LAND LAW IN BURUNDI:
LEGAL AND SOCIAL ORDERING OF LAND TENURE IN HISTORICAL AND CONTEMPORARY BURUNDI

by

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ABSTRACT

The thesis deals with Burundi land tenure (i) historically, with an analysis of reports, recorded cases and oral accounts relating to the colonial era, and (ii) contemporaneously with a description of selected land disputes. These data form the basis of an appraisal of Governmental ideas on land law reform.

In Burundi rights in land may originate either in written or customary law or in instruments established by administrative authorities. The main objective of written law enacted during the colonial period was to regulate the relationships between Africans, the State and colonists concerning land, ensuring the security of tenure of the colonists through a system of leases and freeholds. After Independence most colonial Acts were kept in force. At present, only a minute part of the territory, mostly in urban areas, is governed by written law, whereas most land is still held according to customary law which defines with great precision the various interests individuals and groups may have in land. Finally, in urban areas and in rural settlement schemes, colonial and Burundi administrative authorities have granted interests in land known as "droits d'occupation". In 1978, the Government devised a project of land law reform based on the view that all forms of tenure should be converted to tenure under written law as organized by the Civil Code. This project represents a form of cultural alienation. Colonial law was enacted to fit the colonial situation; the first step to land law reform is therefore not the conversion of tenure, but a rethinking of the relationships between men regarding land in contemporary Burundi, leading to the enactment of new rules which will take into account the various existing systems of land tenure, the various social and economic functions of land, and the development objectives of the Government.

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ABBREVIATIONS

A.A.	American Anthropologist
A.R.S.O.M.	Académie Royale des Sciences d'Outre-Mer
B.A.	Bulletin administratif
B.A.C.B.	Bulletin agricole du Conge Belge
B.J.I.D.C.C.	Bulletin des Juridictions indigènes et de Droit coutumier congolais
B.J.R.U.	Bulletin juridique du Ruanda-Urundi
B.N.D.E.	Banque Nationale de Développement Economique
B.O.	Bulletin officiel
B.O.R.	Bulletin officiel du Rwanda
B.O.R.U.	Bulletin official du Ruanda-Urundi
B.R.A.	Biennal Review of Anthropology
C.E.A.	Cahiers d'Etudes Africaines
C.O.M.	Cahiers d'Outre-Mer
E.S.A.	Ethnographic Survey of Africa
I.R.C.B.	Institut Royal du Congo Belge
J.A.H.	Journal of African History
J.A.L.	Journal of African Law
J.M.A.S.	Journal of Modern African Studies
J.T.O.M.	Journal des Tribunaux d'Outre-Mer
O.R.U.	Ordonnance du Ruanda-Urundi
P.A.C.	Problèmes d'Afrique Centrale
R.A.J.B.	Revue administrative et juridique du Burundi
R.G.	Revue générale
R.I.C.	Revue Indépendance et Coopération
R.J.R.B.	Revue juridique du Rwanda et du Burundi
R.J.B.	Revue juridique du Burundi

R.-U.	Ruanda-Urundi
S.W.J.A.	South-Western Journal of Anthropology
T.N.R.	Tanganyika Notes and Records

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* Arrêté royal du 6 juillet 1934 coordonnant les différents décrets sur les centres extra-coutumiers rendu exécutoire au R.U. par O.R.U. No.22/Just. du 6 mars 1940 (B.O.R.U., p.40).

* Ordonnance No.68/Sec. du 22 décembre 1941 créant le centre extra-coutumier "Belge" Usumbura (B.O.R.U., p.110).

* Ordonnance No.69/Sec. du 22 décembre 1941 créant le centre extra-coutumier "Village Swahili" Usumbura (B.O.R.U., p.110).

* Ordonnance No.8/Sec. du 28 janvier 1944 créant le centre extra-coutumier de Kitega (B.O.R.U., p.18).

* Ordonnance No.9/Sec. du 28 janvier 1944 créant les centres extra-coutumiers de Rumonge et de Nyanza-Lac (B.O.R.U., p.19).

* Ordonnance No.21/258 du 14 août 1949 sur l'organisation territoriale du Ruanda-Urundi (B.A., p.1549).

* Ordonnance du Ruanda-Urundi No.35 du 27 décembre 1927 érigeant Usumbura ainsi que Kitega en circonscriptions urbaines (B.O.R.U., 1928, p.313).

* Ordonnance No.444/190 du 19 août 1958 créant un lotissement résidentiel dénommé Quartier Belge IV dans les limites des centres extra-coutumiers d'Usumbura et fixant les modalités d'octroi de parcelles ainsi créés ainsi que les redevances annuelles à payer par les concessionnaires de droit de superficie accordés en vertu de l'arrêté royal du 30 mai 1922 (B.O.R.U., p.735).

CONCERNING THE EXPLOITATION OF LAND

* Ordonnance No.70/A.I.M.O. du 20 novembre 1944 sur les travaux agricoles imposés (B.O.R.U., p.173).

* Règlement du Résident de l'Urundi No.98/Agri. sur le Reboisement (B.O.R.U., p.195).

* Réglement du Résident de l'Urundi No.96/Agri. du 20 août 1931 sur les cultures vivrières obligatoires (B.O.R.U., p.166) modifié par le Règlement du Résident de l'Urundi No.44 du 27 décembre 1944 (B.O.R.U., p.19).

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* Ordonnance législative No.348/A.I.M.O. du 5 octobre 1943 sur l'organisation judiciaire indigène (B.A.C.B., p.1438).

* Loi du 26 juillet 1962. sur l'organisation et la compétence judiciaire (B.O.B., p.4).

* Nouvelle loi de 1979 sur l'organisation et la compétence judiciaire (B.O.B., p.463).

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* Décret du Roi-Souverain du 28 décembre 1888 sur la succession d'étrangers décédés au Congo (Codes et Lois du Burundi, p.118).

* Arrêté No.11/1955 du Mwami du 30 juin 1955 sur la suppression progressive de la convention coutumière dite "contrat d'ubugabire" (Codes et Lois du Burundi, p.579).

* Ordonnance No.21/30 du 5 septembre 1949 rendant exécutoire au Ruanda-Urundi les dispositions en vigueur au Congo Belge sur la répression de l'adultère et la protection du mariage monogamique en particulier le décret du 5 juillet 1948 (B.O.R.U., p.155).

* Ordonnance No.21/132 du 11 décembre 1951 rendant exécutoire au Ruanda-Urundi le décret du 4 avril 1950 annulant de plein droit tout mariage coutumier contracté avant la dissolution ou l'annulation du ou des mariages anterieurs et toute convention matrimoniale en vue d'un tel mariage et réglementant le résidence des anciens polygames dans certaines agglomérations (B.O.R.U., p.479).

* Ordonnance No.11/122 du 10 septembre 1952 rendant exécutoire au Ruanda-Urundi les dispositions congolaises concernant l'immatriculation des ressortissants du Ruanda-Urundi (B.O.R.U., p.445).

* Décret-loi portant sur le code des personnes et de la famille No.1/1 du 5 janvier (B.O.B., p.83).

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* Jugement du 25 janvier 1965, Tribunal de Province de Muyinga, in (1965) R.J.R.B., p.33. 202
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* Jugement du 15 juillet 1965, Tribunal de Première Instance du Burundi, in (1965) R.J.R.B., p.35. 203
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* Jugement du 13 janvier 1965, Tribunal de Première Instance du Burundi, in (1965) R.J.R.B., p.26. Right of the commune to allot land. 208

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* Arrêt de la Cour d'Appel d'Elizabethville du 29 décembre 1956, in (1957) R.J.C.B., p.47. Nature of the right of occupation (droit d'occupation). 373

PRELIMINARY REMARKS

1. General introduction

Specific interests, as well as chance, often enter into the choice of a research topic. For a lawyer fascinated by legal anthropology, and particularly by the many-faceted development of customary law in Africa, Burundi presented several attractive characteristics. Firstly, it is one of the few independent states of sub-Saharan Africa not created by colonization. For centuries, Burundi had been an organized political entity, a kingdom with a complex and relatively uniform legal system. Secondly, Burundi was included in the interlacustrine Bantu culture complex made up of several states located around the great lakes of central Africa, speaking related Bantu languages. They impressed the first European travellers at the end of the nineteenth century by the degree of their political development, especially when compared with the neighbouring societies based on unilineal descent or age-grade organization.[1] There is abundant anthropological material on the interlacustrine cultural area and some monographs of outstanding academic value have become classics.[2]

Interlacustrine states have been, in particular, a much favoured field of observation for anthropologists and other social scientists interested in personal dependence systems.[3]

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1. A Richards (ed.), East African Chiefs, London 1960, p.60.
2. Among the best known are: L.A. Fallers, Bantu Bureaucracy, Cambridge 1956; J. Maquet, The Premise of Inequality in Rwanda, London 1961; J.H.M. Beattie, Bunyoro: an African Kingdom, New York 1960.
3. G. Balandier, "Les relations de dépendance personnelle: présentation du thème" in (1963) C.E.A., 35, pp.345-9.

Personal dependence relationships, common to the whole inter-lacustrine area, were embodied in institutions with a pronounced legal dimension. Agreements between individuals or groups, creating personal dependence, were regulated by norms defining the rights and obligations of each party, and courts were qualified to settle disputes concerning personal dependence. In Burundi, the personal dependence bond, according to the literature, was often the consequence of a "cattle-contract",[1] an agreement between individuals or groups based on the gift or loan of cattle in exchange for services. Many authors have emphasized the complexity and the variety of these cattle-based agreements, which permeated all aspects of social life.[2] As most of the literature on the subject was either descriptive information about rules regulating the control of cattle, or traditional sociological analysis, it soon became obvious that a legal approach to pastoral law in action, especially in the context of personal dependence relationships, would be of interest. Therefore I left for Burundi with the intention of collecting material concerning pastoral law disputes. Knowing that the country was divided into different regions with a more or less agricultural or pastoral character,[3] I selected a fieldwork area covering both traditionally agricultural and pastoral areas and got permission to survey disputes tried at the local court. I noticed after some time that there were relatively few disputes concerning cattle

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1. J. Goffin, "Le rôle joué par le gros bétail dans l'économie de l'Urundi", in (1951) B.J.I.D.C.C., 19eme année, pp.31-53, 61-86, 100-21.
2. A. Sohier, "Le droit de la vache", in (1951) J.T.O.M., 9, p.105. J. Maquet, "Institutionnalisation féodale des relations de dépendance dans quatre sociétés interlacustres", in (1969) C.E.A., 35, pp.402-14.
3. R. Bourgeois, Banyarwanda et Barundi, Bruxelles 1954, T.2, pp.366-75.
4. Ibid., pp.271-5.

discussed either at the local court or at informal neighbourhood dispute-settlement gatherings. I soon came to realize that there was a gap between the Burundi of the books and the country I was in: for some time, as a peasant would later tell me, the banana had replaced the cow. This trend had already started on the eve of colonization.[1] At the end of the nineteenth century, epidemic diseases had decimated herds and altered the economic and social importance of cattle. Father Van der Burgt, writing in 1903, often stressed, in his account of Burundi customs, the impact of the 1890 epidemic[2] (which destroyed half of the country's live-stock)[3] on the way of life of the Barundi. He particularly emphasized the necessity for pastoralists to begin cultivating their land. In 1920, another disastrous epidemic occurred,[4] and later on herds were slowly built up again, but never to the same extent as before.

The Belgians during the period of their League of Nations Mandate (1923-1946), and later that of their United Nations Trusteeship (1946-1962), promoted agriculture by introducing crops, such as coffee and cotton.[5] In order to prevent hunger, they also compelled people to grow new food crops, such as cassava and sweet potatoes, as well as to clear and begin cultivating the papyrus swamps in the valleys.[6] These colonial policies, coupled with a population explosion,[7] were the main causes of the transformation of much grazing land into agricultural land. The king and

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1. R. Bourgeois, op.cit., pp.271-5.
2. J.M.M. Van der Burgt, Un grand Peuple de l'Afrique équatoriale: Elements d'une Monographie sur l'Urundi et les Warundi, Bois le Duc 1903, pp. 4, 37, 40.
3. G. de Greef, "Monographie agricole de l'Urundi, ancienne province de l'Afrique orientale allemande", in (1919) B.A.C.B., X, p.65.
4. J. Gorju, En Zig-zag à travers l'Urundi, Anvers 1926, p.37.
5. Office de l'Information et des Relations publiques pour le Congo Belge et le Ruanda-Urundi, Bruxelles 1959, p.72.
6. R. Bourgeois, op.cit., p.271.
7. Plan décennal pour le Développement économique et social du Ruanda-Urundi, Bruxelles 1951, p.9.

chiefs who had large herds and controlled much land for grazing purposes, slowly started to reduce the number of their cattle and to distribute portions of their estates to peasants in need of land.

Concurrently the social and political significance of cattle diminished; they were progressively replaced as the main source of power and wealth by cash. The growing pre-eminence of the latter as the basis of economic transactions was introduced into Burundi, as elsewhere in Africa, by the colonial administration through the imposition of poll taxes to be paid in cash, labour in return for money, cash wages for native administrative officers, the availability on the market of goods purchasable in cash, and finally the cultivation of cash crops.[1] As the cash nexus grew in importance, traditional dependence bonds, most often expressed through cattle-clientship agreements, tended to disappear or at least to lose much of their social significance.

Finally cattle-clientship became, in the mind of authorities, progressively equated with feudal exploitation.[2] In 1955, ubugabire, the most widespread form of cattle-clientship, was legally abolished;[3] however in practice it did not disappear but took the form of an agreement based on friendship as opposed to the former arrangement of legally enforced rights and duties of each party.

It became obvious at this stage of the enquiry that if cattle were important in present-day Burundi as a source of proteins and manure in

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1. R. Seidman, "Law and economic development in independent English-speaking sub-Saharan Africa", in (1966), W. Hutchinson (ed.), Africa and Law, Madison, p.6.
2. R. Bourgeois, L'Evolution du Contrat de Bail à Cheptel au Ruanda-Urundi, A.R.S.O.M., Bruxelles 1958.
3. Arrêté No.11/1955 du Mwami de 30 juin 1955 sur la suppression progressive de la convention coutumière dite "contrat d'ubugabire" in Codes et Lois du Burundi p.579.

the peasants' economic life,[1] the pastoral law which formerly governed the use of cattle for social purposes had become more an anachronism than the determining factor of social order it had once been. The above consideration on the social and economic roles of cattle in present-day Burundi are fully supported by the observations of C. Kayondi in his 1972 monograph on Murunga, a rural community in the once mainly pastoral highlands of Burundi:

> "Il faut dire que la vache était au centre de la vie sociale quotidienne, spirituelle même des anciens Barundi. Ce côte mystique est en train de disparaître, mais il pèse malgré tout sur les pratiques des éleveurs.
>
> Aujourd'hui, la valeur utilitaire du bétail aurait tendance à l'emporter sur sa valeur sentimentale".[2]

Today, almost all the Barundi are peasants living off their holdings from small-scale agriculture and animal husbandry. Moreover, it should be emphasized that the idea that historical Burundi was fundamentally a pastoral society overlooks the importance of agriculture even in those days, and the significance of land, not only as grazing ground but as a source of security and power. Most Barundi have always been agriculturalists: Father Van der Burgt wrote in 1903 that the Barundi were essentially an agricultural people, the word for "cultivate" being, in Kirundi, synonymous with work.[3] Families have often lived on the same land-holding among their banana groves for generations. If land has always been the main source of wealth for agriculturalists, its control was as important for cattle owners, a direct link existing between the

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1. C. Kayondi, "Murunga, colline du Burundi: étude géographique", in (1972) C.O.M. (Bordeaux) 25, p.197.
2. Ibid., p.196.
3. J.M.M. Van der Burgt, op.cit., p.180.

number of head of cattle owned and the size of land-holdings. Furthermore, a number of features existing in contemporary Burundi demonstrates the importance land has always had in the life of the Barundi. For example, there is a very elaborate customary boundary system defining holdings and interests in them,[1] as well as a number of old protracted land disputes; finally, well-known proverbs may be cited, such as: uta agatongo ataco kakugize kagatuma ku kandi ngo urampora, 'You abandon your land through no fault of its own and it will tell your new holding, "Avenge me"'; or, uzota itongo azorigura nyina, 'Whoever abandons his land will sell his mother to retrieve it'.

Lately, some authors have stressed the significance of land as a source of security and power in Burundi's past; a man without a land-holding had to be a day-labourer, one of the lowest ranks in Burundi society; control over a piece of land afforded one the right to participate in social life, to be an ingabo, a citizen with military obligations.[2] Moreover, people with large land-holdings used to lend some land in exchange for services, thus creating personal dependence bonds, in many ways comparable to those originating from cattle-gifts.[3]

Questions raised about the relevance of rights over land in the shaping of historical Burundi society already encouraged a change of focus in research from pastoral law to land law, all the more because of

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1. R. Bourgeois, Banyarwanda et Barundi, op.cit., p.217.
2. R. Botte, "Processus de formation d'une classe sociale dans une société africaine pré-capitaliste", in (1974) C.E.A., 56, p.616. R. de Hall and H. Cory, "A study of land tenure in Bugufi, 1925-1944", in (1947) T.N.R., 24, p.29.
3. R. Bourgeois, Banyarwanda et Barundi, op.cit., p.217. A. Verbrugghe, "Le régime foncier coutumier au Burundi", in (1965) R.J.R.B., 2, p.68.

the importance of land tenure and land law in contemporary Burundi. Most civil disputes brought to court concern land, either directly (for example, disputes about boundaries), or indirectly, particularly in most family disputes in which rights over land are a crucial issue. For many years now, there have been discussions about land law reform, in order to avoid excessive subdivision and over-fragmentation of holdings, to improve agricultural production and to facilitate development in general. Burundi authorities have especially paid attention over the years to the regrouping in compact villages of dispersed settlements typical of rural Burundi, and to the abolition of land-clientship. It was my good fortune to be present in the country when, in June 1977, land-clientship was officially abolished.[1]

Today, with the increase in rural population and the diminution of land available for cultivation, agricultural development has become the prime objective and the main concern of the Burundi government. Conscious that rules governing the exploitation of land have proved to be a determining factor in the success of agricultural development policies,[2] the Burundi government, as early as 1963, appointed a national committee to study the various aspects of land reform. A bill of land law has been drafted,[3] which raises many points reflecting the complexities of land law reform. These points will be examined in the conclusion of the present study. The following passage of a speech made by the Minister of Justice of Burundi summarizes the concern of Burundi authorities about the development of land law:

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1. Décret 1/19 du 30 juin 1977 portant abolition de l'institution d'ubugererwa, in 1977 B.O.B, p.555 (Document No.13).
2. D. Tallon, "Introduction", in J. Hazard (ed.), Le Droit de la Terre en Afrique au Sud du Sahara, 1971, Paris, p.11.
3. Projet de décret-loi sur la régime foncier, Ministère de l'Agriculture et de l'Elevage, 1978.

> "Plus ardu encore et plus politique est le système juridique à adopter en ce qui concerne le régime foncier.
>
> Faudra-t-il opter pour le régime de la propriété collective étatique avec droit permanent d'usufruit des occupants, le système de la propriété familiale ou le statut de propriété privée?...
>
> Le régime juridique des terres sera la plus délicate et une des plus importantes législations des temps modernes de notre pays, tant il est vrai qu'il touche au coeur même de l'économie du Burundi en même temps qu'à son âme formée dans une relation multi-séculaire, entre l'homme et la terre qu'il sera difficile de couler dans un moule juridique, comme l'a dit l'un de nos conseillers juridiques".[1]

It therefore seemed appropriate to investigate land law in action, especially rural land law, and to analyse the possible directions open to the State for legal reforms aimed at achieving the most effective agricultural development.

Like most of the legal systems of Africa, Burundi land law is characterized by legal pluralism; as well as written rules inherited from the colonial era or implemented after Independence, there are at least two other sets defining interests over land, stemming from custom and administrative practices. Since only a small proportion of titles over land held by individuals or groups in Burundi has been either registered according to written law procedure, thus falling within its jurisdiction, or granted according to administrative practices, most land is still held according to customary principles. Customary land law will therefore be the main object of the present study.

The need to improve the knowledge of customary land law has been felt for a long time. In 1961, in an article on the arguments for and against the codification of customs, E. Lamy wrote:

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1. L. Nzeyimana, "Les nouvelles orientations de la législation burundaise, ou : Un droit nouveau pour une nouvelle société", in (1980), R.J.B., 2, p.125.

> "Il apparaît que le droit foncier mérite en premier lieu une étude exhaustive... C'est pourquoi les commissions sont tenues d'entreprendre toute l'étude du droit privé indigène en donnant un ordre préférentiel au droit foncier, c'est-à-dire, à celui de la terre proprement dite et au droit des personnes qui, par la famille, le mariage, le divorce, les successions et les testaments, s'interfère sans cesse avec le droit foncier".[1]

Since that date little of this programme has been realized and customary land law remains largely uninvestigated. Moreover, the available literature on Burundi land law contains many clichés found in much of what has been written on African land law, most of which are the consequence either of the over-emphasized conceptual approach of many European lawyers or of overgeneralizations by social scientists. Instead of analysing the function of legal rules in their own context, many European lawyers, especially Continentally-educated ones, have started their inquiry from an analytical framework arising out of their own legal concepts. Some Belgian lawyers, for example, in describing Burundi customary land law, have used concepts, such as ownership and usufruct, deriving from their own law.[1] For them ownership, as it is legally defined in Continental Europe, seems to possess a universal validity. A.N. Allott has expressed well the dangers of over-conceptualization and the risks inherent in the translation and the study of foreign legal systems. His Yoruba example[3] can fully be applied to Burundi: as in Yoruba land, it was said in

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1. E. Lamy, "Le problème de la codification des coutumes au Rwanda et au Burundi", in (1961), R.J.R.B., 3, p.79.
2. A. Verbrugghe, op.cit., p.58. "L'évolution de la propriété foncière coutumière au Burundi", in (1970), R.I.C., 4, pp.1201-6.
3. A.N. Allott, "Language and property: a universal vocabulary for the analysis and description of proprietary relationships", in African Language Studies (1970), XI, p.15.

Burundi that the king, the Mwami, "owned" the whole country; he was nyen'igihugu, 'the possessor of the country'.[1] From this and other similar sayings, many authors, from Father Van der Burgt writing in 1903, to A. Verbrugghe writing in the sixties, have surmised that among the pre-colonial Barundi, the ruler had absolute property rights over all the land of his kingdom,[2] when in fact the saying was an expression of the ideology of kingship, and not of any legal right of property. Besides, it was also said that the ruler owned all cattle and children in his realm (nyen'inka n'abana), whereas in practice no one ever assumed that the king had a legal right of property over Burundi children. To deduce from a maxim which expresses the ideology of kingship that a legal right of property exists is to fall into the trap of literal translation and conceptualization.

Problems of translation and meaning have been a constant concern of legal anthropologists, and in particular the main point discussed in the famous methodological quarrel between Bohannan and Gluckman.[3] Lawyers, such as A.N. Allott,[4] have stressed the necessity of an in-depth analysis of the semantic value of legal terms. Approaches, such as the one described above, are ethnocentric. Moreover, even in European jurisprudence, a purely conceptual vision of law has been criticized[5] as being unrealistic because it ignores the substantive substratum of the concepts

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1. A. Delacauw, "Droit coutumier des Barundi", in (1936) Congo, 3, p.486.
2. J.M.M. Van der Burgt, op.cit., pp.108-9. A. Verbrugghe, op.cit., pp.58-60. For a detailed analysis, see p.131.
3. L. Nader, "The anthropological study of law" in (1965) A.A., 67, p.11. S.F. Moore, "Law and anthropology", in (1969) Biennal Review of Anthropology (Stanford), pp.265-7.
4. A.N. Allott, op.cit., p.13.
5. D. Lloyd, The Idea of Law, London 1976, p.110.

in question. An inquiry directed only towards conceptual analysis is restricted to statutes and legal cases, and overlooks primary facts such as the behaviour of judges and citizens in relation to law, which shapes the content of legal rights and obligations.

Much of what has been written on land tenure in Africa by anthropologists and social scientists is based on over-generalizations.[1] There are many examples, such as the suppositions that all over Africa, land is abundant; that extensive exploitation is the rule;[2] that land tenure tends to be communal;[3] that an individual has secure tenure only as long as he is using the land. From that latter postulate are deduced such conclusions as the following: there is no security of individual tenure in Africa;[4] rights over land are primarily acquired by work;[5] the group, and never the individual, has final control over land.[6] Such affirmations, often having their origins in general works on customary land law in Africa, are also found in the literature concerning Burundi, but their relevance in the case of Burundi may be questioned, for instance, by the simple observation of the elaborate boundary system used to secure individual holdings. Over-generalization and imprecision have been largely responsible for the lack of adequate knowledge of many customary land law systems.[7] A good illustration of the errors which may

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1. R. James and G. Fimbo, Customary Land Law of Tanzania, Dar-es-Salaam 1973, p.4.
2. D. Biebuyck (ed.), African agrarian Systems, Léopoldville 1963.
3. R. Verdier, "Féodalité et collectivismes africains", in (1961) Présence Africaine, 39, p.85.
4. R. de Hall and F. Cory, op.cit., pp.28-33-42. A.Delacauw, op.cit., p.490. P. Lozet, "La propriété foncière au Burundi", in (1970) R.A.J.B., 3ème trimestre, p.40.
5. D. Tallon, op.cit., p.13.
6. Ibid., p.13.
7. Ibid., p.12.

arise from over-generalization is given by the material concerning Ruanda-Urundi, because, during the Mandate and Trusteeship period, Burundi and Rwanda formed an artificial politico-administrative entity. Accordingly, many authors in this period, investigated social organization and institutions of both societies as a whole, though actually they were substantially different in many aspects.[1] Most official reports and documents of the colonial era concern Ruanda-Urundi as a whole, and often do not make a distinction between the two societies.[2] This has led to much confusion and erroneous analysis which have lately been remarked on by Burundi writers.[3] Nevertheless, some authors in the legal field still refer to Rwanda cases in order to explain Burundi customary law.[4]

Finally, there is a basic criticism to be made of the available material on Burundi customary land law in that it is repetitive, with later writers tending to derive their arguments mainly from what has been said on the subject by earlier writers.[5] These considerations about the available written material on hand were a further incentive to an investigation in the field.

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1. The best example is R. Bourgeois, op.cit.
2. For example, Rapports annuels sur l'Administration belge au Ruanda-Urundi, Ministère des Colonies, Bruxelles, 1922-1960.
3. R. Burije, Le Droit foncier au Burundi, sa statique et sa dynamique, Rome 1973, p.111.
4. Cf. A. Ncutinamagara, "La succession en droit coutumier du Burundi", in (1980) R.J.B., 2, p.137.
5. J. Vansina, La légende du Passé. Traditions orales du Burundi, Tervuren 1972, p.14.

2. The use of Kirundi terminology

According to F. Rodegem,[1] Kirundi is a classificatory language, i.e., a language in which grammatical functions are expressed by affixes. Most Kirundi words are composed of a root and a prefix. For example, the root rundi may be found in with prefixes like:

umu-rundi (sing.)	aba-rundi (plur.)	: a person from Burundi
Ubu-rundi		: the country
Iki-rundi		: the language of Burundi.

Authors do not agree on a common transcription of Kirundi terms: when speaking of the people of Burundi, some write 'the Rundi', some 'the Abarundi', some 'the Aba-rundi', some 'the Barundi', and some 'the Warundi'. Regarding the law of Burundi, one may find 'Burundi law', 'Bu-rundi law', 'Kirundi law', 'the law of the Barundi', and 'the law of the Abarundi'.

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1. F. Rodegem, Dictionnaire Kirundi, Français, Tervuren 1970, p.XV.

In the present study two forms will be used: (1) the Kirundi form for all specific terms (all words or sentences in Kirundi will be underlined); (2) the Europeanized form for many terms of current use which have been "europeanized", as for example Kirundi instead of Ikirundi, the Barundi instead of the Abarundi, and Burundi instead of Uburundi. For terms of current use, the europeanized forms will be used and they will not be underlined. In law, the term Burundi law will be used: since Burundi is a nation with a homogeneous culture, this appellation will refer to customary law (Burundi customary law) as well as to written law in force in contemporary Burundi (written Burundi law). When necessary, Kirundi terms will be written in their singular and plural forms: for example, 'man' will be translated umuntu-abantu.

3. Structure of the inquiry

Methods used to collect data are primarily determined by the researcher's aims. In order to investigate the nature of land law as it is conceived and lived in contemporary Burundi, and to discover the relevant tensions in the land tenure system, especially tensions due to development, fieldwork is necessary. The available written material does little more than describe the rules governing the control and exploitation of land; and except for a few published summaries of cases, case law is little known, and not much information is available on land law disputes and on their settlements.

Fieldwork requires, as a preliminary step, the choice of a fieldwork area. After an exploratory trip through the country, the Bukeye region

was chosen. It is an area in the Burundi highlands just east of the mountain range known as the Zaire-Nile crest, and is at the same time a municipality, a Catholic parish and the judiciary territory of a tribunal de résidence, the lowest officially recognized grade of the civil and criminal court system. Several factors motivated this choice. First, the judiciary territory of Bukeye, slightly larger than the municipal territory (Map 1) covers three natural regions: Kilimiro, the central plateau towards the east, Mugumba, the mountainous crest, and a small portion of Mumirwa, the depression to the west of the crest (Map 2). Such a variety of ecological environments is interesting because it offers an opportunity to investigate, within a limited area, the influence of varying ecological factors on land tenure. Second, Bukeye is situated in the historical core of Burundi, the region of Muramvya[1] (Map 3). In the period of kingship, most royal estates and settlements were located in this area, and every December, until 1929, the Barundi from all over the country used to gather in Bukeye to participate in the umuganuro,[2] the national sowing festival, which reaffirmed, through a series of rites, the whole ideology of kingship. Although the institution of kingship was greatly altered during the colonial era and abolished in 1966, the region of Muramvya remains well known today as the centre of Burundi tradition. The people of Bukeye, known as Abanyabukeye, are famous for their knowledge of customary law, as well as, more generally, for their courtly traditions, most families having been involved in court life. Third, Bukeye is not only important historically, but has modern features, whose influence on land tenure

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1. E. Mworoha, Peuples et Rois de l'Afrique des Grands Lacs, Dakar 1977, p.12.
2. P. Canonica, "Journal de la Paroisse de Bukeye", manuscript, p.28.

is worth investigating. The heavily-used and recently-paved road linking the capital of Burundi, Bujumbura, to the north of the country and Rwanda, crosses the territory of Bukeye and has considerably promoted commercial and construction activities in the area. Moreover, the first and largest tea plantation in the country was established in Bukeye in the late sixties, as well as family tea plots. Apart from these special characteristics, Bukeye is a rural area, typical of central Burundi, the hilly "heart" of the country which contains the great majority of the population. The commune of Bukeye, according to the 1979 census, has 45,210 inhabitants for a total area of 187km², [1] with a density of 241.8 inhabitants per square kilometre.

For purposes of comparison, information was also collected in other parts of the country especially in the less-populated region of Bweru in the east which, on the eve of the colonial period, was governed by relatives of the king. That region was practically independent from the central power and consequently very different from the Bukeye area. Information was also collected in the city of Bujumbura and its suburbs.

In all, there were three visits to Burundi: the first for nine months in 1977, eight of them in Bukeye; the second for one-and-a-half months in 1979 to investigate land law in the capital of Burundi; the third lasted for one month in 1980 to collect complementary information throughout Burundi, especially in Bweru.

Although I took intensive courses in Kirundi, I was only able, by the end of my stay, to partake in a general conversation but without complete fluency or a perfect understanding of court debates. During

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1. Recensement 1979, Ministère de l'Intérieur, Bujumbura, p.74.

fieldwork, therefore, communication was the main problem: French is spoken only by school-educated people and is never used in the customary legal context; moreover, Kirundi as spoken in the legal context has its peculiarities, many terms and maxims as well as complex speech forms being used. I hired an assistant, a graduate student of the Burundi University Law School, as my interpreter. Soon he became much more than an interpreter, almost a tactical adviser and a guide to the do's and don'ts of Burundi etiquette. Without his help little work could have been done.

During the fieldwork period, most of the time was spent collecting disputes concerning land law or related subjects. The case-method approach has been widely used by legal anthropologists since 1920. Over the years it has been developed and refined, and its shortcomings have been criticized.[1] It consists mainly of a detailed study of some delineated class of social events of which the fieldworker can observe a large number of instances. In the case of the legal anthropologist these social events are principally legal disputes, their origin and the process of their settlement. Identification of the time and space dimensions in which the case is situated is important. For each case, the description must begin when the dispute first arises and then follow through all the levels of the judicial process until the final resolution of the dispute. Thereafter, it is necessary to examine whether or not the legal decision has been implemented, and how. The future relationship between disputants must also be observed, as must the

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1. For example, A.L. Epstein, "The Case method in the field of law", in A.L. Epstein (ed.), The Craft of Social Anthropology, London 1967, pp.205-30.

historical background of the dispute. The careful collecting of cases implies an investigation of law in action: one should ideally finish up with, on the one hand, an investigation of the rights and duties of particular persons in particular social relationships, the norms referred to in case of breach; and, on the other hand, an investigation of the work of magistrates and its impact on the shaping of rules. The case-method allows an investigation of the total nature of the disturbed social relationship.[1] Finally, tensions resulting from political, social or economic changes may be emphasized in disputes.

In order to collect land law cases, my assistant and I became incorporated in the tribunal de résidence staff as stagiaires (apprentices). This status allowed us to develop a privileged relationship with the local magistrates who were our 'professors of Burundi law', and with the local people in general, because parties in a dispute brought to the tribunal de résidence were eager to give us a good deal of information on their case in the belief that we were somehow capable of influencing the decision of the court. Concerning the unofficial methods of mediation to which parties resort before going to an official court, local councillors informed us of the disputes to be tried at these levels in order to enable us to follow cases through all procedural steps. Similarly, magistrates helped us by letting us know about cases to be tried at the appelate court, i.e., the tribunal de province.

During fieldwork it was not possible to collect land disputes according to the standards mentioned above because of the pace at which

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1. P. Pelto, Anthropological Research, the Structure of Inquiry, New York 1970, p.247.

disputes are settled: the tribunal de résidence is overwhelmed with cases and consequently unable to work efficiently. Often months separate the registration of a case, the first appearance of the parties in court, the giving of the testimony of witnesses, the court decision and finally its application, which often necessitates another visit to the site. The lack of adequate transportation creates special difficulty for the magistrates in reaching remote areas, which, consequently, are rarely visited. As a consequence of this rather chaotic situation it was possible to collect only a few cases in which one could obtain complete history from the beginning of the dispute to the enforcement of the legal decision. Most cases had been pending for months, if not for years, before the fieldwork period, and, in general only the legal decision and sometimes its enforcement were recorded. Other disputes arose during the fieldwork period, and, though non-official mediation had not succeeded, they had still not reached the tribunal de résidence level. Accordingly, the fragmentary nature of the description of many cases referred to in the present study has to be stressed.

Besidesthe collection of actual land cases, more than 300 summaries of land cases tried since 1936 at the tribunal de résidence (before Independence known as tribunal de chefferie) are recorded in law registers (registre des affaires civiles) written by the court clerk, according to the written procedural rules governing official grades of court. In the present study many of these cases are referred to and analysed.

Periodically meetings were organized with the elders to discuss the collected cases. One of the arguments used in court by a party or a

comment made by a magistrate was usually taken as the point of departure for the discussion. Throughout the period of fieldwork structured interviews were conducted on particular topics related to land tenure and law.

Questionnaires were prepared with the help of elders and those interviewed were peasants of all ages selected in different areas of the Bukeye region. Of particular importance were inquiries on the semantic content of land law terminology and on the various agricultural and pastoral uses of land. These structured interviews proved very difficult to conduct, especially because the informants were suspicious. Hours were lost in repeatedly explaining the objectives of the research, and, as soon as a question on a particular point concerning the informant's life was asked, there was either extreme reticence in answering or even deliberate lying. Moreover, in conducting such interviews, my assistant and I were no longer incorporated in a local structure as was the case with the tribunal de résidence, we were inquirers, intruders, indeed dangerous people. The still vivid memory of the recent internecine struggles undoubtedly added to the general mistrust of foreigners.

PART I

SOME GENERAL INFORMATION ON BURUNDI IN RELATION TO THE PRESENT STUDY

Before describing and analysing the legal and social ordering of land tenure in Burundi, it is necessary to give some details on the geography, economy and history of Burundi, as well as on the legal system and the administration of justice in general, since this information helps in understandingthe rules defining interests over land.

Chapter 1 : Geography and Economy of Burundi

Situated in the middle of the continent just south of the Equator, Burundi, with an area of 27,834km² is one of the smallest countries in Africa (Map 4). It is principally a mountainous country whose backbone, the Zaire-Nile crest, reaches a maximum height exceeding 2,600m. The climate is influenced by winds from the Indian Ocean; it is tropical, becoming temperate and more humid with altitude, and is characterized by alternate dry and rainy seasons.[1]

With nearly 4 million inhabitants,[2] Burundi is one of the most densely populated countries in Africa. The centre of the country, being especially populous, provides a steady flow of emigration towards less populated peripheral areas.

The people of Burundi, called Barundi (Umurundi-Abarundi), speak an interlacustrine Bantu language, Kirundi, and share the same culture and history. The Barundi include three groups of different ethnic origin: the Bahutu, the usual translation for the Kirundi Abahutu (Umuhutu-Abahutu), the Batutsi, the usual translation for the Kirundi

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1. Cl. Van der Velpen, Géographie du Burundi, Bruxelles 1972, p.25.
2. Recensement 1979, Ministère de l'Intérieur, Bujumbura.

Abatutsi (Umututsi-Abatutsi), and the Batwa, the usual translation for the Kirundi Abatwa (Umutwa-Abatwa),[1] There are, besides, some Rwandese, Zairians, Swahilis (a term referring to Muslims of African origin), Asians and Europeans.

More than 95 per cent of the Barundi are subsistence agro-pastoralists living on small rural holdings, also cultivating some cash crops, such as coffee, tea and cotton. Agriculture is not only the occupation of most Barundi, but also the main component of the country's financial structure.[2] Industries are scarce and concentrated in Bujumbura, the capital of the country and its only big city (141,040 inhabitants),[3] situated on the shores of Lake Tanganyika(Map 5). Small towns, such as Gitega and Ngozi, which are the commercial centres of the highlands, have less than 10,000 inhabitants each.

The examination of the landscape is the first step to an understanding of land tenure patterns. Geographical and ecological contingencies, population density, as well as types of agricultural or pastoral activity, all of them factors which condition land tenure patterns, are revealed in the landscape, which is the image of man's print on land. Compared to some other areas of sub-Saharan Africa, the Burundi landscape is characterized by a long human occupation coupled with a high population density. The Barundi divide their country into different regions which have ecological as well as cultural

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1. These groups are sometimes called Tutsi, Hutu and Twa.
2. Cl. Van der Velpen, op.cit., p.77.
3. Recensement 1979, Ministère de l'Intérieur, Bujumbura, p.33.

peculiarities (Map 2).[1] West of the Zaire-Nile crest lie the plain of the Rusizi river and the coastal plain of Lake Tanganyika. This area is called Imbo, from the verb kwimba, to dig;[2] it has a tropical climate and has always been sparsely populated. Savannah vegetation and the geometrical pattern of the holdings making up modern settlements (paysannats), set up by the government to receive immigrants from the overpopulated highlands, are typical of the Rusizi plain. The Lake Tanganyikacoast is a slightly hilly plain with lush vegetation and many palm tree plantations. Traditionally, Imbo has been inhabited by Barundi immigrants from the neighbouring highlands, Zairian fishermen and Swahilis. Since the 1972 civil struggles and the repatriation of the Zairians, many new immigrants have settled there. It has become, for the government, one of the test areas for the setting up of compact villages and for finding new ways to exploit land.

Deep valleys, canyons and steep hills are characteristic of the region lying between the western lowlands and the crest. It is called Mumirwa, from the verb kumirwa, to be penetrated; it has a mild climate and a moderate population density; people live in scattered homesteads clinging to steep slopes. From a cultural point of view all those living west of the crest are called Ababo, the inhabitants of Imbo. It is believed that they have distinctive cultural and linguistic peculiarities and that they are wealthy because of the abundance of land, and the mild climate of the area.

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1. Cl. Van der Velpen, op.cit., p.49.
2. H.A. Guillaume, "Monographie de la Plaine de la Rusizi", in (1950) B.J.I.D.C.C., 8., pp.20.66. Plan Décennal pour le developpement économique et social du Ruanda-Urundi, Bruxelles, 1951, p.9.

The crest, Mugamba, is very different, with its humid and rather cold climate.[1] It is situated at an altitude of about 2,000 metres, therefore bananas and most tropical plants cannot grow there. Summits look more like huge hills rather than peaks, and this gently rolling landscape is covered with fields and meadows. The people live in homesteads scattered all over the hills, not in the swampy valleys. Traditionally most of them were stock-breeders, but now agriculture tends to be increasingly important: potatoes, peas, maize and wheat are the main crops, and there are tea plantations in some areas. As there are few trees and no banana groves, the settlement patterns are exposed in Mugamba: some compounds are isolated, others are connected, a sign of an extended family in which the married sons have settled around their father. In sharp contrast with the high rugged hills of Mugamba, Bututsi to the south of the crest is an area of harmonious landscape and gentle hills.[2] It is situated at an altitude of approximately 1,800 metres, and the climate is rather cool and humid. It is still predominantly a cattle-breeding area, and the settlement patterns are the same as in Mugamba. In Bututsi an important stock-breeding development project is under way at present, bringing changes in the traditional land tenure system.

East of the crest, at an altitude varying between 1,500 and 1,800 metres, lies the core of Burundi, the fertile and densely-populated regions of Kilimiro and Buyenzi, where every kind of subsistence crop is grown as well as coffee, the main cash crop. The central plateau

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1. C. Kayondi, "Murunga, colline du Burundi: étude géographique", in (1972), C.O.M. (Bordeaux), 25, p.197.
2. P. de Schlippe, "Enquête préliminaire du système agricole des Barundi de la région Bututsi", in (1957) B.A.C.B., 4, pp.227-82.

presents a garden landscape recalling some monsoon areas of south-eastern Asia,[1] abundant with rolling hills covered with banana groves, fields planted with all sorts of crops, and meadows. Hills are separated by flat-bottomed valleys which were once swampy but which are not intensively cultivated. Compounds are scattered and most often disappear from view under the overhanging banana groves, so that one is in the presence of a well-populated area with practically no settlement to be seen.

The eastern and southern regions of Burundi (Buyogoma, Bweru, Bugesera, Mosso, Buragane) offer different characteristics, since they are drier and much less populated than the central plateau. As soon as one travels to the east of Gitega, one finds huge tracts of uncultivated land covered with grass or wooded savannah; settlements are scarce and the valleys are more cultivated than the hills. The low-lying Mosso has a landscape typical of East Africa bush and is culturally and linguistically quite distinct from the rest of Burundi. The East and South of Burundi are immigration areas: while in Mosso there are many paysannats settlements, the East is a test area for the regrouping of the population in compact settlements.

The Burundi landscape was shaped by agro-pastoralism as tropical forest was progressively cleared and replaced by cultivated fields and grazing grounds. Central Burundi is like a cultivated island surrounded by bush and forest; with population increasing, its typical garden landscape tends to spread towards other regions. It should finally be noted that in present-day Burundi, no region is exclusively pastoral or agricultural, though some are more pastorally oriented, while others are almost exclusively agricultural

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1. P. Gourou, La Densité de la Population au Ruanda-Urundi, Esquisse d'Une Etude Géographique, Bruxelles 1952, p.19.

Chapter 2 : A Brief Account of the History of Burundi

Contemporary land tenure patterns as well as land law rules need to be placed in a time perspective as they have a historical foundation. Furthermore, in the course of the present study, reference will constantly be made to past events. The analysed land disputes, for example, often started generations ago, and, in order to understand them, it is important to have as clear a picture of the country's history as possible.

A. Pre-colonial Burundi

Reports written on Burundi by the first European visitors, oral historical tales, myths, legends, proverbs and maxims are the main material available for investigating Burundi's pre-colonial past. It must be stressed that the processing of this material is the source of many problems.[1] While oral historical tales give more information on how the Barundi conceive of their history than on historical events themselves, the accounts written by the first Europeans, around 1900, stress the political instability of the period. One cannot rely on those accounts to draw conclusions about the social structure of pre-colonial Burundi in general. During the colonial era, most attempts to reconstruct Burundi history were based on information given by great chiefs whose views of the past were greatly influenced by their ideology, and many authors were blinded by ethnocentrism and colonialist ideology.

The general approach to Burundi history by contemporary historians is different: much more time is spent evaluating the available material,

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1. J. Vansina, La Légende du Passé. Traditions orales du Burundi, Tervuren 1972, p.14.

especially oral sources; categorical statements about the social structure of historical Burundi are rare; and there is progressively more emphasis on the complexity of historical, political and social processes. J. Vansina [1] has developed such a method, called the 'historico-cultural method', which was used later by E. Mworoha in his thesis on Burundi history.[2]

Anthropologists and historians have called the region lying between Lake Victoria to the east and Lakes Albert, Edward, Kivu, and Tanganyika to the west, the interlacustrine Bantu cultural area (Map 6). The first European visitors found around 40 states, the most important being Buganda, Bunyoro, Karagwe, Rwanda and Burundi, dominated by the institution of kingship and a system of rituals elaborated around the person of the ruler. These states contrasted sharply with neighbouring societies whose political organization was based on unilineal kinship or age-grade divisions. Inherited regalia and a courtly style of life centring around royal capitals symbolized and enhanced the ruler's political powers.[3] The area was fairly densely populated, and the people spoke related Bantu languages, and were composed, as in most interlacustrine societies, of two more or less homogeneously mixed groups of distinct origin, i.e., a majority of agriculturalists of Bantu negroid stock and an often politically influential minority of Hamitic stock with a pastoral background. In some states, Buganda for example, social and ethnic distinctions between Hamitics and Bantus had

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1. J. Vansina, De la Tradition orale: Essai de Méthode historique, Tervuren 1961.
2. J. Vansina, La légende du Passé, op.cit., pp.197-218.
3. L. Fallars, "The predicament of the modern African chief", in Inequality, Social Stratification Reconsidered (Chicago 1973), p.47.

given place to a division between commoners and the royal family;[1] whereas in other states, like Rwanda or Ankole, the Hamitics formed an aristocracy clearly separated from the Bantu masses.[2] All societies were hierarchically organized, and clientship agreements centred on cattle or land wove a complex network of personal dependence relationships between inferiors and superiors. Throughout the whole inter-lacustrine Bantu cultural area there is a common cultural background, because of a common history of several centuries of contact between groups of different ethnic origins, as well as the use of the same techniques to master more or less similar environments.[3]

Burundi, which is situated in the south-western zone of the inter-lacustrine Bantu cultural area, has been, according to historians an organized state since at least the sixteenth century.[4] Besides the division mentioned earlier between people of Bantu and Hamitic stocks, respectively called in Burundi, the Bahutu and the Batutsi, the first European visitors noted the existence of three more groups distinct from the Bahutu and the Batutsi: the Baganwa, members of the royal family; the Bahima, pastoralists related ethnically to the Batutsi but separated from them by a series of taboos, especially marriage interdictions; and finally the Batwa, potters and hunters of pygmoid origin, who lived on the fringe of society and who did not mix socially with the other Barundi.[5] The Bahutu were by far the most numerous and the different groups were not territorially separated; they spoke the same language and

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1. M. Chave Fallers, The Eastern Lacustrine Bantus, E.S.A., 11, London 1960 - L. Fallers, "Social stratification in traditional Buganda", in Inequality, Social Stratification Reconsidered, pp.152-209.
2. For Rwanda: M. d'Hertefelt, A.A. Trouwborst, J.H. Sherer, Les anciens Royaumes de la zone interlacustre méridionale, Rwanda, Burundi, Buha Tervuren 1962, p.3. For Ankole: B.K. Taylor, The Western Lacustrine Bantu, E.S.A., 13, London 1962.
3. J. Maquet, op.cit., pp.402-14.
4. J. Vansina, op.cit., p.197.
5. A. Delacauw, op.cit., pp.332-3.

shared many cultural features. All were agro-pastoralists, though the Bahima and Batutsi were more pastorally-oriented while the Bahutu were mainly agriculturalists and the Batwa craftsmen.

The most widespread explanation of the origin of these different groups is that the original inhabitants of Burundi were the pygmoid Batwa living on hunting and gathering wild fruit in a then completely forested country.[1] The Bahutu then progressively occupied what is present-day Burundi, clearing the forest in the process; they are thought to have been organized in small territories under the leadership of patrilineage chiefs called Bami (Umwami-Abami), the term applied to the Burundi king. From around the thirteenth century, successive infiltrations of Batutsi took place from the north/northeast.[2] They brought with them the Ankole long-horn cattle and a whole cattle culture typical of the societies of the upper Nile valley. Though at first tending to live in areas distinct from the Bahutu, they slowly established contacts with the latter, especially through the loan of cattle and the consequent creation of clientship agreements between cattle-lenders and borrowers.[3] With time, the Batutsi acquired greater influence and finally came to occupy a privileged political and social position out of proportion to their small number,[4] especially by giving their daughters to local Bahutu, and the mixing of the two groups produced what is known today as Burundi culture. Finally, around the seventeenth century, the Bahima, pure pastoralists ethnically related to

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1. E. Albert, "Socio-political organization and receptivity to change: some differences between Rwanda and Burundi", in (1960) S.W.J.A., 16, p.54. E. Simons, "Coutumes et institutions des Barundi", in (1944) B.J.I.D.C.C., 7, p.142. P. Ryckmans, "L'organisation politique et sociale dans l'Urundi", in (1921) R.G., p.461.
2. The theory of hamitic domination by modern invasions is well explained and commented by E. Mworoha, op.cit., p.27.
3. J. Ghislain, La Féodalité au Burundi, A.R.S.O.M., Bruxelles 1970, p.13.
4. J. Vansina, La Légende du Passé, op.cit., p.195.

the Batutsi, penetrated into Burundi from the east[1] and remained separated from the rest of the Barundi by a series of social taboos, retaining their pastorally-oriented way of life.

