' Law Dictionary, 4th edition, p.384
[42] Constitution of Burundi, article 93
[43] Ibid, article 210
[44] Ibid, article 152

national unity, ensures the respect for the charter of national unity and constitutional act. ensures by his arbitration the continuity of the state and the regular functioning powers.

The president is elected by universal suffrage direct for a term of 7 years renewable once as provided by the constitution of the Republic of Burundi as amended in 2018[45].However, the electoral campaigns in Burundi reflects intimidation, arrests of opposition members and harassment which shows the unfairness of Burundi's elections.[46]

He is the guarantor of national independence, territorial integrity, respect for treaties and international agreements"[47]. The executive branch is composed by two vice presidents who assist the president in his functions[48], ministers and secretaries of state[49]. The powers of the executive through the president are to regulate powers and ensuring the execution of laws he is empowered to make decrees if need be, countersigned by the vice president and ministers[50].

Even though the president is mandated to execute the laws, the constitution gives powers to the head of the state or president of the republic to promulgate the laws adopted by the national assembly within thirty days of their transmission if he does not make any request for a second reading or to refer the matter to the constitutional court for unconstitutionality, if the president request for a new examination which may concern all or part of the law, the parliamentarians after a second reading can promulgate the text if it has been voted by a two-thirds majority present for ordinary laws and three quarters of the parliamentarians for organic laws but where

[45] The constitution of Burundi, article 97
[46] http://www.africaupclose.wilsoncenter.org/Burundi-free-and-fair-elections/ accessed on 3 July 2019
[47] The constitution of Burundi, Article 96
[48] Ibid, Article 122
[49] Ibid, Article 128
[50] Ibid, Article 108

the text concerns security aspects mentioned as important by government, the law is promulgated only if it has been passed by a majority of four-fifths of the parliamentarians present[51].

2.1.2. The powers of the judicial branch

The judiciary is the system of court mandated to interpret and apply the law in the name of the state. Under the doctrine of separation of powers, the judiciary does not make laws or enforce laws but rather interprets and applies the law depending on the facts of each case and is tasked to generally to ensure equal justice and mechanism for the resolution of disputes if it is required by the parties in disagreement.

The judicial officers are appointed by presidential decrees which appointment is proposed by the minister of justice[52] and a competition is made to separate the candidates who must be having a bachelor degree in laws[53]. The appointments of presidents of tribunals or other courts are subjected to the approval of the Senate[54] except the judicial officers of the constitutional court who are appointed by the president of the republic on the proposition of the minister of justice.[55]

The judicial powers are impartial and independent from the executive and the legislative powers. Judges shall exercise their functions subjected to the constitution and the law. However, the executive checks on the powers of the judicature as the president of the republic is the guarantor of the independence of the judiciary and assisted in that function by the superior council of the judiciary[56].

[51] The constitution of Burundi, Article 202
[52] Ibid, Article 219
[53] Law No 1/001 of 29 February 2000 amending the statute of magistrates
[54] The constitution of Burundi, Article 192(9)
[55] Ibid, Article 220
[56] Ibid, Article 214

The superior council of the judiciary ensures good administration of justice and is the guarantor of the independence of judicial officers or judges while exercising their functions[57] and assist the president and the government in the development in the area of justice, monitoring of the country's situation in the judiciary and in the field of human rights and developing strategies to combat impunity[58].

The executive checks the powers of the judiciary as judges are appointed by presidential decrees on proposal by the minister having justice in his attributions[59].

2.1.3 The powers of the legislature

The legislative power is exercised by the parliament comprising of two chambers which are the National Assembly and the Senate and it is provided that no person can be at the same time in the National Assembly and the Senate[60]. An organic law shall fix the conditions in which to replace parliamentarians which are members of the National Assembly and the Senate in case of vacancy of the seat of any member[61].

The mandate of parliamentarians is of a national character and the vote of a member of the National Assembly and the Senate is a personal vote.[62]

Also, the members of the National Assembly and the Senate cannot be arrested, prosecuted, detained or judged for opinions or votes made in the course of their sessions except if they are caught in the act or else the members of the National Assembly and the Senate cannot be

[57] Ibid, Article 215
[58] Ibid, Article 218
[59] Ibid, Article 219
[60] ibid, article 152
[61] Ibid, article 153
[62] Ibid, article 154

prosecuted[63]. The members of National Assembly and the Senate can only be prosecuted by the Supreme Court[64] and their mandate cannot be compatible with any other public function[65].

The duty of the legislature is to make laws and the procedure of adoption of new is that a proposition of a new law must be deposited simultaneously at the National Assembly and the Senate[66] and if it's a project of law which cannot be heard directly by the Senate it will first pass through the National Assembly and if adopted on the first reading it will be transmitted to the Senate which give its opinion on the proposed project of law and if approved shall send it back which adopt the project of law or amend it and the President of National Assembly will transmit to the President of the Republic the project of law approved by the National Assembly for presidential assent and if there is any contradiction between the National Assembly and the Senate, the National Assembly may vote and pass the project of law by a majority of two-third[67].

2.2 International framework

2.2.1 The Arusha peace and Reconciliation Agreement for Burundi

In order to recover a safe and peaceful state after a civil war of about 15 years, many peace and cease-fire settlements have been concluded by politicians from both Hutus and Tutsi political parties. The Arusha Peace and Reconciliation Agreement of 28th August 200 is the key and fundamental covenant that has brought a lot of changes in Burundi's legal system and continue to guide peace and reconciliation policy. It is the first settlement which introduced sharing process of political power between the two main ethnic categories in Burundi by introducing quotas in the composition of the army, the government, the parliament and even in local administration and public services. It integrates a high gender sensibility by assuring to women

[63] Ibid, article 155
[64] Ibid, article 156
[65] Ibid, article 157
[66] Ibid, article 193
[67] Ibid, article 196

at least 30% of representation in all instances of decision and it inspired all the constitutions and acts adopted since 2000[68].

The Arusha Peace and Reconciliation Agreement consist of five main protocols which are:

- Protocol 1 The nature of Burundi Conflict, problems of genocide and exclusion and their solutions
- Protocol 2 democracy and good governance
- Protocol 3 Peace and security for all
- Protocol 4 : Rebuilding the country and development
- Protocol 5: Safeguards for implementation of the agreement

They are also appendices that contain obligations and duties to be observed by signatory parties.

2.2.1.1 The Executive Branch

The executive is provided under the Arusha Peace and Reconciliation Agreement that the constitution shall provide that the President of the Republic will be elected by universal suffrage in which each elector may vote for only one candidate. The President of the Republic shall be elected by an absolute majority of the votes cast. If this majority is not obtained in the first round, a second round shall follow within 15 days. Only the two candidates who have received the greatest number of votes during the first round stand in the second round.

