The Governance of Legal Pluralism

Empirical Studies from Africa and Beyond

Werner Zips / Markus Weilenmann (eds.)

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edited by

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Content

Between Ethnicity, Competing Powers and Legal Change – a Statistical Investigation on the Working of Burundi's State Courts

Markus Weilenmann

This paper refers to two legal anthropological investigations of the conflict management by state courts in Burundi and to some development related experiences with attempts to foster the rule of law there. In particular, it stresses two facets of Burundi's mobilisation behaviour of state courts, which are the influence of the agrarian economy and the pre-colonial state order on the capacity of official state courts to implement legal decisions. While many legal anthropologists already investigated the relationship between state law and customary law[1], statistical long term studies on the working of state institutions from a legal anthropological perspective still remain the exception.[2] And within development political circles these facets have been more or less neglected until today. Often, development agencies only stress the access-to-justice-question and operate with a misleading distinction between "formal" and "informal" concepts of law in order to question the legality of so-called "informal law".[3] Behind such an approach hides the idea of a self-evident superiority of western state law, a general notion which also fits well into the human rights discourse. State law, customary law, indigenous law and religious law are thus rather considered as separate entities, which relate to a process of socio-political development from "informal" to "formal" law and would thus rarely influence each other. All non-state law concepts are thus perceived as rather exotic normative orders and the central problem of cultural legitimacy of "modern" state law is rarely challenged.

For Burundi, which was already an independent African state in pre-colonial times, such an understanding has had especially far reaching consequences. The

1 cf. Allot and Woodman (1985); von Benda-Beckmann, F. and K, Casino, Hirtz, Woodman and Zacher (1988); Crook and Houtzager (2001); Morse and Woodman (1988); Nader (1969); Starr and Collier (1989); Weilenmann (1997).

2 cf. Abel (1979); F. von Benda-Beckmann (1985); Blankenburg (1989); Slaats (1988).

3 cf. Bleeker (2006); Hildebrandt and Gutiérrez (2002); DFID (2004): Malawi Safety, Security & Access to Justice Programme (2003); Parent and Geraghty (2007).

"modern" bureaucratic state power always had to refer its own political directives to at least two cultures and two states, each alien to the other. There is the pre-colonial state order left behind by an abolished sacred kingdom, characterised by its clientele structure, its oral culture, its agrarian economy and its feudalistic value system and there is the bureaucratic state model, imported by the colonial powers Germany and Belgium.[4] These two axes constitute the background of a change in state style, which was initiated from the political centre, but has spread beyond. The cultural identity of the Abarundi[5] has always been bound up with a state organisation, so a change in style means a cultural upheaval too.[6] The western bureaucratic state model is woven into the self-definition of the Abarundi, but does not destroy the cultural heritage reflected in language and history. And the monarchical-feudalistic mentality, which is still oriented towards blood relationships and is hierarchical, cannot rely any more on a state model that corresponds to this way of thinking.

For the development of the rule of law, such a political history has of course other consequences than if one refers to a nation-state, whose legal roots are – such as in the Democratic Republic of Congo – mainly linked to the history of the colonial takeover of power. While in the first case the development of the rule of law is marked by competing powers and the access to qualifications of legitimate authority at all levels of society, so in the latter case it has mainly to deal with problems of cultural heterogeneity such as the integration or disintegration of more or less isolated cultural units. Development political agencies however, which base their problem identification only on one single state model, assume a more or less linear development from pre-colonial to post-colonial times and suppose the "modern" State would simply have devoured the former one (the "crocodile model"). My investigations show however another picture. Though Burundi's monarchy was abolished in 1966, the popular remembrances of the king have not yet disappeared. It is thus important to briefly outline some key-elements of the political development from Burundi's pre-colonial times to nowadays.

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4 The first contacts with Europeans date back to 1858, when Speke and Burton explored the shores of Lake Tanganyika (Atlas du Burundi 1979: planche 12). Livingston and Stanley met 1871 slightly south of Burundi at *Bujiji* and explored the shore. At the international conference of Berlin 1884, the still unknown territory was geometrically divided between Belgium, Germany and Great Britain. Burundi and Rwanda were declared to be a dominion of German interest. Under German sovereignty the first military post was established in *Usumbura* only in 1899. Already in 1916 – during the 1st World War – Belgium expelled the German colonial power from Burundi.

5 Literally translated, the expression '*Abarundi*' means "the people rundi" and it stands for "the people of Burundi". The first syllable of the prefix aba as well as the prefix umu (umu>Umurundi> "the man of rundi") assumes the function of the article, mu and ba indicate the class of words to which the respective substantives belong in Kirundi, the native language of the country. The class at issue refers to the people, their role and their characteristics.

6 cf. Weilenmann (2000); Chrétien (2003).

1 A Historical Overview

Just before colonisation at the beginning of the 20th century, Burundi's monarchy showed very distinct characteristics. There was a clear structure of classes, there existed means of repression and organized forms for the absorption of resources, as there were taxes, compulsory labour, service in the troops for defence and others. Towards the end of the 19th century, Burundi's organization of the state had therefore been untied from ideological forces and had put itself in the service of the control of power. In the centre was the control over persons with the purpose to obtain control over objects. This concept based not upon the today so well known Hutu/Tutsi-dichotomy, as so often suggested[7], but rather on the notions *igihugu, uburundi* and *ingabo*. Typically, all three notions have a reference to the subordinates. The notion *igihugu* has two components; it refers to the subordinates and it designates the area of domination as territory: So the spoliation of the inhabitants is called *kurya igihugu* (Rodegem 1970: 175). The term *uburundi* refers on the one side to Burundi as nation, on the other side it points to the population living in it: *"This expression designates mainly the mass of the Abarundi, the population, the people, the ant-hill of Burundi"* (1970: 376). And the root of the word uburundi – *rund* – comes from the verb *kurunda*: *"Heap up, pile up, store up, accumulate". Kurunda ubugwi: "be onwardly ripe"* (1970: 375).

The expressions *igihugu* and *uburundi* contain thus power- and moral-connotations and refer to the key conception of the pre-colonial power model, *ingabo*: *"army, troop"* (1970: 96), but also *"protection shields"* (Laely 1995: 57). *"The real meaning of the word becomes intelligible, if we (derive) it from the verb kugaba, which has a double sense namely 'give' and 'order/lead' [have in one's dependence, own]"* (same author, translated from German by MW). These are tied up in hierarchic relations that continuously refer to "top" and "down": give and live in dependence on a third party. This point already gives an idea of the political context – the governance of legal pluralism – at that time. The distinction between *uburundi* and *igihugu* makes it further clear that the area of domination did not necessarily correspond with the nation state even when the country was still very small. Burundi had at all times different centres of power which were arranged in groups around the royal residence(s) and which, especially in the 19th century, were permanently feuding with each other (Botte 1982).