This "official" version of the origin of the different groups found in Burundi has been much discussed: some have stressed the importance of the Batutsi military organization in the shaping of historical Burundi,[2] while others, noting the degree of symbiosis between the Bahutu and the Batutsi, have asserted that the two groups penetrated together into Burundi from the North.[3]

The respective social and political importance of the different groups has also been much discussed: except for a few authors, most often polemicists rather than historians,[4] the rough division between a ruling aristocracy of pastoralists and a mass of Bantu serfs has given place to a more complex picture of pre-colonial Burundi society.[5] Rather than a clear-cut hierarchy following ethnic lines, people seem to have been ranked according to the rôle their patrilineage played at court. Every patrilineage - there were about 220 Bahutu, Batutsi, Bahima and Batwa lineages - had a specific, more or less highly ranked function at court.[6] Members of the royal patrilineage, the Baganwa, had naturally the highest rank, immediately followed by the four Batutsi patrilineages whose main function was to give wives to the royal family. The Bahutu and Batutsi lineages, whose function directly concerned ritual matters

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1. J. Gorju, Face au Royaume du Ruanda, le Royaume frère de l'Urundi, Bruxelles 1938, p.97.
2. J. Vansina, La Legende du Passé, op.cit., p.195.
3. G. de Greef, "Monographie agricole de l'Urundi, ancienne province de l'Afrique orientale allemande", in (1919) B.A.C.B., X, p.36. P. Ryckmans, op.cit., p.453. E. Simons, op.cit., p.142.
4. For example, F. Rodegem in "Ainsi parlait Samandary" in (1974) Anthropos, 69, pp.753-835
5. E. Mworoha, op.cit., p.28.
6. E. Simons, op.cit., p.198.

or the personality of the king, held privileged positions, such as for example the Bahutu diviners,[1] regalia keepers, royal graves caretakers, royal cooks and the supervisors of the royal estates, or the Batutsi milkers and royal cattle-herders. Ranking below them came the mass of Bahutu and Batutsi whose function at court was menial. E. Mworoha calls them abanyagihugu (umunyagihugu-abanyagihugu), and divides them into abarimizi (umurimizi-abarimizi), the cultivators, aborozi umworozi-abarazi), the stock-breeders, and abanyamyuga (umunyamyuga-abanyamyuga), the craftsmen.[2] The Bahima were the most pastorally-oriented group and, though they had large herds and were wealthy, they were despised, and a series of taboos prevented them from holding important functions at court. At the bottom of society were the Batwa: social outcasts but nevertheless integrated into society as potters, hunters, court executioners and court jesters. As Gilles rightly writes:

> "On peut évidemment schématiser, simplifier, classifier, étager selon quelque système: batwa, bahutu, batutsi, baganwa, cela représente l'avantage d'être plus clair. Mais si la réalité est obscure, l'imaginer nette et parfaitement découpée pour la clarté d'un exposé c'est au moins un peu mentir".[3]

Marriage was possible between members of different groups who shared the same special position, and it was especially common for Bahutu officials to take Batutsi wives.[4] The physical features of the

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1. A. Gilles, "Notes sur l'organisation des Barundi", in (1937) B.J.I.D.C.C., 3, pp.76-8. P. Ryckmans, op.cit., p.470. E. Simons, op.cit., p.170.
2. E. Mworoha, op.cit., p.184.
3. A. Gilles, op.cit., p.79.
4. Ibid., p.75. J. Ghislain, op.cit., p.41.

purely Hamitic or Bantu lineages became blurred with time.[1] The concept of class is perhaps more relevant in explaining the social organization of historical Burundi than the often proposed concepts of caste and race:[2] one could say that below the royal family there was a dominant class made of Batutsi and Bahutu who, because of their links with kingship, held social and political power, and a great majority of plain Batutsi, Bahutu and Bahima, who held power at the local level through family heads. As for the Batwa, they formed a caste in the sense that they were endogamous and had occupational as well as cultural peculiarities.

Tied to the question of the origins and respective influence of the various groups constituting pre-colonial Burundi, is the question of the creation of Burundi as an organized state centred around the institution of kingship. According to oral accounts, some time around the seventeenth century a certain Ntare Rushatsi founded the Baganwa dynasty and was the first Mwami,[3] the paramount ruler. Vansina thinks that Burundi, at the time of Ntare's reign, was already a unified state, and that he was only the founder of a new dynasty which had taken over from a previous ruler.[4] For a long time there had been a process of concentration of small kinship-based chiefdoms in larger kingdoms under Bahutu or Batutsi bami, the conquest of Ntare being but only the culmination of this process.

After Ntare's reign tradition speaks of Bami Mwezi, Mutaga, Mwambutsa and then of a new Ntare. These are the four cyclical names

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1. Ibid., p.14. A. Gilles, op.cit., p.75.
2. A. Delacauw, op.cit., pp.503-4. A. Gilles, op.cit., p.75. E. Simons, op.cit., p.169.
3. Mwami is the Europeanized form of the Kirundi umwami, plural abami.
4. J. Vansina, La Légende du Passé, op.cit., p.199.

of Burundi rulers.[1] From the reign of Ntare II onwards (second quarter of the nineteenth century), the history of Burundi is better known. He was a great warrior and his conquests doubled the area of the country.[2] He appointed his sons, the Batare,[3] as chiefs in the newly conquered territories; when his son Gisabo, who became his heir to mwamiship, came to the throne around 1852, disputes arose between the brothers and, for half a century, the paramount authority of Mwezi was constantly contested by the rebellion of the Batare.[4] Upon the arrival of the first Europeans the Mwami was a rather weak political figure and Burundi a decentralized state; the Baganwa chiefs were most powerful.[5]

B. The colonial period

In 1845 Arab slave traders reached Ujiji on the eastern shores of Lake Tanganyika, just south of Burundi. It became the base from which they plundered the whole area during the next fifty years. However, despite continual attempts, they never reached the Burundi highlands because of the fierce resistance of the Barundi. In the 1860s and 1870s, several explorers passed along the Lake coast, and in 1892 O. Baumann was the first European to penetrate the interior of the country.[6] Christian missions were founded at the turn of the century[7] under the

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1. R. Bergerhoff, Le Ruanda-Urundi, Bruxelles 1928, p.30.
2. J. Vansina, La Légende du Passé, op.cit., p.205.
3. Batare is the Europeanized form of the Kirundi abatare, 'the sons of Ntare'.
4. R. Lemarchand, "Political instability in Africa: the case of Rwanda and Burundi", in (1966) Civilisations, 16, p.311.
5. E. Mworoha, op.cit., p.139.
6. O. Baumann, Durch Massailand zur Nilquelle Berlin 1894.
7. R. Collard P.B., Les Débuts de l'Evangélisation au Burundi. Les grands Moments du Buyogama et du Buzige 1896-1989, Presses Lavigerie, Bujumbura 1978.

protection of the Germans in whose zone of influence Burundi fell, according to the Berlin Treaty of 1885. The Germans won a battle against Mwezi Gisabo, who managed to remain independent until 1903. Rwanda, a kingdom to the north of Burundi, was also occupied by the Germans, who established in 1905 the Ruanda-Urundi Residency at Usumbura, a newly created settlement on Lake Tanganyika which was later to become Bujumbura. In 1912 a Urundi Residency was established at Kitega. The Germans governed Burundi, or as they called it by its Swahili name, Urundi, following policies of indirect rule; but they never really succeeded in gaining control over the whole country. Internecine fights between the descendants of Ntare, the Batare, and the descendants of Mwezi, the Bezi, continued after the death of Mwezi Gisabo in 1903, during the reign of Mutaga (1903-1915). In 1916, the Germans abandoned Burundi and the Belgians, coming from the neighbouring Belgian Congo, occupied and administered the country. In 1919, the allied forces gave Belgium a mandate to govern Rwanda and Burundi, which was confirmed by the League of Nations in 1923,[1] and accepted by the Belgian Parliament the following year. Belgium was given full powers of administration and legislation over the two kingdoms, henceforth united for nearly 40 years to form one administrative entity under the name of Ruanda-Urundi, though they had often been enemies. In 1946, the Mandate was replaced by a United Nations Trusteeship.

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1. Décision de la Société des Nations du 31 août 1923, confirmant à S.M. le Roi des Belges, le Mandat sur le Territoire de l'Est Africain, approuvée par la Loi du 24 octobre 1924, in (1923) B.O.R.U., p.1.

In 1925 the fundamental act defining the status of Ruanda-Urundi was approved by the Belgian Parliament.[1] It provided for administrative union with the Belgian Congo. The government of Ruanda-Urundi became subordinated to that of Belgian Congo but was allocated a distinct legal personality and its own budget. The Belgians followed indirect rule policies in the administration of the Mandate territory, conceiving their rôle to be that of guardians of the native authorities.[2] The Belgian administrative organization (one Résident for Urundi, one for Ruanda and territorial agents) paralleled native organization (Bami of Burundi and Rwanda, and chiefs). Native authorities were under the direct control of Mandate authorities and all the decisions of the former had to be approved by the latter before they were enforced.[3] The Vice-Gouverneur général headed the whole system of double administration. In 1943, the main principles of Belgian guardianship were given statutory form in an ordonnance législative on native political organization.[4] In 1952, a décret was issued creating advisory councils at all levels of native administration and legalizing the customary power of the Mwami authoritatively to state and guide the evolution of custom.[5]

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1. Loi du 21 août 1925, proclamant l'union administrative du territoire du Ruanda-Urundi et de la Colonie du Congo Belge, rendue éxécutoire au Ruanda-Urundi par Arrêté d'éxécution du 11 janvier 1926, in (1926) B.O.R.U., pp.11-179.
2. Article 4 de l'Ordonnance-Loi No.2/5 du 6 avril 1917 du Commissaire Royal sans les territoires de l'Est Africain allemand occupés par la Belgique, B.O.R.U., 1ère année, p.4.
3. For example, the Conseil supérieur du Pays, a native advisory council, proposed the abolition of bride-wealth; the guardianship refused it. See M. Barengayabo, La Dot matrimoniale au Burundi, Pontificia Universitas Latranensis, Rome 1973.
4. Ordonnance législative No.347/AIMO du 4 octobre 1943 du Gouverneur-Général du Congo Belge, mise en vigueur le 1 janvier 1944 par l'ordonnance du 11 décembre 1943 du Gouverneur du Ruanda-Urundi, B.A., p.1467.
5. Décret du 14 juillet 1952 sur l'organisation politique indigène.

The Belgians with their firm hold over Ruanda-Urundi[1] introduced a number of measures in all spheres of life such as taxes, the creation of a native court system, and forced labour. They also built a wide network of roads and implemented economic innovations such as the introduction of cash, wage labour and cash crops, especially coffee and cotton. Many missions were built: chiefs first converted to Christianity, and then conversions en masse took place accompanied by European education. Contrary to the Belgian Congo, Ruanda-Urundi was never considered an area suitable for large-scale European colonization, and Europeans settled mainly in the urban districts.

C. Independent Burundi

At Independence, 1 July 1962, the colonial double system of administration was abolished: territories and chiefdoms were replaced by provinces and communes. From then on, the history of Burundi consists of a series of tragic events which have severely shaken the foundations of the state itself and have hampered its development. On the eve of Independence, the Baganwa of the Bezi and Batare factions revived old quarrels and initiated a struggle for power which culminated in the assassination of Prince Louis Rwagasore, the son of Mwami Mwambutsa and leader of the Bezi.[2] At Independence, whereas the Baganwa factions progressively lost influence, a sudden politicization of ethnic ties, in the form of a struggle for power between the Batutsi and Bahutu elites, took place. The Baganwa and Bahima took the side of the Batutsi.

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1. Rapport Annuel (1925), Rapports annuels de l'Administration belge au Ruanda-Urundi, Ministère des Colonies, Bruxelles, 1922-1960.
2. R. Lemarchand, "Social change and political modernization in Burundi", in (1966) J.M.A.S., 4, p.409.

The Rwandese revolution brought the Bahutu to power and caused many Rwandese Batutsi to take refuge in Burundi. As R. Lemarchand explains, some educated Bahutu from Burundi gave the ethnic situation of their country a false definition by comparing it with Rwanda, initiating new types of relationships both among themselves and with the Batutsi, which in time made their false imputations true.[1] Since 1962, Burundi politics have focused on ethnic conflicts: in 1965, a Bahutu coup accompanied by massacres failed, Mwambutsa fled, and in 1966 his son Prince Charles Ndizeye was proclaimed Mwami. After a few months, he lost his throne and Burundi became a Republic. Tensions continued, culminating in 1972 in a terrible repression after the failure of another Bahutu coup. During these years political and military powers became increasingly concentrated in the hands of the Batutsi. In 1976, young officers founded the Second Republic, and their main objective since has been ethnic reconciliation and rural development through the creation of local development agencies.

Chapter 3 : Some Characteristics of Burundi Law and Administration of Justice

A. Pre-colonial and colonial Burundi

When the first Europeans arrived in Burundi, they found a judicial system directly tied to the political organization: the imbrication of judiciary and political powers was complete, the control of the judicial process being one of the main expressions of political power.[2] There was a hierarchy of courts: (1) the local court which mediated family and neighbourhood conflicts (urubanza rw'umuryango - imanza z'umuryango);

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1. Ibid., p.413.
2. E. Mworoha, Peuples et Rois de l'Afrique des Grands Lacs, Dakar 1977, p.194.

(2) the sub-chief's court; (3) the chief's court; and (4) the Mwami's court. If local mediation did not settle the dispute, it was brought before the sub-chief's court from which appeal was possible to higher level.[1] Important people, for example clients and relatives of the chief, brought cases directly before the chief's court, while disputes involving a chief or a member of the royal family were tried before the Mwami's court.[2] Such serious crimes as murder, witchcraft accusations or the transgression of taboos, were also directly tried before the chief's court.

In mediation as well as in adjudication, decision by a council of elders (umushingantahe-abashingantahe) was the rule.[3] People of humble origin could be appointed as judges at all levels of court by virtue of their knowledge of legal matters and their reputation for honesty.[4] Political authorities were automatically judges at their court, and chiefs became members of the royal court when they visited it.[5]

Substantive law was not formally divided between criminal and civil law, but a distinction was made between disputes which occurred between individuals or families, including murder for example, and crimes against the whole community such as the transgression of social or religious taboos.

While the Germans had no real impact on law, the Belgians brought changes both in the judicial system and in substantive law. A dual

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1. Gusegura - to bring a case in appeal.
2. F. Rodegem, "Structures judiciaires traditionnelles au Burundi", in (1966) R.J.R.B., 1, p.13.
3. See p.75.
4. The fame of being a man who does not lie was important (umugabo w'intahumba); see E. Mworoha, op.cit., p.173.
6. Gusasa - to pay visit to the royal court, see ibid., p.143.

system of courts was created, a European system applying written law and a native system applying customary law. Whereas, except for minor offences, all criminal cases were tried at European courts, native courts had jurisdiction over disputes between natives concerning private civil matters. Belgian administrative officers were also able to mediate in any dispute arising between natives;[1] in fact, the settlement of disputes was one of their principal daily tasks.[2] Native courts were progressively given more formal and western-type organization under the constant supervision of guardianship authorities who controlled the decisions of the native courts.[3] Besides the Mwami's court, chiefdom courts (tribunaux de chefferie) were established throughout Burundi in the late twenties; the chief was made judge-president (juge-président) of the court, but could be replaced by a substitute judge. Assessors assisted the judge and, as soon as literate people became available, clerks were introduced in native courts to record the proceedings.[4] In 1943, an ordonnance législative on the native judicial organization[5] legally confirmed the administrative regulations and practices which had been the basis of native judicial organization for 20 years.

Substantive customary law was recognized and applied by native courts unless a custom was against ordre public, or enacted law had replaced it. No legislative text defines the notion of ordre public,

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1. Rapport annuel (1923), Rapports annuels de l'Administration belge au Ruanda-Urundi, Ministère des Colonies, Bruxelles, 1922-1960, p.12.
2. Rapport annuel (1923), ibid., p.12.
3. Rapport annuel (1921), ibid., p.41.
4. Rapport annuel (1924), ibid., p.12.
5. Ordonnance législative No.348/AIMO du 5 octobre 1943 sur l'organisation judiciaire indigène, in (1943) Bulletin administratif du Congo Belge, p.1498.

but it has been extensively discussed by colonial legal scholars.[1] Most relate ordre public to universal principles of morality and civilization, such as the respect for human personality, defence of the various institutions which are the basis of the State, and the fundamental notions organizing the judicial process. Customary slavery and evidence rules involving torture or witchcraft were abolished because they were against ordre public. It may be assumed that the legal abolition of polygamy which occurred in 1950 was also dictated by ordre public.[2]

Besides this very limited direct action on customary substantive law, the guardianship administration was indirectly responsible for changes through its advisory rôle to native authorities. One of the main tasks of the Mwami and his council was to define and specify the nature of customary rules.[3] In 1952, the Mwami was legally given power to guide the evolution of custom in order to adapt it to new conditions. Evolution of customary rules was also acknowledged by chiefdom courts' decisions; chiefs, who were automatically judge-presidents of their courts, most often had been educated at the Astrida school for native political authorities and consequently became the active agents of

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1. G, Mineur, Commentaire de l'Ordonnance législative No.347/AIMO sur la Politique indigène du Ruanda-Urundi, Bruxelles 1945, p.93.
2. Décret du 4 avril 1950 sur la polygamie rendu exécutoire au Ruanda-Urundi par O.R.U. No.21/132, du 11 décembre 1951 - B.O.R.U., p.479.
3. G. Mineur, op.cit.

guardianship authorities in many fields, especially in the process of adaptation of customary rules to the imperatives of guardianship politics. Finally, the trusteeship authorities issued many administrative decisions concerning all aspects of life; these decisions were imparted to territorial officers (administrateur territorial), who had to see that they were followed by native political authorities and courts.[1]

B. Independent Burundi

Following Independence, the government abolished dualism in the judicial system and initiated a complete reorganization doing away with the concept of separate courts applying written and customary law respectively.[2] A hierarchy of courts (tribunal de résidence - tribunal de province, tribunal de première instance, Cour d'appel) was established. The material jurisdiction of courts became determined by the amount under dispute or the nature of the dispute, and any reference to customary or written law disappeared. In practice some of the new court levels replaced former ones: for example, the tribunal de résidence replaced the native chiefdom court taking most often its geographical area jurisdiction, being installed in the same building and having much of its material jurisdiction (land and cattle disputes). Cases related to personal status, because of their importance for the maintenance of social order, were to be tried at a higher court, the tribunal de première instance. Only three such courts were instituted throughout Burundi, a situation which brought about an increasingly widening gap

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1. For example, the various decisions concerning the amount of bride-wealth, M. Barengayabo, La Dot matrimoniale au Burundi, Pontificia Universitas Latranensis, Rome 1973.
2. Loi du 26 juillet 1962 sur l'organisation et la compétence judiciaires, in (1962), B.O.B., p.4.

between the judicial system and the people who could not easily reach the higher levels of court.[1]

In order to correct the shortcomingsof the 1962 loi, a new act was promulgated in 1979.[2] The Minister of Justice summarized its scope in saying:

> "Pour ce qui est de la justice, il est important de relever le réalisation d'un des objectifs essentiels dans ce secteur, à savoir le rapprochement de la justice du justiciable, l'organisation judiciaire nouvelle a généralisé les tribunaux de base dans chaque commune et des tribunaux d'un niveau plus élevé dans chaque arrondissement administratif, multiplié les tribunaux de première instance et la Cour d'appel elle-même est en passe d'être dédoublée".[3]

He might have added that the tribunal de province was given important powers in the field of personal status and family in general (divorce, adoption, legitimization of children, etc.), while disputes concerning land and inheritance, as well as other civil disputes concerning an amount of up to 50,000 Fbu, were to be tried before the tribunal de résidence.

Following Independence all provisions enacted before Independence were kept in force unless formally abrogated,[4] provided they were not contrary to the Constitution. Legal dualism consequently subsists in several fields, especially in land law. Since the advent of the Second Republic, a serious effort has been made to create a new law

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1. A case illustrating the lack of realism in the 1962 loi occurred in Bukeye during fieldwork: a lady who had been driven away with her children by her husband, came to the tribunal de résidence to ask, according to customary law, for the benefit of a plot on her husband's holding in order to feed and raise her children. The judge, though he knew very well the nature of her rights, could not help her because the material jurisdiction in case of separation of spouses belonged to the tribunal de première instance in Bujumbura. The judge told the peasant lady to go to Bujumbura in order to open a lawsuit before the right court. The lady had never gone so far and could not understand why the judge refused to allocate her a plot, according to custom.
2. Nouvelle loi du Code sur l'organisation et la compétence judiciaires in (1979), B.O.B., p.463.
3. Laurent Nzeyimana, "Les nouvelles orientations..." in (1980) R.J.B., 2, p.125
4. Loi du 2 juin 1962, sur l'application des actes legislatifs et règlementaires édictés par l'autorité tutèlaire (Codes et Lois du Burundi, p.8).

suited to the developing needs of the country. Once again an excerpt of speech by the Minister of Justice best expresses this trend:

> "La législation du Burundi doit également et avant tout créer le cadre juridique pour réaliser le projet de société que le régime de la Deuxième République a conçu et formulé dans le concept justice sociale pour tous, une société d'où sera combattue l'exploitation de l'homme par l'homme, où le peuple participera démocratiquement à l'exercice du pouvoir, où le contrôle de l'économie nationale sera assurée, où la promotion du patrimoine culturel sera revalorisée".[1]

In spite of the political character of this excerpt, there has been a real effort to give Burundi a new law. For example, a family code became effective in 1980;[2] it abolished all previous written and customary rules and provided a unified legal framework for all the family relationships, bringing about an intrusion of official justice into fields, such as divorce or adoption, which traditionally were family affairs unless a dispute resulted in a court case. The basic aim of the new code is to give to all family members an officially acknowledged legal status, and to set up equality of treatment among all children. Because it does away with many customary rules and needs time to be accepted by the population, a five-year transition period has been set up for its implementation. During the next five years, any judge who must settle a dispute concerning the new code, in which a conflict threatening law and order, social interest or public morality (susceptible de compromettre l'ordre public, l'intérêt ou la morale publique)[3] arises between the provisions of the new code and rules of customary law, will be entitled to refer the case to the Cour Suprême which will give an opinion on points of law concerning it.

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1. L. Nzeyimana, op.cit., p.126.
2. Décret-Loi portant sur le code des personnes et de la famille No.1/1 du 5 janvier 1980, in B.O.B. (1980), p.83.
3. Article 388, in ibid., p.114.

Although there has been a genuine desire to create a code adapted to Burundi, several shortcomings are apparent.[1] Though the code has been elaborated in French, customary law based on concepts and traditions expressed in Kirundi lay at the centre of discussion. Instead of elaborating customary legal concepts from the Kirundi in order to adapt them to contemporary needs, the whole work, as well as the code itself, was done in French, applying legal and social concepts derived from continental law, thus slanting the whole effort of adaptation. Emphasis lies in the adaptation of European models rather than in attention to the evolution of customary rules. Customary law is comprised of principles which are applied and defined in the light of each case, as well as of principles of justice and equity; by nature it is malleable and adaptable. Written law, especially acts governing the new family code, is much more rigid, being set out in precisely worded articles. A legal corpus of principles, defined and illustrated by cases, would be closer to the customary judicial process and would facilitate the practice of justice. Customary principles expressed in maxims could be used, and others could be created to suit new situations, as has always been done. For example, the maxim nta mwana n'ikinono, 'There is no child comparable to the hoof of a cow', i.e., "all children have to receive an equal treatment", perfectly expresses the objectives of the new code concerning the status of children.

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1. According to Mr. Gahungu, President of the Bujumbura Cour d'Appel, who is in charge of translating the various chapters of the Code into Kirundi, problems of translation are arising in the rendering in Kirundi of the French written code.

C. The daily process of settlement of disputes in contemporary Burundi

1. The unofficial mediation process of the abashingantahe

In rural areas, as well as among the lower classes of urban districts, before referring to an official court level, mediation by neighbours and family members always takes place. The basic principle in the customary judicial process is that no individual has the right to take justice into his own hands, and must defer to society's institutions for the settlement of disputes. As in most face-to-face communities, mediation is the preferred method of managing conflict; it has been legally acknowledged in family disputes by the institution of the conseil de famille in the new family code.[1] All disputes concerning the new code have to be brought before the conseil de famille for mediation prior to being brought to an official court level. Mediation of hill notables or party officials has also been favoured in one of the recommendations made at the first Congress of the Uprona Party, held in 1979.[2]

The local mediators, normally including members of the family and neighbours, are adult men known as abashingantahe,[3] (umushingantahe-abashingantahe), or abagabo[4] (umugabo-abagabo). Several maxims express the necessity of resorting to their mediation, such as:

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1. Article 377, in Codes des Personnes et de la Famille, op.cit., p.113.
2. Résolutions relatives à la justice sociale à l'éducation et au changement des mentalités, Ministère de l'Intérieur, Bujumbura 1979, p.314: "Afin d'éviter les faux témoignages qui portent un grand discrédit à la justice, toutes les affaires civiles telles que les litiges axés sur la terre, les vaches et autres devraient être soumises aux notables et aux responsables du Parti sur la colline avant d'être portées devant les instances supérieures. A ce niveau, on établirait, à l'intention des juridictions compétentes, un rapport faisant état des premières confrontations. Les faux témoignages pourront ainsi être constatés et sanctionnés de façon exemplaire".
4. Umushingantahe-abashingantahe, see F. Rodegem, Dictionnaire Kirundi-Français, Tervuren 1970, p.424.
5. Umugabo-abagabo, ibid., p.95.

Ntawinyagira abagabo bariho, 'No one takes for himself when the abagabo are there', meaning that in case of dispute one does not decide for oneself when the abagabo are present; or Ntawihanira abakuru bariho, which means, 'No one punishes for himself when the great are present'. While the term umugabo means 'male' in general, and, by extension, authority for settling disputes, the term umushingantahe[1] refers to a specific institution. It comes from intahe, the staff, which is the symbol of justice.[2] Some men are given the intahe after a long apprenticeship in the settlement of disputes. After several years of apprenticeship, the candidate is appointed as umushingantahe in an important ceremony, the kwatira ku nama; relatives, neighbours and friends participate in a reunion where much beer is drunk, and the most important act performed is the formal handing over of the staff of justice to the candidate by a representative of the municipality, formerly a representative of the chief. The latter, while giving the staff, pronounces a speech emphasizing the social obligations of the umushingantahe: "Here is the staff of justice, I give it to you; you will support the country; you will respect confidentiality; you will help the unfortunate; if you see two children fighting, you will separate them..." Appointment to the function of umushingantahe is automatic for family heads and educated people. During kingship, the political authority could appoint somebody directly without his having to pass through all the stages of apprenticeship. This was called kwirogoza (meaning 'to be chosen') and was considered a great honour.

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1. Conseil supérieur du Pays, "Essai de définition de l'institution historique des bashingantahe et de leur situation actuelle", in (1956) Procès-verbal de la réunion du Conseil supérieur du Pays, held at Kitega from the 18th to the 29th of June 1956, pp.38-40.
2. Staffs of justice are found elsewhere in Africa: for example, the ofo of the Ibo and the likkiro of the Baganda, may be cited.

Among the abashingantahe, there is no hierarchy and no distinction in jurisdictional power based on subject matter or territoriality: wherever an umushingantahe is, he has the duty to conciliate people, to mediate in disputes and to stop quarrels. In the mediation process he never acts alone, and only decisions by council are valid.

Decision by council is stressed by maxims such as umutwe umwe ntiwigira inama, 'One head alone cannot decide', and umugabo umwe ntaca urubanza, 'One man alone does not settle disputes'. An umushingantahe cannot be discharged; if he lies or violates confidentiality (kumena ibanga), one of the most abhorred acts, he will be sanctioned by the community by being ostracized for a certaim time.

The institution of ubushingantahe has great importance in the maintenance of law and order in rural Burundi. A legend illustrates well the role of abashingantahe:

> "Ngoma ya Sacega, a legendary advisor of the first Mwami, once told the Mwami: if a first umushingantahe gives an advice on a subject, ask a second one if you want to be absolutely right; if the second one says the same thing, then accept their advice because kananira abagabo ntiyimye, the one who does not listen to the abagabo has not ruled. Nobody intimidates the notables because they are superior. Notables are close to you (ibibagabaga vyawe). If you lean on their advice, nobody will remove you from office".[1]

The status of umushingantahe is associated with adulthood and experience in life; the relevance of experience in the dispute settlement process is stressed by maxims such as igisagara c'imisore ntigikora umwotsi, 'A cluster of young people does not produce soot', meaning that young people do not have sufficient experience in life. There is a well-known legend which states the importance of experience acquired by age:

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1. Legend cited by E. Mworaha, op.cit., p.173.

> Once upon a time, a Mwami decided to eliminate all old people from his realm. Consequently, all were killed, except for one who had been hidden by his son in the woods. Some time later, the Mwami received a beautiful leopard skin. He washed it and wore it as a garment. When the skin dried, it shrank and the Mwami was about to suffocate. No one among the young followers of the Mwami knew what to do. The Mwami was about to pass away when one of his followers, the son of the hidden man, said that he could find somebody to help and he brought his father who immediately ordered the Mwami to go into water. The skin became softer and the Mwami could free himself from it. From that day on, old people have been respected and their advice followed.[1]

In the mediation of disputes by abashingantahe, evidence is mainly brought by witnesses, witnessing being the basis of the whole customary dispute settlement system.[2] Another legend explains their importance:

> Samandari, a legendary figure, was showing the Mwami the vegetables he had just collected. He put them in a cooking pot with boiling water and asked the king to watch over the cooking. Samandari went out for a moment and when he came back, he took the vegetables out of the pot. They had shrunk because of the cooking and Samandari started to shout that the Mwami had stolen part of his vegetables. The king tried to explain and pleaded innocence, but Samandari did not listen and continued to shout. Finally, he told the king that he knew he was innocent; he had done this to show how some people can be falsely accused if there are no witnesses to testify. From that day onwards, evidence by witnesses became necessary in all trials.[3]

Several maxims express the importance of witnesses, such as urubanza rugirwa n'ivyabona, 'A case is governed by the witnesses', or ntawuragira mu nzu, 'Nobody grazes his cattle inside his house', meaning that all social acts have to be performed in public, before witnesses, or ico umuryango utazi, ntikimenywa n'Abarundi, 'Things the umuryango [family

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1. F. Rodegem, op.cit., p.27.
2. Ibid., p.18.
3. Ibid., p.27.

and neighbours] do not know, the Barundi [strangers] are not supposed to know'. Another famous maxim is urubanza rw'ijoro ruca inkima, 'The case of the night is settled by the monkey', meaning that a case without witnesses cannot be easily settled. In the mediation process the abashingantahe cross-examine parties and witnesses, illustrating their arguments by proverbs.

For the Barundi ubutungane, 'justice', is 'the facts as they are', ibintu uko bimeze, 'truth', ukuri. When they settle disputes, abashingantahe and judges act as abacamanza (singular, umucamanza, 'he who settles disputes'). Umucamanza aca imanza, 'the umucamanza settles [literally cuts] disputes'. 'They look for the truth', batunganya (from the verb gutunganya), 'they render straight', baragorora (from the verb kugorora). The work of umucamanza is mainly to detect truth from the testimony of witnesses and the statements made by parties, and to attribute the truth to one of the parties. Decision is given and formulated in a maxim, embodying the customary principle to be applied. The decision of the abashingantahe, as well as a summary of the debates, is often written down in case of recourse to an official court level. If the mediation of the abashingantahe has not been successful, recourse to the mediation of the commune administrator is common. Though it is unofficial, it is one of the main tasks of the administrator. It is clearly a survival of the judicial powers of the chiefs who, in the minds of peasants, have been replaced by administrators. Peasants acknowledge, as one of the major qualities of a good administrator, his ability to settle disputes and to give good advice. The administrator normally directs the parties towards the court which has jurisdiction over the matter of the dispute, without mediating all cases.

2. The various grades of court

If no settlement has taken place, the case is then brought before the court which has jurisdiction over the matter of the dispute. When a plaintiff comes to court, he first explains the reason for his coming; subject matter and area jurisdictions are then verified. If he is in the right court, the plaintiff is asked about mediation of the abashingantahe b'umuryango, the local notables; he must present a written copy of their decision. If the court thinks it is useful, it will give an impanuro, an advice, in order to prevent the case from being adjudicated; otherwise, it is registered and both parties are summoned to court for the first hearing. The plaintiff normally brings the summons to the councillor of the hill who is charged to get in touch with the defendant. For criminal cases, the court policeman will contact the defendant.

At the first hearing, every party brings his witnesses. The court first states the decision of the abashingantahe b'umuryango and asks the parties why they do not accept it. If the case deals with land, an official visit to the site is necessary.[1] Finally, the court reaches a decision and states to the parties the time allowed for appeal. The settlement of disputes by official court levels is often very long and some trials have been going on for years.

Until recently, judges and assessors at the tribunal de résidence had no legal training in written law. Most judges were former clerks

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1. Résolutions relatives à la justice sociale à l'education et au changement de mentalités, op.cit., p.316: "Les affaires foncières doivent être connues quant au fond par les juges eux-mêmes, ils devront se rendre sur les lieux lorsque les justiciables l'exigent".

with long court experience; assessors were chosen from local elders who had an in-depth knowledge of customary law. Recently, many older judges and assessors have been replaced by younger ones[1] who have a better knowledge of written law, but a complete lack of knowledge of law based on custom. A school for the education of magistrates is to be opened.[2] The training of magistrates is one of the concerns of the government: if not properly designed, such a magistrature will have the book knowledge, but little idea of the practice of law.

The system of execution of court decisions is not efficient. Execution of a court decision often takes place months, if not years, after the decision.[3] This problem may lead to a challenge of the whole system of justice, which would be dangerous, since respect for ubutungane, justice, plays a central rôle in the system of values of the Barundi.

Chapter 4 : The Significance of Land in Burundi and Related Terminology

A. Symbolic, social and economic significance of land

As remarked earlier, more than 95 per cent of the Barundi are peasants living from food and cash crops agriculture as well as from some animal

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1. Ibid., p.314: "Les assesseurs qui recourent encore aux mauvaises pratiques des régimes passés doivent être relevés de leurs fonctions; ceux qui, à cause de leur âge avancé, ne sont plus à même de faire face à leurs obligations, seront mis à la retraite et cèderont la place à d'autres, plus jeunes, intègres et dynamiques".
2. Ibid., p.316: "Une école pour la formation des magistrats et des agents de l'ordre judiciaire est nécessaire; des périodes de recyclage complèteront constamment cette formation".
3. Ibid., p.315: "Les membres de la commission judiciaire doivent redoubler d'efforts car beaucoup de jugements rendus ne sont pas exécutés".

husbandry. Even urbanized people are often part-time agriculturalists.[1] This situation has naturally developed a peculiar range of relationships between people and land. Rites related to agriculture were the core of the national yearly festival of historical Burundi, umuganuro, held every December in the Bukeye area until 1929, when missionaries forbade it for religious and moral reasons. People from all over the country participated in the festival which lasted ten days and which comprised a sequence of the ceremonies reaffirming the symbolic importance of kingship and the relationship between the ruler and the welfare of Burundi. The main event of the festival was the act of kuganura by the Mwami, when the ruler ate sorghum dough and drank sorghum beer especially prepared for the occasion. It was said that, by this act, the Mwami ate and drank the year (kurya n'ukunywa umwaka) and so, officially allowed the people of Burundi to sow sorghum.[2] The act of kuganura attracted blessing on the crops and general prosperity on Burundi. All classes of society participated in the umuganuro festival, which expressed the unity of all Barundi around the institution of kingship. It is significant, especially when one remembers the importance attributed to cattle in historical Burundi by most authors, that the central act of umuganuro was an agricultural rite. C. Kayondi writing about Murunga, a hill in Mugamba, asserts that the kurya umwaka rite is performed once a year by the father in every nuclear family.[3]

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1. For example, most inhabitants of Buyenzi, one of the districts of Bujumbura, have fields, especially rice fields in the nearby countryside. The sale of rice represents for many the main part of their income. They are urban peasants.
2. P. Canonica, "Journal de la Paroisse de Bukeye" (manuscript), p.28.
3. C. Kayondi, "Murunga, colline du Burundi: étude géographique", p.197.

There are legends linking kingship to land produce: one says that the way to recognize a future Mwami is that at his birth, he holds in his hands the seeds of the principal known crops in historical Burundi (beans, sorghum and pumpkin);[1] another says that the Batwa found Ntare I, the first Mwami of Burundi, in a termitary holding in his hands the above-mentioned seeds.[2]

If in traditional Burundi, there were important rites related to land produce, no cult of land itself existed. Some specific areas were considered sacred because they were burial grounds of important people, or places where some misfortune affecting the whole community had happened. The royal burial grounds are situated in Mugamba. All over the country former compounds of kings or princes, which have been abandoned at their death, can be recognized by the great trees which grow there.[3] In former times, these places (ikigabiro-ibigabiro) were cared for by members of specific lineages. Other areas had the same status because they were linked to religious rites.[4]

In ordinary families, the dead were buried on the family holding and the father's grave was often dug at the compound's entrance or at

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1. E. Mworoha, Peuples et Rois de l'Afrique des Grands Lacs, p.12.
2. Ibid.,
3. For example, in Bukeye, the present site of the parish church was once the site of the royal compound of Mutaga, who was killed there by his brother in 1915. After that murder, the site was abandoned and occupied by missionaries in 1929.
4. It is interesting to note that missionaries often settled on land which had a religious significance, exactly as the Christian missionaries in Dark Ages' Europe. Mugera, one of the first missions in the centre of the country, was established on a mountain where several kings had died, thus making it sacred and protecting the missionaries from attack.

the place of the cattle fire. Later, under the influence of missionaries, cemeteries were built. A developed ancestor cult was, and still is to a certain extent, practised; the altars of ancestors are often found in compounds, but there has never been a proper grave cult or the practice of regarding graves as the basis of family interests over land, as in Buganda for example. If graves do not have any specific significance in the shaping of the relationship between men and land, the family holding is a source of family continuity in that, when the father dies, the holding goes to his sons, who, in turn, give it to their sons. Most Barundi have acquired their holdings through succession; it is their itongo ry'umuryango, 'the holding of the family'. Whole areas are occupied by the descendants of one man, and the localized patrilineage is one of the basic structures in Burundi society.[1] The patrilineal family order is based on landed property, which is regarded by the Barundi both as the main source of economic survival and as a way of perpetuating the patrilineal family. Descent and landed property are rightly tied together, and it is one of the main functions of male children to perpetuate the lineage, thereby preserving and increasing family wealth, especially land wealth.[2] R. Massinon rightly says:

> "Le Murundi a le sentiment que la terre, dont il est devenu propriétaire par héritage, devra, après sa mort, assurer la subsistance de ses descendants et qu'il se déshonnorerait s'il ne parvenait pas à la leur transmettre".[3]

This attitude towards landed property explains customary rules regarding land, as, for example, in the exclusion of daughters as statutory heirs

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1. See p. 220.
2. J. Navas et alia, Famille et Fécondité au Burundi Approche Sociologique, Presses Lavigerie, Bujumbura 1977, p.50.
3. R. Massinon, "L'évolution des règles de succession face aux législations étrangères. Le cas de la succession testementaire", in (1980), R.J.B., 2, p. 159.

of landed property,[1] as well as in the various limits on the transfer of family landed property.[2]

In Burundi, most land-holdings are small in size; in the Bukeye area, between one and four hectares, while in the less-populated areas, in the East for example, they tend to be larger. Former native authorities (chiefs and sub-chiefs) generally have the largest holdings, and often several, which are scattered all over the territory they formerly ruled; during the colonial period many of their possessions, especially private grazing grounds and unexploited land, were distributed to people in need; they nevertheless retained large tracts of land, sometimes several hills, as compared with the size of holdings occupied by the average peasants.[3] In 1977, their landed wealth was greatly diminished when ubugererwa, land-clientship, was abolished.[4] It must be underlined that these holdings have nothing in common, in size as well as in social importance, with the latifundia known in many third world countries. The Burundi land tenure system offers a typical example of the peasant smallholding pattern.

Economically, holdings are exploited in order to produce subsistence as well as cash crops and as grazing ground. The various types of

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1. A. Ncutinamagara, "L'évolution des règles de succession face aux législations étrangères. Les cas de la succession testamentaire", in (1980) R.J.B., 2, pp.132-50.
2. See p.231.
3. For example in the province of Muyinga, the son of Chief Karibwami occupies at least three hills amounting to approximately 20 hectares.
4. For example, the widow of Kamatari, the brother of Mwami Mwambutsa, had more than 50 land-clients on her various holdings in the Kiganda area where her husband had been chief.

exploitation and cultivation methods have been studied in depth.[1] At this point it is enough to keep in mind that land is the main source of survival and security for nearly all Barundi. Several sayings express this situation, such as itongo ni amagara y'umuntu, 'The land-holding is the energy, the force of man', or itongo ni ubuzima, 'The land-holding is one's life', or umuntu arya itongo ryiwe, 'Man eats his land-holding', meaning that his main source of survival comes from his land-holding, he profits from his land-holding.

Land is in the long term more important than money, because it is the final security in a country where employment is scarce and social security not developed. Land is also the main source of the wealth of Burundi as a state, because its financial structure is based on the export of cash crops. The protection of the patrimoine sol[2] (land wealth) is at the core of the recommendations made at the first national congress of the UPRONA Party, which made it clear that bad exploitation

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1. J. Bonvin, "L'Agriculture et les Structures rurales au Burundi. Analyse micro-économique à partir d'une enquête en milieu paysan portant sur 1655 exploitants agricoles dans trois regions". Unpublished.
2. Résolutions relatives au développement de l'agriculture et de l'élevage, Ministère de l'Interieur, p.337.

of land coupled with population pressure were the two reasons for the decline in agricultural and stock-breeding production.[1]

Because of the specific social and economic significances of land, it is not considered as a market commodity as such in rural Burundi. Sale of land is known but not for speculative purposes; every peasant wants to increase the size of his holding to produce more goods and to give the largest possible landed property to his children. In urban areas, the situation is different: land is frequently sold for speculative reasons, not only in areas governed by written law, but also in areas where land is not registered as, for example, in the former centres extra-coutumiers.[2] In the Bwiza district of Bujumbura, the

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1. Ibid., p.336: "Après avoir passé en revue les causes principales de l'insuffisance alimentaire, ils ont constaté qu'elles étaient les suivantes:
   - En premier lieu, les terres cultivables se sont fortement réduites. La population s'est accrue considérablement, et cela a entraîné l'occupation de toutes les terres cultivables sur les collines et les vallées et le pays est ainsi devenu une mosaique d'enclos et des petites exploitations individuelles.
   - En deuxième lieu, outre que la terre cultivable est réduite, elle est considérablement dégradée par l'érosion favorisée par les cultures sur les pentes. Cette dégradation est due également au nombre élevé de troupeaux improductifs qui transforment les pâturages en désert par le piétinement et le surpâturage. Cette action de l'érosion et des troupeaux est renforcée par la déforestation, le déboisement et les feux de brousse.
   - En troisième lieu, les méthodes culturales mal appropriées, la non-pratique de la jachère qui reposerait le sol, la polyculture sur une même parcelle, le brûlage des herbes sèches au lieu de les enterrer pour restaurer le sol, et l'abandon de l'aménagement des compostières dans plusieurs régions.
   - En quatrième lieu, les instruments aratoires rudimentaires et l'insuffisance de l'encadrement agricole.
2. For a definition of centres extra-coutumiers, see p.368.

right to occupy a lot is bought for large sums, to be resold at higher prices; it is said that only the house built on the lot is sold; in fact, land is sold because cheap straw huts built on lots situated on good sites are sold for prices which do not correspond to the value of the hut.[1]

B. Terminology related to land

Land is referred to by at least three types of terminology, i.e., (a) a purely geographical terminology, (b) a terminology defining land by what grows on it, and (c) a social terminology defining land by the ways settlement is organized and by the interests people may have over it. The three categories of terminology are often inter-related: for example, the geographical distinction between hill (umusozi) and swamp (umwonga) parallels a distinction between hill and swamp types of land exploitation, and finally hill holdings follow different rules from swamp holdings as far as the origin of legal interests over land is concerned. In a way, it may be said that geographical features condition exploitation, which in turn may have an influence on the legal rights over land.

Before giving any information on specific geographical vegetation and social terminology pertaining to land, the term itongo (plural, amatongo), by far the most important which refers to land, must be defined. In Rodegem's dictionary, it is defined as: "terrain, domaine, propriété".[2] Itongo comes from the verb gutongora,[3] 'to clean, to

1. In some areas of Bujumbura, straw huts built on lots located near markets for example, sell for the price of a brick house. In effect it is not the house that is sold, but the lot.
2. F. Rodegem, Dictionnaire Kirundi-Français, Tervuren 1970, p. 501.
3. A synonym of gutongora is gutema. An informant said: gutongora niugutema ibiti canke ubwatsi n'ukurima - gutongora is to clear trees or a meadow in order to cultivate.

exterminate, to eliminate the state of abandoned or uncultivated land, to clear land', and it has several meanings. Literally, it is a term defining a specific use of land on a hill, i.e., land cultivated as opposed to land uncultivated (ubunyovu) and bush (ishamba-amashamba). It has another more general meaning, viz., a land-holding over which an individual or a group has a direct control interest, including cultivated land, grazing grounds and woods. To make this meaning explicit, it is common to say itongo ryawe ryose, 'all your land-holding', with an insistence on its wholeness. Itongo, in this sense, is opposed to ikivi (plural ibivi), a patch of land.[1] As it will be stressed later, itongo is associated with the way its holder acquired his interest in it: itongo ry'umuryango is 'the holding inherited from the family', while itongo ry'umuheto, literally 'the land-holding acquired through the bow', is the holding granted by a politico-administrative authority, and itongo ry'irigurano is 'the holding acquired through buying'.

1. Geographical terminology

Geographically, the basic landscape of central Burundi is characterized by the association of hill and swamp. Hills (umusozi-imisozi or umutumba-imitumba) may vary greatly in size, shape and height and are in general easily seen. Most of them are convex with a more or less flat top (impinga: the summit of a hill, itaba: a plateau close to the summit of a hill). The steepest slopes (umucamo, the hillside) are the periphery of the hill. On the side, there may be smaller hills (agatumba), as well as small dry flat plateaux (ikiyaya).

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1. Literally ikivi means a patch of land cultivated in one day.

From time to time, one finds a valley on hill-sides: if it is watery, it is called agasoko; if it is dry, ikibande. A large hill may be divided into secondary hills by such valleys. Between hills are alluvial flat swamps (umwonga-imyonga), in the middle of which a river may flow. A dry swamp is called irishumweru, or umwaba'rusi, The area lying between swamp and hill bears several names: whereas inkengera defines a rather flat area between swamp and hill, inkuka is the steep slope where the hill starts. Inkombe designates the banks of a river (sketch 1). The geographical association of hill and swamp may be found in many areas of highland central Africa.[1]

On hills, different types of soil are distinguished according to their appearance and especially to their suitability for agriculture: ikivuvu, black soil; urubuye, stony soil, further subdivided into a urubuye rw'amabubu, stony soil suitable for cultivation, and into urubuye rw'amasare, quartz-like stony soil not suitable for cultivation; umusenyi, sand soil; ibumba, clay; inombe, hard red soil, and so on.

2. Vegetation terminology

The basic distinction between hill and swamp also conditions land terminology according to what grows on it. On hills, cultivated land, itongo in the strict sense, is distinguished from uncultivated land normally exploited as grazing ground (ubunyovu) or consisting of bush (ishamba). Cultivated land is normally divided into more or less concentric circles starting from the compound (urugo-ingo) which forms

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1. For example, B. Taylor, The Western Lacustrine Bantu, E.S.A., 13, London 1962, p.17. The Nyoro country has a large number of clearly defined ridges (migongo) separated by swampy streams.

the kernel of the land-holding. Immediately around the compound is the itongo ry'ibitoke, the banana grove permanently fertilized by household refuse. Under banana trees, different plants and vegetables grow. Further away lie the cultivated areas, indimiro, made up of fields of different sizes and crops (beans, maize, potatoes, sweet potatoes, wheat, sorghum, peas, etc.). Often several crops grow in the same field. A field is called umurima (plural, imirima), from the verb kurima, to cultivate. Coffee and tea plantations are also found in this zone. If the family has a large holding, land is allowed to lie fallow; seasonal fallows are called indare, while land which is left to rest for several years and becomes nearly ubunyovu, is called icibare. The zone at the limit of cultivation is called umubari, and the area lying below fields, already located in ubunyovu but fertilized by dung, dry grass and loam from the cultivated fields, is called umuvumba. Umuvumba is an area which is potentially under cultivation and is primarily an agricultural term; in the fifties, the Conseil Supérieur du Pays, in its land law reform proposals, gave it legal meaning.[1] Further away, one finds ubunyovu classified according to the kind of grass growing on it, and ishamba. In ubunyovu temporary crops may be planted: eleusine especially is grown (imvyirire), and after the harvest, the field goes back to ubunyovu, or it may become permanently cultivated (Sketch 2). During the colonial era, sweet potatoes and cassava were grown in ubunyovu under the order of local authorities (akamashu or imirima yaleta, 'the fields of the state').

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1. Procès-Verbal de la réunion du Conseil Supérieur du pays, June 1956, p. 42.

Swamps are also divided between uncultivated ones, classified according to their vegetation or the quality of their soil (urufunzo, papyrus swamp, urukangaga, uruguhu, umurago, specific kinds of grass growing in a swamp which define it), and cultivated ones called umwaba, plural imyaba, or umurenzo, plural imirenzo. This term comes from the verb kurenza, to throw upon, to bury, describing the way fields are cleared for the first time by turning soil and burying grass. Types of cultivated crops may also give peculiar names to swamp fields: ijago, is a swamp sweet potato field, while isebura is a swamp maize and bean field.

In conclusion, it may be said, following the agronomist de Schlippe, that there are four pseudo-rotations in traditional rural Burundi:

- itongo ry'ibitoke, the interior permanently cultivated nucleus of the itongo;
- indimiro, cultivated fields alternating with more or less prolonged fallows;
- imvyrire, temporary fields normally in uncultivated areas;
- imyaba, fields in flat valley bottoms, which formerly were swamps.[1]

The way the agricultural landscape of central Burundi is organized becomes very clear: banana groves hiding compounds surrounded by a multitude of small fields, grazing grounds scattered with eleusine fields and well-cultivated valley bottoms divided into square fields separated by ditches collecting water.

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1. P. de Schlippe, "Enquête préliminaire du système agricole des Barundi de la région Batutsi", in (1957) B.A.C.B., 4; pp.227-82.

3. Social terminology

Besides the land vocabulary adapted to what grows on it, there is a terminology concerning purely social situations. First of all, land is conceived as the space where men settle down: the hill, a basic geographical feature of the country, is also a social and administrative unit. All hills bear names and their inhabitants are called accordingly. They form a specific community distinct from neighbouring hills.[1] In historical Burundi, large hills often corresponded to sub-chiefdoms forming an administrative and military unit. Today they constitute administrative units inside the municipality and the esprit de colline is still well developed.

Such large hills are subdivided into smaller territories, often taking the shape of a smaller hill whose population is also recognized as a specific group and is usually linked by kinship, alliance or clientship. They form a co-operative unit for the extinction of fires, and various economic activities, such as cattle herding or cattle-fountain building. Mutual help is frequent within the group, as when a new house is built, or in cultivation (guhana umukozi, 'to help each other in work', kurima ikibiri, 'to cultivate together in a group'); the beneficiary then distributes beer. Mutual help is especially frequent among girls and women for cultivation purposes. These small hills may form one or several neighbouring groups, including a certain number of households spread out in a limited area and sharing permanent social contacts. The neighbourhood bears the same name as the agnatic family: umuryango. Kinship, clientship and alliance links, as well

1. The same characteristic is found in Kikuyuland, for example.

as economic co-operation, and shared social activities in particular, give unity to a neighbourhood. It is the primary level of the dispute settlement process. If many members of the same family live together so as to form a neighbourhood, this concentration is called igisata, a large family, umuryango munini.

