

**THE CONCEPT OF POWER SHARING IN THE CONSTITUTIONS OF BURUNDI
AND RWANDA**

Submitted in partial fulfillment of the requirements for the degree

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By

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List of abbreviations

FRODEBU : Front pour la Démocratie au Burundi

PARENA :Parti pour le Redressement National

RPF :Rwandese Patriotic Front

RTL M :Radio Télévision Libre des Mille Collines

UPRONA :Parti pour le Progrès National

Declaration

I, Christian Garuka NSABIMANA, hereby declare that this paper has never been submitted to any academic institution. Where other people's works have been referred to, acknowledgements have been made. In this regard, I declare this paper to be original.

The concept of power sharing in the Constitutions of Burundi and Rwanda

Chapter I General introduction

1.1 Background of the study

Since the independence of Rwanda and Burundi in 1962, these two countries have experienced conflicts due to exclusion from political life based on ethnic basis. The two countries have the same ethnic composition. This composition is unequal in the fact that the *Hutus* constitute the majority ethnic group, while the *Tutsis* constitute the minority group. The political marginalisation, which was the result of the revolution in Rwanda in 1959, led to the exile of *Tutsis* while in Burundi after an aborted coup, the *Hutus* fled into exile in 1972. After the 1993 presidential election in Burundi, *Tutsis* felt marginalised by the victory of the *Hutu* president. The civil wars in Rwanda (1990-1994) and in Burundi (1993 until today) have the same cause, which is the exclusion of *Tutsi* in Rwanda, on one hand, and of *Hutus* in Burundi on the other hand from the decision making process. Democratic elections are not *per se* the solution of the conflict in the two countries because the minority groups will always have a fear of being excluded from the political life since the outcome of elections in many African states depend on ethnic affiliation. The current constitutions of Rwanda and Burundi both contain provisions that allow for power sharing between *Hutus* and *Tutsis* in order to promote national unity and therefore to avoid ethnic conflict.

1.2 Research question

The aim of the power sharing arrangement in Rwanda and Burundi as stated previously is to prevent ethnic conflict as a result of exclusion from the political life. This paper attempts to answer to the question: how effective is power sharing in helping to achieve the goal of establishing a functioning democracy?

1.3 Research methodology

The research will mainly use the non-empirical method. A literature survey will enable me to make a comparison of the two constitutions through the reading of various textbooks and articles. I will first of all define a given concept through a literature review

and then that concept will be analysed under the provisions of the two constitutions separately.

1.4 Literature review

The notion of constitutionalism has been widely discussed by many academics. The Rwandan citizens adopted the current constitution of Rwanda in the referendum of 26 May 2003 and the constitution of Burundi was adopted by the Burundian citizens in the referendum of 28 February 2005. The two constitutions provide for power sharing between political forces in Rwanda whereas in Burundi it is between ethnic groups. The notion of power sharing has also been widely written about by many scholars such as Arend Lijphart and others. The concept of power sharing implies the notion of consensus and coalition, which needs to be reached. Bouchard points out the positive role a consensus can play in a democracy.¹ Some political parties have formed along ethnic lines, although a number of African constitutions prohibit this practice.² Either elections or the political power monopoly can sometimes lead to ethnic violence and therefore consensus can prevent the occurrence of the ethnic violence. In addition, Elazar emphasizes the relevance of power sharing in a constitution by arguing that it guarantees the coexistence of divided ethnic groups and therefore makes the constitution legitimate.³

In spite of providing for the concept of power sharing in their constitutions, Rwanda and Burundi differ in their approach to this concept.⁴ Since this study will deal with the notion of constitutionalism, the academic writing on the topic may play an important role in assisting us to get grips with the topic. Strong, who writes on the legitimacy of a constitution, is particularly helpful in as much as his writing points to the reasons, which

¹ V Bouchard *La démocratie par consensus: une alternative au vote majoritaire* available http://zombie.lautre.net/article.php3?id_article=84 (accessed on 31 March 2005).

² C Shiner *Challenges remain to consolidate democracy in several African countries* available at http://www.tffcam.org/press/african_countries.htm > (accessed on 10 May 2005).

³ J D Elazar *Constitutional design and power-sharing in the Post-Modern Epoch* available at <http://www.jcpa.org/dje/articles3/constdesign.htm> > (accessed on 31 March 2005).

⁴ J D Geslin *Consensus à la rwandaise* available at http://www.lintelligent.com/gabarits/article.asp?article=LIN_06035_idn_O > (accessed on 3 March 2005); Bizimana J I *Démocratie consensuelle vue par Pascal Rugemintwaza: Une démocratie aux inconnues multiples* available at http://www.arib.info/bizimamaisaac_20072004.htm > (accessed on 3 March 2005).

influence the acceptance of a constitution by the population.⁵ The book edited by Hatchard *et al.* illustrates the importance of including the people in the process of constitution making since it raises the public awareness.⁶

1.5 Relevance of the study

The Constitutions of Rwanda and Burundi both contain provisions to support democracy as well as the notion of power sharing. Despite the fact that democracy can be enhanced by a government that comes to power through the popular will of the people, that is, universal adult suffrage, it must be noted that this shall depend on the use of electoral system that ensures greater proportionality of representatives to the popular vote.⁷ This paper aims to analyse the impact of power sharing on democracy. Furthermore, this paper compares the approach of Burundi and Rwanda in their constitutions to the concept of power sharing.

1.6 Limitation of the study

Although there is an abundance of literature available on the roots of the conflicts in Rwanda and Burundi, the present study will not focus too much on that literature since it will only deal with the Constitutions with regard to the concept of power sharing and democracy.

The Constitutions of Rwanda and Burundi have just been adopted recently and there has not yet been any case dealing with the violation of the constitution with reference to the concept of power sharing and therefore, there will be no constitutional case law as a reference.

1.7 Overview of chapters

To achieve its objective, the study is structured as follows: The first chapter contains the general introduction, which encompasses the background of the study, the relevance of the study, the research methodology, the literature review and the limitation of the study.

⁵ C F Strong *Modern political constitutions* (1972) 126.

⁶ J Hatchard *et al* (eds) *Comparative constitutionalism and good governance in the Commonwealth* (2004) 29-31.

⁷ See M Molomo *Multiparty democracy in Botswana* available at <
<http://www.ccssu.edu/afstudy/summer2.html> > (accessed on 10 May 2005).

The second chapter deals with the concept of power sharing and analyses its application in the Constitutions of Rwanda and Burundi, chapter three will focus on the concept of constitutionalism analysing if the constitutional provisions of Rwanda and Burundi comply with and chapter four will analyse the Constitutions of Rwanda and Burundi comply with democracy. In chapter five a general conclusion will be drawn and recommendations will be made.

Chapter II Power sharing

2.1 Introduction

The historical background of Burundi and Rwanda has influenced the concept of power sharing. In both Burundi and Rwanda, the population is made up of three major ethnic groups, the *Hutus*, *Tutsis* and *Twas*, with *Hutus* constituting the majority. The recent history of Burundi and Rwanda has been characterized by frequent conflict between *Hutus* and *Tutsis*. This paper does not intend to discuss deeply the origins of the conflicts between *Hutus* and *Tutsis*. Rather it will attempt to summarize the relationship of these two groups before and after the colonisation of both Rwanda and Burundi.

In 1923, the League of Nations mandated to Belgium the territory of Ruanda-Urundi, encompassing modern-day Rwanda and Burundi. The Belgians administered the territory through indirect rule on the *Tutsi*-dominated aristocratic hierarchy.⁸ It must be noted that it was the *Tutsi* elite who ruled the country by proxy for the Belgian colonisers and that not all *Tutsis* were involved. In addition, the differentiation between *Hutus* and *Tutsis* was physical in a way that *Tutsis* seemed to be taller and longer faced, but there had been a good deal of intermarriage over the years and this had blended such physical differences a good deal. Apart from the physical difference, the economic status also played a role in differentiating between the groups. A *Hutu* could become a *Tutsi* if he acquired large number of cattle, and *Tutsi* could become so impoverished that he sank to being a *Hutu*.⁹

Although this seemed to make the differentiation difficult because an individual could change his economic status, the Belgians transformed the existing *Hutus* and *Tutsi* groups into radical and rigid ethnic groups. During the years 1933-34 a census was conducted and identity cards issued to all citizens. These cards specified the ethnic identity of the bearer and it was not legally possible to change it.¹⁰ Ironically the Rwandans and Burundians accepted the differentiation insofar as the tragic events of

⁸ M Z Bookman *The demographic struggle for power; the political economy of demographic engineering in the modern world* (1997) 227.

⁹ W P Shiley *Power and Choice: An introduction to political science* (1999)365.