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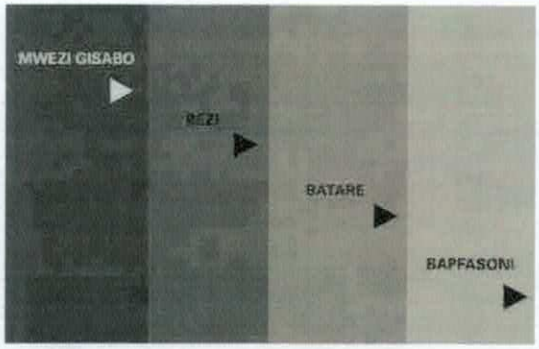
7 Mainly colonial officers such as Ghislan, Maquet or Ryckmans and theologians such as Gorju and van der Burgt, who referred in their ethnic interpretations to *Pater* W. Schmidts' *"Kulturkreislehre"* (1939), were responsible for the diffusion of the theory of hamites in Burundi (c.f. Weilenmann 1997: 128–133), and not, as for instance by Jean-Pierre Chrétien repeatedly alleged, the social anthropologists of colonial resp. European tradition (c.f. Chrétien and Vanacker, 1987: 91–92; Chrétien, 2003: 59).

1.1 The Gutahira-rule

The processes of ongoing inner wars were actuated by the so-called *gutahira-rule*, a rule which regulates the royal succession. As sons of the *Mwami*[8], the princes suffered in case of a royal takeover of power – a formal removal. In case of such a change, for instance following the death of *Ntare II*, one of his descendants came into power as *Mwami* and got the name *Mwezi (Gisabo) II*. His sons now, who had the name *Abezi*, replaced consequently the sons of the preceding king, *Mwezi I*. The former *Abezi* thus lost their dignity and were no longer considered as princes, as *baganwa*, but as *bapfasoni*. "The nobility weakens through the seniority", as Burundi's first resident, Pierre Ryckmans (1925: 36) stated in the beginning of the 20th century. But this change did not take place abruptly, but creepingly. As long as Burundi could secure substantial extension of its territory by raids and conquests, the descendants of former kings were forced to move from the centre to the periphery and to occupy and reclaim new lands.

Under the regency of Mwezi Gisabo II however, this way out was no longer possible so that the area parcelling was pushed ahead in the inner country. The king thus withdrew the control on a part of his territory from the old Muganwa and conveyed it to one of his sons, "who was thought to grow out of his 'nest' and to expand at the detriment of the old leader of the area"[9] (Laely 1995: 82). This regulation did protect the king before the frightening competition of his military



8 The "Mwami" is the Kirundian expression for king. The term "Mwami" is deducted from/*umu-aami*/respectively/*ku-aama*/what means as much as "to be fertile" (Mworoha et al. 1987: 105). The ancestry myth attributes to the Mwami two different genealogies: On the one side he was considered as mediator between the supernatural powers and his subjects (Myth of creation: Creator (Imâna) > celestial beings (ghosts) > Mwami). On the other side, the special feature of his filiation is emphasized and the ideology of ancestry is kept up (Myth of ancestry: Act of creation (incest) > Ancestors of the Mwami (especially queen mother) > Mwami > representatives of ritual services and royal officials > people).

9 Though the gutahira-rule has been outdated for a long time, small farmers still apply the basic model of that rule. This results in innumerable land disputes in the countryside.

equipped princes, as they were busy enough in their "power nests". It resulted however in a permanent state of war (Botte 1982) and in a situation wherein the formal hierarchy did not correspond with the real conditions of power, all the more as the young princes did not always succeed in their actions against their predecessors. Burundi's early state was thus marked by a big structural heterogeneity which had a geographic dimension (formation of enclaves), a political dimension (overlapping constellations of power), an economical dimension (vertical relationships of dependence), a social dimension (network of dependence) and also a legal one.

1.2 The Abashingantahe

The social position and the legal competence of the judges of the pre-colonial state did thus not result from their aristocratic identity.[10] First of all it emanated from the local order, namely from the question where, in which sphere of political influence, in which enclave the *Abashingantahe*[11], the pre-colonial judges lived; only secondly did their social position depend on their legal competence to settle conflicts. Together with all the other farmers, the *Abashingantahe* lived in the beginning at a specific hill and therefore had an excellent local knowledge. After their nomination as *abanyarurimbi (i.e. Abashingantahe of the king)* they had, together with the political authorities, however to wander around in the whole country. Thus, the *abanyarurimbi* passed through the same ritual as any other *Umushingantahe* of any hill ("colline"). Their name, *abanyarurimbi* is not deduced from their social position but from their special function as legal counsels of the king. At all levels of society, the *Abashingantahe* represented the general and the concrete law, they testified concerning all legal norms, were considered as important moral instances and established the standards of decision-making to be applied for the concrete case. The judgement to be pronounced, which had as well a moral-normative as well as a normative-executive side, was neither an exclusive matter of the *Abashingantahe* nor was it exclusively in the hands of the political power holders. The question was rather whether the *Umushingantahe's* ability to assert his legal-moral arguments persuaded the executive branch or whether political considerations prevailed. For the implementation of the legal decisions however, the king, respectively his political representatives were responsible.

1.3 State and Ethnicity

Today, Burundi is not only going down the road of state disintegration, but also the road of social decline because of its ongoing ethnic clashes and massacres. It is however important to note that Burundi's ethnicity made political headway as the end of the former monarchy neared with the attainment of independence in

10 It is thus not a "Tutsi-story" as often suggested today by some political opinion leaders.

11 According to Emile Mworoha et al. (1987: 209–210) the word "Abashingantahe" means those who place the stick. During the instructions of the conflicts the Abashingantahe knocked a small stick, the 'intahe' into the ground.

1961. According to Lemarchand (1989: 685–690), the parliamentary elections of 15 May 1965 could be described as the actual turning point. At the time, 23 of the 33 parliamentary seats went to different political parties that united many Abahutus. However, despite the parliamentary majority, the *Mwami* interpreted the result of these elections as an ethnically motivated verdict in favour of the Abahutu, with which he disagreed. He preferred thus to appoint a representative of the Abatutsi aristocracy from a minority party as prime minister. This decision rested on an ethnic interpretation of the election results, encouraged the ethnicisation of the political stage, and peaked in a first, failed Abahutu state coup d'État. The rebellion was quelled with great bloodshed by the then army commander *Michel Micombero*, an Umuhima-tutsi who became – after a successful coup d'État in 1966 – President of the 1st Republic of Burundi.

Until June 2003, the central political force was more or less monopolised by the same Umuhima-tutsi clan from the south and the presidency changed hands from *Micombero* to the cousins *Bagaza* (1976–1987) and *Buyoya* (1987–1993 and 1996–2003). At the same time, Burundi became the showplace for frequent ethnic massacres with, in total, certainly more than half a million victims and subsequent processes of endemic internal displacements. The frequent massacres were also paralleled by a general discourse order of socio-political conflict denial.

