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**Land reform in Burundi:
Waiting for change after twenty years of fruitless debate**

INTRODUCTION

Burundi is a landlocked country in East Africa, neighboring Rwanda, Tanzania and the Democratic Republic of Congo. With its 8,5 million inhabitants living on 28,000 square kilometres, it is comparable in size and inhabitants to Belgium or Catalonia. In Africa, it is the second most densely populated country after Rwanda. Its economy heavily depends on the agricultural sector and relies to a large extent on subsistence farming.

Since independence from Belgium in 1962, Burundi has experienced several outbreaks of violence. Important interethnic massacres occurred in 1965, 1969, 1972, 1988 and 1991. Between 1993 and 2005, a civil war has caused hundreds of thousands of deaths. At all these occasions, people were displaced or had to seek refuge in neighboring countries, leaving behind their land and livestock. Following a relative political and military stabilization, many refugees have recently returned to Burundi and are now trying to recover their land.

Demands for land or compensation by returning refugees are currently adding to many other problems caused by land scarcity and inappropriate land laws. The current land code of Burundi, which was promulgated only in 1986, is mainly a compilation of former colonial laws and retained most of the shortcomings of preceding texts. Under the 1986 code, the country saw a significant increase in land conflicts and many illegal land allocations. A reform of the land code has been discussed by government officials and international donors since the 1990s. But up to now, all these discussions proved fruitless.

Currently, almost three-quarters of conflicts that are brought before court in Burundi are related to land. Many of these conflicts end up in High Court after years of judicial procedure and appeals, but even at this stage only few decisions are successfully implemented on the ground. Popular resistance against the enforcement of court rulings is very common in Burundi, and criminal offences like “recalcitrance” (*rébellion*) or “removal of land boundaries” (*enlèvement de bornes*) are amongst the most important ones in terms of legal statistics. If judges are not directly attacked or threatened during the execution of their judgments, in many cases, the plants they use to mark the boundaries of litigious plots are found uprooted some days later (Kohlhagen 2008b).

Some authors link the resistance to court decisions in Burundi to the prevalence of customary or other local judicial authorities (Weilenmann 1997). Most conflicts are indeed first submitted to the traditional *bashingantahe* councils, which, although they have changed a lot over time, are still widespread throughout the country and continue to play an important role in local conflict resolution (Kohlhagen 2010a; Nindorera 2003; Ntahombaye 1999; van Leeuwen et al. 2005).

Frequently, conflicts are also brought before administrative or church officials, before ad hoc commissions or “legal clinics” set up by NGOs¹.

Institutional plurality however does not mean people genuinely rely on or believe in all these institutions, nor that they recognize them as more legitimate than state courts. People seize opportunities and practice “forum shopping”² when conflicts arise. As a matter of fact, most authorities, be they recognized under state law or by local people, encounter the same problem: their decisions are contested or ignored by one of the parties in conflict. As a result, many conflicts are actually dealt with by violent means. Almost every day, Burundian radio stations and newspapers report grenade attacks or killings of ordinary people who were simply at odds over the demarcation of a land plot. Violence, fear and lack of rules: tensions over land in Burundi are very close to what Emile Durkheim termed *anomie*, referring to the breakdown of social values and socially accepted norms (Durkheim 1897). Many land conflicts today cannot be solved because people do not agree on a common normative repertoire.

This paper analyses how this situation relates to state policies and state land law and how the repeated attempts to reform the land code failed to respond to steadily growing tensions. The following section focuses on statutory law, showing its instrumental use by colonial and postcolonial state officials to the detriment of ordinary Burundians throughout history. The second section questions the historical evolution of rules governing land relations at the local level. It stresses the progressive erosion of fundamental social regulation mechanisms since the introduction of present-day state law. The final section describes the ways in which political elites tried – but, up to now, failed – to respond to these multiple problems.

MANIPULATED LEGALITY: THE INSTRUMENTAL USE OF STATUTORY LAW

The most obvious reason for the discrediting of normative rules amongst ordinary Burundians is the repeated manipulation and instrumentalization of statutory provisions by state officials. In recent years, several studies and reports have reflected this problem (Gatunange 2004; ICG 2003; UNOPS-PNUD-CNTB 2007).

The best known examples relate to the spoliation of land following the departure of refugees and internally displaced people (ICG 2003; Hatungimana et al. 2003; Gatunange 2005; van Leeuwen et al. 2005; IDMC-NRC 2009). Especially after the 1972 massacres and in the years following the outbreak of civil war in 1993, many Burundians were forced to flee their homes. In many cases, their land was occupied by neighbors or local administrators, and quite frequently these occupations were sealed by documents countersigned by state officials. In 1976, a decree formally legalized some of these transactions, limiting the rights of former owners to partial compensation³. One year later, in 1977, another decree extended the prescription of land ownership to customary land: all land occupied for a period of fifteen years, whether the initial occupation was intentionally illegal or not, was to be automatically transformed into full

¹ For a general survey of local judicial authorities throughout the country see: Kohlhagen 2009a, 22-28.

² Terminology adopted from: von Benda-Beckmann 1981.

³ Décret-loi n° 1/191 du 30 décembre 1976 portant retour au domaine de l’Etat des terres irrégulièrement attribuées. According to its title and to its first three articles, the decree provided for the recovery of illegally attributed land. In article 4 however, the decree foresaw the full legalization of all illegal attributions of plots smaller than four hectares. This provision allowed massive regularization. See: Vandeginste 2009, 82.

ownership⁴. One year before this rule would have given full ownership to the occupants of the land left in 1972 (in 1987), the 1986 land code lengthened the prescription period to 30 years⁵. This implied that from 2002 onwards, the controversial legal provision started to benefit the new occupants and deprived most returning refugees from their former land.