¹⁰ J M Kamatali 'Ethnicity and constitutionalism in post genocide Rwanda' in J Oloka-Onyango *Constitutionalism in Africa: creating opportunities, facing challenges* (2001) 115.

massacre and genocide later on demonstrated it. It must be emphasised that in Rwanda, the identity card with reference to ethnicity remained in practice until 1994.

It is worth noting that the mention of ethnicity on identity cards has been abolished after the genocide.

The persecution of *Tutsi* in Rwanda started with the violent revolution of 1959 which not only led to the overthrow of the monarchy; but also provoked the exile of some *Tutsis* to neighbouring countries *inter alia*: Burundi, Tanzania, and Zaire (now known as the Democratic Republic of Congo), Uganda and Kenya.¹¹

In addition, the *Tutsis* who remained in Rwanda continued to be persecuted and discriminated against and the government was unwilling to repatriate *Tutsi* exiles. This was the reason why the Rwandan Patriotic Front (RPF) launched an attack from Uganda in October 1990. A peace accord known as Arusha Peace Accord was signed in 1993 between the government of Rwanda and the RPF. It must be noted that the Arusha Peace Accord provided for power sharing between the Government of Rwanda and the RPF. However, in 1994 after the death of Juvenal Habyarimana, president of Rwanda, a government of extremist *Hutus* carried out genocide, which claimed more than 800.000 lives, mostly *Tutsis* and moderate *Hutus*.¹²

In 1972 in neighbouring Burundi, an aborted *Hutu* rebellion triggered the flight of hundreds of thousands of *Hutus* with a civil unrest continued throughout the late 1960s and early 1970s Burundi meantime organised a democratic election in 1993 which brought to power the Hutu majority under the umbrella of the Front for Democracy in Burundi (FRODEBU). This led to a rise of ethnic consciousness and this, in turn led to a bloody military coup by extremist *Tutsis*. The consequence of the military coup was an orgy of killings between *Hutus* and *Tutsis*.¹³

The current constitutions of Rwanda and Burundi take into account this history of ethnic conflict. In short, they are post conflict. The incorporation of the concept of power

¹¹ G Prunier *The Rwanda crisis: History of a genocide 1959-1994* (1997) 53.

¹² See A Thomson *An introduction to African politics* (2000)59.

¹³ See C Ake *The feasibility of democracy in Africa* (2000) 93.

sharing in the constitutions of Rwanda and Burundi are not a mere coincidence. It is an attempt of the two countries to prevent genocide and other mass killings in the future.

2.2 Concept of power sharing

Power sharing can be understood as a system of governance in which all major actors of society are provided a permanent share of power. This system is often contrasted with a majority government system in which ruling coalitions rotate among various social groups over time.¹⁴ In a society divided ethnically there is a spectrum of ethnic conflict resulting from power struggle. Ethnic groups do not limit their claims to autonomy. They also seek power and compete for some degree of control over the state itself. They tend to organise themselves politically and to participate in regular elections. By acting as political contenders, minorities do not limit their claims to parliamentary representation but they seek access to government positions that is, the central decision-making power. Thus, minority groups seek to share power with the dominant majority.¹⁵

The basic aims of power sharing are traditionally to ensure the decentralization of power; the protection of minority rights for groups; the establishment of grand coalition governments in which nearly all political parties are represented and the provision of mechanism to ensure decision making by consensus.¹⁶ Furthermore, it is argued that when the minority is a permanent one defined by race, ethnicity, language and the system of political party competition coincides with these communities, rather than cuts across them, such a minority may be permanently excluded from governmental office and from all prospect of political influence. Thus, a system of power sharing that guarantees the minority positions in the government and other political offices proportionate to their numbers is suggested.¹⁷

¹⁴ T D Sisk *Power sharing* available at < [http://www.beyondintractability.org/m/power sharing .jsp](http://www.beyondintractability.org/m/power%20sharing.jsp) > (accessed on 2 August 2005).

¹⁵ See *Conflict theory: classical approaches* available at < [http://www.ecmi.de/cps/about approaches.html](http://www.ecmi.de/cps/about%20approaches.html) > (accessed on 3 August 2005).

¹⁶ See note 7 above.

¹⁷ D Beetham & K Boyle *Introducing democracy: 80 questions and answers* (1995)21-22.

Finally, Power-sharing arrangements help to promote government legitimacy and a sense of political fairness among the populace. Power-sharing arrangements such as proportionality in civil service recruitment and resource allocation can help reduce conflict by encouraging formation of broader coalitions to capture more "spoils" of government. It helps manage conflict by encouraging ethnic group leaders to solve problems cooperatively by participating in post-election coalitions.¹⁸

However, it must be noted that in Rwanda and Burundi one cannot say that ethnic group leaders or chiefs exist because there is no such organisation within the society whereby *Hutus* and *Tutsis* have their chiefs respectively.

2.3 Rwanda

The Constitution of Rwanda specifically refers to the concept of power sharing by emphasizing that Rwanda is a State governed by *inter alia* the rule of law, human rights, pluralistic democracy, equitable power sharing, tolerance and resolution of issues through dialogue.¹⁹

Pursuant to Article 58 of the Constitution, the President of the Republic and the Speaker of the Chamber of Deputies shall be from different political parties.²⁰ However, the Constitution is silent in terms of political affiliation of the Speaker of the Senate. The Speaker of the Senate occupies a higher position compared to the Speaker of the Chamber of deputies due to the fact that in the event of the death, resignation or permanent incapacity of the President of the Republic, the President is replaced in an acting capacity by the Speaker of the Senate.

¹⁸See *Tool E :Political development and governance ,power sharing arrangements* available at < <http://www.caii.com/CAIStaff/Dashboard GIROAdminCAIStaff/Dashboard CAIAdminDatbase/ressouces/ghai/toolbox15.htm> > (accessed on 6 August 2005).

¹⁹ See the Preamble of the Constitution of Rwanda.

²⁰ The Chamber of Deputies is the equivalent of the House of Representative in the United States of America and House of Commons in the United Kingdom. Probably ,it is French translation because in French it is known as *Chambre des députés*. Therefore the word *deputy* refers to a member of the House of Representative or House of Commons.

The members of the cabinet are selected from political parties proportional to number of seats in the Chamber of Deputies. It is worth noting that the political party holding the majority of the seats in the Chamber of the Deputies shall not exceed 50 % of all the members of the cabinet.²¹

The above provision seems to be in line with Lijphart's argument in which he states that: "Majority rule spells majority dictatorship and civil strife rather than democracy. What such regimes need is a democratic regime that emphasizes consensus instead of opposition, that includes rather than excludes, and that tries to maximize the size of the ruling majority instead of being satisfied with a bare majority."²²

The argument of Lijphart is valid in a society whereby majority can be understood in terms of ethnic group and therefore majority rule refers to majority ethnic rule. Prior and even during the genocide, the extremist *Hutus* advocated for majority rule through the broadcast of Radio Télévision Libre des Mille Collines (RTL) not because they were democratic but for them in any elections, the *Hutus* would obviously win due to the fact of their numerical superiority in terms of demographic reference.²³

In addition, with regard to the cabinet composition, it must be noted that the possibility of having a member of the Cabinet who does not belong to any political party is not excluded.²⁴ However, it is my contention that the possibility of having a member of a cabinet without any political party affiliation as recognized in the Constitution can undermine the concept of the power sharing as far as the member of Cabinet can decide to join a political party and this in respect of Article 53 of the Constitution which allows citizens to join political parties of their choice.²⁵ The power sharing concept in the

²¹ See Article 116 of the Constitution of Rwanda.

²² See A Lijphart *Patterns of democracy: government forms and performance in 36 countries* (1999)33

²³ See J P Chrétien *Le défi de l'ethnisme au Rwanda et Burundi 1990-1996* (1997)37.

²⁴ See note 21 above.

²⁵ As a matter of example, an individual who does not belong to any political party, when he or she is appointed as a member of the Cabinet, can decide later to join any political party and if he or she decides a political party which holds the majority of the seats of the chamber of the deputies and therefore the quota of 50 per cent can be exceeded. There will be a difficulty to know when that occurs, unless that individual does not occupy a senior position in the political party he or she has just decided to join.

Constitution of Rwanda is likely to focus on consensus of political parties rather than the ethnic aspect.²⁶

In addition, the concept of power sharing under the Constitution of Rwanda focuses on a coalition government. However, the Constitution of Rwanda allows the President of the Republic to declare war by just informing the Parliament without mentioning if he or she does so after consulting the cabinet.²⁷ It is my contention that the ambiguity of this constitutional provision can undermine the power sharing in case the President of the Republic decides to declare war without prior consensus from the cabinet. Without consensus such a decision will not be in line with the approach of decision making through consensus between representatives of political parties within the cabinet as provided by the Constitution itself.