Both patterns, the official discourse on conflict denial stressing the ideology of national unity, particularly disseminated by the Abatutsi leaders of the former party of national unity (UPRONA) as well as the discourse on ethnic unity, stressed by the discriminated Abahutu opinion-leaders have however in common that they conceal the agrarian heterogeneity by an ideology of homogeneity. Therefore I would suggest that both ideologies of homogeneity have to be seen as a function of the ongoing problem of institutionalising the rule of law and the claim to power of the bureaucratic state administration suffering under the problem of cultural and economic disintegration.

This point has hardly been touched upon until now in Burundi. While the state agents and their epigones found refuge in the continuous extension of the state and parastatal arm[12], various international development agencies have intruded by conditioning aid on democratization along a western ideal, without raising the key-problem of cultural legitimization of governance as such. The results of such an omission can easily be shown: While the history of the cultural and state rift runs through the entire population and raises the issue of cultural, psychological and political self-definition, manifest today in a powerful ethnic ideology, many development agencies only operate within the social context of the modern urban sector and its islands in the countryside. Ignoring the enormous political consequences of such a social and

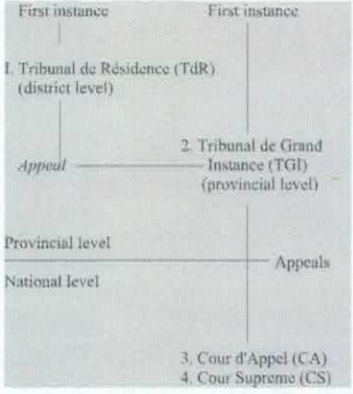
12 Since Independence there have been eight state constitutions, a fundamental reconstruction of the local administrative structures, and the assumption of modern infrastructural duties. Some measures indicate a *case law* that not only is affected by these changes but also supports and deliberately promotes this process.

cultural rift, they often regard agrarian societies as being simply backward, needing to cope with their "ethnicity" and their "traditionalism".[13]

In agrarian societies, where the daily living conditions are, however, marked by traditional production systems, the rural population always orientates itself towards traditional kinship-based systems of relationship as well as towards traditional political structures and their corresponding normative orders. Therefore, even with the formal abolishment of Burundi's monarchy, the popular attachment to the king has not disappeared and the transition to a modern nation state has not yet been accomplished. On the contrary, in the face of missing development progress[14], all political leaders have always referred to domestic strategies of political legitimacy, recalling and even adding on to the shadows of the old monarchy.[15]

2 Composition of the Statistical Data Body

Some consequences of this problem can be visualised by a statistical investigation of the court-use in Burundi. The results are firstly composed from a complete survey of all legal cases reaching Burundi's "*Tribunal de Grande Instance*" (TGI) during the period between 1979–1988 (10 years) and secondly from a recount of each 10th court case for the period between 2001–2004 (4 years) at the same institutional level. Since 1987 the "*Tribunal de Grande Instance*" has been Burundi's principal state court at the province-level. In Burundi two instances for a first inscription exist and the organizational diagram for state courts looks as follows:



13 Often, instances of nepotism, social exclusion and corruption are put down to "traditional" networks only and people are often asked to change their social behaviour and to internalize the principle goals of development programmes such as the promotion of human rights and the rule of law, good governance or gender equality.

14 See f.i. the embargo, under which Burundi suffered in the late 90s.

15 Details see Weilenmann (2000)

At the TGI-level, I collected all in all 20,229 court cases for the years 1979–1988; and the recount from 2005 considered again each 10th case, i.e. 1048 cases out of 10,482 court files. At the TdR-level, I collected 2800 court files for the period 1979–1988 and for the period 2001–2004 another 72 cases out of 723 court files. Though during both researches the official indexing of the court cases contained many weaknesses such as missing or incomplete dockets, weakened legibility of the records, incongruence between cover and content of the records or misleading assignments, I could, as the following chart shows, figure out the subject matter for most cases, the district of the emergence of the conflict and, in the case of an appeal coming up from the "*Tribunal de Résidence*" (TdR) the date of the first inscription at the "*Tribunal de Résidence*", the date of the first inscription at the "Tribunal de Grande Instance" (TGI) and at the TGI-level, the date of the judgement, the date of the payment of the court fees, the date of appeal to a higher instance and/or the date of the final implementation.

object of dispute	relative district	1. inscription (TdR; date:)	2. inscription (TGI; date:)	judgement date:	court fees, date:	Appeal and/ or protocol of implementation ? date:
itôngo*	Ntega	24.10.1978	24.01.1980	24.10.1980	22.07.1981	-----
itôngo*	Busoni	14.05.1984	19.02.1985	25.11.1987	28.12.1987	Appeal court: 25.12.1987
bride prize payment	Bwamba-rangwe	18.01.1980	21.11.1980	à rayer	-----	-----
rape	Kirundo	-----	01.04.2002	22.10.2002	Public safe	-----
divorce	Kirundo	28.04.2003	05.05.2003	14.05.2003	-----	-----

* The term itôngo means property, land or domain.

On the basis of the data from the first count, between 1979–1987, it was possible to calculate the number of cases per inhabitants in a district during a year. This so-called "litigation rate" was then related to some socio-demographic data of the population census from 1979, such as the illiteracy-rate, the population density, the gender composition of each political district and so on (cf. Weilenmann 1997). Furthermore, I projected the territorial extension of the pre-colonial power

order onto the actual geography of Burundi's district order. In this way, I was able to correlate the mobilisation and implementation rates of Burundi's "*Tribunal de Grande Instance*" with the territorial extension of its pre-colonial power claims. All this data has been encoded in dbase-files and processed by an SPSS-programme. The newer data are also very illustrative, because they allow discussing a long-term development of a structural social pattern that is generating a whole series of typical legal conflicts.

My argumentation starts with a presentation of the results of the first and larger research. It is based on the coefficient of correlation according to Pearson "r" as well as on a geographical mapping of the court cases and on some additional and explanatory graphs relating to this research. The newer data collected during a consulting mission I accomplished for an international NGO in 2005[16] allow then drawing the most important lines of development and comparing the mobilisation and implementation capacity of Burundi's TGI during the last 25 years.

3 General Discussion of Social Indicators for the Mobilisation of Burundi's TGI

A widespread supposition in development circles is that a low mobilisation rate of state courts would be a hint for a peaceful society and a well working judiciary.[17] This assumption is however misleading since nobody knows what is happening with those cases that are not negotiated at state courts. Comparative statistical data from Europe, on the contrary, demonstrate how a low mobilisation rate closely correlates to war and a general break down of the rule of law (c.f. Wollschläger 1988: 43f.).