The candidate who receives the majority of votes cast in the second round shall be declared the President of the Republic. The President of the Republic shall exercise regulatory power and shall ensure the proper enforcement and administration of legislation. She/he shall exercise her/his powers by decrees, countersigned, where required, by a Vice-President or a minister

[68] www.nyulawgolbal.org/globalex/Burundi1.html#Arusha accessed on 27th June 2019

concerned. She/he shall be elected for a term of five years, renewable only once. No one may serve more than two presidential terms. In the exercise of her/his functions, the President of the Republic shall be assisted by two Vice Presidents. They shall be appointed by the President of the Republic, who shall previously have submitted their candidacy for approval by the National Assembly and the Senate, voting separately, by a majority of their members.

The President of the Republic may dismiss the Vice-Presidents. They shall belong to different ethnic groups and political parties. The President of the Republic, after consultation with the two Vice-Presidents, shall appoint the members of the Government and terminate their appointments. Parties or coalitions thereof shall be invited, but not obliged, to submit to the President a list of persons to serve as ministers if such parties or coalitions have received more than one-twentieth of the vote. They shall be entitled to at least the same proportion, rounded off downwards, of the total number of ministers as their proportion of members in the National Assembly. If the President dismisses a minister, she/he must choose a replacement from a list submitted by the party or coalition of the minister in question.

The President of the Republic shall be the Head of State and Commander-in-Chief of the defense and security forces. She/he shall declare war and sign armistices following consultation with the Government and the Chambers of the National Assembly and of the Senate. The President of the Republic may be impeached for serious misconduct, impropriety or corruption by resolution of two-thirds of the members of the National Assembly and the Senate sitting together. The President of the Republic may be charged only with the crime of high treason. The case shall be heard by the Supreme Court and the Constitutional Court sitting together and presided over by the President of the Supreme Court. The Supreme Court shall receive a written statement of the

assets and property of the President, the Vice-Presidents and members of the Government when they assume and relinquish office[69].

2.2.1.2Powers of the judicial branch

The judicial authority of the Republic of Burundi shall be vested in the courts. The Judiciary shall be impartial and independent and shall be governed solely by the Constitution and the law. No person may interfere with the Judiciary in the performance of its judicial functions. The Judiciary shall be so structured as to promote the ideal that its composition should reflect that of the population as a whole.

The courts and tribunals shall operate in Kirundi and the other official languages. Laws shall be enacted and published in Kirundi and the other official languages. The Constitution shall provide for a Supreme Court of Burundi. It's Rules of Procedure, composition and chambers, and the organization of its chambers, shall be determined by an organic law. The judges of the Supreme Court shall be appointed by the President from a list of candidates nominated by the Judicial Service Commission and approved by the National Assembly and the Senate. There shall be a National Department of Public Prosecutions attached to the Supreme Court; its members shall be appointed in the same manner as the judges of the Supreme Court.

The other courts and tribunals recognized in the Republic of Burundi shall be the Court of Appeal, the High Courts, the Resident Magistrates' Courts and such other courts and tribunals as are provided for by law. The Ubushingantahe Council shall sit at the level of the hills. It shall administer justice in a conciliatory spirit. The President of the Court of Appeal, the presidents of the High Courts, the public prosecutors and the state counsels shall be appointed by the President of the Republic following nomination by the Judicial Service Commission and confirmation by

[69]Arusha Peace and Reconciliation Agreement for Burundi, Protocol II, Article 7

the Senate. The Government, within the limits of its resources, shall ensure that magistrates possess the desired qualifications and necessary training for the performance of their duties, and that the resources needed by the Judiciary are made available to it. No one shall be denied a post in the magistracy on grounds of ethnic origin or gender.

A Judicial Service Commission with an ethnically balanced composition shall be established. It shall be made up of five members nominated by the Executive, three judges of the Supreme Court, two magistrates from the National Department of Public Prosecutions, two judges from the resident magistrates' courts and three members of the legal profession in private practice. The judges, magistrates and members of the legal profession shall be chosen by their peers. All members of the Commission shall be approved by the Senate.

The Commission shall have a secretariat. It shall be chaired by the President of the Republic, assisted by the Minister of Justice. It shall meet on an ad hoc basis. Its members who are not members of the Judiciary shall not be construed as members of the Judiciary solely because they are members of this oversight commission. The Judicial Service Commission shall be the highest disciplinary body of the magistracy.

It shall hear complaints by individuals, or by the Ombudsperson, against the professional conduct of magistrates, as well as appeals against disciplinary measures and grievances concerning the career of magistrates. No magistrate may be dismissed other than for professional misconduct or incompetence, and solely on the basis of a finding by the Judicial Service Commission. Trials shall be public except where the interests of justice or a compelling public interest require otherwise. Judgments shall be reasoned and shall be handed down in public.

Magistrates shall be appointed by decree of the President on the proposal of the Judicial Service Commission.

The presidents of resident magistrates' courts shall be appointed in the same manner except that the nominees shall be proposed to the President after obtaining the approval of the Senate. The Constitutional Court shall be the highest court for constitutional matters. Its jurisdictions shall be those set forth in the 1992 Constitution. The organization of the Court shall be laid down in an Organic law. Reference is made for this purpose to the elements contained in Chapter II of the present Protocol. The members of the Constitutional Court, seven in number, shall be appointed by the President of the Republic and confirmed by the Senate by a two-thirds majority. They shall have a term of office of six years non-renewable.

The first Constitutional Court shall be that established under Chapter II of the present Protocol for the transition period. The members shall have the qualifications set forth in Chapter II of the present Protocol. Matters shall be referred to the Constitutional Court by the President of the Republic, the President of the National Assembly or the President of the Senate, by petition by one quarter of the Members of the National Assembly or one quarter of the Members of the Senate, or by the Ombudsperson.

In addition, every natural person with a direct interest in the matter, as well as the Public Prosecutor, may request the Constitutional Court to rule on the constitutionality of laws, either directly by means of an action or by an exceptional procedure for claiming unconstitutionality rose in a matter which concerns that person before an authority. The Constitutional Court may sit validly only if at least five of its members are present. Decisions of the Constitutional Court shall

be taken by an absolute majority of its members, except that the President of the Court shall have a casting vote if the Court is evenly split on any matter.

The Constitutional Court shall be competent to: Rule on the constitutionality of adopted laws and regulatory acts; Rule on the constitutionality of executive action; Interpret the Constitution and rule on vacancies in the posts of President of the Republic and President of the National Assembly if a dispute arises in regard thereto; Rule on the regularity of presidential and legislative elections; Administer the oath to the President of the Republic before she/he assumes office; Verify the constitutionality of organic laws before their promulgation, and of the Rules of Procedure of the National Assembly before their application; Rule on any other matters expressly provided for in the Constitution[70].

2.2.1.3Powers of the legislature

Legislative power shall be exercised by the National Assembly and, where specified herein, by the National Assembly and the Senate. A law adopted by a legislative body or bodies may only be amended by the same body or bodies. The number of members of the National Assembly shall be specified in the Constitution, and in the first instance shall be 100. The Constitution may allow for the number of members to be determined in accordance with a designated ratio per number of inhabitants or by setting an absolute number. The National Assembly shall pass legislation, oversee the actions of the Government and exercise all other functions assigned to it by the Constitution.