The advantage of a coalition government is that the policies adopted on the basis of consensus are likely to be accepted by a large number of political parties provided they were involved in the negotiations and debate.²⁸ However, in a multi-party system susceptible to coalition government, that policies announced by parties at election time would get modified and transformed in coalition-formation. Policies that would be implemented in practice would be different from the ones that were announced at the time of elections.²⁹ Furthermore, consensus leads to policies in which results are notable more for their compromise nature than for their efficacy in some instances.³⁰

²⁶ The Constitution of Rwanda under Article 9, subparagraph 6 states that the constant quest for solutions should be through dialogue and consensus. Furthermore, Article 56 of the Constitution of Rwanda provides for the establishment of the forum of the political parties recognized by the law. The decisions of the forum shall be taken by the consensus of the constituent organisations.

²⁷ See article 136 of the Constitution of Rwanda.

²⁸ See A H Chayes & A Chayes "Mobilizing international and regional organizations for managing ethnic conflict" in D Wippman (ed) *International law and ethnic conflict* (1999)183.

²⁹ See A Majeed (ed) *Coalition politics and power sharing* (2000)17.

³⁰ See D Wippman (ed) "Constraints on internal power sharing" in *International law and ethnic conflict* (1999)219.

2.4 Burundi

Even if the Constitution of Burundi provides for power sharing, however one should bear in mind that the approach made by the Constitution of Rwanda is different from the approach of Burundi. Indeed the Constitution of Burundi has taken the approach emphasizing on the ethnic aspect. This is due to the fact that the Pretoria Protocol on power sharing³¹ was incorporated into the Constitution of Burundi. The Pretoria Protocol on power sharing was the result of an agreement reached by political parties in coalition known as G10 and G7.³²

In fact, the Constitution of Burundi provides for the protection of minority groups through their inclusion in political parties.³³ In light of the Constitution, the President of the Republic appoints the two Vice Presidents of the Republic who assist him or her but they should be from different political parties and ethnic groups.³⁴ With respect to the concept of power sharing, the appointment of Vice Presidents of the Republic takes into consideration their political and ethnic origin by ensuring that one of the Vice Presidents of the Republic must be from a different ethnic group compared to the President of the Republic.

In doing so, the President of the Republic has to consider the ethnic predominance within the political parties of the candidates.³⁵ In addition, it must be noted that the First Vice President of the Republic coordinates both administrative and political affair whereas the Second Vice President of the Republic is in charge of economic and social affairs.³⁶

³¹ See the Burundi power sharing agreement .This agreement was signed on 6 August 2004 in Pretoria. The Constitution of Burundi has been influenced by this agreement due to the fact that article 4 of the agreement stipulates that the Constitution should incorporate the principles of power sharing based on the inclusion and protection of minority groups either political or ethnic as recognized in the agreement .

³² The G10 is made of UPRONA, PARENA and other dominated *Tutsi* parties while the G7 is made of FRODEBU with allied *Hutus* dominated parties and *Hutus* armed groups.

³³ See the Preamble of the Constitution of Burundi.

³⁴ Article 124 of the Constitution of Burundi.

³⁵ As above.

³⁶ Article 122 of the Constitution of Burundi.

However, the Constitution of Burundi does not specify clearly which of the Vice Presidents of the Republic shall be from the ethnic group different from the President of the Republic.

Despite the fact that the President of the Republic can dismiss the Vice President(s) of the Republic from offices, it must be noted that in appointing another Vice President of the Republic, he or she is obliged to appoint a person coming from the same ethnic group and political party as the dismissed Vice President(s).³⁷ However, it is my contention that this constitutional obligation imposed upon the President of the Republic, practically, can be difficult in case the dismissal of the Vice President results from a misunderstanding between their political parties' agenda. Therefore the President of the Republic by appointing an individual from the same political party as the dismissed Vice President of the Republic will not solve the conflict of interests between their parties if the misunderstanding comes from the political parties' agenda and not the individual aspirations.

There is an obligation to political parties in Burundi to reflect national unity in their recruitment and organs of leadership.³⁸ This does not preclude a political party from being characterised by a given dominant ethnic group. Furthermore, I would argue that it is difficult to assess if political parties comply with this requirement since in Burundi the identity cards mentioning ethnicity are prohibited. Nevertheless, the Constitution of Burundi refers to ethnic groups and even gives a quota when it deals with the composition of the cabinet, the legislature, the army but with an exception to the composition and recruitment of the judiciary.

Article 130 states that the minister of defence and the minister in charge of the national police shall be from different ethnic groups. The President only appoints them after consulting the first vice President. This translates to some extent the concept of power sharing since one of the Vice of Presidents of the Republic is from the different ethnic group as the President of the Republic and moreover his or her opinion prior to the appointment of the minister of defence and minister in charge of the national police is

³⁷ Article 128 of the Constitution of Burundi.

³⁸ Article 78 of the Constitution of Burundi. The same requirement for political parties in Rwanda is provided under article 54 of the Constitution of Rwanda.

required. The composition of the cabinet must be proportionate to the number of seats allocated to a political party in the national assembly, however the *Hutus* shall not exceed 60 % of the seats and *Tutsis* shall not also exceed 40 % of the seats in the national assembly.³⁹

Although the above constitutional provision might not be rigid in terms of quota requirement, one can still imagine a scenario in which the cabinet in which *Hutus* constitute 60 % and *Tutsis* 40% and then a question will be raised about the representation of *Twas* since they are also an ethnic group in Burundi. It is my contention that, the above provision is discriminatory since *Twas* are likely to be excluded from the cabinet.⁴⁰ Furthermore, the Constitution presents a certain discrepancy in a way that it provides for the representation of *Twas* in the National Assembly by allocating them three seats⁴¹, whereas it is silent in their eventual representation in the cabinet. Similarly, the Constitution provides for three senators representing the *Twas*.⁴² However, the Constitution does not clearly specify how the *Twas* representatives in the Senate and the National Assembly are selected.

Surprisingly, the Constitution of Burundi in dealing with the composition of the army in order to reflect the national unity and moreover to prevent genocide, provides that an ethnic group shall not exceed 50 % in the composition of the defence forces and the security.⁴³ It can still be argued that there is a possibility of having a defence force made of *Hutus* and *Tutsis* only and therefore *Twas* might again be excluded. This provision contradicts article 246 of the Constitution which states that the members of the defence forces and the security forces are subordinate to the Constitution and the law. The fact that the Constitution of Burundi prohibits genocide⁴⁴, and seeing as the members of the defence forces and security forces have to respect by Constitution, there seems to be no need to specify the composition of those institution with reference to ethnic

³⁹ Article 129 of the Constitution of Burundi.

⁴⁰ The Power sharing in Burundi seems to be between *Hutus* and *Tutsis*. Despite the fact that *Twas* were not represented in the Burundi Peace negotiations, they still constitute a part of the Burundi population and therefore there is no reason of excluding them from the cabinet.

⁴¹ Article 164 of the Constitution of Burundi.

⁴² Article 180 of the Constitution of Burundi.

⁴³ Article 257 of the Constitution of Burundi.

⁴⁴ See note 29 above.

representation in accordance with percentage in order to prevent genocide in the future. However, the balance of ethnic groups in the security forces and defence forces can also be understood by the past of Burundi.

The concept of power sharing goes even further by penetrating in the recruitment and composition of the judiciary by stating that the recruitment and composition of the judiciary shall reflect ethnic and regional balance.⁴⁵ Article 209 of the Constitution of Burundi recognises the impartiality and independence of the judiciary by emphasising the judge when exercising his or her function is only bound by the Constitution and the law. It is my view that there is no valid reason to emphasise on the ethnic or regional origin in the recruitment and composition of the judiciary as far as the judiciary must reflect the ethnic balance and on the other hand it must be impartial. As far as a judge is impartial, his or her ethnic, regional origin does not influence a judgment.

2.5 Conclusion

The Constitutions of Rwanda and Burundi both provide for power sharing, they differ in their approach to power sharing. The Constitution of Rwanda focuses on the power sharing between political parties whereas the Constitution of Burundi provides power sharing both for political parties with a specific attention to ethnic groups. As mentioned previously in the introduction of this chapter, the power sharing aims are either to protect the rights of a minority groups, or to allow a grand coalition government in which almost all the political parties participate in order to prevent conflicts which might be caused by the exclusion of minority political parties in the decision making process. The Constitutions of Rwanda and Burundi in their preambles state that power sharing is aimed at the promotion of national unity and reconciliation.

The concept of power sharing can still be a tool for healing and uniting societies that have been divided on ethnic lines but its effectiveness depends on the approach taken by the politicians and therefore it might entrench the ethnic divisions when it advocates for ethnic representation based on a specific quotas and furthermore the recruitment of candidates based on the ethnic origin of candidates might lead to the census of the population to determine an individual's ethnic origin. The approach of power sharing in

⁴⁵ See article 208 of the Constitution of Burundi.

Burundi does not ignore the realities of ethnic conflict, but is an attempt to address the issue by providing for the representation of ethnic minority groups in the decision making.