In respect to Burundi, other change agents often suppose a negative impact of the ethnic structuring of the society on the mobilisation-rate at state courts. They thus suggest that the mobilisation-rate would be very low there, because most judges are Abahima-tutsi, in general coming from the south of Burundi, while the large majority of the total population are Abahutus. Therefore, so the argument goes, common Abahutu-farmers would rarely mobilise official state courts, since ethnic mistrust is a very popular feature and therefore Burundi's society is strongly divided by opposing interests of ethnic allegations. Many operative development agencies such as USAID, "International Alert" or "Search for Common Ground" therefore propagate the promotion of alternative fora of dispute settlement such as conflict mediation circles at the local level, ADR or the training of legal literacy volunteers. My data-body however does not confirm such a supposition.

16 cf. Weilenmann (2005).

17 cf. DFID (2004); Malawi Safety, Security & Access to Justice Programme (2003); Weilenmann (1997b).

On the contrary, compared with available mobilisation-rates of other African countries such as Kenya, Botswana or Togo, as I already stated in 1997, Burundi's mobilisation-rate of official state courts looked quite good. And during my nation-wide recount, it became definitely clear that there is no reason to argue in this direction. With one court case per year out of 342 persons Burundi's state courts had already in the 1980s a very useful and good value. And now, after the signing of the Arusha-Accord, that is after the massive increase of justice personnel[18] i.e. after the integration of an appropriate number of *Abahutu* judges as well as after the installation of the gender balance, the litigation rate did not climb up, but broke down to 1 case out of 502 persons a year. Evidently, there are other factors which have a much larger impact on the question of whether people go to court than the ethnic or the gender arguments. Facing unfitting statistical material, it is still surprising how immune the development community as a whole often behaves. Instead of verifying the obviously politically coloured statements about the decisive negative impact, the ethnic identity (*Tutsi*) and the gender identity (male) would have on the mobilisation behaviour, it is apparently still sufficient that some politicians or some (uninformed) journalists write some polemic articles on the "ethnic bias" of the judicial personnel at Burundi's state courts and "everybody" immediately feels a necessity "to take action".

The problems that need to be highlighted do not thus refer to a complete refusal of the official legal apparatus, but more to problems related to the cultural disintegration of their legal decision-making. Since many social and legal scientists often take a good mobilisation-rate of courts as a general indicator for their social legitimacy, I need to stress that the mobilisation-rate indicates rather the social need for a legal decision but it does not mirror the cultural quality of the legal decision-making. In addition, mobilisation-rates may also mould the agrarian heterogeneity and the different legal structures into one and the same social figure. Thus, their explicative power may not cover all requirements. Therefore, it is important to go into the details and to try to explain the social variations of the general mobilisation rate within one and the same society.

Since Burundi's political structure was subdivided into 114 districts, I developed a sample of 114 cases, referring to the litigation-rate of the 20 most frequent case-types of each district (c.f. Weilenmann 1997: 433f.). All my correlations made it however quite clear that one has to separate Burundi's capital city from the rest of the country and to establish at least two samples, one including Bujumbura-ville and a second sample without the capital. Otherwise the urban living condi-

18 While in the 1980s a TGI usually was staffed with 3 to 4 judges (the only exception was the TGI of Bujumbura-ville with a much higher number of court cases) and 1 lawyer of the prosecution service as well as with 2 or 3 clerks, we encounter now between 10 and 12 judges as well as 5 to 7 clerks. The district courts were in the 1980s usually staffed with two official judges and one lay judge and perhaps one clerk. Today the district courts are at least staffed with three trained judges and two clerks.

tions of Burundi's capital, marked by a growing bureaucratisation, a much higher rate of wage-earners and a general access to cash money would have an inappropriate influence on all the correlations by transforming their meanings sometimes into the contrary. Comparing the results of the full survey from the late 1980s with the data of the recount in the years 2001–2004, two indicators became particularly illustrative, namely 1) the gender composition of each district and 2) the territorial extension of the pre-colonial power order. With the gender composition of each district, I tried to determine how many women in respect to 100 men were living in one district. This way, I expected to get some gender related information about the mobilisation behaviour. And the correlation with the territorial extension of the pre-colonial power order allowed a questioning of the spatial ability to assert legal decisions by state courts. Both correlations show a very stable negative connection. The more women in relation to 100 men are living in a district, the lower the general mobilisation rate. And the same is true for the pre-colonial power order: In those areas where the former sacred kingdom was deeply rooted, the mobilisation-rate of state courts is significantly lower than in those regions where the pre-colonial power claim was weaker and/or absent.

4 To the Influence of the Gender Ratio

At a first glance, one could assume that women are less litigious than men and that the mobilisation of Burundi's TGI is principally a male domain.

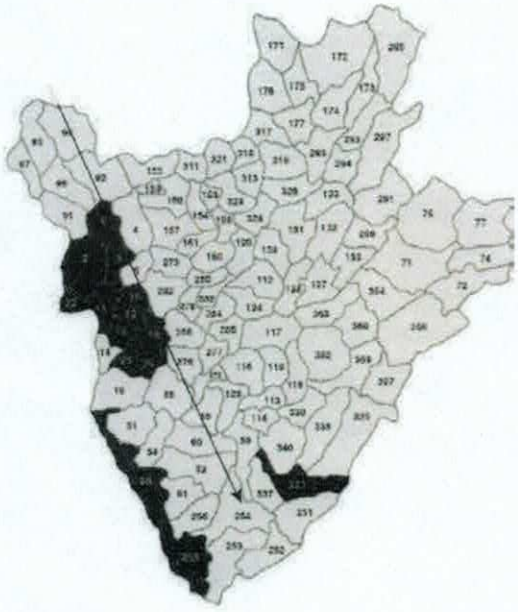
Correlation by Pearson	Criminal law (N=114)	Criminal law (Sub-sample) (N=113)	Civil-codified law (N=114)	Civil-cod. Sub-sample (N=113)	Civil-customary law (N=114)	Civil-cust. Sub-sample (N=113)
portion of women	r= -.3361**	r=-.3564**	r=-.5382**	r=-.3714**	r=-.1758	r=-.2125

I discovered however that such an interpretation would be misleading. More conclusive is rather the connection between the socially defined gender roles and the access to property. Following the customary rules of ownership family property is the property of the patriline. The customary succession rules for instance designate the eldest son as the principal heir (Meyer 1916: 92). Men also have much better access to cash money. This is essential for bringing a case to a state court, where one has to pay court fees. And if one refers to the different case-types and takes a look at the most significant correlations, it becomes quite clear that the negative correlations are principally marked by cases that are referring to property issues:

Full Sample/N=114 Correlation according to Pearson > r=	Portion of women	Sub-Sample/N=113 Correlation according to Pearson > r=	Portion of women
Criminal law		**Criminal law**	
betrayal of trust	-.4746**	betrayal of trust	-.5270**
destruction	-.3721**	destruction	-.4208**
simple theft	-.3669**	simple theft	-.3868**
burglary	-.2582*	burglary	-.2896**
Civil-codified law		**Civil-codified law**	
debts	-.4993*	debts	-.3179**
compensation for damages	-.5500**	compensation for damages	-.4537**
rental fees	-.4717**	rental fees	-.2326*
affiliation payment	-.4864**	affiliation payment	-.3042**
divorce	-.3754**	divorce	-.2260*

It is important to note that Burundi's legal body is still not completely codified. While the criminal law was codified during the colonial period, the civil law continued to contain two branches: A codified part referring mainly to cash-money issues such as debts and compensation claims and to the family law and, since there is no general land register, a customary part referring principally to land disputes, conflicts of succession rights and cattle conflicts. Burundi's official judges have therefore also to decide on cases of customary law. My further comments will however show that the social impact of that division has, compared with the urbanised parts around Bujumbura-ville, another face in Burundi's heartland.