The National Assembly shall be responsible for approving the national budget. This provision shall not preclude the submission of matters for popular approval by way of referendum. A Court of Audit responsible for examining and certifying the accounts of all public services shall be

[70]Arusha Peace and Reconciliation Agreement for Burundi, Protocol II, Article 9

established and organized by law. Its composition shall be specified in the post-transition Constitution. It shall be given the resources required for the performance of its duties. Administrative departments shall not withhold their co-operation from the Court of Audit.

The Court of Audit shall submit to the National Assembly a report on the regularity of the general account of the State, and shall also ascertain whether public funds have been spent in accordance with the proper procedures and in accordance with the budget approved by the National Assembly. The Constitution may not be amended except with the support of a four-fifths majority in the National Assembly and a two-thirds majority in the Senate. Organic laws may not be amended except by a three-fifths majority in the National Assembly and with the approval of the Senate.

Members of the National Assembly and the Senate may not be prosecuted, made the subject of a warrant, arrested, detained or subjected to a penalty for acts performed as a member of the National Assembly or of the Senate. Any criminal case involving a person holding political office shall be referred to a Chamber of the Supreme Court, and in the event of conviction, any appeal shall be receivable by the Chambers of the Supreme Court sitting together. During sessions, a member of the National Assembly or the Senate may be prosecuted in respect of acts other than those referred above only with the authorization of the National Assembly or the Senate, as the case may be.

The mechanisms for replacing members of the National Assembly or the Senate in the event of the vacancy of a seat shall be determined by law. The National Assembly and the Senate shall adopt the rules of procedure governing their respective organization and functioning and the election of their bureau. The post-transition Constitution must specify the duties of the bureau,

when the National Assembly shall convene for the first time and who shall preside at the initial meeting.

The National Assembly's Bureau shall have a multiparty character, while the Senate's Bureau shall be of a multi-ethnic character. The compensation and benefits regime, as well as the incompatibility regime, for members of the National Assembly and of the Senate shall be established by law. The opposition parties within the National Assembly shall participate by right in parliamentary commissions, whether sectorial or of inquiry. There shall be a Senate having the functions set forth herein, and such other functions as are allocated to it in the Constitution or in any law.

The Senate shall comprise two delegates from each province. They shall be elected by an Electoral College comprising members of the commune councils in the province in question, shall be from different ethnic communities and shall be elected in separate ballots. A former president shall be entitled to sit in the Senate. The Senate may co-opt up to three members of the Batwa group so as to ensure representation of this community.

The Senate shall have the following functions: To approve constitutional amendments and organic laws, including laws governing the electoral process; To receive the report of the Ombudsperson on any aspect of the public administration; To conduct inquiries into the public administration and where necessary recommend action, to ensure that no region or group is excluded from the delivery of public services; To monitor compliance with those prescripts of the Constitution requiring representativeness or balance in the composition of any part of the public service, including the defense and security forces; To advise the President and the National Assembly on any matter, including legislation; To monitor compliance with the present

Protocol; To comment on or suggest amendments to legislation adopted by the National Assembly, as well as to initiate and introduce bills for consideration by the National Assembly; to approve laws dealing with the boundaries, functions and powers of provinces, communes(district) and hills.

The Senate shall approve solely the following appointments: The heads of the defense forces, the police and the intelligence service; The provincial governors appointed by the President of the Republic; The Ombudsperson; The members of the Judicial Service Commission; The members of the Supreme Court; The members of the Constitutional Court; The Principal State Prosecutor and members of the National Department of Public Prosecutions; The presidents of the Court of Appeal and the Administrative Court; The principal State Prosecutor in the Court of Appeal; The presidents of the Court of First Instance, the Commercial Court and the Labor Court; The State Prosecutors.

The Senate shall ensure that commune councils in general reflect the ethnic diversity of their constituencies; if the composition of any Commune Council does not do so, it may order the cooptation of persons by the Commune Council from an underrepresented ethnic group to that Council, provided that no more than one-fifth of the Council may consist of such co-opted persons. The persons to be co-opted shall be identified by the Senate from a list of names supplied to it by the Commune Council or by any hill chief within the commune.

Where the Senate proposes amendments to laws other than those in respect of which its consent is necessary, the National Assembly must consider those proposed amendments, and may if it so chooses gives effect to them, before referring the bill to the President for his formal assent. Members of the National Assembly and of the Senate shall have the right to debate the

Government's actions and policies. The Constitution shall grant the Senate the powers and resources necessary to perform its functions[71].

2.3 ANALYSIS ON THE IMPLEMENTATION OF THE POWERS OF ORGANS OF GOVERNMENT

The independence of the organs of the government is a principle strongly proclaimed in Burundi, but it remains unstable due as the independence of the magistracy is only is only in written laws but in practice the magistracy is under the control of the executive and interferences of the latter in the judiciary are monetary. That can be seen through the various arrests of journalists and other human rights activists. Among others, the detention of Kavumbagu who is an internet journalist who was arrested on charges of defamation after publishing an article accusing President Pierre Nkurunziza of misuse of public funds during the 2008 Olympics in China showing the how the executive can influence the judiciary by imprisoning a journalist for the publication of an article which caused a harm to the executive.[72]

The independence of the organs of government diminish the abuse of one power in the jurisdiction of another and promote security and uphold of human rights for example the case of *The UPRONA party &2 others V The Attorney General of the Republic of Burundi* and the secretary General of the East African Community in which The UPRONA party was contesting the creation of a national Commission for Lands and other Assets which was said to be an affront to the general principle of the need of an independent and impartial judiciary in every democracy

[71]Arusha Peace and Reconciliation Agreement for Burundi, Protocol II, Article 6
[72]https://www.refworld.org/docid/4c480a371e.html accessed on 4 July 2019

and it was held that land is emotive in the East African Region and Courts generally bear that fact in mind when settling a disputes tied to land and the case was dismissed[73].