A neighbourhood group is made up of a certain number of amatongo, nuclear or extended family land-holdings. An itongo in that sense is also called ishamvu, agataka or urugo. There is normally a compound as kernel of the itongo, in fact on an itongo there may be one or several compounds (urugo-ingo) according to the composition of the family and to the existence, until 1977, of land-clients. An urugo is also called umuhana; the plural of umuhana, imihana, is used to designate settlements spread out on hills as opposed to (1) igisagara, which means a compact agglomeration being generally a commercial, missionary or administrative centre, and to (2) ikigwati, which means a village set up by the State. An urugo may contain one or several families, for example a father and his married sons; it is the living cell of rural Burundi. The terminology concerning the social use of land as settlement space only concerns the hills because swamps are not inhabited.

Chapter 5 : Legal Pluralism and Interests over Land

Land law may be broadly defined as a language for the social ordering of land tenure and as the expression of the ties linking men in relation to land through a set of normative rules which regulat e distribution, control and exploitation. In Burundi as in most countries with a colonial past, these normative rules originate in several legal systems, as below:

(i) A customary legal system, which covers interests over land held according to the customary observances passed down from generation to generation, and whose normative character is mainly expressed in the process of dispute settlement.[1] During the colonial era, native authorities, guided and advised by their colonial guardians, abolished, modified and created many customary rules These changes and innovations were written down. Furthermore, native courts, through the settlement of land disputes, participated in this evolution. In present-day Burundi the trend goes on.[2]

(ii) A written legal system which covers interests over land held, according to the various statues and legal enactments by legislative and executive powers. This system, also called the system of registered land (système des terres enregistrées), was implemented on the eve of the colonial era to secure rights over the land of European settlers and of companies; more generally its objective was to control the exploitation of the colonial territories. In Burundi, after Independence, all acts dating from the colonial period were kept in force unless expressly abrogated or contrary to the Constitution.

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1. A.N. Allott, Essays in African Law, London 1960, p.62.
2. For example, the recent abolition of land-clientship and the acknowledgement of a 30-year requisition, see p.355 and p.366.

(iii) A system stemming from administrative practices which was implemented in order to control settlement processes and the exploitation of land. During the colonial period, rights over land originated from administrative practices in African urban districts (centres extra-coutumiers) as well as in rural areas where agricultural developments projects were implemented. In contemporary Burundi rights over land still originate in administrative practices as, for example, when lots are granted in village settlement government projects.[1] In this system, the rules defining interests over land are not laid out as clearly as in the customary and written law systems.

Approximately 1.5 per cent of the total area of Burundi is governed by written law,[2] while land held according to interests originating in administrative practices is limited to urban centres and rural areas which are the object of agricultural developments. Thus almost all of the land held by individuals or groups in Burundi is held according to interests originating in custom.

These three systems will be described and analysed; customary law will be the special focus because of its importance, and because of the scarcity of available material on it, in contrast to written law, which has been extensively studied. Their interrelationship, as well as the various consequences of legal pluralism, will be examined in Part V of the present study, which deals with the future land law in Burundi.

As already stressed in the introduction, most authors writing on African law have investigated it using an analytical framework based on

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1. See p.383.
2. R. Massinon, L'Evolution du Droit Burundais, cours popycopié, p.64.

their own concepts, consequently prejudicing their whole approach. In attempting to avoid this trap, the language of analysis developed by A.N. Allott will be used.[1] He sets out a distinction between two basic interests over land: (1) benefit, which is an agglomeration of claims held by a person, or persons, with respect to the profit and exploitation of a resource; at the level of benefit, people are entitled by law to profit from a specific economic resource; and (2) control, which is an agglomeration of claims held by a person, or persons, with respect to the control of the profit and exploitation of a resource; control extends therefore to the creation, enjoyment, transfer and termination of beneficial interests in landed property; the control interest holder has the power to prescribe, permit or forbid the various modes of beneficial action regarding a specific economic resource.

Whereas a benefit interest is rather simple to define because it is directly linked to the enjoyment of what land produces (crops, grass, trees, minerals, etc.) or may be used for (passage, building), control interests are more complex and differ in nature.

A distinction is to be made between direct and general control interests:

(a) A "direct" control interest normally includes full benefit over a specific area and its control; it is expressed by the power to convey any benefit interest, to stipulate conditions for its use and to convey the direct control interest.

(b) A "general" control interest which is an agglomeration of claims held by a person, or persons, in relation with "direct" control interest holders; it generally originates in kinship or the

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1. A.N. Allott, "A universal vocabulary for the analysis and description of proprietary relationships", in African Language Studies (1970) XI, p.16.

political dependence of "direct" control interest holders. It is possible to say that there is dependence of "direct" control interest holders upon kinship-based and territorially-structured social groupings.

An example drawn from Burundi customary land law well illustrates the various degrees of control interest. Normally, in a nuclear family, the direct control interest holder is the father: he is the only person to allocate benefit interests over land to family members or to strangers (rent, loan, land-clientship) as well as control interests (sale, bequest, gift). While the family under the family head has a direct control interest over unallotted land within the family holding, it has a general control interest over the whole family holding. This is expressed by a control over the transmission of control interest over family land (for example, right of pre-emption and redemption in case of sale, right to render void an unjust will). Historically, Burundi political authorities had benefit as well as direct control interests over estates they held as chiefs. They also had a general control interest over the territory they ruled as expressed by the tribute charged to landholders, the control over the sales, the allotment of unoccupied land and finally the confiscation of land as sanction. Political authorities also provided the framework of the settlement process of land disputes. In contemporary Burundi, the State also holds a general control interest over land as expressed by the power of expropriation, land tax and managerial rules concerning the exploitation of land, as for example, in planning laws or forced cultivations.

PART II : THE FIELD OF WRITTEN LAW

Interests over land stemming from written law will first be defined and analysed because they have served as point of reference in the evolution of customary law.

Chapter 6 : Written Land Law during the Colonial Period

The Germans, between the end of the 19th century and 1916, the Belgians for nearly 50 years during their League of Nations Mandate and United Nations Trusteeship, and the independent State of Burundi from 1962 on, have, each in its own interest, endeavoured to promote the development of Burundi; questions pertaining to the distribution and control of exploitation of land have therefore always been at the core of government policies. The history, the functioning and the consequences of the rules regulating land exploitation enforced by the various governments in power for the last century will now be examined.

A. The German Period

German colonization in East Africa may be seen in three often concurrent aspects - economic, political and missionary, the emphasis depending on the objectives sought by the colonizing power.[1] In Burundi, economic activities were almost non-existent, missionary activity limited, and the basic political aim of the Germans, the imposition of order and peace, never properly achieved, partly because of the constant struggle for power between chiefs and partly because of the lack of consistency in German policies as regards native authorities.[2] Overall, German influence was rather limited in Burundi.

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1. R. Cornevin, Histoire de l'Afrique, T3, Paris 1975, p.358.
2. R. Louis, Ruanda-Urundi 1884-1919, Oxford 1969, p.114.

With respect to exploitation of land resources, it was the main concern of the German authorities to keep control of land unoccupied by the natives so as to use it for the development of the colony. They also were the sole grantors of land to European settlers. In the early 1890s Europeans had bought directly from native authorities huge areas in the hinterland of Tanga as far as Kilimanjaro.[1] This led to a tense situation between natives and settlers. On 26 November 1895, an Imperial Ordinance proclaimed that, excluding land already in private ownership or owned by African chiefs or communities, all land was deemed to be vacant and considered as Crown land (herrenlos Kronland).[2] The rights of Africans over land were recognized only when natives actually exploited the land, though provision was made for some land to be left to them to ensure their future. These rights were to be acknowledged by committees, and all transactions between natives and non-natives were to be made under official control. Land grants were made in the name of the Kaiser, and freehold titles were given through a system of land registration inspired by the German land register 'Grundbuch'.

In Burundi, the first missions (Buhonga, Rugari, Giheta, Nyamurenza, Muyaga, Mugera and St. Michel d'Uzige) were granted freehold titles over tracts of land, often large. Today some of these missions are still among the most important landowners in Burundi: the mission of

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1. R. Cornevin, op.cit., p.360.
2. Imperial Ordinance of 26 November 1895, see James and Fimbo, Customary Land Law of Tanzania, Dar es Salaam 1973, pp.21 and 31. Schaffung, Besitzergreifung und Veräusserung von Kronland und über den Erwerb und die Veräusserung von Grundstücken in Deutsch-Ostafrika im allgemeinen, Vom.26 November 1895, in Landesgesetzgebung, I, 212-4.
3. J. Iliffe, Tanganyika under German Rule 1905-1912, Dar-es-Salaam 1973.

Kaniynia in the north-east of Burundi owns an area of 163 hectares,[1] while the mission of Muyaga in the east of the country owns an area of 63 hectares. Except for St. Michel d'Uzige, whose land was bought from the Germans for 400 rupees,[2] the missionaries were given land gratis (cession gratuite).

In the Bujumbura area and in the Lake Tanganyika coastal plain, land was also granted to individuals for settlement or plantation purposes.[3] Most grantees were Swahilis, Indians and Goans. In Bujumbura some of the oldest land grants are found in the so-called Asian district (quartier asiatique).

In conclusion, it may be said that the German influence on land tenure in Burundi was very limited: land remained in native hands except for the sites where administrative posts were built and for forest reservations, as well as some land granted to non-native individuals or groups, i.e., building plots around administrative posts, land for missionary settlements and a few plantations on the Lake Tanganyika coast.

B. The Belgian period

In June 1916, the Belgians occupied Burundi and found the country in a state of civil war. Their first task was to pacify the territory and to strengthen the authority of the Mwami. Within a few years they were able to stop the internecine struggles and to establish administrative posts all over the country.[4] In 1923, a Mandate was assigned to Belgium by a League of Nations' decision, Article 6 of this decision

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1. In Kanyinia the mission owns 100 hectares while the Benetereza congregation owns 63 hectares.
2. Communication of Mr. Timothée Karabagega, Bujumbura.
3. Rapport annuel (1925), Rapports annuels de l'Administration belge au Ruanda-Urundi, Ministère des Colonies, Bruxelles, 1922-1960, p.93.
4. Rapport annuel (1925), ibid., p.8.

specifying the principles to be followed by the country which received the Mandate in establishing land law rules: "that country will in the establishment of rules related to land tenure and to the transfer of land ownership, take into consideration the laws of the natives, respect their rights and safeguard their interests. No native land will be transferred to non-natives without the formal approval of the public authority and no right on native land in favour of a non-native will be created without the same approval".[1]

For a few years, no rules concerning land were enacted in Ruanda-Urundi mainly because the fundamental law under which it was to be organized had to be approved by the Belgian Parliament. During these years "domanialisation", the process by which land unoccupied or occupied by natives was transferred to the colonial State,[2] evolved around practical needs, especially in the establishment of administrative posts. A preliminary inquiry into native land rights with an acknowledgement of land vacancy was made before the procedure of domanialisation could start. Only long leases but no perpetual grants were allocated to individuals or to companies. In urban districts, first in Usumbura[3] and later in other European settlements, 15-year leases were granted, while large agricultural estates could be leased in the empty Rusizi plain, and smaller plots were available in the neighbourhood of administrative posts for intensive market gardening. Temporary grants to missions were possible for an area not exceeding 50 hectares, while mission outposts

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1. Décision du 31.08.1923 de la Société des Nations confirmant à S.M. le Roi des Belges le Mandat sur le Territoire de l'Est Africain, in B.O.R.U. (1923), p.1.
2. See p.106.
3. Usumbura was the name of Bujumbura during the colonial era.

and school chapels were to be built on land under the direct control of the native political authorities, with the latter's consent. In every administrative post a land title book was open to record titles dating back to German rule which were legally recognized by an arrêté royal in 1929.[1] The same arrêté also acknowledged the various leases passed between the Mandate power and individuals or companies since the Belgian occupation.

In 1925, following the practice of the Belgian Congo where important land grants, covering more than 60 million hectares in 1908, had been made to financial companies and missions,[2] there were some proposals under study to grant large areas in the Rusizi plain.

The law governing the status of the government of Ruanda-Urundi was enacted on 25 August 1925, especially providing for the administrative union of Ruanda-Urundi with the Belgian Congo.[3] Belgian Congo legislation became applicable in Ruanda-Urundi only when its Governor had issued a specific ordonnance. So, in 1927, all the land law legislation of the Belgian Congo, except for a few provisions whose application could not be reconciled with the land tenure situation of Ruanda-Urundi, became part of Ruanda-Urundi legislation by an ordonnance du Gouverneur du Ruanda-Urundi.[4] The main texts to become executory were:

(1) The ordonnance of 1 July 1885, regulating the acquisition of land by non-natives (document no.1).[5]

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1. Arrêté royal du 19 octobre 1929 sur la vérification des titres de propriété, in B.O.R.U., (1929), p.1071.
2. R. Cornevin, op.cit., p.446.
3. Loi du 21 août 1925, in (1925) B.O.R.U., pp.11-179.
4. Ordonnance No.8 du Gouverneur de Ruanda-Urundi du 08 mars 1927 rendant exécutoire dans le territoire du Ruanda-Urundi certaines des dispositions législatives du régime foncier en vigueur au Congo Belge, in B.O.R.U., (1927), p.265.
5. Ordonnance de l'Administrateur général du Congo du 01 juillet 1885 sur l'occupation des terres, in B.O. (1885), p.30.

(2) The second book of the Civil Code regulating land rights (document no.2).[1]

(3) Article 15 of the 1908 Colonial Charter on land grants.[2]

Most acts dealt with the problem of land grants because the Belgian Congo was conceived firstly as a colony whose many resources were to be exploited. It was fundamental to secure the necessary land for the most efficient exploitation; access to, and occupation of land was therefore regulated. The first decision of the Belgian colonial power was to deem all vacant land as public land.[3] As it will later be stressed,[4] the definition of land vacancy was to be a source of controversy. It may be noted that this policy was in keeping with the German idea of giving the status of unowned Crown land to all vacant land.

The second principle adopted by the Belgians, and also by the Germans, was to submit the occupation of land by non-natives to official approval; the state was to deliver an appropriate land title only after an inquiry of vacancy (enquête de vacance) had been made by the administration to prove that the land to be allocated was in fact vacant. In the case of land occupied by natives, the intervention of a public officer was necessary, as well as the approval of the natives or native authorities who had rights over land, and a just compensation was given to the natives concerned. Title registration resulted in the application of written law to the land under consideration.

The third principle adopted by the Belgians was to ensure the protection of native rights over land. While at first vacancy was

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1. Livre Deuxième: Des Biens et des différentes modifications de la propriété, in Codes et Lois du Burundi, p.68.
2. Loi du 19 octobre 1908, in Codes et Lois du Burundi, p.9.
3. Article 2 of the 1 July 1885 ordonnance. op.cit.
4. See p.106.

presumed unless natives actually occupied land, in 1906 a provision was made to reserve enough land for native communities for their future development.[1]

In the Belgian Congo and in Ruanda-Urundi, Belgian activity concerning land law centred on defining rights over land according to the needs of the colonial power. Native land law was taken into account mainly with regard to these needs, the main concern of the colonial State being to exploit and develop the colony by providing adequate land for private promoters.

In the Belgian Congo, as well as in Ruanda-Urundi, there was a three-fold classification of land according to the various kinds of interest holders:[2]

(1) Public land, including vacant land; that which was reserved for public service and that which had been allocated by way of concession. Land allocated under a long form of concession (droit de superficie, emphythéose, tenancy exceeding nine years)[3] was classified as registered land since the titles were registered;

(2) native land, i.e., land cultivated or occupied in other ways by natives who had acknowledged native rights over it; and

(3) Registered land, i.e., land over which there was a title that had been registered in the Registration Book. Registered land was either land alienated in freehold by the State to individuals or groups through sale or gratuitous cession, or land allocated by the State to individuals or groups under the various forms of concession.

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1. Décret du 3 juin 1906 sur le statut légal des terres indigènes in B.O., (1906), p.226 (Document No.3).
2. Circulaire administrative de l'Etat indépendant du Congo, Département des Finances, in B.O., (1893), pp.208-35.
3. See p.112.

The treatment of these three types of land during the Belgian colonial period in Ruanda-Urundi will now be described and analysed.

1. Public land

As underlined above, vacant land was considered to be part of the State domain: this principle was first specified in 1885 and later acknowledged by Article 12 of the first chapter of Book II of the Belgian Congo Civil Code. In 1934, a décret[1] detailed provisions on vacancy, which did away with the presumption of vacancy, and implemented the presumption of native rights over land. In the case of the acquisition of non-registered land by the State, the process of domanialisation was to include an inquiry into the nature and extent of indigenous rights, the agreement of the natives concerned, just compensation and finally a deed acknowledging the surrendering of their rights by natives. The approval of the Gouverneur Général and a report of a magistrat du Parquet on the feasibility of the process of domanialisation were necessary.

In practice administrative authorities followed several steps in the domanialisation process:

- The land which was needed was provisionally delimited;
- A petition of domanialisation was then made to the Gouverneur; the land was described, giving the reasons for domanialisation;
- If the petition was accepted, a vacancy enquiry (enquête de vacance) was ordered;
- The local Belgian authority (Agent territorial) then made the enquiry, whose objective was to acknowledge customary interests over land

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1. Décret du 31 mai 1934 sur la constation de vacance des terres in B.O., (1934), p.676.

held by natives, and, if there were any, to acknowledge their approval in giving up their interests and to fix an adequate compensation for this surrender.

The agent territorial, acting as delegate of the Governor, summoned people who were likely to hold interests over the land, subject to the vacancy enquiry. The land in question was then inspected, and the agent territorial interviewed the local political authorities representing their subjects about the possible interests claimed by the latter. Eventual rights of occupation (housing), of cultivation, rights over water, fishing and hunting rights, rights of way as well as other forms of exploitation (grazing, fruit collecting, exploitation of mineral resources, etc.), were recorded. The comments of the natives and their agreement or their objection to the domanialisation were also written down. The minute of the meeting, a report of the local agricultural officer, a plan of the land concerned, and a map of the area, were handed over to the administrateur territorial, then to the Résident of Urundi who advised on the feasibility of the domanialisation. The final decision was taken by the Gouverneur du Ruanda-Urundi.

If the decision was positive, a deed of cession of rights, called the convention de cession de droits (document no.15) was drawn up between the native chiefdom represented by the chief, assisted by a colonial officer and the Government of Ruanda-Urundi. The deed was legalized by a public notary and enacted the domanialisation of the land concerned: it then came under the control of the State.

In practice, land was often occupied according to immediate needs of the colonial authorities, and domanialisation took place much later than the actual occupation, in order to legalize it. For example, in 1938, large tracts of land were taken from natives in the Bujumbura area for the construction of the African urban districts of Buyenzi and Bwiza; only in 1954 was domanialisation completed so as legally to regulate the status of the land on which Bwiza and Buyenzi had been built. Furthermore, the misconceptions of colonial authorities about customary land law often resulted in compensation going to native political authorities instead of being given to those who had benefit and direct control interests over the land concerned. Finally, the whole domanialisation procedure was biased by the fact that the native authorities were assisted and guided by colonial officers; consequently, they were inhibited from expressing their opinion, and thus the point of view of the administrating power proved to be predominant. One may say that the domanialisation process was in the guise of a deed concluded by two parties, in effect, a unilateral action on the part of the colonial power.

In Ruanda-Urundi, the State mainly acquired land for public services, for the creation and extension of urban areas and commercial centres. Land to set up experimental farms and forest reserves and, in Ruanda, national parks, was also acquired by the State.

2. Native land

In the Belgian Congo, the 3 June 1906 décret (document no.5) defined the legal status of native-held land; it never became executory in Ruanda-Urundi and no legislation was enacted to define the legal nature of native rights over land. In the process of domanialisation the nature and extent of natives rights over land had to be defined with precision, since the agreement of natives to give away their rights, as well as just compensation, was an essential part of the process of domanialisation. In Urundi, as in Ruanda, the Belgians followed the principle that the Mwami, represented by his chiefs, had an exclusive ownership right over land; in the process of domanialisation, as stressed above, arrangements were most often made with political authorities, largely ignoring the persons actually occupying the land concerned;[1] while political authorities received compensation for the giving up of their so-called political rights (droits politiques) including ownership, those actually occupying the land were compensated for the rights of use, for the benefit interests they could have on the land concerned.[2] These rights of use included:

(i) droits d'occupation (habitation): rights of settlement;

(ii) droits de culture: rights of cultivation;

(iii) droits d'exploitation: rights of exploitation, including:

- droit de pacage: grazing
- cueillette: fruit collecting
- exploitation des bois, lianes, papyrus, herbes salines, mines carrières, tourbières, terres à poterie: exploitation of woods, creepers, papyrus, salt grass, mines, quarries, peat bogs, clay;

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1. R. Burije, Le Droit foncier au Burundi, sa statique et sa dynamique, p.130.
2. G. Van der Kerken, T. Heyse, H. Léonard, Le Droit Foncier et le Régime légal des Terres et des Mines au Congo Belge, Bruxelles, 1934, p.39.

(iv) autres droits quelconques: other rights, such as:

- usage de sources, ruisseaux, rivières, marais ou étangs: exploitation (use) of springs, streams, rivers, swamps or lakes
- droit de chasse ou de poursuite du gibier: right to hunt or to track game.
- droits de passage: rights of way.

Besides its political rights, the chiefdom was recognized and compensated for grazing rights (droits de pacage).

This conception of native rights over land was convenient both for the colonial authorities who did not need to deal with every land-holder as well as for the native authorities. It must be underlined that the chief normally allotted dispossessed natives a holding equivalent to the one they had been forced to give up, according to informants.

Other than domanialisation of native land, which has been slight in Ruanda-Urundi,[1] the legal ordering of native land tenure was left to native authorities under the guidance of the Belgians.

3. Registered land

The objective of the colonial State to develop the colony was best fulfilled by the granting of land to companies, missions and settlers for exploitation purposes. Between 1885 and 1908, perhaps more than in any other country of Africa, large areas were ceded by the Independent State of the Congo.[2] After the union with Belgium in 1908, the trend continued on a smaller scale, especially within the context of a large-

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1. According to 1959 statistics 35,000km² were occupied by natives in Ruanda-Urundi, while only 433km² had been subject to domanialisation. See Office de l'Information et des Relations publiques pour le Congo Belge et le Ruanda-Urundi, Bruxelles 1959, p.520.
2. Th.Heyse, "Grandes Lignes du régime des terres du Congo Belge et du Ruanda-Urundi et leurs applications (1940-1946)", in (1949), I.R.C.B., IV, pp.3-191.

scale immigration of European settlers which then took place. Because of the many abuses recorded in the earlier stages of the colony, more restrictive measures concerning the occupation of land by non-natives were enforced in order especially to avoid land hoarding, accumulation and speculation.

The fact that non-natives could not acquire land without a title has already been alluded to.[1] The land cession and concession régime was organized under Article 15 of the Colonial Charter,[2] which was replaced in 1942 by an arrêté-loi[3] which provided for the legislative authority's approval in case of grants in excess of 500 hectares in rural areas and in excess of 10 hectares in urban districts, while the approval of executive authorities was necessary for small grants. Executive authorities were also responsible for making free grants in specific cases, as for example, where missions or settlers were concerned.[4]

There were different kinds of grants: whereas cessions took the form of free grants (concessions gratuites) or sales (ventes), concessions could take the form of shorter or longer duration tenancy (location) or of emphytéose or droit de superficie (document no.6).[5]

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1. Art.2 of the ordonnance du 1 juillet 1885, B.O. (1885), p.30.
2. Art.15 of the loi du 15 octobre 1908 called Charte Coloniale in Codes et Lois du Burundi, p.91.
3. Arrete-loi du 19 mai 1934 sur les cessions et concessions, in Codes et Lois du Burundi, p.9.
4. Décret du 24 janvier 1943 sur les cessions et concessions gratuites aux associations scientifiques et religieuses et auxétablissements d'utilité publique modifié par le décret du 2 juin 1945 rendu exécutoire au R.U. part O.R.U. No.51/TF du 22 septembre 1945, in B.O.R.U., (1945) p.94. Décret du 28 octobre 1942 sur les cessions et concessions gratuites en vue de favoriser la colonialisation modifié par le décret du 6 avril 1943 applicable au R.U., in Codes et Lois du Congo Belge, p.733.
5. Arrêté royal du 30 mai 1922 dur le droit de superficie et l'emphytéose rendu exécutoire au R.U. par O.R.U. No.9 du 8 mars 1927, in B.O.R.U. (1927), p.265.

A 1943 arrêté ministériel (document no.8)[1] specified the conditions of the rental and sale of public land; it especially stipulated the compulsory conditions of the contract entered into between the State and the grantee. Among them the most important were:

* exploitation according to the legally-defined nature of the granted land;
* automatic reversion of the contract resulting in the return of the granted land to the State if its exploitation did not meet the legal prescriptions within a period of thirty years following the grant;
* automatic reversion of abandoned land for a period exceeding five years.

Gratuitious cessions and concessions, as well as emphytéoses and droits de superficie were subject to the same conditions.[2]

Freehold (propriété privée or propriété civile) originating in the case of State grants through sale or free cession, was legally defined in the Title II of Book II of the Congolese Civil Code,[3] while Title IV of the same Code defined emphytéose,[4] and Title V the droit de superficie.[5]

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1. Arrêté ministériel du 25 février 1943 sur la vente et la location de terres rendu exécutoire au R.U. par O.R.U. No.54/TF du 10 novembre 1943, in Codes et Lois du Burundi, p.953.
2. Arrêté royal du 30 mai 1922 sur le droit de superficie et de l'emphytéose, rendu exécutoire au R.U. par O.R.U. du 9 mars 1927, in B.O.R.U. (1927), p.265.
3. Titre II, Livre II, Code Civil: De la Propriété. Décret du 30 juin 1913 rendu exécutoire au R.U. par O.R.U. No.8 du 8 mars 1927, in B.O.R.U. (1927), p.264.
4. Titre IV, Livre II, Code Civil: De l'Emphytéose. Décret du 20 juillet 1920 rendu exécutoire au R.U. par O.R.U. No.8 du 8 mars 1927, in B.O.R.U. (1927), p.264.
5. Titre V, Livre II, Code Civil: De la Superficie. Décret du 20 juillet 192o rendu exécutoire au R.U. par O.R.U. No.8 du 8 mars 1927, in B.O.R.U. (1927), p.264.

While freehold ownership in principle implies the right of complete disposal of control and benefit interests over land, except in the case of limitations by law, emphytéose connotes no more than the right to use the land for a maximum period of 99 years, provided that land is properly exploited and an annual fee is paid to the owner, whilst the droit de superficie implies the right to exploit land for a maximum period of 50 years.

Freehold ownership, emphytéose and superficie exceeding nine years, as well as rental exceeding nine years, could only be legally established by a registration certificate (certificat d'enregistrement) of the title granted by the State.[1] This certificate issued by the Land Titles Conservator (Conservateur des Titres Fonciers) indicated the nature of the right, the name of the rightholder, the description, situation and area of the land concerned, and all other rights exercised on the land concerned and tenancies exceeding nine years. Unregistered rights over land had no effect, and the registration certificate was only issued on the basis of a written document, i.e., either a deed of sale or free grant between the State and the buyer or free grant beneficiary, or the presentation of an authentic deed of transfer (sale, gift, exchange). In case of inheritance, an ordinance of the President of the tribunal de première instance was necessary. As this system of registration of titles continues to be enforced in contemporary Burundi it will be examined in depth later.[2]

What happened in Ruanda-Urundi concerning grants after the introduction of the land legislation of the Belgian Congo? As grants

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1. Titre III, Livre II, Code Civil: De la Transmission de la Propriété. Décret du 6 février 1920 rendu exécutoire au R.U. par O.R.U. No.8 du 8 mars 1927, in B.O.R.U. (1927), p.264.
2. See p.128.

to private individuals or groups had a specific objective, viz., the development of the colonial territories, a distinction was made, according to their purpose, between:

(i) grants in urban districts and commercial centres of either residential, commercial or industrial nature;

(ii) grants in rural areas for cattle-raising or agricultural exploitation;

(iii) grants to missions and philanthropic associations.

Specific conditions applied to each category.

(i) Commercial, industrial and residential grants in urban districts and commercial centres

Urban districts, commercial centres and administrative posts were progressively created and enlarged by the administration according to practical needs;[1] legally they were artificial areas of public land which became subject to a special regime by an administrative decision, namely an ordonnance of the Vice-Governor General. A map dividing into lots the area concerned was prepared and land surveying took place. Lots available for rent or for sale, in industrial, commercial and residential zones were identified. Grants made under either tenancy or sale contracts were subject to exploitation conditions according to the character of the land.

The urban district of Usumbura was created in 1927 and enlarged according to need. It was divided into residential neighbourhoods reserved for Europeans, Asians or Africans, and into districts of a

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1. In Urundi, urban districts (circonscriptions urbaines) were created by the ordonnance du Ruanda-Urundi No.35 du 27 décembre 1927 érigeant Usumbura et Kitega en circonscriptions urbaines, in B.O.R.U. (1928), p.313.

commercial or industrial nature. Whereas in European and Asian districts rights over land were acquired according to written law, Africans residing in specific districts, administratively designated as extra-customary centres (centres extra-coutumiers) in 1941,[1] were given a plot without registration of title, receiving a document called autorisation d'occupation of a purely administrative nature which, with time, became equated with a document embodying a right (droit d'occupation) over land, including benefit and direct control. The main concern of the colonial administration with regard to urban African settlements was to control their inhabitants. Only at the end of the colonial era was there any interest in identification of the land rights of urbanized Africans; in 1958, a new settlement was created where Africans received droits de superficie[2] over their holdings. In 1952 large tracts of land were taken from Barundi in the Usumbura area in order to enlarge the urban area; there were reactions among the people thus deprived against the meagreness of compensation awarded.[3] In general, grants in urban districts and commercial centres were not the object of dispute because they were of very small size and were already part of

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1. The main provisions concerning the centres extra-coutumiers are:
   *Arrêté royal du 6 juillet 1934 coordonnant les différents décrets sur les centres extra-coutumiers rendus exécutoires au R.U. par O.R.U. No.22/Just. du 6 mars 1940, in B.O.R.U. (1940), p.40.
   *Ordonnance No.68/Sec. du 22 décemtre 1941 créant le centre extra-coutumier "Belge" d'Usumbura, in B.O.R.U. (1941), p.110.
   *Ordonnance No.69/Sec. du 22 décembre 1941 créant le centre extra-coutumier "Village Swahili" d'Usumbura, in B.O.R.U. (1941), p.110.
   *Ordonnance No.9/Sec. du 28 janvier 1944 créant les centres extra-coutumiers de Rumonge et de Nyanza-Lac, in B.O.R.U. (1944), p.19.
   *Ordonnance No.8/Sec. du 27 janvier 1944 créant le centre extra-coutumier de Kitega, in B.O.R.U. (1944), p.18.
2. Ordonnance No.444/190 du 19 août 1958 créant un lotissement résidentiel dénommé Quartier Belge IV dans les limites des centres extra-coutumiers d'Usumbura et fixant les modalités d'octroi des parcelles ainsi creées ainsi que les redevances annuelles à payer par les concessionnaires de droit de superficie accordés en vertu de l'arrêté royal du 30 mai 1922, in B.O.R.U. (1958), p.735.
3. Burije, op.cit., pp.135-6.

land which had been domanialisé. This was not the case with agricultural grants involving a procedure of domanialisation.

(ii) Agricultural grants

As soon as the Belgians received a mandate over Ruanda-Urundi, they expressed their interest in granting rural land to companies and settlers. The Belgian Minister of Colonies, Louis Frank, defined this interest in 1922 as follows:

> L'établissement des colons blancs est désirable et possible, mais le densité de la population, l'occupation par elle de la plupart des terres, le respect dû à la propriété indigène ne permettent pas de songer à une immigration en masse. Il y a, au contraire, place pour des colons de choix disposant de capitaux qui dans des régions d'accès facile pourront obtenir des résultats favorables.[1]

In later years, the settlement of agricultural colonists continued to be favoured, not so much for economic reasons but in order to give job opportunities to natives[2] and to provide them with the chance to learn modern cattle-raising and agricultural methods.[3]

The 1927 annual report on the Mandate says:

> Ce n'est toutefois que dans une mesure limitée que l'introduction de colons peut être envisagée, car une fois que l'éducation des indigènes sera accomplie, ils devront pouvoir disposer des terres nécessaires à leurs propres entreprises agricoles. C'est le motif pour lequel, à moins de raisons spéciales justifiant une dérogation à cette règle, les terrains agricoles ne font l'objet que de baux à long terme, ou de droits d'emphytéose.[4]

It may be stressed that, in 1928, the League of Nations Mandates standing Committee (Commission permanente des Mandats), commenting on Belgian policies, pointed out the apparent contradiction between the

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1. Rapport(1921) op.cit., p.32.
2. Rapport(1927) op.cit., p.30.
3. Rapport(1930) op.cit., p.6.
4. Rapport(1927) op.cit., p.30.

constant description of the consequences of over-population in Belgian reports and the promotion of European settlements.

Emphytéose was especially favoured for rural land grants because it was a consensual relationship, neither sale nor tenancy, which gave to the State final control over land and allowed private individuals or groups the opportunity of exploiting large tracts of uncultivated land. State profit was not considerable since rent was often nominal, but it was appreciable in the exploitation of land and the final control over it.[1] According to article 24 bis of the ordonnance royale of 29 July 1930, emphytéose could be transformed into freehold ownership at the will of the parties.

Outright sale of rural land by the State was very rare: article 30 of the arrêté ministériel of 25 February 1943 stipulated that before a sale or rental of public land could be concluded, when the object of the transaction was rural land exceeding an area of ten hectares, a five-year temporary occupation was necessary in order to develop the land concerned.

With the years large grants became rare; they were replaced by small grants of land in order to educate the natives in modern methods of agriculture and breeding.[2] There were three kinds of such grants:

a. Grants in underpopulated areas. The Belgians were quick to point out that if Urundi was the most densely populated country in central Africa along with neighbouring Ruanda, there were some areas where population was scarce, such as the Rusizi plain or the eastern lowlands (Mosso). In 1925, several requests were made by companies to obtain the concession of large areas in the Rusizi plain. In

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1. P. Dufrémoy, "Terres vacantes et circonscriptions urbaines", in (1935), R.G., 2, p.206. Rapport (1948), op.cit., p.86.
2. Rapport (1951), op.cit., p.64.

1927, the Syndicat de la Rusizi, a private company acquired several thousand hectares in the Rusizi plain with the approval of the legislative authority, and it was intended to extend the grant to an 18,000 hectares area.[1] In 1928, another similar request was made to obtain land in the Malagarasy river valley in Mosso. In the late 1920s three agreements were concluded between the State and large development companies: freehold ownership was granted over large tracts of land, provided there was a complete agricultural development as well construction of public service buildings.[2] After the economic depression of the thirties, these grants were returned to the State because the economic situation did not allow for the appropriate development and exploitation of the granted land. Smaller grants were made in sparsely populated areas. In 1948 most of the 160 agricultural settlers were living on the shores of Lake Tanganyika and in the Rusizi plain.[3] The maximum size of grants in these areas was 200 hectares.[4]

b. Grants in populated areas. In the populated highlands nearly all land was occupied by natives' gardens, fields and grazing grounds. Nevertheless, in view of the policy that private enterprise was the best incentive to the development of a country,[5] in the late twenties the colonial authorities considered associating private companies or individuals in the development efforts initiated in the highlands. In order to promote the culture of coffee and modern cattle-raising it was proposed to extend the size of grants

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1. Rapport (1927) op.cit., p.32.
2. Rapport (1929) op.cit., p.38.
3. Rapport (1913) op.cit., p.85.
4. Rapport (1951) op.cit., p.64.
5. Rapport (1951) op.cit., p.39. R. Cornevin, op.cit., p.446.

to a maximum of 500 hectares, taken from land which was badly managed by natives as extensive grazing grounds, and to assure to the settler a 70,000-hectare area around his lot where no other land could be granted to another settler. On the land granted, model farms and processing plants were to be built for new agricultural methods to be made popular. It was put forward that the help of private enterprise was important and would improve the native standards of life. Furthermore, private companies and individuals were to be responsible for the processing and export of cash crops. The implementation of this scheme proved to be very difficult because of the conflict of interests between private promoters and natives.[1] In 1933 the colonial administration abandoned the plan because the capital to be invested for the education of natives and the technical material would have been so great that, in order to redeem their initial investment and make a profit, private promoters would have been required to pay extremely low salaries to natives; this would have caused social unrest. From then on, the State, because of its moral authority, was considered better suited to encouraging economic development in the Ruanda-Urundi highlands. The 1948 report on the Trusteeship administration states that the maximum size of grants in populated areas to be of 75 hectares, and several grants with emphythéose titles were allocated for reforestation projects.

In the Bukeye area a few settlers received land grants; granted land was normally ubunyovu, uncultivated land, which was conceded with the agreement of the chief. If land had an owner in the

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1. Rapport (1930) op.cit., p.49.

sense of customary law, the latter received compensation but was most often not consulted when the transaction took place, the chief representing his subjects.

c. Small grants in the vicinity of urban districts, commercial centres and administrative posts. Land was needed for market gardening, quarries, brick factories and other purposes in the vicinity of built-up areas.[1] In general, tenancy agreements were concluded. Where orchards or woods existed, emphytéose was usual. Whereas in 1925, grants up to 60 hectares could be made,[2] in 1951 they became limited to five hectares.

(iii) Grants to missions

As emphasized earlier,[3] several missions had acquired freehold ownership over large estates during the German period. After the Belgian occupation, missions went on with their activities and they became considered a fundamental tool for development and civilization.[4] In the early twenties several new missions were founded. The administration granted land of a maximum area of 30 hectares for a temporary period only. The agreement of the dispossessed natives as well as a reasonable compensation for the loss of their holding was required. In 1924 the maximum area granted was extended to 50 hectares and catechist schools were to be built on chiefs' and sub-chiefs' land with the latters' agreement. The 1925 report on the administration of

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1. Rapport (1948) op.cit., p.85.
2. P. Dufrémoy, op.cit., p.208.
3. See p.99.
4. Circulaire de M. le Gouverneur Rutten du 7 juillet 1923 sur les relations avec les Missions, in Recueil Mensuel (1923), p.146.

Ruanda-Urundi added that missionaries could hold temporary occupation rights over land but that these rights could be transformed into perpetual or long-term concessions.[1] Whereas chapel-schools were to be granted one-hectare plots, new missions received up to 40-hectare estates. In the late twenties, as a result of the success of missionary activities, the demand for land to found new missions and chapel-schools (succursales) increased. In 1933 a décret allowed the transformation of the temporary titles held by religious associations into perpetual free concessions. Eight hundred hectares were consequently granted on a perpetual basis to missions.[2] No perpetual concession was granted for land on which chapel-schools were built. The following years the area granted for the founding of new missions was considerably reduced: in 1935 it was a maximum of 25 hectares,[3] while in 1938 six missions were founded, on a total area of 71 hectares.[4]

In 1943 a new décret[5] reorganized the system of free concessions to religious and scientific associations. The maximum area to be granted was to be ten hectares in urban districts and 200 hectares in rural areas. The sale of granted land was forbidden except if the Governor-General expressly authorized it. The main contribution of this décret was to tie the grant legally to the maintenance of intended function, i.e., in the case of mission the intended function was civilizing purposes.

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1. Rapport (1925) op.cit., Chapter VII.
2. Rapport (1933) op.cit., p.60.
3. Rapport (1935) op.cit., p.62.
4. Rapport (1928) op.cit., p.62.
5. Décret du 24 janvier 1943 sur les concessions et cessions gratuites de terre aux associations religieuses, scientifiques et philanthropiques, modifié par le décret du 2 juin 1945 rendu exécutoire au R.U. par O.R.U. No.51/TF de 22 septembre 1945, in B.O.R.U. (1945), p.94.

Chapter 7 : Written Land Law in Present-day Burundi

Most regulations governing registered land during the colonial period are still in force in contemporary Burundi according to the loi of 19 June 1962[1] which provides that all legislative texts issued by the Trusteeship authorities remain in force in independent Burundi unless they are contrary to the Constitution or are expressly abrogated or replaced by a Burundi regulation.

The main texts dating from the colonial era which are still in force in contemporary Burundi are:

*The second Book of the Code Civil sur les biens et les différentes modifications de la propriété (document no.4);

*The 25 February 1943 arrêté ministériel sur la vente et la location de terres par l'Etat (document No.8);

*The 30 May 1929 arrêté royal sur les droits d'emphytéose et de superficie concédés par l'Etat (document no.6);

*The 24 January 1943 décret sur les cessions et concessions gratuites aux associations scientifiques et religieuses et aux établissements d'utilité publique (document No.9).

The Burundi Constitution promulgated in 1962 and suspended in 1966 includes two articles acknowledging freehold ownership.[2] While Article 11 states that freehold ownership (propriété privée) is guaranteed by the State, the latter issuing the appropriate regulations to define its nature, Article 21 specifies that no one can be deprived of freehold ownership, except when public utility is involved,in which case expropriation takes

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1. Loi du 29 juin 1962 sur l'application des actes législatifs et réglementaires édictés par l'autorité tutélaire, in Codes_et Lois du Burundi, p.8.
2. Constitution du Royaume du Burundi du 16 octobre 1962, in ibid., p.5.

place. The expropriation procedure is defined in the décret sur l'expropriation pour cause d'utilité publique of 24 July 1956.

The new Constitution accepted by popular vote in November 1981 also acknowledges ownership in its Article 13 (Document No.16).

The main regulations concerning land issued since Independence are:

*The 20 March 1968 décret-loi No.1/143 sur la taxe sur les transactions;[1]

*The 11 June 1970 décret-loi No.1/42 sur le tarif des frais cadastraux;[2]

*The 11 June 1970 décret-loi No.1/43 fixant les droits d'enrigistrement en matière foncière;[3]

*The 29 February 1972 décret-loi No.1/48 sur le résiliation des baux emphytéotiques passés entre l'administration et des particuliers avant l'indépendence nationale;[4]

*The 30 June 1977 décret-loi No.1/19 portant abolition de l'institution d'ubugererwa (Document No.13);[5]

*The 30 June 1977 décret-loi No.1/20 étendant le système de la prescription acquisitive aux immeubles régis par le droit coutumier (Document No.15).[6]

The whole system defining interests in land stemming from written law dates back to the colonial era and most remarks made above on

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1. Codes et Lois du Burundi, (1968), p.784
2. B.O.B. (1970), p.191.
3. B.O.B. (1970), p.192.
4. B.O.B. (1972), p.178.
5. B.O.B. (1977), p.555.
6. B.O.B. (1977), p.561.

registered land during the Belgian Mandate and Trusteeship periods still apply to contemporary Burundi.

A. Organization of the Department of Land Affairs and Land Surveying

After Independence, the administration of public land (domaine public) was transferred from the Ruanda-Urundi government to the new states of Burundi and Rwanda. The colonial Land Titles Conservation Department (Conservation des Titres fonciers) first became a section of the Ministry of Economy, later of the Ministry of Agriculture and Breeding, and took the name of Department of Land Affairs and Land Surveying (Département des Affaires Foncières et du Service Topographique National). It is currently dealing with all questions pertaining to interests in land originating in written law. It is subdivided into two sections:

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1. Edit du Mwami No.5 du 10 août 1961, Article 1, Document 12.

(i) The Affaires Foncières also called the Conservation des Titres Fonciers, which deals with all operations concerning interests in land stemming from written law and the general administration of Burundi land (patrimoine foncier du Burundi).

(ii) The Service Topographique National which is in charge of all mapping and land surveying operations on the Burundi territory.

The head of the Department (Directeur des Affaires Foncières et du Service Topographique National) is also called the Conservateur des Titres Fonciers; he has been empowered by the Minister of Agriculture and Breeding to make land grants of an area not exceeding two hectares; he acts as a notary public (notaire) responsible for legalizing all documents pertaining to operations concerning land submitted to written law, as in, for example, deeds of sale and mortgage contracts.

The main tasks of the Affaires Foncières section are:

(1) To receive the petitions for land grants (demandes de terrains), to examine them and to report to the Minister of Agriculture and Breeding if the petitioner requests more than two hectares, in which case the Minister is responsible for the grant;

(2) To proceed with the domanialisation procedure when needed, for example when a mission needs land. Until a few years ago, the expropriation procedure for reason of public utility was handled by the Department; at present, every Ministry involved in an expropriation must proceed on its own;

(3) To make land grants for areas not exceeding two hectares and conclude the necessary contracts with the beneficiary. In urban districts the head of the Department is empowered to make practically all grants;

(4) To receive sale prices and yearly fees in case of tenancy;

(5) To check whether the conditions specified in the original granting contract are fulfilled (in particular, development of the granted land and continuous exploitation);

(6) To take sanctions against the grant beneficiary who does not fulfil the conditions stipulated in the original granting contract and eventually to start proceedings resulting in the return of the granted land to the State, especially in case of abandonment of the land by the beneficiary;

(7) To keep up to date the various registers concerning interests in land stemming from written law, especially the register containing registration certificates.

B. The Main Types of Interests over Land granted according to Written Law

The main interests in land stemming from written law are freehold ownership (propriété), superficie, emphytéose, usage, privilège d'habitation, gage, usufruit, hypothèque and servitudes foncières.[1] These various interests are called droits réels. Tenancy by the State, also an interest in land stemming from written law, is not considered as a droit réel in itself, but has the same effect. We should now define and analyse the nature and content of each of these interests which directly derive from Belgian land law adapted to the conditions of colonization. They all originate in a grant from the State. In present-day Burundi, the main interests conveyed by such a grant are (1) freehold ownership; (2) tenancy; (3) superficie; (4) emphythéose, and (5) droit d'occupation et d'usage.

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1. Art.1, Titre 1, Livre II, Code Civil (document No.4).

(1) Freehold ownership (droit de propriété)

- Nature, extent and effects of freehold ownership

Article 14 of the second title of Book II of the Code civil defines the droit de propriété as follows:

> La propriété est le droit de disposer d'une chose d'une manière absolue et exclusive sauf les restrictions qui résultent de la loi et des droits réels appartenant à autrui.

Within the system defining interests in land stemming from written law it is the most complete interest in land including the well-known Roman law powers of usus, fructus and abusus. In Burundi there is an important limitation to freehold ownership, a direct consequence of the colonial authorities' basic objective to develop all resources of the colonies, namely specific conditions governing the development of the land granted and continuous exploitation. These conditions are specified in the contract concluded between the State and the beneficiary, and they are more generally stated in the 1943 arrêté ministériel on sales and tenancy of land by the State (document no.8). In case of transfer of interest, the conditions found in the original grant contract (documents nos.20, 21, 22 and 23) apply to the new interest holder. If the grantee does not comply with the specified conditions, the Department of Land Affairs may take action which may lead to the return of the granted land to the State, in the case of abandonment. In fact, abandonment through non-use (abandon par non-usage) according to the granting contract results in the return of the granted land to the State. The Department of Land Affairs controls the exploitation of granted land and an ordonnance of the Ministry of Agriculture acknowledges the return to the State of land abandoned for more than five years.[1]

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1. Massinon states the main ordonnances, Evolution du Droit Burundais, Cours polycopié, p.59.

In Burundi freehold ownership is legalized by a registration certificate called the certificat d'enregistrement.

The registration certificate of the title acknowledged or granted by the State is obtained at the Conservation des Titre Fonciers upon presentation of a deed of sale or of free cession concluded between the State and the future owner or upon presentation of a deed of alienation (sale, gift, exchange) legalized by a notary public. In case of succession, new registration certificates bearing the names of the heirs are issued upon presentation of an ordonnance d'investiture du Président du Tribunal de Grande Instance (document no.31). The registration certificate is drawn up in triplicate, one for the owner, one for the archives and one, the original, for the Land Register (registre des enregistrements), which is open to the public. Besides the name and identity of the owner, the certificate contains the reproduction of the land surveying plan of the land involved (fiche cadastrale), a description of the land involved as well as all existing liens such as mortgages, easements, specific conditions listed in the contract. As a registration system to land title, the registration certificate has the advantage of being simple and clear, and it gives complete security to the owner who then holds an irrefutable proof of the nature and extent of his interest, which is State-guaranteed and evident to all people as regards the legal status of the land involved. In case of grant by the State, a tenancy agreement is first made including a requirement that the beneficiary develop the land granted within a determined period of time; when the development has taken place as specified in the original granting contract, the tenancy may become a freehold owner by applying for registration.

- Transfer of freehold ownership

Any transfer of freehold ownership by way of alienation has to be made through a deed legalized by a notary public. The only proper notaries public are:

(i) The Directeur du Département des Affaires Juridiques et du Contentieux, who is responsible for notary matters in general; and

(ii) The Directeur du Département des Affaires Foncières et du Service Topographique National, who is responsible for notary matters pertaining to land.

Once the contract has been legalized by a notary public in the presence of parties and witnesses, the registration certificate bearing the name of the former owner is cancelled and a new certificate is issued bearing the name of the new owner.

In the case of alienation, a double tax has to be paid by the vendor:

- a tax on the real estate transfer amounting to ten per cent of the sale price or, in the case of gift, to ten per cent of the sale value of the immovable property in question.[1] This tax is paid to the Department of Land Affairs for the issue of the new registration certificate, and
- a tax on transactions (décret du 20 mars 1968)[2] paid to the Taxation Department (Département des Impôts). For real estate, this tax equals five per cent of the sale price or value (Article 8 of the décret).

In cases of succession, upon the presentation of an ordonnance d'investiture, the certificate bearing the name of the deceased is cancelled and new certificates are issued for each heir. A tax on transfer of

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1. Décret du 11 juin 1970 fixant les droit d'enregistrement en matière foncière in B.O.B. (1970), p.132. In case of gift (donation entre vifs) the tax amounts to 5 per cent of the sale value.
2. Décret-loi No.1/143 du 20 mars 1968 sur la texe sur les transactions, in Codes et Lois du Burundi, p.784.

ownership of immovable property amounting to 5 per cent of the value of the estate is paid to the Department of Land Affairs.

- Mortgage, real estate security tied to freehold ownership

In order to secure a loan, freehold owners may mortgage their land according to the provisions of the 15 May 1922 décret sur le régime hypothécaire (Document 5). Mortgage is the most effective real estate security and comes into force upon inscription on the registration certificate.

A mortgage contract is concluded between the lender and the borrower and is legalized by a notary public. When inscription on the registration certificate occurs, a tax amounting to 2.5 per cent of the sum involved is paid to the Department of Land Affairs. A reduction of this tax may be granted to the mortgagee, who borrows money in order to build or buy a house for his personal use.[1]

To save their clients the expense involved in the inscription of a mortgage in the registration certificate, many lending firms agree to conclude with the borrower a promesse d'hypothéque avec nantissement du certificat d'enregistrement, a promise of mortgage upon handing over the certificate of registration.[2] As soon as the debtor fails to fulfil his obligations towards the lender, the latter will ask for the inscription of the mortgage in the certificate.