The concept of power sharing that focuses on the coalition of political parties which prohibits a political party to have more than 50 % of its members in the cabinet is not *per se* the absolute solution since it is difficult to regulate this quota. Indeed, an individual can be appointed a minister without any political party affiliation because the Constitution of Rwanda does not exclude this possibility, and in case the same individual decides later to join a political party which has the majority of the seats in the Parliament and therefore there is possibility to that political party to have more than 50 % of the members in the cabinet because it might not be easier to know if that individual does not make a public statement in joining the political party having the majority in the Chamber of Deputies and the Cabinet. Power sharing between political parties prevents political turmoil when all decisions are taken by consensus in a sense that the major political parties, have been involved in the debate and therefore they will accept the policy of the government. On the other hand, the power sharing between political parties presents a disadvantage because the implementation of a given policy depends more on compromise between political parties than efficacy of a policy. The power sharing arrangement in Burundi is between *Hutus* and *Tutsis* whereas in Rwanda it is between political parties. The approaches of Rwanda and Burundi with regard to power sharing have some advantages and disadvantages, and therefore it is not easy to decide which of the two is more suitable than the other.

Chapter III Constitutionalism

3.1 Introduction

In the previous chapter, I had to analyse the approach taken by the Constitutions of Burundi and Rwanda with regard to the concept of power sharing. The present chapter deals with the concept of constitutionalism. Indeed, this chapter attempts to determine whether Rwanda and Burundi comply with the requirements of constitutionalism in order to find the relevance of the incorporation of the concept of power sharing in the constitution. In fact, the non compliance with the requirements of constitutionalism undermines the effectiveness of power sharing arrangements as provided in the Constitutions of Rwanda and Burundi. A constitution can be defined as the system or body of fundamental rules and principles of a nation, state, or body politic that determines the powers and duties of the government and guarantees certain rights to the people.⁴⁶

3.2 Constitutionalism

Constitutionalism is the doctrine that requires states to be faithful to their constitutions with a condition that the rules provided in the constitutions protect the citizens from arbitrary decisions by powerful people.⁴⁷In addition, de Smith gives a detailed definition of constitutionalism:

“The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bounded by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content- Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.”⁴⁸

Furthermore, Constitutionalism consists of many facets such as the constitutional supremacy, the rule of law and the separation of power.

⁴⁶ J Denvir *Democracy's Constitution: claiming the privileges of American citizenship* (2001)1.

⁴⁷ See W P Shively (note 9 above) 198; see also J De Wall *et al The Bill of rights hand book* (2001)7.

⁴⁸ See S A de Smith *The new Commonwealth and its constitutions* (1964)106.

The constitutional supremacy dictates that the rules of the Constitution are binding on all branches of the government and have priority over any other rules made by the government. This implies that any law or conduct that is not in accordance with the Constitution, either for procedural or substantive reasons, will not therefore have the force of law.⁴⁹

There is a nexus between the constitution and constitutionalism in a way that one cannot talk about constitutionalism without the existence of a constitution whereas the existence of a constitution does not necessarily imply the existence of constitutionalism. The African continent has illustrated the relationship between constitution and constitutionalism. Many post independent African states, if not all of them, did not comply with the requirements of constitutionalism despite the fact that they had adopted written constitutions. States elites used constitution as a political instrument by inserting new devices intended to recentralise power with no respect to the rule of law, the separation of powers.⁵⁰ In fact, African states drafted constitutions whereby the executive powers were not limited and provisions of the constitutions were often violated or amended. Subsequently, in Africa there have been constitutions without constitutionalism. The in-depth analysis of the failure of constitutionalism in Africa requires the study of individual states but this will be beyond the scope of this paper.

The rule of law is one of the facets of constitutionalism. The rule of law requires state institutions to act in accordance with the law. The branches of the state (no less than anyone else in the country) must obey the law and in addition the state cannot exercise power over anyone unless the law permits it to do so.⁵¹ I would acknowledge that rule of law is more complicated than this. In other words, rule of law signifies that no political authority is superior to the law itself. When and where the rule of law obtains, the rights of citizens are not dependent upon the will of rulers; rather, they are established by law and protected by independent courts.⁵²

⁴⁹ *Executive council of the Western Cape Legislature v President of the Republic of South Africa* 1995(4) SA 877 (CC) para 62.

⁵⁰ H W Okoth- Ogendo 'Constitutions without constitutionalism: reflections on the African paradox' in I G Shivji (ed) *State and constitutionalism: an African debate on democracy* (1991)12.

⁵¹ See J De Waal *et al* (note 47 above) 10.

⁵² See R L Sklar On the study of constitutional government in Africa in O Akiba (8ed) *Constitutionalism and society in Africa* (2004)43

The other facet of constitutionalism is the separation of powers. The notion of separation of powers can be understood as the separation of government decision-making into the legislative, executive, and the judicial functions. This is aimed at reinforcing constitutional protection of individual liberties by preventing the concentration of such powers in the hands of a single group of government officials.⁵³ However, the separation of powers is supported by checks and balance. It must be noted that arrangements of checks and balances among the three organs allow an independent judiciary to hear and determine matters involving the interpretation of constitution, a legislature to scrutinise both primary and secondary legislation and also having overseeing the activities of the executive.⁵⁴ However, it must be noted that the oversight of the activities of the executive by the legislature does imply that the President of the Republic is responsible to the legislature in the political sense because political responsibility implies a day to day relationship between the executive and the legislature. Furthermore, the impeachment process enforces juridical compliance with the constitutional letter of the law and is quite different from the exercise of political control over the President's ordinary conduct of his or her office.⁵⁵

The accountability must be supported by the rule of law.⁵⁶ The doctrines of the rule of law and separation of powers are intertwined and the mere mention of one immediately invokes the other but there can still be a separation of powers without necessarily having the rule of law.⁵⁷

In short, Constitutionalism means limited government and the rule of law to prevent the arbitrary, abusive use of power, to protect human rights, to support democratic

⁵³ See O Akiba (ed) "Constitutional government and the future of the constitutionalism in Africa" in *Constitutionalism and society in Africa* (2004)5.

⁵⁴ See Hatchard *et al* (note 6 above) 60.

⁵⁵ See D V Verney "Parliamentary government and presidential government " in A Lijphart (ed) *Parliamentary versus presidential government* (1992)43-44.

⁵⁶ See S J Schnably "Constitutionalism and democratic government in the Inter –American system" in G H Fox & B R Roth (eds) *Democratic governance and international law* (2000)166.

⁵⁷ See G P Tumwine-Mukubwa" Ruled from the grave :challenging antiquated constitutional doctrines and values in Commonwealth Africa" in J Oloka-Onyango(ed) (note 10 above) 295.

procedures in elections and public policy making, and to achieve a community's shared purposes.⁵⁸

3.2.1 Assessment of the compliance of the Constitution of Rwanda with the requirements of constitutionalism.

As previously noted, constitutionalism contains many facets such as the separation of power, the supremacy of the constitution and the rule of law. Assessing the compliance of constitutionalism will require an assessment of the Constitution of Rwanda with regard to the mentioned facets.

3.2.1.1 Separation of powers.

The separation of powers being defined previously, the Constitution of Rwanda explicitly provides for the principle of the separation in the text of the Constitution.⁵⁹ Interestingly, the Constitution of Rwanda goes further by emphasizing that the judiciary is both independent and separate from the executive and the legislature.⁶⁰ As previously noted, the separation of powers is enhanced by the principle of checks and balance, and thus it is important to note that the Constitution of Rwanda provides for checks and balance between the executive, the legislature and the judiciary.⁶¹ The power sharing arrangement does not preclude the Parliament from having an oversight role over the activities of the executive (Government). As previously mentioned, the Parliament of Rwanda is bicameral, made up of the Chamber of Deputies and the Senate. The Government is obliged to provide the Parliament with all necessary explanations on questions put to the Government concerning its management and activities.⁶²

The President of the Republic, after consultation with the Prime Minister, the President of the Senate, the Speaker of the Chamber of Deputies and the President of the Supreme Court may dissolve the Chamber of Deputies. Elections of Deputies shall take place

⁵⁸ See J J Patrick *Teaching about democratic constitutionalism* available at <<http://www.ericdigests.org/1998-1/democratic.htm>> accessed on 22 August 2005.

⁵⁹ See article 60 of the Constitution of Rwanda.

⁶⁰ See article 140 of the Constitution of Rwanda.

⁶¹ See note 57 above.

⁶² See article 134 of the Constitution of Rwanda.

within 90 days after the dissolution.⁶³ By consulting the Speaker of the Chamber of the Deputies, the power sharing arrangement is activated insofar the Speaker of the Chamber of the Deputies is not from the same political party. However, as previously noted, the Constitution of Rwanda does not specifically exclude the possibility of the President of the Senate belonging in the same political party as the President of the Republic. Nevertheless, as far as the Speaker of the Chamber of Deputies is consulted, the power sharing becomes effective. The Constitution of Rwanda complies with the concept of the separation of powers.