As a result of the various changes in statutory law, most refugees trying to recover land after their return are facing insurmountable obstacles. To deal with these problems, the government created a number of special commissions in charge of dispute settlement and reallocation of state-owned land to landless returnees. The first two commissions, created in 1977 and 1991, were followed in 2002 by the *Commission Nationale de Réhabilitation des Sinistrés* (CNRS) that in 2006 was replaced by the *Commission Nationale Terres et autres Biens* (CNTB). The CNTB has been installed in all provinces and has parallel competences to the official first-instance courts for all conflicts involving a returnee. Instead of solely applying statutory law, the commission first tries to achieve a mutual agreement between the parties in conflict. However, besides the installment of these dispute settlement mechanisms, the Burundian government never fundamentally questioned the instrumental use of law from which most problems originated

Although international attention and recent reform initiatives mainly focus on the returnee issue, the land problems encountered in Burundian society are actually of a much more general nature. As a matter of fact, the instrumental use of law and public institutions to force arbitrary reallocation of land has a longstanding tradition in Burundi and is almost structural in national legislation. The problem is not only that land services, communal administrations and courts are corrupt or clientelist. The core problem is that most of the spoliations and land grabs were at some point legalized, giving corruption and clientelism an almost normative character. To a large extent, statutory law in Burundi facilitates and even encourages practices that most people perceive as arbitrary, inequitable and unjust.

The 1986 land code, which retained most of the ambiguities in former legal texts, did not succeed in cutting short the logics of arbitrariness (and possibly did not even wish to do so). Under the logics of colonial law, only land that is formally registered with a land title is legally defined as being full “ownership” (*propriété*) and enjoys the effective protection of state law. Customary or locally recognized rights which are not registered are subtly distinguished from this category as being mere “private rights” (*droits privatifs*). This distinction has important practical consequences. Unlike registered “ownership”, unregistered “private rights” are only protected from state intrusion as long as the land is effectively used for farming or grazing. Unregistered land that is left for more than two years without being “used” in one of these two ways is automatically considered as “wasteland” (*terres vacantes*) and belongs to the state⁶.

In theory, all land users can escape the stranglehold of the state by registering their customary land rights under the titling system. Implicitly, the land code even foresees the progressive disappearance of customary land tenure and its replacement by the titling system⁷. When the code was promulgated, this assumption was perfectly in line with the land policy guidelines

⁴ Décret-loi n° 1/20 du 30 juin 1977 étendant le système de la prescription acquisitive aux immeubles régis par le droit coutumier. Before this decree, prescription rules only applied to registered land.

⁵ Article 29 of the 1986 code.

⁶ Article 231 of the 1986 code.

⁷ Article 329, for instance, stipulates that customary land rights are protected by statutory law “even if they are *not yet* recognized by a registration certificate” (“lors même qu’ils ne seraient *pas encore* constatés dans un certificat d’enregistrement”).

published in 1975 by the World Bank, which advocated the ideal of converting all “customary” land rights into what the guidelines termed “legal” land rights (World Bank 1975, 21). According to this perception, that prevails in most post-independence land reforms in Africa, “the most successful land reforms include those whereby [customary] tenants become [freehold] owners of the land they operate” (World Bank 1975, 34). The idea of increasing the protection of customary land rights could consequently only be perceived as a counterproductive measure.

As in most African countries, however, the registration procedure in Burundi is not only complicated, long and expensive. It is also disconnected from social reality. Land registration offices (*services des titres fonciers*) only exist in three cities – the capital Bujumbura, Gitega and Ngozi. Before submitting their demand to one of these offices, applicants have to hire a geodetic surveyor from Bujumbura, report the precise land limits to the national cadastral services and demarcate the land boundaries with stones made of imported concrete. The majority of people in the countryside, used to marking land boundaries at best with perennial border plants, are totally unfamiliar with these procedures. In addition, for most of them, the price they would have to pay for the concrete is already higher than the market price of their land plots, not to mention the cost of the surveyor and the taxes for cadastral services.

In fact, right from the start, the intention of the titling system was clearly not to serve the rural masses. On the contrary, when it was introduced under colonialism, access to the system was strictly limited to a very small and privileged group: the European colonizers. Land registration was mainly an instrument of power through which the colonial state could legitimize its control over land. It was only on the eve of independence, in 1960, that Burundians themselves were effectively allowed to register their land. However, in many respects, the titling system is still an exogenous system for most Burundians. Culturally, it is rooted in legal traditions imported from Europe. Economically, it is unaffordable. Politically, it mainly serves those who are close to the power apparatus of the state. In 1981, one of the best-known specialists in Burundian law, René Massinon, described the ambition to generalize the titling system in Burundi as a mere “illusion” (Massinon 1981, 1). Thirty years later, indeed, the number of registered land plots is still insignificant: only some 46,000 land plots are effectively registered (Republic of Burundi 2008, 3), barely more than 1 per cent of the country’s surface area.

Since the end of the 1980s, several studies have reported similar evidence from other African countries, stressing the need to give more recognition to customary law and local arrangements within the legal system of the state (Lavigne Delville 1999; Le Roy et al. 1986; Toulmin et al. 2001). Since then, different land reforms in Africa have followed this recommendation, either by identifying and formalizing customary land occupancy under a centralized land management system⁸ or by recognizing the right of local and customary authorities to administer land⁹ (Colin et al. 2009; Manji 2006). According to a report published in 2003 by the World Bank, “it is now widely realized that the almost exclusive focus on formal titles in the 1975 paper was inappropriate, and that much greater attention to the legality and the legitimacy of the existing institutional arrangements will be required” (Deininger 2003: xlv). Today, several strategic documents of

⁸ Benin, Burkina Faso, Guinea and Ivory Coast, for instance, launched such identification programs to localize and formally recognize customary land rights without issuing individual land titles. The general idea of these projects was to map customary occupancy in so-called “rural land plans” (*plans fonciers ruraux*) that were to become a kind of simplified cadastre.

⁹ Examples of such policies can be found in Ethiopia, Madagascar, Mozambique, Namibia and Tanzania.

