CONSENSUS APPROACH IN THE CONSTITUTION OF 18TH MARCH 2005 AND ITS IMPLICATIONS ON THE BURUNDIAN POLITICAL REGIME

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Introduction

Burundi has gone through a cycle of political violence since its independence in 1962. The most emblematic dates of this cycle of violence are the years 1965, 1972, 1988 and 1993. The explanation that has often been given to that is that the country was trapped by quasi-atavistic ethnic antagonisms\(^1\), a struggle for the rights and democracy, a democracy that has often been mistaken for the power of the demographic majority\(^2\). This goes to show why all this violence has always taken the shape of inter-ethnic conflicts. The fundamental problem was actually always political (struggle for the control of political power). As Julien NIMUBONA so rightly puts it, “the recourse to ethnicity concealed the reality of a power the objective of which was to reinforce the client-oriented approaches and prevent the periphery and the non governmental elites from participating in the management of the nation and most of all to deny them the use of the economic resources thereto related”\(^3\).

To put an end to these cyclic crises, Burundian politicians entered into peace negotiations in 1998 under the patronage of Julius Nyerere, the former Tanzanian President and under the leadership of Nelson Mandela, the former South African President, who took over after the passing of President Nyerere. A Peace Agreement entitled “The Arusha Agreement for Peace and Reconciliation in Burundi” was reached on 28\(^{th}\) August 2000”. In this agreement, the negotiating parties agreed about the genesis and nature of the Burundian conflict. With regard to the nature of the conflict, the negotiating parties acknowledged that it is:

a) a fundamentally political conflict with extremely deep ethnic dimensions.

b) a conflict resulting from a struggle of politicians to climb to power and /or to cling to it. (Article 4)\(^4\).

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\(^3\) NIMUBONA.J. idem, p.96.

Considering the foregoing, a question arises as to what the solutions that have been proposed to come out of these crises are.

As it has been acknowledged that the Burundian conflict resulted from tug-of-war between Hutus and Tutsis for the conquest of power, it is quite natural that political power sharing between the different ethnic components be the most preferable solution. The source of inspiration was the consensus theory generally referred to as the theory of power sharing.

The aim of this work is to show the extent to which the Burundian constitution of 18th March 2005 has incorporated some consensus arrangements in the sharing of power.

Moreover, given that the institutions that resulted from this constitution have gone through serious crises and problems during the 2005-2010 legislatures, it would be interesting to know whether these are closely related to those arrangements of power sharing in Burundi.

We will begin with the assumptions that some pillars of the consensus approach, such as the grand coalition as well as the right of veto, would be at the cause of the political instability that Burundi experienced during the 2005-2010 legislature.

This work cannot yet draw ultimate conclusions on the current state of this system in Burundi. We think that the 5 year period dedicated to it is not conducive to such conclusions. However, we will demonstrate that the system experienced power sharing-related institutional malfunctions during that period.

I. The notion of the consensus theory

It is not our intention to go into details on consociativism⁵. We shall only try to underline its characteristics as have been developed by Arend LIJPHART⁶, who is considered to be the actual father of consensus.

He does not accept the 'traditional' belief according to which it is difficult to establish and

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⁶ Né le 17 août 1936 à Apeldoorn aux Pays Bas, Arend Lijphart est un politiste spécialiste des systèmes de vote, des institutions démocratiques et de l’ethnicité considérés selon une approche comparatiste. Il est connu pour avoir travaillé sur le consociationalisme et donc sur la façon dont les sociétés profondément divisées parviennent à maintenir un régime démocratique en partageant le pouvoir politique entre des parties.
preserve a steady democracy in a pluralistic society. According to him, that is incompatible, it is pluralistic and therefore a 'majority democracy.'

That being the case, we can therefore summarize the main characteristics of consensus. Generally, a consensus approach is based on the abandonment of the principle of the majority, on the basis of which a simple political majority is enough to control political decision making. This abandonment occurs through the four following elements:

1. Cooperation of the elites through a grand governmental coalition where the executive power is shared between the opposition parties and the ruling ones in order to ensure the involvement of the all the parties representatives in the political decision making process.  

2. Proportionality as a principle of representation, i.e. in parliament but also in the public administration as well as in budget allocation. It is thus considered as a 'guarantee for the fair representation of ethnic minorities.' Yet, it can happen that one of the segments becomes more powerful than the others while applying a pure proportionality, especially when it represents a demographic majority.

This goes to show why some corrections are made to pure proportionality in order to appease the minority segments. The proportionality thus "corrected" can go from a light overrepresentation of a demographically minority segment up to parity.

3. The segmental autonomy in some areas, including the management of areas closely related to the very identity of some segments. This generally occurs through federalization, regionalization or decentralization.

4. The right of veto or 'minority veto' is described as an ultimate weapon that the minorities must have in order to protect their vital interests. That is why for some matters of great importance, a right of veto nullifies the risk of seeing one minority segment being marginalized by the majority and being, de facto, excluded from the decision making process.

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7 Une société plurale est une société divisée par des clivages segmentaires et où des partis politiques, des groupes d’intérêt, des médias, des écoles et des associations ont tendance à s’organiser suivant les mêmes clivages segmentaires (Voir VANDENGISTE, S., Théorie consociative et partage du pouvoir politique au Burundi, Institut de Politique et de Gestion du Développement, Université d’Anvers, 2006, p.8).
9 LEMARCHAND, R., op.cit. p.3.
10 Les termes minorités ou segments minoritaires font ici référence à une réalité statistique et démographique.
To what extent has this approach been integrated in the Burundian Constitution of 18th March 2005? This is dealt with in the next section of this essay.