If we have now a look at the second chart, my correlations make it clear that one has to differentiate Burundi's capital city from the rest of the country and to work with two separate samples. In the coloured districts, where the mobilisation-rate is relatively high, there are significantly less women than in the rest of the country. This is also the region where disputes that can be regulated by the codified part of the civil law, mainly come up to the TGI. The arrow on the chart below indicates the course of the mountain chain that separates the plains of the Imbo from Burundi's traditional heartland.

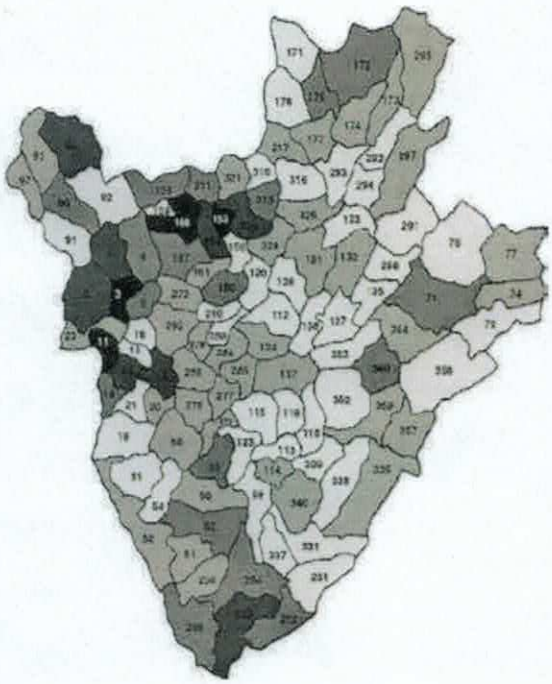


Highly male dominated districts in black (1979–1988)

During the times of the colonial conquest, the German aggressors first built their military posts in this region. The Imbo was also the place, where the first market places were instituted and where Belgium initiated its first projects of "villagisation", which are today again so popular.[19] A part of the coloured localities are grouped around Burundi's present capital Bujumbura-ville, where about 60 % of the total population are wage earners. Directly to the north of Bujumbura-ville, in Mutimbuzi, is the international airport. In the extensive plains of the Ruzizi-river, which go up to the Rwandan border, the large herds of Burundi's state elite graze. There, as well as on the shore of Lake Tanganyika we can find large cotton fields. In the south (Nyanza-Lac) are the palm oil plantations and in the south-east (Bukemba) we find the only large state-owned sugar factory. The Imbo is also known for its fisheries as well as for its intense economic exchange with the Congo. Together with tea and coffee, sugar, fish, cotton, cattle and palm oil are the most important cash-crops of Burundi's economy. And together with the wage earning, most of these economic activities are typically male dominated, while more women cultivate their small fields in Burundi's heartlands on the other side of the mountain chain.

A look at the geographical distribution of court cases concerned with disputed debts does not significantly challenge this general observation of two mobilisation cultures (see chart below). Again, most disputed debts come up from Burundi's west, mainly from the Imbo, while in the heartland, only the region around Kayanza and Ngozi is an exception. The region of Kayanza constitutes however the most important entry-point from Rwanda, where all the western goods are imported on the principal highway leading down to Bujumbura-ville.

19 cf. the plans, programmes and projects for a new Land Policy, as they are outlined by the Fund for Danish Consultancy Services for Burundi (2007) and by the National Unity and Reconciliation Commission (2005) for Rwanda.



Range of the litigation rates and corresponding shading

* no shading:
<=0,005 cases/1000 Pers. and year
* grey level 1:
0,006–0,02 cases/1000 Pers. and year
* grey level 2:
0,021–0,05 cases/1000 Pers. and year
* grey level 3:
0,051–0,100 cases/1000 Pers. and year
* grey level 4:
>=0,101 cases/1000 Pers. and year

Distribution of disputed debts at the TGI (1979–1988)

Resuming, it can be said that the bureaucratically organised nation-state of Burundi is generally in a position to enforce codified conceptions of civil law in regions which are relatively strongly integrated in the cash economy. In the traditional coreland on the other side of the mountain chain however, many family farms can no longer secure their survival within a subsistence economy, because the fields to be cultivated are becoming smaller and smaller through the increasing population density and the low degree of urbanisation. From the limited marked integration of women, it can be assumed that the women together with their children continue to cultivate the hereditary farm, whilst many men go to the coastal region in order to work as herdsmen, day-labourers, "petit fonctionnaires", dealers, or administration officials. Therefore it becomes clear that in the coreland, as we shall see, the lack of access to cash impairs the chances to enforce official state law. This is in particular also true for the family law, codified in 1980, which improves the situation of women in comparison to traditional conceptions. For instance, divorces are possible only if a relation is registered in an official register of marriages. Such registrations are in particular common in small trade centres, where also the women get in closer contact to the public administration. However, those who are not integrated into the market economy remain rooted in tradition and do not register their marriage. Thus, there is also in principle a negative connection between the local rate of official divorces and the proportion of women per district (r= -.3754**).