More so, Burundi as some other countries of the East African Community faced the same facts of amending the constitution in favor of the executive in the view of increasing the terms of the President. In Burundi, the amendment was done through a referendum in May 2018 which is different in Uganda, where the parliament voted to amend the constitution by scrapping off term limits in 2005 and restored by the legislature which was argued about in the case of *Mabirizi & Others V Attorney General* in which it was held that the presidential term limits restoration would contravene to the provisions of the constitution and was deemed to be unconstitutional.[74]

Also, as there is a lack of independence of organs in the government which cause the public officials to be fearless in the outcome of prosecutions and unlawful acts such as abuse of office and corruption become rampant in the government bodies and that is also seen in some of the East African Countries. In the case of *Uganda V Aligonza Francis* in which abuse of office was defined as a person who, being employed in a public body or a company in which the government has shares, does or directs to be done an arbitrary prejudicial to the interests of his or her employer or any other person, in abuse of the authority of his or her office, commits an offence and is liable on conviction to a term of imprisonment or a fine.[75]

The rule of law shall be respected in Burundi and the government officials should also be given special knowledge on its applicability to avoid unlawful practice in the public sector in the case of *Black-Clawson International Ltd V Papierwerke Waldohf-Aschaffenburg Ag* in which an

[73] *The UPRONA party &2 others V The Attorney General of the Republic of Burundi,* Application No 4of 2014
[74] Mabirizi & Others V Attorney General(consolidated constitutional petitions Nos. 49of 2017, 3 of 2018, 5 of 2018, 10 of 2018 and 13 of 2018) [2018] UGCC4 (26 July 2018)
[75] Uganda V Aligonza Francis(constitutional reference No.31 of 2010) [2011] UGCC 11 (1 March 2011)

emphasis was put on acceptance of rule of law as constitutional principle requiring that the citizen before committing himself to any course of action should be able to know in advance what the legal consequences that will follow from it and where those consequences are regulated by a statute, the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates.[76]

The fundamental human rights are breached by the organs of the government especially the judiciary which is the organ supposed to interpret the laws but instead does not apply fair, speedy and public hearing before an independent court or tribunal established by the law but such breach of law is also experienced by some other East African Countries like Kenya as seen in the case of *Nyakundi & Another V The Republic* in which the court of appeal held that the entire trial was a nullity as the court prosecutor was not a person entitled to prosecute on the basis of section 85(2) of the criminal procedure code.[77]

The human rights of citizens especially members of opposition must be respected and acts against the opposition are deemed to be violation of human rights and should not be tolerated in the case of *Uganda V Sekabira & 10 others* in which it was held that the case failed because both the police and the prosecution in their desire to achieve a conviction at all costs totally ignored the basic elementary requirements of not just police procedures and criminal procedure but also ignored most the fundamental duties imposed by the constitution and that by the act of the police of ignoring the 48 hour rule of imprisonment before presenting the accused to court the police was in violation of the provision of the constitution.[78]

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[76] Black-Clawson International Ltd V PapierwerkeWaldohf-Aschaffenburg Ag[1975] AC 591
[77] Nyakundi& Another V The Republic [2003] 2 EA 647 (Annexture 10)
[78] *Uganda V Sekabira & 10 others(*H.C. Cr. Case No. 0085 of 2010) [2012] UGHC 92 (14 May 2012)

There isa hand of the executive in the several arrests of the political opponent which is a fact not only experienced in Burundi but also in some other countries like Uganda for example in the case of *Uganda V Dr.Kizza Besigye* in which it was held that the Besigye should not be deprived of his/her freedom unreasonably and bail should not be refused merely as a punishment as this would conflict with the presumption of innocence.[79]

The executive perform acts of intimidation to force other organs to comply with their decisions which acts are unconstitutional as it is against the doctrine of separation of powers which is enshrined by the constitution and most of these acts are also seen in some other countries for example *Dr. Kizza Besigye & Others V Attorney General* in which petitioners had gone to court to seek Justice but instead they were subjected in court premises inside the temple of Justice to humiliating cruel and degrading treatment which are prohibited by articles 24 and 44(a) of the Ugandan constitution.[80]

[79]Uganda V Kizza Besigye(constitutional reference No. 20 of 2005) [2006] UGCA 42 (25September2006)
[80]Dr. Kizza Besigye & Others V Attorney General(Constitutional petition No.7 of 2007) [2010] UGCC 6 (12 October 2010)

CHAPTER THREE

THE INDEPENDENCY OF THE ORGANS OF GOVERNMENT IN BURUNDI

3.0 Brief analysis of independence of organs

Independence is defined as a state or condition of being free from dependence, subjection or control. A state of perfect irresponsibility. Political independence is the attribute of a nation or state which is entirely autonomous, and not subject to the government, control, or dictation of any exterior power it also mean not to be dependent, not subject to control, restriction modification or limitation from an outside source[81].

Independence of organs of government refers to the non-interference of one organ of government in the duty supposed to be done by another organ of government which is emphasized as separation of powers.

Separation of powers is a term which was prominently used by Charles-Louis de Second at, Baron De La Brede De Montesquieu a French philosopher of the 18th century who was influenced by Aristotle. Separation of powers refers to the subdivision of the functions government into three branches known as the legislative, the executive and judicial functions

3.1 Historical background

The separation of powers concept was first originated in ancient Greece and became widespread in the Roman Republic as part of the initial constitution of the Roman Republic as part of the initial constitution of the Roman Republic. The Aristotle (384-322BC) in his book "The Politics" stated that: "There are three elements in each constitution in respect every serious law giver must look for what is advantageous to it; of these are well arranged, the constitution is bound to be well arranged and the differences in constitutions are bound to correspond to the differences

[81] Blacks' Law Dictionary, 4th Edition, p.911

between each of these elements. The three are, first, the deliberative, which discusses everything of common importance; second, the official; and third judicial element". At the time of Edward I reign (1272-1307) the separation of powers was emerged in England, with the appearance of Parliament, the council of King and the courts. Baron Montesquieu, French Enlightenment political philosopher, how lived in England from 1729-1731 promote the concept of Montesquieu's tripartite system". This term describe the division of political power into executive, the legislature and a judiciary. Baron Montesquieu ascribed this model to the British constitutional system, "a separation of powers among the monarch, parliament and the courts of law".

However, this was misleading because United Kingdom had close connection of executive and legislature. Montesquieu specified in his book "De l'Esprit des Lois" that "the independence of the judiciary has to be real and not apparent merely". "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.

Again, there is no liberty if the power of adjudicating is not separated from the legislative and executive. If it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; because the judge would then be the legislator. If it were joined to the executive power, the judge might behave with violence and oppression.

Where in the same person or body the powers of the judiciary and legislative power are reunited with the executing power there is no liberty because we can fear that the same monarch or the same senate makes tyrannical law to execute them tyrannically"[82]

[82]Baron De Montesquieu, *Spirit Of Laws*, Editions Gallimard 1995,p.112

In the modern theory of separation of powers, Montesquieu saw man as having a tendency towards evil acts which was manifested by the accrue selfishness and pride. Montesquieu wrote that its greatest consequence is "constant experience as that every man invested with powers is apt to abuse it, and to carry his authority as far as it will go"[83] . Montesquieu argued that in a democracy, the government become corrupted because of the people's attempt to try to govern "to debate for the senate, to execute for the magistrate and to decide for the judges"[84]. According to Montesquieu, separation of powers is necessary to modern states but he believed that the doctrine of separation of powers is only suitable to small states[85].

More so, Chief Justice Vanderbilt drew from the governments experience that "respect of the doctrine of separation of powers, not as a technical rule of law but as a guide to the sound functioning of governments rests not only the stability of this nation but of every other nation and the freedom not only of our citizens but of the citizens of every other country"[86].