II. The consensus pillars of the Burundian Constitution of 18th March 2005

By comparing the way political power is shared in Rwanda, Burundi and the Democratic Republic of the Congo, Réné LEMARCHAND wrote: « Measured by the extent to which it approximates Lijphart's consociational formula, Burundi today stands as a unique case. No other state anywhere in the continent offers a more faithful image of the ideal consociational policy ». This means that there is no doubt that the consociative approach is being used.

It manifests itself through the institutionalization of ethnic differences, the sharing of power between different ethnic groups as well as political parties, and finally through the need for big majorities in decision making. This guarantees both the protection for minority groups and compulsory dialogue and consensus in decision making.

All these elements account for the characteristics of the consensus approach, including the grand coalition, the proportionality and the right of veto (which is not even explicit). The last feature, i.e. the segmental autonomy, does not exist in Burundi.

II. 1. The Grand Coalition in the Burundian Constitution

We have already said that grand coalition guarantees the involvement in decision making of all the segments concerned. This is generally done through a governmental coalition that brings together the main major political parties.

This kind of involvement is enshrined in the Burundian constitution with reference at the level of both the presidency and the government. The concerned segments referred to here are actually the political parties and the ethnic groups.

II. 1.1. The Presidency of the Republic

12 LEMARCHAND, R., op.cit, p.3.
The Burundian Constitution of 18th March 2005 provides for a multi-ethnic and multi-political presidency. In fact, according to article 122, the President of the Republic shall be assisted by two vice-Presidents\(^{15}\) belonging to different ethnic groups and political parties\(^{16}\) whose appointment shall take into account the predominant feature of their ethnicity within their respective political parties\(^{17}\).

It is desirable to make a small comment on the above. When one reads the Constitution as a whole, they will notice that only this provision refers to the importance of the political and ethnic membership of a vice-President. It should be remembered that power was shared between different political and ethnic parties (G7 for predominantly Hutu parties and G10 for the Tutsi ones) during the transitional period. This provision is therefore a relic from this approach.

Burundi seems to have adopted an ethnic inclusiveness policy in the different political parties. Besides, article 78 of the Constitution is unequivocal. Stef VANDENGISTE says: “*the reasoning behind this approach was that, while Burundi's segmental cleavages must be explicitly and formally recognised at the political level, it was at the same time necessary to reduce the conflict potential of ethnicity by encouraging political parties to be ethnically inclusive*”\(^{18}\).

Despite all that, one can always wonder if it would not have been wiser if the elites representing the segments belonged to different political parties.

It can be seen clearly that the Burundian Constitution provides for a sort of ‘Grand presidential coalition’ between the different ethnic groups and the parties of Burundi.

This kind of coalition has actually been put in place since the elections that took place in Burundi both in 2005 and 2010. The current President of the Republic is Pierre NKURUNZIZA, a Hutu from the CNDD-FDD party (*Conseil National pour la Défense de la Démocratie-Forces pour la Défense de la Démocratie*), the first vice-President is Térence SINUNGURUZA, a Tutsi from the UPRONA party (*Union pour le Progrès National*), the second vice-President is Gervais RUFYIKIRI, a Hutu from the CNDD-FDD party\(^{19}\). Nevertheless, the presidential coalition has had its hiccups

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\(^{16}\) Art. 124 al.1 de la constitution.

\(^{17}\) Art.124 al.2 de la constitution.


several times, thus giving rise to repeated political crises. We will elaborate on that later.

II.1.2 The Government of the Republic

Here too, the constitution establishes a coalition that is both ethnical and political at the same time (between political parties).

As for the political coalition, article 129 states that the members of the government shall come from different willing political parties that have achieved one-twentieth of the votes. The same article adds that when the President removes a Minister from office, replacement shall be made after consultations with his/her party of origin.

A coalition government is thus organised insofar as the parties that have achieved one-fifth of the votes have a right to a certain percentage, rounded down to the nearest figure of the total number of ministers at least equal to the number of seats they occupy at the National Assembly\textsuperscript{20}.

These provisions need to be elaborated on. On the one hand, the composition of a government is a major role played by political parties insofar as they can be part of the government if they so wish and if they are consulted in relation to the appointment or removal of a Minister.

On the other hand, the Constitution makes compulsory the establishment of a coalition government between several political parties without first putting in place a platform of understanding over the joint programme they have to carry out together. All that is likely to lead to crises. We will elaborate on this subject later.

The ethnic coalition at the level of the government has been provided for insofar as the Constitution states that the government is open to all the ethnic components and comprises not more than 60% Hutus and 40% Tutsis, with a minimum of 30% women representation\textsuperscript{21}. Similarly, the Constitution specifies that the Minister in charge of national defense should not come from the same ethnic group as that of the Minister in charge of public security\textsuperscript{22}.

We are deeply concerned about the fact that the Batwa people have been ignored at the level

\textsuperscript{20} Art.129 de la constitution.
\textsuperscript{21} Art.129 de la constitution.
\textsuperscript{22} Art.130 de la constitution.
of the government. However, the way this provision is formulated allows to make some room for this ethnic minority. The words « not more than » can help with the political will of the person who is in charge of forming the government. However, that Mutwa will have to belong to a political party for that to happen.

After the 2005 elections, the governmental coalition was quaked by a series of crises, which we will elaborate on later. The root cause of these crises was again the influence of the parties on the operation of the governmental coalition.

II. 2. Proportionality in the Constitution of 18th March 2005

We have already said that proportionality is required as a principle of representation at both the parliament and the public administration as a guarantee for the representation of the minority segments. We have also already said that pure proportionality can lead to the crushing of those minority segments and that it could therefore be corrected by an overrepresentation of these segment to the point of anticipating parity.

