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

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INTRODUCTION

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

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

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

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

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1 Report of the General Secretary on the Rule of Law and transitional justice for societies that are prone or emerging from conflict (s/2004/616), paragraph. 35).
2 Rule of Law is a concept which is to be hounoured. According to United Nations Organization, Rule of Law « designates governance principle virtue from which the entire individuals and public entities, including the State herself, have to observe laws that have been publicly promulgated and should be applied in an equal manner to all. The law is equally bound to be administered in an independent manner and should be compatible with international rules and standards in the area of human rights. It involves, among others, proper measures that will ensure respect of the principles of Rule of Law, equality before the Law, responsibility in regard to the law, separation of powers, participation in decision making, judicial security, refusal to arbitrary and transparency of the legislative procedures and processes» (cf. Report of the of the General Secretary on the Rule of Law and Transitional Justice in societies that are prone and emerging from conflict (s/2004/616).paragraph.6), traditionally considered as an reserve for those endowed with legal knowledge, the lawyers, the concept has not only left the arid ground of the legal dogmatic (Chevallier, J., Rule of Law, Montchrestien, 4th edition, 2003, page.9) but also has attained an international dimension (Voir notably Société Française for International Law, the Rule of Law in Internal Law, deed of the Bruxells colloqium of 5, 6 and 7 june 2008).
3 Article 60 of law N° 1/010 of 18th March 2005 pertaining to the promulgation of the constitution of the Republic of Burundi, B.O.B., n° 3 ter/2005.
4 Avocats Sans Frontières (Lawyers without boundaries), Genocide crimes and crimes against humanity before the ordinary jurisdiction of Rwanda, Vade mecum, Kigali et Bruxelles, 2004, p.24.
7 Szepalki- Nagy, « protection of independance : statutory and material protections », in AHUCAF, the independence of the justice, decree of the 2nd congres of the association of the high jurisdiction of Appeal for countries sharing the usage of French, Dakars, Dakar – 7 and 8 November 2007, p.115.
8 Arusha agreement for peace and reconciliation in Burundi, protocol II: Democracy and good governance, chapter 1, article 2, point 8.
and maintenance of peace and security.\(^9\)

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

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

It is however necessary to make an exception of the Constitutional Court which appears as a jurisdictional institution outside the judicial orders which would be the link between the judiciary and the politics.\(^10\)

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

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

At once, none of them is agreeing on the troubling reality; that of minimizing or controlling executive powers on the judicial affairs.\(^11\) Lack of effective independence for the judge is one of the causes for the dysfunction of the jurisdictions.\(^12\)

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

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\(^9\) Arusha agreement for peace and reconciliation in Burundi, protocol II: Democracy and good governance, chapter 1, article 1, point 6, \textit{lit.d}.

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


\(^12\) OAG, \textit{Critical analysis of the functionality of the proximity justice in Burundi, final report}, Bujumbura, March 2007, p.25. It seems that this conclusion was drawn on the subject of the basis jurisdiction for the reason that the study was interested on proximity justice.. Nevertheless this still remain true, \textit{mutatis mutandis}, for the higher jurisdiction.
The two main fundamental characteristic principles of the rule of law: separation of powers and the independence of the judiciary are proclaimed in the Burundian Constitution\(^1\) and in other legal instruments\(^2\). But like it was said by Charles de Gaulle, what is written, was on the parchment and it is only worth once put into application\(^3\). This is the reason why it is necessary to analyze the status of independence of the Burundian judiciary vis-à-vis the executive and equally to envisage the perspectives with the view of reducing, at the opportune time, the difference between the proclaimed principles and the reality on the ground.

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

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

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

Separation of powers is one of the fundamental principles of the modern constitutionalism and Rule of Law\(^4\). The principle of separation of powers devotes the theory triumph of Charles de Gaulle and Montesquieu, who already in 1748 (in his writing, the spirit of Laws), affirmed:

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

For this philosophy

«There is no freedom, if the judicial power is not separated from the legislative and executive powers. If it joined to the legislative power, the power on live and freedom of citizens will be arbitrary; since the judge will be the law maker. If it is enjoined to the executive power, the judge will have power of an oppressor\(^5\) ».

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

« If (...) the administration assumes the roles of the justice, it will be exposed to subordinate private rights to public interest, misjudge with the view of pleasing the state, property, freedom and this will arbitrate the place of law.


The day when the justice will be in the hands of administration, there will be neither guarantee nor security for citizens to have justice»\(^{18}\).

This is to mean that concentration of powers in the hand of one person will translate to tyranny\(^{19}\).

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

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

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

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

« The Burundian judicial system is characterized by three flaws: a serious lack of training for the staff, total lack of equipment and particularly lack of an independent judicial machine». Peace and Justice Commission of the Belgium Francophone\(^{20}\)

« The independence of the magistracy is only written in laws. In practice, the Magistracy is under the control of the executive and interferences of the latter in the judiciary are monetary. The history of the magistracy has been marked by revocation of decisions that have not pleased the executive» Observatory of the Government action\(^{21}\).

