

# Michigan Journal of Race and Law

---

Volume 7

---

2002

## The Promise of a Post-Genocide Constitution: Healing Rwandan Spirit Injuries

Adrien Katherine Wing  
*University of Iowa College of Law*

Mark Richard Johnson  
*University of Iowa College of Law*

Follow this and additional works at: <https://repository.law.umich.edu/mjrl>



Part of the [Human Rights Law Commons](#), [Legal History Commons](#), and the [Military, War, and Peace Commons](#)

---

### Recommended Citation

Adrien K. Wing & Mark R. Johnson, *The Promise of a Post-Genocide Constitution: Healing Rwandan Spirit Injuries*, 7 MICH. J. RACE & L. 247 (2002).

Available at: <https://repository.law.umich.edu/mjrl/vol7/iss2/1>

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Race and Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# THE PROMISE OF A POST-GENOCIDE CONSTITUTION: HEALING RWANDAN SPIRIT INJURIES

*Adrien Katherine Wing\**  
*Mark Richard Johnson\*\**

I. INTRODUCTION.....	249
II. A HISTORICAL BACKGROUND.....	253
A. <i>Pre-Colonial Accounts of Rwandan History and the Struggle to Define the Conflict</i> .....	253
B. <i>The Colonial Period</i> .....	258
1. The Traditional Account’s Reliance on Ethnicity Alone .....	258
2. The Social Construction of Race: Colonial Racialization of the Tutsi .....	259
3. The End of Colonialism .....	260
C. <i>The Post-Colonial/Pre-Genocide Period</i> .....	262
1. The First Republic.....	262
2. The Second Republic .....	264
3. The Rise of the Rwandese Patriotic Front and Its Subsequent Invasion .....	266
4. The Current Constitution .....	268
D. <i>The Genocide</i> .....	269
1. Making the Genocide “Thinkable”.....	269
2. Retelling and Remembering the Genocide .....	271
E. <i>The Post-Genocide State</i> .....	276
1. Women.....	277
2. Children .....	277
3. Bringing Perpetrators to Justice .....	278
4. The Post-Genocide Government and Continuing Conflict.....	281
III. DEMOCRACY WITHIN AFRICA: THE CHALLENGE OF IMPLEMENTING DEMOCRATIC PRINCIPLES WITHIN AFRICAN STATES.....	283

---

\* Bessie Dutton Murray Distinguished Professor of Law, University of Iowa College of Law; A.B. Princeton 1978; M.A. UCLA 1979; J.D. Stanford 1982. Professor Wing was an independent contractor hired through the U.S. State Department to advise the Rwandan Constitutional Commission in August 2001. She attended the Conference on Constitutional Development, held in Kibuye, Rwanda. She would like to thank the State Department, especially the Embassy personnel, the Commission, and all those who attended the Conference for their commitment and dedication to a better Rwanda. Additionally, she would like to thank four members of the Commission and its staff who visited the University of Iowa in October 2001: Omar Hamidou, Olivier Gakwaya, Goretti Dusabe and Commission Vice President Alfred Mukenzamfura. Scott Hofer, J.D. expected 2002, provided essential research assistance, as did Shea Sharpe, J.D. expected 2003.

\*\* B.A. Wheaton College, IL 1999; J.D. expected 2002, University of Iowa College of Law.

A.	<i>Principles and Considerations Germane to the Creation of a Democracy</i> .....	284
B.	<i>Democracy in Africa: Examples from the Past and Advice for the Future</i> .....	286
IV.	PRESENT CONSTITUTIONAL OPPORTUNITIES FOR THE CREATION OF A HUMAN RIGHTS STATE AND THE CONSEQUENT HEALING OF SPIRIT INJURIES.....	289
A.	<i>Introduction—The Nature of Spirit Injuries</i> .....	289
B.	<i>Rights of Minorities, Women, Children, and Disadvantaged</i> .....	293
1.	A Call to Ethnic (Re)integration: Dismantling Racialization in Rwanda.....	294
2.	Women.....	301
3.	Children.....	303
4.	A Final Word on Other Minority Groups: The Disabled and Elderly, Indigenous, and the Opposition.....	306
C.	<i>Freedom of Speech, Press and Information</i> .....	307
D.	<i>Achieving Legitimacy and Penetration: Calling Upon the Community to Participate in the Drafting of their Constitution</i> .....	310
V.	CONCLUSION.....	312

A few mothers killed their sons in the hope of protecting themselves. But the majority, including myself, refused. . . . Somehow, I managed to flee with the children. We headed in the direction of our home. But before we got there, my labour [sic] pains started. . . . We went into the bush and I delivered a baby boy. I could only regard this as unfortunate under the circumstances. [Tutsi men and boys, including babies, were the killers' main target.] . . .

...

In the evening, an old woman, a neighbour [sic], passed by on her way to fetch water. . . . She asked me about the delivery. . . . She requested that I let her see the baby. . . . When she saw it was a boy, she commented "Aha, so you have given birth to another *Inyenzi* [cockroach]? You are not going to live yourself." She picked up a stick and hit the child. He groaned once and then he was dead. He was ten hours old by then. . . .

She then told me to bury the child. But I refused. I told her "The blood of my child is on your hands. You bury him yourself."

...

She went back to her house and unleashed her sons on us. When her sons arrived, they set upon my seven-year-old boy, Emmanuel Mugiraneza. One of them commented, "This future *Inyenzi*, he has to go, otherwise he will be ruling over us when he is older." They dug a small hole first. Then they pierced him with a sword and while he was still groaning, they threw him into the hole.

[Then] they started macheting Theogene [my four year old son] on the head. I literally saw his brains spill out of his head.<sup>1</sup>

## I. INTRODUCTION

Although nearly eight years have passed since the 1994 genocide within Rwanda, both the country and people of Rwanda remain broken. First, Rwanda is broken in a literal sense: the political and governmental structures simply do not work in achieving equality, peace and protection for its citizens.

Perhaps more importantly, the collective spirit of Rwanda and the individual spirits of Rwandans have been subjected to near irreparable "spirit injury."<sup>2</sup> Sadly, this was a wounding perpetrated by both insiders and outsiders for the past century, the 100 days of genocide merely the culmination of 100 years of inflicting spirit injuries upon Rwandans.

To understand the Rwandan genocide, this article relies on two concepts of Critical Race Theory (CRT): the social construction of race theory<sup>3</sup> and the notion of spirit injury. First, to understand the evolution of ethnic hatred in Rwanda, we must unearth how race was socially constructed within Rwanda by colonialists. A central theme of CRT is the social construction thesis: "[R]ace and races are products of social thought and relations. Not objective, inherent, or fixed, they correspond to no biological or genetic reality; rather, races are categories that society invents, manipulates, or retires when convenient."<sup>4</sup>

Ian F. Haney Lopez has defined race in the following way: "Race is neither an essence nor an illusion, but rather an ongoing, contradictory,

1. AFRICAN RIGHTS, RWANDA NOT SO INNOCENT: WHEN WOMEN BECOME KILLERS 58–60 (1995) (testimonial of Tutsi mother Liberata Mukasakindi).

2. See generally Adrien K. Wing, *Brief Reflections Toward a Multiplicative Theory and Praxis of Being*, 6 BERKELEY WOMEN'S L.J. 181 (1990–91) (discussing the concept of spirit injuries).

3. Ian F. Haney Lopez, *The Social Construction of Race*, in CRITICAL RACE THEORY: THE CUTTING EDGE 191 (Richard Delgado ed., 1995).

4. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY 7 (2001).

self-reinforcing, plastic process subject to the macro forces of social and political struggle and the micro effects of daily decisions.”<sup>5</sup> Lopez uses the term “racial fabrication” to describe how a race is socially constructed.<sup>6</sup> This process has four distinct features:

First, humans rather than abstract social forces produce races. Second, as human constructs, races constitute an integral part of a whole social fabric that includes gender and class relations. Third, the meaning-systems surrounding race change quickly rather than slowly. Finally, races are constructed relationally, against one another, rather than in isolation.<sup>7</sup>

The term “fabrication” is preferable to “formation,” the former connoting human involvement with the possibility to deceive as opposed to the latter’s neutrality.<sup>8</sup>

This Article hopes to extend CRT’s social construction of race theory by emphasizing ethnicity as well as race. The Rwandans are undoubtedly within the so-called “Black race.” Historically, they have also been socially constructed as consisting of different races and ethnicities, even though many scholars and Rwandans do not see ethnic, much less racial, distinctions.<sup>9</sup> Some of these Rwandans who did see such differences participated in the genocide.

The other concept central to understanding the state of Rwanda is spirit injury, a term also derived from CRT, that represents a combination of physical, emotional, and spiritual harms.<sup>10</sup> Patricia Williams first contextualized the concept of spirit-murder as related to racism.<sup>11</sup> According to Williams, the effects of spirit-murder are “as devastating, as costly, and as psychically obliterating as robbery or assault.”<sup>12</sup> The term was expanded in order to explore spirit injuries in other discriminatory situations like sexism because of the shared nature of the injury: Racism and sexism resemble other “offenses against humanity whose structures are so deeply embedded in culture as to prove extremely resistant to being recognized

---

5. Lopez, *supra* note 3, at 193.

6. *Id.* at 196.

7. *Id.*

8. *Id.*

9. See Part I: *The Rwandan Context: Political Power and the Ethnic Question Since Independence*, in CONFERENCE ON CONSTITUTION DEVELOPMENT, KIBUYE-RWANDA 28 (Aug. 24, 2001) (comments of Faustin Rutembesa of Rwanda) (unpublished draft of conference proceedings, on file with Professor Wing).

10. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law’s Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987) (characterizing the harm of racism as “spirit-murder”).

11. *Id.*

12. *Id.*

as a form of oppression.”<sup>13</sup> These injuries can ultimately lead to the “slow death of the psyche, the soul, the identity of the individual.”<sup>14</sup> On a larger scale, spirit injury can lead “to the devaluation and destruction of a way of life or of an entire culture.”<sup>15</sup>

While the concept of spirit injury has not yet received wide acceptance within the U.S. legal community, it is arguably one of the hermeneutical keys to unlocking much of the mystery surrounding the “why” question of the Rwandan genocide. Both the Tutsi and Hutu peoples of Rwanda, the Hutus having slaughtered nearly one million Tutsis during a 100 day period in 1994, are perpetrators and victims of spirit injuries spanning more than a century.

Hutus were subjected to repeated injurious conduct both physical and psychological throughout colonial rule, and the Tutsi were assaulted in multiple ways during the period immediately following independence and culminating in the genocide. The Hutu extermination of the Tutsi largely was a product of fear that Tutsis would return to power and reinstate the abusive regime that characterized the colonial period.<sup>16</sup> Furthermore, for the first time, the Hutu were able to ascend to the ranks of the middle class, a socioeconomic status they were not eager to surrender.<sup>17</sup> Decades later, the pain and fear of further physical and spirit injury resulted in what the Hutu perceived as a defensive slaughter of the Tutsi.

In its post-genocidal state, Rwanda is a country ravaged by devastation of most every kind. While the physical effects of genocide are easily recognized in the stacks of bodies and impoverished conditions, there is a failure to acknowledge that the mass graves contain both individual spirits and the collective sense of national unity that ideally should inhabit the country—understanding of what it is to be Rwandan, or “Rwandeness.” In its place, a century of colonialism pitted Hutu against Tutsi through socially constructed races, destroying a previously shared ancestry that undoubtedly reflected more commonality than difference between the Tutsis and Hutus.

An understanding of where Rwanda has been is necessary before recommendations are made concerning where it should go, therefore Part II of this Article provides an in-depth examination of the often disputed and controversial history of Rwanda and its ethnic groups. Such an inquiry is essential to deconstructing the reasons underlying the racism, ethnic discrimination and hatred that have come to characterize Rwanda. Specifically, Part II examines pre-colonial, colonial and postcolonial Rwanda, the genocide, and the post-genocidal state. Particular attention

---

13. Wing, *supra* note 2, at 186 (quoting Patricia Williams, *supra* note 10, at 127–29).

14. *Id.* at 186.

15. Adrien Katherine Wing & Sylke Merchán, *Rape, Ethnicity and Culture: Spirit Injury from Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1 (1993).

16. See MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS* 229–231 (2001).

17. *See id.*

will be paid to ethnicity, racialization, colonial rule, the regimes of the First and Second Republics and an analysis of their respective accompanying constitutions.

Part III provides an overview of democratic theory with an African context coupled with the problems and challenges democracy poses. This discussion and its considerations will offer a framework within which the constitution-building process can occur. Furthermore, Part III will highlight the principles upon which the constitutional recommendations and analysis of Part IV can rest, including Cass Sunstein's notions of deliberative democracy, group polarization, deliberating enclaves, incomplete theorization, transformative constitutions, anticaste, and socioeconomic rights.<sup>18</sup>

Part IV examines the current constitution and provides the recommendations for a new constitution. These suggestions have the benefit of having come, at least in part, from an insider perspective, as many are derived from the Conference on Constitution Development held in Kibuye, Rwanda in August of 2001 and attended by Professor Wing. Moreover, the post-apartheid South African Constitution<sup>19</sup> was also used as a model for the recommended provisions, as its history and the challenges facing those drafting its 1996 constitution are germane to the Rwandan project.

Part IV's emphasis is largely on those provisions relating to molding Rwanda into a "human rights state"—a state that puts human rights at the center of its agenda.<sup>20</sup> Specifically, issues of ethnicity and racialization, women, children, other minority groups, freedom of speech and press, separation of power, and legitimacy and penetration all receive specific analysis and recommendations, often drawing from the example of other countries with similar experiences.

Both the drafting process and the rule of law bring with them the opportunity to fashion Rwanda into a human rights state. By doing so, we can hopefully begin to heal the tens of thousands of spirit injuries inflicted not only during the genocide but also throughout the past century. These injuries have wounded men, women and children of every age, ethnicity, race, and class and have the potential to fuel future violence out of fear and retribution.

While the present state of affairs is important, patience is necessary: the process of drafting a constitution and its effectuation may take time. Moreover, the constitution is but one tool to be utilized in healing Rwanda. Thus, the scope of this article is limited to the drafting of a new constitution and its relation to creating a human rights state, and does not purport to be the cure-all for Rwanda. Nevertheless, with each measure

---

18. See CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* (2001).

19. S.AFR. CONST. of 1996.

20. See Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 64 (1997) (defining a human rights state as "a polity that is primarily animated by human rights norms").

taken, the future and those that inhabit it stand to gain immeasurably from what is achieved today. Indeed, the beginning of the 21st century may mark the beginning of the healing process for Rwanda.

## II. A HISTORICAL BACKGROUND

### *A. Pre-Colonial Accounts of Rwandan History and the Struggle to Define the Conflict*

According to the traditional definition of an ethnic group—commonality of ancestry, language, cultural background and geographic origin—the Tutsi, Hutu and Twa people groups of Rwanda composed a single ethnicity.<sup>21</sup> Indeed, all three groups share a common ancestor, speak the same language, and partake in similar cultural traditions.<sup>22</sup> As a result, experts have concluded that it is technically improper to distinguish the Twa, Tutsi and Hutu as three separate ethnicities.<sup>23</sup>

According to pre-1994 figures, the Hutus comprised roughly eighty-five percent of the population, the Tutsis fourteen percent, and the Twa a mere one percent.<sup>24</sup> Nonetheless, history reveals that the dominance of the Hutus in sheer numbers alone did not translate into control of the social or political spheres.<sup>25</sup>

Those providing an account of Rwandan history generally have shied away from claiming authoritative knowledge of pre-colonial Rwanda, largely due to the lack of historical records and conflicting oral traditions.<sup>26</sup> Nevertheless, traditional accounts often have concurred on the following facts. The Twa, who are considered descendants of the region's first inhabitants, were primarily forest dwellers characterized as pygmy-type people.<sup>27</sup> The Tutsi, upon their arrival in the fifteenth century, elevated themselves above the already present Hutus and established both a monarchy and feudal system. The Hutu, who were largely farmers, entered into contract (*ubuhake*) with the Tutsi whereby the Hutu promised services in exchange for the use of cattle and land.

---

21. See *Part I: The Rwandan Context*, *supra* note 9, at 28.

22. See *id.*

23. PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 48 (1998).

24. BUREAU OF AFRICAN AFFAIRS, U.S. DEPARTMENT OF STATE, *BACKGROUND NOTE: RWANDA*, at <http://www.state.gov/r/pa/bgn/index.cfm?docid=2861> (last visited Apr. 30, 2002).

25. *Id.*

26. GOUREVITCH, *supra* note 23, at 48–49 (“Rwandan history is dangerous. Like all history, it is a record of successive struggles for power, and to a very large extent power consists in the ability to make others inhabit your story of their reality . . .”).

27. Linda Maguire, *Power Ethnicized: The Pursuit of Protection and Participation in Rwanda and Burundi*, 2 *BUFF. J. INT’L L.* 49, 60 (1995).



Consequently, the relationship established between the Hutu and Tutsi was essentially one of serfdom.<sup>28</sup>

Concerning this arrangement, journalist Philip Gourevitch observed: “This was the original inequality: cattle are a more valuable asset than produce, and . . . the word Tutsi became synonymous with a political and economic elite.”<sup>29</sup> Likewise, Rwandan Professor Faustin Rutembesa summarized the pre-colonial establishment of ethnicity as follows:

The ethnic issue . . . originated during the pre-colonial period, under the very profound difference between those who held power and those who did not. Before colonization, the terms Tutsi and Hutu entailed the positions individuals held in society. The Tutsi were the small aristocracy . . . and the Hutu were the masses of the remainder of the population.<sup>30</sup>

Despite the seemingly rigid social and political structures in place, Hutus and Tutsis shared a great deal. In fact, the record of pre-colonial Rwanda is mostly absent of any evidence pointing to a history of hatred or violence between these groups.<sup>31</sup> In addition to speaking the same language, the groups shared many cultural traditions of central Africa’s *Banyarwanda*<sup>32</sup> people: use of similar names, adherence to the same religions, and similar tastes in food, music, and art.<sup>33</sup>

The interrelationships between Hutus and Tutsis even extended to the most intimate of marital and familial relationships, a dynamic made possible by an emphasis on clan rather than ethnic distinctions.<sup>34</sup> A small group of Hutus and Tutsis would comprise a chiefdom, headed by a chief called a *Mwami*.<sup>35</sup> The mixed company would engage in everything from battle to marriage, the latter permitting a Hutu to be a hereditary Tutsi and vice versa.<sup>36</sup> Nevertheless, by 1860, this hierarchical yet relatively harmonious monarchy experienced increased polarization when Tutsi Mwami Kigeri Rwabugir came to power and instituted a regime that

---

28. See *id.* at 60–62.

29. GOUREVITCH, *supra* note 23, at 48.

30. *Part I: The Rwandan Context*, *supra* note 9, at 28.

31. Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365 (1999).

32. Term for people from the Rwanda area in the Rwandan language of Kinyua.

33. Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame in Rwanda*, 75 N.Y.U. L. REV. 1221, 1242–43 (2000).

34. GOUREVITCH, *supra* note 23, at 47–49. “Hutus and Tutsis spoke the same language, followed the same religion, intermarried, and lived intermingled, without territorial distinctions, on the same hills, sharing the same social and political culture in small chiefdoms.” *Id.* at 47.