The inscription in the registration certificate entitles the lender, in case of the borrower's failure to meet his obligations, to proceed with the sale of the immovable property involved, either by voluntary sale of the debtor (vente volontaire du débiteur) or by the clause de

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1. Décret-loi no.1/43 sur les droits d'enregistrement en matière foncière article 18 and article 19, B.O.B., pp.19-20.
2. J. Parisel, "Le nantissement du certificat d'enregistrement ou mortgage in equity", in R.A.J.B., 3, 1970, pp.1-28, and 4, 1970, pp.14-44.

la voie parée, a clause by which the mortgage creditor may request from the judge the authorization to proceed with the sale without resorting to legal action involving a trial.

(2) Tenancy (location)

Rental of land by the State is defined in the arrêté ministériel of 25 February 1943. A contract is concluded between the State and the tenant stating the conditions of development and continuous exploitation, and offering the opportunity for the tenant to become a freehold owner when development has taken place (documents Nos.24 and 25). The Department of Land Affairs receives the annual tenancy fees and checks whether the conditions specified in the tenancy contract are fulfilled. In case of non-fulfilment, a warning is addressed to the tenant., and reversion to the State may then take place. In case of non-payment of the annual fee, the latter is increased as a penalty. The transfer of tenancy is processed at the Department of Land Affairs by means of a simple contract called contrat de cession de bail (document No.26). A tax amounting to 250 Fbu is then paid to the Department of Land Affairs.

Buildings erected on the rented land belong to the tenant (article 24, titre II, livre II, Code Civil). If the tenancy agreement is cancelled for any reason not involving a fault on the part of the tenant, the latter receives compensation for the loss of the buildings erected as bona fide possessor and for the execution of the conditions of development stated in the tenancy contract.

In order to secure a loan, a tenant may hand over the tenancy contract to the lender during the period of the loan (cession de bail).

Tenancy is popular because tenants enjoy practically all the rights of a freehold owner and only pay a low annual fee. In case of transfer, they are not subject to the rather heavy taxes levied on the

freehold owners, but only to a 250 Fbu tax. Though they cannot mortgage their land, they may obtain a substantial loan by handing over the tenancy agreement during the period of the loan. Tenancy contracts normally concluded for a two-year period can actually be renewed on a permanent basis (Document No.27).

As far as the State is concerned, it receives a regular income from the annual tenancy fees and in case of expropriation for public use the tenant will only be compensated for the loss of constructions and cultivations and not for the loss of the land which is owned by the State.

(3) The droit de superficie

Article 76 of the second title of the second book of the Code Civil defines the droit de superficie as the right to get enjoyment from a piece of land belonging to someone else and to own buildings, woods and plantations which are deemed to belong on that land. A droit de superficie may be granted against a fee or gratuitously for a period not exceeding 50 years. A contract is made between the grantee and the State (document no.28). The droit de superficie granted by the State for a period exceeding nine years will be subject to a registration certificate. Its conditions are specified in the 30 May 1922 arrêté royal sur les droits de superficie et d'emphytéose concédés par l'Etat (document no.6).

(4) The droit d'emphytéose

Article 62 of the second title of the second book of the Code Civil defines the droit d'emphytéose as the right to get enjoyment of a piece of land on condition that development and continuous exploitation be made of the land under consideration, and that an annual fee be paid to the owner. The maximum period of a droit d'emphytéose is 99 years. If it

is granted by the State, according to the arrêté royal just mentioned, for a period exceeding 9 years, it must be subject to a registration certificate.

During the colonial era, droits d'emphytéose were granted by the State (baux emphytéotiques) to individuals or groups for agricultural or forest development because they implied a long-term undertaking. The 29 February 1972 décret[1] annulled all emphytéoses contracts concluded between the State and individuals or groups before Independence. The Entente Sportive, a sports club in Bujumbura, which had been granted a bail emphytéotique, escaped this measure because the compensation value for the loss of the constructions to be paid proved to be too high for the State to pay.

(5) The autorisation d'occupation et d'usage

The State may grant to missions, when the latter want to establish chapel-schools (succursales), an authorization to occupy and enjoy a piece of land necessary for the setting-up of the chapel-school. This grant is made provided that development, according to the provisions of the contract, takes place. The land under consideration may revert to the State at any time in case of need; compensation is then provided for the loss of constructions, woods and plantations. This type of occupation is also called occupation à titre précaire, occupation on a temporary basis. It must not be confused with the droit d'occupation granted by administrative authorities on unregistered land.

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1. B.O.B. (1972), p.178.

C. Registered land in contemporary Burundi

All titles over land granted by the State in present-day Burundi confer security of tenure on their holder, provided that development takes place and continuous exploitation is maintained. The State keeps a firm control over all landholders through the enforcement of the various conditions set forth in the original granting contracts. It may, however, be noted that emphytéose is of special interest in agricultural development projects involving foreign companies: the State is assured of the development of the land while remaining owner, through no effort of its own, whilst the company has security of tenure during a reasonable period so as to insure a good return on its investment. In contemporary Burundi most land governed by written law is held in freehold or tenancy, while droits de superficie[1] and droits d'emphytéose are rare, and droits d'occupation are limited to land on which chapel-schools are built.

Freehold ownership mainly exists for land on which missions have been erected, land in urban districts subject to written law (ex-commercial, residential and industrial areas of the colonial period) and

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1. Land in the Nyakabiga zone of Bujumbura was held through droits de superficie according to the ordonnance No.444/190 of 19 August 1958. In 1972 they were replaced by tenancy contracts in order for the tenants to be able to become freehold owners and for the State to receive an annual fee.

in very few cases land held customarily or as the result of a grant from the administration, the title of which has been converted through the process of registration.

In Bujumbura, for example, freehold ownership is found in most zones of the town (Map 5):

*Zone Rohero includes the colonial era, residential, commercial and industrial areas. All land held by individuals or groups has been registered. Freehold ownership is widespread.

When a tenant becomes entitled to freehold ownership, he may ask the State to buy the land under consideration. The purchase prices were the following in 1979:[1]

- commercial lots: 80 Fbu per sq.m.
- industrial lots: 30 Fbu per sq.m.
- residential lots: 60 Fbu sq.m.

*Zone Nyakabiga is a residential district created in the fifties for Africans. Interests in land stem from written law; tenants who have developed the land according to the provisions stated in the tenancy contract may become freehold owners. The purchase price in 1979 was 20 Fbu per sq.m. At this period there were only a few tenants who had availed themselves of the opportunity of becoming freehold owners.

*Zones Bwiza, Buyenzi, Kinama, Cibitoke, Kamenge are districts, which were, in the colonial era, reserved for Africans. They were known as centres extra-coutumiers, and interests in land originate in grants (droits d'occupation) made by the local administrative authorities. After Independence some droits d'occupation holders took advantage of the

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1. Tarif officiel des prix de location et de vente des parcelles et terraine commerciaux résidentiels au Burundi, document provided by the Department of Land Affairs. One Fbu is worth approximately $0.01.

opportunity to become freehold owners as stated in Edit du Mwami No.5 of 1961 (document no.12). In practice, conversion of tenure seems to have been accepted when development of the land under consideration had been made through the construction of buildings in durable material. In 1979 in all the former centres extra-coutumiers there were less than 30 lots held under freehold. The reason for conversion of tenure was mainly for the opportunity of mortgaging land held under freehold.

*Zone Ngagara is a district where houses were built in the early fifties for Africans who bought them while the land remained in the hands of the State. At the eve of Independence some lots were sold to individuals according to the ordonnance No.454/TF/101 of 14 April 1960.[1]

*Urbanized settlements outside the Bujumbura commune are areas where all land is held under customary land law; freehold ownership is unknown.

Tenure exists in the two districts where land is submitted to written law, namely Rohero and Nyakabiga. The length of the tenancy is two years and it is automatically renewed. In 1973 the yearly fee was 6Fbu per sq.m. in the Rohero district and 2 Fbu per sq.m. in the Nyakabiga district. Nyakabiga presents peculiarities concerning the operations around tenancy because, while subject to written law, it is considered as one of the former extra-customary centres. In case of transfer of the tenancy contract, for example, the procedure follows both provisions of written law and the former practice of extra-customary centres. Firstly a house sale contract is concluded by the vendor and the buyer in front of the local

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1. B.O.R.U. (1960), p.629.

administrative authority (chef de zone), who delivers a document attesting the sale called attestation de vente de maison. Then an acte de notoriété (Document No.24) is issued by the local tribunal de résidence as a proof of the interest of the new house-owner. Finally, the transfer of tenancy contract (transfer de bail) is processed at the Department of Land Affairs. It must be stressed that few inhabitants of Nyakabiga understand they are tenants of the State. Most of them are convinced that they are true owners of the lot on which their house is built: when they pay the annual rent they think they are paying a tax to the Department of Land Affairs.

PART III : THE FIELD OF CUSTOMARY LAW

Chapter 8 : Various Approaches to Customary Land Law

A. The attitude of colonial authorities towards customary land law

Before the colonial era, the Barundi had already held various interests in land, defined within a well-established system of oral law acknowledged in the dispute settlement process. The nature and content of these interests were expressed in legal sentences, most often taking the form of proverbs and maxims which are still stated in the decisions of mediators and judges. An elaborate technical vocabulary made distinctions between the various interests held by individuals or groups over land; these interests could vary from complete benefit and control to mere easement. Proof of interest was either given by boundary markers, in the case of the most complete control interest, or by witnesses who testified as to the origin and nature of the interest.

When the first Europeans arrived in the country, they found an organized state ruled by the Mwami and his chiefs, which they identified as a feudal kingdom;[1] they

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1. See p.167.

therefore concluded that individual ownership of land, as known in continental Europe, was non-existent among the Barundi, except for the Mwami who was thought to hold a general ownership right over all his realm. As a matter of fact, sayings stressed his overall power over all land, persons and things. To define the interests over land held by the simple Barundi, many terms were used ranging from tenant[1] to occupier.[2] James and Fimbo underline that in the Tanganyika Territory, colonial authors speak of the rights of Africans over land in terms ranging from squatter or tenant to licensee of the Crown.[3]

The Belgians, in the décret of 3 June 1906, mentioned the existence of native rights.[4] Some practical rules were laid down to protect those rights and to ensure the future development of African communities. It must be stressed that native interests in land were not defined within their own context but in the light of the procedure of domanialisation. Only rights pertaining to the enjoyment of land were taken into account; all aspects relating to the control of land, such as the transfer of rights through sale or inheritance, and the proprietary sense of ownership of the Africans, their devotion to their holding, were not even considered. The concept, implying that Africans had no interest over land that accorded with European ideas of freehold ownership, prevailed.

Besides the effects on native land tenure of domanialisation the colonial administration did not take any direct action in the field of

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1. R. Bourgeois, Banyarwanda et Barundi, p.21.
2. Rapports annuels sur l'Administration belge au Ruanda-Urundi, Ministère des Colonies, Bruxelles, 1922-1960, (1950), p.80: "L'indigène était simple usufruitier de la terre, son droit d'occupation, essentiellement précaire ne relevait que du bon plaisir du Mwami ou de ses délégues".
3. James and Fimbo, Customary Land Law of Tanzania, p.6.
4. See Document No.3.

customary law pertaining to land, except in its rôle of guardian of the native authorities, who abolished many customary practices and also created and modified many customary rules concerning land.[1] The evolution of this process was grounded in the colonial authorities' preconceived idea that colonization's main objective was to bring the benefits of European civilization, among which individual freehold ownership, as conceived in the Belgian Civil Code, was considered paramount. Two other factors had a direct influence on the evolution of the customary rules defining interests over land, namely:

(i) The transformation of political authorities into civil servants under the tutelage of the Belgians, and

(ii) The requirements of economic development implying a strict control over land use and an ad hoc development of the various land resources.

The council of the Mwami (Conseil du Mwami) gave many opinions concerning specific policies to be taken in the field of land tenure and the colonial authorities gave the Mwami the right to modify customary rules.[2] For their part the native courts issued decisions in the settlement of land disputes which sanctioned the evolution of land law.

A few basic concepts underlay the colonial attitude towards native land tenure and land law as expressed by the policies carried on by native political authorities under the guidance of Belgian administration:[3]

(i) No native, except the Mwami, has rights over land amounting to freehold ownership;

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1. R. Burije, Le Droit foncier au Burundi, sa statique et sa dynamique, p.129.
2. See p.70.
3. R. Burije, op.cit., p.129.

(ii) Natives have only the right to occupy land and to enjoy its products; in case of displacement they are entitled to compensation only for the improvement they brought to the land under consideration, and

(iii) The promotion of individual freehold ownership (propriété individuelle civile), as conceived in the Belgian Civil Code, is considered to be one of the tasks of the colonial authorities in their main civilizing mission.[1]

During the colonial era, the nyen'itongo, 'the native land-holder', behaved as an owner within the limitations of customary law: he exploited the piece of land under his control and was free to convey benefit, for example through land-clientship or loan, as well as control through succession, gift or sale. As nyen'itongo, he was a citizen with specific rights and duties towards the political authorities. In case of violation of his interests over land, he could bring an action before the court in which evidence concerning the nature and extent of his interests over land was to be adduced by boundary markers and witnesses. To avoid the insecurity of oral evidence, the colonial administration created the acte de notoriété (document no.29) in the forties: this written document, acknowledging the existence and nature of rights over land, was issued in the case of land allotment by a native political authority and in the case of land sale. The name and identity of the parties at the transaction, the name and identity of the witnesses, the approximate area of the land, object of the transaction, and a description of it, were recorded in the acte de notoriété. In order to draw a distinction

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1. Article 5 of the 1908 Charte Coloniale states that the Governor-General has the obligation to promote the development of freehold ownership among natives. See G. van der Kerken, et alia Le Droit foncier et le Régime légal des Terres et des Mines au Congo Belge, p.56.

between the private land wealth of political authorities and land belonging to their community, actes de notoriété were issued for all private holdings held by political authorities.[1] In the mind of the land-holders, the acte de notoriété, which had been originally created to avoid endless land disputes, progressively became a document embodying a title of customary ownership. The issue of actes de notoriété was in fact an indirect acknowledgement, by the colonial administration, of native rights over land amounting to freehold ownership.

Legally a deep gap was maintained between the native right of occupation (droit d'occupation) and freehold ownership, as defined in the Belgian Civil Code, even though a customary occupier felt the same personal security of tenure as an owner "propriétaire" according to written law. The customary occupier felt an even stronger sense of security since freehold ownership was subject to development conditions and to the requirement of continuous exploitation of the granted land, while he was free to do whatever he wanted on his holding, at least before the intervention of the colonial administration.

In the fifties access to written law ownership by native land-holders became a bone of contention. According to Massinon, Africans in the Belgian Congo could obtain written law ownership by conversion of tenure through registration only if they had the legal status of immatriculé, which was obtained by registration in the "civilized" population book.[2] This procedure entitled them to be equated with non-Africans in many aspects of life. The non-registered Africans (non-immatriculés), who comprised almost all the Belgian Congo population, did

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1. See p.200.
2. R. Massinon, L'Evolution du Droit Burundais, cours polycopié, p.54.

not have access to written law ownership because, as such, they did not enjoy civil rights, as set out in the Civil Code. The décret of 10 February 1953, allowing access to written law ownership by Congolese,[1] changed the situation. Some limitations were provided, however, including:

(i) Sale had to be authorized by the tribunal de territoire;[2]

(ii) Mortgage had to be authorized by the tribunal de territoire;[3]

(iii) Any tenancy exceeding six years was prohibited;[4]

(iv) Gift was prohibited, except to a spouse or to heirs,[5] and

(v) Land could not be seized as a result of an action founded on the non-execution of a contract (saisie).

These limitations illustrate the paternalistic attitude of the colonial authorities. In Ruanda-Urundi the first Book of the Congolese Civil Code came into force only in 1952.[6] Up to that date the Ruanda-Urundi authorities had always considered that the natives could become written law owners; they clearly were of the view that Article 6 of the Civil Code, after it was enforced, was to have no effect in the matter. The décret of 10 February 1953 never came into force in Ruanda-Urundi. In practice, before the eve of Independence, there had been no request from Barundi to obtain written law ownership; in the days just before Independence, some people, who had bought properties sold by non-Africans, became the first Barundi to be written law freehold owners.

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1. Décret du 10 février 1953 organisant l'accès des Congolais à la propriété immobilière individuelle in Codes et Lois du Congo Belge, t.1, p.209.
2. Article 2 al.11, ibid.
3. Article 3, ibid.
4. Article 2 al.12, ibid.
5. Article 15, ibid.
6. Ordonnance No.11/122 du 10 septembre 1952 rendant exécutoires au Ruanda-Urundi les dispositions congolaises concernant l'immatriculation des ressortissants du R-U, B.O.R.U. (1952), p.445.

In 1956 the Conseil Supérieur du Pays[1] expressed the wish that the Barundi should have their customary rights over land acknowledged and registered. A committee was set up to study the nature and content of customary rights over land so that:

> Chaque Murundi puisse avoit la possibilité de faire reconnaître et enregistrer ses droits sans discussion ni équivoque possibles selon des formules bien établies et proclamées officiellement, applicables le cas échéant par devant les Tribunaux indigènes.[2]

It may be stressed that while Europeans always speak of the evolution of customary rights over land towards a form of written individual ownership under written law, the Africans have asked for the acknowledgement of an existing right, namely individual ownership by the Barundi as set up by customary rules. The plan for registering customary rights over land never became reality because the members of the committee did not agree on a common definition of the nature and extent of the various customary rights.

B. The fate of customary land law in independent Burundi

On 11 July 1960, a décret was issued to the effect that the land law of Ruanda-Urundi be reorganized with a view to imminent Independence.[3] This décret was confirmed one year later by the well-known édit du Mwami No.5 of 10 August 1961.[4] This is the most important piece of legislation of independent Burundi dealing with land law. It is divided into three parts, namely:

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1. Conseil Supérieur du Pays, Procès-verbal, meeting held at Kitega from 9 January to 24 January 1956, p.55.
2. Conseil Supérieur du Pays, Procès-verbal, meeting held at Kitega from 18 June to 29 June 1956, pp.41-3.
3. Décret du 11 juillet 1960 sur le régime foncier in B.O.R.U. (1960), p.1136.
4. Document No.12.

(i) The transfer of jurisdiction over the administration of state-owned land from the Government of Ruanda-Urundi to the Government of Burundi;

(ii) Measures to bring uniformity to land law, and

(iii) The granting of freehold ownership to customary right-holders (tenure conversion by registration).

Jurisdiction over the administration of state-owned land, especially cessions and concessions of state-owned land to individuals or groups, is transferred from the Trusteeship authorities to the Government of Burundi (Article 1). The Government is empowered to delegate its powers to local authorities for grants not exceeding four hectares in the case of a new settlement, and one hectare in the case of an extension (Article 1 al.2 and 3). The administration of state-owned land is the responsibility of the Minister of Economy (Article 4). Later this was transferred to the Minister of Agriculture and Breeding.

Following this transfer of jurisdiction, a section of the édit acknowledges the existence of customary rights over land as well as of occupation rights, regularly allocated by competent authorities. No one can be forced to abandon or to transfer the rights he has over land if it is not for public purposes and for a just compensation paid in advance (Article 6 al.2). No cession or concession of land will be made without a preliminary enquiry establishing eventual customary or occupation rights. All texts concerning the procedure of vacancy enquiry had been explicitly abrogated by the décret of 11 July 1960 and the édit provided that specific regulations defining the enquiry procedure were to be issued by an ordonnance du Mwami. These measures have not yet been

promulgated. After the entering in force of the édit, many land grants were made either by the Department of Land Affairs or by commune authorities; their legality may be questioned, because in most cases no formal vacancy enquiry was conducted before the grant.

Article 6 al.1 of the édit states that all land which has not been granted according to written law is part of the State domain. This provision does not make much sense since by definition there is direct control by the State over land which is part of its domain, and Article 6 al.2 explicitly removes any direct control by the State over customary and legally occupied land, except in case of expropriation.

The third section of the édit deals with tenure conversion by registration; it makes it possible for customary or legal occupation right-holders to become owners according to written law by the allocation of a registration certificate of the title (Articles 9 and 10). Interested people may request registration by indicating all information about the land concerned and rights held over it. This request is made to the appropriate Minister, who acts as Conservateur des Titres fonciers, through commune authorities, and must be posted for 30 days at the commune office so as to allow any opposition to be made.

This édit has had practically no application as far as registration of customary rights over land is concerned. In Bujumbura a few people who had an occupation right on a lot (autorisation d'occupation) have asked for registration mainly for credit reasons, and have been granted their request. This failure may be attributed primarily to the lack of information concerning the édit itself. Only a few of the customary or legal occupation right-holders knew about the opportunity for registration. They did not see any advantage in it, since their title

provided them with complete security, and registration involved high land-surveying costs as well as registration fees. Furthermore, the credit system, with land as security, was, and still is, almost unknown to peasants, and consequently the need for a written title is non-existent. Besides this general lack of interest on the part of the peasants, the administrative service dealing with registration (Conservation des Titres fonciers) had been organized during the colonial era in the context of registration limited to titles held by non-Africans, and was not prepared to undertake the registration of all customary titles over land. There were not enough surveyors to measure the land concerned properly, while the sketch-plan which was to be drawn by the owner and approved by the commune was not very reliable.

Finally, the conditions and limits regulating the access to individual ownership, cited in Article 9 of the édit, have never been precisely enacted. Problems directly related to land tenure, which in the long run condition rural development, have not been dealt with, and it soon became obvious that a general application of the édit would cause trouble because there were no provisions against some of the best-known evils which impede rural development, such as land fragmentation or the formation of big estates with absentee landlords. There were also no provisions for the transfer of land, and family law, which has a direct influence on land law, was still entirely customary and not at all well defined. So the édit was ignored and land law pluralism continued in independent Burundi.

The idea of converting customary tenure into individual ownership under written law has not been abandoned. In 1967 a national committee was set up to draft land law bill. A bill including 173 articles was submitted,

the main points of which were that:

(i) All customary and occupation rights are to be abolished without compensation;

(ii) The State acknowledges that anyone holding customary rights over a given piece of land becomes its owner if it is developed;

(iii) The procedure for becoming owner follows that laid out in the 1961 édit du Mwami No.5;

(iv) Registration may be obtained for a maximum area of 25 hectares and a minimum area of one hectare;

(v) The registered land must be properly exploited;

(vi) The division of a registered holding be submitted to administrative authorization, and excessive subdivision is limited.

The purpose of this bill was to establish rules regulating land tenure in order to prevent a registration system which would have a bad impact on rural development in general.

For the last 15 years, the bill has been thoroughly examined by various committees and a new bill was drafted in 1978. Its provisions will be commented on in the last part of the present study.

C. Towards a definition of customary interests over land: the concept of nyen'itongo

The registration of customary rights over land is the key problem in bringing uniformity to land law in Burundi. The greatest difficulty encountered in the various attempts to register customary rights over land is the definition of their nature. Approaches have been varied: some authors have worked out definitions

from the principles of customary law as stated in proverbs and maxims, some from the application of customary land law in the dispute settlement process, others from the objectives the Government of Burundi has with regard to land development.

A good example of these varied approaches is given by the many definitions of the term itongo, 'land-holding', as proposed by the Conseil Supérieur du Pays in its 1956 meetings.[1] When it was asked to define with precision the content of the Kirundi terms pertaining to land law, the term itongo was at the centre of discussions, especially because there were some proposals for granting freehold ownership to itongo holders. Whereas some members of the Conseil Supérieur du Pays were in favour of limiting the definition of itongo to cultivated land, others made clear that customary law acknowledged benefit and control interests of the land-holders over their itongo, i.e., their whole land-holding, including cultivated and uncultivated land.

In 1955 the Conseil Supérieur du Pays stated that every Burundi family, in the restricted sense, occupies its own land-holding.[2] These holdings are of various sizes but are defined and limited by boundary markers, and may include cultivated land, fallow land, grazing grounds, swamps, streams, springs, etc. This customary land-holding is acknowledged as such by customary norms which are stated in the dispute settlement process. The right of "native occupation" (droit d'occupation) amounts to individual ownership.

In 1956, a committee was appointed to propose a definition of Kirundi terms pertaining to land tenure, especially of the term itongo,

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1. Conseil Supérieur du Pays. Procès-verbal, meeting held at Kitega, June 1955, p.23.
2. Ibid., pp.41-56.

which would take into account the land tenure situation of 1956 and problems caused by the lack of available land in the general context of a legal acknowledgement and registration of the rights over land held by the Barundi. The proposed definition was very different from the 1955 one: "the itongo is the land-holding of an individual entirely exploited, including permanently and seasonally cultivated land, banana groves, seasonal and non-seasonal fallow land, plots planted with woods and coffee plantations ;[1] it is bounded on different sides by other amatongo; if there are no definite boundaries, land close to the itongo with soil already improved by manure and nearby cultivation belongs to the itongo; such a stretch is called umuvumba. After first setting out this definition, the committee stated three principles concerning the acknowledgement of the rights over land of the Barundi:

(1) Any Murundi may claim ownership rights over the itongo as defined in the paragraph above. Any uncultivated land (ubunyovu) allocated to him by custom or a local authority returns to the community and must be considered as available land which can be allotted by the competent authorities to meet new needs.

(2) If a Murundi has recently received a land-holding, his rights will be recognized for the part already cultivated and on the portion available for cultivation by himself.

(3) People who possess written evidence (acte de notoriété) acknowledging their rights over land are to be considered as owners of that land.

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1. Ibid., p.42.

The proposals of the committee were widely discussed. Some members of the Conseil Supérieur du Pays suggested that such a reform of customary land law would be considered as a spoliation, i.e., a forcible and unjustifiable deprivation of people who know very well the extent of their rights over land, a good proof of this being the endless disputes concerning amatongo, settled by customary mediators or judges according to customary rules recognized by all. Furthermore, there was still some free land to be allotted to landless peasants. Finally, the projected spoliation would have been understood as a dictatorial measure, especially when the land-holding was precisely delimited. These proposals were put to the vote and accepted by 17 votes to 5, with one abstention. It was decided that the umuvumba would have a 50m depth.

The opponents of the proposals, especially Father Burije, the author of a thesis on Burundi land law[1], some time later submitted a note to their colleagues making clear their disagreement once again by stressing the outright violation of customary law and the consequent unjustifiable deprivation of land-holders. They also pointed out that the proposed exception concerning customary land-holders possessing written evidence of their title would affect only the educated people, especially the native political authorities who had been forced to ask for actes de notoriété for all their private holdings.[2] Ordinary people would be the first to be deprived, though they had acquired their holding through succession, gift or purchase, would defend it against any attempt at encroachment, and would transfer it to their children.

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1. R. Burije, Le Droit foncier au Burundi, sa statique et sa dynamique, p.111.
2. See p. 200.

The proposals were never applied, mainly because amatongo with large portions of uncultivated land were rare, and because the proposed measures would have affected many small land-holders. It must be noted that the Land Law Bill currently under study by the Government of Burundi takes up the definition of itongo found in the 1956 proposals of the Conseil Supérieur du Pays:

> L'Etat reconnaît à toute personne physique ou morale exercant à l'entrée en vigueur du présent Décret-Loi, soit personnellement, soit par personne interposée en vertu d'un titre coutumier ou en vertu d'une autorisation délivrée par une autorité compétente, des droits privatifs sur le sol, sur des terres non appropriées selon le législation de droit civil, un droit actuel à devenir propriétaire sur les parcelles ou terrains mis en valeur, d'une manière effective et continue, soit par des constructions en matériaux durables ou semi-durables, soit par des cultures industrielles ou vivrières, des plantations ou des reboisements.[1]

The many views and proposals concerning the interpretation of the term itongo illustrate the various approaches to the question of land tenure in general. The work of the Conseil Supérieur du Pays was hampered by a basic methodological error: instead of distinguishing between the principles of customary land law, their application in the dispute settlement process and the planned land law reforms to suit the objectives of development of present-day Burundi, the whole discussion started from a definition of the term itongo. including what an itongo needed to be in order to meet the development objectives of the country, and ignoring its definition by customary law.

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1. Article 4, Projet de Décret-Loi sur le Régime Foncier, document No.17.

So what kind of interests over land does the concept of itongo imply in contemporary Burundi, according to the principles of customary law as applied in land disputes? What is the the right over land which during the colonial era was called propriété coutumière by the Barundi, and droits d'occupation by most European writers? Some comments will be made about (1) its nature; (2) its origins; (3) its proofs, and (4) its loss.

(1) The nature of the interests over land held by the nyen'itongo

Most rural Barundi, and since the 1977 abolition of land-clientship nearly all of them, are ben'itongo (plural of nyen'itongo), holders of an itongo. Nyen'itongo is also expressed in the term inaryo (plural beneryo). With respect to the land under consideration, two verbs define the powers of the nyen'itongo, i .e.:

(i) Kuganza, which, according to Rodegem, means être maître, être propriétaire, disposer de, gouverner,[1] and in English may be translated as "to have full authority and control over something or someone" and

1. F. Rodegem, Dictionnaire Kirundi-Français, p.102.

(ii) Kugaba, which, according to Rodegem, means être maître, commander, posséder, disposer de ses biens,[1] and has more or less the same meaning as kuganza but implying a less complete control.

The powers of the nyen'itongo in present-day Burundi imply:

(i) Benefit of the itongo i.e., the use of land and the enjoyment of its produce;

(ii) Control of the use of the itongo as well as of the enjoyment of its produce; the nyen'itongo makes arrangements for the allocation of land for cultivation purposes (kurima, to cultivate) among the members of his family and strangers; he is free to make any allocation within the limits of customary law which requires certain types of behaviour (for example, the father has specific obligations towards his children and his wife as far as land allocation is concerned);[2]

(iii) Control of the disposal of the itongo; the nyen'itongo may convey his interests over land by means of a will, gift, sale or pledge, again within the limits of the principles of customary law which requires certain types of behaviour on the part of land-holders in using their privilege of disposal.

A nyen'itongo has benefit and direct control interests over land and all which grows on it as stressed in the following cases:

Case No.223/C/78 (Tribunal de Résidence de Bukeye, 18.8.1971)

X has bought a coffee plantation from Y. Nevertheless the latter goes on collecting coffee beans on the plot sold. X consequently files an action against Y. He argues that he has bought the land

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1. Ibid., p.94.
2. See p.236.

as well as the coffee trees and that Y has no more right to collect coffee beans. The court condemns Y's trespassing because the sale of land has resulted in the conveyance of control and benefit interests over land to the buyer. One cannot sell land and keep the trees for himself. Customary legal principle cited (coutume citée):

Uwuguze ikintu ntikigabanywa,

'When you buy something, that object cannot be reduced.'

Case No.1828/C/55 (Tribunal de Résidence de Bukeye, 2.2.1961)

X claims that several years ago he received a holding from the chief after its previous owner had left. Y claims a right over the coffee trees which are on X's holding, arguing that the chief had given them to him separately. The court states that Burundi customary law does not acknowledge separate control interests over land and trees, thus confirming the rights of the claimant. Customary legal principles cited (coutumes citées):

Uwuhawe isi aba ahawe nibiri kuri yo,

'When you receive land, you receive what is on it';

Uwuhawe itongo aba ahawe ibiri kuri ryo vyose biriteyeko,

'When somebody receives a holding, he receives everything planted on it.'

2. The origin of the interests over land held by the nyen'itongo

There are four main ways to acquire a direct control interest over land, i.e.:

(i) By means of inheritance, the most common way of becoming nyen'-tongo; a holding thus acquired is called itongo ry'umuryango, 'the holding of the family';

(ii) By means of allotment by political authority; this is the original way by which all land has been acquired by ben'itongo;

a holding thus acquired is called itongo ry'umuheto, which literally means 'the holding of the bow', if the grant consists of land which is not yet cleared;

(iii) By means of contract (gift, sale or pledge), the holding acquired as the result of a gift being called itongo ry'-ingabirano, 'the holding of the gift'; that acquired by means of sale is called itongo ry'irigurano 'the holding of the purchase';

(iv) By means of long occupation; in traditional customary law it was impossible for someone to acquire a direct control interest over land without a form of conveyance because the concept of unoccupied land was unknown; long occupation, as a way to acquire a holding, is a concept which was introduced during the colonial era by several court decisions, and, in 1977, it was legally acknowledged.[1]

3. The proofs of the interests over land held by the nyen'itongo: the customary procedure by which one becomes nyen'itongo

Witnesses of the procedure by which a direct control interest over land is acquired bring evidence in case of conflict over the nature and extent of the interest. Acquisition of land by way of inheritance, allotment by political authority, gift or sale, is always made through a formal procedure involving several witnesses. This customary procedure consists of (a) a speech; (b) the sharing of beer, and (c) the marking of the limits of the holding with boundary markers:

(a) A speech is made by the interested parties explaining the terms and conditions of the acquisition of the interest. The speech may be made by the representative of the political authority, by the father, by the vendor or by the umukuru w'umuryango, the head of the local kin group presiding over the partition of estates

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1. See document No.15.

in case of intestate succession, in short by the person who is responsible for the granting of the interest.

(b) Beer (inzoga) is shared by parties and witnesses. The main kinds of beer shared in the context of conveyance of interests over land that have been noticed during fieldwork, are:

- Inzoga y'inyugururanzu, 'the beer to open the house', is given by someone who has left his land-holding which has been taken over by someone else. When the original land-holder comes back, he offers a beer to the occupier of his holding to acknowledge his direct control interest and to thank the occupier for having taken care of the holding.[1]
- Inzoga y'agataka literally means 'the beer of the little plot', and is offered by the tenant in case of land-clientship, renting and loan.

Case No.21/C/71 (Tribunal de Résidence de Bukeye, 9.9.1965)
A has allocated part of his holding to B in the context of land-clientship. B argues that he received the land under consideration from a chief and not from A. As witnesses maintain that they have drunk inzoga y'agataka offered by B to A every year, the court decides that B is the land-client of A who is the only nyen'itongo.

Case No.330/C/67 (Tribunal de Résidence de Bukeye, 24.4.1964)
A claims that he has bought a piece of land which he later rented to B for a monthly sum of 50 Fbu. When B has paid 300 Fbu, the price A had paid for the piece of land, he claims that he bought the land under consideration with money borrowed from A, and that the monthly 50 Fbu were instalment payments of the debt. As A

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1. Case No.87/C/76 (Tribunal de Résidence de Bukeye 30.4.1970).

cannot produce any witness who has drunk inzoga y'agataka offered by B, as is the practice when a renting contract has taken place, B wins the case and is acknowledged the status of nyen'itongo.

Customary legal principle cited (coutume citée):

Ubwatsi bw'ubutizanyo bwamye butangirwa inzoga y'agataka,

'One has always given inzoga y'agataka for a plot loaned.'

- Inzoga y'agacabuguzi or inzoga y'ubuguzi are two terms meaning 'the beer of the sale'.

Case No.2611/C/61 (Tribunal de Résidence de Bukeye, 26.3.1963)

A claims that he bought a piece of land from B who asserts that no such sale has ever taken place. As A cannot bring any witness of the sale who shared inzoga y'agacabuguzi, the court does not acknowledge the existence of the sale. B is the only nyen'itongo.

Customary legal principle cited (coutume citée):

Icemeza ko ubuguzi bwahabaye ni inzoga y'agacabuguzi,

'The proof that a sale has taken place is inzoga y'agacabuguzi.'

Case No.155/C/77 (Tribunal de Résidence de Bukeye, 21.1.1971)

The paternal uncle of B has bought some land from him while B's mother was away. The mother, who is a widow, files an action in court arguing that she is the guardian of the family property before it is partitioned among her husband's heirs. She is consequently the only person entitled to conclude a sale. She says: "I never drank inzoga y'ubuguzi, therefore I refuse the sale". The court decides that she is right and the sale is declared void.

- Inzoga y'ubushikiriza is the beer acknowledging the grant by a

political authority which is actually made by a representative of the authority concerned, called umushikiriza.

Case No.306/C/70 (Tribunal de Résidence de Bukeye, 1965).

A was sub-chief and as such acted several times as the representative of the chief in the granting of land. He comes to court arguing that the beer that B, one of the grantees, gave him was not inzoga y'ubushikiriza but rather inzoga y'agataka acknowledging a land-clientship agreement. Witnesses who shared the beer declare that it was inzoga y'ubushikiriza. B is consequently confirmed by the court in his status of nyen'itongo.

- Inzoga y'ingabire means 'the beer of the gift', and acknowledges a gift of land.
- Inzoga yo kuraga umuryango, meaning 'the beer of the will', is drunk by family members, witnesses and the testator when the latter pronounces his will.
- Inzoga y'umuryango means 'the beer of the family' and normally acknowledges the lending of land among relatives.

It must be stressed that the sharing of beer is an important part of all social activities in Burundi, including the ones with a legal dimension. In the process of settlement of a land dispute, the first question asked to witnesses will be: 'Which beer did you drink when you acted as witness to the contract between the parties to the dispute? Did you drink the beer of the loan, the beer of the sale, or the beer of clientship?'

(c) The marking of the limits of the holding takes place, normally immediately after the speech and the sharing of beer. It finalizes the conveyance of a direct control interest over land. There are

several terms which refer to boundaries, such as akarimbi, urubibe, umufuri and umuvo.

*Akarimbi - akarimbi means any artificial boundary marker indicating a limit;[1] the expression gushinga akarimbi refers to the action of actually planting boundaries in the ground by the abashingantahe in case of land dispute, sale, partition or allotment.

*Urubibe - imbibe, also meaning any artificial boundary marker indicating a limit is synonymous with the term urugabano - ingabano; the expression guca urubibe also refers to the action of actually planting boundaries in the ground.

*Umufuri - imifuri means the edge of a land-holding, and, by extension, its boundaries;[3] the verb gufurura means to plant boundaries in the ground.

*Umuvo - imivo means a man-made ditch or drain separating fields;[4] in swamps, for example, it is often used as a boundary marker.

In former times, when land was plentiful, boundaries were very general, usually special features of the landscape, such as a hill or a river. Sometimes land was even allotted without any specific definition of the boundaries of the grant; establishing boundaries became necessary only when other people settled in the area. In present-day Burundi, on the contrary, boundaries are the most

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1. F. Rodegem, op.cit., p.358. He translated akarimbi by the French word piquet which means post, while akarimbi, according to informants, is a term referring to all artificial boundaries.
2. Ibid., p.34.
3. Ibid., p.90.
4. James and Fimbo, op.cit., p.192. They stress that in Tanzania the courts have, on many occasions, held that the planting of permanent trees and the act of fencing land are, in customary jurisprudence, acts tantamount to ownership and are inconsistent with rights less than ownership.

evident proof of a direct control interest over land,[1] because land which has been rented, loaned, or allocated in another way is never bounded.

Artificial boundaries are generally trees or plants, and they must have the following characteristics:

(i) They must be trees or plants whose roots go way down in the soil and are difficult to remove;

(ii) They must be trees or plants of a useless nature in order to avoid possible disputes among neighbours regarding use (for instance, a eucalyptus tree is not recommended because its wood may be used, a situation which may lead to a dispute between neighbours about the control of the tree; bamboos, for the same reason, also make bad boundaries);

(iii) They must be fast-growing trees or plants so as to become visible proofs of direct control interests over land as quickly as possible, and

(iv) They must be trees or plants which are not detrimental to nearby cultivation.

The main trees and plants used as boundaries are:

- umunyari - iminyari called in botanical terminology Euphorbia tirucalli L.;[2]
- inganigani - inganigani called in botanical terminology Dracaena afromontana Milder;[3]
- umuravumba - imiravumba called in botanical terminology Moschosma multiflorus (Hochst.) Benth in DC;[4]

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1. F. Rodegem, op.cit., p.536.
2. Ibid., p.295.
3. Ibid., p.101.
4. Ibid., p.342.

- umurinzi - imirinzi called in botanical terminology Erythrina.[1]

Displacement of boundaries is a criminal offence according to Article 115 of the Burundi Criminal Code, and the guilty party may be sentenced to jail.[2] Many land disputes are about boundaries, and one of the main tasks of abashingantahe, as well as of judges, is to set up boundaries between neighbours. This task is expressed by several customary legal principles such as abapfuye akarimbi baragashingirwa, 'When people fight about boundaries, boundaries will be set up for them by abashingantahe', and abapfuye urubibe baragororerwa, which has the same meaning. Another well-known maxim is abashatse urubibe bararugaburirwa, 'People who ask for a boundary to be set up, will get it'.

Besides customary proofs of a direct control interest over land, there are several written documents to serve as evidence, such as the written contracts of sale or gift, the document issued by the commune in case of allotment (urupapuro rw'ubugabire) and the acte de notoriété issued by the tribunal de résidence in case of allotment by administrative authorities, of sale and of gift.

4. The loss of the interests over land held by a nyen'itongo

In pre-colonial Burundi, the loss of a direct control interest over land was primarily conceived as a sanction against failure to comply with various social and political commitments, such as the transgression

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1. Ibid., p.361.
2. Code pénal du Burundi, in Codes et Lois du Burundi, p.178, Article 115, says: "Seront punis d'une servitude pénale de 5 ans au maximum et d'une amende de 25 à 1000 francs ou d'une de ces peines seulement ceux qui, sans y être valablement autorisés, auront enlevé ou déplacé et ceux qui auront méchamment endommagé des bornes délimitant des terres légalement occupées par eux ou par autrui".

of taboos and serious crimes.[1] In colonial Burundi, customary courts progressively acknowledged the notion of loss of the status of nyen' itongo as a result of non-exploitation or bad exploitation of land. At present, this concept is at the centre of discussions on the reform of land law. Loss of direct control interest over land, through the procedure of expropriation for public use, is also legally acknowledged. The many ways of losing direct control interests over land are discussed in the various chapters dealing with the holders of customary interests over land.

Besides the rights over land held by ben'itongo, there are many other benefit and control interests recognized by customary law. They range from political or family control over land development and transfer to specific benefit interests such as, for example, cultivation, grazing, collecting of firewood or right of way.

Holders of customary interests in land may be politico-administrative authorities, groups and individuals.

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1. See p.178.

Chapter 9 : Politico-administrative Authorities as Holders of Customary Interests over Land

A. Interests over land held by political authorities in pre-colonial and colonial Burundi

In pre-colonial as well as in contemporary Burundi, political power has always been tightly linked to control over land. With time, the forms of this control have changed. Before the colonial era, the control over land allotment was one of the foundations of political power since it was the most common way to attract new subjects under one's rule, and it was primarily conceived as a means to reinforce the respective strength of chiefs in the constant struggle which was the motor of political life. With the arrival of Europeans and the progressive transformation of political authorities into civil servants, managerial control over the development and exploitation of land resources became the most apparent expression of political authority. Economic considerations prevailed: the Burundi were forced to cultivate certain crops in order to avoid famine, to plant eucalyptus trees, to dig anti-erosion ditches and to grow cash crops. At present, Burundi, which has become part of the world economy, derives its main source of power from the currency brought in by agricultural exports. Land is the country's main wealth and its development and conservation are among the foremost preoccupations of the Government. When studying the customary interests over land held by political authorities, an historical approach is therefore of particular relevance. Furthermore,

it is indispensable in order to understand the present-day ordering of land tenure in Burundi: even though the monarchy was abolished in 1966, the various interests granted by native authorities (the king and chiefs) according to custom are still referred to in many land disputes because most interests in land hark back to the royal period, and stem from the privileges which were held by native authorities in respect to land.

As the many versions explaining the origins of Burundi as an organized kingdom have already been summarized,[1] it is only relevant to recall here that before the colonial era the Mwami, the paramount ruler of Burundi, administered his realm through appointed chiefs who were either members of his own family (abaganwa) or of Tutsi or Hutu origin (abatware b'umwami). Some territories were also handed to court officials with ritual functions.

The generic term referring to a chief directly subject to the Mwami was umutware-abatware (from the verb gutwara, 'to govern'). The abatware in turn appointed sub-chiefs throughout the territories they ruled. A sub-chief was called icyariho-ivyariho, and his main task was to supervise the collection of tribute and the performance of work duties due to the chief. For every hill for which he was responsible, he appointed a representative, in central Burundi called umuhamagazi-abahamagazi (from the verb guhamagara, 'to call aloud'), and in the east, umurongozi-abarongozi (from the verb kurongora, 'to head'). This representative was in charge of the implementation of the sub-chief's orders among the abanyagihugu, the subjects who held no direct political responsibility. It must be noted that all these political authorities played an important rôle in the mediation and adjudication of disputes, since there were organized courts from the hill level up

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1. See p.62.

to the Mwami. Political offices assumed a different character according to their level, but all were conceived as rewards for the good personal relationships between the grantor and the beneficiary.[1] The strength of these relationships depended upon many factors, such as descent, affinity, cattle-clientship, courtship, military feats and ritual importance at court.[2] Often sons took over their father's functions, but there was no institutionalized rule of succession as far as political offices were concerned. Lower political functions had a rather stable character, somewhat similar to that of a civil servant. In fact the task of sub-chiefs and of their representatives on hills was not so much to rule as to check that the ruler's orders were properly applied. At higher levels, political offices implied the transfer of jurisdiction over subjects living on a determinate territory, as a counterpart of the beneficiary's loyalty to the grantor. In practice these territories had no clear boundaries and were a reflection of the power play among chiefs rather than set administrative units. It was common practice for chiefs to encroach upon the territory of their neighbours (gufururа igihugu, 'to nibble at the territory of neighbouring chiefs'). The Mwami generally did not intervene, because these contests often increased his overall power; he generally acknowledged the removal of a chief when he had been ousted by one of his neighbours.[3] He took an active part in the power play among chiefs when he wanted a place for one of his sons or courtiers. In such a case the chief concerned could accept the Mwami's decision and was usually allowed to keep part of the territory for himself; he could also refuse and then

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1. A. Trouwborst, "La base territoriale de l'Etat du Burundi ancien", in R.U.B. (1972), pp.249-51.
2. E. Mworoha, op.cit., p.208. He states that kinship links and personal ties are the main factors in the process of political appointment.
3. When a chief was removed from office, the term gutahira 'to fall from a position', was applied if he was umuganwa; if he was not a umuganwa the term gukura, 'to force someone to move', was applied.

be ousted by force and removed from office.[1] A chief often ruled over different territories located in various parts of Burundi; some were held by virtue of succession, some had been given by the Mwami. In this connection, J. Vansina gives the example of Chief Ndivyare, a son of Mwami Ntare, who held political control over the whole of Bweru, as well as parts of Kilimiro and Mugamba.[2]

The importance of clientship in Burundi society, and especially in the process of appointment to public office, has led many authors to label pre-colonial Burundi a feudal kingdom and to use a vocabulary commonly associated with European feudalism in order to describe some of the country's institutions. The Mwami has often been described as a supreme lord commanding a handful of great vassals endowed with estates who in turn ruled over a mass of serfs. The territories held by chiefs have been called 'fiefs' while the land-holdings of plain subjects have been equated with servile tenures for which a yearly rent in kind had to be paid. The decentralized political organization of late nineteenth-century Burundi and the weakness of royal authority at that period have been compared with the situation prevailing in Europe during the ninth century, whereas during the later years of the Belgian rule the term 'feudalism' was used to describe institutions linked with personal dependence and implied backwardness in the pejorative connotation of the word.

The many uses of feudal vocabulary in Burundi reflect in a way its various meanings when applied to Europe: feudalism may relate to a type of society, to a private agreement between individuals, to an economic system or to several historical periods. As a type of society

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1. E. Mwohora, op.cit., p.140.
2. J. Vansina, La Légende du Passé. Traditions orales du Burundi, p.109.

it is normally characterized by the fundamental rôle of personal dependence relationships as the basis of political organization, by a class of warlords holding military and economic power and by the use of land as the essential element materializing the personal dependence relationship, a use implying a hierarchical subdivision of interests over land. This hierarchy of interests (i.e., the superior ownership of the lord of the fief co-existing with the inferior estate of the tenant) characterizes feudal land tenure along with the concentration of land wealth in the hands of a few people. As a matter of fact, in Western Europe, from the eighth century onwards, a progressive concentration of the land wealth took place: a few lords gained direct control over large estates, parts of which were then allocated to vassals linked to them by personal dependence relationships. The vassals in turn allocated tenure to peasants who paid a rent in kind to their lord. Free holdings, _alleux_, then disappeared in most parts of the continent, and in some areas, for example England after the Norman Conquest, the king became the sole owner of the country.

It is of interest to examine whether this association of personal dependence with the granting of a landed benefit, one of the essential features of feudalism as a type of society, was known in pre-colonial Burundi. As explained above the main consequence of control over land by political authorities in pre-colonial Burundi was its allotment to people who then became subjects. This was also one of the main policies of European feudal lords to increase their power. Furthermore, as in feudal Western Europe, personal dependence permeated all aspects of pre-colonial Burundi social life. R.P. van der Burgt has rightly noted that _gusaba_, 'to ask', and _guha_, 'to give', were among the main

terms characterizing Burundi society at the turn of the century. But the link between personal dependence and the granting of land by a political authority, essential in feudal society, was not widespread in pre-colonial Burundi. The material benefit granted by a lord to his client was most often a cow and rarely land. Some instances have however been found in which political control over land and personal dependence were tied. An informant stated that it was quite common in pre-colonial Burundi for a chief to allot grazing grounds as a complement to a cow given in ubugabire, especially in populated areas where grazing ground was scarce. It is also well known that when clients of a political authority immigrated to his territory they were immediately allotted a land-holding as a result of clientship. J. Salmon writes that in Bushi, an interlacustrine state situated on the Zaire coast of Lake Kivu, oboshobole, cattle-clientship, is the normal complement to land allotment.[1] If clientship ends, interests over land held by the client revert to his lord. A. Trouwborst underlines that, in Burundi, chiefs and the Mwami distributed land in order to create a group of clients and favourites, just as they did with cows through ubugabire agreements.[2] The main difference between the two systems of clientship lay in the fact that a client who had been allocated land was better controlled by his lord than a ubugabire client who could leave with the loaned cow at any time.

Before making a comparison between ubugabire clientship and allotment of land by political authority, it should be realized that the allotment of land was directly linked to the political structure, in which

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1. J. Salmon, "Le régime foncier du Bushi", in (1953) P.A.C., p.281.
2. A. Trouwborst, "L'organization politique et l'accord de clientèle au Burundi", in Anthropologica, Ottawa, vol.4, 1962, No. 1, p.25.

the relationships between rulers and subjects were of a different nature than those linking lords to clients. Even when they distributed land to their own clients, a widespread practice, political authorities acted primarily as territorial authorities and subsequently as lords.[1] Ubugererwa, land-clientship proper, resulting in the transfer of benefit interests over a piece of land by a nyen'itongo to a petitioner, is clearly distinguished from the allotment of land by political authority. A chief never considered the people to whom he had allotted land as his land-clients, his abagererwa, even though they were his cattle-clients; he could have land clients on his own holdings; his relationship with them was of a completely different nature than that he had with his subjects.