The independence of the judiciary is a principle strongly proclaimed in Burundi but it remains precarious\(^{22}\) just like many several regions in the world. In other words, the principle stated in almost all constitutions or fundamental laws, lacks practical translation. Beyond these good


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


\(^{21}\) Analyse critique du fonctionnement des juridictions supérieures du Burundi, Bujumbura, décembre 2007, p.8.

\(^{22}\) Commission des droits de l'homme, Résolution 2004/33 intitulée Indépendance et impartialité du pouvoir judiciaire, des jurés et des assesseurs et indépendance des avocats, point 2.
legal and regulatory predictions on the independence of the judiciary, the reality has not seen the light of the day. Exception is made to executive authorities and to the least extent of policies that are close to the coalition of parties present in the government. Citizens, human rights activists, civil society, political opposition, lawyers and law experts are of the view the Burundian magistracy is not independent from other powers and in particular that of the executive.

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

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

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

III. Imbalanced separation of powers in favour of the executive

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

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

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

But in practice, the judicial power is dependent on executive power which often influences judicial decisions and interferes with judicial matters. According to the report of the evaluation

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26 Accord d’Arusha pour la paix et la réconciliation au Burundi, le 28 août 2000, Protocole II, Chapitre 1, article 9.2.
mission concerning the creation of a judicial survey commission for Burundi:

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

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

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

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

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

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

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

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

The conditions for nomination of magistrates do not naturally guarantee their independence.

31 SABIMBONA, S., La justice au service de la paix, inédit, s. d, p. 5.
Recruitment criteria remain arbitrary in practice. Whilst the persons selected to fill in the magistracy positions should be selected based on the precise objective criteria considerably taking into account integrity, competence; in addition, it should include academic and sufficient legal qualifications\(^{32}\); a similar selection method of magistrates is aimed at reducing the risk of abusive\(^{33}\) appointments, recruitment are carried out in an opaque\(^{34}\) manner. The ones who are recruited are not the best in terms of education, academic files and experience in relation to their previous professional activities.

While the law stipulates appointment through the basis of competitiveness of the candidates\(^{35}\), the judges are not appointed through this procedure and the Minister for Justice Proceeds with the appointments without even consulting the Supreme Council of the Judiciary\(^{36}\).

An opaque appointment system of judges can affect the independence of the judge who will fill indebted to the appointing authority. This will make the judge to make decisions are inclining to the appointing authority so as to please then and eventually get promotion\(^{37}\).

The promotion of judges is not shielded from critics. Promotion of judges should be founded on objective factors notably, their competence, integrity and their experience\(^{38}\). This is not what happens in practice.

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

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

Despite the fact that the constitution provides for a Judicial Supreme Council\(^{40}\), which assists the President of the Republic so as to guarantee independence of the judiciary, the council is

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

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

V. Absence of guarantees against abusive sanctions of the executive

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

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

Security of tenure is one of the most important components of the independence of the judiciary. It puts the executive in a difficult position to delay the independence of the judicial system by undeserved disgrace. By virtue of this principle, a judge can only be removed for valid reason, which must be linked to his capacity to exercise his judicial functions. Once a judge is appointed, he can only be dismissed, suspended or transferred in accordance with

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45 Nous soulignons.
the specified conditions of the law and not to the discretion of the executive power\textsuperscript{46}.

The principle of security of tenure of a judge is unknown or rather misunderstood in some of its aspects in the practical reality in Burundi. Certainly, in terms of guarantee to their careers and the independence of the magistracy, the judicial statutes of 29th February 2000 proclaim that the bench is appointed for life\textsuperscript{47}. In the same line of thought, but pertaining to other judges, article 212 of the Burundian Constitution of 2005 states that «a judge can only be removed due to professional error or incompetence and only on recommendation by the Supreme Council of the Magistracy». However, the daily reality shows that this guarantee has not been adhered to. The other factor is that this aspect is not sufficient on its own to guarantee judicial independence. And in these conditions just like it was clearly said by Charles de Gaulle, «what is written, was on the parchment and it is only worth once put in application »\textsuperscript{48}.

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

For instance, judges have been transferred for having made rulings that lead to temporary release\textsuperscript{49} or acquittal\textsuperscript{50} to characters opposing the government. Between December 2009 and June 2010, within a period of seven months, another judge was transferred three times from Kayanza to Muyinga through Kirundo and Bubanza\textsuperscript{51}.

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

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

Whilst the judge can only be suspended or dismissed due to ineptness of carrying out his duties, incapacity or misconduct\textsuperscript{52}, the reality is different in Burundi. Thus for example, in 1988, the president and two advisors of the Supreme Council of Burundi were dismissed from office for having made a judgment that acquitted a former minister belonging to the overthrown

government. In 1995, on the eve of a judgment pertaining to the amendment of article 85 of the Constitution of the 13th March 1992 which had permitted election of President Cyprien Ntaryamira by the National Assembly was revoked by the Constitutional Court. The government was suspecting that a judgment was to be pronounced invalidating the election of Cyprien Ntaryamira as President of the Republic. Finally, three judges were suspended from their duties for a period of two months for the reasons that they had:

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

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

If the laws in force claim that judges are appointed for life, they do not exclude at the same time, the possibility of dismissal as a disciplinary sanction or sanction due to incompetence.