35. *Id.*

36. *Id.* at 47.

explicitly favored the Tutsi population.<sup>37</sup> “Hutu and Tutsi identities took definition only in relationship to state power.”<sup>38</sup>

While this account is believed to be accurate, it is incomplete. There is a sense that there is far more going on beneath the surface than is presented by such a historical narrative. Admittedly, scholars have been unable to correctly characterize the conflict, noting that defining it as ethnic is not being faithful to traditional definitions of ethnicity.<sup>39</sup>

In his book, *When Victims Become Killers*,<sup>40</sup> Mahmood Mamdani moves beyond the “who” question, namely “who is a Hutu and who is a Tutsi?”<sup>41</sup> Instead, he argues that these identities are inextricably linked to the state, and consequently, are fluid concepts dependent upon how the state enforces those identities.<sup>42</sup> Furthermore, Mamdani rejects an approach focusing only on the origins of the Tutsi and Hutu as an explanation for polarization.<sup>43</sup> Rather, he argues that the colonialists were responsible for branding the Hutu as indigenous and racializing the Tutsi as “alien.”<sup>44</sup> Without a national identity capable of overcoming these constructs, these unchecked political identities have resulted in violence.<sup>45</sup>

Mamdani’s theory that the state constructed races within Rwanda at the direction of the colonialists fits within the social construction of race theory defined by Lopez.<sup>46</sup> Of those characteristics Lopez detailed, many are directly on point: in Rwanda, the construction of race was directly attributable to humans, the changes occurred quickly during the first part of the twentieth century, and the construction occurred relationally by pitting Tutsi against Hutu.<sup>47</sup>

In his critique of prior historical accounts, Mamdani deconstructs “The Migration Hypothesis,” which holds that the Tutsi were not indigenous to Rwanda but instead had immigrated to Rwanda.<sup>48</sup> The theory is woven together with four distinct threads, each positing that the Tutsi were indeed a separate, geographically distinct people group based on differences in phenotype, disparities in genotype, findings of cultural anthropology based on memories, and evidence in archaeological and

---

37. *Id.* at 48–49.

38. *Id.* at 50.

39. See GOUREVITCH, *supra* note 23, at 48; *Part I: The Rwandan Context*, *supra* note 9, at 28.

40. See generally MAMDANI, *supra* note 16.

41. *Id.* at 34.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. See Lopez, *supra* note 3, at 196.

47. *Id.*

48. See MAMDANI, *supra* note 16, at 43–50 (providing a full account and critique of the theory).

linguistic source materials.<sup>49</sup> Mamdani notes that while there may have been some differences in physical characteristics or genotype, it can largely be attributed to natural or social selection.<sup>50</sup> For example, insofar as the Tutsi maintained a privileged position in society, diets rich in meat and milk could be responsible for the differences in height between Tutsi and Hutu.<sup>51</sup>

Moreover, historical accounts once touting the sharp divide between the agricultural Hutus and pastoral Tutsis were softened in light of evidence that the line of separation was permeable (there were pastoral Hutu and agricultural Tutsi).<sup>52</sup> Without entirely denying the possibility that pastoral groups were immigrating to the region in the fifteenth century, Mamdani argues that the line drawn between the pastoral Tutsi and agricultural Hutu was often blurred. In fact, ancestors of the Hutu possessed cattle prior to the time Tutsi are said to have immigrated to the area.<sup>53</sup> Nevertheless, concurring in traditional historical accounts, Mamdani agrees that the two groups generally “spoke the same language, lived on the same hills, and had more or less the same culture . . . . But they had yet to become one people.”<sup>54</sup> Thus, while the line between the groups was somewhat porous, including practices like intermarriage between Tutsi and Hutu, separatism did exist.<sup>55</sup>

Mamdani also explores the organization of kin groups, the smallest being a lineage and the largest called a clan.<sup>56</sup> The lineage consisted of only four or five generations and was never composed of a mix of Tutsi and Hutu. On the other hand, the clan was much larger and usually mixed. However, a sense of separateness still characterized the clan despite its mixed heritage: “Hutu and Tutsi clansmen ‘did not exhibit any solidarity at all and behaved towards each other as complete strangers.’”<sup>57</sup>

From these observations, two theories emerged regarding the Tutsi and Hutu. One argues that there is essentially no difference between them other than socioeconomic; the other argues that the groups stem from separate origins.<sup>58</sup> However, Mamdani synthesizes the weak form of each view, seeing no need to adopt the strong form of either side: “[A] hypothesis suggesting numerous migrations stretched out over centuries in no way rules out a weak version of social selection whereby rulers in-

---

49. *Id.* at 43–44.

50. *Id.* at 44–45.

51. *Id.* at 45.

52. *Id.* at 50–51.

53. *Id.* at 51.

54. *Id.* at 52.

55. *Id.* at 53.

56. *Id.* at 54.

57. *Id.* at 55 (quoting JACQUES J. MAQUET, *THE PREMISE OF INEQUALITY IN RWANDA: A STUDY OF POLITICAL RELATIONS IN A CENTRAL AFRICAN KINGDOM* 46 (1961)).

58. *Id.* at 57.

breed and reproduce on the basis of notions of social selectivity and physical beauty.”<sup>59</sup>

Although Hutu and Tutsi did share a single cultural community, the process by which Rwanda became a state under Tutsi Mwami Kigeri Rwabugir was largely responsible for polarizing the political identities of the Hutu and Tutsi.<sup>60</sup> Particularly telling of the damage done during this process is the change in patron-client relationships organized by the monarchy through the serfdom-like arrangement. What began as payments by Hutu to Tutsi in exchange for protection culminated in nonreciprocal relationships where labor was demanded of Hutus merely because they occupied the land.<sup>61</sup> Power imbalances such as these sustained and gradually increased the sense of separation between the Hutu and Tutsi.<sup>62</sup>

Ultimately, Mamdani concludes that it is inappropriate to call the differences between the Hutus and Tutsis an ethnic one, a proposition asserted by previous scholars despite the inability to characterize the situation as anything else.<sup>63</sup> Mamdani casts this pre-colonial division in terms of political identities fashioned by the state.<sup>64</sup> Because the Tutsis, led by Mwami Rwabugiri, held the power and the Hutus were increasingly subjected to unreasonable payments resembling serfdom, the polarization of the groups was essentially a political distinction, not an ethnic one.<sup>65</sup> Finally, Mamdani reminds us that despite these distinctions, social mobility still existed between Hutu and Tutsi prior to colonialism: although bottom rung Tutsis were never subject to the tributes required of Hutu, it was possible for Hutus to ascend through ennoblement or intermarriage.<sup>66</sup>

The following section explores the changes that occurred to the Hutu and Tutsi identities under colonial rule. Utilizing Mamdani’s paradigm, these identities were largely political and became racialized under colonialism, a process that ultimately solidified the bipolarity of the two groups and resulted in the first explosion of violence between Hutus and Tutsis. Likewise, the social construction of race theory is evidenced in the way human beings racialized the Tutsi rather quickly by relationally pitting them against the Hutu.

---

59. *Id.* at 58.

60. *Id.* at 74.

61. *Id.* at 66.

62. *Id.*

63. *Id.* at 73.

64. *Id.* at 74.

65. *Id.* at 75.

66. *Id.* at 74.

## B. The Colonial Period

### 1. The Traditional Account's Reliance on Ethnicity Alone

An examination of the colonization of Rwanda provides insights into the gradual escalation of hatred between the Hutus and Tutsis. The Germans are regarded as the first Europeans to visit Rwanda, and their initial impressions seemed to hasten the stratification already congealing: the Tutsi were clearly aristocratic and sophisticated compared to the Hutus, because the Tutsi physical characteristics—towering height, narrow facial features and light complexion—most mirrored those of Europeans.<sup>67</sup> Until the Belgians expelled the Germans in 1915, the Germans held Rwanda and Burundi as provinces, lauding favor upon the Tutsis, thereby widening the separation between the Hutu and Tutsi.<sup>68</sup>

Even after World War I and the subsequent Belgian rule of Rwanda, the favoritism extended to the Tutsis continued, including advancement to positions of prestige and trust.<sup>69</sup> With this privilege came power. Belgium's authority is described by Mamdani as a hybrid of direct and indirect rule: Belgium granted the Tutsi the indirect power to rule (and punish) the Hutu, but the Hutu hatred toward the Tutsi was characteristic of direct rule where the oppressed direct their anger toward the visible oppressor.<sup>70</sup> However, the real devastation was in the damaging focus on ethnic differences.

It was during Belgian rule that "Belgian administrators further reinforced the Territory's ethnic distinctions and corresponding hierarchy when they began requiring that an individual's ethnic group be specified on identity cards."<sup>71</sup> In the educational arena, Catholic schools freely and blatantly preferred Tutsi students at the expense of Hutu children.<sup>72</sup> In employment, Hutus were subjected to forced labor, where their Tutsi brother became a brutal taskmaster.<sup>73</sup> As recounted by a Tutsi man much later, the Belgian threats made to the Tutsi may account for some of the rough treatment: "You whip the Hutu or we will whip you."<sup>74</sup>

The short term consequences of favoring Tutsis and requiring ethnicity identification cards included increased polarization between the

---

67. *Id.* at 44.

68. BUREAU OF AFRICA AFFAIRS, *supra* note 24.

69. Maguire, *supra* note 27, at 63.

70. MAMDANI, *supra* note 16, at 100 (noting that Belgium "constructed the colonized along a majority/minority axis, an indigenous majority and a so-called nonindigenous minority").

71. UNITED NATIONS DEP'T OF PUB. INFO., *The United Nations and Rwanda 1993-1996*, 10 UNITED NATIONS BLUEBOOK SERIES 8 (1996) [hereinafter "DEP'T OF PUB. INFO."].

72. GOUREVITCH, *supra* note 23, at 57.

73. *Id.*

74. *Id.*

ethnicities and the bestowal of privileges upon the Tutsis in the educational, employment and civil administration systems.<sup>75</sup> The long term consequences would not fully manifest themselves until a 100 day period in 1994, those identification cards ultimately aiding the Hutus in identifying fleeing Tutsis at roadblocks and checkpoints so that they could be slaughtered on the spot.<sup>76</sup>

## 2. The Social Construction of Race: Colonial Racialization of the Tutsi

Mamdani posits that the colonialists essentially racialized the Tutsis through their reliance on the Hamitic Hypothesis.<sup>77</sup> Colonialists believed that there were two types of people with black skin: Hamites and Negroes.<sup>78</sup> Hamites were held to be descendants of Noah's cursed son Ham, and were responsible for all civilizing influences in Africa; they were "[c]aucasians under a black skin."<sup>79</sup> On the other hand, the native, indigenous population were the Negroes, and the Hamites were responsible for civilizing the Negroes.<sup>80</sup> At this time, the Hutu were merely regarded as indigenous rather than "Hutu."<sup>81</sup>

This was not merely an intellectual theory, but rather was institutionalized in a way that this racialization could be realized.<sup>82</sup> He attributes this process to a cooperative effort between the Catholic Church and the colonial state.<sup>83</sup> As stated above, all institutions were infected with this racialization, including schools, state administrative agencies, taxation, and the Church.<sup>84</sup>

The process of racialization culminated with the census of 1933-34, which "constructed the Tutsi as nonindigenous and the Hutu as indigenous. By constructing a distinction between the alien Tutsi and indigenous Hutu, the Tutsi came to be defined as a race—the Hamitic race—different from the Hutu, who were viewed as indigenous Bantu."<sup>85</sup> Moreover, the Belgian colonialists only saw the Hutu and Tutsi as distinct races, paying no attention to ethnic groups.<sup>86</sup>

---

75. DEP'T OF PUB. INFO., *supra* note 71, at 8.

76. *Id.* at 37-38.

77. MAMDANI, *supra* note 16, at 82.

78. *Id.*

79. *Id.*

80. *Id.* at 82, 101.

81. *Id.* at 99.

82. *Id.* at 87.

83. *Id.*

84. *Id.*

85. *Id.* at 99.

86. *Id.*

This racialization went hand in hand with the form of Belgium rule imposed upon Rwanda.<sup>87</sup> The Belgian colonialists governed through a hybrid of direct and indirect rule: the colonialists used Tutsi chiefs to govern over the people, a practice which “legally fractured natives into so many ethnicities, and this mitigated the tension between the colonizer and the colonized.”<sup>88</sup> Thus, the colonialists, in constructing an alien race that could be used to rule over the indigenous population, ultimately created enmity between the Tutsi and Hutu. Hutus came to see the Tutsis as “the other”—an alien race imposing their rule upon the natives.<sup>89</sup>

This process provides a chilling example of the social construction of race.<sup>90</sup> Consistent with CRT’s social construction of race theory, the process of racializing the Tutsi minority as outsiders and forcing them to be the visible oppressor of the indigenous majority was carried out deceptively with the intervention of human hands (Belgian) and was accomplished by manipulating the relationship between Hutus and Tutsis. Thus, this hybrid form of direct-indirect rule ultimately served to create an unprecedented distance between Tutsi and Hutu.

### 3. The End of Colonialism

The flourishing of the Tutsis under Belgium came to an end during the Revolution of November 1959.<sup>91</sup> Mamdani chiefly looks for the causes of the Revolution in the colonial period, and not in pre-colonial history.<sup>92</sup> To summarize the colonial period, the Tutsi embraced Belgium’s racialization of them as non-indigenous largely because they were granted positions of power and exempted from the labor requirements imposed on the Hutu.<sup>93</sup> However, a Hutu counter-elite was forming that eventually led the Revolution.<sup>94</sup>

United Nations (UN) decolonization missions began as early as 1949 and local elections were held in 1953.<sup>95</sup> During the 1950’s, Belgium began to promote democracy, but the Tutsi, who viewed such reforms as a threat, opposed this trend.<sup>96</sup> However, the Hutu saw democracy as majority rule, and they constituted the majority in Rwanda. “This was what passed for democratic thought in Rwanda: Hutus had the numbers.”<sup>97</sup>

---

87. *Id.* at 100.

88. *Id.*

89. *Id.* at 102.

90. *See supra* Part I.

91. MAMDANI, *supra* note 16, at 104.

92. *Id.* at 105.

93. *Id.*

94. *Id.* at 106.

95. *Id.* at 114–115.

96. BUREAU OF AFRICAN AFFAIRS, *supra* note 24.

97. GOUREVITCH, *supra* note 23, at 58.

Nonetheless, Hutu efforts to become involved were ultimately thwarted by the power retained by the Tutsis.<sup>98</sup> From these experiences in the ensuing years, the Hutu realized the Tutsi could only be uprooted by political power.<sup>99</sup>

The initial sparks of the Revolution began in the summer of 1959. Tensions escalated over the *Mwami* (chief) coup that occurred on July 28, 1959, in which the Mwami died without an heir and his half brother was immediately placed in the position of the new Mwami without colonial consultation.<sup>100</sup> This set off an outbreak of violence between the Tutsi political party, Union Nationale Rwandaise (UNAR), and the Hutu party, PARMEHUTU.<sup>101</sup>

Belgium ultimately intervened and declared a state of emergency.<sup>102</sup> However, rather than merely restore order, Belgium, arguing the need for stability, began replacing Tutsi chiefs with Hutus.<sup>103</sup> This change in allegiance from Tutsi to Hutu was likely due to the Hutus' receptiveness to Belgium's promotion of democratic reforms.<sup>104</sup> Gradually, Hutu chiefs came to control most of the localities, and on January 28, 1961, this culminated in a gathering in the town of Gitarama where Hutu officials declared the end of the monarchy and established a republic.<sup>105</sup> This coming to power became known as the coup of Gitarama.<sup>106</sup>

An ensuing wave of violence left hundreds of Tutsis dead and sent thousands more fleeing to neighboring countries.<sup>107</sup> A United Nations report concluded that approximately 120,000 Rwandans, most of whom were Tutsis, had become refugees in the countries surrounding Rwanda.<sup>108</sup> It was also the first ever-documented case of systematic political violence between the Hutu and Tutsi.<sup>109</sup> Finally, on July 1, 1962, Rwanda was granted independence after the General Assembly ended the trusteeship

---

98. MAMDANI, *supra* note 16, at 115.

99. *Id.* at 116.

100. *Id.* at 123.

101. *Id.* at 120–121.

102. *Id.* at 124.

103. *Id.* at 124.

104. See Maguire, *supra* note 27, at 64.

105. MAMDANI, *supra* note 16, at 124.

106. *Id.*

107. DEP'T OF PUB. INFO., *supra* note 71, at 8–9. Even in the years immediately preceding independence, the number of refugees residing in surrounding countries reached as high as 150,000. *Id.* at 10.

108. *Id.* at 9. These exiles in turn became militarized in an effort to return to power in Rwanda. During the 1960's, these armed refugees engaged in ten confrontations. *Id.* at 10. See also *infra* Part II.C.3 (discussing the rise of the Rwandese Patriotic Front, some of whom were undoubtedly refugees from thirty years earlier).

109. GOUREVITCH, *supra* note 23, at 59.



of Belgium.<sup>110</sup> Unfortunately, “the new order . . . was merely the old order stood on its head.”<sup>111</sup>

The Revolution of 1959 constituted more than a mere transfer of power.<sup>112</sup> Rather, it brought about three distinct changes: first, a change in representation occurred in terms of both a shift from minority to majority rule and by the placement of power with the “indigenous” rather than alien population; second, elections were instituted at the national and local levels; finally, social reforms were carried out with the effect of abolishing practices like forced labor.<sup>113</sup> These changes and their effects are the subject of the following section.

### C. *The Post-Colonial/Pre-Genocide Period*

#### 1. The First Republic

Rwanda became independent on July 1, 1962.<sup>114</sup> The First Republic was led by President Gregoire Kayibanda.<sup>115</sup> While he ensured that the Tutsi were extracted from politics, he allowed them to maintain their positions and access to most other spheres.<sup>116</sup> Nevertheless, in the aftermath of the Revolution, Rwanda was a Hutu state first and foremost.<sup>117</sup> This was maintained by retaining the view of racialization put forth by the colonialists: Tutsi were aliens, outsiders, a different race, and this distinction justified their treatment as resident aliens.<sup>118</sup> However, despite efforts of the First Republic to favor the Hutus and establish a Hutu republic, there was a growing dissatisfaction with the regime.<sup>119</sup>

The First Republic did draft and adopt the first constitution of the independent state—the Constitution of November 24, 1962.<sup>120</sup> Primarily, the Constitution abolished the Mwami regime<sup>121</sup> (a functional monarchy) and established a “democratic, social and sovereign Republic.”<sup>122</sup>

The Constitution also included a limited equality clause, ensuring the “equality of all its citizens without distinction of race, origin, sex or

---

110. BUREAU OF AFRICAN AFFAIRS, *supra* note 24.

111. GOUREVITCH, *supra* note 23, at 61.

112. MAMDANI, *supra* note 16, at 133.

113. *Id.* at 133–134.

114. BUREAU OF AFRICAN AFFAIRS, *supra* note 24.

115. MAMDANI, *supra* note 16, at 134.

116. *Id.*

117. *Id.*

118. *Id.* at 135.

119. *Id.*

120. RWANDA CONST. of 1962.

121. *Id.* at tit. I, art. 2.