Western donors underline the importance of taking account of local and customary systems in land reforms (EU Task Force on Land Tenure 2004; French Development Cooperation 2009).

In Burundi, decentralization of land management in line with these “new wave” land reforms has been recommended on different occasions since discussions on reform started in the early 1990s (Bouderbala 1992; Leisz 1998; SDC 2007). In order to stop benefiting a small minority only, the land management system of the state does indeed have to adapt to its social environment and to take account of the needs and realities of rural farmers. That said, such a policy requires a thorough knowledge of rules and processes people actually perceive as legitimate to govern use of land and access to natural resources. A closer look at research done on land management at the local level reveals however that many Burundian customs have in fact eroded and been deprived of their foundations.

ERODED LEGITIMACY: ANCIENT CUSTOMS IN PRESENT-DAY REALITY

Despite the great number of recent publications on land problems in Burundi, very little fieldwork has been carried out on local land tenure mechanisms. Most in-depth studies on customary land regulation date back to the first years of independence (Sohier 1962; Verbrugge 1965, 1970; Bukera 1970; de Clerck 1971; Ndayisenga 1974). Later publications rather concentrated on state law and its implementation (Massinon 1981; Nimpagaritse 1983). The most recent studies are mainly interested in conflict analysis (Manirumva 2004; Suguru 2004; van Leeuwen et al. 2005; Manirakiza et al. 2007; Ntampaka 2008). For forty years now, no significant fieldwork has been done on customary land law, tenure security and local land management outside conflict situations in the Burundian context.

The privileged focus on conflict analysis probably explains why the only local legal institution that found its way into books, articles and expert reports in recent years is the council of *bashingantahe* (ICG 2003; Gatunange 2004; van Leeuwen et al. 2005; Ntampaka 2006). As judicial authorities, however, the *bashingantahe* have never been in charge of land administration. They are basically facilitators of dispute resolution. In ancient customary law, the allocation of land plots, control over land and tenure administration were the exclusive responsibility of the *Mwami*, the local chiefs, and their *batware* sub-chiefs. Nowadays, however, these authorities no longer exist. All of them disappeared in the 1960s and have never been replaced. Quite surprisingly, until now, this remarkable lack of customary land authorities has never been questioned in any research work on land relations in Burundi. The absence of in-depth studies on local land management since the 1970s is probably the main reason for this knowledge gap.

The historic importance of the *Mwami* and of the chiefs in terms of customary land tenure is beyond doubt. Until the end of the monarchy in 1966, all ethnographic literature described the *Mwami* as the pre-eminent owner of all land (Meyer 1916; Mworoha et al. 1981). Whereas most lawyers interpreted the *Mwami's* prerogatives as some kind of exclusive ownership (Verbrugge 1965; de Clerck 1971), religious writers emphasized the *Mwami's* spiritual role as protector and guarantor of fertility (Rodegem 1966). Whatever his exact significance was, the pre-eminence of the *Mwami* was embedded in a complex cultural matrix of beliefs and practices. According to an ancient proverb, “*umwami aguntugira mu vyawe*”, “The *Mwami* protects your property” (Lemarchand 1970, 305). The Burundian king was believed to be born holding sorghum grains in his hand, and his supernatural powers were celebrated in the annual fertility ritual *umuganuro* (Meyer 1916; Simons 1944, 194; Mworoha et al. 1981, 82). He was obviously more than just any monarch who happened to own all the land.

In most parts of the country, land was allocated in the king's name by local chiefs and sub-chiefs. The individual plot given to a family – the so-called *itongo* – was hereditary within the patrilineage, but it could always be withdrawn in the case of disagreement between the family and the chief. Whereas some authors perceived this system as inegalitarian and stressed the imbalance of power between chiefs and owners (Botte 1974), others emphasized the checks and balances that obliged a chief to be a “good” chief and to protect those who cultivated his land if he did not want people to leave for another chiefdom (Mworoha 1977, 192). In any case, the traditional system can be described as a clientelistic system in which rights to land had a very personalized character.

At different levels of society, land rights were determined by personal links. Under the traditional *ubugererwa* system, families could in turn surrender parts of their plots to landless people who, in return, were obliged to complete some work for the family (Trouwborst 1962, 24-25). Unlike land ownership in Western societies, Burundian customary land law did not rely on a direct link between the land and its user. Anthropologists even argued that the bond between a land user and “his” chief was perceived as more important than the bond between the user and his land (Trouwborst 1959).

It is difficult to determine to what extent the traditional system was altered under colonialism. In colonial literature, land relations were mainly apprehended through the lens of private property, which unquestionably led to many misinterpretations. In particular, the rights of the chiefs were understood by colonial authorities as much more exclusive than they were historically. The progressive monetization of the economy also transformed the traditional rather symbolic repayment between chief and client into some kind of mandatory rent. This change added to the political and economic supremacy of the chiefs (Gahama 1983, 320-329). In addition, the colonial system strengthened the power of the chiefs in the judicial sector, to the detriment of the *bashingantahe*, who traditionally played a preeminent role in this field (Gahama 1983, 314).

A couple of years before the end of colonialism, in December 1959, colonial authorities radically changed their approach and abolished chieftaincy. Amongst ordinary people, the role of the chiefs was by that time associated rather with the idea of oppression than with the “traditional role as the benevolent protector of the weak and the ultimate source of assistance to the needy” (Lemarchand 1970, 124). Some months after the dismissal of the chiefs, in July 1960, a decree on land tenure transformed all unregistered land into state-owned land. The decree guaranteed all farmers permanent rights to the land they had been allocated by their chief and provided for the possibility to register these rights under the titling system. In 1977, another reform suppressed the last trace of the ancient system, the *ubugererwa*, under which families could surrender parts of their plots to landless people for a limited period of time. Those people who used land under the *ubugererwa* also received permanent rights and the possibility to register their land.