It must also be emphasized that there were many petitioners asking for a holding who received land from political authority without becoming clients. In fact, personal clients of the Mwami, chiefs and sub-chiefs, were in the minority. It might have happened that the breaking of a clientship agreement between a political authority and one of his subjects resulted in the latter being deprived of his property; eviction was not the result of the breaking of clientship but rather the result of spoiled relationships between the ruler and the subject. The latter was often harassed, and a motive for his expulsion was usually found, such as asking him to pay too heavy a tribute or accusing him of treason.

There was another effect on clientship links between political authorities and subjects regarding the political allegiance of the

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1. A. Trouwborst, op.cit., p.23.

latter: the clients of a political authority were sometimes called abishikira, 'the ones who do not need intermediaries to reach the court' (from the verb gushika, 'to enter without difficulty'). It was a coveted position because such clients were directly dependent on their lord without the need to obey lower political authorities. The Mwami could enter an ubugabire agreement with a simple subject, thus freeing him from his obligations towards the chief and the sub-chief. The umugabire was directly subject to the jurisdiction of the Mwami, and was enrolled in his army, and paid tribute only to him. The situation was the same for a client of a chief living in a sub-chief territory. Such cases were frequent in the Bukeye area, even during the colonial era: for example, an informant who was a cattle-client of the chief did not get along well with the local sub-chief; he was awarded the privilege of coming directly under the chief's jurisdiction without leaving his holding. The 1926 report on the administration of Ruanda-Urundi states that abagendanyi, 'the chief's followers' (from the verb kugendana, 'to go with') and intore, 'the chief's dancers and pages', usually received a cow in ubugabire when they married and were consequently exempt from the normal political obligations towards the local sub-chief as they were directly under the jurisdiction of the chief.[1] It is added that this situation was especially common in the east of Burundi and resulted in a conflict of authority; sub-chiefs used to complain that some of their territorial subjects were removed from their authority. The Mandate administration understood that this practice was dangerous for the political stability of the country and

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1. Rapports annuels sur l' Administration belge au Ruanda-Urundi, Ministère des Colonies, Bruxelles, 1922-1960. (1926).

one of its first achievements, in the context of the politico-administrative reorganization, was to abolish all the privileges held by the clients of political authorities. Cory and Hall and J.S. Clark underline the dangers of a similar situation, which occurred in Bugufi, an area formerly part of Burundi: intore, Mwami retainers (in Bugufi, the Mwami is the ruler of the area, a chief who formerly owned allegiance to the Mwami of Burundi) were not subject to local headmen but directly to the Mwami.[1]

Although personal dependence was an important feature of pre-colonial Burundi society, it cannot be considered as the foundation of the relationship binding political authorities to their subjects. An individual and his family were primarily subjects of a political authority because they lived on a given territory, and land allotment did not in itself create personal dependence.

Concerning the applicability of the feudal model of land tenure to Burundi, it will be stressed below that the Mwami held a general control interest over land, partly deriving from his mythical powers. of a different nature from the direct control interests of ben'itongo. While the political hierarchy ranging from Mwami to subject was evident, there was no proper hierarchy of rights over land, but rather the co-existence of different interests held by various people over the same piece of land. The political structure was the framework within which these rights operated.

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1. R. de Hall and F. Cory, "A study of land tenure in Bugufi, 1925-1944", in (1947), T.N.R., 24, p.29. J.C. Clark, "A note on the Ntore system in Bugufi, Biharamulo District", in (1938) T.N.R., 5, pp.76-8.

The rules of the political game changed considerably during the colonial era: political territories were delimited exactly, and appointment to political functions was made subject to the approval of colonial authorities; it was conceived as a reward for "enlightened behaviour", as understood by the Belgians. The rights and obligations of native political authorities were legally stipulated in 1943 in the ordonnance No.347/AIMO.[1] They became more like civil servants than political leaders. In respect of land, their political rights, droits politiques, over the territory which they ruled, were acknowledged by the colonial authorities. These rights have never been set out in detail by any previous author: they particularly included the right to allot land not yet granted, and the right to take properties abandoned or left without heirs. Political rights were exercised only over land held under customary law; domanialisation resulted in the loss of the political rights of the native authorities, a loss which was compensated for by certain sum of money; the procedure of domanialisation provided compensation for political rights. On the eve of Independence a conflict arose in this respect between the Mwami and the Belgian authorities concerning the status of Usumbura: the Belgians asserted that, since the territory of Usumbura had been entirely domanialisé and since native political authorities had received compensation for the loss of their native rights, the Mwami did not hold any right of sovereignty over the area concerned; consequently Usumbura was not to be part of independent Burundi. The native authorities reacted with vigour to the Belgian assertions, and the Mwami was finally recognized as the ruler of all Burundi.

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1. Ordonnance législative No.347/A.I.M.O. sur l'organisation politique indigène au Ruanda-Urundi (B.A., p.1467)

1. Forms of native political control over land

In pre-colonial and colonial Burundi political control over land was exercised in the functions of (a) the allotment of non-granted land, (b) the control over abandoned land, (c) the control over land left without heirs, (d) the confiscation of land as penalty, (e) the collection of tribute and the right to exact corvees from subjects, (f) the control over the legal ordering of land tenure through the settlement of land disputes, and (g) the control over the conveyance of direct control interests held by subjects.

(a) Allotment of non-granted land to subjects

The most evident form of political control was the privilege held by political authorities of allotting non-granted land to individuals or families who had requested it, or simply as a gift. The allotment resulted in the conveyance of direct control and benefit interests to the grantee and his heirs. Allocation implying only the conveyance of a benefit interest was never practised by political authorities, except in the case of the allocation of a plot to a land-client on their own holdings.[1] There were three kinds of grants, viz., (i) a grant of cleared land (itongo ry'umuheto), (ii) a grant of uncleared land (itonto ry'inyicire), and (iii) a grant of grazing grounds made to cattle-owners (itongo ry'ibuga).[2]

The conveyance of control and benefit interests was made at the ceremony of ubushikiriza, in which a representative of the political

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1. According to G. Malengreau, periodic rentals of land by political authorities seems to have existed in Ruanda. See, G. Malengreau, "Les droits fonciers...", I.R.C.B. (1949), pp.5-260.
2. For more information on itongo ry'umuheto, see p.357. For more information on itongo ry'inyicire, see p.344.

authority expressly indicated the boundaries of the holding, which had been granted, before witnesses.

In 1943, Article 55 of the ordonnance 347/AIMO legally acknowledged the power held by chiefs to allot non-granted land, and, from 1945 on, the drawing up of an acte de notoriété become compulsory in cas e of land grant by a chief.

Confiscation of a holding held by an individual or a family in the prelcolonial period, was legally acknowledged solely as a sanction.[1] Simons writes that a political authority had no right to take over granted uncultivated land from someone except when that person had not complied with his social and political obligations.[2] Europeans brought with them the notion of managerial control over land by the administration. Native political authorities then became empowered to allot all unexploited land to people in need, even if it had already been granted. This trend started in 1939 when the Conseil du Mwami authorized chiefs to distribute land not exploited at the time to people in need.[3] This decision was never implemented to any large extent because it openly ran against the principles of customary law. It especially hurt the political authorities themselves whose families often held large tracts of undeveloped land. Simons, explaining the decision, brought up the problems of its application:

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1. See p.179.
2. E. Simons, "Coutumes et institutions des Barundi", p.221.
3. Procès-verbal de la réunion du Conseil du Mwami (juillet 1939),

> La terre en friche, celui qui n'en fait pas usage, sera averti à plusieurs reprises par son sous-chef. Le chef interviendra et si ses observations s'avèrent vaines, il lui reprendra la partie d'itongo laissée inculte pour en doter un homme dans le besoin; la coutume ancienne reste toutefois tellement ancrée dans les esprits que cela n'ira pas sans palabres: le Mwami lui-même sera harcelé et pour un bout de terre dont on n'avait cure autrefois on s'estimera lésé et l'appareil judicaire sera mis en branle.[1]

Several decisions by the native courts of Ruanda and Urundi also acknowledged this practice; in that respect, the following excerpt from a decision rendered by a chiefdom court of Ruanda, a country which followed the same colonial policies as Burundi, is interesting:

> Le sous-chef est en droit de céder une propriété non occupée si les ayant-droits s'avèrent incapables de l'entretenir.[2]

(b) Control over land abandoned by subjects

A holding which had been abandoned was called itongo ry'umusibu. Reasons for abandoning one's holding were numerous: famine, the hatred and continuous harassment of a political authority, a better opportunity to find more fertile land elsewhere and the desire to settle close to one's clientship lord were the most frequent reasons. During the colonial period many people left their holdings to settle in urban districts or in the less populous areas of the country.

There were two kinds of abandonment, namely (i) temporary, and (ii) definitive.

(i) In case of temporary abandonment due to an extraordinary situation such as famine (gusuhuka, 'to abandon one's holding because of famine'), the nyen'itongo generally returned to his

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1. Simons, op.cit., p.221.
2. Jugement No.120 in (1948) B.J.I.R.U., 5, p.272.

holding later. He had the right to claim it back from the political authority (gukomoza itongo). If the holding had been granted to somebody else in the meantime, another piece of land was alloted to the returned emigrant.

(ii) In case of abandonment without intention of returning (émigration sans esprit de retour), the holding usually passed under the control of the emigrant's family unless confiscation took place; according to informants, political authorities confiscated abandoned land when a criminal action had been the cause of the emigrant's departure and when the emigrant had no family. Simons however asserts that the emigrant's family had no right of any kind over abandoned land, which immediately passed under the control of the political authorities.[1] His statement has been corroborated by a decision rendered by a Urundi court which specified that holdings abandoned by people who had left a chiefdom with no intention of returning passed under the control of the chief and not to the emigrant's family.[2] This decision should be understood in a political context: a subject who left the chiefdom represented a loss for the chief; from the latter's point of view it was more advantageous to allot the abandoned holding to a new subject than to have it pass under the control of the emigrant's family.

With time, political authorities were authorized to take over abandoned land only after the land under consideration had

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1. E. Simons, op.cit., p.221.
2. Jugement No.86, du 7 avril 1945, Tribunal de la Chefferie Barusasiyeko, in (1948) B.J.I.D.C.C., p.271.

actually been abandoned during a given period of time without being claimed by anyone.[1]

(c) Control over land left without heirs

According to Burundi customary law, if there were no heirs to a landed property, it automatically came under the direct control of political authorities.[2] Article 36 of the ordonnance No.347/AIMO legally endowed native political authorities with the right to take control of landed estates left without heirs (successions en déshérence).[3]

(d) Confiscation of landed property as penalty

A number of authors have stressed the lack of security of land-holders with regard to the power of confiscation of land held by political authorities. Van der Burgt writes that a whim of the chief was a good enough reason for a land-holder to be evicted,[4] while it has often been asserted that subjects were constantly exploited and plundered by their rulers. Cattle were confiscated at the will of political authorities, and the ever-present threat of eviction from their land-holding weighed upon the ben'itongo. In that respect the 1948 report on the administration of Ruanda-Urundi states that:

> L'indigène était essentiellement usufruitier, son droit d'occupation essentiellement précaire ne relevait que du bon plaisir du Mwami ou de ses délégués.[5]

Such affirmations are often linked to the aforementioned rights of ownership of the Mwami over all the wealth in his kingdom, including land.

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1. In 1965 this period was fixed at three years. See R.J.R.B., 5 (1965), p.26.
2. B.J.I.R.U. (1947), 3, p.153.
3. B.A., p.1467.
4. R.P. Van der Burgt,
5. Rapport (1948) op.cit., p.80.

Yet the same authors most often state that confiscation actually took place only when the nyen'itongo was umumenja, which means 'traitor', or umugarariji, which means 'he who rebels against authority by not fulfilling his obligations as subject or by committing a crime'. Discussing land eviction, Simons states that security of tenure of the nyen'itongo was ratified by custom so that confiscations were not at all a daily practice.[1]

In order to understand the limits of land confiscation by political authority in pre-colonial Burundi, it is necessary first to analyse in depth the concept of kunyaga, which means 'to deprive someone of his wealth', 'to confiscate', and then to explain the political and legal limits to the arbitrary actions of political authorities.

(i) The concept of kunyaga

Kunyaga is originally a term referring to cattle; it literally means 'to take back cattle given in clientship', an action which was understood as a penalty for bad behaviour in the context of cattle-clientship. Resort to the court was allowed in case of unjustified kunyaga.

In a more general sense kunyaga refers to the act of confiscation of cattle, land or other goods by political authorities. There are other terms for the same action, such as kwambura, which means 'to deprive someone of his goods by force' (it is used to describe robbery), gusohora, which means 'to chase someone by force from his holding' (it is used especially in the land-clientship context), and gukura, which means 'to force someone to move'.

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1. E. Simons, op.cit., p.220.

The distinction between justified or legal and unjustified or illegal kunyaga is important. One of Burije's main arguments in his thesis on land law is based on this distinction:

> Quant à la faculté avec laquelle le chef pouvait faire sortir quelqu'un de son lot de terre c'était plutôt un abus de pouvoir qu'un droit. De cet abus de pouvoir il y avait certainement des victimes. Cependant personne ne pourrait affirmer, pas même insinuer, qu'au Burundi l'arbitraire était le règle.[1]

Limits to the confiscation powers held by political authorities were already clearly explained in the 1925 report on the administration or Ruanda-Urundi:

> Le droit de culture est révocable mais seulement à titre de peine...En somme l'exercice de droits que lui reconnaît la coutume n'implique pas pour le chef le propriété de la terre. Dans la réalité les chefs se comportent comme s'ils étaient propriétaires. Tous les prétextes sont bons pour kunyaga mais le fait qu'ils cherchent un prétexte prouve qu'en agissant ainsi ils violent le coutume.[2]

In the 1928 report the explanation is even more explicit:

> Le chef ne peut déposséder la famille indigène de son itongo que dans certains cas précis prévus par la coutume:
> - le refus par l'indigène d'éxécuter un ordre légal du chef
> - le vol commis dans le pays
> - le crime de sorcellerie.
>
> A part ces cas, la spoliation est toujours considérée comme une injustice, un abus de pouvoir dont la partie lésée poursuivra le redressement pendant des années et devant toutes les juridictions possibles.[3]

Burije, speaking of the circumstances which resulted in legal eviction from one's holding, cites treason, as well as sanctions

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1. R.P. Burije, Le Droit foncier au Burundi, sa statique et sa Dynamique, p. 72.
2. Rapport (1925) op.cit., p.50.
3. Rapport (1928) op.cit., p.47.

embodied in judicial decisions.[1] Mwohora also mentions cattle-stealing without the capacity to return the stolen cattle, the act of hitting someone possessed by the spirit of Kiranga, witch-craft, lèse-majesté, and transgression of taboos, such as going into one's daughter's house or sowing sorghum before the umuganuro festival.[2] Eviction from one's land-holding, as the consequence of a supposed right of ownership over land held by the Mwami and delegated to his political subordinates, was an arbitrary action which was not acknowledged by custom. Gilles stresses that, during the colonial era, when administrative authorities expropriated land without giving fair compensation, the natives called the whole procedure kunyaga n'impaka, to confiscate by force.[3] This term carries a pejorative connotation; it does not refer to any right but rather to an unjustifed action. Finally, a comment made by G. Malengreau may be cited, speaking of a colonial officer who had asked elders about the legality of the chief's action in confiscating holdings. The elders answered that the chief could be reprimanded when he did not act rightly, as in confiscating property on a whim or for personal interest. On the contrary he was fulfilling his rôle of political authority and upholding justice when he confiscated the land-holdings and other possessions of cattle-robbers or rebels.[4]

Hatred of political authority often resulted in land eviction. A chief could begin by annoying a land-holder he did not like; he might ask him for a heavier tribute or for more days of work,

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1. R.P. Burije, op.cit., p.89.
2. E. Mworoha, op.cit., p.192.
3. A. Gilles, "Notes sur l'organisation des Barundi", p.81.
4. G. Malengreau, op.cit., p.199.

putting him in so uneasy a position as to make him emigrate. This was not land confiscation proper because the holding was abandoned, but it amounted in practice to eviction. Relationships between political authorities and their subjects were of a subtle nature, and the personal mood of the chief sometimes resulting in the subject's emigration. An old member of the royal family (umuganwa by blood, but not chief) gave an example of how the chief's moods were often expressed on public occasions: when a favourite of the chief was no longer invited to share beer with him, it was interpreted as a bad sign presaging trouble for the courtier. That courtier then prepared to leave, a solution preferable to being constantly harassed. A chief could also ask for a specific tribute, usually a cow (ingorore),[1] which the subject could not or did not want to pay: in one instance, which happened in Bukeye, the eviction of a nyen'itongo and his eventual emigration to Bweru were the result of the chief's demand for one head of cattle as ingorore. Rather than give ingorore the nyen'itongo preferred to emigrate, and the holding came under the control of the chief, who allotted it to someone else. In such a case the family of the emigrant could always keep the itongo by paying ingorore.

Resort to court was possible in case of unjustified confiscation, and cases are known in which plaintiffs recovered their confiscated holdings. In case of land eviction by a chief, the normal procedure was to file an action at the Mwami's court. In case of decision in favour of the evicted holder, the chief had to

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1. See p.185.

return the land, was reprimanded, and had to give one head of cattle to the Mwami's abashingantahe as penalty for his unjustified action. This procedure was practised only by influential people and those with good connections.

(ii) Limits on arbitrary actions of political authorities

The main objective of all political authorities was to remain in office and to broaden their power by adding new territories and new subjects. The nature of the pre-colonial political system was a guarantee for subjects against arbitrary actions on the part of authorities, in that the security of political position was primarily based on reputation for good and just government.[1] A maltreated subject was always free to leave his political superior and to go to another one who was happy to welcome him.[2] The threat of rebellion or emigration served as a constant limit on the ruler's arbitrary exercise of power. A stable population was important as the basis of political power, and the large patrilineages, because of their numerical force, had influence on political authorities; their elders were often respected abashingantahe appointed as judges at sub-chiefs' and chiefs' courts.[3]

During the colonial era, legal kunyaga was abolished by the Mandate authorities because people who had committed crimes were judged and sentenced according to the principles of written criminal law. Nevertheless, a new form of kunyaga appeared with the confiscation of portions of holdings which were not cultivated. Though made in the

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1. A. Trouwborst, op.cit., p.32.
2. J. Ghislain, La Féodalité au Burundi, p.17.
3. A. Trouwhurst, op.cit., p.32.

name of progress and social justice, this type of confiscation was conceived by the Barundi as kunyaga. Most informants questioned about it agreed that it was justified kunyaga because it was done in order to allow everyone to become nyen'itongo, yet a few claimed that it was kunyaga n'impaka because the confiscated land was the object of a direct control interest acknowledged by customary law; no one was entitled to take over the land concerned unless the nyen'itongo had committed a fault. These opinions recall to mind the quarrel about the definition of the term itongo,[1] and more generally the gap between the legal ordering of land tenure as conceived in Burundi customary law, and the legal ordering of land tenure as it should be to promote development. The examination of the term kunyaga well illustrates the evolution of the relationship between political authority and land: while in pre-colonial Burundi kunyaga was a penalty for crimes against political power, in colonial Burundi it became a penalty for bad exploitation of land.

(e) Collection of tribute and performance of work duties by subjects

In pre-colonial Burundi the itongo was the basic unit for the collection of tributes in kind, and of work duties.[2] Any nyen'itongo was responsible to his political superiors for paying tribute and performing specific work duties.[3] It must be noted that Vansina states that the patrilineage was originally taxed as a whole for the payment of the tribute and for the performance of work duties.[4]

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1. See p.148.
2. G. Malengreau, op.cit., p.206.
3. I. Hamnett, Chieftainship and Legitimacy. An Anthropological Study of Executive Law in Lesotho, London 1975, p.68. According to Hamnett, tax payment is the generally recognized index of allegiance among the Basotho.
4. J. Vansina, op.cit., p.5.

There were two main forms of tribute in kind, namely (i) cattle, and (ii) products from the itongo and beer.

(i) Cattle as tribute

The cattle-owners had to give one head of cattle to the chief every year. This tribute was called ingorore y'itongo or inka y'itongo, which means 'the cow of the land-holding', and it was conceived as a gift to the chief so as to obtain recognition at court and to be protected from encroachments by neighbours or lower political authorities.[1] Ingorore, the Kirundi term referring to this tribute, was an expression of allegiance to political authority, an acknowledgement of political power. Though ingorore always implied the handing-over to the chief of a head of cattle, its purpose varied. It could be given in a variety of situations, such as the payment of legal fees, the acknowledgement of a new political authority and the counterpart of a social privilege, such as the right to follow the chief's herd with one's own cattle (ingorore y'umukurikizo).

In all cases the handing-over of ingorore was conceived as iteka, an honour for the giver and a sign of respect towards the receiver. If someone refused to give ingorore when required, members of his family could give it for him. If no ingorore was presented to the chief, eviction could take place, because the refusal to give ingorore was considered as an act of insubordination towards the political authorities.

The handing-over of ingorore normally exempted all people living on the itongo of the giver from performing work duties and from giving any other tribute in kind.

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1. E. Mworoha, op.cit., p.149.

(ii) Land produce and beer as tribute

People who did not own cattle had to give tribute in the form of land produce and pots of beer. Inzoga z'amarari, 'pots of beer', were collected by the sub-chief. Normally this tribute was asked for once a year. Subjects would also bring pots of beer to political authorities in order to win their favour. Sometimes they could be asked to bring food or part of the harvest to the chief's court.

Tributes in kind were redistributed among the various political authorities: the sub-chiefs asked their representatives on hills to collect pots of beer from the ben'itongo and kept some for their own consumption, while bringing the rest to their chief, who in turn kept some pots which were drunk at his court. When the chief had to go to the royal court every year to pay allegiance to the Mwami (gusasa), he brought with him ishikanwa, offerings which consisted of amarari, pots of the remaining beer, and ingorore, cattle.

Besides tribute in kind, the ben'itongo who had not given ingorore had to provide people to cultivate the fields of the authorities and to look after their compound and house. This obligation was called gucungura urugo, 'to go and work for one's holding', to work in order that the nyen'itongo and his family might remain on the itongo. The performance of work duties was also considered as an acknowledgement of political power, and did not seem, according to old informants, to have been an onerous task: some have stated that one day per month per itongo, which included the whole family of the nyen'itongo, his land-clients (abagererwa)

and his servants (abashumba), was expected. Another and very important obligation of ben'itongo was the performance of military duties. Each sub-chief had his own regiment, whose members were selected among ben'itongo and their families. People who performed a specific function at the chief's or Mwami's royal court were exempt from tributes and work duties. In conclusion, it may be said that, in pre-colonial Burundi, a direct link existed between the giving of tribute and land tenure, tribute being an acknowledgement of political power which was expressed by general control over land.

During the colonial era work duties and tributes due to political authorities were regulated: while tribute in kind was replaced by a poll tax, work duties were limited to ten days a year due to the sub-chief and three days a year due to the chief.[1] Later on, when political authorities began to receive a salary as civil servants, these obligations were abolished.[2]

It must finally be noted that no land tax was established during the colonial era for customary-held land.

(f) Control over the legal ordering of land tenure through the settlement of land disputes

The holding of a judicial court was one of the main expressions of political power in pre-colonial Burundi.[3] Political authorities were considered as the supreme grantors of justice and, as such, exercised a continuous control over the application of land law principles. As

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1. Rapport (1931), op.cit., p.87.
2. Rapport (1945-46), op.cit., p.30. G. Mineur, Commentaire de l'Ordonnance législative No.347/AIMO..., p.36.
3. King as "fountainhead of justice" in medieval England.

stressed above, the Mwami was empowered to guide custom by the colonial authorities and his Conseil had a great impact on the evolution of land law.

(g) Control over the conveyance of direct control interests over land held by subjects by means of contract and will

In pre-colonial and colonial Burundi a nyen'itongo could convey his interests over land either by means of contract, such as sale and gift, or by means of will.

(i) Control over conveyance by means of contract

Several authors have asserted that traditional political authorities strictly controlled the sale of land by their subjects and that they even forbade it. For many authors the transfer of land through sale is a consequence of colonization, and it met with the resistance of native political authorities. According to J. Keuppens, who wrote in the 1950s, sale of land was unknown to the Barundi. In that respect he says:

> Si le Murundi quitte son itongo, il a le droit de vendre ses cultures. Il peut emporter les souches de bananiers, voire même les ficus à impuzu. Toutefois il ne peut vendre son itongo que s'il reste dans sa sous-chefferie et encore n'est-ce pas réellement son itongo qu'il vend mais plutôt son rugo, la partie construite.[1]

R. Massinon states that:

> Alors qu'en droit enropéen, la terre est un bien dans le commerce qui se négocie librement, la plupart des coutumes africaines érigent la terre en bien hors commerce car elle constitue le patrimoine commun des membres défunts, vivants et à naître d'un clan ou d'une ethnie; par la suite la propriété même de la terre ne peut

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1. J. Keuppens, Principes de Droit coutumier en Urundi, polycopié, Bujumbura 1953. Cited by R. Massinon, "L'évolution des règles de succession....", p.28.

> jamais être aliénée; elle peut seulement être concédée en jouissance pour une durée le plus souvent indéterminée; mais, même si les concessions de ce genre sont généralement transmissibles aux héritiers du concessionaire, elles peuvent être révoquées ad nutum dès lors que l'autorité coutumière estime une telle mesure conforme à l'intérêt général...
> Sous l'influence des conceptions d'origine européenne, le droit foncier évolue lentement, à partir des années 30, dans le sens de l'aliénabilité des concessions et tenures des autorités traditionnelles. Celles-ci, chefs et sous-chefs, semblent s'être opposés à cette évolution, non seulement parce qu'elle était contraire aux idées reçues, mais aussi et surtout pour cette raison que l'aliénabilité risquait d'amoindrir leur influence sur la classe paysanne en permettant aux cultivateurs en quête d'établissement d'acheter directement une exploitation à un propriétaire sans plus devoir, comme dans le passé, solliciter l'octroi d'une terre vacante auprès du chef...
> L'aliénation de la terre ne semble avoit été définitivement reconnue en droit foncier coutumier qu'à l'époque de l'accession du pays à l'indépendance. Il s'agissait sans doute là d'une conséquence indirecte et peu connue de la supression des chefferies et sous-chefferies décrétée en 1960.[1]

Other authors, especially the Barundi ones, assert that some form of sale has always existed in Burundi, and that the approach of European writers was but a consequence of the preconceived idea that Africans could not hold any interest over land amounting to freehold ownership as known in Europe.

Both opinions may be reconciled if transactions in land are understood in the context of traditional society: the nyen'-itongo was a political subject with specific obligations, resulting directly from his status as land-holder. Conveyance of one's direct interest over land by means of sale or gift was allowed

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1. R. Massinon, op.cit., pp.43-4.

provided it did not jeopardise the authority of political officers; the latter seem to have held close control over the conditions of conveyance rather than over conveyance by way of contract as such. Sales, gifts and exchanges of small plots, part of holdings, called ikivi-ibivi, were common and accepted because such transactions did not affect the relationship between the subjects concerned and their political superiors. When someone emigrated, he normally left his holding to his family. If he wished to sell it, his family and the local sub-chief had to approve the transaction. Political authorities required that the transaction was made openly with their approval so that there could be no question of treason or other rebellious behaviour on the part of the emigrant. If departure and sale were done in a secret manner, the political authorities immediately confiscated the holding in question and could take severe measures against the vendor's family. In such a case it was not so much the sale which was at stake as the secrecy of the action. Conveyances of interests over land by means of a contract which did not jeopardise the power of political authorities were even welcomed, because they brought new subjects under one's rule. The sale, exchange and gift of land by individual ben'itongo in colonial and pre-colonial Burundi will be examined later.[1]

(ii) Control over conveyance by means of will

There was no direct control from political authorities over the conveyance of interests over land held by the nyen'itongo by way of will except through the judicial control exercised in the

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1. For sale see p.321. For gift see p.330. For exchange see p.319.

settlement of disputes arising from unfair distribution of an estate among heirs.

2. Specific interests over land held by the Mwami, chiefs and sub-chiefs

I. The Mwami's interests over land

a. General remarks on the Mwami's interests over land

An old umushingantahe, in order to explain the rôle of the Mwami in the procedure of land allotment to the Barundi, once said: "You have to start from the general concept implying that the Mwami was the universal giver of all goods, including land. All land held by ben'itongo was a gift of the Mwami through the intermediary of his chiefs, who could be represented by sub-chiefs". Besides being called the universal giver, the Mwami was also referred to as se barundi, 'the father of the Barundi', nyen'inka n'ingoma, 'the one who has control over cattle and drums', nyen'igihugu, 'the one who controls the country', and finally nyen'isi, 'the one who controls land'. From these sayings in which the term nyene is used, many authors have deduced that the Mwami was not only the paramount ruler of Burundi but its owner. A. Verbrugghe states that the Barundi recognize the king's right of ownership over all the goods in his realm; he is the owner of granted as well as non-granted land, and his rights combine the concepts of sovereignty and ownership.[1] E. Simons also stresses the dominium of the Mwami over all land in his realm, including the power to distribute as well as to take back granted land.[2] In this respect there are several sayings which assert the Mwami's power kugerera, which means 'to allocate land', and gusohora, which means 'to take back the

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1. A. Verbrugghe, "Le régime foncier coutumier au Burundi", p.59.
2. E. Simons, op.cit., p.219.

granted land'. Finally, concerning the neighbouring Kingdom of Ruanda, it has been said that the interests over land held by the Mwami did not only lie in sovereignty (propriété publique), which any State exercises within its borders, but also in a real ownership right (propriété privée) which the Mwami could claim against any of his subjects who occupied land.[1] Yet authors writing on the subject are careful to point out that the Mwami rarely made use of his ownership right; as Verbrugghe put it, he generally allowed his subjects to hold exclusive occupancy rights over land at an inferior level to that of his own universal right.[2] In order to clarify the apparent contradiction between the Mwami's universal rights over land and the ben'itongo interests, let us first analyse the context in which sayings about the Mwami's universal ownership right are used. According to these sayings, cattle, men and land are the Mwami's: he holds close control over them derived firstly from his status as supreme ruler of Burundi, a status of primarily sacred character.[3] Ideologically, the Mwami was considered as the direct heir and representative of the first Mwami of Burundi, who had been put into office by God and consequently held power over all goods and men. He is the great owner

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1. Conseil Supérieru du Ruanda in (1961) R.J.R.B., 4, p.122.
2. A. Verbrugghe, op.cit., p.72.
3. R. Burije, op.cit., p.72.

(Grand Propriétaire) of all existing goods, especially of cattle and grazing grounds on which these are driven to pasture.[1] In Burundi the Mwami, besides his power over cattle, also became the master of sowing, consequently extending his sacred authority to agriculturalists. He was the dynamic centre of the country, the symbol of its unity and, in a way, of its very existence.[2] In this context, the concept implying that everything "belonged" to the Mwami must be understood primarily as an ideological concept, as a myth tied to the sacred power of the Mwami which was of symbolic nature. As a matter of fact, historians have stressed the gap existing at the eve of the colonial era between the overall powers of the Mwami, as implied in the ideology through sayings and legends, and his actual precarious political position, his rule being contested by most of his chiefs and limited only to a small part of his realm. Furthermore, the Mwami had his own private holdings all over Burundi. In respect of these holdings he was nyen'itongo and held interests of a different nature from the general control he exercised over his kingdom as a paramount ruler.

b. The effective exercise of the Mwami's interests over land

E. Simons states that in pre-colonial Burundi there were two clearly distinct political domains, namely land which directly depended on the Mwami and land which he had conceded to chiefs.[3] According to scholarly writing and to information collected on field visits, from the point of view of the nature of the Mwami's interests over land, there were three kinds of domains involved, viz., (i) territories

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1. J. Goffin, op.cit., p.202.
2. J. Vansina, op.cit., p.202.
3. E. Simons, op.cit., p.196.

conceded to chiefs, (ii) the Mwami's own chiefdom and (iii) the various royal estates scattered all over Burundi.

(i) Territories conceded to chiefs

On the territories he had conceded to chiefs (abatware), the Mwami held a general control interest stemming from his sovereignty over all the Barundi, and expressed fundamentally by final control over land allotment and confiscation as practised by lower political authorities. When allotting land, chiefs and sub-chiefs were considered as the delegates of the Mwami. Sayings, such as uhawe n'Umwami atekera Uburundi bubona, which means 'whoever receives from the Mwami takes what he receives before the whole of Burundi', and uhawe n'Umwami atekera abagabo babona, which means 'whoever receives from the Mwami takes what he receives before all men', express this idea very clearly. These sayings were used in a legal context to acknowledge the validity of a grant made by political authority. Furthermore, when people explain the origin of an ancient grant, they usually say that it had been given to one of their ancestors by a Mwami.[1]

The control of the Mwami over territories conceded to chiefs was of a political nature and implied the power to appoint and to remove chiefs. In order to retain the territory allotted to them, chiefs had to give the Mwami tribute as well as tokens of loyalty. Loyalty was expressed by regular visits to the royal court and military assistance. In practice the control of the Mwami over territories conceded to chiefs was very limited, at least on the eve of the colonial era. At that period most chiefs maintained a great deal of independence, and before obeying an order of the Mwami, their absolute sovereign in theory, they considered their personal interests and the number of their

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1. C. Kayondi, "Murunga, colline du Burundi...", p.176.

warriors they wished to supply.

(ii) The Mwami chiefdom

At the end of the nineteenth century, the historical core of Burundi was under the direct control of the Mwami (Map 3). The whole Muramvya area was called icibare c'umwami, the Mwami's domain. In his chiefdom, the Mwami appointed chiefs called abatware b'umwami, who controlled small areas normally including only a few hills. E. Mworoha calls these chiefs abishikira, a term meaning 'the ones who have direct access to court'. However, according to informants, it seems that this term was an attribute of the abatware b'umwami rather than their generic name. They had no sub-chiefs under their authority because they only ruled over small territories. Their main task was to provide for the labour necessary to maintain the various royal households and domains which were scattered over their territory. They also collected tribute, organized military regiments and held a judicial court.[1] In his chiefdom the Mwami exercised a general control similar to that exercised by the chiefs over the territories they ruled; such control stemmed directly from political power.

(iii) The various royal estates scattered all over Burundi

All over Burundi, but mainly within the royal chiefdom, there were royal estates which often corresponded to landmarks in the country's history. These estates were under the direct control of the Mwami; he was nyen'itongo. They passed from one Mwami to the next, and each ruler created some royal holdings while abandoning others. The holdings of the Mwami normally included a household (urugo rw'umwami) inhabited by the Mwami himself or by one of his wives or concubines,

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1. E. Mworoha, op.cit., p.166.

fields (imirima y'umwami or indimiro z'ibwami), and grazing grounds (ivyanya). When an estate included a household there were always surrounding grazing grounds and fields; the whole was called umurwa (pl.imirwa). There were also estates composed only of fields or grazing grounds.

The size of the amatongo held by the Mwami seems to have been four to six times the size of normal holdings.[1]

According to E. Mworoha, there were four kinds of royal estates, namely:

- the main political capitals (capitales politiques principales) where the national umuganuro festival took place. The hill on which the mission of Bukeye is built was one of these estates; it was surrounded by less important holdings of the Mwami consisting mainly of grazing grounds and fields;
- the secondary political capitals (capitales politiques secondaires), which were inhabited by wives or concubines of the Mwami;
- the ritual capitals (capitales rituelles), which were occupied, by right of inheritance, by religious dignitaries; these estates were normally associated with the umuganuro festival or the person of the Mwami;
- the production-oriented estates which had specific functions, such as providing the Mwami's court with honey or sorghum.

After the death of a Mwami, or if a misfortune happened in a royal estate, it was abandoned, and the area where the household of the Mwami had been erected became a sacred area called ikigabiro (pl. ibigabiro); within the limits of an ikigabiro cultivation was normally forbidden.

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1. Ibid., p.148.

Royal estates were taken care of by appointed stewards who were in charge of making arrangements with the surrounding sub-chiefs or abatware b'umwami in order to provide for the labour necessary to maintain the household of the Mwami and to cultivate his fields. Besides the labour force, composed of the subjects living nearby, people from all over the country worked on the royal estates according to the ibango, 'customary function', reserved to their patrinlineage. For example, some Batutsi patrilineages provided abakamyi, the milkers, and abungere, the cattle-herders, in charge of taking care of the large herds attached to royal estates; the most important Bahutu patrilineages had the privilege of providing abakevyi, the cooks of the Mwami. Other patrilineages had to provide abakuzi b'ubuki, the royal court honey purveyors, abakutsi, the ones in charge of sweeping dung in the royal compounds, abavomyi, the royal court water carriers, as well as many other people with a specific function. Often people exercising amabango in a royal estate came from distant areas and, once married, settled nearby the royal estate where they were employed on a holding allotted to them by the Mwami. To take care of royal estates there were, besides the principal steward, a chief of cultivations, called umubwiriza w'imirima, in charge of controlling the fields of the Mwami, and a chief of the cattle herders, called umubwiriza w'abungere, in charge of the royal herds.[1] These people as well as the steward's family often resided on the royal estate itself. There were also some estates with no royal household, on which the Mwami would settle land clients (abagererwa).

As nyen'itongo, the Mwami held direct control and benefit interests over the royal estates which were clearly differentiated from interests

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1. Ibid., p.203.

stemming from sovereignty. When informants were asked whether they thought that the Mwami had an ownership right over the whole of Burundi, they always answered: "If the Mwami had owned the whole of Burundi, why would he have his own amatongo? He was nyen'itongo of royal estates only". During the colonial era, the estates of the Mwami were progressively abandoned and allotted to people in need. They were most often allotted to former stewards and ibango holders, as, for example, in Bukeye. Politically royal estates became incorporated in the chiefdoms created by the territorial reorganization of the late twenties. In 1939, chiefs were expressly granted the right to allot land belonging to the Mwami to petitioners.[1] In Bukeye, the Mwami took his last cattle out of his private grazing grounds (ivyanya) in 1947. With the arrival of Europeans, the Mwami became stationary and only kept some of his holdings, especially in the Muramvya area where he was appointed chief by the Belgians. He even lost direct control over some of these holdings, which with time became considered as the property of Burundi; in one instance, for example, Mwambutsa had wanted to sell one of his properties to a foreigner, but all his chiefs arose against the sale and offered to buy the land in the name of the people of Burundi rather than to see it fall into foreign hands. In 1950-1951 the Belgian Résident ordered the issue of actes de notoriété for all the landed properties of the Mwami.

II. The chief's interests over land

Like the Mwami, chiefs held both a general control interest over the territory they ruled, and direct control and benefit interests over specific estates. When a chief came to power, he normally inherited

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1. Conseil du Mwami, Procès-verbal (1939), p. 9.

his predecessor's estates and could create new ones. These estates were called ivyibare and were scattered all over his territories, having a sizeable area compared to normal land-holdings. The mainly chiefly household was the one where the favourite wife lived, while others were controlled by other wives and concubines. Concerning the maintenance of the compounds and the cultivation of fields, the system to recruit labour was exactly the same as for the Mwami.

During the colonial era most of the land held by chiefs was distributed to petitioners, while an interesting question pertaining to political control over land by chiefs was raised the treatment of inyurwa land. As noted above, chiefs could take for their own use as much available land as they needed, especially confiscated and abandoned holdings as well as land for which there were no direct heirs. Itongo ry'inyurwa is the holding that a chief had acquired for his own use as a political authority, and not by way of allotment by a superior political authority or by way of succession. According to R. Burije, it etymologically means a passage holding (propriété de passage).[1] To explain the nature of inyurwa, he states the comment of one of his informants:

> Inyurwa s'itongo canke ganwa canke ry'umutware. N'irya nyene ryo. Aba ar'umuntu aryosha inzoga, azi kwenga neza. Aza arajana kwa shebuja inzoga canke igitoke ciza,[2]

translated as "Inyurwa is not the proper holding of a chief or a sub-chief. It has its own holder: the latter is a man who makes good beer and knows how to brew it. He brings beer or a nice banana bunch to his

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1. R. Burije, op.cit., p.90.
2. Ibid., p.91.

lord from time to time." Some informants from Bukeye did not agree with this definition: they stressed that itongo ry'inyurwa was a holding over which a political authority held direct control. He could allocate the holding or part of it to someone who had a status similar to that of a land client because an itongo ry'inyurwa was an estate on which no chiefly household had been built.

The Conseil du Mwami defined itongo ry'inyurwa as a holding which was used as an encampment by chiefs, sub-chiefs or the Mwami,[1] whereas for F. Rodegem it is a holding tied to political office and not to the person of the political authority;[2] for A. Verbrugghe it is a term referring to any confiscated holding.[3]

In pre-colonial Burundi, control over inyurwa land was clearly a privilege restricted to political authorities. The notion of a chiefdom is wealth separated from the chief's personal wealth only appeared during the colonial era when political authorities became civil servants. Article 36 of the ordonnance 347/AIMO gave personnalité civile to chiefdoms, stressing that land left without heirs should come under the control of the chiefdom, and not of the chief himself.[4] In order to establish legally a distinction between the land wealth of chiefdoms and the private holdings of chiefs, the Belgian Résident ordered, in 1950-1951, actes de notoriété for all private holdings held by chiefs. These actes de notoriété could only be issued after the public acknowledgement by neighbours of the existence of a direct control interest held by the chief over the piece of land concerned. This procedure resulted in the disappearance of inyurwa holdings. However,

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1. Conseil du Mwami, Procès-verbal, 18-21 juillet 1939.
2. F. Rodegem, Dictionnaire Kirundi-Français, p.303.
3. A. Verbrugghe, op.cit, p.63.
4. G. Mineur, op.cit., p.18.

in the fifties, there were repeated complaints against chiefs and sub-chiefs who took holdings left without heirs under their direct control, and later allocated them to land-clients or granted them to petitioners in return for gifts.[1] In response to these complaints, the Conseil Supérieur du Pays issued an opinion stressing that political authorities were not legally endowed to appropriate for their own use holdings left without heirs, nor any other land. Should a political authority need land, he ought to follow the procedure regulating land allotment to chiefs and sub-chiefs as set up by the Conseil du Mwami in 1945: he had to file a petition to the tribunal de territoire which was endowed to allot land to political authorities.[2]

In accepting the definition of itongo ry'inyurwa as a "political" itongo acquired during office, as opposed to private holdings acquired by way of succession or allotment by a political superior, there were attempts, during the colonial era, to draw a difference between both kinds of holdings in case of the removal from office of a political authority. Whereas inyurwa holdings were given to the newly-appointed authority, the previous one could keep for himself umuryango and umuheto holdings. In respect to that distinction, the Conseil Supérieur du Pays stressed that it did not correspond to any customary practice because, traditionally, removal from political office resulted in the loss by the removed chief of all interests over land, especially if he was a threat to the newly-appointed chief.[3] Such a loss was a direct consequence of the political power game. If the removed chief and his family did not create problems, they could keep their umuryango holdings, and were considered, from then on, as simple subjects.

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1. Conseil Supérieur du Pays, Procès-Verbal, meeting held at Kitega in January 1956, p.40.
2. Conseil du Mwami, 22-25 octobre 1945, Habitation des chefs, p.13.
3. Conseil Supérieur du Pays, Procès-Verbal, meeting held at Kitega in January 1956, p.43.

There is a famous case in which the distinction between "political" and family holdings is stressed. In 1945, Karibwami, a chief in the Muyinga area in the east of Burundi, was removed from office by the Trusteeship authorities. He was replaced by Ntidendereza, son of the then very influential chief Baranyanka. When Ntidendereza took control of the chiefdom, he alienated all land-holdings held by Karibwami as well as his house and some of his herds. Karibwami appealed several times to the Mwami asking for the return of the land-holdings he had inherited from his father (amatongo z'umuryango), who had also been chief in the area. While Ntidendereza assumed that all holdings held by Karibwami should be considered as "political", Karibwami claimed, on the contrary, that, as he had inherited all the holdings he occupied from his father, they were consequently umuryango holdings which he could keep for his own use. Although the Mwami acknowledged that some of the alienated holdings had been inherited by Karibwami, the latter never recovered them because of the political influence of Ntidendereza's father, Chief Baranyanka. The whole question revolved much more around the strength of political power than around a legal definition of interests over land. Karibwami continued to ask for the restitution of his confiscated holdings until the sixties. At that time, he filed an action against a nyen'itongo called A., who was occupying a holding which had belonged to Karibwami when he was chief. Kwaribwami claimed that the holding under dispute belonged to him because he had inherited it from his father. The Tribunal de Province of Muyinga issued a decision in favour of the former chief;[1] it was reversed by an appellate decision of the Tribunal de Première Instance

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1. Tribunal de Province de Muyinga, Jugement du 25 janvier 1965, in (1965) R.J.R.B., p.33.

du Burundi.[1] When all holdings held by Karibwami came under the control of the newly-appointed chief Ntidendereza, the latter allotted most of them to petitioners; one of the grantees was A., the defendant. In his deposition, Karibwami told the court that Ntidendereza had always refused to give him back his umuryango holdings, although the Mwami had made clear that he could keep them after his removal from office. He complained several times to the Mwami about the situation, but without much success. Now, he wanted the court to acknowledge his status of nyen'itongo over the confiscated holdings, especially the one occupied by A. A. told the court that Ntidendereza, the new chief, had allotted him the holding under dispute as itongo ry'umuheto. He had built an urugo on it, and, according to the practice at the end of the forties, the grant had been registered at the Tribunal de Résidence, which had issued an acte de notoriété. The Tribunal de Province of Muyinga decided that, since Karibwami had had his "customary ownership" rights over the holding under dispute confirmed several times by the Mwami himself, he was nyen'itongo. Furthermore, he had been the first to develop the land concerned. Consequently, A. was ordered to evacuate the holding. He immediately filed an appeal before the Tribunal de Première Instance du Burundi, arguing that he had received the holding from the newly-appointed chief according to the regular procedure, and in that consequently he was nyen'itongo. The court issued a decision in his favour reversing the decision of the Tribunal de Province of Muyinga, principally because Karibwami had not filed any action against A. for nearly twenty years, a period of time during which A. had peacefully occupied the holding under dispute. The court added that:

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1. Tribunal de Première Instance du Burundi, Jugement du 15 juillet 1965, in (1965) R.J.R.B., p.35.

> Beaucoup de chefs ou de sous-chefs destitués abandonnaient leurs propriétés soit qu'ils craignassent le malveillance de leur successeur, soil qu'ils refusassent d'être sujet dans une province où ils avaient exercé le commandement...Leurs successeurs conformément aux dispositions qui avaient été prises en 1939 distribuaient alors ces propriétés à ceux qui en avaient besoin. Si tous les anciens chefs et sous-chefs se mettaient à réclamer leurs anciennes terres, il se trouverait peu de Barundi assurés quant à leurs droits sur la terre qu'ils occupent puisque tout Murundi recevait sa terre du chef ou du sous-chef.

The above comments on inyurwa land stress well the nature of political power as it existed in pre-colonial Burundi, and the progressive transformation of political authorities, whose person was confused with political office, into civil servants. It may finally be noted that it was a current practice of the Belgian administration during the colonial era to confiscate the holdings held by dismissed chiefs, and to transfer them to their successors. Removed chiefs complained about this practice. In this regard, the case of Chief Ntunguka is famous: after he was removed from office in 1930, he resorted to all known authorities, even to the United Nations, for more than thirty years, to obtain the restitution of the holdings he held as chief in the Rusizi plain.[1]

III. The sub-chief's interests over land

Sub-chiefs, called icyariho - ivyariho in pre-colonial Burundi and umutware - abatware in colonial Burundi, were not only the theoretical subordinates of chiefs, as the latter were in regard to the Mwami, but their direct representatives within a given area, normally not exceeding several hills. The sub-chiefdom seems to have been primarily a tribute

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1. R. Massinon, op.cit., p.58.

collecting territory,[1] and sub-chiefs played an important social and political role because they were the direct link between the chief and his subjects. Sub-chiefs were often selected from among the heads of prominent local lineages, and, most often, they occupied an itongo ry'umuryango. If a sub-chief came from another area, he received a holding as umuheto when he was appointed. During the colonial era, controversies arose concerning the nature of political power held by sub-chiefs, especially in regard to their ability to control non-granted, abandoned, confiscated and heirless land. Could they take land for their own use? The question of the direct control by sub-chiefs over unoccupied land was settled in the forties by the same provisions as the ones applied to chiefs, which required, in the case of the need for a new holding by a political authority, a formal petition made by the latter to the Tribunal de Territoire, which was made responsible for the allotment of land to native political authorities.[2]

While chiefs were empowered to allot land to petitioners, there were discussions concerning the sub-chiefs' powers in this particular matter. In 1947, a Urundi chiefdom court issued a decision stating that sub-chiefs could not allot land to petitioners without referring to their chief.[3] Later the Conseil Supérieur du Pays specified that:

> Coutumièrement les sous-chefs n'avaient pas le droit de disposer des terres disponibles. Ils ne l'ont pas plus de nos jours et le Conseil s'élève vivement contre la pratique de certains sous-chefs de faire des dons de terres innoccupées.[4]

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1. E. Simons, op.cit., p.197.
2. Conseil Du Mwami, "Aliénation des terres au profit des chefs et sous-chefs", in (1945), Procès-Verbal.
3. Jugement du Tribunal de la Chefferie Barusasyeko No.86 in (1947) B.J.I.R.U., No.3, p.161.
4. Conseil Supèrieur du Pays, Procès-Verbal, meeting held at Kitega in June 1955, Procès-Verbal, p.43.

Whereas the ordonnance 347/AIMO gave personnalité civile to the chiefdom, empowering the chief to be its legal representative and consequently to allot unoccupied land to petitioners, there was no provision made concerning the nature of the powers held by sub-chiefs. The practice differed from area to area. In Bukeye, during the colonial period, sub-chiefs most often acted as representatives of the chief (abashikiriza) in the land allotment procedure. The chief was always considered as the grantor. However, it happened, as, for example, with the distribution of swamp land, that the chief delegated his powers to sub-chiefs who were allowed to distribute plots to petitioners without referring to him. In eastern Burundi a sub-chief could allot land directly to a newcomer because, in underpopulated areas especially, emigrants were welcome and added to the power of the whole chiefdom. The sub-chief had the obligation of telling his chief about the allotment later on. In the forties this practice changed: in case of land allotment, the sub-chief had first to tell the chief about petitioners, and then the chief made the grant, and the sub-chief acted as umushikiriza only.[1]

Abahamagazi and abarongozi, who were the representatives of sub-chiefs on hills, were never given the power to distribute land to petitioners or to take it for their own needs.