122. *Id.* at tit. I, art. 1.

religion.”<sup>123</sup> Under Title II, “The Public Liberties” are given further definition, encompassing the Universal Declaration of the Rights of Man.<sup>124</sup> Article 16 expanded the equality clause to include race, clan, color, sex and religion, and article 17 abolished the “privileges of caste.”<sup>125</sup> Freedoms to express opinion, access information, and to associate were generally protected.<sup>126</sup> The right to privacy in correspondence, right to travel, property rights, and domestic privacy were also guaranteed.<sup>127</sup>

The Rwandan Constitution explicitly provided recognition and protection of the family, with parents given the right to raise their children.<sup>128</sup> Although men and women were recognized as being equal in the eyes of the law, “[t]he man was the natural head of the family.”<sup>129</sup> The state acknowledged responsibility for education, required primary education, and pledged aid to pay for education insofar as the parents were unable to do so.<sup>130</sup> Military service was also required of males over eighteen.<sup>131</sup> Though mentioned earlier in the Constitution, freedom of conscience and religion were again explicitly guaranteed.<sup>132</sup> Important for the Hutu in breaking from the old regime, forced labor was abolished and the right to work was recognized, with the accompanying right to join a union.<sup>133</sup>

Structurally, the Constitution separated the three branches of government—executive, legislative, and judicial—with the respective highest offices of each being the President, National Assembly, and the Supreme Court.<sup>134</sup> The President was the supreme Head of State, and was to be assisted by his ministers.<sup>135</sup> However, the President alone answered to the National Assembly.<sup>136</sup>

The National Assembly consisted of members titled “Deputies to the National Assembly.”<sup>137</sup> The deputies then elected a President or Vice-President to preside over the National Assembly,<sup>138</sup> which was to meet

- 
- 123. *Id.* at tit. I, art. 3.
  - 124. *Id.* at tit. II, art. 13.
  - 125. *Id.* at tit. II, arts. 16–17.
  - 126. *Id.* at tit. II, arts. 18–20.
  - 127. *Id.* at tit. II, arts. 21–24.
  - 128. *Id.* at tit. II, art. 24.
  - 129. *Id.* at tit. II, art. 30.
  - 130. *Id.* at tit. II, arts. 31–34.
  - 131. *Id.* at tit. II, art. 35.
  - 132. *Id.* at tit. II, arts. 37–38.
  - 133. *Id.* at tit. II, arts. 40–42.
  - 134. *Id.* at tit. III, arts. 45–46.
  - 135. *Id.* at tit. IV, arts. 51, 62.
  - 136. *Id.* at tit. IV, art. 68.
  - 137. *Id.* at tit. V, art. 73.
  - 138. *Id.* at tit. V, art. 76.

twice a year,<sup>139</sup> and was responsible for passing the budget<sup>140</sup> and other laws with a majority vote.<sup>141</sup>

The Constitution organized the judiciary as follows: cantonal tribunals, courts of the first instance, the Court of Appeal and the Supreme Court.<sup>142</sup> The Supreme Court was then divided into the Department of Courts and Tribunals, the Court of Appeal, the Constitutional Court, the Council of State, and the Court of Accounts.<sup>143</sup> Finally, the President of Rwanda was to appoint the President of the Supreme Court.<sup>144</sup>

## 2. The Second Republic

In 1973, Hutu Major-General Juvénal Habyarimana came to power after a successful military *coup d'état* under the Mouvement révolutionnaire national pour le développement (MRND) party.<sup>145</sup> This time, there existed a marked change in the way the Tutsi were viewed. The political identity of the Tutsi was now that of an ethnic group rather than a race, conferring the status of a people indigenous to Rwanda.<sup>146</sup> Ultimately, this meant that Tutsi were permitted to reenter the political sphere, though the Second Republic limited them to a degree proportional to their "minority status."<sup>147</sup>

In fact, this regime was very interested in employing affirmative action and quotas to redistribute power in proportion to Hutu and Tutsi presence in the larger society.<sup>148</sup> However, it granted representation solely on the basis of the groups' percentage in the population.<sup>149</sup> For example, in the education arena, school admittance was made dependent on these quotas: the Hutu were guaranteed at least eighty-five percent of available spots, the Tutsi were entitled to somewhere between ten to fifteen percent, and the Twa were given one percent.<sup>150</sup>

Besides the extensive reorganizing effort, the Second Republic also adopted a new constitution on December 17, 1978.<sup>151</sup> The Constitution was a synthesis of provisions from three different countries' constitutions:

- 
139. *Id.* at tit.V, art. 80.  
 140. *Id.* at tit. V, art. 81.  
 141. *Id.* at tit.VI, art. 89.  
 142. *Id.* at tit.VII, art. 99.  
 143. *Id.* at tit.VII, art. 103.  
 144. *Id.* at tit.VII, art. 104.  
 145. DEP'T OF PUB. INFO., *supra* note 71, at 10.  
 146. MAMDANI, *supra* note 16, at 138.  
 147. *Id.*  
 148. *Id.* at 138-39.  
 149. *Id.*  
 150. *Id.* at 139.  
 151. RWANDA CONST. of 1978.

France, Belgium and Tanzania.<sup>152</sup> The French model was relied upon for establishing the government's structure.<sup>153</sup> Interestingly, the drafters drew upon Belgium for human rights provisions.<sup>154</sup> Lastly, they looked to Tanzania for an example of how to organize a single-party state.<sup>155</sup> Consequently, following the Tanzanian model, the country was divided up into ten prefectures and then into 143 communes, each made up of some 30,000 people.<sup>156</sup> This system of organization ultimately facilitated the genocide nearly twenty years later.<sup>157</sup>

Among its specific provisions, the Constitution recognized those fundamental liberties identified in the Declaration of Human Rights.<sup>158</sup> Compared to its predecessor, the equality clause was further expanded to include "race, color, origin, ethnic group, clan affiliation, sex, opinion, religion, or social position."<sup>159</sup> Freedoms of worship, conscience, expression, association, and travel were carried over from the previous Constitution.<sup>160</sup> Likewise, rights to privacy in personal life, communications and residences were guaranteed.<sup>161</sup>

The family continued to receive recognition, though a provision declaring the husband head of household was absent.<sup>162</sup> Freedom of education was also guaranteed, and the compulsory primary education was now free of charge for those children of appropriate age.<sup>163</sup> The remainder of the Constitution laid out the structure of government, largely the same as the prior Constitution, though changing the name of the National Assembly to the National Development Council.<sup>164</sup>

During the next fifteen years, Rwanda experienced some degree of success in developing its infrastructure.<sup>165</sup> However, as the 1980's came to a close, the Second Republic began to experience serious problems stemming from both internal and external factors.<sup>166</sup> Externally, the drop in coffee prices by fifty percent during the summer of 1989 and the

---

152. MAMDANI, *supra* note 16, at 143.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 144.

157. *Id.* ("the administrative machinery of the local state was key to organizing the series of massacres that constituted the genocide of 1994").

158. RWANDA CONST. of 1978, ch. II, art. 12.

159. *Id.* at ch. III, art. 16.

160. *Id.* at ch. III, arts. 18–21.

161. *Id.* at ch. III, art. 22.

162. *Id.* at ch. III, arts. 24–25.

163. *Id.* at ch. III, arts. 26–27.

164. *Id.* at ch. III, ch. 2, art. 51.

165. See MAMDANI, *supra* note 16, at 144–45 (discussing Rwanda's economic growth throughout the 1980's).

166. *Id.* at 147.

military costs associated with the Rwandese Patriotic Front invasion in 1990 (described below) placed great demands upon the country.<sup>167</sup>

### 3. The Rise of the Rwandese Patriotic Front and Its Subsequent Invasion

By the late 1980s, some 480,000 Rwandans were refugees in neighboring countries, which included about half of the Tutsi population.<sup>168</sup> In 1988, a group of mostly Tutsi refugees in Uganda formed the Rwandese Patriotic Front (RPF), whose goals were to secure the “repatriation of Rwandans in exile and the reform of the Government of Rwanda, including political power-sharing.”<sup>169</sup> By July of 1990, an agreement on repatriation was made between Uganda and Rwanda.<sup>170</sup> President Habyarimana then declared that a multiparty system would be instituted in Rwanda.<sup>171</sup>

Nevertheless, despite these apparent advancements, the RPF began an invasion into Rwanda from its headquarters in Uganda on October 1, 1990.<sup>172</sup> The battle lasted until July 31, 1992, when a cease-fire halted the two-year conflict that had cost thousands of lives.<sup>173</sup> The Rwandan government and the RPF then began to engage in political talks, which culminated in the signing of the Arusha Peace Accords on August 4, 1993, an agreement guaranteeing power-sharing between the two factions.<sup>174</sup> To aid in the enforcement of the agreement, the Security Council unanimously authorized the formation of the United Nations Assistance Mission for Rwanda (UNAMIR) in October of 1993, and by the end of December, 1,260 troops had been deployed.<sup>175</sup>

According to Mamdani, “the October [1990] invasion [by the RPF] was more a response to developments within the region than those inside Rwanda.”<sup>176</sup> Despite their numbers, Rwanda refugees in Uganda suffered mistreatment and oppression, and Mamdani compares their situation to that of Palestinian refugees in the Middle East—“once a refugee, always a refugee.”<sup>177</sup> “They were the butt of popular prejudice and official discrimination, the readily available explanation for any situation difficult to

---

167. *Id.*

168. DEP’T OF PUB. INFO., *supra* note 71, at 11. Note that some of these had been exiles since the Revolution of 1959. See *supra* Part II.B.3 and note 108.

169. DEP’T OF PUB. INFO., *supra* note 71, at 12.

170. *Id.*

171. BUREAU OF AFRICAN AFFAIRS, *supra* note 24.

172. *Id.*

173. *Id.*

174. Maguire, *supra* note 27, at 57.

175. DEP’T OF PUB. INFO., *supra* note 71, at 27–28.

176. MAMDANI, *supra* note 16, at 159.

177. *Id.* at 165.

explain, from poverty to sabotage."<sup>178</sup> Thus the Rwandan refugees inhabiting Uganda, having suffered spirit injuries, represented a large "armed and political force."<sup>179</sup>

The first organization of these refugees was the Rwandese Alliance for National Unity (RANU) in Uganda.<sup>180</sup> However, as the issue of indigeneity became a key issue in both Rwanda and Uganda, it brought with it the question of entitlement: "Who was entitled to justice in the postcolonial period. Who was the postcolonial subject?"<sup>181</sup> The consequence of the emphasis on indigeneity was the continued oppression in Uganda as in Rwanda of those who were not indigenous.<sup>182</sup>

In response to repression of refugees and attempts to expel them during the mid-1980's, many Rwandan youth joined the Ugandan National Resistance Army (NRA), a guerrilla group intent on overthrowing the Ugandan regime.<sup>183</sup> The NRA was finally successful in its battle, and came to power in Uganda in January of 1986.<sup>184</sup> The NRA's politics were meant to change the postcolonial favoritism lavished on the indigenous by enforcing a distinction that hinged on residency rather than on descent.<sup>185</sup> However, these good intentions ultimately were unrealized.<sup>186</sup>

The RPF was born because Rwandans continued to face discrimination in the NRA based on descent despite a policy decision that held otherwise.<sup>187</sup> Not surprisingly, RPF leadership was dominated by Tutsis, though the head of the RPF was Hutu.<sup>188</sup> The RPF did not act until a dispute between ranchers (Ugandan citizens) and squatters (Rwandan refugees) ended in such a way that it favored only Ugandan citizens and left no provision for Rwandan refugees, signaling the latter's disenfranchisement.<sup>189</sup>

The view that deteriorating conditions in Uganda precipitated the RPF invasion of Rwanda is held not only by Mamdani; Katenta-Apuli, Uganda's ambassador to the U.S., cited the imposition of "the prohibition[s] against nonindigenous Banyarwanda owning land or holding state positions" as cause for the invasion and return to Rwanda.<sup>190</sup> However,

---

178. *Id.*

179. *Id.*

180. *Id.* at 166.

181. *Id.*

182. *Id.*

183. *Id.* at 168–169.

184. *Id.* at 170.

185. *Id.*

186. *Id.* at 175.

187. *Id.* Note that the RPF was nothing more than RANU "rechristened." *Id.*

188. *Id.*

189. *Id.* at 182.

190. *Id.* at 182–83 (citing Letter to Human Rights Watch, August 26, 1993).

Uganda did agree to aid the RPF in its invasion on the condition that it never return.<sup>191</sup>

#### 4. The Current Constitution

Despite the RPF conflict, Rwanda adopted their present Constitution on May 30, 1991.<sup>192</sup> Its Title I provisions concern general housekeeping matters of "The Republic," defining the form of government; flag and language; status of political parties; suffrage; and division of country into prefectures and communes.<sup>193</sup>

Title II brings us into the realm of "Public Liberties."<sup>194</sup> Of note, the equality clause declares equality of all citizens "without any discrimination, especially with respect to race, color, origin, ethnic background, clan, sex, opinion, religion, or social status."<sup>195</sup> Article 16 abolishes all slavery, and articles 17 through 20 guarantee freedom of religion, expression, conscience, association, and assembly.<sup>196</sup> Citizens also have the right to move and settle, the right to privacy, and an inviolable right to private property.<sup>197</sup> As with prior constitutions, family is recognized and protected, with parents having the right to raise their children.<sup>198</sup> Liberty of teaching is guaranteed, and primary education continues to be both mandatory and free.<sup>199</sup> Additionally, the rights to work, join a union, and be protected from "excessively punishing hard labor" are all protected.<sup>200</sup>

The powers of government are delineated in Title III of the Constitution. In general, the various powers are separated.<sup>201</sup> The President is the ceremonial Head of State and the Supreme Chief of the Armed Forces.<sup>202</sup> He can declare a state of siege or state of emergency after consulting with Government, the Constitutional Court and the Bureau of the National Assembly (all three of which are discussed below).<sup>203</sup> In addition, he is responsible for appointing the Prime Minister, who is the head of the Government.<sup>204</sup> The Government is charged with determining and con-

- 
191. *Id.* at 183.  
192. RWANDA CONST. of 1991.  
193. *Id.* at tit. I, arts. 1–11.  
194. *Id.* tit. I, arts. 12–33.  
195. *Id.* at tit. II, art. 16.  
196. *Id.* at tit. II, arts. 17–20.  
197. *Id.* at tit. II, arts. 21–23.  
198. *Id.* at tit. II, art. 24.  
199. *Id.* at tit. II, arts. 26–27.  
200. *Id.* at tit. II, arts. 29–32.  
201. *Id.* at tit. III, art. 34.  
202. *Id.* at tit. III, ch. I, § I, art. 45.  
203. *Id.* at tit. III, ch. I, § I, art. 48.  
204. *Id.* at tit. III, ch. I, § I, art. 44.

ducting the Nation's policies.<sup>205</sup> The armed forces are entrusted to it, and it is accountable to the National Assembly.<sup>206</sup> The Prime Minister is responsible for presenting the Government's programs to the Assembly, as well as delegating assignments to the Ministers and Secretaries of State.<sup>207</sup> All of these officials are accountable to both the President and the National Assembly.<sup>208</sup>

Legislative power is vested in the National Assembly, which is composed of "Deputies of the National Assembly."<sup>209</sup> Among the determinations and initiatives made by the Assembly, it votes upon the financial laws providing resources for the State and votes on a yearly budget.<sup>210</sup> Voting typically requires a simple majority.<sup>211</sup>

The judiciary is a hierarchical system made up of the following courts from lowest to highest: canton courts, courts of the first instance, courts of appeal, and the Court of Cassation.<sup>212</sup> The Constitutional Court is composed of a combination of the Court of Cassation and the Council of State.<sup>213</sup>

The next section of this Article discusses the genocide that occurred during a 100-day period in 1994. According to Mamdani, the RPF's invasion alerted the Hutu that Tutsi power was perhaps not a thing of the past, and this conjured up threatening images of forced labor, mistreatment and expulsion from the middle class.<sup>214</sup> Consequently, the concept of "Hutu power" was born and began to reestablish the racialization of the Tutsi as alien.<sup>215</sup> In essence, the Hutu's old physical and spirit injuries were reopened and provided the initiative to mobilize against the Tutsi.

#### D. *The Genocide*

##### 1. Making the Genocide "Thinkable"

Among his aims, Mamdani has sought to make sense of the incomprehensible "by making the genocide thinkable."<sup>216</sup> The prospect of the Tutsis (in the form of the RPF) waging war and coming back into power was disturbing to the Hutu, whether for fear of forced labor or reclaiming

---

205. *Id.* at tit. III, ch. I, § II, art. 50.

206. *Id.*

207. *Id.* at tit. III, ch. I, § II, art. 51.

208. *Id.* at tit. III, ch. I, § II, art. 54.

209. *Id.* at tit. III, ch. II, § I, art. 58.

210. *Id.* at tit. III, ch. II, § II, arts. 76–77.

211. *Id.* at tit. III, ch. II, § II, art. 73.

212. *Id.* at tit. III, ch. IV, art. 88.

213. *Id.* at tit. III, ch. IV, art. 90.

214. MAMDANI, *supra* note 16, at 189–90.

215. *Id.*

216. *Id.* at 195.



land.<sup>217</sup> Consequently, a propaganda effort was launched following the RPF invasion, including a telling publication called the “Hutu Ten Commandments,” which “forbade Hutu from entering into a wide range of relations with Tutsi, whether in sex, business, or state affairs.”<sup>218</sup> Indeed, one resident’s observations reveal the degree to which the Hutu were inflamed: “They hear over and over that the Tutsis are out to kill them, and that is reality. So they act not out of hate as fear. They think they have only the choice to kill or be killed.”<sup>219</sup>

As stated earlier, a peace process began between the RPF and Hutu opposition parties that culminated in the Arusha Accords of 1993.<sup>220</sup> The RPF appeared to come away from the process victorious: first, a provision was included on merging the two armies; second, the Ministry of the Interior was given to the RPF; third, Tutsi were given reserved seats in parliament and permitted to exclude the extreme Hutu Power group; and fourth, a provision was included that guaranteed the right of return to all refugees.<sup>221</sup> Unbeknownst to the RPF, the Hutu would use this RPF victory as evidence that the Tutsis were indeed taking over and that the Hutu “were in imminent danger.”<sup>222</sup>

Mamdani also points to the experiences of the Hutu in neighboring Burundi as bearing heavily upon the Rwanda Hutu.<sup>223</sup> In 1972 around 200,000 Hutu schoolchildren and intellectuals were slaughtered under Tutsi rule in Burundi.<sup>224</sup> However, change later swept the land with the institution of a “one-person-one-vote” principle within a multiparty system.<sup>225</sup> Nevertheless, in late October of 1993, an all-Tutsi army turned against the Hutu dominated government and murdered the Hutu President.<sup>226</sup> Consequently, after violence broke out throughout the country, some 200,000 Burundi Hutus fled into Rwanda.<sup>227</sup>

Gourevitch notes that the state of Rwanda at the time of its 100-day genocide was somewhat paradoxical:

In 1994, Rwanda was regarded in much of the rest of the world as the exemplary instance of the chaos and anarchy associated with collapsed states. In fact, the genocide was the product of order, authoritarianism, decades of modern

---

217. *Id.* at 190–91.

218. *Id.*

219. *Id.* at 191 (quoting Benedicte Ndagijimana).

220. *Id.* at 211.

221. *Id.* at 210–11.

222. *Id.* at 211.

223. *Id.* at 215.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 215–16.

political theorizing and indoctrination, and one of the most meticulously administered states in history.<sup>228</sup>

Similarly, Faustin Rutembesa observed: “[T]oday we must know that something was broken and the Rwandans were not able to fix it. . . . [T]he government of 1994 was the most terrible manifestation of that thing that was broken.”<sup>229</sup> Thus, despite the appearance of a highly efficient administration, the Rwandan government of 1994 was corrupt, malevolent, and fundamentally flawed.

The genocide consequently became “thinkable.” After considering the colonialists’ racialization of the Tutsi, the history of forced Hutu labor under Tutsi-rule, the Hutu Revolution and subsequent attainment of middle class status, the Hutu’s defeat at the hands of the Tutsi-dominated RPF, and the experiences of the Hutu and Tutsi in Burundi, it is plausible if not probable, that the April 1994 plane crash that killed Rwanda’s and Burundi’s Presidents was not a random spark that set off an incomprehensible genocide. Rather, the crash merely removed the last roadblock restraining Hutu Power: Rwandan President Habyarimana had been facilitating a power-sharing arrangement, which was now unthinkable to many Hutu.<sup>230</sup> Indeed, the President had begun the Second Republic by recasting the Tutsi as an indigenous ethnicity rather than a foreign race.<sup>231</sup> However, Hutu Power had reverted to the notion that the Tutsi was a racialized enemy and decided they would never again be permitted to inflict both physical and spirit injuries upon the Hutu.

## 2. Retelling and Remembering the Genocide

The rumblings of genocide came as early as January of 1994.<sup>232</sup> Romeo Dallaire, commander of UNAMIR, received information from an anonymous but high-ranking Hutu government official describing the “rapid arming and training of local militias.”<sup>233</sup> Dallaire subsequently sent a fax to the United Nations Headquarters in New York reporting the alarming news that “Hutu extremists ‘had been ordered to register all the Tutsi in Kigali.’”<sup>234</sup> Furthermore, Dallaire relayed the grave conclusion

228. GOUREVITCH, *supra* note 23, at 95.

229. *The Evolution of Powers in Rwanda: Distortions between Constitutional Provisions and Institutional Practice*, in CONFERENCE ON CONSTITUTION DEVELOPMENT, KIBUYE-RWANDA 34, 37 (Aug. 24, 2001) (comments of Faustin Rutembesa of Rwanda) (unpublished draft of conference proceedings, on file with Professor Wing).