3.2.1.2 The rule of law

The Constitution of Rwanda provides for the rule of law by recognising that judicial decisions are binding on all parties concerned ,either public authorities or individuals and the Constitution further states that judicial decisions shall only be challenged through ways and procedures determined by law.⁶⁴ The Constitution of Rwanda seems to comply with the rule of law.

3.2.1.3 The supremacy of the Constitution

The Constitution of Rwanda guarantees the supremacy of the Constitution by clearly indicating that the Constitution as the supreme law of the State and therefore any law contradicting the Constitution is null and void.⁶⁵ The Constitution of Rwanda complies with the supremacy of the Constitution doctrine.

3.2.2 Assessment of the compliance of the Constitution of Burundi with the requirements of constitutionalism

The assessment of the compliance of the Constitution of Burundi with the requirements of constitutionalism will follow the approach made in the case of Rwanda as matter of objective comparison.

⁶³ See article 133 of the Constitution of Rwanda. The President of the Republic even if he or she can dissolve the Chamber of Deputies, it must be noted that this provision of the Constitution does not allow him or her to do so more than once during in the same presidential term.

⁶⁴ See note 58 above.

⁶⁵ See article 200 of the Constitution of Rwanda.

3.2.2.1 Separation of Powers

The Constitution of Burundi provides for the separation of powers in a sense that it distributes the exercise of state power amongst three institutions, namely the executive, the legislature and the judiciary.⁶⁶ In addition, the Constitution of Burundi states that the judiciary is independent from the executive and the legislature and judges when exercising their functions are only bound by the Constitution and the law.⁶⁷ The Constitution of Burundi recognises checks and balance between the executive, legislature and judiciary in a way that the legislature is entitled to pose oral or written questions to any member of the government (executive).⁶⁸ Interestingly, the President of the Republic can be removed from the office by the procedure of impeachment by a majority vote of the two-thirds of the members of the Parliament (National Assembly and the Senate)⁶⁹. As previously noted, the National Assembly of Burundi is made up of 60 % of *Hutus* and 40% of *Tutsis* with respect to Constitution of Burundi in terms of the power sharing and therefore the power sharing becomes effective because the members of the National Assembly vote for or against the impeachment. The Constitution of Burundi complies with the requirement of the separation of powers and provides for checks balance.

3.2.2.2 The rule of law

Unlike the Constitution of Rwanda which clearly provides for the rule of law, the Constitution of Burundi refers to the rule of law implicitly.⁷⁰ Nevertheless, it must be noted that the Constitution of Burundi obliges everyone to respect the law.⁷¹ Therefore, the Constitution of Burundi complies to some extent with the rule of law.

⁶⁶ See article 18 of the Constitution of Burundi.

⁶⁷ See article 209 of the Constitution of Burundi.

⁶⁸ See article 202 of the Constitution of Burundi.

⁶⁹ See article 116 of the Constitution of Burundi.

⁷⁰ Article 18 of the Constitution of Burundi under sub section two stipulates that the Government respects the separation of powers, the supremacy of law, good governance and transparency in the management of public activities. The Constitution of Burundi by respecting the supremacy of the law can be interpreted as the rule of law as far the law is binding to the Government in the broad sense (Executive, legislature and judiciary).

⁷¹ See article 65 of the Constitution of Burundi.

3.2.2.3 The supremacy of the Constitution

The supremacy of the Constitution is guaranteed under the Constitution of Burundi. Indeed, the Constitution of Burundi prohibits any violation of the rights protected under the Constitution by whatever means.⁷² This implies that the supremacy of the Constitution is applicable to all three branches. In addition, the Constitution of Burundi requires all bills before their promulgation to be in conformity with the Constitution.⁷³ The Constitution of Burundi provides for the supremacy of the Constitution.

3.3 Conclusion

The Constitutions of Rwanda and Burundi provide for power sharing. Constitutionalism has many facets amongst the separation of powers, the rule of law, the supremacy of the constitution and the protection of human rights. This chapter did not analyse if the two Constitutions provide for the protection of human rights as far as they recognize in their preamble their adherence to Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Social, Economic and Cultural Rights and the African Charter on Human and Peoples' Rights.

The mere fact of having power sharing in the constitution cannot lead someone to conclude that it leads necessarily to constitutionalism. The power sharing arrangement as provided in the Constitutions of Rwanda and Burundi can be effective only if the two constitutions comply with the doctrine of constitutionalism. Indeed, the Constitution of Rwanda provides for the separation of power with an emphasis on checks and balance, the supremacy of the constitution and the rule of law. Thus, it seems to fulfill the requirements of constitutionalism. The Constitution of Burundi seems to fulfill the requirements of constitutionalism such as the separation of powers, the rule of law, and the supremacy of the constitution. Therefore the entrenchment of constitutionalism in Rwanda and Burundi is likely to make effective the power sharing arrangement only if the constitution is binding to all without exception. The power sharing arrangement is compatible with constitutionalism.

⁷² See article 61 of the Constitution of Burundi.

⁷³ See article 228 and 231 of the Constitution of Burundi.

Chapter IV Democracy

4.1 Introduction

The previous chapters have analysed the approach of power sharing arrangements in the two constitutions and their compliance with constitutionalism. This chapter will therefore not focus in-depth on the concepts of power sharing and constitutionalism. The present chapter undertakes to examine the impact of the power sharing arrangement in achieving democracy in Rwanda and Burundi. Indeed, Rwanda and Burundi in their Constitutions state their adherence to democracy.

4.2 Democracy

Although many scholars have written about and argued about the true nature of democracy, no precise and universally accepted definition has yet emerged. The in-depth analysis of different definitions of democracy is beyond the scope of this study. There exist two main types of democracy; participatory democracy and representative democracy. On the one hand, direct democracy (sometimes called participatory democracy) is based on the direct, unmediated and continuous participation of citizens in the tasks of government. It is a system of popular self-government. This was possible in ancient Athens through a form of government by mass meeting.⁷⁴ Despite the fact that direct democracy equates to some circumstances to participatory democracy, some scholars argue that direct democracy is totally different from participatory democracy and therefore they conclude that there are three main forms of democracy: direct, representative and participatory democracy.⁷⁵ The debate of whether a direct democracy is necessary a participatory democracy or not does not constitute the focus of this paper.

On the other hand, representative democracy is a limited and indirect form of democracy. It is limited in that popular participation in government is infrequent and brief, being restricted to the act of voting every few years. This form of rule is democratic only

⁷⁴ A Heywood *Politics* (2002)70 ; see also L J Strang "The clash of rival and incompatible philosophical traditions within constitutional interpretation: originalism grounded in the central western philosophical tradition " (2005) 28 *Harvard Journal Law and Public Policy* 909.

⁷⁵ See De Wall et al (note 47 above) 18.

insofar as representation establishes a reliable and effective link between the government and the governed. This is sometimes expressed in the notion of an electoral mandate.⁷⁶ As far as participatory democracy in its strict sense as it was in Ancient Athens, is not applicable in Rwanda and Burundi and probably in most states, then I will only focus on representative democracy which implies elections as the legitimacy of the rulers.⁷⁷ The current and common definition of democracy which reflects representative is described as “government of, by and for the people”.⁷⁸

Government by the people means a government ruled by their representatives with a free (party based) mandate or government for the people means a government ruled by politicians responsive to the people interests.⁷⁹ Briefly, democracy is a method by which decision-making is transferred to individuals who have gained power in a competitive struggle for the votes of citizens.⁸⁰ This implies the link between elections and democracy.

An election can be defined as a device for filling an office or post through choices made by the designated body of the people known as the electorate. Participation of the citizens in elections and thereafter collective involvement of the elected officials in the decision-making process are important ingredients for the gradual establishment of democracy.⁸¹ In addition, the Inter-American Commission on Human Rights held that the concept of representative democracy is based on the principle that it is the people who

⁷⁶ See A Heywood (as note 74 above).

⁷⁷ The possibility of having both participatory democracy and representative democracy in one country cannot be ruled out, however participatory democracy as it was in the Ancient Athens excludes the existence of representative democracy; See also M A Hamilton "Republican democracy is not democratic" (2005) 26 *Cardozo Law Review* 2529.

⁷⁸ Abraham Lincoln, the US President, during the American civil war in 1864 described democracy as the government of the people, by the people and for the people.

⁷⁹ H –P Schneider "Democracy, Human rights and economic development :relations and tensions regarding the role of the State" in N Steytler (ed) *Democracy, Human rights and economic development in Southern Africa* (1997)16.

⁸⁰ O Van Cranenburgh " Democratization in Africa : the role of the election observation " in J Abbink and G Hesselink (eds) *Election observation and democratisation in Africa* (2000) 22.