All these mechanisms are embedded in the Constitution. Of course, we do not have statistics on the actual number of people from each ethnic group in Burundi, it is agreed that the Hutus constitute a big majority, followed by a Tutsi minority and a tiny Twa minority\(^{23}\).

Thus, proportionality is provided for at the level of the parliament as well as at the local one.

II. 2.1. In the National Assembly

According to article 164 of the Constitution, the National Assembly shall be composed of at least one hundred MPs on the basis of 60% of Hutus and 40% of Tutsis, including a minimum of 30% of women elected by direct universal suffrage for a five year term of office, and three MPs from the Twa ethnic group co-opted according to the electoral code shall be elected on the basis of the closed lists of proportional representation so that for three candidates registered one after the other on the list, two only shall belong to the same ethnic group and at least one over four should be a woman.\(^{24}\)


\(^{24}\) Article 108 de la loi n° 1/22 du 18 septembre 2009 portant révision de la loi n°1/015 du 20 avril 2005 portant code électoral.
In case the outcome of the vote does not reflect the targeted percentage above, the imbalance shall be rectified through the cooptation mechanism\(^{25}\).

In practice, these cooptation mechanisms have been used by the independent national electoral committee. In fact, at the end of the 2005 elections, the quotas of 60% of Hutus, 40% of Tutsis and 30% of women was not respected. Over 100 MPs, 65 were Hutus, 35 were Tutsis and 24 were women.\(^{26}\) That is why, in accordance with article 118 of the then electoral law, the CENI (the Independent National Electoral Committee) co-opted 15 additional MPs from the CNDD-FDD, FRODEBU (Front pour la Démocratie au Burundi) and UPRONA on the basis of 4 Hutus and 11 Tutsis. So, the National Assembly of 2005 was eventually composed of 118 MPs.\(^{27}\)

Cooptation was resorted to again during the 2010 elections. So, the CENI co-opted 6 MPs, to be specific- a Tutsi woman, two Hutu men and three representatives from the Twa ethnic group.\(^ {28}\)

II. 2.2 In the Senate

It is at the Senate that the Hutu-Tutsi parity is respected, with a few exceptions.\(^ {29}\). In fact, according to article 180 of the Constitution, the Senate shall be composed of two delegates from each province, elected by an electoral college composed of members of the municipal council of that province, from the different ethnic communities and elected by distinct polls. That means that each province has two senators- one Hutu and the other Tutsi. In practice, the quotas were respected here, although the senate was always predominantly CNDD-FDD.\(^ {30}\)

II. 2.3 At the Level of Municipalities

As for municipalities, the Constitution has not expressly provided for the quotas allocated to each ethnic group, but it gives indications as to ensuring an overrepresentation of the minority group.

In fact, according to article 266, the independent national electoral commission makes sure that

\(^{25}\) Article 164 de la constitution article 108 al2 du code électoral.

\(^{26}\) Voir VANDENGISTE, S. Théorie consociative et partage de pouvoir au Burundi, p.20.

\(^{27}\) Voir Arrêt RCCB n°136 du 4 juillet 2005 portant proclamation des résultats des élections législatives.


\(^{29}\) Le sénat comprend également trois sénateurs Twa et quatre anciens chefs d’État.

\(^{30}\) Après cooptation par la Commission électorale nationale indépendante, le Sénat était composé en 2005 de 49 sénateurs dont 32 sont du CNDD-FDD. Depuis les élections de 2010, le Sénat compte 41 membres, dont 32 sont également du CNDD-FDD.
the municipal councils reflect the ethnic diversity of their electorate. Where the composition of a municipal council does not reflect such ethnic diversity, the independent national electoral commission may order to the council the cooptation of people from an under-represented ethnic group, provided the people thus co-opted do not represent more than one fifth of the members of the council. The co-opted people are designated by the independent national electoral commission. The Independent national Electoral Commission (CENI) can also co-opt a person from the Twa ethnic group if their names are listed in political parties and if they have not been elected.\(^\text{31}\)

Although express quotas are not provided for in the Constitution with regard to the municipal council, it is however provided that no main ethnic component has more than a 67% representation as municipal administrators at the national level.\(^\text{32}\)

**II. 2.4 At the Public Administration Level**

The Constitution also remains vague regarding the quotas required for each ethnic group. It clearly stipulates that public administration is largely representative of the Burundian nation and must therefore reflect the diversity of its components. Its employment practices are based on objective and equitable aptitude criteria as well as on the necessity to correct the imbalances and ensure a wide ethnic, regional and gender representation.\(^\text{33}\)

However, the constitution is explicit as regards ethnic representation in public companies. The representation is provided for on the basis of not more than 60% for the Hutus and 40% for the Tutsis.

Question arises as to whether this equilibrium is respected in practice. The Constitution had provided for a control mechanism for this equilibrium and diversity of which the Senate is in charge. In fact, by the terms of article 187, it is in the competence of the Senate to:

- Conduct investigations in the public administration and, where possible, make recommendations to ensure that no region or group is excluded from the benefiting from the civil service.

\(^{31}\) Article 181 du code électoral.

\(^{32}\) Article 266 de la Constitution.

\(^{33}\) Article 143 de la Constitution.
Monitor the implementation of the constitutional provisions requiring ethnic and gender representation and equilibrium in all the structures and institutions of the State, including public administration and the defence and security corps.

It is in this framework that the Senate has established a fact finding committee on the status of the compliance with the equilibrium within the public administration. That committee has given rise to a controversy from different political parties. As far as we know, the committee has not produced any report yet.