The doctrine of separation of powers is very important as Montesquieu said: "when the legislative and executive powers are united in the same person or in the same body of magistrate there can be no liberty because apprehensions may arise lest the same monarch or senate should exact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judicial powers be not separated from the legislative and the executive. Where it joined with the legislative the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then a legislator. Where it joined to the executive powers, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same

[83] Baron De Montesquieu, *Spirit Of Laws*, Editions Gallimard 1995, p.213
[84] Ibid,p.88
[85] Ibid,p.94
[86] Arthur T. Vanderbilt, *The doctrine of separation of powers and its present-day significance,* (The University of Nebraska Press 1953), p.469

body, whether of the nobles or of the people, to exercise those three powers, that of exacting the laws, that of executing the public resolutions and of trying the causes of individuals"[87]

In addition, Basu is of the view that in modern practice, the doctrine of separation of powers means a separation which is organic and clear distinction must be drawn between "essential" and "incidental" powers and that an organ of the government cannot usurp the essential functions belonging to another organ, but may exercise some incidental function thereof.[88]

Montesquieu's view in his book *De l'Esprit des Lois* is that the doctrine of separation of powers has to be done in the sense that "where in the same person or body the powers of the judiciary and legislative power are reunited with the executing power there is no liberty because we can fear that the same monarch or the same senate makes tyrannical law to execute them tyrannically"[89]

He, thereby suggests that "there are three kinds of powers in each state should be the legislative power, executive power and the judiciary"[90]

However, it is not so in reality; there are watertight compartments as there is overlapping of each other. Friedmann and Benjafield wrote that:

"*The truth is that each of the three functions of the government contains elements of the other two and that any rigid attempt to define and separate those functions must either fail or cause serious inefficiency in any government*"[91].

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[87] Baron De Montesquieu, *Spirit Of Laws*, Editions Gallimard 1995,p.151-152
[88] Administrative Law, 1986, p.24
[89] Baron De Montesquieu, *Spirit Of Laws*, Editions Gallimard 1995,p.112
[90] ibid
[91] Wolfgang Friedmann and David Gilbert Benjafield, *Principles of Australian administrative law*, 2nd Edition Sydney: Law Book co. of Australasia 1962.

3.2 The independence of the judiciary

The independence in simple word means freedom of control or influence of another or others, in relation the branches of the state, Michel Troper wrote that "independence means that each authority must be shielded from all forms of influence from others. Independence provides above all, absence of revocation from one authority to the other, secondly, an authority is also independent if it does not owe its nomination to another authority, if its budget does not come from another authority or still if judicial proceedings cannot be exercised against it by one of the authorities"[92].

The legislature, executive and the judiciary have traditionally been regarded as the three main organs of government. Each of those organs of government has been entrusted with distinct powers and responsibilities. The doctrine of separation of powers implies the power and responsibility is equally distributed among three organs of the government in a manner that prevents any one organ from abusing its powers. The concept is well known as "Checks and balances" and used mostly in the same breath with separation of powers because one organ is supposed to check possible abuse by other organs.

However, it is important to note that the arm of government feared the most is the executive organ which attempt to dominate the other branches of government as the law making powers between the legislature and the executive are not well developed in the constitution of Burundi which give extensive law making powers to the president via his ability to make presidential decrees in regard to **article 107** of the constitution of the republic of Burundi which undermine the concept of separation of powers between the executive and the legislature as the legislature ought to be the law-making body and the executive the implementation body.

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[92] Michel Troper, *The judicial power and democracy*, Vol. 1, No 2, p.316

As has been set out above, the executive and the president in particular is extremely involved in the judiciary and as provided under **article 224** of the constitution of the republic of Burundi that "the president shall preside the superior council of the judiciary assisted by the president of the supreme court the minister of justice respectively as vice president and secretary".

It is also to be noted that Burundi courts do not have a reputation for independence and are seen to be subject to interference by both the executive and the legislature[93].

"At the heart of any system based on the rule of law, there is a strong judicial system, independent and equipped with powers, financial resources, material and skills that are necessary to protect human rights within the framework of administering justice"[94] showing that the strength of the judiciary is key for the rule of law to prevail in a state.

The Secretary-General has described the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before law, accountability to the law, fairness in application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency"[95].

The rule of law concept is remarkable in the preamble of the **Charter of the United Nations** stating that among the aims of the UN the establishment of conditions favorable to the practice of justice and the respect of treaties and other international agreements obligations are respected.

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[93] Justine Limpitlaw , *Media Law handbook for Eastern Africa*, Konrad Adenauer stiftung 2016, Vol. 1, p.118

[94] Report of the General Secretary on the rule of law and transitional justice for societies that are prone or emerging from conflict(S/2004/616) para. 35

[95] Ibid.

According to Avocats sans frontieres(Lawyers without boundaries), a non-governmental organization, which stated that the independence of the judiciary is dependent on the non-interference externally of the affairs of interpreting the law, the judiciary should not be imposed any kind of pressure from any higher authority making the independence of the judiciary an important point for the rule of law to be said in existence in a particular state[96].

More so, according to the Arusha agreement for peace and reconciliation in Burundi, the independence of the judiciary is important in to the rule of law as among the principles good governance and a requirement which cannot be overlooked in establishing peace and security in a state[97].

The constitution of Burundi put an emphasis on the independence of the judiciary from any other branch of the state such as the legislature or the executive branch.

The Burundian judicial system was said to be characterized by three flaws: a serious lack of training for the staff, total lack of equipment and particularly a lack of an independent judicial machine[98].

"The independence of the judiciary is only in written laws but in practice the judiciary is controlled by the executive and interferences of the latter in the judiciary is monetary. Also, the history of the judiciary has been marked by revocation of decisions that have not pleased the executive"[99]

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[96] Avocats Sans Frontieres, Genocide crimes and crimes against humanity before the jurisdiction of Rwanda, Vade mecum, Kigali etBruxelles, 2004, p.24.

[97] *Arusha peace and reconciliation agreement for Burundi*, Protocol II, Chap. 1, article 2, point 8.

[98] Commission justice etpaixbelge francophone, *le long chemin du Burundi vers la paix et la democratie*, Mai 2006, p.4.

[99] Analyse critique du fonctionnement des jurisdictions superieures du Burundi, 2007, p.8.

According to scholars like Bracton, even the highest authority of a state need to obey to law from the Latin saying "*Non sub homine, sed sub deo et lege*" meaning that "not under man, but under God and the law"[100]which in other sense try to show that the king himself ought not to be subject to man but to God and the law. The executive should not impose on the other branches its views to be done due to the monopoly of the power in favor of the executive therefore occasioning non respect of rule of law.