Index of the districts

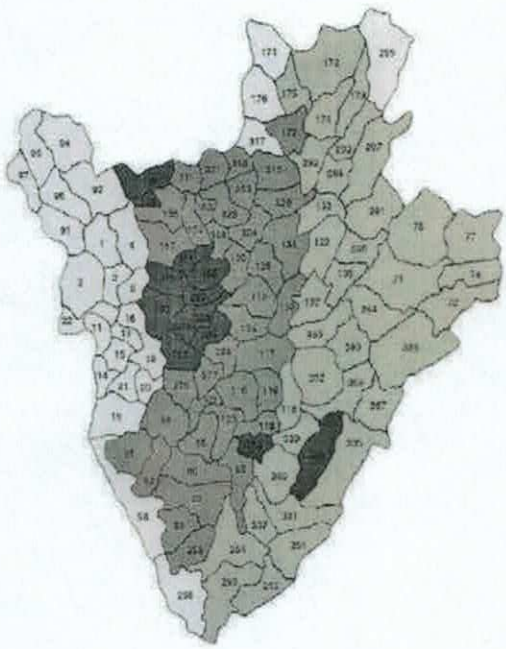
Code	district's name	Code	district's name	Code	district's name
1	Bubanza	131	Bugenyuzi	297	Muyinga
2	Gihanga	132	Buhiga	298	Mwakiro
3	Mpanda	133	Gitaramuka	311	Busiga
4	Musigati	135	Mutumba	313	Gashikanwa
5	Rugazi	137	Nyabikere	316	Kiremba
11	Bujumbura-ville	138	Shombo	317	Marangara
13	Isale	139	Gihogazi	318	Nyamurenza
14	Kabezi	153	Gahombo	321	Mwumba
15	Kanyosha	154	Gatara	323	Ngozi
16	Mubimbi	155	Kabororc	324	Ruhororo
18	Mugongomanga	156	Kayanza	326	Tangara
19	Muhuta	157	Matongo	331	Bukemba
20	Mukike	158	Muhunga	335	Giharo
21	Mutambu	159	Muruta	337	Gitanga
22	Mutimbuzi	160	Rango	338	Mpinga-Kayove
51	Burambi	161	ButaganzwaK	339	Musongati
52	Bururi	171	Bugabira	340	Rutana
54	Buyengero	172	Busoni	352	ButaganzwaR
55	Matana	173	Bwambarangwa	353	Butezi
56	Mugamba	174	Gitobe	354	Bweru
58	Rumonge	175	Kirundo	356	Gisuru
59	Rutovu	176	Ntega	357	Kinyinya
60	Songa	177	Vumbi	359	Nyabizinda
61	Vyanda	251	Kayogoro	360	Ruyigi
71	Cankuzo	252	Kibago		
72	Cendajuru	253	Mabanda		
74	Gisagara	254	Makamba		
75	Kigamba	255	Nyanza-Lac		
77	Mushiha	256	Vugizo		
91	Buganda	272	Bisoro		
92	Bukinanyana	273	Bukeye		
94	Mabayi	276	Gisozi		
95	Mugina	277	Kayokwe-Mwaro		
96	Murwi	278	Kiganda		
97	Rugombo	280	Mbuye		
112	Bugendana	282	Muramvya		
113	Bukirazazi	284	Ndava		
114	Buraza	285	Nyabihanga		
116	Gishubi	286	Rusaka		
117	Gitega	288	Rutegama		
118	Itaba	291	Buhinyuza		
119	Makebuko	292	Butihinda		
120	Mutaho	293	Muyange-Gashoho		
123	Ryansoro	294	Gasorwe		
124	Giheta	295	Giteranyi		

5 The Legal Impact of the Pre-colonial Power Order

The heartlands, which are marked by a strong subsistence economy including shifting cultivation, horticulture, pastoralism and an accentuated scattered settlement, are at the same time also the regions where the former kingdom was strongly rooted and where even nowadays the customary part of the civil law is very well anchored. The correlation shows thus a stable negative connection and is particularly pronounced in the civil-codified part:

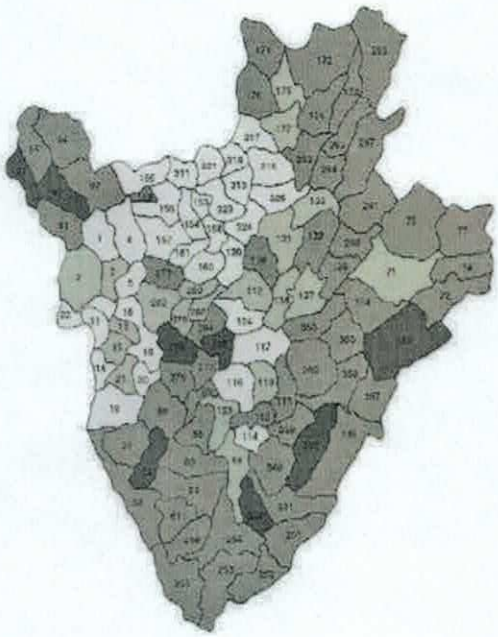
Correlation according to Pearson > r=	Territorial extension of the pre-colonial power order
mobilisation of criminal law	
full sample N=114	-.1147
sub-sample N=113	-.1117
mobilisation of civil-codified law	
full sample N=114	-.2243*
sub-sample N=113	-.2186*
mobilisation of customary law	
full sample N=114	-.1406
sub-sample N=113	-.1465

In those areas where the former sacred kingdom was deeply rooted, the mobilisation-rate of state courts is thus significantly lower than in those regions where the pre-colonial power claim was weaker and/or absent.



Burundi's pre-colonial kingdom (19th century) projected onto the actual district order*
* The dark coloured districts were once areas of the royal courts and/or ritual places of the king Mwezi Gisabo.
The dark grey coloured districts were the dominions of the Abezi (direct descendants of Mwezi Gisabo). The light grey coloured districts were the dominions of the Abatare, the descendants of the ancestor on the Mwezi Gisabo's side, king Ntare II.

Most probably, the litigation rate at official state courts is lower in these regions because of today's role of the *Abashingantahe*, who still witness the presence of the pre-colonial power order. However, their official role is still very limited.[20]



Implementation rates
(proportional part of implemented cases
in relation to all the judgments per district)

Corresponding shading
* no shading < 10 %
* grey level 1: 10 % – 30 %
* grey level 2: 31 % – 60 %
* grey level 3: > 61 %

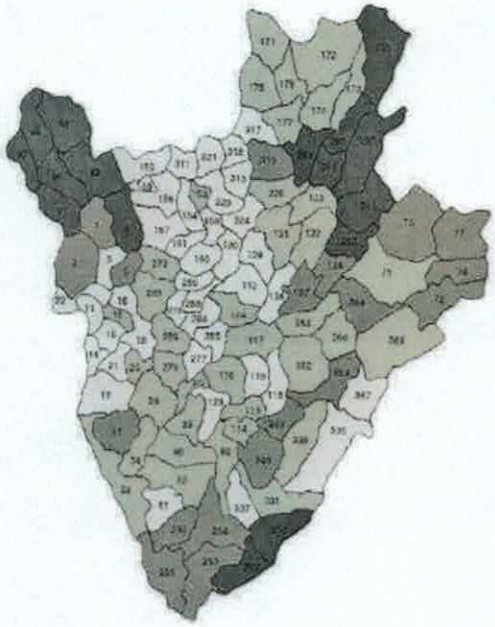
Map of all implemented TGI **criminal law cases** (1979–1988)

And if we focus now on the *spatial implementation capacity* of cases of criminal law, codified civil law and customary law by Burundi's TGI, we can easily identify that Burundi's bureaucratic organised military regime, which was in power until June 2005, was able to implement its legal decisions mainly along the Tanzanian border, in Burundi's south, where most governmental staff comes from, and in the north-west-strip of the country. This statement, which refers mainly to the results of the complete survey accomplished in 1989, has – though after my recount from 2005 some slight changes have to be noticed[21] – still kept its validity. This observation is all the more surprising, as it seems as if the different normative regulations of the various legal bodies only play a subordinate role. And there is a continuous nega-

20 In Article 1 of the Arusha Accord for instance, the *Ubushingantahe* is explicitly mentioned as one of the most important unifying powers, which would or could favour Burundi's social cohesion and Article 7, paragraph 27 calls for a rehabilitation of this old institution. But in the actual constitution (02.2005), the *Ubushingantahe* sink again in silence and the new law on the organisation of the judiciary (03.2005) delegates their former role as lay judges and assessors to the clerks. Of course, this process again entails a lot of frustration and anger on the side of the *Abashingantahe* and all those, who still remain so much attached to Burundi's history-loaded traditions.