II. 2.5. At the Level of the Defence and Security Corps

Since independence, defence and security forces have always been associated with the crises that Burundi has experienced. So, the Arusha negotiators agreed to reform the corps and correct at the same time the ethnic, regional and gender imbalance. The desire to correct the imbalance was thus incorporated in the constitution.

Thus, article 258 stipulates that the defence and security corps shall not be comprised of more than 50% of members belonging to one particular ethnic group for a period of time to be determined by the Senate so as to ensure ethnic equilibrium and prevent acts of genocide and coups d’etat.

Correction of imbalances within the defence and security organs is however addressed progressively through reconciliation and confidence building with the objective of securing all the Burundians. The reason behind this was to avoid precedences of 1993. Indeed, after the 1993 elections, which brought in victory for the FRODEBU party, President NDADAYE wanted to initiate reforms in the military that had largely been dominated by the Tusti. Some people think the Coup d’etat was due to fear by the Tustis who, in their own understanding, believed that they had lost their protection. do explain the reasons SULLIVAN explains using these terms:

“But the greatest fear and uncertainty came from plans to reform the Tutsi-dominated armed forces, which many Tutsi saw as their only protection against violent domination by the Hutu...”

36 Les forces de défense et de sécurité comprennent la Force de Défense Nationale (FDN) et la Police Nationale du Burundi(PNB).
37 Voir article 7, point 17 du Protocole 1 de l’Accord.
majority. These fears helped spark the coup attempt in October 1993 which resulted in the assassination of President Ndadaye, and led to extensive violence and the ultimate failure of this attempt at peace."

As we wrote it before, the Senate has among other tasks the control of the implementation of the constitutional provisions requiring ethnic representation in the defence and security corps. So, a senatorial fact finding committee on the status of the compliance with the balanced representation within the Burundi National Police Force (PNB) has been already set up and has even published a report.

II. 3. The Right of Veto

The right of veto, as we already wrote, is a protection for the minority segments. It comes in different forms the most important of which are the unanimity or the qualified majorities in the decision making process.

The Burundian constitution does not provide for unanimous decision making. On the other hand, the combination of the above-mentioned ethnic quotas with the strong majorities required for the legislative work leads, at least theoretically, to a sort of 'de facto veto.'

So, regarding the National assembly, for instance, it can only deliberate validly in the presence of the two-thirds of the MPs. Legislation is passed by a the two-thirds vote of the present or represented MPs. Organic laws are voted by a two-thirds of the present or represented MPs, without this majority being lower than the absolute majority of the members composing the National Assembly.

The two-thirds majority of the present or represented MPs is also required for the vote of important resolutions, decisions and recommendations.

As for the Senate, it can deliberate validly only if the two-thirds of the senators are present. Decisions are made by a two-thirds vote of the present or represented senators.

Organic laws are voted by two-thirds of vote of the present or represented senators, without

38 SULLIVAN, D., op.cit. p. 78.
40 Article 175 de la Constitution.
this majority being lower than the absolute majority of the members composing the Senate\textsuperscript{41}.

Finally, the draft or the proposal for the amendment of the Constitution is adopted by a four-fifths vote of the members composing the National Assembly and two-thirds of the members of the Senate\textsuperscript{42}.

What is the objective of these overwhelming majorities? The objective is undoubtedly to prevent the majority ethnic group from being the only one to approve projects or bills, or to amend the Constitution in a way that could discriminate against the minority ethnic group. So, since the National Assembly comprises 60\% of Hutus and 40\% of Tutsis, and that the Senate comprises 50\% of Hutus and 50\% of Tutsis, the Hutus cannot approve decisions without the support of the Tutsis, who theoretically\textsuperscript{43} have a minority threshold.

Besides the de facto veto provided to ethnic groups, the Constitution also provides a minority threshold to political parties. In fact, the spirit of the Constitution is to avoid that only one political party has a strong majority allowing it to make unilateral decisions. What is worth underlining here is the fact that this spirit is only valid for the first post-transitional period\textsuperscript{44}.

This spirit is in fact embedded in article 303 of the Constitution. By the terms of this article, a total of additional eighteen to twenty-one members shall be- exceptionally and for the purpose of the first parliamentary elections, and solely if a party has won more than the three-fifths of the seats in direct election- co-opted in equal numbers from the lists of all the parties that have reached at least the threshold determined for the election, or on the basis of two people per party in the case the seven parties have met the requirements. The cooptation modalities shall be determined by the electoral law.

This is another provision that bestows on the other political parties the power to oppose a majority party, therefore getting it to always favour dialogue and consensus. Non majority parliamentarianism has thus been established in Burundi. The impact of this system on the operations of the institutions is not open to question or review: the weakening of the government. We shall come back to this topic.

\textsuperscript{41} Article 186 de la Constitution.
\textsuperscript{42} Article 300 de la Constitution.
\textsuperscript{43} Nous disons ici théoriquement dans la mesure où la Constitution burundaise a admis que les Tutsi ou les Hutu peuvent représenter leurs composantes ethniques peu importe le parti dans lequel ils se trouvent. Or, étant donné qu’actuellement les élus sont fortement soumis à leurs partis d’origine (un élu qui est exclu du parti ou qui démissionne de son parti perd son siège), cette représentation peut rester un leurre.
\textsuperscript{44} La constitution du 18 mars 2005 consacre deux périodes, la première période post-transition et la deuxième période post-transition. La première période post-transition correspond à la première législature 2005-2010 tandis que la seconde commence avec la législature 2010.Cette distinction fait d’ailleurs que la Constitution burundaise porte deux formes de régime politique(voir les détails dans MANIRAKIZA,A., op.cit, pp.52-70).
Such are the arrangements for power sharing that are embedded in the Burundian Constitution of 18th March 2005. They have been, for the most part, influenced by the consensus approach.