230. MAMDANI, *supra* note 16, at 216.

231. *Id.* at 99.

232. Samantha Power, *Bystanders to Genocide: Why the United States Let the Rwandan Tragedy Happen*, ATLANTIC MONTHLY, Sept. 2001, at 84, 88.

233. *Id.*

234. *Id.*

reached by the anonymous informant (who was given the name Jean-Pierre): "He suspects it is for their extermination. . . . [The] [e]xample he gave was that in 20 minutes his personnel could kill up to 1000 Tutsis."<sup>235</sup> Jean-Pierre even went so far as to describe how the Hutu would kill many of the Belgian peacekeepers within Rwanda so that Belgium would evacuate its personnel.<sup>236</sup> Unfortunately, the mazes of United Nations bureaucracy ultimately ignored the warning.<sup>237</sup>

The spark that ignited the ensuing 100 days of genocide occurred on April 6, 1994.<sup>238</sup> While President Habyarimana was returning from a peace conference with President Ntaryamira of Burundi, their plane was shot down, killing all aboard.<sup>239</sup> Although the group responsible for these assassinations was never identified, many believe that Hutus were behind it.<sup>240</sup> Upset with President Habyarimana's decision to power-share with the Tutsis, they assassinated him and began the genocide.<sup>241</sup> Within a half hour of the crash, Hutu militiamen and the *gendarmerie*—the Hutu controlled army—erected checkpoints and roadblocks where travelers were required to present the identity cards disclosing their ethnicity.<sup>242</sup> Those identified as Tutsi were immediately murdered by the side of the road.<sup>243</sup>

As predicted by Jean-Pierre, on the second day of the genocide, the Hutu brutally murdered ten Belgian peacekeepers protecting the Hutu moderate Prime Minister Agathe Uwilingiyimana.<sup>244</sup> Although the U.S. had safely evacuated all of its people, Belgium asked for cover from the U.S. while it sought to remove its troops.<sup>245</sup> By April 19, the Belgian withdrawal was complete, and two days later, the Security Council reduced UNAMIR's troops to a mere 270 after receiving pressure from the U.S.<sup>246</sup>

Even without the Belgian presence, Dallaire was aware of the positive effects a mere 2,100 troops could have had.<sup>247</sup> Because Hutus were being deterred from committing acts of genocide in front of foreigners

---

235. *Id.*

236. *See id.*

237. *See id.*

238. Maguire, *supra* note 27, at 60.

239. *Id.*

240. *Id.*

241. *Id.* "[T]here is every reason to believe that hardliner Hutu in Habyarimana's administration killed the President and then pointed the finger at the Rwandan Patriotic Front, knowing full well such a move would ignite Hutu violence against Tutsi." *Id.* at 66.

242. DEP'T OF PUB. INFO., *supra* note 71, at 37–38.

243. *Id.*

244. Power, *supra* note 232, at 89.

245. *Id.* at 99.

246. *Id.*

247. *Id.*

and peacekeepers, each one of these troops was crucial to saving lives.<sup>248</sup> Samantha Power, in her article *Bystanders to Genocide*, relays this story: "At the Hotel des Mille Collines ten peacekeepers and four UN military observers helped to protect several hundred civilians sheltered there for the duration of the crisis."<sup>249</sup>

Despite retaining 503 troops, Dallaire was well aware of what they faced:

My force was standing knee-deep in mutilated bodies, surrounded by the guttural moans of dying people, looking into the eyes of children bleeding to death with their wounds burning in the sun and being invaded by maggots and flies . . . . I found myself walking through villages where the only sign of life was a goat, or a chicken, or a songbird, as all the people were dead, their bodies being eaten by voracious packs of wild dogs.<sup>250</sup>

The acts of genocide were carried out not only by general slaughter, but also by the targeting of specific individuals using previously prepared lists broadcast over the government controlled Radio Television Libre des Mille Collines.<sup>251</sup> Such organization only reaffirmed and legitimated the warnings received in January from Jean-Pierre. The UN estimated that by the end of April some 200,000 Rwandans had been murdered using the most inhumane of means:

The massacres were all the more horrific for the inhuman way in which they were carried out, often with machetes, axes, cudgels and iron bars. Women and young girls were systematically raped, tortured and maimed, while males were subjected to torture and extreme degradation before being killed. Children who were not killed became helpless witnesses to these atrocities.<sup>252</sup>

Perhaps one of the most startling facts of the genocide is the inclusion and involvement of men, women and children to carry out the killings, both willingly and unwillingly.<sup>253</sup> Indeed, the Hutus organizing the massacre knew they would have to employ as many Hutu as possible to eradicate the Tutsi population.<sup>254</sup>

---

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 89.

252. DEP'T OF PUB. INFO., *supra* note 71, at 44.

253. AFRICAN RIGHTS, *supra* note 1, at 1.

254. *Id.*

Some women, including young girls in their teens, were participants in the carnage, hacking other women and children, and sometimes even men, to death. Some of these women joined the killing willingly. Others were forced in the same manner that men were forced, at the point of a gun, by threats and other forms of intimidation.<sup>255</sup>

Even if they did not actually kill, many women and girls acted as “cheerleaders” during a killing spree, and then went on to strip the corpses of clothes and jewelry.<sup>256</sup> “There is no evidence that women were more willing to give refuge to the hunted than men.”<sup>257</sup>

Indeed, the role of women in the genocide spread across all classes and levels of education. Educated women were involved in the organization of the genocide, preparing lists and acting as informants.<sup>258</sup> Hospitals no longer were places of refuge, with women nurses handing over both Tutsis looking for shelter and their Tutsi colleagues.<sup>259</sup> Likewise, schools and churches could not be trusted: female teachers and nuns were involved in exposing those Tutsi seeking protection.<sup>260</sup>

Children were also exposed to the killing. Both boys and girls would follow their mother as she not only looted the bodies and homes of the slaughtered, but while she brutally murdered.<sup>261</sup> Many children were even forced, and in some instances, chose to murder.<sup>262</sup> The older male children of women who were infamous killers were placed in active roles of escorts and killers.<sup>263</sup> Conversely, the male Tutsi children were targets out of fear that they would one day bolster the ranks of the RPF.<sup>264</sup>

To organize the genocide, the radio was immediately employed to incite violence against the Tutsis. Broadcasts assured Hutu listeners that plenty of targets remained: “Radio Mille Collines broadcast names, addresses, and even license-plate numbers. Killers often carried a machete in one hand and a transistor radio in the other.”<sup>265</sup> Indeed, the radio was one of the chief tools utilized in carrying out the genocide, broadcasters calling for the eradication of the “Tutsi cockroach.”<sup>266</sup>

---

255. *Id.*

256. *Id.* at 1–2.

257. *Id.* at 2.

258. *Id.* at 3.

259. *Id.*

260. *Id.*

261. *Id.*

262. See DEP’T OF PUB. INFO., *supra* note 71, at 67–68.

263. AFRICAN RIGHTS, *supra* note 1, at 3.

264. *Id.* at 4.

265. Power, *supra* note 232, at 89.

266. DEP’T OF PUB. INFO., *supra* note 71, at 38.

Dallaire saw firsthand the effects of the broadcasts, and as such he requested assistance from the UN in blocking the radio transmissions.<sup>267</sup> The U.S. was the country with the ability and technology to “neutralize” the broadcasts, yet it refused its assistance, citing several reasons: the time necessary to gain flight clearance from surrounding countries (one week); a cost of \$8,500 per flight hour; and a desire to uphold that trophy of American freedoms—free speech.<sup>268</sup> Power recounts what is perhaps the most telling instance of U.S. bureaucratic ignorance: “When Bushnell [Deputy Assistant Secretary of State] raised radio jamming yet again at a meeting, one Pentagon official chided her for naiveté: ‘Pru, radios don’t kill people. *People* kill people!’”<sup>269</sup>

The paralysis of the U.S., UN and other countries cannot be blamed on lack of media attention. To the contrary, major U.S. newspapers began reporting the horrific details within the first few days of the genocide.<sup>270</sup> On April 9, the *Washington Post* reported the killing of Rwandan workers of international relief agencies.<sup>271</sup> The next day, both the *Post* and *The New York Times* relayed stories of thousands of Rwandan corpses being placed in piles.<sup>272</sup> The stories of mass killings continued, and on April 19, Human Rights Watch declared the estimated 100,000 now dead to be the product of genocide.<sup>273</sup> On May 4, 1994, during an appearance on the U.S. news program *Nightline*, Boutros Boutros-Ghali stated, “Here you have a real genocide, in Kigali.”<sup>274</sup>

Given the widely disseminated information on the genocide occurring in Rwanda, especially the fact that it was coming from national, reputable news sources, it is difficult if not impossible to understand why it took so long for the UN and U.S. to respond.<sup>275</sup> Nonetheless, by the time the U.S. acceded to Dallaire’s plan on May 17, the lives of the genocide victims had already been lost.<sup>276</sup> The UN immediately requested armored personnel carriers (APCs) from the U.S.<sup>277</sup> However, further bureaucratic squabbles ensued, and the APCs did not arrive until a month

---

267. Power, *supra* note 232, at 101.

268. *Id.*

269. *Id.*

270. *Id.* at 94–96.

271. *Id.* at 94.

272. *Id.*

273. *Id.* at 95–96.

274. DEP’T OF PUB. INFO., *supra* note 71, at 51.

275. See generally Power, *supra* note 232, at 84 (providing an account of the decisions or lack thereof by the UN and U.S. that resulted in standing aside and permitting the genocide to occur).

276. *Id.* at 103.

277. *Id.*

later on June 19.<sup>278</sup> Of course, by this time, the genocide was over and roughly 800,000 were dead.<sup>279</sup>

While those in the Clinton administration still generally claim that President Clinton did not know of the genocide until two weeks into it, there is evidence pointing to other personnel who knew almost immediately of the atrocities underway.<sup>280</sup> Nevertheless, those defending the President have conceded this much: "a belated intervention would have saved 75,000 to 125,000—no small achievement."<sup>281</sup>

The RPF had begun fighting the Hutu at the start of the genocide.<sup>282</sup> In fact, calling this a civil war rather than a genocide provided bystanders with an excuse as to why they were not acting: "'War' was 'tragic,' but created no moral imperative."<sup>283</sup> What remained of the RPF marched into Kigali on July 4, 1994, and "took full control" of the capital, as well as Rwanda's second largest city, Butare.<sup>284</sup> On July 17, a cease-fire was declared.<sup>285</sup>

UNAMIR II began its troop deployment in the middle of August and became the chief method of stabilization in the devastated country, providing both protection and humanitarian assistance.<sup>286</sup> In July of 1994, Rwanda's new President, Mr. Pasteur Bizimungu, secured the return of refugees from Zaire.<sup>287</sup> The presence of UNAMIR II diverted most of those Rwandans still intending to flee to Zaire, however, an estimated 100,000 still did so, most of whom were Hutu, some even genocidaires.

### E. The Post-Genocide State

The aftermath of the Rwandan genocide leaves behind not only surviving victims and witnesses, but also its perpetrators. Specifically, the unspeakable trauma undergone by everyone has undoubtedly led to widespread cases of both spirit injury and spirit murder, as the following reports reveal. This section addresses those issues, as well as the legal systems now prosecuting acts of genocide and the post-genocide government.

---

278. *Id.*

279. *Id.* at 84.

280. *Id.* at 103–04.

281. *Id.* (referring to Alan Kuperman who claims in *Foreign Affairs*, that President Clinton did not know about the genocide for two weeks). See Alan J. Kuperman, *Rwanda in Retrospect*, FOR. AFF., Jan.–Feb. 2000, at 94.

282. DEP'T OF PUB. INFO., *supra* note 71, at 16.

283. Power, *supra* note 232, at 104.

284. DEP'T OF PUB. INFO., *supra* note 71, at 56–57.

285. *Id.* at 57.

286. *Id.* at 58.

287. *Id.* at 57.

## 1. Women

According to the Special Rapporteur of the UN Commission on Human Rights assigned to monitor the human rights situation in Rwanda, rape was used as a weapon of genocide and inflicted in some 250,000–500,000 cases: “[R.]ape was the rule and its absence the exception.”<sup>288</sup> Furthermore, women who “survived” were left to deal with maiming and sexually transmitted diseases.<sup>289</sup> Particularly devastating has been the ongoing assault on the spirit of these women. Victims have been deemed unsuitable for marriage, causing them to flee in hopes of finding anonymity.<sup>290</sup> Additionally, those who were impregnated during the rape and subsequently bore the murderers’ children find it nearly impossible to accept these children, which has resulted in abortion and infanticide.<sup>291</sup>

Besides rape and its consequences, women have been confronted with new burdens of overwhelming responsibility to face on their own. Because Tutsi men were often specific targets, especially the wealthy, educated and young, many of the Tutsi who survived are women.<sup>292</sup> These women have been “widowed, orphaned, [left] homeless, disabled and left alone with the burden of looking after the remaining members of their families.”<sup>293</sup> The situation is further complicated by the availability of “help” from the surrounding community: many of the women providing aid participated in the killing and looting, and are now hiding behind the guise of female innocence to avoid prosecution.<sup>294</sup> “[T]he Rwandan killings took place in the local communities where both victim and aggressor resided. The situation was truly one of neighbor killing neighbor. As a result, many aggressors are known to the surviving family members.”<sup>295</sup>

## 2. Children

Likewise, children have suffered irreparable damage to their spirits. United Nations Children’s Fund (UNICEF) has declared the degree of traumatization undergone by these children as “unparalleled in any other conflict in the last ten years.”<sup>296</sup> Besides the many children murdered, sometimes at the hands of their own parents in situations where one of the parents was Tutsi, nearly ninety-six percent of surviving children were

---

288. *Id.* at 67.

289. *Id.*

290. *Id.*

291. *Id.*

292. AFRICAN RIGHTS, *supra* note 1, at 4.

293. *Id.*

294. *Id.* at 5.

295. Drumbl, *supra* note 33, at 1260 (citations omitted).

296. DEP’T OF PUB. INFO., *supra* note 71, at 67.



exposed to the brutal murder of family and friends.<sup>297</sup> Even mothers and grandmothers refused to hide their own Tutsi children and grandchildren.<sup>298</sup> Perhaps even more horrifying was the extensive use of children as instruments for committing crimes against humanity, either as civilians or as soldiers.<sup>299</sup>

Consequently, the Special Rapporteur has reported that surviving children experience “depression, insomnia, nightmares, mistrust of those around them and an ever-present fear of being killed.”<sup>300</sup> A year and a half after the genocide, there were approximately 47,000 orphans in Rwanda.<sup>301</sup> Current reports cite grim statistics: “The massacres have left several hundred thousand children either orphaned or separated from their parents. A recent UNICEF report estimates that 700,000 children—eighteen percent of Rwanda’s 4.2 million children—still live in difficult circumstances.”<sup>302</sup>

### 3. Bringing Perpetrators to Justice

In order to prosecute those involved in carrying out the massacre, the Security Council voted to establish the International Criminal Tribunal for Rwanda (ICTR) on November 8, 1994.<sup>303</sup> In general, the ICTR has focused its attention on the gravest of offenders, but is bound by the UN’s prohibition on imposing a death sentence.<sup>304</sup> However, obtaining justice has been a tedious process. Only eight people have been found guilty since 1994, and the first “not guilty” verdict came down in July of 2001.<sup>305</sup>

The *Akayesu*<sup>306</sup> case is one of the most significant decisions handed down by the ICTR. Defendant Akayesu was a Rwandan national who had been mayor of the Taba commune until 1994.<sup>307</sup> He was indicted on some fifteen different charges, including “genocide, complicity in geno-

297. *Children of Rwanda’s Genocide*, N.Y. TIMES, at <http://www.nytimes.com/library/world/Africa/index-rwanda-children.html> (last visited Jan. 4, 2001).

298. AFRICAN RIGHTS, *supra* note 1, at 2.

299. *Id.*

300. DEP’T OF PUB. INFO., *supra* note 71, at 68.

301. *Id.*

302. *Children of Rwanda’s Genocide*, *supra* note 297.

303. DEP’T OF PUB. INFO., *supra* note 71, at 64–65.

304. Drumbl, *supra* note 33, at 1316 n.467.

305. See *Belgium arrests genocide suspect*, BBC NEWS, July 27, 2001, at [http://news.bbc.co.uk/1/hi/English/world/Africa/newsid\\_1460000/1460344.stm](http://news.bbc.co.uk/1/hi/English/world/Africa/newsid_1460000/1460344.stm).

306. *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T (Sept. 2, 1998), at <http://www.ictor.org/English/judgements/akayesu.html>.

307. Susan W. Tiefenbrun, *The Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court*, 25 N.C.J. INT’L L. & COM. REG. 551, 587 (2000).

cide, direct and public incitement to commit genocide, extermination, murder, torture, cruel treatment, rape, other inhumane acts and outrages upon personal dignity, crimes against humanity and violations of Article 3 Common to the 1949 Geneva Conventions . . . .”<sup>308</sup> The complaint was then amended to include an additional three counts of acts of sexual violence defined as “forcible sexual penetration of the vagina, anus, or oral cavity by a penis and/or the vagina or anus by some other object, and sexual abuse, such as forced nudity.”<sup>309</sup>

The court held that rape and sexual violence fit within the meaning of genocide delineated in the Genocide Convention.<sup>310</sup> The prosecution proved this by showing that “rape and sexual violence were committed with the specific intent to destroy, in whole or in part, a particular group—in this case the Tutsi women . . . .”<sup>311</sup> Judge Pillay of South Africa concluded with this declaration: “From time immemorial, rape has been regarded as spoils of war . . . now it will be considered a war crime. We want to send out a strong signal that rape is no longer a trophy of war.”<sup>312</sup>

Although the ICTR handles most serious cases, Rwandan courts are also involved.<sup>313</sup> Rwanda is holding its own national trials, so as to create a form of concurrent jurisdictions, though the statute grants the ICTR superseding jurisdiction.<sup>314</sup> Rwanda has not abolished the death penalty, and therefore, courts can sentence those guilty of the gravest offenses to death.<sup>315</sup> However, the wheels of justice have moved slowly, with the accused being detained for several years before trial, thereby raising human rights concerns.<sup>316</sup> According to a report by Amnesty International in 2000, there are approximately 125,000 individuals still awaiting trial in extremely poor conditions.<sup>317</sup>

The national courts have followed the Organic Law enacted to deal with the genocide trials, which consists of four levels of offenses.<sup>318</sup> Category one applies to leaders, organizers and planners; category two covers charges of manslaughter to murder; category three applies to assault; and

---

308. *Id.*

309. *Id.* at 588.

310. *Id.*

311. *Id.*

312. *Id.* at 589 (citing Bill Berkeley, *Judgment Day*, WASH. POST, Oct. 11, 1998, at W10).

313. Bernard Muna, et al., *The Rwanda Tribunal and Its Relationship to National Trials in Rwanda*, 13 AM. U. INT’L L. REV. 1469, 1473–74 (1998).

314. *Id.* at 1473.

315. *Id.* at 1476.

316. *Id.* at 1475.

317. AMNESTY INT’L, *THE TROUBLED COURSE OF JUSTICE*, at <http://www.amnesty.org.uk/cgi-bin/eatsoup.cgi?id=956738732z212w2d8v51> (last visited Aug. 13, 2001).