At first sight, the 1960 and 1977 reforms seemed favorable for rural farmers who gained individual ownership over the land they were cultivating without being dependent any longer upon any superiors. But as mentioned previously, only a very small part of the land has been registered fifty years after the 1960 decree. According to statutory law, all other (unregistered) land is supposed to be governed by “custom”, but no legal text gives any indication as to what should be considered as such “custom”.

In fact, the supposed normative field that the land code named “custom” has above all become a field of growing normlessness. Most Burundians still implicitly derive what they perceive as their “customary rights” from a personalized authority that no longer exists. Whenever they are asked about the legitimacy of alleged land rights, most people refer to the name of a former chief.

However, the perpetuation of customs deprived of their foundation frequently turns out to be problematic. Boundaries that were once known by local authorities can now be easily contested. Land abandoned by refugees can be taken over with the complicity of neighbors, as no chief now knows anything about the real owners. Today, the capacity to allege customary land rights in Burundi basically comes down to the capacity to afford the price of credible witnesses.

Once a conflict arises, the profound uncertainties characterizing “customary” rules make it almost impossible to reach consensus. Inheritance rights, traditional obligations, questions of legitimacy, authority of people and institutions: many rules have become contestable, and many rules are indeed contested. Also in other contexts of legal pluralism, changes in customary rules are now a well-known phenomenon (Cotula 2007; Woodman et al. 2004). In Burundi, however, law and normativity have eroded to such an extent that land conflicts regularly result in massacres and violence.

Despite this normative erosion, the underlying values and logic of customary law still play a very important role in Burundi. Several recent field studies, for instance, show the importance of the values associated with the institution of *bashingantahe* (Ingelaere 2009, 98-117; Kohlhagen 2010a; Uvin 2009, 58-66)¹⁰: self-control, truthfulness, moral integrity. Dispute resolution very much relies on logics different from those dominating in state law. Negotiation, conciliation and arbitration continue to play an important role, whereas only very few people recognize written state law as an effective means to mitigate conflicts. Not only the *bashingantahe* but also state administrators and even judges in state courts refer to customary values and logics to settle disputes (Kohlhagen 2009a, 2009b, 2010a).

This very complex reality of legal and institutional pluralism poses additional challenges for policymakers in Burundi. The country obviously lacks land authorities people genuinely recognize as such, and traditional rules governing access to land have to a large extent eroded. Nevertheless, people still recognize common principles that, despite all efforts to generalize state law, clearly prevail in everyday life. If the Burundian state intends to propose a regulatory framework that really helps in administering the use of land and natural resources, it has to identify clearly the needs and expectations that arise from this tense situation. Unfortunately, for the moment, land policy in Burundi is far from responding to coordinated and coherent objectives intended to serve ordinary Burundians.

UNDEFINED POLICY: THE NON-RESPONSE OF BURUNDI’S ELITE

After the enactment of the 1986 code, there were three major reform initiatives. The first one was the most innovative and most ambitious. Funded in the early 1990s by FAO, its intention was to consolidate all land laws into a “rural code” (*code rural*) designed to integrate all issues related to natural resource management¹¹. The forestry code and the mining code as well as water rights were to be taken into account in order to develop a coherent and comprehensive text. It was planned to comprehend, in a first phase, a concise and understandable framework law that would contain general guidelines and principles. Later on, the text was to be completed progressively

¹⁰ According to these studies, rather than the *bashingantahe* as individual people (who have also lost a lot of their legitimacy), it is indeed the *values* associated with them (referred to in Kirundi as *bushingantahe*) that are still a very important part of social life.

¹¹ Projects TCP/BDI/9155 and TCP/BDI/2251 (“phase d’identification et d’orientation”, 1991-1992), project TCP/BDI/2355 (“préparation et rédaction d’un avant-projet de code rural”, 1993-1994) of the FAO technical cooperation program.

with sectoral laws on land tenure security, agricultural development and natural resource management, including areas like the use of water and forests, environmental law and mining law.

The preparatory work of the FAO initiative underlined explicitly that future legislation had to be based on the needs and knowledge of rural farmers. It emphasized the shortcomings of a generalized registration system, stressing that “Burundi, as a country of micro-properties with a highly fragmented and compartmentalized agrarian landscape, is the epitome of the situation that does not suit the Torrens [titling] system”¹² (Bouderbala 1992, 17). The project was intended to increase the protection of local and customary land rights and arrangements. In order to reduce interpersonal conflicts and abuses by local officials, the project foresaw a special “land investigation procedure” (*enquête foncière*) under which an independent state authority could investigate litigious land limits and enforce physical demarcation (Bouderbala 1994, 27-30).

The FAO project responded rather well to the specific problems of Burundi. Although, in general, the project provided for protection of local arrangements from state intrusions, it nevertheless foresaw prerogatives for the state to impose land limits by force in the case of conflicts that could not be solved locally. This meant that the need to prevent abuses of state authorities on the one hand and the call for alternatives to failing customs on the other hand were judiciously balanced. The initiative even led to a set of concrete legislative proposals (Bouderbala 1994). The government, however, never formally adopted the *code rural*. After the first democratic elections that took place in June 1993 and the subsequent killings of two elected presidents in October 1993 and April 1994, the country entered into a period of political and military turmoil that also put an end to the land reform process.

The idea of land reform was renewed with the peace agreement signed in Arusha in 2000. The agreement provided for a “revision” of the existing land code “in order to adjust it to the current problems with respect to land management” (Protocol IV Chapter 1 Article 8 i. of the agreement). Except for the need to respond to problems encountered by returnees, however, the peace agreement gave no details with regard to the precise content of the projected “revision”.