However, the question that one could ask is about the impact of their implementation in the general operations of the institutions. We will analyze here the impact on the Burundian institutions established after the 2005 elections. Nevertheless, we do not pretend to draw final conclusions on the viability of this system in Burundi, but we are only underlining the temporary balance of its five years of existence.

We shall begin with the assumption according to which these consensus power sharing arrangements lead to political instability.

**III. The Consequences of Implementing the Consensus Approach in Burundi: the Repeated Institutional Dysfunction.**

The 2005-2010 legislatures has been marked by a series of serious institutional crises. These were for the most part related to some constitutional consensus arrangements, including among other things the governmental and presidential coalition as well as the strong majorities required for the legislative work.

**III.1. The Findings**

There were crises at both the level of the executive power as well as at that of the legislative one.

**III.1.1. At the Level of the Executive Power**

The governmental coalition that was formed after the elections experienced some ups and downs. In fact, in accordance with article 129 of the Constitution, only CNDD-FDD, FRODEBU and UPRONA had the right to be part of the governmental coalition. Yet, in addition to these parties, the other parties such as PARENA (Party for the National Recovery), MRC (Movement for the Rehabilitation of the Citizen) and MSP-INKINZO (Pan African Socialist Movement) had their ministers in the government.

45 Parce que ce sont ces partis qui ont pu recueillir 5% des suffrages au niveau de l’Assemblée nationale (voir article 129 al2)
Since FRODEBU and UPRONA were not consulted about the appointment of their representatives, they considered that the government was unconstitutional and wanted to occupy ministerial positions as important as were their parties at the level of the government. Besides, FRODEBU submitted to the Constitutional Court a motion for unconstitutionality of the decree related to the appointment of members of the government. The motion was declared illegal.

If the governmental coalition held on until then, it could no longer go on from March 2006 when the FRODEBU decided to leave the coalition government and henceforth join the opposition. That move had an impact at the level of the legislative business. We shall come back to this topic later.

The UPRONA followed suite in July 2007. It was only in November 2007 that these two parties would join the coalition government thanks to a new government reshuffle that took into account the wishes of these parties.

All in all, eight governments have been formed during the whole legislature, i.e. an average of one cabinet shuffle every six months.

III.1.2 At the Level of the Legislative Power

These difficulties encountered at the level of the executive power did not spare the legislative power, which also experienced a series of operational and functional crises during the 2005-2010 legislatures.

The epicentre of the crisis was always the National Assembly. Its important relationship with the Senate also dragged the latter into difficulties.

So, the work of the National Assembly went through some hardship since 2006. To illustrate this, the ordinary session of June 2006 was interrupted for three weeks due to the non

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46 Arrêt RCCB 164 du 22 août 2006
47 À la suite du remaniement ministériel, certains membres de l’UPRONA y ont été intégrés sans consultation du parti. Pourtant, le Premier vice-président d’alors contresigna le décret de nomination des membres du gouvernement, d’où le parti décida de le suspendre du parti et d’entrer dans l’opposition.
50 A l’exception des matières attribuées exclusivement au Sénat, les projets et propositions de loi sont étudiés préalablement par l’Assemblée nationale. Le texte adopté est transmis ensuite au Sénat pour analyse et éventuellement adoption. Il arrive que les deux chambres ne convergent pas sur le texte à adopter. Dans ce cas, sous réserve des matières visées à l’art.187 al.1et 3 de la constitution, le dernier mot revient à l’Assemblée nationale (art.191 de la constitution).
attendance of some MPs\textsuperscript{51}. Therefore, the bills that were on the agenda had not been analyzed and adopted as the quorum was not reached.

Similarly, the National Assembly hardly worked all along 2007. In fact, during the two parliamentary sessions of February-April and June-August 2007, only 13 bills over 63 initially provided for had been adopted at the rate of 5 over 28 for the first session and 8 over 35 for the second one\textsuperscript{52}.

Furthermore, the crisis reoccurred in 2008 when the February session was characterized by no result at the level of the legislative function\textsuperscript{53}. The situation only improved during the June session following a questionable constitutional Court judgement on the unconstitutional occupation of some seats in the National Assembly\textsuperscript{54}. We shall later come back to this topic.

After these findings of institutional instabilities, it is important to demonstrate in the following analysis how these instabilities had been caused by some consensus arrangements that had been introduced in the Constitution of Burundi.

\textbf{III.2. The Causality}

\textbf{III.2.1. The Grand Coalition as Cause of Government Instability in Burundi}

We already wrote that the grand presidential and government coalition is established as a model of government in Burundi. It is even made compulsory if the parties having reached a certain number of MPs want it (article 129 of the Constitution). Besides the fact that this type of government favours political parties, putting in place of such a coalition inevitably leads to misunderstandings, particularly in Burundi.

In fact, the political parties that intend to form a coalition government should normally conduct negotiations in order to develop a consensual government programme that has to be implemented during the legislature. In this case, the coalition is a matter for political realism. To have one's programme supported, a political party with more votes (still not enough votes to reach the majority required to govern) sees itself obligated to agree on a common

\textsuperscript{51}Renouveau n°6827 du 4 septembre 2006, p.3.
\textsuperscript{54}Arrêt RCCB 213.
programme with other parties thus leading to the formation of a coalition government.

No such thing is provided for in Burundi where 5% of votes at the National Assembly are enough for a party to claim entry in the government without any prior understanding on a political platform to be implemented. And if CHAGNOLLAUD thinks that even a classic coalition government (formed after an agreement) generally leads to political instability in the sense that "the first serious difficulty will destroy it, as the majorities are forming and disbanding according to the way things develop"\textsuperscript{55}, this risk will all the more be higher in Burundi where prior understanding on a political program is not required.