⁸¹ K G Adar" The interface between elections and democracy: Kenya's search for sustainable democratic system 1960-1990s" in J Hyslop (ed) *African democracy in the era of globalization* (1999)341.

are the nominal holders of political sovereignty and that, in the exercise of that sovereignty, elect its representatives so that they can exercise political power.⁸²

In other words, elections are meant to do more than bolster support for the regime. They may also be the means by which leaders and (sometimes) actual policies are chosen by the people. An election must involve a choice between candidates or a choice whether a particular policy is to be followed. If elections are to be used to choose political leaders, there must be some rules translating people's votes into a particular selection of leaders.⁸³

However, once one analyses critically the notion of "representation" then modern democracy ceases to be a form of delegated rule *by* the people and instead becomes a form of rule by professional politicians and government officials *over* the people, in which some of those rulers are periodically changed by the mechanism of elections.⁸⁴ It can also be argued that democracy acknowledges the difference between the people and the ruling elites, and distinguishes between the wish to rule and the will of the electorate as to whether they should do so.⁸⁵ Nevertheless, democracy still presents an advantage on condition that the governmental decisions are responsive to the needs of citizens; is efficient and based on adequate information; is subject to criticism; and is not systematically oppressive of individuals.⁸⁶

As previously noted, the legitimacy of the rulers derives from the consent of the people through elections. It must be noted that elections have to be free and fair. Free and fair elections signify that results reflect the free expression of the will of the people. Thus, those who are elected gain legitimacy. Popular leaders would expect to do well in elections, but when such leaders participate in undemocratic elections and are victorious, they lose legitimacy.⁸⁷ Free and fair elections translate the essence of

⁸² See *Bravo v Mexico*, case 10.956, Report No 14/93, Inter-Am.CHR,OEA/Ser.L/VII at para.269.

⁸³ See W P Shively (note 9 above) 208.

⁸⁴ See P Hirst *Representative democracy and its limits* (1990)28; see also S E Finer "The contemporary context of representation "in V Bogdanor *Representatives of the people? Parliamentarians and constituencies in western democracies* (1995)289.

⁸⁵ As above.

⁸⁶ See note 79 above.

⁸⁷ See L R Corchado 'Complying with International Law: A call for free and fair elections ' (2005) 30 *Brooklyn Journal of International Law* 1029.

representative democracy whereby those who rule not only come from the people, but they represent the people in process of decision-making.⁸⁸

Free and a fair election presupposes the competition between political parties or independent candidates.⁸⁹ With respect to the relevance of political parties in elections, the European Court of Human Rights held that to form political parties seeking elected office for their candidates plays an essential role in ensuring pluralism and the proper functioning of democracy.⁹⁰

Indeed, it can be assumed that elections without parties are likely to reproduce the *status quo*. Multi-party elections, however, provide a mechanism for political mobilization within an institutional framework. The stronger the political parties are involved in the elections, the larger the voting turnout as far as elections are free and fair.⁹¹ If the electorate is unhappy with its government's policies or conduct, it needs an alternative political force which it can vote into power. Credible opposition's choices, however, are not always guaranteed. Democracy cannot be measured by the quantity of competitors alone. The quality of these parties is also important. Above all, they should be able to offer alternative policy and leadership options to the electorate.⁹²

Despite the fact that a multi-party election system presents the above advantages, it must be noted that democracy is dependent upon the consent of people to co-exist. In contrast, if they are so divided along lines of ethnicity, language, religion, historical memory or other sense of identity that they cannot agree to live with each other, the only alternatives are secession, civil war or authoritarian rule. Yet even in less extreme situations, democracy as electoral competition for power will exacerbate divisions as politicians seek to mobilise popular support along those lines that will most readily deliver

⁸⁸ See B de Gaay Fortman "Elections and civil strife: Some implications for international election observation " in J Abbink & G Hesselting (note 73 above) 78.

⁸⁹ Political competition implies different political actors with their agendas.

⁹⁰ *Socialist Party and others v Turkey*, case No 20/1997/804/1007, para.41.

⁹¹ See S P Huntington *Political order in changing societies* (1968)42-43.

⁹² See A Thomson (note 12 above) 223.

them maximum number of votes.⁹³ This presents a danger as far as a competition based on ethno-regional identities is that a victory for one group may be seen as a total defeat for another.⁹⁴ Indeed, the (total) defeat of a given political party in that situation of elections based on ethnic line or region will lead to the exclusion of the supporters of that defeated party from the decision making process within the government, parliament and furthermore the civil, political and socio-economic rights of those people will be at stake. In fact, it will be difficult to a marginalised group to claim its socio-economic rights when it is denied to exercise civil and political rights.

Nevertheless, one cannot dismiss the fact that ethnic, religious, and linguistic differences will transform into a major political problem if they correspond to significant social and economic inequalities. They provide a source of identity and a common bond for the socially and economically deprived groups.⁹⁵ However, it must be noted that an ethnic group cannot properly be said to be collectively in office or in power whatever the level of solidarity. Only ruling elite can be said to be in office or power. If one can resist the temptation of privileging the ethnicity in everything to which it is remotely relevant, it is readily seen that what is important here is the defense of power against threat by those who hold it. Ethnicity is just one possible means among many other for accomplishing this task. In other words, power is all that matters to politicians⁹⁶

The relevance of free and fair elections is that if elections are held in a country whereby there is no respect for basic human rights of its citizens and there is a persecution of both opposition parties and civic society, with inexistence of an independent judiciary, then elections will have no real meaning.⁹⁷ In addition, at the decisive stage of collective decision-making, each citizen must be ensured an equal opportunity to express a choice that will be counted as equal in weight to the choice expressed by any other citizen. In

⁹³ R Southall "Electoral systems and democratization in Africa" in J Daniel *et al* (eds) *Voting for democracy* (1999)21.

⁹⁴ See A Thomson (note 12 above) 227.

⁹⁵ See Z F Arat *Democracy and human rights in developing countries* (1991)60.

⁹⁶ See C Ake (note 13 above) 113.

⁹⁷ J Abbink "Introduction: Rethinking democratization and election observation " in J Abbink & G Hesselning (note 73 above) 10.

determining outcomes at the decisive stage, these choices, and only these choices, must be taken into account.⁹⁸

However, the present chapter does not intend to assess if the Constitutions of Rwanda and Burundi fulfil the requirements for free and fair elections, it rather seeks to assess the compatibility of power sharing arrangement with representative democracy⁹⁹ Thus, I will assess if the Constitutions of Rwanda and Burundi provide for the establishment and protection of political parties and guarantee the outcomes of elections that will achieve representative democracy. I will neither discuss the electoral law of Rwanda and neither of Burundi since the Constitutions of Rwanda and Burundi provide for the supremacy of the Constitution and therefore it is assumed that the electoral law has to comply with the Constitution.¹⁰⁰ However, it must be noted that elections *per se* are not enough to conclude that a given State is democratic. The possibility of elections to be won by racists, dictators, and separatists cannot be dismissed, and in that situation the elected governments will cause miserable conditions for their people. As a matter of illustration, elected governments in Peru, the Palestinian Authority, Ghana, and Venezuela ignore constitutional limits on their powers and in other ways deprive citizens of basic human rights.¹⁰¹ Nevertheless, it is difficult to speak convincingly of democracy without reference to elections.¹⁰²

⁹⁸ See R A Dahl "Democracy and its critics "in P Green (ed) *Key concepts in critical theory democracy* (1983) 58.

⁹⁹ The deep analysis of free and fair elections requires monitoring and observation of elections on the ground. It is a whole process which starts from registration of political parties, independent candidates, voters, civic education, and electoral campaign, voting day and the result without forgetting the analysis of the electoral law.

¹⁰⁰ By providing for the supremacy of the Constitution one might come to the conclusion that the electoral law has to be in line with the Constitution, in case it is in contradiction with the Constitution is unconstitutional and consequently null and void.

¹⁰¹ See F Zakaria *The future of freedom :illiberal democracy at home and abroad* quoted in B Ledewitz "The promise of democracy" ,32 Cap.U.L.Rev.407(2003)

¹⁰² See J K Black "What kind of democracy does the democratic entitlement entail" in G H Fox & B R Roth (note 55 above) 517.

4.2.1 Rwanda

As previously indicated, representative democracy derives from elections within a multi-party system. In order to assess if the Constitution of Rwanda complies with this statement, one has to analyse if the Constitution of Rwanda provides for multiparty system and elections, and if it does so, then one has to find how the Constitution regulates the multiparty system and elections.