Certainly, dismissal of a magistrate due to professional error or incompetence only happens on recommendation by the Judicial Supreme Council, which in its current composition, is chaired by the President of the Republic and assisted by the Minister for Justice, is dominated by the executive.

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

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

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

53 Décret N°100/127 du 4 avril 1988, Voir aussi NINDORERA, E., Pas de réconciliation véritable sans justice, inédit, Bujumbura, mars 2006, p.18, note de bas de page n° 5.
56 Art. 212 de la constitution burundaise de 2005.
To be able to assume efficiently this role, the Judicial Supreme Council must itself be independent, in particular from the executive power. This does not seem to be the current case.

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

The composition of the Judicial Supreme Council is characterized by State’s domination. Besides the President of the Republic and Minister for Justice as Chairman and vice-Chairman respectively, the council is comprised of fifteen members distributed as follows: five members appointed by the Government, three judges of the Supreme Court, two magistrates from general public prosecutor’s office of the Republic, two judges from the resident tribunals and three members from the private practice. A total of seventeen members out of which we find only seven judges being chosen by their colleagues. Other two members are eminent members of the executive, the President of the Republic and the Minister Justice. The rest of the members, eight in number, are appointed by the Minister for Justice.

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

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

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

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

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61 Protocole I, art. 6 et 7 (par. 18) et Protocole II, art. 17.
Judicial Supreme Council which has been demonstrated by strong domination by the executive.

At the end of the said article:

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

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

VII. Other related provisions on constitutionality

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

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

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

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

Article 397 of the law n° 1/010 of 13 May 2004 pertaining to the Civil Procedural Code, is

another example of provisions of which the constitution is subject to caution. The following is what emanates from this article:

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

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

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

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

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

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

63 C’est nous qui soulignons.
64 Cf. chapeau des articles 43 et 44 de la loi n°1/07 du 25 février 2005 régissant la Cour suprême, B.O.B., N° 3 quater/2005
According to government decree n°1/17 of 17 June 1988: « (...) the income submitted by lower Courts is transferred in totality to the district»\(^{67}\). In practice, the districts/ Administrative towns only retrocedes very partially and promptly these income.

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

This dependence is coupled with interference from the district administration in the functioning of the basic justice to a point that the resident tribunals are reduced to simple district institutions of solving disputes\(^{68}\).

IX. A fear that turns into a resignation

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

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

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

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

\(^{67}\) Art.1\(^{e}\) du décret-loi n°1/17 du 17 juin 1988.


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

On the contrary, both the law and the judicial practice converge in vesting this prerogative to the jurisdictions. The presidents of the jurisdictions are therefore responsible for the efficiency of the service\textsuperscript{71}. To this effect, they designate the judges who are supposed to be on the bench. The Minister of justice can only receive copies of the reports on the situation prevailing in the jurisdictions from the people responsible for the latter\textsuperscript{72}.

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

X. An Oath of Allegiance

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

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

\begin{quote}
« I pledge loyalty to the President of the Republic and obedience to the Constitution and Laws of Burundi \textsuperscript{74} »
\end{quote}

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

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

\begin{quote}
«I pledge to respect the Constitution and laws of the Republic, to behave with integrity, dignity, loyalty and to be respectful of the laws of all the parties and of
\end{quote}

\textsuperscript{71} Article 15 of the law n° 1/01 of 23 February 2000 on the reform of the statute of the magistrates, B.O.B., N° 2/2000
\textsuperscript{72} Art. 49 and 56 of the Ministerial Order n° 550/101/90 of 10 March 1990 on the internal regulation for the jurisdictions of Burundi, B.O.B., N° 5/90.
\textsuperscript{73} Law of 26 July 1962 on the code of the organization and judicial jurisdiction, as modified respectively by the decree - law n°001/14 of 10 March 1966, the Decree-Law n°1/122 of 8 December 1967 and the Decree-Law n° 1/162 of 31 May 1968, art.80. The Oath wording results from the Decree - law n°1/4 of 19 December 1966
\textsuperscript{74} Art.164 of the law n° 1/004 of 14 January 1987 on the reform of the code of the organization and judicial jurisdiction B.O.B., N° 4/87.
Similarly, the members of the Constitutional Court would take the following oath before the President of the Republic:

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

Conclusion

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

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

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

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

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

76 Art. 4 of the law N° 1/018 of 19 December 2002 on the organization and operations of the Constitutional Court as well as the applicable procedure before it, B.O.B., N°12 bis/2002.
independence after proclaiming its necessity»\textsuperscript{77}.

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

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

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


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