This probably explains the fact that the first government that was formed after the 2005 elections was contested by the UPRONA and the FRODEBU insofar as, on the one hand, they had not been consulted and, on the other hand, they did not have the right to more ministerial positions proportional to the results they achieved at the National Assembly, hence their resignations from the government.

In addition to this lack of understanding at the time of the formation of the government, which is likely to lead to political crises, the weight that the political parties exert is also likely to cause some difficulties at the government level. Actually, as the ministers who form the coalition government are in principle appointed after consultation with their parties of origin, these continue to exert their weight on their ministers. In fact, if a party no longer support its minister, the President should replace him/her, but this has not been the case in Burundi\textsuperscript{56}.

We have just shown how the grand coalition consensus mechanism had some implications in the work of governmental institutions. The other mechanisms, such as proportionality combined with the right of veto, have also been the cause of the legislative function crisis through the demand of the strong majority decision.

\textbf{III.2.2. The Influence of the Strong Majorities on the Parliamentary Operations}

We already wrote that the Burundian Constitution, through some quotas combined to the required majorities, provides for a de facto right of veto consensus mechanism. This right of veto belongs to the ethnic groups as well as to some political parties. The great merit of this

\textsuperscript{55} CHAGNOLLAU, D., Droit Constitutionnel contemporain, Tome 1, théorie générale, les grands régimes étrangers, Paris, Armand Colin, 2001, p.112.

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merit of reassuring the ethnic and political minorities against the exclusionary thinking of the
ethnic or political majority, it practically leads to a chronic dysfunction of the parliamentary
institution in particular and that of all the institutions in general. This can be noticed especially
if no political party has a majority required for the legislative business. It will also be noticed in
case of misunderstanding between the political parties forming the parliamentary and
government coalition.

III.2.2.1. The Illustrative Cases

The intention of the Burundian Constitution is to avoid that only one political party becomes
predominant on the political scene that is why it provides for a proportional representation
voting procedure whose advantage is, inter alia, to favour all the political parties represented in
parliament. It is certainly possible that only one party wins by an overwhelming majority, but
some mechanisms are foreseen so as to dilute its power even if that means it has to work with
other parties.57

That is why the absence of this understanding led to dysfunctions of the legislative power in
Burundi.

The legislative dysfunctions noticed in Burundi can, at least in part, be explained by the
requirement of the strong majority’s decision.

First, the Constitution requires a quorum of 2/3 of the MPs to hold a plenary session. At the end
of the 2005 legislative elections, no political party was able to reach this quorum on its own. In
fact, the configuration of the National Assembly was as follows: the CNDD-FDD had 64 MPs, the

57 Comme nous l’avons écrit supra, pendant la 1ère période post-transition, l’article 303 de la constitution faisait partie de ce mécanisme requis
pour diluer une majorité renforcée d’un parti politique. Depuis les élections de 2010, ce verrou a sauté et c’est ainsi par exemple qu’à la suite du
boycottage des élections législatives de 2010 par certains partis politiques, le parti CNDD-FDD détient à lui seul 81 sièges sur 106, soit 76.4%. 
FRODEBU had 30, the UPRONA 15, the CNDD 4 and the MRC 2; that is to say a total of 118 MPs if we add 3 Twa MPs. The required quorum was of 79 MPs.

This goes to show why the UPRONA and FRODEBU boycott paralyzed\textsuperscript{58} the parliamentary operations during the 2006 session due to a lack of quorum.

Then, the Constitution requires a 2/3 majority of MPs present or represented for the adoption of ordinary laws, resolutions, decisions and important recommendations, as well as an absolute majority of the members composing the National Assembly to the minimum for the adoption of the organic laws. If the quorum was reached, which was not always the case; the majority party (CNDD-FDD) could alone have all the laws and resolutions adopted. Actually, 53 MPs were required to vote the ordinary laws and the resolutions and 60 MPs were necessary for the adoption of the organic laws. But, it had only 64 MPs.

However, the CNDD-FDD majority crumbled in February 2007 following the split of the parliamentary group of the party. The 3rd convention of the CNDD-FDD party was held on 7 February 2007 in Ngozi and dismissed the chairman of the party, the MP Hussein Radjabu\textsuperscript{59}. At the close of convention, the CNDD-FDD parliamentary group split into two: there was the" law-abiding group of MPs" on one side with a total of 21 MPs who officially signed the declaration of withdrawal from the CNDD-FDD parliamentary group on 7 March 2007 and the other side the group that had allegiance to the new party chairman\textsuperscript{60},

From then on, it has become quasi impossible to obtain the required majorities to reach the quorum as well as adopt some laws.

Several attempts have been made in order to re-establish the majority but they have all failed\textsuperscript{61}. This is so true that the Burundian constitution did not provide for management mechanisms for conflicts between the institutions. As a matter of fact, in case of break-up of the coalition or separation within a majority party, the classically admitted solution resides in the right of dissolution. As Jacques CADART puts it so well, in case of break-up of the majority for instance, "the government can only be dissolved if it does not want to withdraw purely and simply"\textsuperscript{62}, so the people can decide what the new majority will be.

\textsuperscript{58}Théoriquement, comme ces partis étaient représentés au gouvernement, ils faisaient également partie de la majorité au parlement et devraient soutenir l’action gouvernementale. Mais à cause de leurs désaccords avec le parti CNDD-FDD, la coalition parlementaire a volé en éclat.

\textsuperscript{59}Renouveau n°6939, p.3.