In 2003, under a transitional government, the land code reform was again put on the political agenda. Unlike the initiative in the 1990s, this new project was not preceded by a preliminary study, nor did any policy document define its general objectives¹³. As proclaimed in Arusha, the reform was conceived as a mere “revision” of the existing land code. The consultants in charge of the review were essentially the same as those who compiled the 1986 land code. Unsurprisingly, the draft code that was finished in 2004 had the same structure as the 1986 text, retained most of its terminology, its legal mechanisms... and its shortcomings. A remarkable difference however was the length of the new draft: it was even longer than the already very technocratic 1986 code, reaching a record number of 650 articles.

One noteworthy innovation of the 2004 text was the institution of a new procedure allowing communal administration to issue “acts of notoriety” (*actes de notoriété*) as a legally recognized

¹² “Le Burundi, pays de micropropriétés au paysage agraire très morcelé et compartimenté, est l'exemple même de la situation qui ne convient pas au système Torrens”. The Torrens system refers to Sir Robert Torrens who originated the system of land titling and registration in New South Wales (Australia) in 1858.

¹³ Even the preliminary studies and the project reports produced for the FAO initiative in the 1990s were obviously not taken into account. One of the rare reports on the post-Arusha draft states for instance that the FAO project foresaw compulsory registration of all land: “ce code n'était pas réaliste en prenant un enregistrement systématique des terres rurales en vue de faire accéder la population au crédit” [sic] (N. N. 2004, 2). This is the exact opposite of the true objectives of the FAO draft.

proof of local tenureship. At the same time, the draft code renamed customary tenure as “ownership” (*propriété coutumière*). Consequently, it placed local land tenure and registered rights on the same level and, at least in theory, provided them with the same legal protection. Most ambiguities of the 1986 code remained unchanged, however. To put it simply, the draft text only gave legal recognition to an already common popular practice whereby people validated land transactions by a written document countersigned by their communal administrator. The proposed revision did not call into question the whole apparatus of legal mechanisms marginalizing unregistered land.

The 2004 draft was, again, overtaken by political events. In 2005, a new Constitution was approved by referendum and the first democratic elections since the war (1993-2005) took place. Following the political stabilization, the resumption of cooperation programs led to a quick rebirth of the general idea of land reform, but without reference to the 2004 initiative. The Swiss Agency for Development Cooperation (SDC) and the European Union launched a program on “decentralized land management” whose main objective was to finance the creation of experimental “land desks” (*guichets fonciers*) in charge of certifying socially accepted land occupation at the commune level (123 in total). Based on first experiences in Madagascar, the certificates were to become an affordable alternative to expensive land titles delivered by the national land services. The experience was supposed to sensitize people in the countryside to alternative approaches towards land titling, to allow the participative elaboration of a new national land policy and, eventually, to lead to the drafting of a new land code (SDC 2007).

In February 2008, the European donors were followed by USAID, who announced its intention to support a revision of the land code in the short term. Chemonics, the company in charge of implementing the USAID program, named as its director the former environment minister who had been a leading proponent of the 2004 reforms. Instead of writing a new code based on local experiences, Chemonics planned a rapid revision based on the 2004 draft to enable them to present a “new” code before the renewal of their contract with USAID at the end of the US fiscal year in September 2008. Two years before the national elections, the Burundian government expressed a preference for this rapid-result approach compared to the European long-term project. In April 2008, the second vice-President announced the government’s intention to draft a new code as soon as possible.

At the time, the “land desk” experience of the European donors was only in its preliminary phase, and no single land desk had yet been put in place (Habwintaha et al. 2008a, 2008b). Although the initial European project foresaw extensive field experience before integrating the “land desk” model into a new code (SDC 2007, 37), the Europeans agreed to join the accelerated reform initiative. The compromise that was found with the Burundian government and the Americans implied the inclusion of a participative component, in accordance with the initial European project. The reform process thus allowed the holding of “communal consultations” to gather opinions from ordinary people about the reform. Based on these consultations, a strategic document, the “Land Policy Letter”, was written to define the guidelines for the new code. For the first time, the reform explicitly intended to integrate public demands and to respect a certain degree of transparency.

The timing of this innovative work, however, raises questions. Formally, the new reform process started on 11 June 2008, when the second vice-president set up an inter-ministerial committee to prepare a “Land Policy Letter” (*Lettre de Politique Foncière*) and to revise the 1986 land code. Soon after, popular consultations were organized outside the capital. These *consultations communales*

closed on 27 August. Fewer than three weeks later, on 15 September, the committee presented the final version of the “Land Policy Letter”. The new code, which was supposed to be based on the content of the letter, was ready only two weeks later. On the last day of the US fiscal year, 30 September 2008, a “validation workshop” of the new draft was organized in Bujumbura. After some subsequent modifications, the revised text of the land code was adopted on 29 June 2009 by the Council of Ministers and became the first draft land law submitted to the National Assembly since 1986. Given this timing, the alleged “participative” character of the process appears to be rather superficial (Kohlhagen 2008b, 2010b).

Nevertheless, the produced texts provide for some significant new guarantees of tenure security of rural farmers. Most of the planned actions in the “Land Policy Letter” (Republic of Burundi 2009) are intended to make land management procedures more transparent. An important emphasis of the letter is on decentralization and on the creation of new land services at the commune level. As in the 2004 draft code, the general idea is to create administrative structures in order to validate local land ownership and land transactions formally. This time, the proposed reform is based on the Malagasy “land desk” model and foresees the creation of the same kind of local structures as the program documents of the European donors. The reference to the land policy of Madagascar is also more than obvious. The policy letter not only bears exactly the same name¹⁴, it also has the same general structure and even replicates some of its content.

Unlike the Malagasy document, however, the Burundian Land Policy Letter also provides for some very directive and interventionist measures that contrast sharply with the idea of improving tenure security and individual rights of smallholder farmers. Without detailing the ways and means of implementation, quite some of its content is replicated from another foreign land policy document: the “National Land Policy” of Rwanda (Republic of Rwanda 2004). Like its Rwandan counterpart, the Burundian letter foresees the determination of a minimum area for land plots and the proscription of land divisions under this minimum. It also provides for a restructuring of the traditionally scattered habitat through a “villagization” policy and, without giving any further details, even announces a birth control policy. Despite its ambitious targets, the Burundian Land Policy Letter proposes only very few concrete measures. It also contradicts with the draft land which does not really call into question previous legislation.