3.3 The Independence of the Legislature

The parliament of Burundi which is bicameral and consists of the National Assembly and the Senate[101], Parliament exercises the legislative power but also the constitution sets out a broad range of areas in which the legislature can intervene, from the basic rights to the national budget[102]. Draft bills originate from the executive power and parliament. In reality, the real legislative power of parliament is triggered by the executive.

Most draft bills come from the government and very rarely from within the parliament. Moreover, they are placed and discussed in priority on the agenda of parliament. This situation confirms the presidential nature of the Burundian political regime, which features a powerful executive with a de facto subordination of other powers.

Also, the majority of members of parliament are not really politically and technically well-prepared for the task, either due to a lack of proper training or to allegiance to their political parties. In fact, the current electoral system allows very little chance for independent candidates to enter parliament[103].

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[100] https://oll.libertyfund.org/pages/rule-of-law-us-constitutionalism accessed 27 June 2019
[101] Constitution of Burundi, article 152
[102] Ibid, article 182
[103] Professor Pacifique Manirakiza, The 2005 Constitution of Burundi, p.24

However, constitutional measures and guarantees for parliamentary control of the government may not be effective and efficient, at least for the moment. In fact, the main political parties represented in parliament are constitutionally and effectively part of the government. Moreover, the ruling party, the CNDD-FDD, is predominantly represented in both chambers of Parliament to the point that it controls all of the institutions[104], which gives rise to fears of the return of a mono-party system. These two factors have a great impact on the independence of Parliament and its ability to effectively control the government's policies and conduct[105].

3.4 The independence of the executive

The executive branch is incarnated by the president, the Vice-Presidents and the Cabinet. The President, who is the head of the executive, is directly elected by the population, while the other cabinet members are appointed by him. He is the guarantor of national independence, territorial integrity, respect for treaties and international agreements"[106].

The executive branch is composed by two vice presidents who assist the president in his functions[107], ministers and secretaries of state[108]. The powers of the executive through the president are to regulate powers and ensuring the execution of laws he is empowered to make decrees if need be, countersigned by the vice president and ministers[109].

The President of the Republic may be impeached for serious misconduct, impropriety or corruption by resolution of two-thirds of the members of the National Assembly and the Senate sitting together. The President of the Republic may be charged only with the crime of high treason.

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[104] International Crisis Group, *Burundi: From electoral Boycott to political Impasse*, (Africa Report N°169, 2011), p.8
[105] Professor Pacifique Manirakiza, *The 2005 Constitution of Burundi*, p.26
[106] *The Constitution of Burundi*Article 96
[107] ibid, Article 122
[108] Ibid, Article 128
[109] Ibid, Article 108

The case shall be heard by the Supreme Court and the Constitutional Court sitting together and presided over by the President of the Supreme Court. The Supreme Court shall receive a written statement of the assets and property of the President, the Vice-Presidents and members of the Government when they assume and relinquish office[110].

[110] Arusha Peace and Reconciliation Agreement for Burundi, Protocol II, Article 7

CHAPTER FOUR

THE APPLICABILITY OF RULE OF LAW IN BURUNDI'S JUDICIAL SYSTEM

4.0 Background to the judicial system

Since the colonial period, the judicial system moved from customary law to positive law and it adopted civil law system following the example of the Belgians who were the colonialists. At independence, positive law covered all branches of law, with the exception of some private, civil law issues. After independence, positive law has come to govern almost all the fields of society, with important exceptions related to inheritance, marital property, gifts/liberalities, acquisition and sale of non-registered land and relationships between employers and workers of the traditional or unstructured sector[111].

4.1 The Burundian Legal System

The judicial system is organized through the Code of Organization and Judicial Competence of 17 March 2005.At hills level, there are kinds of Courts of Hills "*intaheyo ku mugina*" in which elders "abashingantahe" and elected people on the hills, comprise the bench; the current communal law has conferred upon them the power to reconcile the parties. However, they do not have the right to impose punishments[112].

At the Commune level in the rural provinces and at the Zone level in the town of Bujumbura, there are the "Courts of Residence" or Magistrate Courts Tribunal de Residence" which handle both criminal and civil cases. Residence courts have jurisdiction to try offenses punishable by up to two years of penal servitude regardless of the amount of the fine. They rule by one and same

[111] Jean-Claude Barakamfitiye and JanvierNcamatwi, *UPDATE: The Burundi Legal System and Research,* 2017https://www.nyulawglobal.org/globalex/Burundi1.html#_edn17 accessed on 28 June 2019

[112] Ibid

judgment on civil interests irrespective of the amount of damages and interest to be allocated automatically or after constitution of the civil party[113].

At the rural province level and at the Commune level in the town of Bujumbura, there are county courts/high courts: "*Tribunaux de Grande Instance*". The Tribunals of Grand Instance can hear all offenses whose material or territorial jurisdiction is not attributed to another jurisdiction.They also know, in case of connectedness, infringements committed by the military including officers wearing a rank below that of Major[114].

The Tribunal of Grand Instance are followed by four Courts of appeal with four General prosecutions based at Bujumbura, Ngozi, Gitega and Bururi The courts of appeal can hear appeals of the judgments rendered in the first instance by the high courts, the labor courts and the commercial courts of their jurisdiction[115]

Specialized courts including labor courts[116], administrative[117], commercial[118] and also exist. The Anti-Corruption court[119] together with a prosecution and a special brigade have been settled in 2006 as new mechanisms to deal with corruption and public wealth mismanagement matters.

The Constitutional Court is has the supreme jurisdiction in matters of interpretation of constitutional matters and the constitutionality of the laws[120].

Lastly, the Supreme Court is the highest appellate court in the republic and guarantor of the good application of the law by the courts and tribunals[121] and when united with the constitutional court

[113] Code of Organization and Judicial Competence,Law N° 1/08, Title 1, chapter 2, section 1(2), Para 1, article 6
[114] Ibid,section2(2), Para 1, article 17
[115] Ibid, Para 2, article 35
[116] Ibid, Chapter 3, section1(1), article 39
[117] Ibid, section3(1), article 58
[118] Ibid, section 2(2), article 42
[119] Law N°1/36 of 13 December 2006 for the creation of the anti-corruption court, article 1
[120] The constitution of Burundi, article 231

they form the High court of Justice[122]which has competence to try a seating president and other senior members of the government of high treason[123].

4.2The Impacts of Rule of Law in the Judicial System

The essence of the rule of law ideal is that 'people ought to be governed by law'. For this goal of 'government by law, not by men' to be realized, the rule of law ideal requires the establishment of laws that meet a number of criteria.

First, law must be universal or general, in the sense that its prescriptions must be addressed to all citizens, and not to particular individuals. Second, law must be promulgated to its subjects, whose conduct it can only guide if they know of its existence. Third, law must prescribe modes of behavior prospectively and not retroactively. Fourth, the prescriptions of law must be clear so that its subjects understand how they are required to behave. Fifth, the prescriptions of law must not be contradictory. Sixth, the prescriptions of law must not require conduct that is impossible for the subjects to perform. Seventh, the prescriptions of law must be stable over time.