B. Interests over land held by politico-administrative authorities in independent Burundi

After Independence, according to the Edit du Mwami No.5, the

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1. Conseil Supérieur du Mwami, Procès-Verbal, meeting held at Kitega from 18 June to 26 June 1956, p.49: "Les questions d'appropriation individuelle (attribution de terres d'extension et d'amatongo) relèvent uniquement du chef qui décide après enquête effectuée le cas échéant par ses délégués".

management of State-owned land (domaine de l'Etat) fell under the jurisdiction of the Minister of Economy, replaced later by the Minister of Agriculture and Breeding.[1] The Minister became empowered to allot non-granted land to individuals or groups. However, concerning land which had not been domanialisé, the commune authorities, replacing former chiefs, started to allot land to Barundi petitioners. Land granted by the commune authorities is called ingabire yatanzwe komine which means a land-holding given by the commune. It is also called ingabire yatanzwe a gift of the commune. Allotment by the commune follows exactly the procedure of the colonial era: a petition is made to the administrateur who studies it and decides whether land is to be allotted; if so, a representative of the commune goes to the site to delineate the boundaries of the allotted plot in the presence of witnesses. The representative is called umushikiriza, and inzoga y'ubushikiriza is offered by the grantee and shared by all the participants.[2] A written document, called urupapuro rw'ubugabire bwa komine, meaning document of the gift made by the commune, is given to the grantee. The latter then goes to the tribunal de résidence where the grant is registered, and an acte de notoriété is issued. The grantee pays a tax amounting to 500 Fbu per hectare granted. The maximum area which may be allotted by commune authorities is four hectares for a first holding, and one hectare for supplementary land enlarging a holding. In 1979, the Minister of Interior, to whom commune authorities are responsible, suspended such land grants while waiting for an eventual land law reform. It must be stressed that there is no legal basis to land allotment by commune authorities. The Edit du Mwami No.5 mentions

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1. See p. 126.
2. See p. 309.

that the powers concerning land allotment held by the Minister of Agriculture and Breeding may be delegated to communes by the Government of Burundi (Article 1 al.2). Until now, no ordonnance of the Government of Burundi has been enacted in that respect. However, in 1965, the Tribunal de Première Instance du Burundi issued a decision stating that, if no provisions regulating the commune powers concerning land allotment had ever been enacted, the practice followed by the commune authorities in that matter, had to be understood as a form of evolution of the customary rule organizing the allotment of non-granted land by political authorities. The expression used by the court was évolution générale et indiscutable de la coutume.[1] In Bujumbura, a serious conflict arose in the early sixties between the Minister of Agriculture and Breeding and the Mayor of the city, concerning the allotment of lots in the former extra-customary centres which were part of the Bujumbura commune. Both authorities claimed responsibility in the matter, and some lots were allocated at the same time by both authorities.[2]

Besides their power concerning the allotment of non-granted land under customary tenure, administrative authorities have the legal privilege of expropriating land when needed for public use. The décret of 24 July 1956 defines the nature of expropriation (expropriation pour cause d'utilité publique) and sets up the rules of the procedure. It provides, in particular, for the protection of the expropriated person or group in the process of expropriation, and for just

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1. Tribunal de Première Instance du Burundi, Jugement du 13 janvier 1965 in (1965) R.J.R.B., p.26.
2. G. Sahinvugu, Les droits fonciers dans les ex-centres extra-coutumiers de Bujumbura sous leur double aspect historique et juridique, Mémoire de Licence, Bujumbura 1973.

compensation paid in advance for the loss of his interests over land. Resort to court in case of conflict with the State over expropriation is provided for. An ordonnance d'expropriation, which is published in the Bulletin officiel, finalizes the procedure.

Article 6 of the Edit du Mwami No.5 states that nobody can be forced to abandon his customary or legally recognized occupation rights over land except when land is needed for public use, and after just compensation has been paid for the loss of rights. This provision clearly puts customary-held holdings on the same level as land held according to written title. A decision of the Tribunal de Première Instance of Bujumbura acknowledged in 1970 that:

> Nul ne peut être contraint de céder les droits qu'il exerce sur le sol envertu de la coutume, si ce n'est pour cause d'utilité publique et moyennant une indemnisation préalable et équitable.[1]

Four hectares belonging to someone had been taken for the extension of a veterinary centre without even consulting the nyen'itongo. The latter went to court in order to be compensated for the loss of his land. The court declared that, according to Article 6 of the Edit du Mwami No.5, just compensation should be given to the expropriated nyen'itongo. The land under consideration was valued at 7 Fbu per square metre, and the State of Burundi was ordered to pay 280,000 Fbu to the plaintiff.

However, in practice, neither the provisions of the Edit du Mwami No.5 nor the provisions of the 24 July décret are applied. The procedure of expropriation of customary land is simplified and conditioned by the development needs of the country. The main stages of the expropriation procedure concern customary-held land are:

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1. Tribunal de Première Instance du Burundi, Jugement du 22 avril 1970, in (1971) R.A.J.B., 1, p.54.

* The Ministry interested in an expropriation prepares a report concerning its land needs;
* The report is handed over to the Ministry of Agriculture and Breeding which is empowered to proceed with the expropriation procedure; however, in practice, in 1979, only the Ministry concerned with the expropriation undertook proceedings;
* The population concerned with the expropriation is then informed through the intermediary of provincial and communal authorities;
* The compensation fees are calculated by the Ministry officials;
* An official of the Ministry accompanied by a local administrative authority then draws up an inventory of the holdings affected by the expropriation;
* When the inventory has been drawn up, the Ministry officially concerned, declares the necessity for the State to use the land under consideration (déclaration d'utilité publique) and decides that expropriation will take place;
* Works planned by the Ministry concerned start immediately, and compensation is to be paid as soon as possible.

When holdings held according to written law are expropriated, compensation is given for the land as well as for what is on it, namely crops, plants, trees and buildings. It is generally paid before expropriation takes place. When customary-held land is alienated by the State, there is, on the contrary, no compensation for the loss of land; only crops, plants, trees and constructions are compensated for, according to a list stating the value of the various plants, crops and trees, as well as of the different kinds of constructions. The State only acknowledges occupation rights to customary ben'itongo. The list, drawn up by the

administration, fixes in advance the amount of compensation, and expropriated persons are not consulted, contrary to what happens in the procedure concerning land held according to written titles. Finally, compensation is most often paid a long time after expropriation has taken place.

Expropriation of customary-held land is considered as a discretionary power of the State justified by the country's development needs. Resort to court in case of conflict is very rare and no ordonnance d'expropriation is published in the Bulletin officiel. So, even if ben'itongo are legally protected, in practice no direct control interest over land in the context of expropriation is acknowledged.

The practice of expropriation of customary-held land has led to some interesting developments in the Bujumbura area where many people bought holdings or building-lots according to the customary procedure, including registration at the tribunal de résidence and the issue of an acte de notoriété. In Musaga, a suburb of Bujumbura, people hold customary interests over land. In 1979, expropriation by the Ministry of Public Works of a sizeable area proved to be necessary in order to build roads, hospitals and schools in the context of a U.N.D.P. project. Most of the land to be expropriated had been bought by immigrants from local ben'itongo, and a land market had been developing for at least twenty years. According to the expropriation procedure followed by the State, compensation was only paid for trees, plants, crops and constructions. Many land-holders were unhappy with the whole expropriation procedure because they held actes de notoriété and written contracts of sale stating the price they had paid to purchase the expropriated land.

In the context of expropriation, there is clearly a gap between legal provisions and administrative practices. The 1956 décret was issued during the Trusteeship period, and is not adapted to contemporary Burundi where thriving development activities are carried out by the State. Nearly every day tracts of land have to be expropriated. Everyone acknowledges that the procedure set up by the 1956 décret is too severe; however, its fall into disuse favours arbitrary actions by the State, while customary land-holders are in a situation in which they have lost their customary rights, which implied security of tenure as well as their rights in case of expropriation as stated explicitly in Article 6 of the Edit du Mwami No.5. Burundi urgently needs an act which organizes legal expropriation, taking into account the imperatives of development of the country as well as the importance to social order of security of tenure and of the protection of customary interests over land.

The State also takes non-granted land under customary tenure when it needs it. In such cases there is no domanialisation procedure. It may use it for its own needs, develop it through governmental agencies or lease it to private individuals or groups. For example, in Rumonge large tracts of public land under customary tenure are being ploughed by State-owned machines and then lent to peasants for one crop rotation period. Peasants pay only the cost of mechanical ploughing.

Besides these various forms of direct control over land by the State, there is another form of control which is very important in contemporary Burundi: the control over the way land resources are exploited. If enforced cultivations were abolished at the eve of Independence, most agricultural projects presently undertaken in Burundi

imply specific means of exploitation of land within the area concerned by the project; in some areas, for example, people are encouraged to grow particular crops or plants, such as tea, on some plots that are part of their family holdings.[1] In other areas where development of cattle-raising is stressed, the exploitation of grazing grounds has been organized.[2] Most often these agricultural reforms are smoothly implemented, and efforts are made to explain to the interested population the objectives of the reforms. Such agricultural reforms are sometimes difficult to apply because they directly damage traditional agricultural and cattle-raising practices. For example, in Mugamba, a region which is traditionally pastorally-oriented, grazing grounds were taken to plant tea shrubs in the context of a tea cultivation project sponsored by the Government. Ben'itongo, who were encouraged to grow tea on part of their grazing grounds, showed a great reluctance to participate in the whole project.

Finally, it must be underlined that, in present-day Burundi, the most important form of control over land by the State stems from its legislative and executive powers: through new Acts, it may abolish, modify or create interests over land held by ben'itongo. As legal change is viewed as one of the basic instruments of development by the authorities of Burundi, the future of the legal ordering of land tenure depends upon the States's action.

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1. Atlas du Burundi, planche 22, Cultures commerciale.
2. Ibid., planche 24, Elevage.

Chapter 10 : Groups as Holders of Customary Interests over Land

A. Interests over land held by the whole community

Except for the general control of administrative nature exercised over land by political authorities on the behalf of the community, the latter has not control interest over land, according to customary law. On the other hand, the community has several recognized benefit interests over land, namely (1) grazing rights, (2) hunting rights, (3) rights over mineral deposits, (4) rights to collect firewood, (5) rights over water, and (6) rights of way.

1. Grazing rights

In pre-colonial Burundi, besides grazing grounds reserved to political authorities (icyania - ivyania) and granted to individuals for private use (ibuga - amabuga), pasture land, either in non-granted areas or within the limits of amatongo, was open to all the cattle-owners living in the area, but not to people living on other hills, who were obliged to ask permission of the hill elders to graze their cattle on the hill. Such petitions, naturally accompanied by a pot of beer, were described by the verb gusembera, which literally means to ask for hospitality.

E. Mworoha has drawn up the following list of private and public grazing grounds: public grazing grounds included amanyovu, grazing grounds on hills, intaryama, pasture land in the swamps, and ibisakura, grass in the woods; semi-public grazing grounds included ibibara, which are plots of land laid fallow for a period of time exceeding two years, and ibishakara, sorghum stubbles, reserved for private use if the nyen'-itongo was a cattle-owner, and for public use if he was not a cattle-owner. Private grazing grounds included ivyania held by political authorities, amabuga held by individuals, exploited land such as intebu, fields

planted with beans or peas which become pasture land after the harvest, ibiteme, areas which have been cleared in view of future cultivation, ibiyogori, corn fields, ibirare, fields laid fallow for one season only, and imivumba, areas below cultivated fields which have been fertilized by cultivation.[1] If a cattle-owner wanted to put his cattle on private pasture land, he had to pet ition for it and to pay a fee in nature. Political authorities had the privilege of grazing their cattle on the sorghum stubble of the subjects. When the chief's herd arrived on someone's holding, a ceremony known as umuteguro was performed by the nyen'itongo in honour of the chief's cattle.

Private grazing grounds did not exist in Mosso and Imbo, whereas they were numerous in Mugamba and Bututsi, where political authorities and influential cattle-owners controlled large tracts of land for personal use. During the colonial era, because the Mandate authorities were fostering agriculture at the expense of cattle-raising and because of the growing population, ivyanya and amabuga gradually became public land open to free grazing, reforestation and allotment to peasants. This process, known as communalisation des amabuga, took place from

1. E. Mworoha, Peuples et Rois de l'Afrique des Grands Lacs, pp.192-3.

1939 to 1952.[1] In the early forties, the Mwami began to give his ivyanya to the community. He followed by chiefs who also abandoned their private grazing grounds; they finally declared all amabuga in their chiefdom as public land. This evolution took place without great resistance because the Mwami and the chiefs had first given the example by abandoning their own grazing grounds. On the other hand, conflicts arose when former amabuga were allotted, in Mugamba especially, where amabuga had been the most numerous, families who living alone on a hill did not accept the allotment of land surrounding their itongo to foreigners.

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1. Several Conseils du Mwami have issued opinions concerning the customary norms organizing the control and use of grazing grounds and their evolution. The question was treated in the meetings of July 1939, November 1943, April 1949, December 1951 and February-March 1952. For details see Conseil Supérieur du Pays, Procès-Verbal, Kitega, 22-30 juin 1955, pp.23-9.

In contemporary Burundi, fallow and cultivated land are private when used as pasture land, and a rent is paid to the nyen'itongo in case a plot is rented for grazing. On the other hand, it would be unthinkable to refuse someone else's cattle access to grazing ground, part of one's itongo. If the ownership of cattle is individual, right of common is acknowledged to all cattle-owners living in the area.

In Bututsi, there is a cattle-raising development project.[1] The Government is trying to rationalize the exploitation of pasture land by, for example, implementing paddocking. If they are regulated, grazing rights nevertheless remain communal.

2. Hunting rights

In pre-colonial Burundi hunting was unrestricted, although some animals, such as the leopard and some kinds of antelopes, could only be taken by the Mwami and chiefs. There were also some areas where hunting took place for ritual purposes; for example, in the Bukeye area, several swamps were reserved for the yearly umuganuro hunting.[2] In 1956, the Conseil Supérieur du Pays decided to forbid hunting on privately-held land without the approval of the nyen'itongo.[3]

3. Rights over mineral deposits

According to R. Burije, customary law acknowledges that everything found on land or under land belongs to the nyen'itongo. He may convey benefit interests over mineral deposits found on his holding freely or in return for payment. On non-granted land, the exploitation of mineral deposits is generally free.

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1. Atlas du Burundi, planche 24, l'Elevage.
2. E. Mworoha, op.cit., p.162.
3. Conseil Supérieur du Pays, Procès-Verbal, meeting held at Kitega from 9 January to 24 January 1956, p.50.
4. R. Burije, Le Droit foncier au Burundi, sa statique et sa dynamique, p.107.

The main minerals which are exploited by the Barundi peasants are ubutare, iron, insyo, grinding stone, imonyi, friable stone used to wash milk pots and calabashes, ibumba, clay used to make pots, igitumba, salty loam for cattle, agahama, red loam, and ingugu, kaolin.[1]

4. Right to collect firewood

According to customary law, people are free to collect firewood on privately held land. However, they are not entitled to cut branches off trees which have been planted by the nyen'itongo, eucalyptus trees, for example.

5. Rights over water

In Burundi water is considered as an amenity available to all, and it is a basic social obligation to provide water for anyone in need, as it is with fire. Access to water is fundamental to the common good. Everyone has access to umugezi, a term referring to any place where drinkable water is found, such as a spring, a fountain or a stream. To reach umugezi, passage through a private holding is allowed. Moreover, anyone has the right to canalize water so that it can irrigate his fields, and the ditch may pass through other people's holdings. Access to umugomero, 'a watering place for cattle', is also free.

6. Rights of way

Gutanga inzira, 'to give the way', according to customary law, is a legal obligation. A space of four strides (intambwe) is the normal width of a passage for humans and cattle. The main kinds of way acknowledged by custom are inzira, a term referring to any kind of path, irango, 'a path for men' (irango ry'abantu), ikirari, 'a broad trail', and umuhora or umurombero, 'a trail for cattle'.

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1. Conseil Supérieur du Pays, Procès-Verbal, meeting held at Kitega from 9 January to 24 January 1956, p.51: "Tour gisement appartient à la chefferie et est considéré comme ayant un caractère d'intérêt public à moins qu'il ne se situe dans la propriété strictment privée d'un individu".

There are several maxims which express the obligation to respect rights of way of the community, such as:

Ntawuzibira umurombero inka zigihita,
'One cannot obstruct the cattle trail when cows pass';

Ntawuzibira inzira y'Uburundi,
'One does not obstruct the path of Burundi';

Ntawuzibira irango n'umurombero vy'Umwami,
'One does not obstruct the path and the cattle trail of the Mwami'.

B. Interests over land held by kinship groups

There is one word umuryango, 'door', which refers to the various patrilineal groups existing in Burundi: (1) the clan, (2) the localized patrilineage, (3) the local kin group, and (4) the household. Each of these groups held or still holds interests over land according to customary law.

1. The clan

There are approximately two hundred clans in Burundi.[1] A continuous process of fragmentation and subsequent emigration due to family quarrels, famine, the need to find grazing grounds and over-population, has resulted, over the centuries, in the dispersal of patrilineal clans and their members all over Burundi, and in the formation of sub-clans which form extended patrilineages bearing a specific name added to the clan name. The clan has no head, no internal organization and no procedural means to settle eventual conflicts among its members.[2] Most clans have a history going back to a mythical founder and to an original territory controlled by

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1. Eighty-eight clans are of Batutsi origin, one hundred of Bahutu origin, and thirty-eight of Batwa origin. The royal family (Abaganwa) forms a specific clan.
2. E. Mworoha, op.cit., p.41.

the clan.[1] In present-day Burundi, because of the dispersal of their members, clans as such do not hold any interests over land. However, historical accounts relate that whole regions were once controlled by clans and ruled by autonomous clan heads.[2] With the formation of the Burundi kingdom and the predominance of the Abaganwa clan, territories held by particular clans progressively disappeared, and blood ties were replaced by political allegiance as the controlling factor in the land-holder's security of tenure. With the elimination of territories controlled by clans and the dispersal of clan members all over Burundi, clan exogamy disappeared. Members of the same clan, unless they are part of the same localized patrilineage, cannot trace back kinship links tying them. The progressive loss of the political and social importance of clans has been a common feature to the development of many inter-lacustrine kingdoms.

2. The localized patrilineage

Localized patrilineal groups in which the rule of exogamy is enforced, called patrilineages, may vary considerably in size; some are composed of only a few closely related people while others are so large that their members are not able to trace back their exact genealogical relationship, though they are aware of existing kinship links. Most often, localized patrilineages have their origin in the immigration of a founding ancestor who had been granted a holding by the local political authority. C. Kayondi describes with accuracy the territorial division of the Mugamba hill of Murunga among three

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1. Ibid., p.40.
2. Ibid., p.42. He cites the region of Muramvya as the former territory of the Abakono clan, the region of Nkoma as the former territory of the Abajiji clan...

localized patrilineages whose members form the great majority of the hill ben'itongo.[1] In Bukeye it is also possible to find important patrilineages established in the area for centuries. However, because it is a former royal capital, there are also many small patrilineages which have their origin in the employment of an individual at the royal court. The most important patrilineages belong to clans which held ritual functions at court closely tied to the person of the Mwami or the keeping of regalia.

Land originally allotted to the founder of the patrilineage was divided among heirs at each generation. As a group, the patrilineage does not hold any benefit or direct control interest over land. However, it withholds the power to recover the land held by one of its members, in case of abandonment or if there is no direct heir to the property under consideration. It has been noted already that political authorities have contested this power.[2] It should be emphasized that the right over land held by the patrilineage as a group originates in the allotment of a holding to an individual, the founder of the patrilineage; thus an individual interest over land gave birth to a group interest, a process which is expressly contrary to the well-known theory stating that customary interests over land in Africa were originally held by groups, most often kinship based, and that individual interests are a recent evolution.

In neighbouring societies, localized patrilineages seem to have retained more control over land. In Rwanda, for example, the ubukonde system of land tenure survived until Independence.[3] The term ubukonde

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1. C. Kayondi, "Muruhga, colline du Burundi...", p.197.
2. See p.176.
3. Edit No.530/1 due 26 mai 1961 in B.O.R. (1961).

comes from the Kinyarwanda verb gukonda, 'to cut branches off a tree', and more generally to chop forest trees in order to plant crops. In the forests of Central and North Rwanda, the clearing of virgin land was normally undertaken by the members of a localized patrilineage under the authority of their patriarch, who controlled the occupation and use of land as well as clearing activities. He held control over land expressed in particular by a discretionary power to allocate land to patrilineage members or foreigners. The latter could be allocated holdings provided they paid tribute to the patrilineage head. Ubukonde is supposed to have been the first stage of foreign occupation by Bantu agriculturalists in Central Africa. In Rwanda, the ubukonde system of land tenure was abolished at Independence. However, its foundation had already been shaken during the colonial period when Batutsi chiefs were appointed in the regions where ubukonde prevailed; they started to ask for tribute from patrilineage heads as well as for the control of land abandoned or left without heirs; patrilineage heads progressively lost their powers over land at the same time as losing their political independence.[1] As stressed later in the present study, some authors argue that inyicire, which is a way of becoming nyen'itongo known in Burundi, was basically similar to ubukonde.[2] Whereas the clearing of trees in common to both practices, they differ basically as far as control over the occupation and use of land are concerned: in Burundi, general control over land was vested in political authorities who were independent of localized patrilineages; on the other hand, in Rwanda the ubukonde system of land tenure vested general control in the patri-

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1. E. Malengreau, "Les droits fonciers coutumiers...", p.33. He states: "Au Ruanda on assistait encore à le veille de notre occupation, à la constitution d'un royaume puissant créé par le génie des Batutsi sur la dislocation des groupes familiaux". Rapport annuel (1960), pp.113-5.
2. R. Bourgeois, Banyarwanda et Barundi, p.178.

lineage heads. The political structure determined the difference between inyicire and ubukonde: whereas in Rwanda localised patrilineages managed to remain politically independent, in Burundi they were subjects of the Mwami, inyicire being only one of the ways to acquire a holding in the context of land allotment by political authorities.

3. The local kin group

Large localised patrilineages are ordinarily divided into local kin groups (famille-parentèle) composed of the members of what may be called a small localized patrilineage. It includes the descendants of a known ancestor who have regular social and economic relationships.

The male members of the group normally share the same father or grandfather, and one of them is umukuru w'umuryango, the head of the local kin group, who is empowered to settle disputes arising among relatives.

The members of a local kin group may live either in the same urugo or in scattered ingo. Land is held by the father, who is nyen'itongo; after his death, his holding may either be divided among his heirs or kept by them in joint property. Joint property by the heirs of a nyen'itongo is not a customary obligation but the consequence of circumstances. It is, by nature, a temporary arrangement because custom prescribes the division of landed property among the heirs of a deceased nyen'itongo.[1] Joint property occurs, for example, when a father dies intestate; his children may decide to leave their father's holding undivided with each one having the benefit of a portion of the holding. Division is carried out in case of conflict. A holding held by a family

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1. See p. 260.

in joint ownership is called itongo ry'isangi, a term coming from the verb gusangira, 'to have in common', 'to eat together'. The administration of the undivided holding is under the responsibility of the umukuru w'umuryango. Sooner or later, partition will take place and all heirs will be allotted a portion of their father's holding and become ben'itongo; allotment is then sanctioned by the planting of boundary markers to demarcate each portion. Joint family property is widespread in populated areas, such as Bukeye or Buyenzi, and is the cause of most land disputes.

The local kin group holds a general control interest over individually held amatongo within the umuryango estate, i.e., the area which had been originally allotted to the founder of the group and later divided among his heirs. This interest is expressed, in particular, by the power to control the conveyance of direct control interests by ben'-itongo, members of the group, by way of contract or succession. This control naturally affects umuryango land only. If land has been sold without its consent, the family council may redeem it; it also may refuse to register a will which it considers unfair. In pre-colonial Burundi, when a land-holding was to be confiscated as sanction by a political authority, the local kin group of the condemned nyen'itongo would redeem it in order that umuryango land should not fall into foreign hands. In contemporary Burundi, the local kin group can still redeem pledged land in case of payment difficulties by the debtor.

If the member of a local kin group leaves his umuryango holding, he normally entrusts it to one of his relatives who will watch over the

holding, especially in regard to encroachment by neighbours or the administration. The trustee may use the land for his own benefit and will receive a reward from the nyen'itongo, when the latter comes back and recovers his holding. This reward is called umuzibukiro.

The local kin group has a social obligation acknowledged by customary law to take care of umuryango land when a nyen'itongo cannot do it himself. This obligation is expressed by sayings such as:

> Uwutariho azigamirwa n'umuryango, itongo ry'umuryango ni wo urizigama,
>
> 'The family takes care of the share of family land held by the relative who is absent';

or

> Umuryango usigaranira uvuka mu muryango,
>
> 'The family takes care of the property for the one who was born on it'.

In the present context, "taking care" refers essentially to a protection against encroachment by neighbours or the administration.

4. The household

The household, called inzu, is normally composed of a man, his wife or wives, their children, who may be married, and sometimes relatives, as for example, an unmarried sister or an old aunt, as well as servants. All the household members live in a single urugo or in ingo connected to each other. Inside the urugo, nuclear families occupy separate houses and operate as independent units for purposes such as cooking, drawing water or getting firewood. A household is essentially a nuclear family which has grown, exactly as a local kin group is a household which has grown. The father is the head of the household, and as such, is called nyen'urugo. He is normally nyen'itongo, and organizes the exploitation of his holding and the allocation of plots

Witnesses say, on the contrary, that both fathers were friends who acquired their holding together from a chief as amatongo y'umuheto. Therefore Y's holding is for him itongo ry'umuryango, the holding he inherited from his father and not itongo ry'ubugererwa. The court's decision recognizes as umuryango the holding under dispute.

Customary legal principles cited (coutumes citées):

Ntawugira umugererwa uwo bagabanye hamwe,

'The person who received land at the same time as you did cannot be made into a land-client' (literal translation: on ne fait pas de quelqu'un son umugererwa, celui avec qui on a reçu).

Ntawunyaga uwatagabiye,

'You cannot deprive someone of what you did not give him' (literal translation: one ne spolie pas à qui on n'a pas donné).

Case No. 31/C/71 (Tribunal de Résidence de Bukeye, 1965)

Y claims to be the paternal cousin of X and consequently to have a right of inheritance to the holding he occupies. A says Y is not his paternal cousin (mwenewacu) bu the land-client of his father. Witnesses assert that X's and Y's fathers were brothers and the court therefore decides that X and Y will share the inherited holding.

Customary legal principle cited (coutume citée):

Ibisangiye imizi bisangira n'ukuma navyo ibisigi bisizwe n'umuvyeyi bisangira abavukana,

'Trees which share the roots, share the drought, and the inheritance of the father is shared by his offspring (literal translation: les arbres qui ont les mêmes racines sèchent en même temps et l'heritage laissé par le parent est partagé par ceux qui sont nés de lui).

to family members of foreigners by way of renting of loan. He may also convey his direct control interest over land, provided he does not wrong his family. It must be stressed that the control exercised by the local kin group over land held by ben'itongo does not abrogate the latter's interests. On his holding the father is his own master, and his direct control interest is only limited by the welfare of larger social groups.

Customary law does not acknowledge any group as holder of interest over land, other than the whole community, political groups and kinship-based groups.

Chapter 11 : Individuals as Holders of Customary Interests over Land originating in Kinship

When an elder of Burundi is questioned about land law, he will immediately classify the different kinds of estates held by individuals according to the way these people have acquired their interest.. For example, a holding may be classified as itongo ry'umuryango, 'the holding by purchase', if the individual has acquired interests through purchase.[1] A holding may also be itongo ry'umuheto, literally, 'the holding from the bow', acquired from a political authority, or itongo ry'ubugererwa, 'the holding acquired through clientship'.[2]

Most disputes about land are concerned with the nature of interests one has over land as defined in these categories:

Case No.30/C/71 (Tribunal de Résidence de Bukeye, 28.4.1965)

X overpasses the boundary marker between his holding and Y's holding, claiming that Y's father was his father's land client (umugererwa).

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1. L.A. Fallers, Law without Precedent, Chicago 1969, p.205. L.A. Fallers speaks of the two dimensions of land rights in Busoga, i.e., the individual contractual and the corporate hereditary dimensions.
2. The association of ubugerewa and itongo may be legally because a umugerewa has never been considered nyen'itongo, 'master of the itongo'.

Therefore, in most disputes the work of hill mediators and of the court officials may be summarized as an inquiry into the nature of the various interests the parties have over the disputed holding.

In the description and analysis of individual interests in land, the indigenous classification will be followed as it is found in court proceedings, especially in the customary sayings which at the same time explain and justify court decisions It may be noted that many terms found in these sayings belong to cattle vocabulary originally reserved for social activities centred around cattle. For example, the following saying acknowledging the validity of land gifts by a political authority and more generally by any direct control interest-holder, uses a pastoral image:

Uhawe n'umwami acanira Uburundi bubona, which means 'He who has received a cow from the Mwami makes fire for it while the whole of Burundi is watching'. In the land law context the saying means: he who has received land from a direct control holder may act as direct control interest-hold in front of anyone. Among the various individual interests over land acknowledged by customary law, those originating in kinship will be examined first; then, the interests originating in contract (sale, exchange, loan, lease, etc.), then the interests originating in personal dependence, and finally, interests stemming from land exploitation.

Kinship ties provide the framework in which most individual interests over land originate. Itongo ry'umuryango, 'the family holding', may be the object of various benefit and control interests stemming from kinship links. In the present chapter many aspects

of customary family law, as well as some of the new family code enacted in 1980, will be dealt with.

First, some comments will be made on the concept of itongo ry'umuryango and on the father as nyen'itongo; then on the main principles relating to the distribution of benefit interests within the itongo ry'umuryango, and finally on the conveyance of a direct control interest over itongo ry'umuryango, especially through inheritance and sale.

A. The concept of itongo ry'umuryango

1. Its definition

The family holding is also called itongo ry'iyoko, 'the holding of the lineage', itongo ry'imvukira, 'the holding where one is born', from the verb kuvukira, 'to be born at a certain place',[1] ubwatsi bwo munzu, 'the meadow of the house', or itongo ry'inyamo, 'the holding on which one's family has always been'. Inyamo comes from the verb kwama, 'to have always been'. The Barundi explain the origin of the family by referring to the founder of their lineage, who received land from the Mwami or a chief on which he settled.[2] This original holding has progressively been partitioned among the descendants of the first allottee. The unpartitioned portion, if there is any, remains under the direct control of the lineage. A holding, which an individual acquired through purchase or through another way, becomes itongo ry'umuryango for his children. Whether a holding is itongo ry'umuryango therefore, depends on the person who speaks.

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1. E. Mworoha, Peuples et Rois de l'Afrique des Grands Lacs, p.192.
2. C. Kayondi, op.cit., p.176. P. Nkezabera, "Etude du régime foncier actuel du Mugamba (Akanoge) en Urundi", in (1959) Servir, 9, p.100.

2. The father as nyen'itongo ry'umuryango

Once a holding has been partitioned among the heirs, each heir has full benefit and control interests in the land provided he exploits it for the welfare of his immediate family and more generally of the extended family which holds, as underlined already, some form of control over the transfer of direct control interests in family land, whether it be through gift, sale or succession.
A father who has inherited a holding and founded a nuclear family, is nyen' urugo 'the master of the urugo', or umugabo mu rugo rwiwe, 'the man in his urugo'. Urugo, literally, 'the compound', should be understood, in the present context, as the holding with all the goods and persons it contains. As nyen'urugo, the father holds a direct control interest over land, cattle and other goods, and paternal power over people. It also implies the social responsibility of using goods under his control for the support of his family. Theoretically, a father may dispose of his goods as he wants. A famous, and often cited, maxim says: Umuvyeyi agaba uko ashaka, 'the parent gives as he wants'.
In practice, the abashingantahe b'umuryango, the hill notables, umuryango in the present context meaning family and neighbours, may be called in case of unjustified transfer of benefit or control interests by the father, and may issue an opinion against the father's action; they try to persuade him to act according to the way a rightful father acts, and in the case of unfair partition, they may redivide the estate according to the principles of justice. Several cases will be examined later, illustrating

for example, the case of a father who does not allocate land to one of his sons who is about to marry, or one in which a father refuses to give the benefit of a plot to his daughter who comes back home after a divorce.[1] Society, through the intervention of the abashingantahe, is the ideal mediator in family conflicts. The extended family has a right of control over the father's actions concerning land in general and especially in the conveyance of direct control interests over an inherited holding. As a principle, one does not sell itongo ry'umuryango unless one is in a state of financial distress, in urgent need of cash, and without help from one's relatives. His holding has been transferred to him by his father, and more generally his ancestors, as the main part of the family patrimony, which should remain intact and must not be squandered. Moreover, the family's privacy has to be protected against foreign newcomers. While the sale of whole holdings is very rare, the sale of plots (ibivi) is common because it does not affect the family directly, nor the inheritance, nor the privacy. The following case well illustrates the social obligations of the father towards his children and their obligations in return.

Case No. 55/C/83 (Tribunal de Résidence de Bukeye, 12.7.1977)

B, the father of several children, sold part of his holding to H without consulting his adult children. On the contrary, he acted to that no one knew of the sale because he was aware that the family would forbid it. Previously, when he had asked his children, they had refused.

When the buyer comes to cultivate, he is denied access to the purchased land by the children of the seller; subsequently,

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1. See pp.239 and 244.

N, a son of B, brings a suit in court to redeem the sold plot. Here is an excerpt of the judge's examination of B, the father, and of the seller:

J: Have you been invested umushingantahe?

B: Yes.

J: So, why have you sold part of your holding in secret?

B: Because the umuryango had previously forbidden me to sell it.

J: And what about your grandchildren who will be left without property?

(The judge goes on to ask a question in the form of a proverb.)

Kananiy'abagabo ntiyagize gute?

The one who has not listened to the men (the umuryango elders), what happened to him?

B: Ntiyimye,

He has not ruled.

J: Utazi agakura abaga umutavu,

He who is not aware of the process of growth kills the calf.

The following day the court and the parties visit the family holding to see the plot under litigation. The judge examines the plaintiff N, son of the seller:

J: What are you complaining about?

N: Our itongo ry'umuryango is too small to be diminished by a sale. My father has not yet allocated to all his sons the land due on their marriage (gusohora).[1] We should buy more land rather than sell what we have.

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1. See p. 239.

J: Have you already been asked by the abashingantahe b'umuryango to redeem the plot from the buyer?

N: Yes, and I have offered to redeem it within three days.

J: Where were you when the sale was registered, when the acte de notoriété was delivered?

N: I was here, but I did not know anything about the sale.

J: Will you accept paying the price asked by the buyer to redeem the plot?

N: The court is empowered to answer that question.

The judge examines B again.

J: You have sold some of your holding secretly. Why have you acted like that?

B: I had a debt to pay to S and I was ordered by the court to pay it immediately. To avoid being sent to jail I sold some of my land.

J: Did your children and the umuryango know about your financial situation?

B: Yes, they knew about my financial situation, but they did not agree to help me pay the debt.

The court decides that the umuryango cannot claim its right of redemption in the present case, because B has sold part of his land as a direct consequence of lack of assistance from his family, when he was in financial distress.

Customary legal principles cited (coutumes citées):

Akari mu rugo niko karuvuna,

'What is in the household is what helps it in case of need'.

(Literal French translation: Ce qu'il y a dans le rugo, c'est ce qui l'aide en cas de besoin.)

Umuntu yikora ku co afise,

'Man gets help from what he has'. (Literal French translation: L'homme se fait aider par ce qu'il a.)

Umwana na we ugomba ko biba rwiwe afasha umuvyeyi ikimufashe,

'The child, who wants things to be his, helps his parent to get rid of what handicap the parent'. (Literal French translation: L'enfant qui veut que les choses soient à lui aide son parent à se débarasser de ce qui le handicape.)

Finally, the court puts forward in its decision that the sale has been registered, and an acte de notoriété has been delivered validating it.

This case calls for several remarks about the character of the relationships between father and children. The judge summarises very well the father's obligations towards his children by quoting the maxim, utazi agakura abaga umutavu, 'he who is not aware of the process of growth kills the calf'. It means, in the present context, that the father who does not take care of his family, who is not responsible in supporting it by giving his children resources to live, will be liable for their decline. "Killing the calf" is an image which in an ideologically pastoral society suggests something terrible. This maxim can be compared with the two other sayings quoted which justify the court's decision, i.e., akari mu rugo niko karuvuna, 'what is in the household is what helps it in case of need', and umuntu yikora ku co afise, 'man gets help from what he has'. These two sayings put the father's obligations in the right light: he can fulfil them and has to, as long as he is not in distress, as long as other more immediate problems do not weigh upon him.

Furthermore, the father's obligations are not one-sided: while he must help his children and support them, they have to behave as "good children", namely to obey their father, to respect him and in case of need, to help him, as is the case here. This obligation of assistance is expressed in the saying, umwana na we agomba ko biba rwiwe afasha umuvyeyi kukimufashe, 'the child who wants things to be his, helps his parent to get rid of what handicaps the parent'. It may be noted that this saying it not a maxim, but rather an explanation of the court's decision.

The complementary obligations implied in the relationships between a father and his children, provide the framework in which interests in land within the family are defined. It must be stressed that obligations of members of the family towards one another are mainly of a moral nature: moral principles therefore have legal consequences.

According to R. Massinon,[1] the mutual actions of father and children obey three basic principles: they must be:

- reasonable,
- rightful,
- not contrary to customary principles.

B. The distribution of benefit interests over itongo ry'umuryango

Within the family, the nature of interests over land is stressed by two verbs: while those entitled to a benefit interest only may kurima, 'cultivate', those entitled to a direct control interest may

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1. R. Massionon, "L'évolution des règles de succession face aux législations étrangères. Le cas de la succession testamentaire", in (1980), R.J.B., p.153.

cultivate and gutorana, share as heir a portion of the holding which is the object of the interests under consideration.

The nyen'itongo ry'umuryango allocates benefit interests over land under his direct control to (1) family members, and (2) other people.

1. The distribution of benefit interests within the family

According to the principle asserting that family land must first serve to support family members, the nyen'itongo must allocate the necessary land to his kin. Family members who are deprived of their rights of benefit of family land may resort to the abashingantahe b'umuryango for mediation, and, subsequently, to court for adjudication.

The main situations in which benefit interests over land are granted by the father to members of his family, are as follows:

(a) When children grow up, they receive a plot to cultivate for their education.

(b) The wife may be allocated a specific plot to cultivate, and the husband may reserve a plot for his own use.

(c) When the children are about to marry they receive a portion of their father's holding on which to settle their new family.

(d) When a girl marries, she may receive a plot to cultivate.

(e) When a girl is married and customary visits from her family are not performed regularly, she may claim a plot on her father's holding as compensation.

(f) When a married daughter has divorced or is widowed, she may come back to her paternal home, and her family has the obligation to support her by allocating her a plot to cultivate.

(g) A divorced or repudiated woman with children who remains on her husband's holding is allocated a plot to cultivate.

(h) In case of polygamy, each wife has the benefit of separate holdings or of specific parts of a holding.

(j) If a relative, close or far, asks for a plot to settle down. he may be allocated one.

While sections (a), (b) and (d) are benefit interests originating in the will of the nyen'itongo, numbers (c), (e), (f), (g) and (h) are legally sanctioned obligations. Section (j) depends upon the will of the nyen'itongo if the allocation is made in favour of a relative, but it is a legal obligation if the petitioner is an heir by status.

(a) Allocation of a plot to children for educational purposes

As soon as children, boys as well as girls, are able to cultivate, the father gives them a small plot, called icibare c'umwana which means 'the field of the child'. Such an allocation is part of the general education of any child; the latter is to grow crops on the allocated holding. When he becomes an adult, the nyen'itongo may allow him to keep it. He will then hold a benefit interest over the land under consideration. As a matter of fact, when a son is about to get married, his icibare c'umwana is usually included in the portion of land which he is allocated by the father to settle his family on. Daughters too, after their marriage, are often allowed to keep their icibare. The father does not have any legal obligation to allocate a plot to his children for education purposes; in that respect, he is absolutely free to act as he wants. Very few disputes about icibare c'umwana arise. During the period of fieldwork not one was found, but it was mentioned in a single instance:

Case No.73/C/83 (Tribunal de Résidence de Bukeye, 9.7.1977)

X, the paternal uncle of A and B, claims that his nephews received a

plot as gift (ingabirano)[1] from their paternal grandfather. On the contrary, A and B say that they have been raised by their paternal grandfather who adopted them in such a way that he made them heirs along with his own sons (kuvukanisha).[2] According to A and B, the plot to which their uncle refers was not ingabirano but rather icibare c'umwana, which was allocated to them in the context of their education. The affirmations of A and B are corroborated by witnesses. The fact that the plot occupied by A and B is recognized as icibare c'umwana and not ingabirano, provides evidence that A and B were considered by their grandfather as his own children.[3]

(b) Allocation of a plot to one of the spouses

Several authors writing on Burundi customary land law, speak of specific plots within a land-holding which are allocated by the husband to his wife.[4] Such a plot is called icibare c'umugore, which means 'the field of the wife', the wife being entitled to grow crops on it and to the benefit of its produce. According to the same authors, there is also icibare c'umugabo, which means 'the field of the husband'; it is a plot which the husband may reserve for his own benefit.

In the Bukeye area, such transfers of benefit interest are unknown within a nuclear family; informants always stressed that an itongo is cultivated by husband and wife together; they pointed out that the nuclear family must be understood as a unit sharing tilling activities as well as the produce of land. If the wife or husband cultivates a specific plot, it must be understood in the context of the distribution

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1. See p.256.
2. See p.232.
3. For a detailed description of the case see p.234.
4. R. Burije, Le Droit foncier au Burundi, sa statique et sa dynamique, p.97. A. Verbrugghe, "Le régime foncier coutumier au Burundi", p.77.

of work among the members of the nuclear family and not as the transfer of benefit interest over a particular piece of land.

(c) Allocation of land to sons who are about to get married

When a son is about to get married, his father, if he is able, usually provides him with the cattle necessary for bridewealth, and, as the normal settlement pattern is patrilocal marriage, with land to settle his new family on. Such an allocation is called gusohora umwana, which means 'to give a land dowry to one's son'; it is also known as guha umwana indimiro, which simply means 'to give a holding to one's son'. Contrary to the allocations described above, gusohora umwana is a legal obligation according to customary law. It was the origin of the obligation d'établissement, the obligation of settlement of children, which is provided for in Article 123 of the 1980 Family Code, which states that:

> Les époux contractent ensemble l'obligation d'entretenir, d'éduquer et d'établir leurs enfants communs. Cette obligation dure jusqu'à ce que leurs enfants soient capables de subvenir eux-mêmes à leurs besoins.[1]

Several cases concerning the gusohora umwana have been found; and the following well express the nature of the obligation of the father towards his married sons:

Case No.2401/C/67 (Tribunal de Résidence de Bukeye, 10.5.1964).

A married son files an action against his father who has taken back some of the land he had received when he married in the context of the gusohora umwana practice. The father argues that the land under dispute had not been given as gusohora, but rather as a loan (intizo). As he

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1. Décret-loi portant Code des Personnes et de la Famille in (1980), B.O.B., p.92.

lent the land under dispute, he is free to take it back at any time. The father is not able to present any proof of the loan, such as a written document or witnesses who shared inzoga y'agataka, the beer of of the loan. Consequently, the court decides that the land confiscated by the father has to be given back to his son.

Customary legal principle cited (coutume citée):

Umwana iy'umuhaye umugore, umuhana n'itongo arimamwo,

'When you give a wife to your son, you give him a holding to cultivate at the same time'.

Allocation of land to a son about to get married only operates the transfer of benefit interest; the father remains nyen'itongo, and is free to allocate whichever plots he wishes to his sons. If a son acts badly, his father may take back some of the allocated land. On the other hand, in case of a manifestly unfair allocation, failure to allocate or of unfair confiscation of allocated land, the wronged son usually resorts to the abashingantahe b'umuryango, who remind the father that he has to act as a "good" father, and may order allocation. If the mediation of abashingantahe fails, resort to court is possible as expressed in the following saying:

Umwana atarasohorwa, sentare iramusohora,

'If a child has not been allocated land in the context of gusohora, the court makes the allocation'.

The complaint of a son to the abashingantahe may result in the immediate partitioning of his holding by the father, which often may be to the plaintiff's disadvantage. In that context, an informant made an interesting comment stressing that, if a father allocates a a small plot to one of his sons about to get married, it is often

wiser for the latter not to resort to the abashingantahe in order to obtain a fairer allocation. Such an action could provoke an irreversible partition of the holding by the father who could allot a small share to the plaintiff, if he has good reason for doing so. On the other hand, if the wronged son waits for the death of his father, the plots allocated to married sons in the context of gusohora will be mixed and all brothers will eventually receive equal shares. When a father prepares his will, he normally takes into account plots which have been allocated to married sons, but he may also mingle all the plots and divide his holding independently. In present-day Burundi, this practice is a source of problems, because sons have often built stone or brick houses and planted permanent crops, such as coffee or tea, on the plots they had been allocated in the context of gusohora. In this respect, customary rules are evolving and the notion of improvement of allocated land is now taken into account in the context of succession.[1]

(d) Allocation of a plot to a married daughter

In rural Burundi when a girl marries, she usually goes to live with her husband's family. However, her father may leave her the benefit of the plot she received as icibare c'umwana, or allocate her a new plot. Often, such an allocation takes place when the daughter gives birth to a child. From the point of view of her brothers, such a plot is called icibare ca'mushikabo, 'the field of one's sister'.

A father may also allocate to his daughter a plot to settle on with her husband. Uxorilocality is not frequent; it happens

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1. See p. 304.

especially when a father has only daughters, or when a daughter has married someone who has a small land-holding, whereas the wife's father has a large one. Uxorilocality is called umukwe ku ndaro, an expression which literally means 'the son-in-law in the hut', and most often results in the low status of the husband. In general, the grant of a plot to a daughter, in case of uxorilocality, is not made as an allocation with transfer of benefit interest, but as a gift (ingabirano). Such a gift may also be made to the husband. The father may also put his daughter or her husband on the same level as his legitimate heirs (kuvukanisha).[1] In that case, a plot will be allocated to the person who has been made a legitimate heir, in the context of gusohora, when she gets married.

Gifts and types of allocations have differentiations. A gift from the father with the formal planting of boundary markers to demarcate the given plot transfers benefit and control interests over land, while the allocation of a plot operating the transfer of benefit interest over land grants the right to cultivate and to benefit of the produce of the allocated plot, whereas the allocation of a plot in the context of gusohora transfers benefit interest over the land under consideration, and the right to participate in the inheritance of the nyen'itongo.

(e) Allocation of a plot to a married daughter who does not receive the customary visits and gifts from her paternal family.

According to the principle that visits must be reciprocal, as expressed by the maxim ikirenge kukindi, 'a foot in the other's

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1. See p.292.

property', i.e., a visit calls for another visit, custom prescribes informal but frequent mutual visits between the married daughter and her paternal family. Moreover, specific visits have to be performed when a married daughter has given birth to a child or is ill. These visits are always accompanied by gifts of beer and of other goods.

If the paternal family does not perform them, the daughter is entitled to ask for the allocation of a plot on her father's or brothers' holding. Such a plot is called ingemurano or igikemanyi. Igikemanyi literally designates 'a basket', while ingemurano refers to the content of this basket. According to a decision rendered by a native court in 1948, the parents may replace visits prescribed by custom as well as presents due to their married daughter, by giving her a young ox called igiseke, a term also meaning 'basket'.[1] The allocation of a plot or the gift of cattle is clearly a compensation for the visits which are not performed. A daughter who receives igikemanyi holds a lifetime benefit interest over it, but never gains control, never becomes nyen'itongo.

Case No.59/C/81 (Tribunal de Résidence de Bukeye, 27.5.1975)
A married woman files an action against her brothers complaining that they do not perform the customary visits of courtesy in case of child-birth or sickness. As compensation, she asks her brothers for the benefit of a plot situated on the family holding as igikemanyi; the brothers refuse. The court decides that she is entitled to the allocation of plot (ikivi) as igikemanyi, but that such an allocation does not result in giving her a right of inheritance in her father's

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1. Décision du 21.4.1948 (Territoire de Ruyigi, Urundi), in (1949) B.J.I.R.U., 7, p.408

family.[1]

Customary legal principle cited (coutume citée):

Umwigeme akura iyo yagiye ntakura iyo yavuye,

'A girl "grows" where she has gone, she does not "grow" where she has come from'.

Case No.74/C/83 (Tribunal de Résidence de Bukeye, 26.8.1977)

A married woman, called A, files an action against her brother who does not want to allocate her a plot as igikemanyi.

Here is an excerpt from the judge's examination of the plaintiff:

J: Have you received bridewealth? [Are you properly married?]

A: Yes.

J: Do you want to share the holding left by your father along with your brothers, or do you only want to be allocated an ingemurano?

A: I only want to benefit from an ingemurano.

J: Would you be happy if your brother made the prescribed customary visits to married sisters and brought you an igikemanyi [beer and other presents]?

A: As igikemanyi I prefer to be allocated a plot because I know that my brother's wife will not be able to perform the prescribed customary visits.

The court decides that A is entitled to an igikemanyi because she is married. The igikemanyi may consist of presents or of a plot. Since A prefers a plot, the court decides that she will be allocated one.

(f) Allocation of a plot to a divorced, widowed or unmarried daughter

According to customary law, married women who have problems with their husband or his family are always free to go back to their paternal

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1. Rights of inheritance held by daughters will be discussed on p.264.

family. Both families are in charge of conciliation proceedings between the spouses, and, if necessary, of the proceedings leading to the end of the marriage. According to the 1980 Family Code, marriage may only be dissolved by a court decision, but the families of the spouses are obliged to attempt reconciliation.[1] Repudiation occurs more often than divorce, as divorce requires the return of bridewealth. Repudiated women, especially if they have children, remain on their husband's holding where they are allocated a plot.[2] If they do not stay there, they normally return to their father's holding where they are entitled to the benefit of a plot. The same customary rule applies to the widow who does not stay on her late husband's holding.

The term designating the married daughter who goes back to her paternal family is igisubira-muhira, meaning 'the one who returns home'. This term implies a pejorative connotation[3] because it stresses a failure in marriage and relationships with affines.

Case No.76/C/83 (Tribunal de Résidence de Bukeye, 14.9.1977)

The court is asked to proceed in the partition of X's estate because of disagreement among the heirs after the death of their father. The family holding has to be shared among seven brothers. Before the partition takes place in situ, the judge asks whether anybody has anything to claim in regard to the particular case; one of the sisters of the heirs, called A, says:

A: I am a daughter of X. After his death, my mother gave me a plot (ikivi) to live on, and my brothers have now taken it back. I ask

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1. Articles 171 and 160, Codes des Personnes et de la Famille, pp.95-6.
2. See p.251.
3. The prefix igi is usually pejorative.

the court to give me that plot back because I need it to survive.

J: Are you married?

A: Yes, but my husband left and went I do not know where.

J: Do you have children?

A: Nta kuvyaran'akana kamwe k'agakobwa.

Not really, it is only a small child, a small girl. My brothers want to evict me from the family holding; they do not want to give me any land.

J: Why don't you bring to your brothers a present as a token that you would like to have your plot back (insuhuzo)?[1] Do you have one brother who takes special care of you?

A: No, I do not have anybody to take care of me.[2]

Being without resources and without protection, the daughter is allocated a plot by the court before partition takes place among the brothers. It is specified that she will only have the benefit of it as long as she needs it.