318. Drumbl, *supra* note 33, at 1263–64.

category four covers theft.<sup>319</sup> However, as mentioned above, the sheer magnitude of the process has posed numerous problems.<sup>320</sup>

In an effort to deal with these problems, Rwanda is implementing the Gacaca<sup>321</sup> legal system, a system “set up at four administrative levels nationwide, the lowest level being the cell, followed by the sector, district and province. These courts . . . have the power to hear and pass judgment on all but the highest category of genocide. The respective levels . . . will judge different categories of genocide suspects.”<sup>322</sup> The chief objectives of the system are twofold: first, it is hoped the increase in capacity to conduct trials will rapidly diminish the current backlog of some 115,000 genocide suspects; and second, it is believed that the participatory nature of the system “[f]oster[s] national reconciliation between killers and the families of victims.”<sup>323</sup>

The core of the Gacaca legal system centers on its grassroots nature: it is “a traditional system of justice involving the local population in trying people accused of participation in the genocide.”<sup>324</sup> According to Justice Minister Jean de Dieu Mucyo, “Gacaca is a participatory system of justice, not just a people’s court, because it is based on the participation of those who saw what happened in 1994 . . . .”<sup>325</sup> The benefits of such a system may include increased efficiency and facilitating an environment where witnesses of genocide crimes would be more likely to come forward.<sup>326</sup> However, human rights organizations like Amnesty International have voiced a number of concerns:

The accused in the [G]acaca trials will not be allowed representation by a defence lawyer; [t]hose judging these extremely complex and serious cases will have no legal training or may have a personal interest in the verdict, thus potentially undermining the competence, independence and impartiality of these courts; [and] fundamental aspects of the [G]acaca proposals do not conform to basic international

---

319. *Id.*

320. Muna, et al., *supra* note 313, at 1482.

321. Gacaca means “justice on the grass.” Helen Vesperini, *Rwanda Speeds Up Genocide Trials*, BBC NEWS, Oct. 4, 2001, at [http://news.bbc.co.uk/hi/English/world/Africa/newsid\\_1578000/1578841.stm](http://news.bbc.co.uk/hi/English/world/Africa/newsid_1578000/1578841.stm) (last visited Oct. 31, 2001).

322. RWANDA GOV’T, GACACA JUDGES TO BE ELECTED IN OCTOBER, , at [http://www.Rwanda.com/government/07\\_11\\_01\\_gacaca.htm](http://www.Rwanda.com/government/07_11_01_gacaca.htm) (last visited Oct. 31, 2001).

323. *Rwanda Speeds Up Genocide Trials*, *supra* note 321.

324. AMNESTY INT’L, *supra* note 317.

325. *Rwanda Gets New Judicial System*, NEWS24.COM, at [http://www.news24.co.za/News24/Africa/Central\\_Africa/0,1113,2-11-39\\_1088593,00.html](http://www.news24.co.za/News24/Africa/Central_Africa/0,1113,2-11-39_1088593,00.html) (last visited Oct. 31, 2001):

326. AMNESTY INT’L, *supra* note 317.

standards for fair trials guaranteed in international treaties which Rwanda has ratified.<sup>327</sup>

Rwandans elected 260,000 Gacaca Court judges on October 4, 2001.<sup>328</sup> The election process was carried out as follows: "The Electoral Commission . . . send[s] representatives to each cell in the country . . . to supervise the elections. The cell is the lowest administrative level in Rwanda, with nearly 10,000 cells nationwide."<sup>329</sup>

Finally, each cell elects nineteen judges.<sup>330</sup> The courts are then granted the authority to rule on all but the highest category of genocide crimes.<sup>331</sup> Procedurally, the system is participatory, calling upon the members of the community to serve as judges and witnesses.<sup>332</sup>

It remains to be seen if a combination of prosecutions by the Tribunal, national courts, and now Gacaca tribunals will speed up the process of obtaining some small measure of justice. In a country where so much remains broken, even incremental improvements in provision of services may be revolutionary in scope for both victims and victimizers.

#### 4. The Post-Genocide Government and Continuing Conflict

After the RPF came to power in July of 1994, it formed a new government called The Broad Based Government of National Unity.<sup>333</sup> The fundamental law established by the new regime consisted of three components: the Constitution, the Arusha Accords<sup>334</sup>, and political declarations of the parties.<sup>335</sup> Additionally the former government's party, the MRND, was banned, as was all political organizing through 1999.<sup>336</sup> Finally, in 1999 the post-genocide government unilaterally extended its rule through 2003.<sup>337</sup>

The post-genocide period has been plagued with political instability. Most recently, in early 2000 the President, Speaker of the National

---

327. *Id.*

328. RWANDA GOV'T, *supra* note 322.

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. BUREAU OF AFRICAN AFFAIRS, *supra* note 24.

334. *Id.*

335. *Id.*

336. *Id.*

337. See HUMAN RIGHTS WATCH, RWANDA: HUMAN RIGHTS DEVELOPMENTS, at <http://www.hrw.org/wr2k/Africa-08.htm> (last visited Aug. 13, 2001).

Assembly and the Prime Minister all resigned due to pressure.<sup>338</sup> Of the three, the latter two officials fled the country.<sup>339</sup> Interestingly, Joseph Kabuye Sebarenzi, the Tutsi speaker of the National Assembly, “was the first leading Tutsi politician to flee. His departure highlighted the rift between Tutsi survivors of the 1994 genocide and the RPF over such issues as jobs in the administration, military promotions, aid to genocide victims, and justice for genocide.”<sup>340</sup>

As a result, the former Vice President General Paul Kagame was elected President by the assembly.<sup>341</sup> This was a significant departure from existing practice and law because Kagame, a Tutsi minority, replaced a Hutu, thus effectively abolished the system of reserving the Head of State office for the group constituting the majority.<sup>342</sup> Furthermore, after cabinet positions were reconfigured, the new President’s RPF party ended up with ten of the eighteen seats.<sup>343</sup> The result of these changes was a violation of the Arusha Accords.<sup>344</sup>

The above events suggest that the post-genocide government is not promoting adherence to the rule of law to the fullest extent possible. First, the current regime has banned public meetings, which greatly inhibits the ability of political parties to present their platform.<sup>345</sup> Furthermore, as mentioned above, both Hutu and Tutsi officials have been fleeing the country.<sup>346</sup> Tutsi students have also been critical of the government, fleeing to Uganda due to “the ‘dictatorial’ nature of the government.”<sup>347</sup>

In concluding the history of the post-genocidal era, it is of no small concern that violence has continued in the region during the last half of the decade.<sup>348</sup> After the RPF came to power in 1994, some two million Rwandans were led into Zaire (now the Democratic Republic of the Congo (DRC)) by the overthrown government.<sup>349</sup> However, as the Hutus were fleeing, hundreds of thousands of Tutsis were returning to Rwanda.<sup>350</sup> Of this phenomenon, Gourevitch observed:

---

338. HUMAN RIGHTS WATCH, *Human Rights Watch World Report 2001*, in RWANDA: HUMAN RIGHTS DEVELOPMENTS, at <http://www.hrw.org/wr2k1/Africa/Rwanda.html> (last visited Aug. 13, 2001).

339. *Id.*

340. *Id.*

341. *See id.*

342. *Id.*

343. *Id.*

344. HUMAN RIGHTS WATCH, *supra* note 337.

345. *Id.*

346. *Id.*

347. *Id.* at 2.

348. *Id.*

349. *Id.*

350. *Id.*

What possessed these people, a great many of whom had never before set foot in Rwanda, to abandon relatively established and secure lives in order to settle in a graveyard? The legacy of exclusion, the pressures of exile, and the memory of, or longing for, a homeland all played a part. So did a widespread determination to defy the genocide, to stand and be counted in a place where one was meant to have been wiped out. And for many, the sense of belonging was mingled with a straightforward profit motive.<sup>351</sup>

Since then, the period has been marked with violence as the RPF has tried to “put down an insurgency which had operated out of north-western Rwanda and adjacent areas of the . . . DRC.”<sup>352</sup> The result of this has been the loss of “tens of thousands” of lives.<sup>353</sup> The refugees in the DRC are mostly Hutu driven out after the Tutsi-led RPF came to power. Therefore these exiles constitute a continuous and imminent threat to the current state of Rwanda.<sup>354</sup> The threat and possibility of another genocide is by no means an irrational or distant fear of the Tutsis now living in Rwanda.

The next section addresses how various democratic principles operate within Africa, focusing specifically on some of the problems that democracy encounters within African states. Professor Cass Sunstein provides various principles that are relevant to a country making the transition to a democracy, especially with regard to constitution making. However, scholars with a distinct African perspective point to the hindrances present in African countries that often prevent democracy from coming to fruition.

### III. DEMOCRACY WITHIN AFRICA: THE CHALLENGE OF IMPLEMENTING DEMOCRATIC PRINCIPLES WITHIN AFRICAN STATES

This section presents a discussion of democracy and democratic principles at work in Africa. First, it examines the various democratic principles that Cass Sunstein has identified as crucial to “designing” a democracy.<sup>355</sup> While guiding principles are necessary, they must also be grounded in the concrete reality of African experience. Thus, the remainder of this section will survey past experiences of democracy at work in Africa coupled with suggestions and considerations from African or “insiders’” perspectives.

---

351. GOUREVITCH, *supra* note 23, at 230–31.

352. HUMAN RIGHTS WATCH, *supra* note 337.

353. *Id.*

354. *Id.*

355. SUNSTEIN, *supra* note 18.

A. Principles and Considerations Germane  
to the Creation of a Democracy

While a number of western scholars have expounded on the nature of democracy, this section focuses on the work of University of Chicago Professor Cass Sunstein in *Designing Democracy: What Constitutions Do*.<sup>356</sup> Professor Sunstein lays out several considerations critical to the constitutional drafting process that can have applicability in the Rwandan context. Because the operation of pure democracy in the Rwandan context would only place the genocide perpetrators back into power (the Hutu comprise eighty-five percent of the population),<sup>357</sup> Sunstein's paradigm of deliberative democracy and its accompanying considerations are highly relevant to Rwanda as it constructs its constitution.

Sunstein begins with the overarching view that "a constitution should promote deliberative democracy, an idea that is meant to combine political accountability with a high degree of reflectiveness and a general commitment to reason giving."<sup>358</sup> Consequently, a deliberative democracy is not a direct democracy whereby "popular referenda" controls, but instead it provides the necessary structures needed to facilitate exposure to and discussion of diverse points of view.<sup>359</sup> The aims of this process are specifically germane to Rwanda in its early discussions of democracy and constitutionalism.

However, Sunstein also acknowledges that deliberation alone cannot explain or solve all conflict or disagreements.<sup>360</sup> Indeed, Sunstein calls our attention to "group polarization," a concept he uses to describe "a process by which groups of like-minded people move one another to increasingly extreme positions."<sup>361</sup>

Related to group polarization is the idea of deliberating enclaves, which are nothing more than groups of like-minded people.<sup>362</sup> While these groups do provide for minority opinions, there is also inherent peril in these groups: "Members will move to positions that lack merit but are predictable consequences of the particular circumstances of enclave deliberation."<sup>363</sup> Sunstein resolves this somewhat paradoxical arrangement with the following prescription: "An appreciation of group polarization helps show why a constitutional democracy takes steps to protect deliberation within enclaves, to ensure that those inside enclaves hear alternative views, and to ensure as well that those outside of particular enclaves are exposed

---

356. *Id.*

357. See BUREAU OF AFRICAN AFFAIRS, *supra* note 24.

358. SUNSTEIN, *supra* note 18, at 6–7.

359. *Id.* at 7.

360. *Id.* at 8.

361. *Id.*

362. *Id.* at 45.

363. *Id.* at 46.

to what enclave members have to say."<sup>364</sup> Thus, Rwanda would be the wiser for heeding Sunstein's balancing approach.

Sunstein also advocates the idea of "incomplete theorization," which encourages agreement on constitutional practices rather than on the underlying theories.<sup>365</sup> He argues that it is easier for people to agree on practices or rights than on the theories underlying them.<sup>366</sup> As an example, he cites provisions from the South African constitution to demonstrate what an incompletely theorized agreement looks like (e.g. "freedom of speech" or "religious liberty").<sup>367</sup> Leaving these concepts in a more abstract realm ultimately leaves room for them to take shape as society changes and progresses.<sup>368</sup>

Sunstein also makes the distinction between constitutions that are preservative and those that are transformative, the former safeguarding tradition and the latter calling the state "toward an ideal future."<sup>369</sup> Indeed, the implications in the Rwandan context are obvious: while much can be learned from the past, the events of the last decade reveal that there is much to discard and much to achieve in the future.

Sunstein goes on to introduce us to what he posits as the "anticaste principle," which "forbids social and legal practices from translating highly visible and morally irrelevant differences into a systemic source of social disadvantage, unless there is a very good reason for a society to do so."<sup>370</sup> This idea goes much further than current U.S. constitutional protection, resembling that of countries like South Africa and Canada instead. The latter countries examine and occasionally strike down laws producing discriminatory effects, whereas the U.S. requires that the law either discriminate on its face or have been fashioned with a discriminatory purpose in order to strike it down.<sup>371</sup>

To combat the effects of a caste system, Sunstein argues that remedial programs, founded upon their objection to caste, are entirely appropriate insofar as they are abolishing the second-class status once established.<sup>372</sup> Thus, Rwanda stands to learn much from taking into consideration the anticaste principle and doing all it can to erase any categories of second-class citizenship—a process that will require affirmative action programs in areas like education, government, employment and political arenas.<sup>373</sup>

---

364. *Id.* at 47.

365. *Id.* at 50.

366. *Id.*

367. *Id.* at 56.

368. *Id.* at 60.

369. *Id.* at 68.

370. *Id.* at 155 (emphasis removed).

371. *Id.* at 166.

372. *Id.* at 180.

373. *See infra* Part IV.



Finally, Sunstein addresses whether socioeconomic rights should be placed in a constitution—rights often referred to as positive rights because they require the government to provide something.<sup>374</sup> The core principle advocated here is extremely relevant to post-genocidal Rwanda: “Should constitutions protect social and economic rights? It is certainly relevant that if basic needs are not met, people cannot really enjoy the status of citizens.”<sup>375</sup>

In the South African context, where the constitution does include positive rights like the right to housing, the Constitutional Court has interpreted this not to mean “housing on demand but a reasonable program for ensuring access to housing for poor people, including some kind of program for ensuring emergency relief.”<sup>376</sup> Likewise, Rwanda’s inclusion of socioeconomic rights is essential if it is going to ensure a democracy where its citizens can experience a level of independence and security.

#### B. *Democracy in Africa: Examples from the Past and Advice for the Future*

While Sunstein’s considerations are of great relevance, reviewing constitutional theories designed with the African context in mind is critically important to the creation of a Rwandan democracy. A chief problem in implementing democracy in Rwanda is the fear that the eighty-five percent Hutu majority will crush the fourteen percent Tutsi minority. Professor Muna Ndulo has summarized the ethnicity problem within African democracies as follows:

[T]he issue of ethnicity could potentially be destabilizing to the democratic process. Democracy can magnify rather than reduce the adverse effects of ethnicity. African states also need to accommodate the significant numbers of racial minorities that exist in their countries. Constitutions must deal with this fact sensitively by not only acknowledging the fears and apprehensions of the racial minority groups, but also by meeting their legitimate demands and meaningfully engaging them in political systems and nation-building. The issue of ethnic or racial minority protection has to be addressed in a proactive manner.<sup>377</sup>

---

374. SUNSTEIN, *supra* note 18, at 222.

375. *Id.* at 235.

376. *Id.* at 236.

377. Muna Ndulo, *The Democratic State in Africa: The Challenges for Institution Building*, 16 NAT’L BLACK L.J. 70, 81 (1998–1999).

As Mamdani puts it, “foreclos[ing] the possibility of a *democratic despotism* remains our toughest challenge yet.”<sup>378</sup> However, control of all power by the minority does nothing to mitigate the tensions between Hutu and Tutsi,<sup>379</sup> and only conjures up abuses perpetrated upon the Hutu by Tutsi under colonialism.

Mamdani’s prescription for Rwanda comes from the experience of another African country—Zanzibar.<sup>380</sup> In that situation, both the “Arab” minority and “African” majority yielded power as Zanzibar merged with Tanganyika to become Tanzania.<sup>381</sup> Over time, this fusion worked a gradual dissolution of these separate identities, and the new “Zanzibar” identity slowly became the unifying identity.<sup>382</sup> Mamdani posits that the opposing political identities of Hutu and Tutsi must be abolished, and, in their place, Tutsis and Hutus *together* could begin to identify under the regional Banyarwanda identity.<sup>383</sup>

In evaluating Tanzania’s success with implementing democracy, scholars have also found other factors highly relevant.<sup>384</sup> First, there was a great grassroots effort in Tanzania to involve the public in the decision-making process.<sup>385</sup> Second, in Tanzania, both sides were willing to cede power, and control was curbed by such provisions as a two-term limitation upon the office of the President.<sup>386</sup>

Concerning the implementation of democracy in African states in general, Ndulo cites a number of considerations relevant to these often ethnically-divided countries.<sup>387</sup> First, the foundational consideration is the constitution: “The basic law that implements constitutional democracy is the national constitution. It represents the basic structure of an organized society.”<sup>388</sup> Furthermore, for democracy to survive in Africa, states must develop “constitutional arrangements that set up viable institutions which foster an environment where peace and development can flourish.”<sup>389</sup>

Ndulo warns that failure is likely within African countries if “Africa’s cultural and historical peculiarities” are ignored.<sup>390</sup> Thus for a constitution to obtain legitimacy within a population, the country’s

---

378. MAMDANI, *supra* note 16, at 281.

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. See ZIYAD MOTALA, CONSTITUTIONAL OPTIONS FOR A DEMOCRATIC SOUTH AFRICA 151–52 (1994).

385. *Id.* at 151. For further discussion on legitimacy, see *infra* Part IV.D.

386. See MOTALA, *supra* note 384, at 152.

387. Ndulo, *supra* note 377, at 79.

388. See *id.* at 80.

389. *Id.* at 75.

390. *Id.* at 81.

unique history must be taken into account. Merely borrowing provisions from other constitutions without considering the country's past sets up a state for failed democracy.<sup>391</sup> Professor Makau wa Mutua also warns against relying too heavily on rights discourse alone: "What is doubtful, however, is . . . the possibility for any state, to overcome such a dreadful legacy of human rights abuses primarily through the rights idiom."<sup>392</sup>

Other problems include the roles of a free press and military regimes. While establishment of "a free and vibrant press" is absolutely necessary, it is often problematic in African countries: media outlets are frequently owned by governments or receive substantial subsidies from them.<sup>393</sup> Additionally, the intrusive role of the military in many African countries must be curbed: "It is . . . essential that the military be respectful of the democratic process. In some parts of Africa, especially West Africa, the military has proved to be the greatest threat to the development of democratic governance."<sup>394</sup>

Coupled with this problem and exacerbating it is the inclination for African states to maintain highly centralized governments, which is a structure that remains from colonial rule.<sup>395</sup> "Centralization of power refers to the constitutional concentration of power in the hands of a few executive offices and this greatly undermines the importance of courts, legislatures and sub-regional governments."<sup>396</sup> Ndulo's solution is to invest local governments with "real responsibilities" and actual power.<sup>397</sup>

Ndulo also draws our attention to the electoral process.<sup>398</sup> Simply put, winner-take-all systems do not work in most African countries despite the fact that such a system is used in nearly all African states.<sup>399</sup> This process:

creates permanent losers and permanent winners. . . . The size of a party's representation is thus determined not only by the number of votes received, but also by their geographic concentration. . . . [G]roups that are numerically small can never win an election. They, therefore, remain

---

391. See *id.* (citing Adrien K Wing, *Towards Democracy in South Africa: A Review of Ziyad Motala, Constitutional Options for a Democratic South Africa: A Comparative Perspective*, 16 MICH. J. INT'L L. 689 (1995)). For a discussion of achieving legitimacy within Rwanda, see *infra* Part IV.E.

392. Mutua, *supra* note 20, at 111.

393. Ndulo, *supra* note 377, at 82–83.

394. *Id.* at 83.

395. *Id.* at 84.

396. *Id.* at 84.

397. *Id.* Note that this delegation of power must involve more than mere administrative efficiency between the central and localized governments, as this was true of Rwanda at the time of the genocide.

398. *Id.* at 88.