That is, while changes in the law are a good thing, such changes must not be too frequent since many of the actions that law seeks to regulate 'require advance planning, preparations and a certain level of guaranteed expectations about the future normative environment'.

Finally, the prescriptions of law must be applied consistently, in the sense that there must be 'considerable congruence between the rules promulgated and their actual application to specific

[121]The constitution of Burundi, article 227
[122] Ibid, article 239
[123] Ibid, article 240

cases'. This criterion of the rule of law is particularly important, as it implicates the day-to-day and practical application of law.[124]

The Judiciary is supposed to administer justice through resolving disputes between citizens and between the State and citizens; interpret the Constitution and the laws of the country; promote the rule of law, to contribute to the maintenance of order in society and protect human rights of individuals and groups.

4.2.1 Right to a Fair Hearing

The Constitution of Burundi stipulates that the judiciary shall be impartial and independent from the legislature and the executive power.[125] The hearings shall be in public except when it can cause public disorder or against good morality it will be heard behind closed doors[126].

Also, the Arusha Peace and Reconciliation Agreement for Burundi promote an impartial and independent justice. In this respect, all petitions and appeals relating to assassinations and political trials shall be made through the National Truth and Reconciliation Commission[127].

The right of fair hearing in the courts has been infringed in various cases for example the case of Nestor Nibitanga, a human rights defender and regional observer with the Association for the Protection of Human Rights and Detained Persons (Association Burundaise pour la Protection des Droits Humains et des Personnes Détenues, APRODH), was convicted on charges of threatening the security of the state and sentenced to five years in prison on August 13, 2018.Nibitanga was arrested in November 2017 and was unlawfully held incommunicado, without charge and without access to his family or a lawyer for almost two weeks. APRODH

[124]Patricia KameriMbote and MigaiAkech, *Kenya: Justice Sector and the Rule of Law,* (The Open Society Initiative for Eastern Africa,2011) p.22
[125]The Constitution of Burundi, article 214
[126] Ibid, article 211
[127]Arusha Peace and Reconciliation Agreement for Burundi, Protocol 1, article 7(18)

reported that judges cited Nibitanga's continued work for the organization, which was suspended in 2016, as a motivation for the verdict[128].

Another case is the case of Ernest Manirumva, a respected economist, had been investigating allegations of large-scale police corruption and illegal weapons purchases, among others, when he was killed. Manirumva was vice president of the Burundian group Anti-corruption and Economic Malpractice Observatory (Observatoire de Luttecontre la Corruption et les MalversationsÉconomiques, OLUCOME)"Manirumva's work threatened the interests of corrupt officials and businesspeople," said Lewis Mudge, Central Africa director at Human Rights Watch. "A decade later, Manirumva's life and death are a stark reminder of the risks activists takes in Burundi and the inability of the courts to end the impunity of the powerful asA trial of those accused of kidnapping and murdering Manirumva, concluded in May 2012 after three years fell short of holding high-level police and security suspects accountable. The court convicted 14 people, with sentences ranging from 10 years to life, but the prosecutor ignored important leads and recommendations from a Burundian commission of inquiry and the US Federal Bureau of Investigation (FBI)[129].

Among those recently imprisoned was Germain Ruvakuki, who was prosecuted in relation to his work with the now-banned anti-torture organization ACAT-Burundi. He was found guilty of "rebellion," "threatening state security," "participation in an insurrectional movement," and "attacks on the head of state" and sentenced to 32 years in prison. Ruvakuki appealed the conviction, and although a decision should have been made by December 26, 2018, a lawyer

[128] https://www.hrw.org/news/2019/04/09/burundi-10-years-justice-denied-murdered-activist accessed on 28 June 2019
[129] ibid

informed about the case told Human Rights Watch that the appeals court had not located the file, leaving Ruvakuki's case in limbo[130].

4.2.2 The duty to interpret the laws

The constitutional court has the power to adjudicate on the constitutionality of the laws and to interpret the constitution[131]. This aspect needs to strengthen as the courts while deciding must free from any kind of pressure or intimidation. For example when Judge Sylvere Nimpagaritse fled the country shortly after the matter of amending the constitution and specifically a provision giving the power to the president Pierre Nkurunziza to run for a third term. Judge Sylvere Nimpagaritse affirmed that the court judges had come under "enormous pressure and eve death threats" from senior figures and that most of the court's seven judges believed it would be unconstitutional for Nkurunziza to stand again, but had faced threats to force them to change their mind[132].

4.2.3 The Duty to Uphold Human Rights

4.2.3.1 Equality and Freedom from Discrimination

Every individual has the right to enjoy the rights and the freedoms recognized and guarantee in the present charter with no distinction as to race, ethnic group, color, sex, language, religion, political, conviction or their opinion, to national or social origin, to fortune, to birth or any other status[133].The constitution of Burundi provides for the fundamental law that "All citizens are equal before the law, which guarantees them equal protection. No individual shall be object of discrimination for reasons of his origin race, ethnic group, color, language, social status, religion,

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[130] https://www.hrw.org/news/2019/04/09/burundi-10-years-justice-denied-murdered-activist accessed on 28 June 2019

[131] The constitution of Burundi, article 231

[132] www.google.com/amp/s/amp.the guardian.com/world/2015/may/05/senior-burundi-judge-flees-rather-than-approve accessed on 28 June 2019

[133] Charter on Human and people's rights, Article2

philosophical or political convictions or because of a physical or mental disability or because he has HIV/ AIDS or any other incurable disease."[134]

Equality before the law is not observed as there is a kind of impunity for certain category of citizens, the former vice president Gervais Rufyikiri in his writings asserted that there is a strong form of corruption networks have developed and they operate through informal, parallel structures of decision making but with supra-institutional powers which have consolidated around the famous myth of generals and the generals mean those general from the "maquis" or who fought with Nkurunziza the bush war.[135] He also stated the temptation for corruptions is fostered by the low risk of being caught and punished in relation to the lack of anti-corruption policy enforcement.[136]

4.2.3.2 The Right of Freedom of Conscience and Religion

The freedom of conscience, the profession and free practice of religion shall be guaranteed and no one may subject to law order be subjected to measures restricting the exercise of these freedoms.[137] The constitution of Burundi stipulates that "freedom of expression is guaranteed and the state respects the freedom of religion, thought, conscience and opinion.[138]

Hundreds of people from all corners of Burundi, as well as from other African countries, make a pilgrimage on the 12th of every month to pray at Businde, a hill in Gahombo commune, Kayanza province, in northern Burundi. They apparently believe that the Virgin Mary conveys messages to them at Businde through Eusébie Ngendakumana, a young woman viewed as a leading figure in the movement, and through other visionaries. The worshippers are commonly referred to as

[134] The constitution of Burundi, Article 22.
[135] Gervais Rufyikiri, *Grand corruption in Burundi: a collective action problem which poses a major challenge for governance reforms*, 2016, p.12.
[136] Ibid, p.13
[137] Charter on Human and people's rights, Article 8.
[138] The Constitution of the republic of Burundi, Article 31.