\textsuperscript{60}Aube de la Démocratie n°80 du 5 au 11 mars 2005 : p.4

\textsuperscript{61}Signalons à titre d’exemple deux remaniements du gouvernement, en juillet et en novembre 2008.

Such being the case, the Constitution forbade the right of dissolution during the first post-transitional period. In fact, by the terms of article 302 paragraph 3, the President elected for the first post-transitional period cannot dissolve the Parliament. That is the reason why the crisis worsened and the institutional rigidity persisted.

In order to come out of this situation after the failure of the attempts to exit the crisis, the Constitutional Court decided to consider that the 21 MPs who had resigned from the CNDD-FDD party in addition to Hussein Radjabu illegally occupied the seats in the National Assembly. The judgement of the Constitutional Court, questionable in many ways, is a dangerous precedent and will undoubtedly have negative implications on the operations of Burundian institutions.

**III.2.2.2. Indirect Consequence: Establishment of an Imperative Mandate**

After a long period of deep crisis at the National Assembly and subsequent to failed attempts to re-establish the lost majority through political dialogue, the CNDD-FDD party opted for resorting to the Constitutional Court.

**III.2.2.2.1. Time Markers**

On 23 May 2008, the chairman of this party informed the President of the National Assembly that 22 MPs the list of whom was appended to his letter were no longer members of his party and asked him to let the Constitutional Court know so as to appeal for the seats occupied illegally by these MPs. He made reference to articles 98 and 169 of the constitution.

On 30 May 2008, the Chairman of the National Assembly addressed a letter to the Chairwoman of the Constitutional Court the object of which was "Motion for unconstitutional occupation of seats in the National Assembly." In that letter, he mentioned articles 98 and 169 of the constitution with a reminder according to which the list of independents did not totalise at least 2% of national votes at the 2005 legislative elections and that as such the group of the independents did not have parliamentarians and could not therefore be represented at the National Assembly. He concluded his letter by pointing out, on the one hand, that the MPs initially elected on the CNDD-FDD list had resigned or had been excluded from the same and were therefore illegally occupying their seats, and by requesting, on the other hand, that the Court to dispose of the possible unconstitutional occupation of the seats by those MPs.
On 5 June 2008, the court disposed of the request. After considering the legality of the referral to the court, the admissibility of the motion as well as his jurisdiction to adjudicate, the Court studied the reason for the motion and “noted the unconstitutional occupation of the seats in the National Assembly by the 22 MPs”.

### III.2.2.2.2. Reflection on the RCCB 213 Judgement

In this reflection, we shall elaborate on the substance of the case to highlight that the judgement establishes a total submissiveness of the MPs to their parties, which will undoubtedly have an impact on the operations of the institutions.

In its motion, the office of the National Assembly referred to articles 98 and 169 to demonstrate the unconstitutional occupation of the seats in the National Assembly.

Article 98 relates to the presidential election. It provides that "the candidates can be presented by political parties or present themselves as independent. An independent candidate is the one who is not introduced by a political party on nomination of the candidates".

Article 166 refers to article 98 of the constitution, the Court rightly said that "the candidates in the legislative elections can be introduced by political parties or can do so themselves as independent candidates as defined by article 98 of the constitution".

The Court concluded that « article 98 applies to both presidential and legislative elections ».

Article 169 of the Constitution provides that "the candidates introduced by the political parties or the lists of the independents can only be considered elected and sit in the National Assembly if their party or their list totalled a number of votes equal or superior to 2% of the vote cast nationally".

This article sets the conditions for entering and sitting in the National Assembly. The status of an independent candidate as is stated in article 169 is considered before the election and not after.

In this regard, the reading that the court makes of this article is surprising as is shown in this excerpt: "Considering that according to the court and in the light of the spirit of the
aforementioned article 169, one is elected before the legislature and sits during the legislature; as a result, the independent candidate who did not total 2% of the votes has not been elected and cannot sit in any case in the National Assembly;

*Considering that the MPs whose names are on the list of the motion have been elected on the basis of the lists presented by one political party to sit in the National Assembly (...)*. 

. The allusion made by the Court to the independent candidates is incomprehensible since it affirms that the MPs in question have been elected on the basis of the lists presented by one political party."

In our opinion, we think that the unconstitutional occupation is a matter for another area, such as the area related to the loss of the status of parliamentarian. And this area is regulated by both the Constitution and the electoral code.

Actually, by the terms of article 156 of the Constitution "the mandate of an MP and that of a senator come to an end through death, resignation, permanent inability and unjustified absence of more than a quarter of the sittings of a session, or when the MP or Senator falls into one of the cases of disqualification provided for by an organic law".

And the former electoral code\(^{63}\) corroborates the Constitution when it stipulates in its article 132 paragraph 1 that the mandate of an MP ends before his/her normal term, either in the case of dissolution of the national assembly, or in the case of vacancy due to death, resignation, physical inaptitude, permanent inability, unjustified absence of more than a quarter of the sittings of a session, or disqualification consecutive to the loss of an eligibility condition ".

And among the conditions of eligibility provided in article 145 of this electoral law, none is related to the resignation or the exclusion from a political party.

And yet the Court bases its decision on a cause that is neither provided by the Constitution nor by the electoral Code.

It argues that “considering that these people are no longer on the list of the political party that had introduced them, that they have been excluded, or that they have willingly resigned as is

\(^{63}\) Nous nous référons au Code électoral qui était en vigueur au moment de l’arrêt étant donné que le nouveau code électoral a par après inséré parmi les causes de la perte de la qualité de député la démission ou l’exclusion d’un parti(article 112 alinéa 2 de la loi n°1/22 du 18 septembre 2009 portant révision de la loi n°1/015 du 20avril 2005 portant code électoral ).
indicated in the CNDD-FDD minutes of 28 January;

Considering that they had been elected as such and occupied the seats in the National Assembly;

Considering that they no longer fulfil this constitutional condition;

On all these grounds

(...)the Constitutional Court (...) notes the unconstitutional occupation of the seats in the National Assembly by the MPs (the names of the excluded 22 MPs are listed)".