21 see details below.

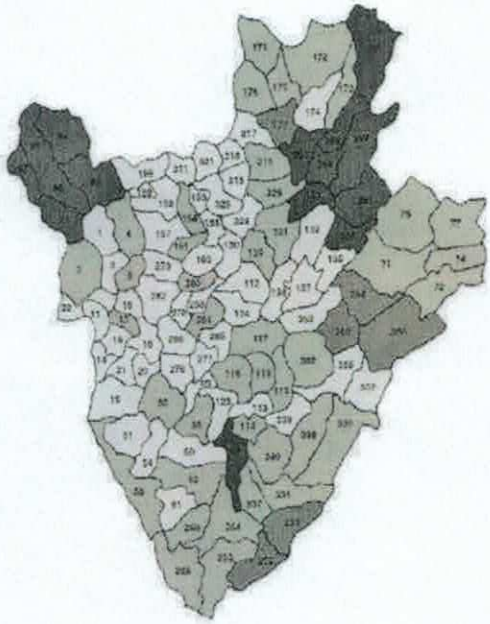
tive connection between the implementation capacity per district and the pre-colonial power order of the former kingdom, which is particularly significant in the civil codified part as well as in the customary part.



Implementation rates
(proportional part of implemented cases
in relation to all the judgments per district)

Corresponding shading
* no shading < 10 %
* grey level 1: 10 % – 30 %
* grey level 2: 31 % – 60 %
* grey level 3: > 61 %

Map of all implemented TGI cases on **customary law** (1979–1988)



Implementation rates
(proportional part of implemented cases
in relation to all the judgments per district)

Corresponding shading
* no shading < 10 %
* grey level 1: 10 % – 30 %
* grey level 2: 31 % – 60 %
* grey level 3: > 61 %

Chart of all implemented TGI cases on **civil-codified law** (1979–1988)

Index of the districts

Code	district's name	Code	district's name	Code	district's name
1	Bubanza	131	Bugenyuzi	297	Muyinga
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3	Mpanda	133	Gitaramuka	311	Busiga
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16	Mubimbi	155	Kabororc	324	Ruhororo
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19	Muhuta	157	Matongo	331	Bukemba
20	Mukike	158	Muhunga	335	Giharo
21	Mutambu	159	Muruta	337	Gitanga
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This observation becomes accentuated by a strong negative correlation between the local implementation-rate and the population density. The denser the local population is, the weaker is the general implementation capacity of Burundi's TGI. Therefore one has to see that villages in the heartland of Burundi are nearly absent and that the local ways of scattered settlement refer to the pre-colonial power order.

If we now refer to Burundi's political history, in particular to the history of Burundi's colonial conquest, and compare this history with our charts of the legal implementation-rates, the following interrelations become imaginable: The former King *Mwezi Gisabo* held the traditional tablelands under his firm control, while his kingdom was weaker in the east flank and in the northwest strip of the country and the Imbo was out of his control. The east flank, which was under the control of some *Abatare*, and marked by unclear border lines, was mostly a no-mans-land, neglected steppes, a refuge of dissatisfied people, rebels and self-proclaimed rulers (Bukuru 1986). The Germans invaded through the "failles des Allemands" in Burundi's south-east. Because of this, the political proportions dramatically changed: The sacred kingdom fell into the Germans' trap and had to capitulate after a fight lasting at least four years. At that point in time, the coast, today another implementation-zone, came under direct colonial control. Even if the colonial powers Germany and Belgium then attempted, with long lists of normative declarations of legality and illegality, to gain ground in Burundi's core land, they remained unable to culturally control the old monarchy. Their difficulties of leadership left a torso state in which the pillars of the former kingdom were destroyed but not replaced by new political support structures. Today our charts of the implementation geography look like reversed copies of the pre-colonial power order. I thus think that Burundi's so-called ethnic conflict is not so much a cultural problem but rather a problem of state integration that is firmly linked to the cultural disintegration of recent political history.

6 To the Influence of Ethnic Massacres

This observation also becomes interesting, if we refer the massacres of 1993, which have been officially mapped to the implementation capacity of Burundi's state courts. In 34 of the 53 districts, that is in 64 % of the localities in which the massacres of 1993 took place, the implementation capacity of criminal law matters is below 30 %. The same is true for 44 of the 53 districts in civil-codified law matters and for 43 of the 53 districts in customary law matters.

But it is also striking to see that the principle zones of weak legal implementation are involved in almost all the killings having taken place up to now in Burundi (Weilenmann 1998: 154f.). We can refer to the massacres of Marangara/Ntega, that took place in 1988 or to the huge massacres from 1972 to 1974, that started in the north of Bururi (Rutovu), or to the massacres of 1965, that happened in Bukeye, always we are confronted with the same observation: while the pillars of the former monarchical order were largely destroyed during the colonial and post-co-

lonial period, the emerging bureaucratic regimes were however rarely able to implement an alternative legal order that really penetrated the social relations in the countryside. This constellation continues to exist until today.

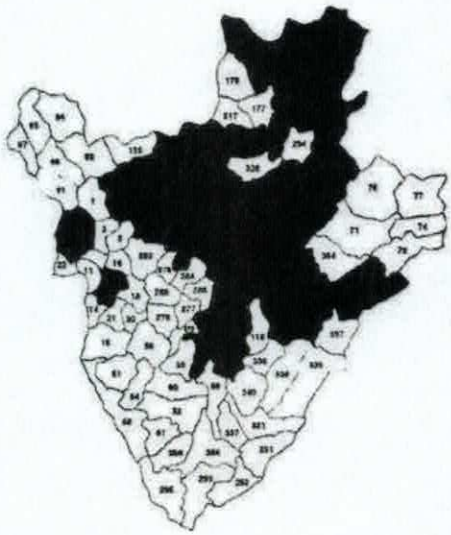

Chart of the ethnic massacres, October/Novermber 1993

If one considers therefore all those TGIs which towards the end of the civil war, i.e. between 2001 and 2004, did not implement any single court case, one can easily remark that 5 of these 7 TGIs are again located in the corelands of the former monarchy of Burundi.