The question remains what will now happen with this last reform project. In the past, all democratic elections in Burundi were – almost ritually – preceded by a debate on land code reform, and in the end all reform attempts failed. For the moment, it is unclear whether the 2008 draft will actually be implemented. Although it was submitted to parliament in September 2009, its vote was repeatedly postponed until after the communal and national elections in mid-2010. Even if the text was promulgated, however, it remains clear that change also has to occur in people’s minds as well as in legal texts. Real reform should call for more equity, less arbitrariness and a new power balance between political elites and smallholder peasants.

Revealingly, the 2008 reform initiative attracted relatively little attention in the media. Only the most important moments, such as the official launching of the so-called public consultations, the presentation of the *Lettre de Politique Foncière* and the adoption of the draft code by the Government retained some attention. Many newspaper articles interpreted the reform in their own way. Most recent news about the reform process does not even mention such significant elements as decentralization of land management, the relationship between rural farmers and the

¹⁴ Madagascar and Burundi are the only countries in the world to name their land policy document *Lettre de Politique Foncière*; see: Republic of Madagascar 2005.

state or the obsolescence of certain legal provisions. The reform is rather associated with the repatriation of refugees from Tanzania or the proliferation of neighborhood and family disputes over land. Interestingly, those questions are not really addressed by the draft code.

Also, in political discourse, the true content of the reform is rarely referred to. Several months after the validation of the draft code, the secretary general of the committee in charge of the preparation of the draft declared to reporters that “it is too early for me to speak about the main innovations contained in the next land code”¹⁵. Some weeks before this declaration, the President of the Republic, in his New Year speech in 2009, stated however that the code had already “been given to several Burundian citizens for review and consideration” and that the results had been favorable¹⁶. That said, in his speech, the president himself did not specify in any way the elements and orientations of the reform.

In many ways, it is more the idea of initiating a reform that appeals in Burundi than its true content. By some, it is understood as an agrarian reform or as a way to remedy abuses and land spoliations of the past. Others see it as a response to land disputes or as a means to overcome land shortage. After successive aborted reform initiatives, neither the press nor Burundian citizens seem to perceive the need to question the intentions of yet another project added to the list.

Meanwhile, the crisis of Burundi’s land tenure system continues to intensify dramatically. The failure of the state to fulfill the task it assigned itself to secure land tenure stands beyond doubt. For about a century, the state robbed, despised and devalued the land of small farmers. The current legal situation still facilitates these abuses and does not provide for effective protection of small-scale farmers from expropriation or eviction. The crisis not only affects the relationship between citizens and state institutions, however. It is at the grassroots level that land insecurity literally undermines Burundian society. Indeed, over 70 per cent of conflicts before court are land disputes (Kohlhagen 2009b, 25). The vast majority of them involve family members who grew up together. And, all too often, these conflicts culminate in bloodshed. Today’s problems are largely owed to the erosion of customary land management systems under present-day state law.

CONCLUSION

The major problem that land policy has to address in Burundi is an imminent danger of social collapse. It is no longer ethnic groups or social classes that kill each other, it is also – and perhaps primarily – families. Society is shaken to its foundations over land issues.

In the capital, the central importance of land problems is now commonly recognized. Fortunately, all recent reform initiatives addressed the need to break with colonial legislation. Although none of these initiatives has effectively led to a new code, it is likely that popular legal practices will receive better legal recognition in future. In this regard, the 2008 project certainly took a step into the right direction, but the measures it proposes are not sufficient. After disregarding traditional land practices for a century, the central state will have to do more than just transplant a one-size-fits-all policy from an island in the Indian Ocean. In Burundi, unlike Madagascar, customary land

¹⁵ “C’est encore trop tôt pour que je m’exprime sur les principales innovations contenues dans le prochain code foncier” (source: *Burundi Tribune*, 24 March 2009, article titled “Bientôt un nouveau code foncier qui remplace celui de 1986 jugé inadapté”).

¹⁶ The speech is reproduced on the website of the Burundi government at www.burundi-gov.bi: “Nous rappelons que le nouveau code foncier a été donné à plusieurs citoyens Burundais pour avis et considérations pour sa révision est satisfaisant [sic]. Pour le moment, il reste que les procédures législatives légales [sic] pour cette révision”.

authorities no longer exist and ancient customs have to a large extent eroded. Today, in most places in Burundi, it is not possible to find a consensus on questions as crucial as the land rights of women, inheritance schemes or sharing of family land.

In the short term, land policies will probably have to put a much stronger emphasis on conflict regulation. After decades of destructive policies, the Burundian state now has to provide locally-specific answers to the lack of socially accepted norms. It has to help people to find ways to live together again, to settle their ever-growing conflicts and to share their common natural heritage in a sustainable and culturally acceptable manner. In the interest of peace and national conciliation, state institutions and state courts should consequently give priority to negotiated solutions and compromise over strict enforcement of written law or supposed customary rules.

In the long term, Burundi needs a land code that is truly adapted to social reality. This requires policymakers to acquire precise knowledge of the real expectations of ordinary Burundians. Genuine public consultations and a genuine public debate have to be organized over a period of at least one year. A real land reform has to respond to ordinary people's need for access to land without fear of state intrusion. It also has to provide answers to people's need for alternatives to failing customary rules and authorities. Possessing values and logics different from those of present-day state law, people frequently perceive state institutions as substitutes for former customary authorities. They ask local officials to mediate in conflict situations or expect communal administrators to allocate land like ancient chiefs. Sometimes, such demands are opportunistic. Usually, they also reveal a very specific perception of the role of the state. This perception needs to be understood and to be taken into account in future reforms.