4.2.1.1 Multi-party system

The advantages and disadvantages of a multi-party system already being discussed, the Constitution of Rwanda provides for multiparty system. Indeed, the Constitution of Rwanda provides for multi-party system by recognising it.¹⁰³ Regarding the creation of political parties, the Constitution of Rwanda prohibits political parties from being based on ethnic affiliation, religion, sex or on regional ground.¹⁰⁴ In addition, political parties are compelled by the Constitution to reflect national unity in their leadership or executive committee.¹⁰⁵ By national unity, one refers to the ethnic groups of Rwanda which are *Hutus*, *Tutsis* and *Twas*. There is no indication of the way these ethnic groups are proportionally represented in political parties.

However, multi-party system in Rwanda presents a special feature. The Constitution of Rwanda provides for a consultative forum whereby officially recognised political parties discuss on national policy; and serves to mediate but with the approval of a political party facing internal conflict and also the forum can mediate in case of conflicts arising between political parties.¹⁰⁶ Despite the fact that the forum reflects the power sharing arrangement by stating that decisions are taken by consensus, however, its functions are debatable with regards to democracy.

Indeed, it is my contention that the mandate of mediating in case of internal conflict within a political party can constitute an interference by other political parties and undermines the independence of that political party. In addition, I will argue that it is the

¹⁰³ See article 52 of the Constitution of Rwanda.

¹⁰⁴ See article 54 of the Constitution of Rwanda.

¹⁰⁵ As above.

¹⁰⁶ See article 56 of the Constitution of Rwanda.

elected leaders who have the mandate of conducting national policy and not other political parties who have not been elected. In as much as the Parliament represents the people and has the mandate of overseeing the activities of the Executive, in case the national policy violates the Constitution, there are mechanisms which the Parliament can use such as by instituting a vote of confidence.¹⁰⁷ Furthermore, the Constitution allows all political parties to participate in the forum provided they are officially recognised without specifying if they have to be represented in the Parliament and this gives at the same time to political parties without the mandate from the electorate to conduct or influence on the national policy.

In short, the Constitution of Rwanda provides for multi-party system but the role of the forum undermines democracy because it allows all officially recognised political parties even those without any mandate from the people to decide on national policy.

4.2.1.2. Elections

As previously discussed on the relevance of elections with regard to democracy, the Constitution of Rwanda guarantees the right to vote and to be elected.¹⁰⁸ This implies that the legitimacy of the leaders shall derive from the consent of the people through elections. However, the Senate does not adhere to these requirements of legitimacy. Indeed, four of the 26 members of the Senate are designated by the forum of political parties.¹⁰⁹ Although this provision complies with the concept of power sharing through consensus, however it does not comply with the requirement of representative democracy. As previously noted, the basic requirement of representative democracy is that legitimacy must derive from the consent of the people through elections.

With respect to the concept of national unity, it must be noted that the Constitution requires political parties in compiling the list of their candidates to reflect national unity.¹¹⁰ Implicitly, this means that lists should contain *Hutus*, *Tutsis* and *Twas*. With regard to the social context of Rwanda, this requirement is acceptable in order to promote national

¹⁰⁷ See U Liebert "Parliament as a central site in democratic consolidation: a preliminary exploration" in U Liebert & M Cotta (eds) *Parliament and democratic consolidation in Southern Europe* (1990)16.

¹⁰⁸ See article 2 and article 8 of the Constitution of Rwanda.

¹⁰⁹ See article 82 of the Constitution of Rwanda.

¹¹⁰ See article 77 of the Constitution of Rwanda.

unity because without this requirement there is possibility of having elections based on ethnic lines, however it must be noted that the implementation of this requirement is difficult.¹¹¹ Furthermore, the Constitution of Rwanda provides for affirmative action by stating that the President of the Republic the power to appoint eight senators from the historically marginalised group.¹¹² Surprisingly, the Constitution of Rwanda does not specifically define are marginalised groups and it is my contention that the Constitution gives discretionary power to the Executive without considering its consequences.¹¹³

In short, the Constitution of Rwanda provides for elections of leaders but still there are some difficulties with respect to organisation of political parties and also some members of the Senate are not elected, they are just appointed by the President of the Republic and the forum of political parties.¹¹⁴ The appointment of almost the half of the Senate does not comply with the requirement of representative democracy which dictates that the legitimacy of leaders derives only from elections and not appointment.

¹¹¹ I do not deny the fact that it is possible to identify a political party that does not fulfill this requirement, however the question is by presenting the list of candidates to the National Electoral Commission how does the Commission disqualify a political party if the political party puts for example in the list of 30 candidates whereby the first 20 candidates are from the same ethnic group and then puts the others from the different ethnic group on the list after the 20? In addition, even by giving the photographs of the candidates, it can still be difficult to recognize someone's ethnic group affiliation due to the fact of intermarriage between ethnic groups. Furthermore, two questions can be raised such as how are political parties' activities monitored and who does the monitoring of political parties without interfering on political parties internal activities or organisation? These two questions remain valid even in post elections period.

¹¹² See note 106 above.

¹¹³ Indeed, when one analyses in depth the meaning of marginalised group it can be understood as ethnic, gender, or even religious ground. In the context of the Constitution of Rwanda, the question of gender is resolved as far the same article (herein 82) provides for 30 % of seats to be allocated to women. The marginalised group can either be understood in terms of inter- ethnic relationship or on the religious aspect. If it is based on ethnic consideration, one cannot deny the fact that *Tutsis* have been historically marginalised between 1959 and 1994 but also *Twas* have been marginalised. Then the difficult question arises; from which group does the President of the Republic appoints the 8 senators and also how do they represent their kin to the Senate if they are not elected? In terms of religion, Rwanda is a tolerant and secular State therefore one cannot say that there is a discrimination based on religious ground in Rwanda.

¹¹⁴ The Senate of Rwanda is made of 26 members with eight of the Senators appointed by the President of the Republic and four appointed by the forum of political parties. This leads to the conclusion that 12 of the 26 senators are appointed while the remaining 14 are elected.

4.2.2 Burundi

The approach taken in assessing the Constitution of Rwanda with regard to the concept of representative democracy is applicable to the Constitution of Burundi.

4.2.2.1 Multi-party system

Having previously discussed the advantages and disadvantages of the multi-party system, this section does not deal with it again. The Constitution of Burundi guarantees a multi-party system with the condition that political parties must reflect national unity.¹¹⁵ In short, the Constitution of Burundi provides for multi-party system of government.

4.2.2.2 Elections

There is no need to discuss the relationship between elections and democracy as far as it has been discussed previously, the only focus is to assess if the Constitution of Burundi provides for elections and how it is regulated. The Constitution of Burundi provides for multi-party elections.¹¹⁶ Despite the fact that the Constitution of Burundi provides for multi-party elections, however it must be noted that it provides that a Presidential candidate has to be supported by 200 people who have to reflect diversity of ethnic groups and gender.¹¹⁷ One can ask if 200 votes can really make a difference in the country. Thus, it is my contention that this constitutional requirement is not democratic because not only it may encourage corruption but it may limit an individual's right of being elected.¹¹⁸

In addition, the Constitution of Burundi focusing on the ethnic balance, provides for co-optation of legislators in case the quota of 60% for *Hutus* and 40 % of *Tutsis* is not

¹¹⁵ See article 75- 78 of the Constitution of Burundi.

¹¹⁶ See article 86 of the Constitution of Burundi.

¹¹⁷ See article 99 of the Constitution of Burundi.

¹¹⁸ This requirement seems to be irrelevant insofar any Presidential candidate can still fulfill this requirement either through manipulation or corruption. The mere fact of having a support from *Hutus* and *Tutsis* is not per se a guarantee that if elected that the individual will promote democracy and national unity. Despite the fact that a society can be divided on ethnic lines, surprisingly human beings can still share some qualities and weaknesses and therefore corruption cannot be attributed to a specific ethnic group, in each ethnic group it is possible to corrupt some individuals in order to get their support.

reached after legislative elections.¹¹⁹ The co-optation in itself violates the democratic principle which dictates that outcome of elections should reflect the will of the electorate. Furthermore, the Constitution provides for three seats for *Twas* in the National Assembly.¹²⁰ Although this provision advocates for affirmative action for *Twas*, I would argue that this is not democratic because the Constitution does not clearly state how the three seats are allocated to *Twas*. A question that remains unanswered is who elects the people to represent the *Twas* at the National Assembly. Also, the problem of illegitimate representation of *Twas* is also found in the composition of the Senate whereby the Constitution provides for three seats for the *Twa* ethnic group.¹²¹

In short, the Constitution of Burundi provides for elections but the co-optation of some individuals in order to assure power sharing does not reflect representative democracy which requires elections as the only source of legitimacy of leaders.