TGI-level	criminal law	civil law	customary law
time period	2001–04 (1979 – 88)	2001–04 (1979 – 88)	2001–04 (1979 – 88)
Cankuzo	0 % (34.7 %)	0 % (8.9 %)	0 % (34.2 %)
Gitega	0 % (8.4 %)	0 % (10.9 %)	0 % (9.9 %)
Kayanza	0 % (4.4 %)	0 % (2 %)	0 % (1.5 %)
Makamba	0 % (38.4 %)	0 % (22.4 %)	0 % (38.2 %)
Muramvya	0 % (26.9 %)	0 % (3.6 %)	0 % (9.8 %)
Mwaro	0 % (49.1 %)	0 % (8.5 %)	0 % (9.5 %)
Ngozi	0 % (0.3 %)	0 % (6 %)	0 % (8.2 %)

And except for Mwaro's relatively high implementation rate of 49.1 % in criminal law matters for the years 1979–1988, all these 5 courts already had in the 1980s a remarkable bad implementation capacity. But because of the war between 1993 and 2005, obviously also the TGIs of Cankuzo and Makamba, which before had, at least in criminal law, a quite good score, now got caught in the maelstrom of absolute insignificance. On the other hand, the TGIs of the southern Mugamba and the Bututsi like Bururi and Rutana, where most of the governing class comes from, could keep and partially improve – even under the particularly difficult security conditions of the civil war and without any trained bailiffs – their implementation capacity:

TGI-level	criminal law	civil law	customary law
time period	2001–04 (1979–88)	2001–04 (1979–88)	2001–04 (1979–88)
Bururi	25 % (49.9 %)	33 % (17.6 %)	36 % (21.5 %)
Rutana	15.4 % (54.6 %)	100 % (37.9 %)	44.45 % (31.8 %)

Interestingly enough, the same also holds true for the TGIs of Kirundo and partly Ruyigi, both courts located in the eastern part of Burundi and also outside of the former dominions of the *Abezi*.

TGI-level	criminal law	civil law	customary law
time period	2001–04 (1979–88)	2001–04 (1979–88)	2001–04 (1979–88)
Kirundo	12.5 % (31.7 %)	50 % (20.5 %)	63.64 % (19.5 %)
Ruyigi	6.45 % (50.3 %)	33 % (33 %)	33 % (25 %)

And for Bujumbura, Bubanza and Karusi, the situation has not changed very much, the implementation capacity was already very weak in the 1980s, and so it is nowadays. I think, these are rather challenging results which turn the current discussion on Burundi's ethnic clashes upside down, because they focus on a largely neglected problem complex, the social consequences of a missing cultural integration of "modern" bureaucratic governance guidelines on social behaviour and not so much on the history of ethnic phantasms only, which were introduced by the colonial powers as means of domination.

7 Conclusion

In order to explain Burundi's massacres and genocides, the current analyses refer mainly to two chains of arguments: to the history of ethnic mythologies and colonial politics and to the problem of population density and land shortage, an argument which actually is particularly en vogue in development political circles. Population pressure and very limited and poorly urbanized space (i.e. subsistence economy), it is argued, would thus quasi-automatically lead to a jeopardized national cohesion and to a threatening of (social) peace. And as is so often the case, the existence of customary law is identified as the principal barrier for social change:

> *"Land disputes are mostly dealt with at the local level by local authorities and decisions taken based on a combination of statuary and customary law. However, the interpretation hereof varies greatly from province to province. Less than 5 % of the land and title deeds are formally registered and ownership is based on oral tradition and the period of occupying the land"* (DANIDA 2007: 4).

These reasonings are actually widely exploited for the justification of a new land policy. Change agents of different development political circles advocate thus resolutely for a codification of customary law as an instrument of a better predictability. In order to emphasize the argument, we can now observe a tendency either to extrapolate local or peculiar observations and/or to cement free floating legends. One of these legends says, that up to 80 % of all court cases would concern disputes on land (cf. Gatunange et al. 2005; RCN 2003: 18).

My statistical data body shows however a great regional variety. Conflicts on land are particularly frequent in the most fertile zones of Burundi, i.e. in the corelands of the former monarchy and in the North West strip, which long was virgin forest and only in the 1990s got in the focus of inner migrations as a consequence of growing population pressure and of the civil war. In these particular regions, disputes on land might climb up to 50 % of all court cases. But in general, such an assumption cannot be confirmed. Disputes on land (itôngo) covered only 12.5 % of all legal cases at district and province level between 1979 and 1988, and between 2001 and 2004 only slightly more. An additional 5.2 % resp. 4.8 % of all legal cases are conflicts on succession rights. But 15.5 % resp. 17.5 % concerned debts and 18.7 % skilled thefts. Important were also brawls (9 %), conflicts on indemnities, simple thefts and divorces (each 5.2 %) as well as rapes (3.2 %).

Following the genocides in Burundi and Rwanda, many social scientists prefer arguing on the basis of a multi level approach. Dieter Neubert (2004: 126) for instance highlights the importance of a socially violent situation which is fostered by divisive and polarising topics of conflict, the accepted use of violence by political leaders, the public recognition of acts of violence and the constriction of primarily multiple identities entailed by a weakened or endangered state monopoly on power.[22] Though

22 "A key factor of the violent situation is a weakening of the state monopoly on power and the impunity of the use of violence, also named as 'culture of impunity'" (Neubert 2004: 128).

I principally share his view, I interpret these phenomena rather as logical consequences of a culturally disintegrated state order of power. This bureaucratic state order never achieved the ability to maintain a monopoly on power. My conclusion refers thus to the assumption that the dominating ethnic ideologies have to be seen as ideologies of homogeneity. They are rooted in a bureaucratic state order which culturally and economically fails to integrate the cultural heterogeneity of Burundi's agrarian society.

Such ideologies are thus a means to veil the progressive disintegration of loyalties and of solidarities – in short, of the basic process of modernisation that started with the colonial and postcolonial order. The post colonial state order fails to implement its legal decisions in regions which come closer to the core lands of the former monarchy. And the massacres happened precisely there where the post colonial state order was and continues to be weak and powerless. The massacres mainly reveal thus a problem of domination of the modern state order. Its origins point to the Abarundi's historical experiences with the breakdown of the old monarchy and to the faulty relations they keep with the modern bureaucracy.

Therefore, not decentralisation, democratisation or the lack of knowledge concerning human rights are the key-problems of Burundi's post-colonial nation state, but its missing cultural legitimacy. Development agencies, which start running on the basis of western ideals of power legitimacy programmes on good governance and the rule of law by means of (formal) institution- and capacity-building, training and sensitising programmes etc., do not in fact respond to Burundi's most fundamental question of how to govern legal pluralism and thus remain imprisoned within the residual power structures of the colonial heritage.

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