399. *Id.* at 90.

permanently aggrieved. Such a system will be unable to implement democratic principles in deeply divided societies that are non-homogenous.<sup>400</sup>

Finally, speaking of South Africa's experience, Mutua warns that a

democratic, rule of law, rights-based state . . . [can] turn[] out to be an instrument for the preservation of the privileges and the ill-gotten gains of the [W]hite minority. The state has become a stamp of approval for an unjust and unfair society. It is clear that a state that is unable, in the first place, to overcome these basic problems cannot become a human rights institution.<sup>401</sup>

Therefore, our analysis must invoke more than the proper language, being mindful of the history and context of both Rwanda and Africa.

In conclusion, both Western and African scholars' explications on democracy furnish this project with appropriate guideposts and cautionary advice. Thus, Part IV offers recommendations for a new Rwandan constitution in light of the past Rwandan and African experiences recounted in Part II. Specifically, these proposals address discrimination directed toward ethnic and racial minorities, women, children and other disadvantaged groups; freedom of speech, press and information; and how to achieve legitimacy and penetration within Rwanda.

#### IV. PRESENT CONSTITUTIONAL OPPORTUNITIES FOR THE CREATION OF A HUMAN RIGHTS STATE AND THE CONSEQUENT HEALING OF SPIRIT INJURIES

##### A. *Introduction—The Nature of Spirit Injuries*

The various accounts and reports of the Rwandan genocide all contain a common thread: each narrative reveals one or more symptoms of spirit injury, which this Article will now examine. Symptoms include defilement, silence, denial, shame, guilt, fear, blaming the victim, violence, self-destructive behaviors, acute despair/emotional death, emasculation, trespass, and pollution, a number of which have manifested themselves in Rwanda.<sup>402</sup>

The first symptom present in Rwanda is defilement: "[Because a] fundamental part of ourselves and of our dignity is dependent upon the uncontrollable, powerful, external observers who constitute society, . . . [i]f

---

400. *Id.* at 90.

401. Mutua, *supra* note 20, at 112.

402. See generally Wing & Merchán, *supra* note 15, at 29–38 (discussing the symptoms of spirit injury in the context of rape).

society places a low value on certain of its members, they in turn will perceive themselves as having a lesser worth in that society."<sup>403</sup> The result of defilement includes the collapse of family structure.<sup>404</sup> Rwanda is an example of defilement taken to the extreme. Society (eighty-five percent being Hutu) placed such a low value on the Tutsi minority that Hutu took the Tutsis' very lives. Conversely, the Hutu also live with a history of defilement: under colonialism, the Tutsi became the oppressor of the Hutu, subjecting the latter to involuntary servitude and beatings at the direction of the colonialists.<sup>405</sup> Thus, both Hutu and Tutsi live with feelings of defilement stemming from devaluation.

The silence of both Hutu and Tutsi is the second symptom of spirit injury, and is indicative of "a chronic, festering wound which needs treatment."<sup>406</sup> It is not difficult to understand Hutu silence, as they were the perpetrators and do not want to incriminate themselves. Closely related to this is a third symptom—denial, which Hutus regularly manifest. According to Gourevitch, after learning of a Hutu admitting participation in the genocide, he was surprised: "In my time in Rwanda, I had never encountered anyone who admitted to having taken part in the genocide."<sup>407</sup>

Besides the Hutu, the post-genocide Tutsi population has also been silent. For example, women who were raped remain silent for fear that they will be rejected by their families and communities.<sup>408</sup> Likewise, those Tutsi women who bore children resulting from rape by Hutu men are forced to remain silent out of shame and fear of rejection.<sup>409</sup> Thus, shame, constituting a fourth symptom of spirit injury, is closely related to silence. Undoubtedly, shame, as well as guilt (a fifth symptom), are also factors in Hutu silence.

A sixth symptom of spirit injury is fear. For the Tutsi, this most obviously translates to fear that the genocide could happen again if the Hutu were to regain control of Rwanda. As a result, the RPF led government has aggressively held on to its power and been quick to crush any Hutu opposition, whether inside the country or from incursions from the DRC.<sup>410</sup> Conversely, as Mamdani has pointed out, the Hutu also are plagued with symptoms of fear: mindful of their oppression under colonialism at the hands of Tutsis, Hutus fear a loss of their middle class status and a return to involuntary servitude.<sup>411</sup>

---

403. *Id.* at 29 (quoting Willams, *supra* note 10, at 151).

404. *Id.* at 29–30.

405. GOUREVITCH, *supra* note 23, at 57.

406. Wing & Merchán, *supra* note 15, at 31.

407. GOUREVITCH, *supra* note 23, at 305.

408. See discussion *supra* Part II.E.1.

409. See discussion *supra* Part II.E.1.

410. See discussion *supra* Part II.E.4.

411. See discussion *supra* Part II.E.4.

The seventh symptom—severe depression and despair of the genocide survivor—remains one of the cruelest symptoms of spirit injury, resulting in near emotional death. Gourevitch relates the following observation:

Bonaventure [a survivor] believed that survival was meaningless until one found “a reason to survive again, a reason to look to tomorrow.” This was a widely held view in Rwanda, where depression was epidemic. The so-called survival instinct is often described as an animal urge to preserve oneself. But once the threat of bodily annihilation is relieved, the soul still requires preservation, and a wounded soul becomes the source of its own affliction; it cannot nurse itself directly. So survival can seem a curse, for one of the dominant needs of the needy soul is to be needed. As I came to know survivors, I found that, when it comes to soul preservation, the urge to look after others is often greater than the urge to look after oneself.<sup>412</sup>

Thus, even to survive the genocide was not to be blessed, but rather cursed.

The symptom of emasculation is the eighth symptom present in Rwanda, and involves the male Tutsi feeling that he failed to protect both his family and the Tutsi population as a whole. Emasculation was caused not only from the physical violence, but also from the sexual violence: Tutsi men suffer from feelings that they could not protect their Tutsi women from Hutu men. The effects of emasculation can be devastating on the culture as a whole, constituting a spirit injury on the entire community: “The men no longer perform those roles they traditionally performed in the society, and the women are forced out of necessity to take over some of those roles. This sudden shift in the societal roles can lead to a fragmentation within the society. . . . [I]t might rip the social fabric of that society forever.”<sup>413</sup> Violence, a ninth symptom of spirit injury, can also be an effect of emasculation, and domestic violence is currently a problem within Rwanda that is being handled inadequately.<sup>414</sup>

Trespass constitutes a tenth symptom of spirit injury in Rwanda. The genocide carried out by the Hutu can be viewed by the Tutsi as a trespass on Tutsi property, from their physical property to more intangible items.<sup>415</sup> After the Hutu revolution in 1959, thousands of Tutsi fled, leaving behind land, homes and personal property.<sup>416</sup> Furthermore, trespass was

412. GOUREVITCH, *supra* note 23, at 228.

413. See Wing & Merchán, *supra* note 15, at 34.

414. See *infra* Part IV.B.2.

415. See *infra* Part IV.B.2.

416. DEP'T OF PUB. INFO., *supra* note 71, at 8.

most obvious during the genocide, when Hutu forced their way into Tutsi homes, killing the inhabitants, seizing property and even looting the dead.<sup>417</sup> Additionally, because of the gender inequality present in Rwanda, Tutsi men undoubtedly felt that Hutu men had trespassed on their “female property” when the Hutu committed crimes of rape.<sup>418</sup>

The results of trespass are no less devastating than other symptoms of spirit injury.

This spirit injury may cause the . . . men to reject their tarnished “property.” They may not want to marry or continue to stay married to such damaged “property.” Furthermore . . . many of these men regard the resulting children as tarnished “property” as well, and will not accept them as their own. The women, having been rejected by the men of their own ethnic group as tarnished or damaged, will feel ostracized from the entire society.<sup>419</sup>

As discussed previously, these symptoms have already manifested themselves. Women raped by Hutu men are no longer considered for marriage.<sup>420</sup> Furthermore, women have fled their communities in anonymity with their Tutsi-Hutu children who were the product of a genocide rape.<sup>421</sup>

Though not a complete list, the final and eleventh symptom we will discuss is pollution, a situation where “individuals . . . might view the cross-cultural rape as a deliberate attempt at ethnic ‘pollution.’”<sup>422</sup> Consequently, children born from such a rape

may be seen as “polluted” and undesirable, and thus will find it difficult to be accepted in the society. . . . Additionally, the mere existence of these children will serve as a constant reminder to the . . . women of the shame, humiliation, and injury inflicted upon them by the rape, and their utter helplessness to prevent or stop the rape. These children will also serve as a reminder to the . . . men that they were unable to prevent this humiliation to their wives, mothers, and daughters. Furthermore, these children will serve as a constant reminder to all . . . of their inability to prevent these atrocities. The result will be a long-lasting spirit injury.<sup>423</sup>

---

417. AFRICAN RIGHTS, *supra* note 1, at 81–83.

418. See Wing & Merchán, *supra* note 15, at 34–35.

419. *Id.* at 36.

420. See discussion *supra* Part II.E.1.

421. See discussion *supra* Part II.E.1.

422. Wing & Merchán, *supra* note 15, at 36.

423. *Id.* at 37–38.

Men are rejecting these children born from Hutu rape of their Tutsi women during the genocide, and women are in turn forced to flee their communities with their children.<sup>424</sup> Furthermore, time can only tell how these children will be treated and what kinds of self-destructive behaviors<sup>425</sup> they may engage in because of neglect and rejection.

Consequently, the history of Rwanda is in no way deficient in presenting those issues that a constitution must address if it is to be successful in creating a human rights state capable of facilitating the healing of spirit injuries. The symptoms of spirit injury are acute and severe, and a constitution centered on human rights can hope to be just one cure in a panoply of remedies that includes justice through trials, reconciliation through forgiveness, and restoration of land and property.

Healing ethnic divisions, deconstructing racialization, protecting minorities, limiting government power resident in such practices as declaring a "state of emergency,"<sup>426</sup> ensuring the freedom of speech, press and expression, and achieving legitimacy and ultimately penetration of the new constitution are among the subjects whose inclusion is nothing less than imperative if the violence and ensuing spirit injuries within Rwanda and along its borders is to cease. The following sections address each of these issues in turn.

### *B. Rights of Minorities, Women, Children, and Disadvantaged*

After recounting the history of Rwanda and examining how the hostility between the Tutsis and Hutus almost resulted in the annihilation of the former, it is no surprise that a new constitution must direct its attention to destroying this divide. Additionally, since Rwanda's population experiences discrimination in a variety of other areas, an equality clause must prohibit discrimination based on race, ethnicity, sex, gender, disability, age, sexual orientation, or membership in some other minority group.

Although we recognize each minority group as separate, it is important that the multiplicative nature of the problem is recognized.<sup>427</sup> As a starting point, every human being has multiple identities.<sup>428</sup> For some,

---

424. DEP'T OF PUB. INFO., *supra* note 71, at 6–7.

425. Self-destructive behavior is also a symptom of spirit injury, and includes such conduct as smoking, alcohol and drug abuse, food abuse, and engaging in high-risk sexual activities.

426. Because the scope and emphasis of this article is on a prescription for the new constitution with regard to human rights norms, discussions concerning the structure of government will be limited to the intersection of human rights and unchecked governmental power.

427. See Adrien K. Wing, *Introduction: Global Critical Race Feminism for the Twenty-First Century*, in *GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER* 1, 7–12 (Adrien K. Wing ed., 2000).

428. *Id.*



such as Anglo-Saxon American males, these identities may secure positions of privilege.<sup>429</sup> On the other hand, when an identity stems from membership in a minority group or a group traditionally disadvantaged, the oppression can be devastating.<sup>430</sup> The problem is further exacerbated and compounded when an individual is simultaneously a member of many minority groups, and consequently, experiences discrimination from identification with each of the groups at the same time.

The juncture at which all these identities intersect is not to be ignored, given its ability to both privilege and disadvantage the possessor.<sup>431</sup> The implications in the Rwandan context are profound. For example, a disabled, Tutsi woman would be subjected to discrimination based on her disability, her ethnicity (or perceived race) and sex. As discussed in the introduction, this discrimination causes spirit injuries, whose cumulative result may be spirit murder.<sup>432</sup>

While the current Rwandan constitution provides that “[a]ll citizens shall be equal in the eyes of the law, without any discrimination, especially in respect to race, color, origin, ethnic background, clan, sex, opinion, religion, or social status,”<sup>433</sup> enforcement of these provisions remains unrealized in a broken society. Thus, the following subsections address discrimination with regard to ethnicity/racialization, women, children, and other disadvantaged groups such as the disabled, elderly, indigenous, and the opposition.

### 1. A Call to Ethnic (Re)integration: Dismantling Racialization in Rwanda

The ethnic strife within Rwanda is a condition common to many African countries.<sup>434</sup> Unfortunately, this has prevented the building of nationhood and a national identity.<sup>435</sup> The fragmentation of ethnicity, or a sense of “Rwandanness,” is the earliest and remaining cause for the hatred between the Tutsi and Hutu people. Without the establishment of national unity, the cycles of reoccurring violence will continue. Therefore, the constitution must call for and facilitate the ethnic cooperation of the Tutsis and Hutus, calling them back to an ancestry that was arguably more inclusive than exclusive.<sup>436</sup>

429. *Id.*

430. *Id.*

431. *Id.* at 8.

432. See discussion *supra* Part I.A.

433. RWANDA CONST. of 1991 tit. II, art. 1.

434. Phyllis M. Martin & Palmer O'Meara, *Africa: Problems and Perspectives*, in AFRICA 3, 4 (Phyllis M. Martin & Palmer O'Meara eds., 1986).

435. *Id.*

436. See *supra* Part II.A.

According to Rutembesa, if we define ethnicity as a shared ancestor, language and culture, the Tutsi, Hutu and Twa would compose a single ethnicity.<sup>437</sup> However, as discussed earlier, the Hutu and Tutsi were socially constructed as distinct groups: the Tutsi and Hutu lived under a functional monarchy where the aristocratic Tutsi ruled over the more agricultural Hutus despite the fact that the Hutus composed eighty-five percent of the population and the Tutsi only fourteen percent.<sup>438</sup> Thus, the discussion must never look solely to numbers as a means to determining who should be protected or in power.

Interestingly, this pre-colonial political order did not lead to violence until colonization under the Germans and Belgians.<sup>439</sup> Their influence exacerbated the ethnic differences through a process of racialization to the point where the dividing line between the groups and its accompanying hatred was solidified with the characterization of Tutsis as an alien race and Hutus as indigenous.<sup>440</sup> Additionally, Rutembesa summarizes Rwandan history as follows: “[T]he historical development of Rwanda was defined by ethnicity, and that ethnicity served as a pretextual basis for building a monolithic consolidation of power that abolished diversity as opposition.”<sup>441</sup>

Although much has been done to sever the ties that once existed between Hutus and Tutsis, those within Rwanda are not without hope or a plan for achieving their end—a unification of all Hutu, Tutsi and Twa peoples as Rwandans. Indeed, the very “educational” and propaganda-laden process that served to construct much of the divide between the Hutus and Tutsis can also be subverted to tear down those walls, namely through education of the public. While not denying that differences do exist between the groups—certainly a degree of separateness existed between Hutu and Tutsi prior to colonization—the focus must change from ethnicity and race to Rwandanness and the creation of a national identity.<sup>442</sup>

Professor Mark Drumbl sees this as a critical shift:

In order for dualist and pluralist postgenocidal societies to coexist in peace, a critical mass of individuals eventually must change the principal instrumentalization of their political allegiance away from the ethnic (or racial or religious)

---

437. See *Part I: The Rwandan Context*, *supra* note 9, at 28.

438. BUREAU OF AFRICAN AFFAIRS, *supra* note 24.

439. *Part I: The Rwandan Context*, *supra* note 9, at 29.

440. MAMDANI, *supra* note 16, at 102.

441. *Part I: The Rwandan Context*, *supra* note 9, at 29.

442. See Drumbl, *supra* note 33, at 1242–45, 1292–94.

group. In the case of Rwanda, this suggests that individuals must identify themselves politically as Rwandan citizens.<sup>443</sup>

Furthermore, while it is perfectly acceptable for a Rwandan to identify as a Tutsi and as Rwandan, it is imperative that one's Rwandanness "trump ethnic allegiances, at least in the areas where persons act politically as opposed to simply socially."<sup>444</sup>

The process of establishing Rwandanness is not necessarily an easy task, a fact that exposes an often-neglected injury to the collective Rwandan spirit. "The ultimate tragedy of Rwanda may be the emptiness of the concept of 'Rwandan' to many of its citizens. Hutu and Tutsi may have lost the ability to imagine each other, and themselves, as Rwandan."<sup>445</sup> Despite the close communal world the Hutu and Tutsi inhabit, they have constructed a degree of separateness that precludes any commonalities in the political arena or in citizenship.<sup>446</sup> Thus, a massive deconstruction of these hollow constructs must occur, and in their place, a "common framework for living" must be established.<sup>447</sup>

Lest the "educated" observer hastily and pessimistically write off such a possibility, there have been reports of the notion of "Rwandanness" penetrating the populace in the most heroic of circumstances:

During their attack on the school [on April 30, 1997] . . . the students, teenage girls who had been roused from their sleep, were ordered to separate themselves—Hutus from Tutsis. But the students had refused. At both schools, the girls said they were simply Rwandans, so they were beaten and shot indiscriminately.<sup>448</sup>

Furthermore, in an attempt to curb the government's unhealthy focus on ethnicity, it no longer permits identity cards to state the holder's ethnic origin.<sup>449</sup>

The task that lies before Rwanda is clear: "A reintegration of the ethnic groups of the country must occur, to establish a unified national identity. One of the means of achieving convergence of power, the state must submit all citizens to the same rights and the same access to public

443. *Id.* at 1294.

444. *Id.* at 1294–95.

445. *Id.* at 1295.

446. *Id.* at 1294.

447. *Id.*

448. GOUREVITCH, *supra* note 23, at 353. The perpetrators were a group of 150 farmer *interahamwe* engaged in a Hutu power campaign. *Id.*

449. U.S. DEPARTMENT OF STATE, HUMAN RIGHTS REPORTS FOR 1999: RWANDA, at 12, available at [http://www.state.gov/www/global/human\\_rights/1999\\_hrp\\_report/rwanda.html](http://www.state.gov/www/global/human_rights/1999_hrp_report/rwanda.html) (last visited Aug. 13, 2001).

employment."<sup>450</sup> This requires a constitution that explicitly recognizes the common elements of ethnicity among Rwandans and calls upon all citizens to share in a spirit of national unity under the banner of Rwandanness that trumps all other differences. Indeed, fostering such unity is imperative if Rwanda is to overcome one of the chief obstacles to attaining penetration of the rule of law—the “rise of ethnic nationalism.”<sup>451</sup>

However, as suggested above, and as the experience of neighboring Burundi indicates, language recognizing the existence of both objective and subjective differences may also be required:

Article Two of the Arusha Accord of the Burundi negotiations recognized ethnic imbalance. For example, the President was to be from one group and the vice president from another . . . . It is difficult to think of going backward to regional balance between ethnic groups. I am totally against the idea of striking a balance between the ethnic groups. We need to establish equal rights and then a period of transition to evaluate impact.<sup>452</sup>

Rwanda must employ language that seeks to balance the call to national unity with the recognition of different ethnicities.

While much of the above discussion of ethnicity has focused on the general social status of Rwandans, attaining the proper view of ethnicity within the political sphere is absolutely crucial. Specifically, Rwanda must target the practice of marrying power to ethnicity and root it out, as the myriad of injustices seen in Rwanda often flowed from power imbalances: ethnic groups were denied access to public employment, education and basic human rights based on whether the Hutus or Tutsis were in power.<sup>453</sup> Thus, as Professor Joy Ezelio of Nigeria stated at the Rwandan Conference on Constitution Development, one of the major challenges to most African countries is “dissociating power from ethnicity.”<sup>454</sup>

As Mamdani pointed out, the Second Republic attempted to bring about some sort of progress by recasting the Tutsi as indigenous rather than a separate race.<sup>455</sup> However, the President was ultimately thwarted

---

450. *Part I: The Rwandan Context*, *supra* note 9, at 30.