4.3 Conclusion

The Constitutions of Rwanda and Burundi provide for multi-party and elections. At first glance one might be tempted to conclude that they are conducive to achieve representative democracy. However, their in-depth analysis shows a different outcome. The Constitution of Rwanda provides for multi-party system but it has some flaws insofar the forum seems to be less democratic. In addition, the requirement of political parties to reflect national unity is neither practically easy to achieve nor to assess without interference into political party's internal functioning. Furthermore, the Constitution of Rwanda provides for the appointment of eight individuals from the historically marginalised group to the Senate by the President of the Republic but without explaining in details the process of their appointment and therefore one can ask if they represent which marginalised groups and moreover how they represent the marginalised group without being elected by the marginalised group.

The Constitution of Burundi provides for a multi-party system but when it comes to elections, it does not take into consideration of the outcome of the elections as far as

¹¹⁹ See article of 164 of the Constitution of Burundi.

¹²⁰ See note 117 above.

¹²¹ See article 180 of the Constitution of Burundi.

there is a possibility of co-optation in order to secure the ethnic balance provided under the power sharing arrangement. Furthermore, the Constitution of Burundi attempts to promote affirmative action of *Twas* in both the Senate and the National Assembly by indicating that *Twas* are co-opted according to the electoral law. Similarly, the legitimacy of the *Twas* who are in both the Senate and National Assembly can be a subject of contention because co-optation does not reflect the electorate will and therefore it is not legitimate.

Both the Constitutions of Rwanda and Burundi provide for democracy to some extent but the cooptation of some members in the Parliament does not reflect representative democracy. Nevertheless, as previously pointed out, the Constitutions of Rwanda and Burundi differ in their approach on power sharing and therefore the outcome of their approach differs in democracy. Thus, the Constitution of Rwanda is likely to achieve representative democracy based power sharing with emphasis on consensus between political parties whereas the Constitution of Burundi will achieve representative democracy based on power sharing resulting on the inclusion of ethnic groups.

Chapter V General Conclusion and Recommendations

5.1 General Conclusion

The African continent is embarking on the democratisation process which is a long journey with many obstacles to be overcome. Rwanda and Burundi like other African countries, are involved in the process but they both take into consideration their historical and political background and therefore they have embarked on the process with many precautions. In other words, the two countries have taken a unique approach to democracy by taking into consideration the causes of their ethnic conflict in which many innocent civilians have lost their lives. Thus, the concept of power sharing has been incorporated as in the Constitutions of Rwanda and Burundi with the same aim of preventing ethnic conflict but with a different approach. This paper is aimed at answering to the question: how effective is power sharing in helping to achieve the goal of establishing a functioning democracy? This question constituted to some extent the cornerstone of chapter one.

In chapter two, the paper analysed the concept of power sharing arrangement. After analysing the concept of power sharing arrangements, it was possible to analyse in-depth how respectively the Constitutions of Rwanda and Burundi have approached this concept. It has been found that the Constitution of Rwanda adopted an approach on power sharing arrangement based on consensus between political parties in the decision making.

Despite the fact that this approach has some advantages because almost all political parties were involved in the decision making process through consensus, it has been contended that the power sharing based on consensus could lead a situation where it could be difficult to implement the policy promised during the campaign. Indeed the requirement of consensus with other political parties in decision making policies which also do not necessarily share the same approach with the elected rulers affect the implementation of the policy on which the rulers were elected for. As far as political parties will be bound by the Constitution to reflect national unity in their leadership, and if this becomes a reality, then the requirement of power sharing arrangement in the composition of the cabinet, such as the prohibition to a political party to have

more than 50 % of the members in the cabinet no matter the numbers of seats it has in the National Assembly, will no longer relevant.

It has been found that the Constitution of Burundi has adopted the approach of power sharing based on ethnicity basis with an emphasis on ethnic representation through quotas. The approach of Burundi might seem to address the problem of ethnic conflict; however this approach presents some problems as it might strengthen ethnic division and furthermore it seems to only deal with the problem of *Hutus* and *Tutsis* without taking into consideration the *Twa* who are also of an ethnic group in Burundi. In addition, the approach of power sharing in Burundi is not consistent with ethnic representation through quota because in terms of representation in the cabinet (Executive) it provides for the quota of 40 % for *Tutsis* and 60% for *Hutus* whereas the quota relating to the composition in the security forces (army, police, intelligence) is made of 50 % for *Tutsis* and 50 % for *Hutus*. Interestingly, it has been found that the Constitution of Burundi provides three seats for *Twas* in the National Assembly while it does not provide for their inclusion neither in the cabinet (executive) nor in the security forces. However, I would acknowledge that they might be other reasons for having inconsistency in the ethnic representation through quotas which probably are only known by individuals who were involved in the peace process in the conflict of Burundi and the draft of the Constitution of Burundi.

In chapter three, I discussed the notion of constitutionalism. This paper found that the Constitutions of Rwanda and Burundi complied with the notion of constitutionalism. Power sharing arrangements can go hand in hand with the notion of constitutionalism. In addition, the inclusion of a power sharing arrangement in a constitution can be enhanced by constitutionalism as far as the supremacy of the constitution, which is one of the facets of constitutionalism, is guaranteed.

In chapter four, I discussed the impact of the inclusion of a power sharing arrangement in the Constitutions of Rwanda and Burundi in achieving democracy. I came to the conclusion that the Constitutions of Rwanda and Burundi provide for a representative democracy but the power sharing had an impact on achieving democracy. On the one hand, with respect to the background of Rwanda and Burundi power sharing arrangements can be a tool to prevent ethnic conflict resulting from exclusion of minority groups. On the

other hand, the provisions of power sharing undermine representative democracy. Power sharing arrangements as provided for in the Constitution of Rwanda allows the forum of political parties to appoint four individuals to the Senate and because of the influential role of the Senate this detracts from the democratic nature of the Senate because the senators appointed by the Forum of political parties do not have the mandate of the people. This provision therefore does not seem to be within the spirit of representative democracy. In addition, the Constitution of Rwanda provides for the appointment of eight Senators by the President of the Republic. In Burundi, the Constitution provides for three seats in the Senate and the National Assembly each for *Twas* without specifying how they are to be elected or appointed. In addition, the Constitution of Burundi requires any presidential candidate to get a prior signature of approval from 100 *Hutus* and 100 *Tutsis*. This requirement in my view only limits an individual's rights to participate in elections and therefore it undermines democracy whereby individuals not only have the right to elect but also the right to be elected.

In Burundi, the Constitution provides three seats for *Twas* in the National Assembly and three seats in the Senate, but this is done through co-optation and it is both unclear and it undermines representative democracy because there is no guarantee that the Senators or Deputies from the *Twas* are representing the interests of their kin or political parties. In addition, the requirement that presidential candidate must have a prior signature of 100 *Hutus* and 100 *Tutsis*; nothing such is a guarantee of having a potential good president.

5.2 Recommendations

The present paper does not ignore the attempts of the Constitutions of Rwanda and Burundi to promote democracy and avoid ethnic conflict through power sharing arrangements. In addition, one should always bear in mind all the negotiations and compromises for the specific clauses of a constitution that take place within the social context in order to make any recommendations.¹²²

However, the power sharing arrangements as provided for in the two constitutions undermine representative democracy. With respect to the

¹²² See D Easton *The analysis of political structure* (1990)224.

Constitution of Rwanda, an amendment is suggested in term of membership of the Senate. It is in the interest of democracy to elect all Senators rather than appoint some of them because the legitimacy of all the senators as legislators should derive from the consent of the people through a free vote. Secondly, with time, the mandate of conducting national policy should only be vested in people who have been elected and not the forum because the vote of the citizens for a particular political party is a result of confidence the citizens have on the agenda of that political party during the electoral campaign. Lastly, it is suggested that in the future that as far as a political party is multiethnic, once it wins the elections to not to be limited for a coalition with other political parties of different policies because this forced coalition makes difficult the implementation of the policy on which ground a political party won the elections.

With respect for Burundi, the Constitution of Burundi, the power sharing arrangements based on ethnic balance fails to take into consideration the *Twas* in the composition of the Executive or in the army. It is suggested that the power sharing which only advocates for the balance of power between *Hutus* elites and *Tutsi* elites, does not promote national unity. Therefore, political parties should be compelled to reflect national unity by ensuring that all political parties have the three ethnic groups not only *Hutus* and *Tutsis* but *Twas* as well. Lastly, it is suggested that if the power sharing based on ethnic balance is permanent, then the ethnic cleavage will remain and therefore ethnicity could be used by politicians either to incite violence and hatred, therefore it would be useful for the nation of Burundi to transcend the ethnic difference and cleavage to go forward on the basis of national identity rather than ethnic structures. This can be possible through civic education aimed at promoting national reconciliation and national unity.

I would conclude quoting one scholar who argued:" in a truly democratic state where there is the rule of law, equal opportunity, accountability of power, a leadership which must be caring because its power derives from the consent of the governed and a firm commitment to sharing the burdens and the rewards of citizenship with equity, the ethnic group would be far less attractive." ¹²³

¹²³ See C Ake (note 13above) 115.

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