The questions asked by the judge and A's answers well summarize the status of woman in rural Burundi. Questions about her marriage and her offspring are asked in order to place the woman in her social context. She has no security in her husband's family because she had given birth only to a daughter, and, moreover, her husband had abandoned her. For a married woman security depends principally on male children. Once

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1. Insuhuzo is a term meaning, according to Rodegem, Dictionnaire Kirundi-Français, p.453; cadeau à un malade que l'on visite, cadeau de condoléances. In the present case, the daughter has to bring a pot of beer to her brothers as a sign of sympathy, and will then claim her rights.
2. In his will, the father normally appoints for each daughter one of her brothers to take care of her. This may also be done when daughters marry.

her position in her husband's family was known, the judge went on to question her about her position in her paternal family, namely, whether, her father being dead, she had a brother who would have an obligation to take special care of her. The negative answer meant that she also lacked security in her own family. Thus, it was up to the court to intervene in order to make sure that she would get a plot for her survival, as she is entitled to according to customary law. The woman's answer to the question concerning her offspring is worth keeping in mind, because it stresses the importance of male children in such a patrilineal society as Burundi.

Case No.196/C/77 (Tribunal de Résidence de Bukeye, 11.5.1971)

A woman files an action against her brothers who refuse to allocate her a plot, though she has had problems with her husband and his family, and has consequently gone back to her paternal home. The court proceedings indicate that her two brothers have already partitioned their father's holding, and that they are willing to allocate a plot to their sister provided she only has the benefit of it and will never alienate it or bequeath it.

The court decides that the woman is to be allocated a plot to live on only.

Customary legal principle cited (coutume citée):

Igito gitabwa iwabo,

'The worthless person is thrown back on her family'.

This saying, in which the pejorative prefix igi is also found, expresses at the same time the low status of the repudiated or divorced woman, and the responsibility of the family to assist her and to insure the means of her survival.

Case No.85/C/76 (Tribunal de Résidence de Bukeye, 11.10.1972)

A woman files an action against her brothers because they do not accept her as an heir to their father's estate. She has previously left her husband's holding and gone back to her paternal home where she has been allocated a plot to live on. As no evidence is produced to prove that the father has included her in his will, the court decides that the woman will continue to benefit from the allocated plot, but will not have any right in the father's inheritance.

Customary legal principle cited (coutume citée):

Igisubira-muhira kimaze kuronka indimo igikwiye ntigisubira gutorana,

'When the married woman, who has returned to her paternal family, has already received a plot to live on, she has no right to a claim in her father's inheritance'.

Case No.66/C/83 (Tribunal de Résidence de Bukeye, 18.7.1977)

A, a widow, files an action against her brother B who does not want to allocate her a plot on the family holding, although she has expressed the wish to go back to her paternal home. Here is an excerpt from the court proceedings:

A: My father, before his death, made it clear that if I had problems with my husband or his family I could always come back to the holding occupied by my mother to settle on. Now that I have expressed the wish to go back, my brother forbids me to settle on the holding under consideration. Naturally, my father specified that, after my death, the holding would be inherited by my brother and by my sons.

B: A long time ago, A received a plot from her father as igikemanyi, and I have never taken this plot back. If one day, she is chased from her late husband's holding, I will welcome her and allocate

her sufficient land for her survival. What I refuse is to give her the benefit of two holdings, one in her late husband's family and one here. Our father never made any bequest in her favour.

Judge to A:

Do you want to live on your father's holding or do you want to remain on your husband's holding and only come to cultivate a plot on your father's holding as you did with igikemanyi?

A: I want to live on my father's holding, namely on the portion of the holding which was occupied by my mother. My husband is dead and my children will stay on their father's holding. The day I die, they will come to the land I occupied in order to harvest what I planted and they will take my personal belongings. In any case, they will have no claim to the inheritance of land.

Judge to B:

Do you agree to your sister coming to settle on the portion of the holding occupied by her mother?

B: What I do not want is that she alternately cultivates her husband's plot and her's here, and that through living elsewhere, she cultivates a large tract of land on our family holding.

I do not agree with any claim on her part to be an heir, or that, when she dies, her children might have some claims in our father's inheritance.

If she comes back home because she has problems (amagorwa, meaning literally 'pains, sufferings') with her husband's family; if she cannot do anything else but come back to her paternal home, then I agree to let her settle on the portion of the holding occupied by her mother.

As both parties agree, the court decides that A will settle on the portion of the holding occupied by her mother, but that she will have only a life-

time interest over it.

Customary legal principle cited (coutume citée):

Uwugowe umuryango uramwakira,

'The family welcomes the married daughter who has difficulty in her marriage or with her husband's family'.

In this case, the centre of the dispute is again about the nature of the interests over land implied in the allocation of a plot to the widowed daughter who returns to her paternal home. The male heir refuses to allocate a plot to his sister because he is afraid of her eventual claims in their father's inheritance. Igisubira-muhira is welcome provided she does not have any claim over the control of the land under consideration.

It must be stressed that the 1980 Family Code acknowledges the obligation of the husband, in case of divorce, to pay a pension to his former wife as well as to provide a place to settle on (établissement for herself and her children).[1] On the other hand, there is no provision concerning the rights of the divorced woman who returns to her paternal home.

Unmarried daughters are entitled to the benefit of some land on the family holding in order to supply her needs.

Case No.83/C/81 (Tribunal de Résidence de Bukeye, 30.7.1975)

A and B are brother and sister. They lost their parents. The sister, B, is not married and lives on the family holding. Her brother wants to sell the whole holding. B goes to court to prevent the sale. The court decides that her brother cannot sell the family property as long as his sister is not married and needs land to survive.

Customary legal principle cited (coutume citée):

Umukobwa atarasohoka ntatwarwa ubwatsi bwo munzu,

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1. Article 186, Codes des Personnes et de la Famille, p.97.

'The daughter who is not married cannot be deprived of the family property'.

(g) Allocation of land to a repudiated woman with children who remains on her husband's holding

According to customary law, the payment of bridewealth to the girl's family results in the transfer of rights over her fertility to the husband's family.[1] In case of marriage disputes, the way in which the question of bridewealth is handled, namely whether it is returned to the husband's family or kept by the wife's family, determines the fate of the children and of the wife. If a marriage breakdown occurs when the wife is childless, the latter usually goes back to her paternal home and the bridewealth is returned. On the other hand, if the wife has given birth to children, especially male children, bridewealth is rarely returned, and the wife is entitled to the benefit of a portion of her husband's holding in order to raise her children who "belong" to their father's family. She has the status of intabwa, meaning 'left aside', 'repudiated'.[2] In spite of her low position, the intabwa has the right by customary law to the means of survival and to bring up her children.

Case No.43/C/83 (Tribunal de Résidence de Bukeye, 23.8.1977)

B, the first wife of X, was repudiated, and, consequently, she left her husband's holding with her children to live with another man. X took another wife who settled on the holding formerly occupied by B. Later on, B returns to her husband and asks him for the benefit of a portion of his holding to raise her children. X, the husband, refuses, and B files an action against him.

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1. See p.269.
2. One of the objectives of the provisions on divorce as set out in the 1980 Family Code is to abolish the status of intabwa. However, the divorced wife remaining on her husband's holding will still suffer from the social implications resulting from the status of intabwa.

Here is an excerpt from the proceedings:

Judge to B:

Do you want the other wife to go away or your husband's property to be shared in two?

B: I want my husband's holding to be shared in two because I have to feed my children.

Judge to X:

Do you agree to share your holding between your two wives?

X: Yes, but I do not want the children B has had with other men to be raised on my property, and later make a claim on the holding. To inherit, they have to go to their respective fathers.

Judge to B:

Do you agree with your husband's proposal?

B: Yes, I agree.

The court decides that the holding of X will be divided in two portions, one for each wife, provided the children B has had with other men go to their respective fathers.

This case is interesting because it points out the basic insecurity of present-day Burundi children whose mother is not divorced and who have not been begotten by her legal husband. According to customary law, if bridewealth has not been returned to the husband's family, all the children begotten by the wife "belong" to their social father, and are his heirs. In the present case, though bridewealth has never been returned, some of the wife's children are rejected by their social father and sent to their respective genetic fathers who, according to customary law, do not have any right over them. It may be questioned how the respective genetic fathers will be found if, as in the present case, the woman has been promiscuous, and, if they are found, on which

grounds the genetic fathers will be obliged to take the children. This case is a good illustration of the way customary law, especially family customary law, cannot cope, in many of its aspects, with modern Burundi society, and, in particular, with population pressure. Traditionally, the strength of a family largely depended on the number of its members, and no child was rejected; formerly, in such cases as the present one, the children would either have been accepted by the legal husband or "purchased"[1] by their genetic fathers from their legal father. This procedure would have resulted in making the children the legitimate children of their respective genetic fathers. In any case, they would have had a place to live, a place to be brought up in and goods to inherit. On the contrary, in the Burundi of 1977, if large families still enjoy consideration, no child from outside the family in the genetic sense will be readily accepted, because of the pressure on land. The 1980 Family Code, in its titre VIII, provides for rules regulating consanguinity in the direct line (filiation), its denial by the husband, and the acknowledgement of natural children, as well as action for affiliation.[2] The objective of the 1980 Family Code provisions is to ensure equality among all the children: there are no more natural children as opposed to legitimate children because, through acknowledgement by the genetic father or justice, natural children possess all the rights of legitimate children.

(h) Allocation of land to the various wives of a polygamous household

Polygamy was banned by statute during the colonial era, but it is still practised to a small extent.[3] It is acknowledged, in the dispute

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1. See p.263.
2. Titre VIII, articles 199-246, Code des personnes et de la famille, pp.99-103.
3. According to J. Navas et alia, Famille et Fécondité au Burundi..., p.27, polygamy on a small scale is practised in present-day Burundi. In 1971, 5.4% of the married men were polygamous.

settlement process, in respect to inheritance rules concerning the estate left by a polygamous father: his children must inherit the portion of the land-holding on which their respective mothers had settled as well as the goods they possessed.

A man who has two or more wives has normally as many holdings as wives: each wife manages the holding she has been settled on. If a polygamous man has only a small holding, he is careful to demarcate clearly the portions allocated to each wife. In the relationships among the various wives, the basic social principle which is applied is inzu ntisenyer'yindi, meaning 'a household does not look for wood for another one'. This principle has legal implications because it acknowledges the independence of wives within the polygamous family both in the management of land as well as in all social activities. The consequences of polygamy on inheritance will be described in detail later.[1]

(j) Allocation of land to a relative

In pre-colonial and colonial Burundi, when unexploited land was plentiful, any relative, close or distant, was welcome to settle on one's property provided it was large enough. This operation was called kuzoza, which means 'to have a relative come on one's holding', 'to pursue family relationships'.

There were two kinds of kuzoza, namely kuzoza uwugowe, which means 'to bring on one's holding a relative in need', and kuzoza uwuhiriwe, which means 'to bring on one's holding a relative who is well-off'. The nyen'itongo used to give goods to his relatives to survive on, especially a plot of land and cattle. Land was either allocated with the transfer of benefit interest or allotted as gift (ingabirano). The immigrating relative could also be adopted and made an heir (kuvukanisha).

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1. See p. 263.

Today, this practice has nearly disappeared because of the population pressure on land. There are often loans of land among family members. The relative in need of land asks for it (gusaba buryango, to ask within the family), and will give to the nyen'itongo a yearly pot of beer called inzoga y'umuryango. This beer acknowledges the temporary transfer of benefit interest over the plot under consideration.

2. Distribution of benefit interests outside the family

The nyen'itongo may allocate land under his direct control as he wishes, provided he does not harm the welfare of his children and does not prevent members of his family from exercising their rightful benefit interests over land. The main modes of transfer of benefit interests to non-family members are loan, renting and pledge. These modes will be examined later.[1]

C. The main principles related to the conveyance of a direct control interest over itongo ry'umuryango

The nyen'itongo ry'umuryango may transfer his direct control interest over land by means of (1) gift, (2) sale, and (3) succession.

1. Gift of land which is part of itongo ry'umuryango

'To give' is kugabira, a verb derived from cattle vocabulary, and ingabirano is 'the gift'. Kugabira ikivi, 'to give a plot of land', was, and still is a common practice in rural Burundi, whereas kugabira itongo, 'to give a land-holding', has always been rare. As a principle, the father is free to make a gift of land to whom he wants, provided he does not harm his children's welfare. A distinction must be made between (a) a gift of land within the family, and (b) a gift of land outside the family.

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1. For loan, see p.331; for renting, see p.335; for pledge, see p.340.

(a) Gift of land within the family

During his lifetime, the father may give land to members of his family, especially to his daughters,who are not normally legitimate heirs. Such gifts are always made in public in the presence of the abashingantahe b'umuryango; the father specifies who is the grantee and why the gift is made. While the father is free to give movable goods, such as cattle, he is much more restricted when land is concerned: he must put forward a good reason to make the gift, because the abashingantahe may refuse to acknowledge an unjustified gift arguing that nta umwana n'ikinono, 'there is no child comparable to the hoof of the cow'. If the father makes an unjustified gift, it is said that he makes an error (yihenda). If the father favours one child, he may give him a head of cattle which will be used to purchase a plot rather than to give him the plot itself.

The main reasons accepted for giving a gift of land are the good behaviour of a child and the state of material need of a married daughter:

- the good behaviour of a child: if a son works very hard for his father while his brothers neglect their father, he may be given a plot as a reward. When the father shares his holding among his heirs, he may give a plot as gift to the good child. This plot is added to the share he would normally receive. The father, when making this gift, has to explain clearly the reasons for it to the abashingantahe b'umuryango.
- The material need of a married daughter: daughters may sometimes receive as a gift land to settle on with their husbands, especially if the latter are poor. Umukwe kundaro, 'the husband who settles

on his wife's family holding', does not have any right over land given to his wife, and is considered her guest. People say that he is the servant of his wife (umushumba). It also happens that the son-in-law might receive land as ingabirano from the nyen'-itongo. In that case, the son-in-law himself becomes nyen'itongo: he is no longer a servant but the master of his land.

On the death of the wife's father, conflicts often arise between her brothers and herself. Her brothers refuse to acknowledge their sister's interests over land. Resort to the abashingantahe is sought, and the issue of the case will depend on the testimony of the witnesses of the father's actions concerning the land under dispute. It must finally be stressed that the witnesses of the gift to a daughter or her husband may refuse to accept it if it is not justified, in the case of the husband already having a large land-holding, for example.

Sons rarely receive gifts of land from their father because they are legitimate heirs and, as such, are allocated a portion of their father's holding when they marry. Other members of the family may also be given land, especially if the holding is large. Such a gift is made under the same conditions as the granting of benefit interests to a relative, which has been described above.[1]

(b) Gift of land outside the family

In contemporary Burundi, gifts of plots are still made, although they are becoming rare with the increasing population pressure on land. When such gifts are made, the family of the giver has naturally to agree.[2]

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1. See p. 254.
2. See p. 330.

2. Sale of land which is part of itongo ry'umuryango

As with gifts, the nyen'itongo is free to sell land provided he does not harm his children's and more generally his family's welfare. Regarding land he has inherited, he must warn his family, whose members have a right of pre-emption, and, if the sale has already taken place, a right of redemption.

Case No. 65/C/67 (Tribunal de Résidence de Bukeye, 25.5.1964)

X has sold his holding while his brother Y was away, without telling him. The commune officials looked for Y when they became aware of what had happened. Y then files an action in court against his brother and the buyer in order to redeem the sold holding. The court decides that he is entitled to buy it back for one head of cattle, which is the price the buyer had paid for it.

In its decision the court clearly acknowledges the right of redemption of family members when part of the itongo ry'umuryango has been sold without their consent. To express this right of redemption, the term kuguranura, which means 'to return something which has been bought', 'to return the exchanged things', is used. In the present case, the purchase price had to be returned by the redeemer, while, according to customary law, the court can oblige the vendor to return the purchase price.

It should be kept in mind that there are two factors justifying limits to the sale of family property, namely the danger of squandering the family heritage, which is the main guaranty of its survival, and the protection of the family privacy. The obligatory warning of relatives in case of sale of family property, the pre-emption right of the family, and the opportunity to redeem sold land

are only the legal expressions of these factors. The same limits exist in neighbouring societies: in Haya law, for example, land held in family tenure cannot be sold without the consent of family members, and an inherited share must always be offered first to family members in case of sale.[1]

3. Conveyance of a direct control interest by way of succession

In Burundi there is no statutory law governing inheritance except for provisions regulating inheritance by foreigners.[2] Therefore it is entirely ruled by customary law, which evolves along with society.

The estate to be apportioned among heirs consists of all goods over which a person has direct control; in rural Burundi it is mainly cattle and land. In the traditional society cattle and land-clients were also inherited by their lord's heirs.

To be an heir, in Kirundi samuragwa, is a social position one acquires either by birth or by appointment by the testator. There are some basic Kirundi terms which refer to inheritance: gutorana, 'to share an estate', kuraga, 'to make one's will', and ibisigi, 'the left estate'.

Inheritance adheres to two main principles:

(i) all heirs by status, namely all sons, or the closest patrilineal kin in the absence of sons, share the estate left;

(ii) the holder has the freedom to give his goods to whom he wants and as he wants.

These apparently contradictory principles form the framework in which inheritance operates in Burundi. A third principle which

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1. James and Fimbo, Customary Land Law of Tanzania, p.250.
2. Décret du Roi-Souverain du 28 décembre 1888 sur la succession d'étrangers décédés au Congo, in Codes et Lois de Burundi, p.118.

links the two mentioned above, requires that everyone in society must act according to his social position; a father must act like a "good father" and children must act towards their father as "good children". Moral and social obligations within the family condition the application of the two basic principles regulating inheritance. The interlocking of moral, social and legal norms is well-illustrated in most cases brought to court concerning the relationships between father and son in respect to material goods. Abashingantahe and judges work out their decisions within that framework.

The main principles relating to inheritance of landed property, according to customary law, will now be examined. Afterwards, some remarks will be made on the future of customary inheritance rules concerning land.

(a) The basic principles of the inheritance of landed property

Burundi being a patrilineal society, sons share the estate left by their father. In the absence of sons, the male next-of-kin become heirs, and, finally, in the absence of any male kin, the estate left comes under the direct control of the State. Sons tend to inherit the same share, although the eldest one (umwana w'infura) may be the first to choose his share of the holding being divided among heirs. Daughters are not legitimate heirs, according to customary law, because they do not continue the patrilineage. However, an evolution of this principle has taken place since the colonial period; and will be explained later.[1]

The following cases illustrate the basic principles of patrilineal inheritance:

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1. See p.264.

Case No.222/C/78 (Tribunal de Résidence de Bukeye, 20.7.1971)
A girl goes to court and claims that she has been willed some banana orchards and several fields by her father. Her brother argues, on the contrary, that his sister received only the benefit of some land, but that she was never made heir by their father. In the absence of witnesses of the will, the court gives satisfaction to the brother.
Customary legal principle cited (coutume citée):
Umukobwa akura kwa sebukwe, ntakura kwa se,
'A daughter "grows" by her father-in-law, she does not grow by her father'.
A daughter, once she is married, has no right over her father's property, but she has rights, as a wife of a son, over the holding of her father-in-law. If witnesses could have testified in favour of the daughter by saying that her father had made her heir, she would have inherited part of her father's property, because her position as heir appointed by the testator would have been acknowledged by the court.

According to the same principle, sons can inherit from their father, but not from their mother's family:
Case No.27/C/82 (Tribunal de Résidence de Bukeye, 9.3.1976)
X's widow and his married sister, who has been repudiated by her husband, live on X's holding. His widow gave as ingabirano a plot to A, one of her sister-in-law's sons. After the death of his mother, A claims to inherit the plot on which his mother lived as igisubira-muhira.
His aunt, X's widow, does not accept his claim because he is heir in his father's family only.
The court confirms X's widow's point of view, stressing that A has a direct control interest only over the plot given to him as ingabirano, while the plot on which his mother settled will be inherited

by X's heirs.

Legal customary principle cited (coutume citée):

Umwana akur'ibuse ntakura ibu-nyina,

'A child "grows" by his father, he does not "grow" by his mother'.

There are many sayings which express the principle that the estate left is shared by the children of the testator, such as:

Ico umuvyeyi asize nico araga,

'Who the parent has begotten, inherits';

Ibisigi bisiga umuvyeyi bigaburirwa abana yasize,

'The inheritance a parent leaves is partitioned among the children he has begotten';

Abasangiye umuvyeyi basangira nivyo asize,

'Those who have the same parent share what he has left';

Ibisigi vy'uwupfuye bitoranwa nabo yasize,

'Inheritance of the deceased is shared by those he has begotten'.

And finally, the following saying which summarizes and embodies the principle of inheritance by status:

Ibisangiye imizi bisangira n'ukuma na vyo ibisigi bisizwe n'umuvyeyi bisangira abavukana,

'Trees which share the same roots share the drought, so what is left by the parent is partitioned among those he has begotten'.

(b) Particular situations related to the inheritance of landed property

Landed property is inherited according to particular rules in several instances, such as when (i) children of polygamous unions are concerned, (ii) daughters are concerned, (iii) children from divorced parents are concerned, (iv) natural children are concerned, (v) orphans are concerned, (vi) a widow is concerned, and (vii) when there are no direct heirs.

(i) Children issued from polygamous unions as heirs to landed property

As underlined earlier, polygamy is still practised on a small scale in present-day Burundi, although several décrets issued during the colonial period banned it.[1] Each wife of a polygamous man occupies her own holding or a part of holding, and her sons will inherit the land on which she had been settled by her husband.

Case No.35/C/73 (Tribunal de Résidence de Bukeye, 25,4,1967)

X had two wives settled on two different holdings. One wife, A, has had only one daughter, while the second one, B, has had several sons and daughters. Before his death, the father bequeathed the holding occupied by A to their common daughter. The children of the other wife claim to share the holding under consideration, but the court confirms the rights of A's daughter.

Customary legal principle cited (coutume citée):

Urugo ntirwubaka urundi,

'One household does not build for another one'. This staying stresses that in polygamist families, each household is separated and must not be mingled.

Case No.107/C/58 (Tribunal de Résidence de Bukeye, 28.7.1961)

X, a nyen'itongo, had two wives: each one has had one son. A, the son of the first wife says: 'Our father gave to each wife her holding. My half-brother mingled the two holdings while I was away. I want to recover the holding I have a right to, namely my mother's holding.

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1. Ordonnance No.21/30 du 5 septembre 1949 redant éxécutoire au Ruanda-Urundi les dispositions en vigeueur au Congo Belge sur la répression de l'adultère et de la bigamie et la protection du mariage monogamique en particulier le décret du 5 juillet 1948, in B.O.R.U. (1950), p.155. Ordonnance No.21/32 du 11 décembre 1951 rendant éxécutoire au Ruanda-Urundi le décret du 4 avril 1950 annulant de plein droit tour mariage coutumier contracté avant la dissolution ou l'annulation du ou des mariages antérieurs et toute convention matrimoniale en vue d'un tel mariage et règlementant la résidence des ancient polygames dans certaines agglomérations, in B.O.R.U. (1951), p.479.

B, the son of the second wife, argues that: "A's mother left the holding with her son, so I took back the holding she had been occupying and I mingled it with mine".

The court decides that A has a right of inheritance over the holding on which his mother had been settled by her husband.

Customary legal principles cited (coutumes citées):

Ingoro ntisenyera iyindi,

'The household of a prince does not look for wood in someone else's palace';

Inzu ntiyinjira mu yindi,

'One household does not go into another one';

Ntawunyaga umwana ibisigi se yamusizemwo,

'Nobody deprives a child of the goods left to him by his father'.

The abolition of polygamy in Burundi was a direct consequence of Christianisation and missionary pressure, but it continued to be acknowledged by court decisions concerning the inheritance of children from polygamous unions.

(ii) Daughters as heirs to landed property

In traditional customary law, daughters have, as heirs, a right to the benefit of a portion of the family holding if they need it, namely if they are unmarried, divorced or widowed, and do not have land to survive on. They are entitled to the benefit of a given plot as long as they do not have a place to live on. This principle is expressed negatively by the following saying:

Ntamukobwa agabura itongo na musazawe atabuze aho aba,

'No girl shares the family holding with her brother if she does not lack one on which to live'.

If a girl is married she automatically benefits from her husband's holding. Once married, her main social obligation is to give children to her husband, and, consequently, she becomes part of his family, as expressed in the sayings already cited:

Umukobwa ntakura aho yavuye akura aho yagiye

'The girl does not "grow" where she was born, she "grows" where she has gone',

and,

Umukobwa akura kwa sebukwe ntakura kwa se. Ntawubaka zibiri,

'The girl "grows" by her father-in-law, she does not "grow" by her father. She does not build two households'.

According to customary law, the married girl follows her husband. However, it is acknowledged that a girl may receive gifts of land, and may be appointed as heir by her father. She is never an heir by status, but may only be made samuragwa (la faire son garçon, 'to make her his son').[1] In the fifties an evolution of this customary principle took place. In the case of absence of sons, daughters, instead of their male cousins, became entitled to inherit the estate left by their father, including land. A decision of the Tribunal du Mwami, rendered on 9 February 1960, acknowledges that daughters, in an ab intestat succession, have a right to inherit from their fathers in the absence of sons. The customary legal principle cited to explain the decision is:

'Que l'enfant qu'il soit même une fille, en l'absence de garçons, doit jouir des biens de son père si ce dernier n'en a pas décidé autrement'.[2]

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1. Jugement du Tribunal de la Chefferie Barusasyeko in (1945) Servir, 5, p.3.
2. Jugement du Tribunal du Mwami du Burundi du 9 février 1960 in (1961), R.J.R.B., p.102.

Several cases pointing in the same direction have been found:

Case No.27/C/67 (Tribunal de Résidence de Bukeye, 6.10.1964)

A woman has sold the holding of her deceased brother whose daughter was away. Upon the return of the latter, the two women quarrel about the holding.

The daughter files an action to redeem her holding. The court decides that the buyer has to give back the land under dispute and the vendor the sale price because the daughter is acknowledged a right of inheritance over her father's holding.

Customary legal principle cited (coutume citée):

Uwurera impfuvyi ayireresha utwayo,

'He who who brings up an orphan brings him up with his goods'.

Case Not.2632/C/ 63 (Tribunal de Résidence de Bukeye, 6.6.1963)

Two brothers partitioned the holding of one of their paternal cousins who they pretended had no children. In fact, he had two daughters, who go to court to claim their right of inheritance to their father's holding. The court decides that the daughters have a right of inheritance.

Customary legal principles cited (coutumes citées):

Ntawuhisha ubwari nyina ngo yarame,

'If a woman hides from her mother the fact that she bears a child, she will have bad luck';

Ico umuvyeyi asize nico arerewa,

'What the parent leaves is what you bring up for him'.

Case No.2628/C/64 (Tribunal de Résidence de Bukeye, 22.11.1963).

A woman and a man with the same father but different mothers inherit the holding occupied by their respective mothers. The man goes to

court and claims that, according to custom, his half-sister has no right of inheritance over the holding because only sons share the estate left by their father. The court does not agree with him and confirms the woman's rights.

Customary legal principle cited (coutume citée):

Ingoro ntisenyera iyindi,

'The household of a prince does not look for wood in someone else's palace'.

Going even further, a decision of the Cour de Cassation, rendered on 28 October 1964, asserts that, according to Burundi customary law, unmarried and divorced daughters have the same rights to paternal inheritance as their brothers. During fieldwork, no case has been found to support this decision, but, as underlined above, divorced and unmarried daughters are entitled to the benefit of a portion of their father's holding in case of need. Here again confusion must be avoided between rights of benefit over land, as acknowledged by customary law, and rights of direct control conveyed by way of succession.

It may be noted that sayings which refer traditionally to male inheritance are equally used to support female inheritance over land. If the trend towards the acknowledgement of the rights of daughters to paternal inheritance continues in the same direction, there will be a progressive passage from patrilineal to cognatic descent. Several governmental agencies, in particular the Union des Femmes Barundikazi, are in favour of making daughters fall heirs to paternal inheritance. A number of authors do not agree with this position because of the consequences inheritance of daughters to landed property could have on land tenure. A. Ncutinamagara explains that:

> On sait que le patrimoine du défunt est essentiellement composé de la propriété foncière qui est également un patrimoine familial. Lors du partage de la succession, chaque héritier reçoit un lopin de terre qui doit rester au sein de la famille. L'ordre familial repose sur la propriété foncière et l'introduction du droit de succession pour les filles apporterait un désordre profond.[1]

The legal enforcement of the rights of daughters over paternal inheritance, besides bringing about a dramatic social transformation, would lead to an even greater fragmentation of land-holdings, which would have bad consequences on agricultural development in general.

As long as the relationship between man and land and the system of land exploitation does not change, it does not seem advisable to enforce legally the right of daughters to landed property inheritance.

(iii) Children of divorced parents as heirs to landed property

Before the 1980 Family Code came into force, divorce observed customary rules. Although the procedural rules put divorce under the jurisdiction of the tribunal de première instance, resort to an official grade of court was very rare. Divorce and repudiation were a family business which was settled between the abashingantahe of the interested families. Official grades of court dealt with divorce and repudiation principally through the adjudication of disputes over land in which children of divorced or repudiated women were involved. The 1980 Family Code provides that any divorce or separation must be made by a decision of the tribunal de province.[2]

The consequences of divorce and separation on the inheritance of landed property in customary law and according to the 1980 Family Code will now be examined. It must be stressed that the principles of

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1. A. Ncutinamagara, "La succession en droit coutumier du Burundi", p.137.
2. Articles 160-172, Code des Personnes and de la Famille, pp.95-6.

customary law are still referred to because there is a gap between the new enacted provisions and the legal practice, a gap which is easily understandable since family law has its roots in the deepest conceptions about life, and, consequently, may not be transformed from one day to the next by the enactment of a statute.

*Divorce and repudiation according to customary law and their consequences on the inheritance of landed property.

As already stressed, when a girl marries, the bridewealth given by the husband or his family to her family seals the union. A famous saying, embodying this principle, says:

Nta bugeni ata nkwano,

'There is no marriage without bridewealth'.

Other sayings express the same principle:

Inkwano n'iteka,

'Bridewealth is an honour' (it is an honour for the wife and her family to receive bridewealth);

and,

Umugore ni uw'ukoye,

'The woman belongs to the one who has given bridewealth'.

Bridewealth is the medium by which relationships are established between the two families; it has important legal consequences, and it fixes in particular the legal status of children. They belong to and, consequently, inherit in the family who has given bridewealth, which is considered as a kind of price for the fertility of the woman. If bridewealth has been returned, the children will inherit in their mother's family unless the father has given compensation to his ex-wife's family to keep them. This practice is known as kugura abana, 'to purchase children', or as gukwa abana, 'to endow children'.

Several cases collected at the Tribunal de Résidence of Bukeye provide a good illustration of the customary rules governing marriage and divorce and, consequently, the rights of children to inherit.

Case No.95/C/64 (Tribunal de Résidence de Bukeye, 25.2.1965)

A wife has gone back to her paternal home after her father came to look for her because she had received bad treatment in her husband's family. The husband's father goes to look for her and she returns to her husband's holding. The next night, she flees again. The husband files an action in court to reclaim bridewealth he had given to his father-in-law when he married. The father-in-law says clearly: "You cannot have both things, children and bridewealth. If I give you back bridewealth, then you have to give me the children my daughter has borne".

The court decides that the husband has to choose between the children and the bridewealth. He chooses the children.

Customary legal principle cited (coutume citée):

Ntawukoranura k'uwo yavyayeko,

'One does not ask for the restitution of the bridewealth of the woman with whom he has had children'.

Case No.94/C/81 (Tribunal de Résidence de Bukeye, 30.10.1975)

A son who is about to get married comes to his father to ask for the benefit of a portion of his holding according to the gusohora practice. The father refuses because the son's mother left the holding a long time ago. As bridewealth has not been restituted, the court decides that the father has the obligation to allocate a portion of his holding to his son who is his legitimate heir. If he does not allocate a plot to his son in the context of the gusohora practice, he will be

acting against the custom of Burundi. The minute states imburano za N. zidahwanye n'imigenzo 'kirundi, which means that Y's allegations are contrary to the customs of Burundi.

Customary legal principles cited (coutumes citées):

Ntamwana n'ikinono,

'There is no child who is like the hoof of a cow';

Umugabo ata umugore ntata umwana,

'A man can reject his wife, he cannot reject his child'.

*The breach of marriage according to the 1980 Family Code.

The 1980 Family Code does not acknowledge the handing over of bridewealth by the future husband's family as a condition of marriage; a marriage is only legalized by its recording by a public officer acting as registrar (officier de l'état civil).[1] Bridewealth being no longer a condition of the validity of marriage, the whole system of marriage and divorce, as conceived by customary law, falls apart. Divorce, instead of being a family affair, has become a public matter. In respect to the right to inheritance of children born from divorced parents, they are automatically the legitimate heirs of their father unless the latter denies paternity.[2]

(iv) Natural children as heirs to landed property

If the rights to inheritance of children born from repudiated or divorced women depend primarily upon the way bridewealth is handled, bridewealth equally determines the way natural children inherit.

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1. Article 90, Code des personnes et de la famille, op.cit., p.90, "La validité du mariage ne peut être conditionnée, par le versement d'une dot, même dans ls cas d'un engagement écrit du futur époux". Article 118, op.cit., p.92.
2. Articles 200-214, op.cit., pp.99-100.

According to customary law, the only children who are automatically legitimate are the ones whose mother's family has received bridewealth. All other children are considered as natural as long as some arrangements have not been made between the families of both parents.

A fundamental distinction is drawn between the unmarried woman who does not live with the father of her children, and the woman for whom bridewealth has not been paid, but who lives with the father of her children.

The first case was unheard of in pre-colonial Burundi, because custom ordered the putting to death of girls who became pregnant without being married. The punishment was extended to her whole family, in so far as their goods were confiscated. It was one of the worst crimes to be committed. During the colonial period, under the influence of missionaries, unmarried mothers began to be accepted, and in present-day Burundi they live in their father's family. Their children inherit from their paternal grandfather. These children bear the name of umwana w'ishushu or nkurinkobwa. The use of the last term in the present context is a recent evolution because it was traditionally reserved to a specific arrangement between families of couples living together without any payment of bridewealth.

Even in pre-colonial Burundi, people could live together and beget children without any payment of bridewealth. Generally, sooner or later, the two families tried to arrange their affairs. The man's family could pay bridewealth and their union became a legally acknowledged marriage. Sometimes, one child born from the union, usually a girl, was given to the woman's family as a compensation for the non-payment of bridewealth. This child was called nkurinkobwa

and was considered as a legitimate heir in his maternal grandfather's family. The other children born from the union remained with their father and mother, and the union itself was recognized by the handing over of nkurinkobwa. It must added that nkurinkobwa could be brought back to his father's family, if the latter gave compensation to the mother's family in the context of the ingurano y'abana procedure ('purchase of children').[1] At present, this practice has disappeared; when bridewealth is not paid, according to custom, both families arrange for it to be paid later.

Nkurinkobwa, in the current language, is a term referring to any natural child who "belongs" to his maternal grandfather's family. In order to explain the term nkurinkobwa, there is a saying: Nkurinkobwa n'umwana atakowe, which means that nkurinkobwa is the child for which no bridewealth has been paid.

Case No.28/C/67 (Tribunal de Résidence de Bukeye, 12.11.1964)

X is nkurinkobwa. His mother goes to court to have his rights over his grandfather's holding acknowledged, because her brothers want to take the entire holding for themselves and exclude their nephew from inheritance. The court acknowledges the right of nkurinkobwa. However, some time later, X goes back to court, arguing that one of his maternal uncles has taken a plot of land which was his. As X cannot prove that the plot under dispute is part of his inheritance share, the court rejects his claim.

Customary legal principles cited (coutumes citées):

Uwuburanye ikinyoma arafitsindanwa,

'He who pleads falsely, is liable for his lies';

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1. The ingurano y'abana, also called inkwano y'abana, consisted, according to old informants, of an ox for a boy and a heifer for a girl.

Ntawufata impene umurizo umutumba wagiye,

'One does not take a goat by the tail when its body has already gone over the hill.

This case well illustrates the rights of nkurinkobwa over his maternal grandfather's estate. The customary legal principles cited are general principles organizing the administration of justice, especially in the second case: if one thinks he has a right over something, he should claim it in time; in the present case, when the partition of the maternal grandfather's estate took place, X should have made public his claim to the plot under dispute.

Case No.42/C/76 (Tribunal de Résidence de Bukeye, 15.1.1970)

A natural child has been raised by his maternal grandfather's family. His maternal uncles do not want to share with him the holding left by their father. The court acknowledged that the natural child is nkurinkobwa and, consequently, has a right of inheritance over his maternal grandfather's estate.

Customary legal principle cited (coutume citée):

Nkurinkobwa atorana ibunyina,

'Nkurinkobwa inherits from his mother's family.'

If arrangements or the lack of arrangements between the spouses' families are fundamental in determining the fate of children born from unions without bridewealth, the place where these children have been raised and who has brought them up, are indications of the intentions of the educator in respect to the legitimization of the children under consideration. A note following a decision of the Tribunal de Première Instance de Bujumbura rendered on 26 June 1963, states that three conditions are necessary for the acknowledgement of a natural

child by his genetic father, namely that:

- the child's mother and her family must recognize the man as father of the child concerned;
- the genetic father must bring the customary presents given by the father to the mother after the birth a child (igihembo);
- the father has to educate the child or arrange the means by which the mother can bring him up.[1]

Several cases found at the Tribunal de Résidence of Bukeye also point to the importance of education in the legitimization process of children from unions without bridewealth, provided that the right holders over the woman's fertility agree.

Case No.17/C/73 (Tribunal de Résidence de Bukeye, 14.4.1967)

A woman called A and a man called B have the same mother but not the same father. B is a natural child who has been brought up by the husband of his mother. A, his half-sister, wants to sell the family holding. B goes to court to avoid this sale. He says: "I have lived on the holding of my sister's father all my life; I have never been expelled by him, and that is the proof that he recognized me as his legitimate son. Moreover, when we returned to the area after our forced emigration during famine, I went to the chief to reclaim the holding for the whole family (gukomoza itongo).[2]

The court decides that the holding under dispute must be divided between the legitimate daughter and the natural child who has been brought up by his mother's husband, and, consequently, legitimized by him.

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1. Jugement du Tribunal de Première Instance de Bujumbura du 26 juin 1963, in (1963) R.J.R.B., 4, p.171.
2. See p.176.

Customary legal principle cited (coutume citée):

Ntawuca uwo se ataciye,

'No one rejects a child his father has not rejected'.

In this case, education is brought forward as the determining factor proving adoption. It must be stressed that it is not a case of legitimization, but rather of adoption. One may wonder whether the decision of the court would have been the same had there been legitimate sons and not just one daughter.

If education enters into account in the process of the legitimization and adoption of natural children, it does not result in the annulment of the rights deriving from the transfer of bridewealth.

Case No.52/C/73 (Tribunal de Résidence de Bukeye, 8.12.1966)

The sons of X's sister, called A, have been brought up by X, their maternal uncle. A member of the sister's husband's family comes to court to claim the right of his family over the bridewealths, paid for the daughters of A when they married. These bridewealths have been taken by X, their maternal uncle, who had brought them up. X says: "I have a right to these bridewealths because I have brought up these children who are, consequently, mine". Several witnesses assert that that bridewealth was paid by the father of the children to marry their mother, A. The court decides that, since bridewealth has been paid by the father of the daughters, his family has a right over the bridewealth paid for them.

Customary legal principle cited (coutume citée):

Abana bahera ibuse, ntibahera ibunarume,

'Children "belong" definitively to their father, they do not "belong" definitively to their maternal uncle'.

This case points out the priority of the bridewealth principle over the

education principle as far as the fate of children is concerned. Here, the children concerned are not natural because they have a father who has paid bridewealth.

Case No.11/C/63 (Tribunal de Résidence de Bukeye, 21.8.1963)

X has brought up the natural child of his sister and has allocated him a portion of his holding in the context of the gusohora practice.[1] Later he wants to expel him because the child does not respect him as a father. The child goes to court to claim his right to benefit of the portion of the holding. He says: "X does not respect me as his son". The court decides that X cannot expel the natural son of his sister because he has brought him up. Moreover, according to customary law, a natural child who has not been legitimized "belongs" to his maternal family and is entitled to inherit there.

Customary legal principles cited (coutumes citées):

Aho uva ntihakuvako,

'"From where you come" does not leave you' (You never escape your origins.)

Umuvyeyi wemeye nawe niwe abari umuvyeyi,

'The parent who agrees to bring you up is your parent'.

This case also stresses the priority of the bridewealth principle, but also its complementarity with the education principle.

With the enactment of the 1980 Family Code, bridewealth has become irrelevant as a condition of the validity of marriage. The recognition of a natural child is the object of a document issued by the civil registry office (état civil). It may result either of a voluntary

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1. See p. 239.

action of the genetic father,[1] or from a court decision resulting from an action en recherche de paternité.[2]

(v) Orphans as heirs to landed property

If a nyen'itongo dies when his children are young, his family has the obligation of taking care of them. The family will bring them up, as expressed by the following saying: Ico umuvyevy asize nico arererwa, which means, 'The children a parent leaves are brought up for him by the family'. Orphans are the legitimate heirs of their father estate. A decision of the Tribunal de Première Instance of Bujumbura, rendered on 25 March 1964, stresses that, in case of death of the husband, the surviving father of the deceased becomes the guardian of his grandchildren, and, as guardian, he must take care of the goods left by the deceased to the children, raise the children and maintain the widow.[3] The guardian is called umurezi, a term coming from the verb kurera, 'to bring up a child'.

A decision of the Tribunal de Territoire of Ruyigi, rendered on 12 December 1947, describes the mission of the guardian as that of taking care of the wealth left to orphans as if he were their own father.[4] The obligations of guardian are most often taken care of by the widow under the supervision of a male relative of her deceased husband. A guardian can never appropriate for himself goods left to orphans.

Case No.53/C/64 (Tribunal de Résidence de Bukeye, 12.9.1963)

Before his death, X left his holding to Y, a neighbour, asking him to take care of it while his children were young. He also asked him to

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1. Articles 218-235, Code des personnes et de la famille, pp.100-5.
2. Articles 238-244, ibid., pp.103-4.
3. Jugement du Tribunal de Première Instance de Bujumbura du 25 mars (1964), R.J.R.B., No.2, p.74.
4. Jugement du Tribunal de Territoire de Ruyigi du 12 décembre 1947 in (1948) B.J.I.R.U., 6, pp.362-4

bring his children up. Y took most of the land for himself, especially the portions which had been allocated to land-clients by the deceased. The orphans, being left with only a small share, come to court to complain about the behaviour of their guardian. Y, the guardian, argues that X had given him the land as a proof of friendship (ingabirano), and that he had brought beer to X to make this gift (inzoga y'umuryango). One of the land clients of X who was present when that beer had been drunk affirms that X never had the intention of making a present to Y. On the contrary, X made it clear that the entire holding was to be inherited by his children.

The court decides consequently that the children have a direct control interest over the entire holding.

Customary legal principles cited (coutumes citées):

Uwurereshejwe impfuvyi, zikuze azishikiriza ivyase,

'He, who is asked to bring up orphans, must hand over to them what the father has left, once they have grown up';

Ntawuragizwa ngo afate,

'No cattle-herd keeps them for himself'.

umwungere ntagaba inka za shebuja, anywa ay'ubwungere,

'The cattle-herd does not dispose of the cattle of his master, he only drinks the milk due to him';

Umwungere akukira shebuja,

'The cattle-herd is responsible to his master'.

In this case the customary legal principles stress the obligations and rights of the guardian, according to customary law. While he can take advantage of the goods entrusted to him by the deceased during the time he brings up the orphans (anywa ay'ubwungere, he drinks the milk due to

the cattle-herd), he can never dispose of them. Note that three sayings refer to cattle: here again, cattle vocabulary is used to explain a customary rule.

Case No.14/C/81 (Tribunal de Résidence de Bukeye, 13.12.1974)

A woman, called A, lost her husband. When he was alive she used to share the family holding with her mother-in-law. A later remarries. The mother of her first husband wants then to evict her as well as he children from the holding. A comes to court to complain about her mother-in-law's behaviour.

The court decides that, even if she has remarried, A can have the benefit of a portion of the holding of her first husband, because she is the guardian of the children of the deceased, who have a right over the holding.

Customary legal principles cited (coutumes citées):

Impfuvyi irerwa n'abasigaye,

'The orphan is brought up by those who outlive his father';

Inkware itora mu nzira agatima kari kumwonga,

'The partridge pecks on the hill, but its heart is in the swamp'.

The second saying means that, even if the orphans live with their remarried mother, they retain their rights over their father's holding.

Case No.27/C/67 (Tribunal de Résidence de Bukeye, 28.4.1964)

A, a woman, sold the holding belonging to her deceased brother. The latter had only one daughter who was living on the holding of her husband. When the daughter hears about the sale, she goes to court to complain about the behaviour of her aunt.

The court decides that the sale is void, because an orphan cannot be deprived of the goods left to him by his father. The buyer has consequently to give the holding back, and to return the purchase price.

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B's holding under his direct control. B's mother goes to court to assert her son's claims over the land under dispute. The son of A says that he prefers to take the holding under his direct control rather than to see it pass into foreign hands because B's mother is not able to take care of it while her son is in jail The mother of B, the jailed man, says: "No, I can take care of my son's holding while he is in prison, and I can protect it from any encroachment. I have placed land-clients on it. If by any chance, my son does not come back, the holding will pass to his sister and not to his cousin". The court decides that the mother will take care of the holding while her son is away.

Customary legal principles cited (coutumes citées):

Nta baryango batorana itongo rifise beneryo,

'Members of the family do not partition a holding which has its owners';

Imponyi ihonera umuryango,

'He who dies without children dies to the advantage of the family';

Itongo ry'imponyi rigaburwa n'abo bivukana,

'The holding of someone who dies without children is partitioned among his brothers'.

Imponyi, 'he who dies without children', is a social position which is a great misfortune since, in traditional Burundi society, procreation is one of man's main functions. In respect to land, there is a saying which expresses well the link between landed property and the imponyi, i.e., Amatongo ɣ'imponyi atambanwa n'ibisiga, 'The land-holdings of those who die without children serve as a dancing floor for birds'. A man owns land and enlarges his properties not so much to get wealthier, but rather to leave the largest possible estate to his

children. In contrast with the customary principle cited above, the decision of the Tribunal de Chefferie of Ijenda may be remembered: it was stressed that, in the case of the death of the occupier of a land-holding, that holding reverted to the chief if the deceased had neither child nor wife.[1] No one among the abashingantahe consulted during fieldwork agreed with this opinion; on the contrary, they all put forward that land reverted to political authorities only in the absence of any kin; they added that the taking-over by political authorities of holdings under the direct control of a nyen' itongo with known legitimate heirs was considered an unjustified confiscation (kunyaga n'impaka).

(vii) The widow as heir to landed property

Unless a widow has been given a plot as gift by her late husband, she does not hold any direct control interest over the landed property of her late husband, since it passes to his children. However, according to customary law, she is entitled to benefit of it while her children are minors, in order to bring them up. Once they have grown up, she is entitled to the benefit of a portion of the property in order to survive. The same principle applies if the widow has not had any children, unless she leaves the holding or remarries.[2] When the widow dies, the portion she occupied will be partitioned among her husband's heirs according to the customary principle, which says abasangiye imwe basangira no gukamisha meaning 'those who share a cow also share the the milk'. Several cases found at the Tribunal de Résidence of Bukeye

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1. See p.178.
2. James and Fimbo, op.cit., p.190. According to Haya law, the widow is entitled to lifetime possession of a part of the holding of her late husband unless she remarries.

deal with the widow's rights over her late husband's inheritance:

Case No.249/C/78 (Tribunal de Résidence de Bukeye, 19.11.1971)

A widow comes to court because the brothers of her late husband want to expel her from the holding left to her by her husband.

The court decides that she is entitled to the portion allocated to her until her death.

Customary legal principles cited (coutumes citées):

Ntawunyagwa ubwatsi yasizwemwo n'umugabo kandi bwari rwiwe,

'The widow cannot be evicted from the holding on which her husband had placed her, provided that this holding was his';

Umupfakazi aguma mw'itongo yasigaranywe n'umugabo,

'The widow remains on the itongo left to her by her husband'.

Case No.52/C/83 (Tribunal de Résidence de Bukeye, 30.8.1977)

K (Kaburente), a widow, has been evicted from the portion of the family holding her late husband had been allocated in the context of the gusohora practice. She goes to court to assert her claims on the land under consideration. The judge questions K:

K: I was married to M, and B is my brother-in-law. He has evicted me from the portion of the family holding my husband had received in the context of the gusohora practice. Now, I am living on another hill on the itongo ry'umuheto of my husband. However, it is not a sufficient reason to evict me from itongo ry'umuryango.

J: When you left itongo ry'umuryango, did you ask somebody to take care of your portion of the family holding?

K. Yes, my husband asked his father who was umukuru w'umuryango. Moreover, my husband and myself returned occasionally to the family property in order to cultivate our portion. Now that my husband is dead, I have been refused access to the land allocated to my late husband.

J: Who has forbidden you access to the land?

K: The younger brother of my husband does not let me go to the plot. For two years now, I have not been able to harvest my coffee plantation. I nevertheless brought a case against B because he is now umukuru w'umuryango, the head of the family, and, as such, is responsible for family land. The portion allocated to my husband by his father "has gone to them" (yagiye iwabo) and "left" its legitimate owner.

The judge questions B:

B: I am the elder brother of K's husband. They left the family holding during a famine and settled on another hill.

J: Did your father allocate a portion of the family holding in the context of the gusohora practice?

B: Yes, but after the death of our father, our mother took the plot which had been allocated to my brother, and allocated it to other brothers about to get married.

Aside from the judge: Ntukabe gikuru kibi, 'Do not follow the bad umukuru'.

J: When your mother allocated your brother's portion to her other sons, did she also take your portion?

B: No.

J: At the time you were an adult, did you not tell your mother that she was acting wrongly?

B: No.

Case not settled during fieldwork. It illustrates the rights and obligations of the two widows in regard to the land property left by their husband. On the one hand, the widow has to take care of the

holding left by her husband on behalf of her children who are the legitimate heirs of their father. She will even fight her husband's family to protect the rights of her children. On the other hand, another widow, the husband's mother, was left by her husband with the responsibility of bringing up their children and of taking care of his holding. Following custom, she allocated plots to her sons about to get married, but, by doing this, she deprived a son who had already been allocated a plot. The judge, commenting on the mother's action, said: "Ntukabe gikuru kibi, 'Do not follow the bad family head'". Although the present case is incomplete, it is interesting because it stresses the obligations of the widow concerning the land property left by her husband.

(c) The powers of the testator

Concerning the inheritance of his goods, the father has the basic power to make a will in which he may, if he has good reasons, allocate specific shares to legitimate heirs, appoint as heir an unlawful heir, and finally disinherit a legitimate heir.