In any case, after twenty years of fruitless debates, land policy has to meet one major additional challenge. It has to restore confidence in the capacity of the state to conduct reforms and to address land problems. If it fails to convince Burundian people to believe in its goals, it will repeat yet again the grave mistakes of the past.

BIBLIOGRAPHY

- Botte, R. (1974) "Processus de formation d'une classe sociale dans une société africaine précapitaliste", *Cahiers d'études africaines*, XIV, 56, 605-626.
- Bouderbala, N. (1992) *Appui à l'élaboration d'un code rural. Rapport final*, Bujumbura: FAO.
- Bouderbala, N. (1994) *Appui à la conception d'un code rural. Avant-projets de textes annotés (présentés pour discussion)*, Bujumbura: FAO.
- Bukera, J. (1970) "Les droits fonciers coutumiers au Burundi", *Revue Juridique et Politique, Indépendance et Coopération*, XXIV, 4, 1207-1214.
- Colin, J.-P., Le Meur, P.-Y., & Léonard, E. (2009), *Les politique d'enregistrement des droits fonciers. Du cadre légal aux pratiques locales*, Paris: Karthala.
- Cotula, L. (ed.). (2007) *Changes in "customary" land tenure systems in Africa*, London and Rome: IIED and FAO.
- de Clerck, L. (1971) "Le régime foncier au Burundi", *Revue administrative et juridique du Burundi*, 1, 1-16.
- Deininger, K. (2003) *Land policies for growth and poverty reduction*, Washington DC: World Bank.
- Durkheim, E. (1897) *Le suicide: étude de sociologie* (Paris: Félix Alcan).
- EU Task Force on Land Tenure (2004), *EU Land Policy Guidelines. Guidelines for support to land policy design and land policy reform processes in developing countries*, Brussels: European Commission.
- French Development Cooperation (2009) *Land Governance and Security of Tenure in Developing Countries. White Paper*, Paris: French Development Cooperation, Technical Committee on "Land Tenure and Development".
- Gahama, J. (1983) *Le Burundi sous administration belge. La période du mandat, 1919-1939*, Paris: Karthala.
- Gatunange, G. (2004) *Étude sur les pratiques foncières au Burundi. Essai d'harmonisation*, Bujumbura: RCN Justice & Démocratie.
- Gatunange, G. (2005) *La problématique foncière dans la perspective du rapatriement et de la réinsertion des sinistrés*, Bujumbura: Observatoire de l'Action Gouvernementale.
- Habwintahe, J.-M., & Nkurunziza, A. (2008a) *Diagnostic socio-foncier dans la commune Bugenyuzi de la province Karuzi*, Bujumbura: Programme "Gutwara Neza".
- Habwintahe, J.-M., & Nkurunziza, A. (2008b) *Diagnostic socio-foncier dans la commune Itaba de la province Gitega*, Bujumbura: Programme "Gutwara Neza".
- Hatungimana, A., & Ndayishimiye, J. (2003) *Politique de rapatriement, de réinsertion et de réhabilitation des sinistrés ainsi que la problématique de gestion des terres au Burundi*, Bujumbura: Observatoire de l'Action Gouvernementale.
- ICG (2003) *Réfugiés et déplacés au Burundi. Désamorcer la bombe foncière*, Nairobi and Brussels: International Crisis Group.
- IDMC-NRC (2009) *Long-term IDPs need land security. A profile of the internal displacement situation*, Bujumbura: Internal Displacement Monitoring Centre and Norwegian Refugee Council.

- Ingelaere, B. (2009) *Living Together Again. The Expectation of Transitional Justice in Burundi - A View from Below*, Antwerp: Institute of Development Policy and Management.
- Kohlhagen, D. (2008a) *Le tribunal face au terrain. Les problèmes d'exécution des jugements au Mugamba dans une perspective juridique et anthropologique*, Bujumbura: RCN Justice & Démocratie.
- Kohlhagen, D. (2008b) *Appui à la révision et à l'élaboration du code foncier du Burundi. Rapport de mission*, Bujumbura: Swiss Agency for Development and Cooperation.
- Kohlhagen, D. (2009a) *Burundi: La justice en milieu rural*, Bujumbura: RCN Justice & Démocratie.
- Kohlhagen, D. (2009b) *Statistiques judiciaires burundaises*, Bujumbura: RCN Justice & Démocratie.
- Kohlhagen, D. (2010a) "Le bushingantahe au Burundi. Transformations et réminiscences d'un concept judiciaire ancien", in: LAJP (ed.), *Cahiers d'Anthropologie du droit 2009. Dire le droit, rendre la justice*, Paris: Karthala.
- Kohlhagen, D. (2010b) "Vers un nouveau code foncier au Burundi?", in: S. Marysse, F. Reyntjens & S. Vandeginste (eds.), *L'Afrique des Grands Lacs. Annuaire 2009-2010*, Paris: L'Harmattan.
- Lavigne Delville, P. (1999) *Harmonising Formal Law and Customary Land Rights in French-Speaking West Africa*, Paris: Groupe de Recherche et d'Echanges Technologiques.
- Le Roy, É., Le Bris, É., & Crousse, B. (1986) *Espaces disputés en Afrique noire. Pratiques foncières locales*, Paris: Karthala.
- Leisz, S. (1998) "Burundi Country Profile", in: J. W. Bruce (ed.), *Country profiles of land tenure. Africa, 1996*, Madison: Land Tenure Center, University of Wisconsin-Madison.
- Lemarchand, R. (1970) *Rwanda and Burundi*, London: Pall Mall Press.
- Manirakiza, T., Hatungimana, J., & Nkezabahizi, F. (2007) *Analyse critique de la gestion des conflits fonciers au Burundi*, Bujumbura: USAID Livelihood Consortium.
- Manirumva, E. (2004) *Etude sur les conflits sociaux liés à la gestion des terres et des propriétés foncières dans les sites de Kinyankonge, Nyabugete et Kamenge en mairie de Bujumbura. Rapport final*, Bujumbura: Observatoire de l'Action Gouvernementale.
- Manji, A. S. (2006) *The politics of land reform in Africa: from communal tenure to free markets*, London and New York: Zed Books.
- Massinon, R. (1981) "L'illusion civilisatrice dans les actes législatifs de la période coloniale: trois exemples burundais - 4. L'accession des Burundi à la propriété foncière de droit écrit", *Culture et société, Revue de civilisation burundaise*, IV, 135-161.
- Meyer, H. (1916) *Die Barundi. Eine völkerkundliche Studie aus Deutsch-Ostafrika*, Leipzig: Otto Spamer.
- Mworoha, E. (1977) *Peuples et rois de l'Afrique des Lacs. Le Burundi et les royaumes voisins au XIXe siècle*, Dakar: Nouvelles Editions africaines.
- Mworoha, E., & Ndayishinguje, P. (1981) "Le Mwami dans l'Etat du Burundi ancien", in: Centre de civilisation burundaise (ed.), *La civilisation ancienne des peuples des Grands Lacs*, Paris: Karthala.
- N. N. (2004) *Compte rendu des travaux de validation de l'avant-projet du code foncier révisé*, Bujumbura.
- Ndayisenga, G. (1974) *Les droits fonciers coutumiers au Burundi*, Bujumbura: Université du Burundi.