"followers of Eusébie." police fired live ammunition into a crowd of hundreds of worshippers who are part of an informal spiritual movement that makes a monthly pilgrimage to Businde, Kayanza province. The police then apprehended worshippers, including many children and people already wounded, and brutally beat them with sticks[139].

4.2.3.3 Right of Freedom of Expression and Media

The Burundian state recognize the freedom of expression under article 31 of the constitution which mean that media such as radios, TV's, newspapers. The National Communication Council (CNC) which is in charge of regulating the operation of Medias in the state banned the British Broadcasting Corporation (BBC) for six months for "violating press law" and "unprofessional conduct" as they invited Pierre Claver Mbonimpa who is a Burundian human rights activist in exile and also radio Voice of America (VOA) also for six months for the technical reason that it was using a banned frequency and all those media are still off.[140]

Another example of infringement of a constitutional right is when a law was enacted by the National Assembly which attempt to curtail free speech and independent journalists which provide that journalists are required to provide competent courts information revealing the source[141] which is against the provision of international convention on the safety and independence of journalists and other media professionals providing protection in law and in practice the confidentiality of journalists sources[142]and led to the suit of Burundi Journalists Union against the government of Burundi before the East African Court of Justice sitting in

[139] https://www.hrw.org/news/2013/07/26/burundi-shot-beaten-near-prayer-site accessed on 28 June 2019
[140] Human Rights Watch, *World report* 2019,P.104-105
[141] Law N°1/11 of 4th June 2013, amending Law N° 1/025 of 27th November 2003, Article 20.
[142] International convention on the safety and independence of journalists and other media professionals Article 5(4).

Arusha that held that article 20 of Law N°1/11 of 2013 violated articles 6(d) and 7(2) of the East African Community Treaty.[143]

4.2.3.4 The Right of Liberty and Security of One's Person

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and in conditions previously laid down by law in particular no one may be arbitrarily arrested or detained.[144] The right to liberty and security of a person is recognized in the Burundian constitution which states that "No one shall be treated arbitrarily by the state or by its institutions. The state has obligations to compensate any individual who is a victim of arbitrary treatment on its account or on account of its institutions."[145]

[143] *Burundian Journalists Union V The Attorney General of the Republic of Burundi of Ref N°7of 2013*
[144] Charter on Human and people's rights, Article 6.
[145] The Constitution of Burundi, Article 23

CHAPTER FIVE

FINDINGS AND RECOMMENDATIONS

5.0INTRODUCTION

This chapter considers findings and recommendations emanating from the above presentation and discussion of the study findings on the challenges of using rule of law to promote independence of the organs of the government and especially the judiciary in Burundi.

5.1 FINDINGS

In the final analysis, it should be noted that the people of Burundi have struggled to realize viable and sustainable observance of the rule of law through a democratic system of governance that has for long been expected to deliver the country from its undesirable political woes.

Among the principles which are set out by the constitution of Burundi there is separation of powers and checks and balances known as safeguards against tyrannical leadership.

However as the researcher concludes, the provisions have not been observed as the public expected in light of the current events of 2018 as already discussed. The reason is that there is no particular position reached by the organs of the government in the view of the interests of the Burundians and that none can meet its responsibilities in complete disregard of the functions of the others.

Another point is the media's role in upholding rule of law which is vital to the democratic states as the media deals with important issues affecting the country and it is one avenue where government is subjected to public scrutiny and accounts to the people.

However, the role of media to the democratization process cannot be over emphasized. For developing democracies, the challenges remain at high level, as the principles which govern the proper regulation of the right to freedom of expression are difficult to exhaust.

Also, periodic elections is another way of showing the relevancy of rule of law but the elections shall not be associated with undemocratic practices for example intimidation violence, harassment of voters, vote rigging.

The supreme law being the constitution provides for the doctrine of separation of powers it is not practically reflected because the executive always infringe upon the duties of the other organs especially the judiciary as the executive influence the judicial officers while exercising their powers of adjudicating and the members of the executive mostly use that influence to persecute their opponents and humiliate them through courts of law which are supposed to be the temple of justice but instead become a temple of injustice.

Also, the independence of the judiciary is very hard to achieve as the executive power is in charge of the appointment of judicial officers and the latter because of the fear of being sacked always uphold the position of the executive.

The superior council of the judiciary which is in charge of disciplining the members of the judiciary, is headed by the president of the republic, who is the head of the executive and by the fact of heading the superior council of the judiciary influence the decisions of that council nourishing the fear of the judicial officers to be relieved of their functions.

5.2 RECOMMENDATIONS

The executive should desist from criticizing the judiciary and instead find ways to strengthen it by providing all the necessary facilitation to ensure its effectiveness. The executive's interference in other organs makes them weaker and unable to do their work effectively. The researcher recommends that the executive should strictly respect the independence of the other organs so as to give them a chance to do their work effectively.

For the judiciary, it needs to be stronger to be able to take decisions that would compel other organs to respect and observe the laws. But it should be noted that the judiciary has for long been subject to the executive pleasure and pressure as a result of the presidential power to appoint the judges.

The legislature should also be strong in the way that it does not stand or entertain being corrupted and interfered and their point can be driven through strikes, boycotting and also using the law.

Furthermore, the press is described as the fourth organ of government because of its considerable influence over the public opinion which it wields by distributing facts and opinions about the various branches of the government. However, the press should not do the publication in order to entice unfair protest against government.

More so, for Burundi to adhere to the rule of law the different organs of the state shall be independent from each other by the fact of not being subjected to the influence of any other organ of government. The head of the judiciary and other members of the judiciary should not be selected by the president of the republic who is the head of the executive because it affects the decision they make due to the fact that they will not adjudge against the will of the one who raised them to the position in which they are.

A system of auto-administration to avoid dependency of one organ to another organ of the government should be created so that the organs of the government can manage their needs and make a budget which is suitable to the requirements of the particular organ without being interfered by another organ which will have a great impact on the independence of the organs of the government.

The powers of the executive should be diminished because it is that super power of the executive which cause the interference of the powers of other organs making the executive organ the most supreme organ among others and the administration of the state will not be in line with independence of organs which is provided in the constitution, thus not adhering to the rule of law as the doctrine of separation of powers is not observed.

The head of one organ of the government power to influence another organ of the government should be annulled by the constitution to promote the independence of the organs of government.

The powers of the head of organs of government which are the legislature, the executive and the judiciary should be put on the same footage in order to avoid the overlap of the organs of the government.

The recruitment of judges should be done in a transparent manner on the basis of objective criteria that put merits first. The recruitment by way of contest as provided for in the magistrates statute has the advantage of getting rid of political favoritism and the merit of guarantying skills and a true judicial system that is respectful of human rights will be formed.

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