We can conclude that the judgement by the Constitutional Court has purposely ignored the relevant articles. It is therefore judicially ill-intentioned. It intended to settle a political problem by violating the law and establishing a principle whose consequences are numerous on the operation of the institutions. The judgement also raises the issue of respect for the State of law as well as that of the future of the consensus approach in Burundi64

III.2.2.2.3. Lessons to Learn from the RCCB 213 Judgements

The judgments as returned by the Court establishes an imperative mandate for the MPs in violation of article 149 of the Constitution, which stipulates that the mandate of MPs and senators is of national nature and that any imperative mandate is void.

By this provision, the Constitution grants independence of vote and position to parliamentarians and senators in relation to the ideology and guidelines of their parties. By the terms of this judgment, the Court agrees constitutionally more than ever a total submissiveness of MPs and senators to their political parties. Henceforth, an MP or a senator who would oppose the wishes of his/her party would see them purely and simply excluded from the party, and thus lose their seat in the National Assembly or the Senate. They will thus tend to be docile and timorous and not to play fully their role as representative of the people. The parliamentary institution risks being power transmission belting or a letter box for political parties. The political system would thus be party authoritarianism.

64 Etant donné que notre constitution a opté pour le fait qu’une personne pourrait représenter son ethnie, peu importe son parti, il serait légitime que dans ces conditions de soumission totale de cette personne à son parti, de douter de l’effectivité de cette représentation au cas où son parti déciderait de piétiner les droits ou les intérêts de cette ethnie.
The judgment also raises the issue of the separation of power and more especially that of the independence of the judiciary. Looking closely, the Constitutional Court has been manipulated by political actors in order to solve a political problem of loss of the parliamentary majority. This is why it made a determination blatantly violating the Constitution. Here the future of the state of right in Burundi is put with acuteness.

IV. Are the 2010 elections the End for the Consensus Approach?

Burundi organized a series of elections from the grassroots to the highest level of the State from May to September 2010. These votes established dominance of one political party, the CNDD-FDD, over the whole political system. As a matter of fact, at the end of the local elections won by that party, the other political parties started bandying words like all-out electoral fraud about without showing evidence of the "masquerade". That is why they boycotted the other elections, leaving the electoral boulevard only to the CNDD-FDD, which eventually won in a canter. From all this it emerged that the political landscape seemed to be a de facto single-party environment, as the other institutional political parties (the UPRONA and SAHWANYA-FRODEBU NYAKURI) were unable to act as a real counterbalance.

Does this political landscape seal the end of the consensus approach in Burundi? It certainly puts an end to consensus as has been implemented since the Arusha Agreements until 2010. In fact, we have already mentioned it, until the first post-transitional period, the spirit of the constituent was to avoid that only one political party is predominant on the political scene. That is the rationale for article 303 of the Constitution. As for the rest, arrangements were made to avoid dominance of one ethnic group over the political system. It is this paradigm that has been chosen by the 2005 constituent, and the institutions that followed 2010 reflect just that choice. The ethnic quotas as embedded in the Constitution are respected. If the political landscape puts an end to consensus as is experienced today, it does not however puts an end to the pillars of consensus. The grand coalition, the right of veto and proportionality are always present.

Furthermore, considering what has been said earlier that some elements of consensus have been the cause of institutional dysfunctions; this political landscape should be a pledge of stability and efficiency.

65 Ces élections sont les communales, la présidentielle, les législatives et les collinaires.
66 Ce parti a gagné les élections législatives avec un score de 81,19%,le président issu de ce parti a gagné avec un score de 91,62%(voir le rapport d’évaluation de la mission d’observation de l’Union européenne).
During the first post-transitional period, the CNDD-FDD party that was at the helm (because the president belongs to this party) justified its setbacks by saying that “the opposition parties were spiking its guns”. Henceforth, it will be difficult for it to allude to this alibi to conceal its failures.

**Conclusion**

In order to face the problems that arise in society, the State or the politicians look for the ways and means to resolve them. After agreeing that the cyclic conflicts that the country has experienced since the independence had an ethnic and political dimension, the Burundian politicians have opted for a power sharing policy between their ethnic groups. That is what led them to adopt the consensus approach, which can sum up in this formula" the good gates make good neighbors ". Arrangements of a consensus nature like the grand coalition, proportionality as well as a kind of right of veto have thus been imbedded in the Burundian Constitution of 18 March 2005 and institutions bearing the mark of these arrangements have been put in place both in 2005 and in 2010.

And yet, the implementation of these arrangements during the 2005-2010 legislatures was problematic. The political system was discredited.

Nevertheless, these arrangements were not void of interest. They have had at least the merit of "toning down the ethnicity" in relation to the political problems in Burundi and bringing about a relative stability between ethnic groups. On the other hand, they were the root cause of the serious institutional dysfunctions even though the latter cannot be explained exclusively by the first.

As a matter of fact, beyond the institutional aspects, the stability and efficiency of the institutions also depend to a large extent on the politicians. These politicians are also the actors, who want to hog the stage, thus making it difficult for the system to run smoothly. No matter how perfect the legal texts are, without political culture of the ruling class, without respect for nation, without respect for human rights, better still, without respect for the state of law, stability and efficiency will always be wild dreams. A capacity building project for politicians on the values of dialogue and consultations, the virtues of the respect for the state of law should be organized, and the rest will just follow.
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