- Nimpagaritse, D.-O. (1983) *Organisation foncière et disparité des statuts immobiliers au Burundi: arrière-plan historique, courbes de développement et nécessité d'intégrer un nouveau droit*, Bruxelles: Université libre de Bruxelles, Faculté de droit.
- Nindorera, A. (2003) *Ubushingantahe as a base for political transformation in Burundi*, Boston: Boston Consortium on Gender, Security and Human Rights.
- Ntahombaye, P., et al. (1999) *The Bashingantahe institution in Burundi. A pluridisciplinary study*, Bujumbura: s. n.
- Ntampaka, C. (2006), *La question foncière au Burundi. Implications pour le retour des réfugiés, la consolidation de la paix et le développement rural*, Bujumbura: FAO.
- Ntampaka, C. (2008), "Le règlement des conflits fonciers, un sérieux problème pour le Burundi", *Dialogue*, 243, 3-33.
- Republic of Burundi (2008) *Lettre de Politique Foncière*, Bujumbura: République du Burundi.
- Republic of Madagascar (2005) *Lettre de Politique Foncière*, Antananarivo: Repoblikan'i Madagasikara.
- Republic of Rwanda (2004) *National Land Policy*, Kigali: Ministry of Lands, Environment, Forests, Water and Mines.
- Rodegem, F. (1966) "Structures judiciaires traditionnelles au Burundi", *Revue juridique de droit écrit et coutumier du Rwanda et du Burundi*, VI, 1, 5-28.
- SDC (2007) *Document de planification Burundi 2007-2009. Programme de gestion décentralisée des terres dans la province de Ngozi*, Bujumbura: Swiss Agency for Development Cooperation.
- Simons, E. (1944) "Coutumes et institutions des Barundi", *Bulletin des juridictions et du droit coutumier congolais*, 12, 137-283.
- Sohier, A. (1962) "L'étude et l'application du droit coutumier", in: ARSOM (ed.), *Livre blanc, Witboek*, Brussels: Royal Academy for Overseas Sciences.
- Suguru, S. (2004) *Etude sur les conflits sociaux liés à la gestion des propriétés foncières de Gatakwa en zone Kigwena, province Bururi*, Bujumbura: Observatoire de l'Action Gouvernementale.
- Toulmin, C., Delville, P. L., & Traoré, S. (2001) *The dynamics of resource tenure in West Africa*, Oxford: James Currey.
- Trouwborst, A. (1959) 'La mobilité de l'individu en fonction de l'organisation politique du Burundi', *Zaire*, XIII, 8, 787-800.
- Trouwborst, A. (1962) "L'organisation politique et l'accord de clientèle au Burundi", *Anthropologica*, IV, 1, 9-43.
- UNOPS-PNUD-CNTB (2007) *Mission d'étude sur la problématique foncière et les solutions alternatives face aux défis de la réintégration et réinsertion des sinistrés au Burundi. Rapport finale* [sic], Copenhagen: PEM-Consult.
- Uvin, P. (2009) *Life after violence. A people's story of Burundi*, London and New York: Zed Books.
- van Leeuwen, M., & Haartsen, L. (2005) *Land disputes and local conflict resolution mechanisms in Burundi. Final, complete English version*, Bujumbura: CED-Caritas.
- Vandeginste, S. (2009) *Law as a Source and Instrument of Transitional Justice in Burundi*, Antwerp: University of Antwerp.

Verbrugghe, A. (1965) "Le régime foncier coutumier au Burundi", *Revue Juridique de droit écrit et coutumier du Rwanda et du Burundi*, V, 2, 59-82.

Verbrugghe, A. (1970) "L'évolution de la propriété foncière coutumière au Burundi", *Revue Juridique et Politique, Indépendance et Coopération*, XXIV, 4, 1201-1206.

von Benda-Beckmann, K. (1981) "Forum Shopping and Shopping Forums: Dispute Processing in Minangkabau Village", *Journal of Legal Pluralism*, 19, 117-159.

Weilenmann, M. (1997) *Burundi: Konflikt und Rechtskonflikt. Eine rechtsethnologische Studie zur Konfliktregelung der Gerichte*, Frankfurt am Main: Brandes and Apsel.

Woodman, G., Wanitzek, U., & Sippel, H. (2004) *Local Land Law and Globalization. A Comparative Study of Peri-urban Areas in Benin, Ghana and Tanzania*, Münster: Lit Verlag.

World Bank (1975) *Land Reform. Sector Policy Paper*, Washington DC: The World Bank.