451. *Part II: The New Rwandan Constitution: Its Contents (I)*, in CONFERENCE ON CONSTITUTION DEVELOPMENT, KIBUYE-RWANDA 45, 47 (Aug. 24, 2001) (comments of Otiwere Igbuzor of Nigeria) (unpublished draft of conference proceedings, on file with Professor Wing).

452. *Id.* at 39–40 (comments of Gerard Niyungeko of Burundi).

453. *See supra* Part II.B.1.

454. *See Part II: The New Rwandan Constitution*, *supra* note 451, at 32 (comments of Joy Ezeilo of Nigeria).

455. MAMDANI, *supra* note 16, at 99.

and assassinated by Hutus because of his moves toward power sharing.<sup>456</sup> Thus, power sharing and balanced representation must be implemented in the political process and in all branches of government.

An ethnically sensitive approach should begin in the reform process of the party system. In particular, the Conference on Constitutional Development Working Group (Working Group) called for the establishment of an Election Code that would outline the criteria.<sup>457</sup> A significant part of the regulations must involve a prohibition on the union of power and control to an ethnic group. Such a rule would then have to be subject to enforcement through an independent electoral commission. The Working Group suggested the creation of the Central Election Commission: "a permanent organ that prepares, supervises, manages, verifies all aspects and referenda and announces their result."<sup>458</sup> Of course, even the Commission's members must be subject to certain restraints to curb the potential for a particular ethnicity's corruption of the process.

Within the branches of government, in order to separate power from any one particular group, ethnicity must also be recognized rather than ignored. In the executive branch, the Working Group recommended that the President serve as the head of State and the Prime Minister act as the head of government.<sup>459</sup> While the intent of this arrangement is to create a situation of power sharing in the executive branch, the President is the one that appoints the Prime Minister.<sup>460</sup> Therefore, Rwanda will have to decide the proper arrangement: should it go further in requiring that the President and Prime Minister come from different ethnic groups, as in Burundi? Will Rwanda return to the historical practice where the President was Hutu or will Rwanda adopt some other such method of checks and balances?

Concerning the legislative branch, the Working Group recommended a unicameral system where the representatives would be elected from both a local and national list.<sup>461</sup> Three groups would have a certain number of seats reserved—women, youth and military.<sup>462</sup> Therefore, Rwanda must recognize the ethnicity problem within Parliament and consider the use of quotas.

---

456. *Id.* at 215.

457. *Report of Working Group B, in* CONFERENCE ON CONSTITUTION DEVELOPMENT 109 (Aug. 24, 2001) (unpublished draft of conference proceedings, on file with Professor Wing).

458. *Id.* at 109.

459. *Recommendations of the Working Groups, Group A, in* CONFERENCE ON CONSTITUTIONAL DEVELOPMENT, KIBUYE-RWANDA 105 (Aug. 24, 2001) (unpublished draft of conference proceedings, on file with Professor Wing).

460. *Id.*

461. *Id.* at 106.

462. *Id.* at 107.

Finally, the Working Group recommended that judicial review be exercised by the chamber of the Supreme Court that currently constitutes the constitutional court.<sup>463</sup> Jose E. Alvarez advocates that the ethnically sensitive approach should be extended to the bench of the ICTR because “[s]uch judges would also provide the tribunal with valuable insights as to Rwandan law.”<sup>464</sup> This approach could also be applied to Rwandan national courts, ensuring that the Tutsi, Hutu and Twa groups receive adequate representation on the bench.

Also germane to this discussion on the balance of power is the invocation of a state of emergency and its potential for abuse. Currently, the Rwanda Constitution permits “[t]he President of the Republic . . . when the situation requires it and after consultation with the Government, [with] the Constitutional Court and [with] the Bureau of the National Assembly, [to] proclaim a state of siege or a state of emergency.”<sup>465</sup> However, “the discretion for when to call a state of emergency in Rwanda is determined by the *government* itself, which obviously has some significant contradictions.”<sup>466</sup> Thus, we must “ensure that the authorities who have the police and the military under its control, respect the Constitution.”<sup>467</sup>

South Africa’s Constitution extensively lays out the conditions upon which a state of emergency is appropriate, who can declare such an emergency, how long it can last, and what rights can never be derogated.<sup>468</sup> Specifically, only an Act of Parliament can declare a state of emergency, and only when “(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (b) the declaration is necessary to restore peace and order.”<sup>469</sup> Such a declaration is generally limited to twenty-one days, and the validity of such a declaration can be challenged in any court.<sup>470</sup>

Furthermore, South Africa absolutely prohibits certain rights from being derogated, even in a state of emergency.<sup>471</sup> These rights include equality in § 9, human dignity in § 10, § 10’s right to life, the freedom and security of the person in § 13, children’s rights found in § 28, and

---

463. *Id.*

464. Alvarez, *supra* note 31, at 451.

465. RWANDA CONST. of 1991 tit. III, ch. I, art. 48(1).

466. *Session II: Imposition of State of Emergency: Constitutional Safeguards and Suspension of Rights*, in CONFERENCE ON CONSTITUTION DEVELOPMENT, KIBUYE-RWANDA 70 (Aug. 24, 2001) (comments of Robin Palmer of South Africa) (unpublished draft of conference proceedings, on file with Professor Wing).

467. *Id.* at 71.

468. S.AFR. CONST. ch. 2, § 37(1)–(8).

469. *Id.* at ch. 2, § 37(1)

470. *Id.* at ch.2, § 37(2)–(3).

471. *Id.* at ch. 2, § 37(5) and accompanying table.

§ 35's rights regarding arrested, detained and accused persons.<sup>472</sup> Thus, if Rwanda is to abolish the possibility of abuses of power perpetrated through declarations of states of emergency where basic rights are suspended, it must follow South Africa and include within its constitution an explicit and comprehensive provision.

In summary, the constitution must prohibit all forms of discrimination based upon ethnicity, while guaranteeing all people equal rights. Drawing on Sunstein's notion of a transformative constitution, Rwanda can look to South Africa's example and its post-apartheid Constitution. In its Bill of Rights, the South African Constitution includes an unprecedented equality section.<sup>473</sup> After declaring everyone equal before the law and granting them a right to equal protection, it specifically defines equality as including "the full and equal enjoyment of all rights and freedoms."<sup>474</sup> To accomplish this, it further provides that "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."<sup>475</sup> Thus, such provisions rely on Sunstein's anticaste principle, in that it seeks to eradicate any categories of second-class citizens.

Lest there be any doubt, the South African Constitution's equality clause makes explicit reference to a wide range of groups and statuses: "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."<sup>476</sup> In a later provision, South Africa's Bill of Rights also addresses ethnic and cultural groups with the appropriate limitations: "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."<sup>477</sup> Thus, South Africa has ensured that ethnic affiliation does not trump the rule of law.

As outlined above, Rwanda must follow in the steps of countries like South Africa if it is to rid itself of racial and ethnic hatred. This means drafting a transformative constitution founded upon principles of equality and "anticaste." Furthermore, as in South Africa, Rwanda must aggressively pursue the establishment and enforcement of ethnic equality through mechanisms of affirmative action in all spheres of society.

---

472. *Id.* Note that some of these Non-Derogable Rights are either entirely protected or receive limited protection. *Id.*

473. *Id.* at ch.2, § 9.

474. *Id.* at ch.2, § 9(1)&(2).

475. *Id.* at ch.2, § 9(2).

476. *Id.* at ch.2, § 9(3).

477. *Id.* at ch.2, § 30.

## 2. Women

Though reforms have been slow going within Rwanda, there are newly implemented laws that show promise for guaranteeing women's rights. In October of 1999, women were finally permitted to inherit property from their husbands and fathers, eliminating the customary practice that prohibited women from owning property.<sup>478</sup> Furthermore, couples were empowered to choose the type of property rights that would govern their relationship, such as community property or joint ownership.<sup>479</sup> New legislation was also passed in 1998 that prohibits sexual violence and forced marriage and provides penalties for noncompliance.<sup>480</sup> Before these reforms, Rwandan women were regarded as incompetent and granted the legal status of a minor.<sup>481</sup>

Even though many of these reforms abolished language establishing the incapacity of women, discrimination still exists in the marital relationship.<sup>482</sup> First, there remains a legal recognition of the husband as the head of the household.<sup>483</sup> Furthermore, the punishment imposed on crimes like adultery remains more severe for female violators.<sup>484</sup> Additionally, the process of acquiring nationality for a foreign spouse remains imbalanced: a Rwandan husband encounters no obstacles in securing Rwandan citizenship for his spouse, while a Rwandan wife will experience various impediments in obtaining citizenship for her foreign husband.<sup>485</sup> Also relevant to the marital relationship is the issue of polygamy: while the constitution recognizes only monogamous marriages,<sup>486</sup> *de facto* polygamy exists in Rwanda.<sup>487</sup> In addition, crimes of a far more grim nature continue within households, with violence against women a common element of family life.<sup>488</sup> Unfortunately, justice is rare: "Cases normally are handled within the context of the extended family and rarely come before the courts."<sup>489</sup> Thus, despite micro-reforms, it is clear women need far more guarantees and protections than those currently provided.

---

478. U.S. DEPARTMENT OF STATE, *supra* note 449, at 12.

479. *Id.*

480. *Rights of Minorities, Disadvantaged, Women and Children*, in CONFERENCE ON CONSTITUTION DEVELOPMENT, KIBUYE-RWANDA 80, 83 (Aug. 24, 2001) (comments of Claudine Gasarabwe of Rwanda) (unpublished draft of conference proceedings, on file with Prof. Wing).

481. *Id.*

482. *Id.* at 83.

483. *Id.*

484. *Id.*

485. *Id.* at 84.

486. RWANDA CONST. of 1991 tit. II, art. 25, § 1.

487. U.S. DEPARTMENT OF STATE, *supra* note 449, at 12.

488. *Id.*

489. *Id.*



Representation of women in politics and government also remains inadequate despite the fact that there is no law barring participation of women. In a 1999 report, there were fifteen women who were members of the National Assembly and two women on the Cabinet.<sup>490</sup> To bring about equality in this area and in others, affirmative action and quotas will have to be utilized. For example, in South Africa, the African National Congress reserves one in four seats in parliament for women.<sup>491</sup>

In concluding this section, it is again imperative to draw from the South African model concerning the rights of women. The equality clause includes a number of statuses bearing upon the rights of women, including prohibiting discrimination based on gender, pregnancy, and marital status.<sup>492</sup> Of course, the other categories delineated may apply to women as well, which would further highlight the multiplicative nature of identity. Of course, the affirmative action provision included in the equality clause would also apply to women.<sup>493</sup> Additional rights guaranteeing the freedom of movement,<sup>494</sup> property rights,<sup>495</sup> freedom from private violence,<sup>496</sup> and a right to reproductive health care<sup>497</sup> all directly impact women.

In adopting a transformative model encompassing an anticaste principle, Rwanda must prohibit all direct discrimination against women and also root out its more indirect effects as South Africa has done.<sup>498</sup> Thus, the constitution must prohibit discrimination based on sex, gender, birth, pregnancy, and marital status in the equality clause. To ensure the attainability of equality, the means must utilize affirmative action and quotas. Therefore, affirmative action clauses must be inserted in all areas, including education, politics, the workplace and the economy.<sup>499</sup>

Within the right to health, the rights of pregnant women should be explicitly recognized. Women must also be guaranteed the right to own property and the right to confer citizenship to a foreign spouse and children. Additionally, Rwanda should follow the example of the Ugandan constitution in its recognition of the constitution's supremacy: "If any other law or any custom is inconsistent with any of the provisions of the Constitution, the Constitution shall prevail, and that other law or custom

---

490. *Id.* at 11.

491. *Rights of Minorities, Disadvantaged, Women and Children*, *supra* note 480, at 82 (comments of Adrien K. Wing of the United States of America).

492. S.AFR. CONST. ch. 2, § 9(3).

493. *Id.* at ch. 2, § 9(2).

494. *Id.* at ch. 2, § 21(1).

495. *Id.* at ch. 2, § 25.

496. *Id.* at ch. 2, § 12(1)(c).

497. *Id.* at ch. 2, § 26(1).

498. In the equality clause. *Id.* at ch. 2, § 9(3).

499. *Id.* at § 115.

shall, to the extent of the inconsistency, be void."<sup>500</sup> Finally, it is imperative that Rwanda forbid all forms of public and private violence as South Africa has done: "Everyone has the right to freedom and security of the person, which includes the right . . . to be free from all forms of violence from either public or private sources."<sup>501</sup> Such provisions must be accompanied with criminal penalties that are actively enforced.

There exist several other considerations that Rwanda should not neglect as it develops its constitution. They include establishing a gender commission (in addition to the Ministry of Gender and Women in Development), creating rights to procreate and protect the family, and specifically mentioning women in the preamble of the constitution.

On a final note, perhaps one of the instances of good coming from evil is the rise of women's groups in Rwanda during the post-genocidal period.<sup>502</sup> Among the issues being addressed, the difficulties of widows, orphaned girls, and households headed by children receive primary attention.<sup>503</sup> Also of importance are the "social and cultural barriers to the equality of women."<sup>504</sup>

### 3. Children

Recognition of children and children's rights occurred in the 1998 legislation referred to previously.<sup>505</sup> However, we must ensure that the constitution is adequate to protect children from the many harms being inflicted upon children internationally, including increased child labor, using children as soldiers, the neglect of orphans, children as head of household, the use of children as sex slaves, and the HIV/AIDS epidemic.

There presently exists a variety of circumstances affecting Rwandan children since the genocide. In a 1999 study, eighty-five percent of children who were separated from their parents during the genocide had either been reunited with their family or placed in a foster home.<sup>506</sup> Nonetheless, according to UNICEF, some 60,000 children below the age of eighteen are the head of households.<sup>507</sup> To the government's credit, it has been active in assisting and seeking outside aid for these children.

In the area of education, families must pay to enroll children in school and Rwanda's public schools are unable to house all the children

---

500. UGANDA CONST. ch. 1, art. 2(2).

501. S.AFR. CONST. ch. 2, § 12(1)(c).

502. U.S. DEPARTMENT OF STATE, *supra* note 449, at 12.

503. *Id.*

504. *Id.*

505. *Rights of Minorities, Disadvantaged, Women and Children*, *supra* note 480, at 80, 83 (comments of Claudine Gasarabwe of Rwanda).

506. U.S. DEPARTMENT OF STATE, *supra* note 449, at 12.

507. *Id.*

of school age.<sup>508</sup> Despite the existence of private schools, they are out of reach both financially and geographically for most Rwandans.<sup>509</sup>

The penal system is guilty of mistreatment of children even though laws prohibit some of the conduct. While the Penal Code forbids imprisoning a child with an adult, there are reports that approximately 300 children under the age of two have been imprisoned with their mothers.<sup>510</sup> Children are also being imprisoned for crimes related to the genocide, and few of those incarcerated have been brought to trial. Many were imprisoned while under the age of fourteen, and some incarcerated children are still below that age.<sup>511</sup>

The use of children as soldiers and combatants remains a problem plaguing many African countries, and Rwanda is no exception to engaging in this abuse.<sup>512</sup> Perhaps one of the most shocking violations during the genocide involved not only the murder of innocent children, but also the use of children to carry out the genocide.<sup>513</sup> Stories abound of children being forced to kill or assist their mothers in looting valuables from the dead bodies.<sup>514</sup> Possibly one of the most chilling accounts of this took place in the classroom:

[A]ll the Tutsi students were asked to leave the school and were segregated. . . . [E]ighty-two of them, boys and girls aged between twelve and twenty, were shot and hacked to death by fellow pupils, villagers, and the gendarmes who had been sent to protect the youngsters. . . . Some girls were abducted by their teachers and repeatedly raped.<sup>515</sup>

Additionally, the sons of female killers were used as drivers and escorts, and also given opportunities to murder.<sup>516</sup>

Aside from the use of children to carry out acts of genocide, there are specific instances of children being recruited to act as soldiers and combatants, which is in direct violation of the Convention on the Rights of the Child.<sup>517</sup> According to a report from Human Rights Watch, the lack of adult males in the post-genocide era has created a situation in which “children as young as fourteen have been pressed into service. They are often called ‘the young ones’ or even *Kadogo*, the local term for child sol-

508. *Id.* at 13.

509. *Id.*

510. *Id.*

511. *Id.*

512. See AFRICAN RIGHTS, *supra* note 1, at 67–68.

513. *Id.*

514. *Id.* at 1–2.

515. *Id.* at 67–68.

516. *Id.* at 3–4.

517. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/Res/44/25 (1989) [hereinafter “CRC” or “Convention”].

diers.”<sup>518</sup> In Uganda, the Lord’s Resistance Army camp provides an example of the tortuous and inhumane conditions to which these children have been subjected:

Children who do not perform their assigned tasks to the rebels’ satisfaction are beaten. Children who flout rebel orders are beaten or killed, often by other abducted children. Failed escape attempts continue to be punished by death, and successful escape attempts lead to retaliation: if one sibling escapes, the rebels often kill the other sibling.<sup>519</sup>

As a first step, Rwanda has ratified the Convention on the Rights of the Child,<sup>520</sup> a comprehensive treaty that can serve as a resource and model for drafting those provisions relating to children. In its forty-one substantive provisions, it grants political, economic, social, cultural, and humanitarian rights.<sup>521</sup> As its overarching concern, it establishes rights and provides protection for those children below age eighteen.<sup>522</sup> Among other things, it invokes the “best interests of the child” standard, establishes safeguards for adoption, provides guidelines with regard to punishment for criminal acts, prohibits the use of children as sex slaves, proscribes the trafficking of children in employment and sex, and limits the use of children as soldiers.<sup>523</sup>

In addition, in March of 2001, Rwanda adopted a law to address the problem of orphans.<sup>524</sup> Not only are there many orphans who are still searching for their parents, but as mentioned above they also fulfill the role of head of household in the meantime.<sup>525</sup> The law also addresses the practice of forcing young girls to marry.<sup>526</sup> Thus, Rwanda should be praised for these initial steps taken to conform to the Children’s Convention.

South Africa’s transformative constitution explicitly recognizes the rights of children and provides for their protection.<sup>527</sup> Among its provisions, children are granted the right to (a) to a name and nationality, (b) to family, parental or alternative care, (c) to basic nutrition, shelter, health and

---

518. HUMAN RIGHTS WATCH, *THE LOCAL DEFENSE FORCE, RWANDA: THE SEARCH FOR SECURITY AND HUMAN RIGHTS ABUSES* (April 2000), at <http://www.hrw.org/reports/2000/Rwanda/Rwan004.htm> (last visited Aug. 13, 2001).

519. HUMAN RIGHTS WATCH, CHILDREN’S RIGHT PROJECT, *THE SCARS OF DEATH: CHILDREN ABDUCTED BY THE LORD’S RESISTANCE ARMY IN UGANDA 1* (1997).

520. See CRC, *supra* note 517.

521. *Id.*

522. *Id.*

523. *Id.*

524. See *Rights of Minorities, Disadvantaged, Women and Children*, *supra* note 480, at 86.

525. *Id.*

526. *Id.*

527. S. AFR. CONST. ch. 2, § 28.

social services, (d) protection from abuse, (e) protection from exploitative labour, (f) to work regulation, (g) to criminal procedure rights, (h) to legal representation, and (i) to not have to participate in armed conflict and be protected.<sup>528</sup> Furthermore, the Constitution relies on the “best interests of the child” standard, and defines children as those less than eighteen years of age.<sup>529</sup>

Rwanda’s constitution must contain specific provisions on children’s rights, modeled after the Children’s Convention and South African Constitution. It must explicitly recognize children who are orphaned, homeless, and head of household, and also provide protection and the greatest degree of care. If Rwandan children are ever going to begin to heal from the spirit injuries stemming from the genocide—injuries that include “depression, insomnia, nightmares, mistrust of those around them and an ever-present fear of being killed,”<sup>530</sup> the constitution must halt their neglect and mistreatment. The Children’s Convention’s provisions speak directly to the post-genocidal state of Rwandan children: a child has the right to be protected from all kinds of abuse and neglect, and the additional right to physical and psychological recovery and social reintegration.<sup>531</sup>

#### 4. A Final Word on Other Minority Groups: The Disabled and Elderly, Indigenous, and the Opposition

Disabled persons receive no legal recognition from the law, whether in the form of restrictions or affirmative action.<sup>532</sup> The failure to recognize these persons has made it nearly impossible for those with disabilities to access employment and education.<sup>533</sup> Furthermore, Rwanda does not require that public places be adapted to make them accessible to disabled persons.<sup>534</sup> As in South Africa,<sup>535</sup> the constitution must prohibit discrimination of disabled persons. As in the U.S., the definition of disability should include those with HIV/AIDS.<sup>536</sup> In Rwanda, the AIDS rate is eleven percent, whereas in Kigali, it is thirty-three percent among eighteen to forty-four year olds.<sup>537</sup> Furthermore, subject to available resources, Rwanda should support the provision with accompanying

---

528. *Id.* at ch.2, § 28(1)

529. *Id.* at ch.2, § 28(2)&(3).

530. DEP’T OF PUB. INFO., *supra* note 71, at 56–57.

531. *See* CRC, *supra* note 517, at arts. 19, 39.

532. U.S. DEPARTMENT OF STATE, *supra* note 449, at 12.

533. *Id.*

534. *Id.*

535. S. AFR. CONST. ch. 2, § 9(3).

536. *Rights of Minorities, Disadvantaged, Women and Children*, *supra* note 480, at 80 (comments of Adrien K. Wing of the United States of America).

537. *Id.* at 81.

Rwanda should support the provision with accompanying legislation that furthers access of disabled persons to the public sphere.

In addition to disabled persons, the elderly should also be recognized in the equality clause. Just as the South African Constitution prohibited such discrimination by including "age" in its equality provision, Rwanda should also provide for protection of the elderly with such a provision.<sup>538</sup>

The genocide brought attention only to the Tutsis and Hutus, therefore the Batwa group, descendants of the Twa tribes, has been largely ignored. The Batwa constitute less than one percent of Rwanda's population; thus they are unable to protect themselves against discriminatory practices.<sup>539</sup> With both the Tutsi and Hutu groups regarding the Batwa as inferior citizens, the Batwa have been thwarted in attempts to acquire land, housing and education.<sup>540</sup> Such suppression only furthers the inability of the Batwa to gain a foothold in government.<sup>541</sup> Thus, a comprehensive equality clause coupled with affirmative action can assist in elevating the Batwa to a position where participation in government is possible.

Finally, during the Conference on Constitutional Development in Rwanda, a Working Group addressed the need for political minorities to receive protection.<sup>542</sup> Thus, the constitution must prohibit discrimination against political opposition and further ensure their rights through the establishment of a system of checks and balances.

### *C. Freedom of Speech, Press and Information*

The ability of the genocide perpetrators to use extensively the press and radio to organize, instruct, and incite Hutus to kill exposed the vulnerability of the press to manipulation and transformation into a weapon of genocide. As Ndulo warned, the press in African countries is often government controlled, ultimately thwarting democratic reform.<sup>543</sup> Most Rwandans rely on the radio and media for information and there now exists a profound mistrust of the main source from which they can receive information. These injustices were especially damaging to the individual and collective Rwandan spirit. Thus Rwanda must use caution in its guarantee of the freedom of speech and press: the freedom must be restrained in those situations where the speech is likely to cause imminent violence, and those responsible for restricting such speech must be prohibited from silencing mere dissent or criticism of the government.

---

538. S. AFR. CONST. ch. 2, § 9(3).

539. U.S. DEPARTMENT OF STATE, *supra* note 449, at 14.

540. *Id.*

541. *Id.*

542. *Rights of Minorities, Disadvantaged, Women and Children, supra* note 480.

543. Ndulo, *supra* note 377, at 82.

Rwanda's track record in guaranteeing such freedoms is certainly marred despite the fact it has long recognized these freedoms on paper.<sup>544</sup> Prior to 1991, only one viewpoint was disseminated in Rwanda—that of the government.<sup>545</sup> While new information sources opened after 1991 with the creation of the news media, freedom of speech was still greatly curbed and the government very much dominated the discourse.<sup>546</sup> Ultimately, this inability to break free of government control resulted in the use of Radio Rwanda, RTLM, and Kangura to further the genocide.<sup>547</sup>

Even in the post-genocide era, a variety of abuses continue to be reported. Those journalists who refuse to self-censor are routinely incarcerated by the government, and charges are frequently brought against those who voice criticism of the government.<sup>548</sup> For example, Newline editor John Mugabi was charged with libel and arrested when he refused to reveal his source for a story exposing bribery of a government official.<sup>549</sup> It is not surprising that Rwandans are jaded and skeptical of the prospect of an independent press that presents diverse viewpoints and cannot be perverted to carry out another genocide:

We are a country that has never experienced freedom of the press. Just when we were about to experience such a freedom of the free public expression, the newspapers and the media then participated in furthering the violence of genocide. This is why the government and many of the people mistrust the media and its ability to be independent, impartial, and fair. Some of the media will even say that the genocide never even took place. Yet in our country where most of the population is poor, the public depends on the media for information.<sup>550</sup>

It cannot be denied that Rwanda's context is unique, and consequently, the rights of freedom of speech and press cannot be lifted from another country and affixed to Rwanda. At the Conference on Constitutional Development, Louis Aucoin acknowledged this complexity: “[T]oday's problem of incitement and hatred in Rwanda is a special prob-

---

544. *Plenary Session: The Rwandan Constitution: Its Contents (II) Freedom of Speech, Press, and Information*, in CONFERENCE ON CONSTITUTION DEVELOPMENT, KIBUYE-RWANDA 62, 63 (Aug. 24, 2001) (comments of Louis Aucoin of the United States of America) (unpublished draft of conference proceedings, on file with Professor Wing).

545. *Id.*

546. *Id.*

547. *Id.*

548. U.S. DEPARTMENT OF STATE, *supra* note 449, at 8.

549. *See id.*

550. *Plenary Session: The Rwandan Constitution: Its Contents (II) Freedom of Speech, Press, and Information*, *supra* note 544.

lem and . . . the government has both a right and a responsibility to adopt specific measures to address the situation . . . [without] destroying the freedoms of press and the freedoms of speech.”<sup>551</sup> Specifically, Aucoin advised Rwanda to be explicit about how such rights would be applied and limited.<sup>552</sup> However, there are models and experiences to draw upon, including the U.S., South Africa and Germany.

As a starting point, a basic U.S. formulation would grant the freedoms of speech, press and expression so long as they do not incite others to imminent violence.<sup>553</sup> While the U.S. has refused to explicitly ban hate speech for fear of creating a slippery slope that would jeopardize free speech, it has increased the penalties for crimes motivated by hate.<sup>554</sup>

However, this does not go far enough in the Rwandan context, and looking to other countries for guidance may be instructive. In South Africa, a two-stage process was created for the regulation of speech: first, the complainant must show infringement of a right; and second, the court conducts a rights-analysis whereby it examines the importance of “the right being infringed, how effective . . . the law [is] in achieving its purpose, and whether the purpose can be achieved through less intrusive means.”<sup>555</sup> Thus, South Africa can “prohibit and limit speech that entails propaganda for war, incitement for imminent violence, as well as the advocacy of hatred that is based on ethnicity, gender, or religion and that may incite others to cause harm.”<sup>556</sup> Essentially, South Africa viewed the American approach to freedom of speech and expression as superseding all other rights, and South Africa, mindful of the legacy of apartheid, instead chose to adopt a provision that relied on a balancing approach.<sup>557</sup>

Likewise, Germany faced a similar problem with a free speech provision in the post-Nazi era.<sup>558</sup> Besides prohibiting government from acting as a censor, government is to take an active role in ensuring freedom of speech: “The ‘guarantee of broadcast freedom’ also imposes a ‘duty on the state to see to it that broadcasting facilities’ are ‘controlled by a broad spectrum of interest’ and also provide ‘a forum for a broad spectrum of opinion.’”<sup>559</sup> Sunstein rightly points out that this constitutes an “affirmative obligation” on the government to regulate communications, choosing not to leave it to the private sector.<sup>560</sup>

---

551. *Id.*

552. *Id.*

553. *Id.* at 68.

554. *Id.* at 67–68.

555. *Id.* at 64.

556. *Id.*

557. *Id.*

558. SUNSTEIN, *supra* note 18, at 79.

559. *Id.* at 79 (quoting DAVID CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 229–30 (1994)).

560. *Id.*



In light of the above models and admonitions, Rwanda will have to draft its provisions on freedom of speech, press and expression carefully if it is finally going to achieve penetration (the infiltration of these legal rules into the general public) in this area and heal the wounds of mistrust. To do this, Rwanda will have to address the problems of hate, incitement to commit acts of violence, and the overbearing presence of government in its efforts to punish those who speak against the State. Consulting both the post-apartheid South African constitution and the post-Nazi German constitution and examining subsequent practice and experience can provide Rwanda with a model for drafting. Indeed, it is imperative that the freedoms of speech and press be secured: if Rwanda fails to do this, it will lose one of the greatest elements of a checks and balances system—the media.

*D. Achieving Legitimacy and Penetration: Calling Upon the  
Community to Participate in the Drafting of their Constitution*

The discourse surrounding the creation of a new constitution must include the participation of the people who are to be subject to the new rule of law, a process that Rwanda has already begun.<sup>561</sup> This will involve a three-step process of educating the people, encouraging their participation so that they have a political voice, and integrating their views into the constitution.<sup>562</sup> Ultimately, the goal of such a process is legitimacy—“a sense that the constitution belongs to [the people], and that the document truly reflects the values, history and culture of their country . . . . [H]istory reminds us that legitimacy lends considerable force to a government.”<sup>563</sup>

Carrying out the three-step process of achieving legitimacy may involve a variety of tools. The media can be utilized to inform the public of the issues and of upcoming meetings where they can voice their opinions. For example, in Benin, they set up a constitutional commission, and teams were sent out to meet with the people and discuss the draft of the constitution.<sup>564</sup> Suggestions of the people were taken seriously, improvements were made, and then the people voted whether or not to ratify it.<sup>565</sup> Burundi has also voted on constitutional proposals through referenda.<sup>566</sup>

---

561. *The Consultation Process—Part I*, in CONFERENCE ON CONSTITUTION DEVELOPMENT, KIBUYE-RWANDA 2 (Aug. 24, 2001) (comments of Louis Aucion of the United States of America) (unpublished draft of conference proceedings, on file with Professor Wing).

562. *Id.*

563. *Id.*

564. *The African Experience, A Global View: Constitutionalism in Transition*, CONFERENCE ON CONSTITUTION DEVELOPMENT, KIBUYE-RWANDA 9 (Aug. 24, 2001) (unpublished draft of conference proceedings, on file with Professor Wing).

565. *Id.*

566. *The Consultation Process—Part I*, *supra* note 561, at 4.

This process is not without its perils, however, as the inclusion of “traditional values” may be contrary to the principles of equality as applied to ethnicity, women, children and other disadvantaged groups. While this should be a chief concern, such problems can be avoided so long as participation of all members of society is guaranteed throughout the process.<sup>567</sup> Thus, the course of creating a constitution must be subject to the same values sought in the constitution. Otherwise, the people will view the resulting constitution as illegitimate and ultimately fail to heed the rule of law.

Finally, the notion of democracy within the Rwandan context must be carefully scrutinized, as power in numbers works for both good and evil. For example, women compose a high percentage of the population in Rwanda due to the many males killed during the genocide. Women, by their sheer numbers alone, can bring about change and make their voice known if they unify and vote. On the other hand, power in numbers (the Hutu majority) largely led to the genocide. With the Hutus composing roughly eighty-five percent of the population, they were easily able to decimate nearly one million Tutsis, which composed fourteen percent of the population.<sup>568</sup> In fact, it was the imposition of democracy under the Belgians in the late 1950’s that gave the Hutu’s promise of gaining power and ultimately revenge against their Tutsi masters.<sup>569</sup> Therefore, we must learn from history rather than repeat it, and “reflect on the type of democracy that is needed in Rwanda.”<sup>570</sup>

The above approach is also largely representative of a deliberative democracy. First, the issues of group polarization and enclaves are highly relevant: the former “a process by which groups of like-minded people move one another to increasingly extreme positions,”<sup>571</sup> and the latter describing groups of like-minded people who “will move to positions that lack merit but are predictable consequences of the particular circumstances of enclave deliberation.”<sup>572</sup>

Insofar as Hutu or Tutsi enclaves deliberate exclusively among themselves, the Hutu and Tutsi each will have the tendency to shift toward more extreme positions within their respective groups.<sup>573</sup> This can be prevented or at least mitigated if each group is required to listen to the opinion of the other group—in essence, to hear a voice other than their own.<sup>574</sup> Thus, democracy should protect enclaves—as minorities often

---

567. *Id.* at 5.

568. BUREAU OF AFRICAN AFFAIRS, *supra* note 24.

569. *Id.*

570. *Id.*

571. SUNSTEIN, *supra* note 18, at 8.

572. *Id.* at 45–46.

573. *Id.* at 47.

574. *Id.* at 47.

find a voice in such forums—but also require that enclaves be exposed to the views of other such groups.

It is also imperative that Rwanda embrace a second concept of Sunstein's—that of incomplete theorization, which encourages agreement on constitutional practices rather than on the underlying theories.<sup>575</sup> While it is unlikely that Hutu and Tutsi will agree on the theories underlying various proposed provision in the new constitution, it is likely that the two groups will agree on many of the proposed provisions outlined above.<sup>576</sup> This is a concept that South Africa adopted, as exemplified in the court case prohibiting the death penalty despite disagreement on the rationale.<sup>577</sup> Incomplete theorization can also be used to guarantee something like the right to housing provided for in South Africa's Constitution—a provision for which there is no accompanying definition of what this means. Thus, South Africa has left it open to the courts to interpret the provision and the obligations placed upon the state, a form of drafting that allows these notions to take shape over time according to the changing and evolving nature of a nation. Similarly, Rwandans can come together through focusing on formulation of broad provisions that will permit future decision makers flexibility to meet an uncharted future.

## V. CONCLUSION

The past decade brought to fruition in a most horrific way the seeds of hatred and division sown over the past century. Based on the historical accounts available, it took only 100 years to construct a climate of hatred that ultimately resulted in the bodily murder of some 800,000 men, women and children and the spirit murder of those who “survived.”<sup>578</sup>

However, just as the solidification of ethnic cleavages and the accompanying hatred was socially constructed and exacerbated to the point of genocide, so too can healing also begin by deconstructing the web of lies that now passes for truth within Rwanda. In time, Rwandans, called by the constitution to remember their shared heritage and reunite as Rwandans first and foremost, may have the capacity to become a human rights state where all men, women and children are treated equally on paper and in practice.

This Article has taken the reader on a journey through the history of Rwanda's geographical, ethnic, racial and political tapestry, and exposed both physical and spiritual injuries that have been sustained and currently

---

575. See *id.* at 50.

576. *Id.* at 50.

577. *Id.* at 53.

578. It is true that a degree of separation did exist prior to the colonial period, but the last 100 years, half of which were dominated by colonialism, were largely responsible for the escalating hatred between Hutu and Tutsi.

continue. With this understanding, it has analyzed the current constitution, and provided recommendations for a new constitution with accompanying principles and models.

Part II moved beyond the traditional and often inadequate discourse of ethnicity alone to witness how European colonialists racialized the Tutsi initially through the institution of politics and then disseminated that construction to most public and private institutions. This further exacerbated the line of separation that already existed in the pre-colonial period, though to a much lesser degree. In essence, the colonialists oversaw the social construction of race in Rwanda.

When the Hutu subsequently came to power, we saw the marginalization of the Tutsi: the First Republic retained the political framework of the colonialists that had racialized the Tutsi, but now used it to disadvantage the latter. However, the Second Republic did away with this, referring to the Tutsi as an ethnicity and branding them as indigenous. But when the RPF began its invasion into Rwanda, the Hutu were reminded that Tutsi power was not yet dead. Consequently, the Hutu launched an unprecedented defensive action to protect the power and class attained in the last half of the century, an attack which culminated in the horrific 100 day genocide during 1994.

In Rwanda's post-genocidal state, the spirit injuries sustained by both Hutu and Tutsi through racialization are profound and still affect its victims in all aspects of life. We specifically looked at the impact of the genocide on women and children, both on victims and on perpetrators. This Article further examined the current mechanisms of justice at work, including the ICTR, national Rwandan courts and the newly implemented Gacaca system. Finally, it discussed the current instability of Rwanda, observing examples of the pressures being exerted on participants in politics by the military regime, with many being forced to flee the country.

In Part III, we were exposed to various principles of democracy and explored their relevance to the Rwandan process. These principles included the overarching notion of deliberative democracy coupled with the following concepts: group polarization, deliberating enclaves, incomplete theorization, transformative constitutions, anticaste, and socioeconomic rights. However, the analysis went beyond these abstract principles, and studied the past experiences of other African countries with the implementation of democracy. Concerns unique to Africa included ethnicity and majority rule, curbing military regimes and centralized power, ensuring freedom of speech and press, fostering participation from the public to gain legitimacy, and rejecting a "winner-takes-all" system.

The historical and theoretical analysis brought us to Part IV, which took into consideration the unique context of the region and developed constitutional recommendations unique to Rwanda. Part IV began with an analysis of the symptoms of spirit injury currently manifesting

themselves in Rwanda, and discovered many symptoms revealing lasting harms from the genocide. Thus, as a component of the healing process—one of many possible cures—the rule of law must be established in Rwanda in the form of a new constitution emphasizing human rights.

The analysis first addressed the problems of various minorities and disadvantaged groups. First, it delved into the possibility of ethnic integration, recognizing that the racialization and social construction of race wrought by the colonialists during the early part of the twentieth century would have to be dismantled. In its place, both Hutu and Tutsi would have to learn to unite under the banner of Rwandanness—or a sense of what it is to be a Rwandan. Unfortunately, this concept is currently empty and without meaning.

The Article then turned its attention to women, children and other minorities. With regard to women, we uncovered inequality in a number of areas, and provided constitutional recommendations to remedy these situations, including the use of quotas and affirmative action. Children also received special attention, given the many problems confronting these orphans and heads of households. Additionally, the problem of using children in armed combat was examined. Finally, attention was directed at remaining minority groups—the disabled and elderly, the indigenous and the opposition. Similar to the other minority groups, recommendations were intended to give these groups a voice and representation in Rwandan society.

We then explored the area of freedom of speech, press and information. Drawing on the experience and models of post-apartheid South Africa, post-nazi Germany and the United States, we explored various options and provisions Rwanda could adopt given their unique history of ethnic hatred. Accounts from Rwanda exposed the mistrust the Rwandans have, especially Tutsis, concerning the media, as it was a tool manipulated by government and used to facilitate the genocide. Thus, the media must be severed from government control, and laws must be put into place limiting the sort of hate speech that fostered the genocide of 1994.

Finally, mindful of the many failures of democracy in Africa, we concluded with a section on how to achieve legitimacy and penetration of the new rule of law in Rwanda. Specifically, we discussed how the discourse could operate, how the public could be assured that their input is taken into account, and how Rwandans could ultimately voice their approval or disapproval of the constitution (i.e. through a referendum). Part IV also looked at many of the principles of democracy discussed in Part III, considerations highly relevant to the deliberative stage of forming a democracy that often act as safeguards.

It is hoped that this new constitution, tailored to Rwanda after considering its unique history and present instability, will constitute just one of many cures needed so urgently by Rwandans to heal the individual

and communal spirit injuries that have festered for over 100 years. By providing them with a constitution centered on human rights, we may pray for the day when Rwanda is regarded as a model human rights state.

Imagine a day when the apt characterization of Rwanda will not be Gourevitch's 'We wish to inform you that tomorrow we will be killed with our families.' Imagine instead a new refrain: 'We wish to inform you that the killing has stopped and will never start again!'