(i) The will in Burundi customary law

To make one's will is kuraga. It is a widespread customary practice: owners of goods, when they get old, often on their death beds, dictate their will. As the most important part of inheritance is generally land, a Murundi who makes his will primarily considers the question of disposal of immovable property. He asks the umuryango (family and neighbours), especially the local abashingantahe, to come to his compound; there, he solemnly states his will. People who are present act as witnesses and will testify to the father's decisions concerning the inheritance of his goods in the later stages of the

property devolution. Beer, called inzoga yo kuraga umuryango, is then shared, and it will be referred to in case of dispute about the character of the transmission of property. Witnesses of a will always say: "X made his will in front of us, and, afterwards, we shared inzoga yo kuraga umuryango".

Case No.80/C/71 (Tribunal de Résidence de Bukeye, 25.5.1965)

A grandson has received a plot from his grandfather, but his father does not want to acknowledge the gift. Witnesses of this grandfather's will testify that he made clear in his will that the plot under consideration should be given to his grandson.

Customary legal principle cited (coutume citée):

Ntawurenga ijambo ry'umukuru ryavuzwe abantu bumva,

'No one ignores the word of the umukuru which he has pronounced when men were listening'.

Case No.2251/C/59 (Tribunal de Résidence de Bukeye, 24.5.1963)

A, the daughter of X, claims that her father bequeathed her a plot on the family holding. Her brothers do not accept her claim and she goes to court. As she cannot bring any witness of her father's will in her favour, the court does not acknowledge the bequest.

Customary legal principles cited (coutumes citées):

Ntawuragwa umuryango utumva,

'No one makes a will if the family does not listen to it';

Ntawuragira mu nzu,

'One does not graze his cattle in his house' (Important things must be done in public);

Ico umuryango utazi ntikimenywa n'Abarundi,

'The things the family does not know, the Barundi also do not know'.

The maxims cited above stress the importance of the publicity of wills and bequests; it is simply the application of the customary principle stating that any action concerning the transfer of an interest over land is only valid if property witnessed. Very few wills are written, although written testaments are becoming more common. Wills may either be written by the testator or dictated by him; in both cases the signature of witnesses is necessary.[1] If there is no proper system of registration of wills, they may be legalized by the Directeur du Contentieux, the head of the Department of Legal Affairs, who holds the power to act as notary public. Such a legalization is made especially when bank accounts are part of the estate left.

In his will, the testator primarily provides for the partition of his movable and immovable goods among his heirs. He may then make specific provisions about the transmission of his goods, and he appoints one of his heirs as samuragwa, heir to family headship. The latter promotion is known as kuraga icumu n'ubugabo, to bequeath the spear and family headship. Icumu ry'ubugabo is the spear symbolizing family continuity, which passes from family head to family head. When samuragwa becomes umukurú w'umuryango, the family head, he will inherit the family spear and churn.

Finally, the testator will transfer responsibility to each of his sons of one of their sisters: each of his daughters is put under the protection of a son who will take care of her and receive her bridewealth after the death of the father.

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1. R. Massinon, op.cit., pp.152-3.

(ii) The main acts of the testator

In the first place, the testator may make gifts during his life-time which are considered as bequests at his death. Most often, such gifts are done within the family. It is always made clear that they do not entitle their beneficiaries to become heirs. When pronouncing his will, the father confirms the gifts in order for the given land to be excluded from the land to be divided among heirs.

Case No. 20/C/80 (Tribunal de Résidence de Bukeye, 1974)

A daughter received a plot from her father during the latter's life-time. After his death his son wants to lay claim to the plot which had been given to their sister.. The daughter comes to court with the witnesses of the gift. The court decides consequently that the plot under consideration will be excluded from the partitioning.

Customary legal principles cited (coutumes citées):

Umuvyeyi agabira uwashaka mu vyiwe,

'The father gives his goods to whom he wishes'.

Ugabiwe n'umuvyeyi acanira Uburundi bubona,

'He who who receives from the Mwami takes what he receives in front of the whole Burundi'.

The two last sayings cited are interesting because they provide a comparison between the father and the Mwami: whereas the Mwami is the paramount ruler of Burundi, the father is the paramount ruler in his family; they are both free to give what they want to whom they want, provided they act as a "good" Mwami and as a "good" father.

Case No.38/C/81 (Tribunal de Résidence de Bukeye, 26.4.1975)

A girl has been brought up by her paternal grandfather. He gave her a portion of his holding as ingabirano. One of her brothers wants to

evict her from that plot. The court decides that, since witnesses of the gift have testified to it, the brother has no right over the plot.

Customary legal principles cited (coutumes citées):

Umwana mtanyaga uwundi,

'A child does not evict another one from inheritance';

Umuvyeyi agaba uko ashaka,

'The parent gives as he wants'.

Besides gifts during his lifetime, the testator may make specific provisions in his will which are enforced as long as they respect the principles of customary law. These provisions may concern:

(1) the allocation of specific shares to legitimate heirs;

(2) the appointment to heirship of heirs other than the legitimate heirs, and

(3) the disinheriting of a legitimate heir.

(1) The allocation of specific shares to legitimate heirs

When he makes his will, the testator may favour one of his legitimate heirs; this privilege is a consequence of his basic freedom to make his will as he wants, according to the way legitimate heirs have behaved towards him. If the father puts forward a reasonable argument favouring one heir, the witnesses of the will will accept it, and the principle "Uraga araga uko ashaka" ('He who makes a will, makes a will as he wants') applies. If the argument put forward by the testator is not considered as reasonable by the witnesses, they will refuse to record the will according to the principle Ntukabe gikuru kibi ('Do not follow the bad umukuru').

Case No.241/C/78 (Tribunal de Résidence de Bukeye, 24.9.1971)

A woman who held a direct control interest over a holding had two daughters, called A and B. While B never came to visit her mother,

A always took care of her. So the mother, in her will, gave the greatest part of her holding to A. Before the partition takes place, B comes to court to complain about the will. As witnesses confirm the bad behaviour of B, the court decides that the mother had the right to make the will she wanted.

Customary legal principles cited (coutumes citées):

Uraga araga uko ashaka,

'He who makes a will makes it as he wishes',

Uko so aguhaye umwaka niko uwurya,

'The way your father feeds you is the way you eat'.

Case No.87/C/64 (Tribunal de Résidence de Bukeye, 16.4.1963)

Three brothers have to partition their father's estate. The eldest claims a bigger share than his brothers. As he cannot bring any evidence that the father has favoured him in his will, the court decides that the holding must be divided in three equal parts.

Customary legal principle cited (coutume citée):

Umuvyeyi ntagira nkunzi mubana biwe kuba ari ukùbateranya,

'A parent has no favourite among his children, it would be a source of trouble'.

This saying is closer to a moral obligation than to a legal principle. It has to be understood in the context of the relationships between father and son: a "good" father, if he has "good" sons, has no reason to favour one of them; it would be unfair and bring trouble within the family. At first one might think that such a saying is contrary to the sayings referring to the complete freedom of the testator to

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1. Here the term kurya umwaka, meaning literally 'to eat the year', is used. It refers to a ceremony performed by the father in which he ate first sorghum dough and then gave some to each member of the family.

give his goods as he wants and to whom he wants. Actually, each saying is acceptable, when taken in the context in which it is used. Customary legal principles explaining court decisions are very different from the sections of a Western-style code because they do not form a coherent system of their own. Their meaning stems from the context in which they are used.

(2) The appointment of heirs other than the legitimate heirs

If he has good reasons, a testator may appoint as his heir someone other than a legitimate heir. It is often one of the daughters of the testator who is made an heir by the latter. While R. Massinon says that such appointment is an evolution of customary law which occurred during the colonial period,[1] according to informants, the practice of including a daughter as an heir in one's will, known in Kirundi as kuraga umwana wiwe w'umwigeme, has always been acknowledged by customary law. A decision of the Tribunal de Chefferie of Ijenda rendered in 1945, states that: "Même lorsqu'il existe des garçons, la jurisprudence coutumière admet que le père récompenser sa fille d'un acte méritoire, la faire un garçon et cohéritière de ses biens".[2] Relatives and strangers may also be appointed as heirs by the testator.

The action of making someone heir is known as kuvukanisha, which means literally 'to create brotherhood', 'to make people brothers'. It may be made either in one's will or during one's lifetime. The holding someone receives as a result of kuvukanisha is called itongo rya samuragwa, the holding of the heir. Kuvukanisha is always performed in a public ceremony: the testator, normally the father,

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1. R. Massinon, op.cit., p.153.
2. Court decision cited by A. Ndutinamagara, "La succession en droit coutumier du Burundi", p.148.

calls the abashingantahe b'umuryango, and tells them that he has decided to give to a certain person the same rank as his own sons. Reasons for the kuvukanisha are explained in detail. The person who is made heir is usually a relative of the person who performs the kuvukanisha, but he may also be a stranger who has been brought into the family and even a land-client who is rewarded for his services by his lord by making him a heir.[1] The kuvukanisha ceremony is always accompanied by the sharing of beer.

Case No.4/C/82 (Tribunal de Résidence de Bukeye, 30.1.1976)

A claims that his father and B's father have been kuvukanisha together by X. He consequently wants to share the holding occupied by B. As A is not able to bring any witness of the joint kuvukanisha, he loses the case.

Customary legal principles cited (coutumes citées):

Ushengera n'ikinyoma ugashenguruka atajambo,

'If you court with lies, you end up courting without any answer';

Ubwenge buje mu nyuma buba ar'ubucuzo,

'Craftiness which comes late, comes too late to be of effect'.

Case No.61/C/82 (Tribunal de Résidence de Bukeye, 17.5.1976)

A grandfather has made kuvukanisha for his grandson. The latter consequently becomes heir to his grandfather on the same level as his father. The father refuses to partition the holding with his son, who goes to court. As witnesses certify that kuvukanisha has taken place, the court orders a division of the holding in equal shares between the father and the son.

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1. In Buyogoma the kuvukanisha of land-clients seems to have been common (Communication of F. Kibwa, Muyinga).

Customary legal principle cited (coutume citée):

Ibisangiye imizi bisangira m'ukuma,

'Trees which share roots, share the drought'.

If kuvukanisha is not performed in a public ceremony, the testator may announce it when he makes his will.

Case No.73/C/83 (Tribunal de Résidence de Bukeye, 22.7.1977)

N has begotten two sons, called K and G. Their mother died following the birth of K. Both the children have been brought up by their paternal grandfather, and K has even been suckled by his paternal grandmother. When G became adult, his grandfather provided him with a wife and allocated him a plot, according to the gusohora practice. Feeling that death was near, the grandfather gathered the umuryango to pronounce his will. He stated that K and G had been brought up by him, and that they should consequently be considered as his sons and heirs. He allotted to each of his grandsons a part of his estate. Some time later he died, before K was married.

The paternal uncles do not want to acknowledged the kuvukanisha of their nephews G and K, who go to court to claim their rights over their grandfather's estate.

Here is an excerpt of the proceedings: the judge questions G, one of the grandsons, Y, one of the sons who refuses to acknowledge the kuvukanisha, and witnesses of the kuvukanisha ceremony.

G: I have been kuvukanisha by my grandfather; I am not heir of my father, but I inherit from my grandfather with my father and my paternal uncles. During his lifetime my grandfather often said that all his sons except my brother and myself had received a portion of his holding.

Y: My father preferred to bring up G and K himself because their father had remarried and he did not want to leave them with a woman who was not their mother (muka se). However, they do not have comparable rights as the sons of Z over their grandfather's estate. Our father made it clear that he would only give to G and K a plot as a gift (ingabirano), but that they would inherit from their own father. There has never been any kuvukanisha. The plot, which G claims to occupy as a consequence of gusohora, is in fact ingabirano.

G: There has never been any gift. The plot I occupy has been allocated to me as indimiro, a field, to settle my wife on, in the context of the gusohora practice. I have nothing to do with my father. If there is any witness who can prove that my brother and myself were sent to my father by my grandfather, we have lost the case.

N (a witness):

When G married, his grandfather asked, according to custom, for beer from friends and relatives to help organizing the marriage party (gutererezа), as any father who wants to "give away" his son would so. The wedding took place at his home. When the grandfather was on the deathbed, he called us and made clear that G and K had been brought up by him, were considered as his own sons, and were to receive a portion of his holding as heirs.

Other witnesses confirm N's testimony.

The court decides that G and K are legitimate heirs of their grandfather.

Customary legal principles cited (coutumes citées):

Umuvyeyi araga uko ashaka n'uwashaka,

'The parent makes a will as he wants and in favour of whom he wants';

Ibigize ingabe ntibikurwa n'ingabekazi,

'What has been done by the ingabe (the royal ox, the head) cannot be undone by the ingabekazi (its mate, other people)'.

The present case is interesting primarily because the importance of the education principle is stressed: if a child is brought up by someone, given a wife and allocated a plot to settle her on, it is proof that his proxy father regards him as one of his legitimate heirs. Secondly, the difference is well established between gusohora, kuvukanisha and kugabira. G has been conveyed a benefit interest by his grandfather over a plot when he married (gusohora), and has been made heir (kuvukanisha). His paternal uncles want to prove that he has only received a plot as gift (ingabirano), and that he is therefore excluded from inheritance because his grandfather has not acted towards him as a father would.

Another known case of kuvukanisha happens when the father adopts his daughter's husband and gives him the benefit of a plot on his holding as if he were one of his sons. In the present situation, uxorilocality must be differentiated from other cases, such as when a gift of land is made to daughter, or when the daughter is made heir by her father. Nowadays uxorilocality is very rare, because family land must be kept for the sons. It happens only when the father has no sons but daughters to inherit his estate.

Besides kuvukanisha, there are several ways to welcome strangers into the family, according to customary law. Umwana w'umutorano is a

term referring to a found child whose origin is unknown; he is given a home by a family, but does not become heir unless kuvukanisha takes place. The father, in order that the child does not later become the land-client of his sons, normally gives him some land as gift or makes him an heir.

Umurerano is a child whose origin is known, and who is brought by someone else than his father or his mother. A distinction is made between umurerano w'umuryango and umurerano ahandi. Umurerano w'umuryango is the child of the patrilineage who is entrusted to a relative by his parents; at the death of his parents he will normally inherit his father's estate. Umurerano ahandi is the child whose parents are strangers, and who is entrusted to someone else. He will inherit from his father, unless kuvukanisha takes place, which is very rare since the child has already a father and a place to inherit. Umutirano, the loaned child (from the verb gutiza, to lend), is a child whose father lends him for a given period to someone else; he is taken care of by the borrower and has to work for him. He is never made heir and goes back to his family after the period of loan is over.

Finally, a practice which has now fallen into disuse may be noted. In the context of ubugabire, cattle-clientship, a child, usually a girl, was sometimes given by a client to his lord as inyokorano, when all the cattle, object of the clientship agreement, had died by accident. The child thus given was called umukworano or umugerurano; he or she was brought up and adopted by the lord's family, who received bridewealth if it was a girl, and gave indongoranywa to her husband.[1]

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1. G. Sendanyoye, "Indongoranyo", in (1950) B.J.R.U., 8, pp.429-43.

According to the 1980 Family Code, adoption only results from a court decision following a petition made to the tribunal de province.[1]

(3) Disinheritance of a legitimate heir

In Burundi customary law, disinheritance (kudatorana) is differentiated from paternal curse (guca). Whereas kudatorana only bars a legitimate heir from inheritance, guca implies a curse, and is no longer in current usage. Guca umwana was the most terrible act a father could perform as father.[2] It was announced in a public ceremony in the presence of political authorities. E. Simons stresses that, during the colonial era, it had become exceptional and that public opinion was cautious about it:

> Ndarenza avait voulu déshériter complètement son fils unique. Il avait fait une déclaration publique par laquelle il léguait tout son bien, soit sa propriété et soixante vaches, au chef Ndugu... A sa mort, Ndugu n'a pas osé faire éxécuter le testament et il a pris deux vaches pour la forme, le reste a été au fils .[3]

In the minute of the meeting of the 1943 Conseil du Mwami,[4] the guca umwana was banned: if a son beat his father, for example, only criminal sanctions could then be applied.

Kudatorana, disinheritance without curse, happens in rare cases: if there is a conflict between father and son, the mediation of the abashingantahe b'umuryango is sought. If the son continues to offend his father, the latter may take the decision to disinherit him. This

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1. "De la filiation adoptive", articles 247-63, op.cit., pp.103-4.
2. See James and Fimbo, op.cit., p.218. According to the authors, Haya law sets stringent restrictions on the testator disposing of his land outside his family. These restrictions reflect the abhorrence with which kuchwa (to disinherit) is considered among the Bahaya. The will of the testator who purports to disinherit his heirs must be witnessed by no fewer than ten witnesses and it must give valid reasons.
3. E. Simons, "Coutumes et institutions des Barundi", p.288.
4. Conseil du Mwami, Procès-verbal, 23-26 novembre 1943.

is done in the presence of witnesses who must validate the disinheritance. The heir concerned, if he feels he has been wronged, may always resort to the abashingantahe b'umuryango mediation, and finally to court for adjudication.

(d) The various states of distribution of landed property by way of inheritance

The direct control interest holder may distribute his land to his heirs during his lifetime, and so settle all the problems pertaining to his inheritance. However, in most cases, the death of the testator opens the inheritance proceedings. There are two stages in the conclusion of the period of mourning, guca ku mazi (petite levée de deuil) and the kuganduka (grande levée de deuil).

Guca ku mazi takes place a few days after death and is a gathering of friends and relatives who come to present their condolences to the family of the deceased. The first discussions about the settlement of his inheritance take place. However, in the context of inheritance, kuganduka, which takes place approximately six months after the death, is more important. The whole family as well as friends and neighbours participate in the event, in which important quantities of beer are drunk. The date of the kuganduka is publicized by the umushikiriza w'uburagi, the executor of the will. It is very important that all interested people should be present so that the various problems pertaining to the inheritance can be settled.

At the kuganduka, the umushingantahe, who is the most knowledgeable about the situation of the deceased, in general the umukuru w'umuryango, conducts the proceedings. A local official,such as a commune councillor or a party official, may also preside over the kuganduka, and especially over the informal council of abashingantahe who will listen to and appreciate the various claims put forward in regard to the deceased's

inheritance. The ceremony normally takes place in the compound of the deceased: abashingantahe sit together and are the first to be offered beer; around the abashingantahe, the men sit on one side, and the women on the other side. The master of the ceremony makes a speech praising the deceased, and announces the content of his will, commenting on each provision. In case of intestate succession, the family council itself carries out the partition of the estate among the lawful heirs, and the master of ceremonies comments on the decisions of the family council. Then, anyone who has a claim concerning the inheritance may speak and argue his claim. The council of the abashingantahe discusses each claim and decides whether it is acceptable or not.

Whereas, at the guca ku mazi, all the persons who have claims to the inheritance under consideration may not be present, because they have not been informed in time, there is no such excuse for not participating at the kuganduka; months have passed since the death of the testator and no one is supposed to ignore it. In the case of resort to court, the claim made at the kuganduka will serve as a proof of one's sincerity.

Case No.250/C/78 (Tribunal de Résidence de Bukeye, 19.11.1971)
R claims that his mother lent a cow to the paternal grandfather of B. As a security the paternal grandfather of B gave to R's mother a plot of land (kugwatariza, 'to give in pledge'). R's mother, and after her death, R himself, have cultivated the plot under consideration. Now B wants to take the plot back. R argues that he will return the plot only when he has recovered the lent cow. They go to court.
B tells the court that he does not know anything about the loan and the pledge. When his grandfather died, he was already an adult and

he remembers that, at the kuganduka, R did not make any claim about an eventual debt owed by the deceased to his mother. Other participants at the kuganduka confirm that R did not say a word, although he was present.

The court decides consequently that R loses the case.

Customary legal principle cited (coutume citée):

Uwishuza ico adaheraniwe arakibura,

'He who claims a debt which does not exist, is not repaid'.

Case No.1334/C/49 (Tribunal de Résidence de Bukeye, 17.11.1959)

B married Z and they separated after a while. A few years after Z's death, B brings a child to her late husband's family. She claims that the child is the son of Z, whom she had left during pregnancy. Because the child is the son of Z, he is entitled to inherit from his estate.

B goes to court and loses the case because, at the kuganduka of Z, she did not come to present the child to the family. If she had been of good faith, she would have participated in the kuganduka, as it is prescribed by custom.

Customary legal principle cited (coutume citée):

Uwutabonye kurupfu rwa so ntumubona ku rwa nyoko,

'If you do not see someone at your father's death, you will not see him at your mother's'.

The actual distribution of the estate among the heirs normally takes place after the kuganduka. The heir to ubugabo, family headship, may first choose his share. This privilege is called gukura inkoro, which means literally 'to choose for oneself the best part of a cow', namely its thigh; this was a right acknowledged by custom when cattle

were eaten. The actual partition of the estate is carried out by the local abashingantahe. Boundary trees are planted to demarcate each each heir's new holding. It must be emphasized that, especially when friendly understanding prevails among the heirs, the father's holding is not partitioned. Heirs often wait for the death of the widow of the land-holder before realizing the division of the itongo ry'umuryango. They remain on the portion their father allocated them, in the context of the gusohora practice, when they marry. Partition entirely depends upon the relationships existing among the heirs; any unsatisfied heir may always ask for it.

If an heir does not agree with the way inheritance has been settled by the abashingantahe b'umuryango, he may resort to court. As a matter of fact, one of the main tasks of the tribunal de résidence is to proceed with the partition of land-holdings among heirs. After having heard each party, the court either confirms the settlement of the abashingantahe b'umuryango or decides on a new partition. In the latter case, court officials go to the holding to divide it among heirs and to plant boundary trees to demarcate the share of each heir.

Case No. 76/C/83 (Tribunal de Résidence de Bukeye, 14.9.1977)

Seven brothers share their father's holding. It has already been partitioned by the abashingantahe b'umuryango. Whereas six of the brothers accept the partition, the seventh refuses it, and goes to court.

He says: "My six brothers have received larger shares than me. I refuse the partition as made by the umuryango. I have remained on the plot allocated to me by my father in the context of the gusohora practice, and I will refuse to leave it as long as a new

partition does not take place. I ask the court to bring about an equal distribution among all heirs".

Court officials go to the holding and begin a new partition among the seven brothers; all previous shares are rendered void, and the holding is redivided into seven equal shares. Every heir receives a portion of land on the hill and a portion of land in the swamps. Boundary trees are planted in the presence of the umuryango. Court officials proceed with the partition according to the principles of equity, as defined by customary law. For example, they leave to each heir the plots where they have built their houses, and where they have planted permanent crops such as tea or coffee shrubs. The partitioning lasts for a whole day.

Customary legal principle cited (coutume citée):

Ibisigi bisigarira bene gusigwa bose,

'The father's estate is left to all the children who outlive him'.

(e) Some effects of the development of the customary rules governing inheritance on land tenure

Rules governing inheritance have direct consequences on land tenure, because, among the rural Barundi, the estate left by a peasant consists mainly of land, which is ideologically conceived as the family wealth 'par excellence', and is to be transferred to one's heirs. They also have a direct influence on the exploitation of land because the excessive division and fragmentation of land-holdings is largely due to inheritance rules.

In the context of the relationship existing between inheritance rules and land tenure, two aspects may be considered, namely (i) the influence of the new types of land exploitation on inheritance rules,

and (ii) the influence of the evolution of inheritance rules on land tenure and, more generally, on the ideological link between family property and family continuity.

(i) The influence of the new types of land exploitation on inheritance rules

In the last fifty years, the main transformation, as far as land exploitation is concerned, has been the progressive diminution of grazing grounds and the development of permanent crop plantations, such as coffee and tea. There has also been an extensive reforestation with the planting of many eucalyptus trees on private as well as public land. With the planting of permanent crops, the input of work in land has become a long-term operation. Moreover, the improvement of the land itself has become a factor adding to its value, as compared with the traditional clearing and planting of seasonal crops only. In regard to inheritance rules, plots which had been allocated to sons in the context of the gusohora practice, were normally intermingled by the testator when he made his will. New shares were distributed to heirs. With the planting of permanent crops by sons on portions allocated by their father, the system progressively changed. In his will, the father took into account the improvements made by his sons to the allocated land. In present-day Burundi, each heir receive an equal share of his father's estate, but the improvements in land are taken into account, and heirs inherit, for example, the coffee trees that they have planted on the family holding. The same evolution took place concerning the construction of buildings. Whereas in traditional Burundi, only straw huts were built, at present there are many brick houses, whose value exceeds that of the land on which they are built. When a son marries, his first obligation is to build a

proper house for his new family. It is generally built on the family holding, namely on the portion allocated by the father to his son in the context of the gusohora practice. When the partition of the family holding occurs, the plots on which buildings have been erected are allotted to the builders. Land granted according to the gusohora practice is no longer a temporary allocation, but tends to become an advance on one's share in inheritance (avancement d'hoirie).

(ii) The influence of the evolution of inheritance rules on land tenure

The 1980 Family Code, by abolishing the legal effects of bride-wealth, has considerably altered the customary rules governing inheritance. As a matter of fact, the way bridewealth was treated used to determine the rights of inheritance. Children for whom no bridewealth had been paid inherited from their mother's family, and were entitled to share a part of their maternal grandfather's land-holding. The 1980 Family Code provides for the legitimization of natural children by a court decision as the result of an action for affiliation. Such children will naturally inherit from their father's family.

The trend to make daughters legally acknowledged heirs, if it becomes a reality, will have far-reaching consequences on inheritance rules and on the system of land tenure prevailing in rural Burundi. If daughters become heirs the whole system tying family land to family continuity will fall apart because portions of family land will pass to the sons of daughters who are not part of the family (umuryango). Moreover, the division of landed property among sons and daughters will increase the excessive division of land-holdings.

Now that a Family Code has been enacted, rules concerning inheritance should also be enacted. It is not the point here to

make comments on such an enactment. However, as estates in rural Burundi consist mainly of land, the fact that land is much more than a simple good to be shared among heirs should be taken into account. The attachment of the Barundi to land, the close link existing between family land and family continuity, and the small holding land tenure system are factors which contribute to the social stability of the country and to its cultural identity.

Chapter 12: Individuals as Holders of Customary Interests over Land originating in a Grant from a Political Authority

As stressed earlier, in pre-colonial Burundi all non-allotted land was under the direct control of political authorities, and is considered at present as public land. Before Independence, land acquired from a political authority was called itongo ry'umuheto, which literally means 'the holding acquired through the bow', or itongo ry'inyicire, which literally means, 'the holding acquired through clearing'. In present-day Burundi, a holding acquired from the commune is called itongo ryatanzwe na komine, which means 'the holding given by the commune'.

A. The various ways of obtaining land from a political authority in Burundi before Independence

As a principle, all grants of land were made by the Mwami through the intermediary of chiefs and sub-chiefs. Relationships between individuals and political authorities in Burundi before Independence should be understood in an "ask/give" context. The normal way to acquire a holding from a political authority was to ask for it (gusaba). Land could also be granted as a reward for service rendered or as the result of special links with a political official.

The political authority could grant either land already cleared or an uncleared plot. Cleared land was often a confiscated holding or a holding which had reverted to political authority. The grant of itongo ry'inyicire gave one the right to clear forest or bush, thereby acquiring a direct control interest over the cleared land. It could also happen that someone could receive grassland for his cattle (itongo ry'ibuga).

During the colonial era, political authorities continued to distribute land to their subjects. However, several changes occurred, especially as the result of decisions of the Conseil du Mwami.[1] The procedure of allotment was precisely defined, and the customary gifts given by the grantee to the grantor or his representative were forbidden in 1943.

Except for these provisions regulating the powers of political authorities in the context of their transformation into civil servants, the principles of allotment remained the same throughout the colonial era. People either asked for a holding or received it as a reward.

(i) The petition for land (gusaba)

When an immigrant arrived in an area, his first move was to pay allegiance to the local political authorities and to ask for land on which to settle with his family. Rich cattle-owners had direct access to the chief or sub-chief, and were immediately given a holding, because political authorities were always eager to attract wealthy people. They normally gave a head of cattle to the chief as ingororе.[2] According to E. Mworoha, it was called inka y'ubucikire, which means 'the cow of

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1. See p.174.
2. See p.184.

the moving'.[1] An old man, whose father had immigrated to the Bukeye area where he had immediately been allotted a holding by the local chief, related that cattle-owners were at ease anywhere because they were sure to be welcomed as a source of wealth and prestige for the chief.

People who were not rich or well-known usually asked for the help of a member of the chief's court, whose assistance they sought to obtain land. This intermediary was called umuserukira, which means 'the one who speaks in the place of someone else' (from the verb guserukira). He was in charge of presenting the petition to the chief on behalf of the petitioner, and he received a gift from the latter as an acknowledgement. Such a gift was called ipfupfu and was generally an ox or hoes. A similar practice is found among the Bahaya: a prospective settler who is a stranger has first to find a sponsor, called his muhikya, who collects as much information as possible about the newcomer. While he is collecting the information, the newcomer looks for a suitable plot. When the muhikya has sufficient information, he speaks to the village head, who then goes to the sub-chief, who actually makes the grant.[2]

People already living under a chief's rule could ask him for land to extend their holding or to acquire a new one.

(ii) Allotment without asking

Political authorities often granted land as a reward for a service rendered. It was considered as a reward for someone's ubugabo, a term which means 'manhood', and, in the present context 'bravery' or 'the ability to have as many friends of influence as

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1. E. Mworoha, Peuples et Rois de l'Afrique des Grands Lacs, p. 191.
2. Cory and Hall, "A study of land tenure in Bugufi, 1925-1944", p. 116.

possible, to be a good courtier' (umutoni). In the latter case, the land grant created in some way a personal dependence bond. The land grant could also be accompanied by the loan of a cow (ubugabire) in which case the grantee became the personal client of the chief.

It is important to stress that chiefs and sub-chiefs were eager to grant land and cattle in order to attract people to their territory. These became their subjects and could become their clients, and so added to their power. In particular, rich cattle-owners were sometimes invited by a chief to immigrate to his territory. They were called abacikizwa, a term coming from the verb gucikira, 'to leave one's holding for a conquest', and were immediately given a land-holding. Such grants were the consequence of the constant struggle for power among chiefs and sub-chiefs.

B. The allotment procedure

Once the political authority had decided to grant land to someone, he sent one of his courtiers or a local personage to demarcate the granted land. He was called umushikiriza, a term coming from the verb gushikiriza, which means 'to pass on', 'to convey'.[1] The whole umuryango was present at the formal planting of boundaries by the umushikiriza; if the area was populated, the limits of the granted holding were precisely defined, but if there were few inhabitants, the grantee often received a whole hill without specific boundaries other than rivers, mountains and forests. He cultivated all that he needed, and the remaining part of the hill which remained undeveloped was available for another allotment. The degree of precision in defining the boundaries of a grant depended mainly on the density of population.

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1. Gushikiriza is a term originally reserved to cattle. It literally refers to the presenting to the umugabire of the cow his shejuba has decided to lend him.

During the ubushikiriza ceremony, beer was shared (inzoga y'ubushikiriza). It served as evidence of the nature of the grant in case of dispute.[1]

Case No.52/C/81 (Tribunal de Résidence de Bukeye, 30.11.1975)

X and Y fight for a holding. X argues that he received a holding from the chief, and that he later allocated part of it to Y in the context of a land-clientship agreement. Y claims that X and he received holdings from the chief at the same time. He consequently holds benefit and direct control interests over the land under consideration, and does not have to perform any of the land-client's obligations.

Witnesses assert that they always drank the land-clientship beer (inzoga y'agataka) offered by Y to X during the dry season. When the chief allotted land, only X offered inzoga y'ubushikiriza to the umuryango and to the chief's representative.

The court recognizes the rights of nyen'itongo of X over the whole holding. It also confirms Y in his status of land-client.

Customary legal principles cited (coutumes citées):

Uwuhawe n'Umwami acanira Ubrundi bubona,

'He who received from the Mwami, makes fire in front of all Burundi';

Umugererwa ntakura ngo yishikire,

'A land-client never "grows" so much that he has no more obligations to perform';

Ntawukurwa aho yahawe n'abakuru,

'No one can chase you from the holding you received from the great'.

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1. James and Fimbo, Customary Land Law of Tanzania, p.83.

Informants related that the ubushikiriza ceremony was the acte de notoriété of the ancient Barundi. Along with the testimony of witnesses, the statement of the umushikiriza was most important in case of dispute.

The chief's representative was only responsible for the conveyance process, and never acted as grantor.

Case No.306/C/70 (Tribunal de Résidence de Bukeye, 1965)

A, a sub-chief (umutware), was ordered by the chief to act as umushikiriza in the granting procedure of several holdings. In return, he was offered inzoga y'ubushikiriza. He later maintains that he gave the holdings under consideration in the context of land-clientship agreements (ubugerewa), and not as umushikiriza. He asks the various land-holders for inzoga y'agataka. Witnesses assert that the beer drunk when the granting took place was inzoga y'ubushikiriza and not inzoga y'agataka. The sub-chief loses the case .

Customary principle cited (coutume citée):

Umushikiriza ntiyigira umugavyi nawe uhawe n'Umwami acanira Uburundi bubona,

'The umushikiriza does not himself give, and he who received from the Mwami makes fire in front of all Burundi'.

The chief's representative was often given a present in return for his service: it was called ipfupfu ry'umushikiriza, and could be an ox (ishuri) or a mat (ikirago c'indava). It was considered as a personal present for the representative, and not as a fee to pay for the allotment. In Burundi before Independence there was no formal fee, such as the Buhaya kishembe[1] or the Bushi kalinzi.[2]

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1. James and Fimbo, op.cit., p.74.
2. J. Salmon, "Le droit foncier du Bushi", p.277.

The ubushikiriza ceremony finalized a transfer of benefit and direct control interests over land; from the moment he had been allotted land, the grantee assumed all responsibilities of subject towards the local sub-chief and the chief. He was assured security of tenure within the limits of customary law.

Case No.237/C/78 (Tribunal de Résidence de Bukeye, 29.9.1971)

A chief had distributed swamps to many people in 1948. Some years later, a nyen'itongo claims that the swamps located close to his itongo are part of it. He loses the case because they have formally been granted by the umushikiriza on behalf of the chief. At the time of the grant, he did not complain.

Customary principle cited (coutume citée):

Ntawukurwa aho yahawe n'abakuru,

'No one can chase you from the holding you received from the powers-that-be'.

Case No.52/C/82 (Tribunal de Résidence de Bukeye, 6.5.1976)

A holding, which had been used by sub-chiefs as a camp site, has been given to X by the chief. Y comes to court arguing that the holding under consideration is his itongo ry'umuryango. When the grant took place, Y failed to announce his claim. Consequently, the court decides to confirm the grant.

Customary legal principles cited (coutumes citées):

Uhawe n'Umwami atekera abagabo babona,

'He who received from the Mwami, receives in front of all men';

Ubwenge buje munyuma buba ar'ubucuzo,

'Craftiness which comes too late cannot give you back what you have lost'.

Case No.254/C/78 (Tribunal de Résidence de Bukeye, 7.12.1971)

X and Y are neighbours. X maintains that Y is his land-client and he wants to recuperate the holding occupied by Y. The latter, on the contrary, asserts that their grandfathers had received holdings together from the chief during the time of German rule.

Witnesses confirm Y's statement; they have never drunk inzoga y'agataka offered by Y.

The court confirms Y's rights of nyen'itongo, and X loses the case.

Customary legal principle cited (coutume citée):

Ntawunyagwa ico yagabanye izuba ryaka,

'One cannot despoil someone of what he was granted when the sun was shining'.

Case No. 30/C/83 (Tribunal de Résidence de Bukeye, 10.8.1977)[1]

A, the daughter of B, comes to court to claim a holding occupied by P.

A: My father received the holding from the chief. When P settled nearby he took it over.

P. I received from the chief a holding located on Giko. My umushikiriza was the local sub-chief. He placed the whole hill under my control, except for three holdings which were clearly demarcated. There was a plot cultivated by B, the father of A. However, it was not demarcated by boundaries, but only by a small ditch (umuvo). When I asked the umushikiriza about the nature of B's interests over the plot, he answered that the chief had lent it to B and that it would be mine after the end of the loan. When B stopped cultivating it, I took the plot for my own use. The plot is legally part of my itongo ry'umuheto because there were no boundaries which demarcated it. B was only a temporary occupier.

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1. Date of hearing.

There was no control by the extended family over the holding granted to an individual. He could dispose of his itongo ry'umuheto and use it as he pleased within the limits of his political obligations. In particular, there was no obligation to develop the granted land, as in Buhaya for example.[1] However, an uncultivated holding could easily be confiscated by political authorities, and in order to insure the maximum security of tenure, ben'itongo, who were not able to cultivate their whole holding, used to place abagererwa on it.

c. The grant of uncleared land (itongo ry'inyicire)

Itongo ry'inyicire is the holding over which someone has acquired benefit and direct control interests by the clearing of forest or wooded savannah after having obtained the agreement from the local political authority to settle in a given area. It often happened that a new immigrant started to clear forest or bush without the previous formal authorization, which was given only later. In the Kibira region, the tropical forest which is located on the Zaire-Nile crest, confusion between itongo ry'umuheto, itongo ry'inyicire and itongo ry'umuryango is frequent. As a matter of fact, most families have acquired their holding after having received the right from the local chief to clear the forest; in the Kibira region, this practice went on during the colonial era. In ancient Burundi, when most of the country was covered with tropical forest, clearing must have been the most common way to acquire a direct control interest over land. However, such a practice must not be confused with the often cited maxim défrichage vaut possession, which means 'clearing equals

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1. James and Fimbo, op.cit., p.86.

possession', and is used to describe how Africans gain control over land. In Burundi, the right of the first occupier to become nyen'-itongo can only be understood in the context of the preliminary authorization of political authorities. To clear forest or bush does not itself create any benefit or direct control interest over land. For a long time the concept of unoccupied land (terres vacantes) did not exist in the customary law of Burundi. In ancient Burundi all land was under the political control of the Mwami and his representatives, the chiefs. The first act of a new immigrant was to pay allegiance to the local authorities. Most often the latter were happy to allow the clearing of forests and bush, and encouraged people to do so.

R. Bourgeois compares the Burundi itongo ry'inyicire to the Rwanda ubukonde, a family form of tenure achieved by clearing forest, and found in central and northern Rwanda.[1] He nevertheless stresses that ubukonde functioned independently from the Rwandese State organization in areas outside royal jurisdiction, while in Burundi, inyicire was associated with the action of kugerera by political authorities.

D. Grants by the State in present-day Burundi

After Independence, commune authorities, replacing chiefs, allotted holdings to petitioners, although they had no recognized power to do so.[3] People in need of land go to the administrateur

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1. See p.221.
2. Kugerera is a general term referring to the action of granting land to someone for him to settle on. Ubugererwa, for example, comes from kugerera.
3. See p. 207.

communal to ask for a piece of land. The practice is to grant a plot of a maximum four hectares area if the petitioner has no other holding, and a plot of a maximum one hectare area if the petitioner wants to enlarge an already existing holding. Land granted by the commune authorities is called itongo ryatanzwe na komine, the 'holding given by the commune', and is considered as gift. The grantee receives a written document called urupapuro rw'ubugabire, 'the document of the gift', which is a kind of written contract. The grant is also registered at the tribunal de résidence which issues an acte de notoriété. In the minds of peasants, a grant from the commune is similar to the traditional itongo ry'umuheto: the grantee becomes nyen'itongo.

It has happened, especially after the 1972 civil struggles, that province and commune have granted large tracts of abandoned land to individuals. They also allotted holdings exceeding four hectares. When the leaders of the Second Republic came into power, they had to settle the problem of abandoned land granted to petitioners as well as the problem of the progressive decrease of public land as resulting from grants by province and commune authorities. They promulgated the décret-loi No.1/91 portant retour au domaine de l'Etat des terres irrégulièrement attribuées.[1] A committee was to be appointed in order to proceed with the reversion of land which had been granted irregularly by the State. The ordonnance No.710/65 of 27 March 1980, appointed the committee in charge of carrying out the various provisions of the décret-loi. At present, its members of are

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1. In B.O.B. (1977), p.296.

checking the origin and nature of the interests over holdings listed as irregularly acquired by Provincial Governors. The terms and conditions of the reversion to the State of land considered as illegally acquired will eventually be defined in an ordonnance of the Ministry of Agriculture and Breeding. The décret-loi recognizes grants made by commune authorities to peasants when the area granted does not exceed four hectares. There will be no compensation paid by the State for the increase of value due to development of land which is considered as irregularly acquired. The irregular occupiers will only be allowed to harvest what they have planted.[1]

In 1979, the Minister of Interior, on which the commune authorities depend, ordered the end of all grants of land of any size because new rules concerning land grants were to be enacted. Today, grants of land are still made by governmental agencies, especially in the paysannats and in the newly-implemented villages (ibigwati). Since these grants differ radically from customary practices, they will be described in the chapter dealing with individual interests over land originating in administrative practices.[2]

Chapter 13: Individuals as Holders of Customary Interests originating in Contract

Customary contract law is developed in Burundi. People conclude contracts on marriage, clientship, the sale of land, cattle and other goods, loan, pledge, caretaking, etc. The basic principle of contract customary law is that the parties to a contract must keep their word. Many sayings express it, such as:

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1. Fidèle Ntirushwa, "Les modifications du droit foncier au Burundi depuis l'indépendance", in Le Renouveau du Burundi, No.651, 12 novembre 1980, p.7.
2. See p.383.

Ubusoro bupfa mu mvugano,
Literally, 'The game of ubusoro dies in the discussions',
meaning: The content of a contract is fixed b y the discussions;[1]

Ubusoro bushira mu kwesa,
'The content of a contract is fixed by the discussions';

Ijambo ripfa mu mvugano,
Literally, 'The word dies in the discussions',
meaning: The content of a contract is fixed by the discussions.

Ic'umuntu yemeye ntakigarwako,

'What a man has accepted, he cannot disown'.

Umugabo yihindukiza mu kirago ntihindukiza mw'ijambo,
'A man changes his position on his sleeping mat, he does not change his mind about what he has said';

Ugira umukobwa umwe ukaronka umukwe umwe,
Literally, 'If you have only one daughter, you will have only one son-in-law', meaning: One has only one word;

Ntawucira ico yamize,
'No one hides what he swallowed'.

Breach of contract, and its consequences, are expressed by several sayings, such as:

Uwiciriy' amaragano aheba ivyo yarimwo,
'He who does not keep his promise must waive his claims';

Uburimwo umuregesho ntibuvura,
'A liquid in which something stirs cannot become solid';

Uwanse Nyabuzana amwankana n'ubuzana bwiwe,
Literally, 'He who hates a man in rags also hates his rags',[2]
meaning: 'He who refuses a clause of a contract, refuses the contract'.

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1. F. Rodegem, op.cit., p.450. Ubusoro is a term which literally refers to seed used in a traditional game akin to backgammon.
2. Nyabuzana is the name of an individual which is used here to correspond with ubuzana, 'rags'.

It must be underlined that the keeping of their words by the parties to a contract is acknowledged by the Burundi Civil Code in Article 33 of Book III of the Civil Code, which states that: "Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites".[1]

As in all oral societies, the concluding of agreements is accompanied by specific forms, such as a formal speech in the presence of witnesses, and the sharing of beer by parties and witnesses.

The main contracts which have land as their objects are (A) the exchange, (B) the sale, (C) the gift, (D) the loan, (E) the modern renting agreement, and (F) the pledge. Clientship agreements resulting in the transfer of benefit interests over land will be described in a specific chapter.[2] Although many authors have called clientship agreements contracts, the element of personal dependence implied in them leads to quite different consequences than a contract in which the rights and obligations of each party are objectively defined.

A. Direct control interest over land acquired by way of exchange

Kuguza is the Kirundi verb which means 'to exchange'. According to F. Rodegem, it literally refers to the exchange of cattle against sheep or goats.[3] It has been extended to all kinds of exchanges

Ubuguzo, 'the exchange', which has land for object, was known in Burundi before Independence, and is still practised. It normally occurs among relatives or friends. Plots (ibivi) are generally exchanged, but very rarely whole holdings. Exchange among relatives and friends is called ubuguzo bw'urukundo, 'the exchange resulting from love'.

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1. Codes et Lois du Burundi, p.75.
2. See p. 343.
3. F. Rodegem, op.cit., p.132.

The exchange may be temporary or permanent. Temporary exchanges are very frequent: for example, two friends may exchange two fields, or a hill plot in return for a swamp plot, for one period of cultivation, because one of the friends has no field in the swamps and the other agrees to give him one in exchange for a plot on the hill. Sometimes exchanges may be permanent: in the latter case, rules regulating customary sale apply because it is a sale of which the price is land instead of cash. The consequence of definitive exchange is the transfer of direct control and benefit interests over the plots under consideration.

When an exchange takes place, the parties ask for witnesses to listen to their speeches explaining the terms of the transaction, and to share the beer of the exchange (inzoga y'ubuguzo).

Case No.2256/C/59 (Tribunal de Résidence de Bukeye, 13.7.1962)

A claims that there has been an exchange of plots between his sister B and himself. As his sister has occupied a plot on the holding he inherited from his father, he asks for a plot on the holding where his sister lives.

B, the sister, claims, on the contrary, that there has never been any exchange, but that her father had granted her a plot on the itongo ry'umuryango as igikemanyi.[1] She brings several witnesses who assert that the plot under consideration has been allocated to B as igikemanyi. A cannot produce any proof of the supposed exchange. He does not have any witness of the transaction (icabona c'ubuguzi).

The court decides to confirm the igikemanyi allocation to B.

Customary legal principle cited (coutume citée):

Urubanza rugirwa n'ivyabona,

'The settlement of a dispute is based on witnesses'.

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1. See p. 242.

B. Direct control interest over land acquired by way of purchase

Itongo ry'irigurano, 'the holding acquired by way of purchase' (from the verb kugura, 'to buy'), is part of the classifications of land-holdings as defined by customary law according to the origin of the direct control interest. The purchase of land seems to have been known in prelcolonial Burundi, but it was not conceived as a commercial transaction; before the arrival of Europeans, cash as well as a market-oriented economy were unknown. Neither land nor cattle were economic goods as such, but they were a source of power; interests over them could be transferred, most often within the framework of clientship agreements, but also as gifts (ingabirano), or in return for another good, which may be considered as a kind of customary sale price. According to informants, land could be exchanged for cattle, hoes, brass ornaments or another piece of land. Small plots, and rarely entire holdings, were the objects of such transactions.

As has already been stressed, family members have a right of pre-emption in case of sale of part of the family holding by one of the family members, and a right of redemption if such a sale has already taken place without their approval.[1] Political authorities also had a right of control over the sale of land by their subjects.[2] In the forties, the Conseil du Mwami lifted this control and expressly allowed the Barundi to sell land without the previous authorization of local political authorities.[3] The tribunaux de résidence began to issue actes de notoriété in case of sale, and eventually, registration of all land sales at the local court became obligatory.

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1. See p.258.
2. See p.188.
3. Conseil du Mwami, Reunion du 3 octobre 1941, vente des amatongo, Procès-Verbal, p.6. Conseil du Mwami, Reunion du 23 au 25 novembre 1943, Amatongo: droit de vente, déchéance du droit de possession, droit de location, Procès-Verbal, p.5.

In present-day Burundi, the pre-emption and redemption rights of the local kin group are still acknowledged by courts, and a sale concluded without its approval is normally declared void. However, cases have been found in which the court has accepted such sales:

Case No.29/C/76 (Tribunal de Résidence de Bukeye, 24.7.1969)
A wants to sell a plot, part of the holding he inherited from his father (itongo ry'umuryango). His brother comes to court to prevent the sale because family land would be transferred to strangers. The court decides that anyone can sell what he owns.
Customary legal principle cited (coutume citée):
Uwurya ivyiwe ntawumwimira,
'He who "eats" what he owns, cannot be forbidden to so do'.

Case No.161/C/75 (Tribunal de Résidence de Bukeye, 10.6.1969)
A left two holdings, one to each of his sons B and C. C sells several plots, part of the holding he inherited. B comes to court to prevent him doing so, arguing that it is family property. The court decides that each son can do what he wants with his holding since partition by their father has taken place.
Customary legal principle cited (coutume citée):
Ntawusangira n'uwa batasangijwe,
'No one eats with the one he was not determined to eat with'.

At present, the transfer of direct control and benefit interests over land by way of sale is not widespread, except in urban districts and their surroundings, as well as in underpopulated areas where many immigrants settle on holdings they have bought from local ben'itongo. For example, many people from Bukeye have bought land in Rugombo in the Imbo region, where land is still plentiful. On the contrary, in populated areas, such as Bukeye, fields (ibivi), and rarely whole

holdings, are sold. If someone plans to emigrate, he will normally entrust his holding to a relative rather than sell it. J. Bonvin states in that respect that, in his inquiry, he found that half of the pieces of land sold had an area of less than 2,500m². [1] He also stresses that the purchase of land seems to be directly linked with market-oriented economy and the desire to increase the production of cash crops, because most purchases occur in areas where cash crops are grown. Moreover, in these, some people who are not peasants (businessmen, civil servants) have begun to buy land as an investment: according to J. Bonvin, 17 per cent of the buyers of land in the Province of Bubanza are not peasants, while this figure is down to 14 per cent in the coffee-growing province of Ngozi, and to 0 per cent in the Province of Ruyigi, where few cash crops are grown.

The procedure of transfer of interests over land by way of sale inclused three stages; first, a private agreement is made between the vendor and the buyer: the parties agree on the terms of the contract, oral or written, which are called imihango y'ubuguzi or indagano y'ubuguzi. Then, the conclusion of the contract takes place in the presence of the umuryango (family and neighbours) as well as of specific witnesses called abagabo b'ubuguzi or ivyabonavy'ubuguzi. The parties to the transaction make a speech explaining the terms of the contract to the assembly. Then the witnesses question them about their intents and stress the obligations of buyer and vendor in case of dispute. Finally, a beer (inzoga y'agacabuguzi or inzoga y'ubuguzi) is shared by the parties and the witnesses. The sharing of beer seals the contract and will serve as evidence in case of dispute.

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1. J. Bonvin, "L'agriculture et les Structures rurales au Burundi. Analyse micro-economique a partir d'une enquête en milieu paysan portant sur 1965 exploitants agricoles dans trois regions" (unpublished), p.17.
2. Ibid., p.19.

Case No.40/C/81 (Tribunal de Résidence de Bukeye, 30.5.1975)

A sold a plot to B. The latter then does not want to pay the agreed sale price, arguing that he did not want to buy the plot. A brings witnesses of the sale contract who shared beer with the vendor and the buyer. The court decides that the sale did take place and that B has to pay the agreed sale price.

Customary legal principles cited (coutumes citées):

Akaryamyenda karishura,

'The debt-holder (literally, he who has eaten debts) has to pay his debts';

Ntawutanga agacabuguzi atashimye ico aguze,

'No one gives the beer of the sale (agacabuguzi), if he is not happy with what he is buying'.

Case No.155/C/77 (Tribunal de Résidence de Bukeye 1971)

A, the uncle of B, has bought a field from his nephew in the absence of B's mother, to whom the family holding has been entrusted until partition among heirs takes place. B's mother goes to court to ask for the sale to be declared void. She says: "Since the death of my husband, I have taken care of his holding, and I will take care of it until it is partitioned among my sons. Concerning the present sale, I never drank the beer of the sale; therefore I do not recognize the sale". The court decides that B had no right to sell a field which was not his. The sale contract is declared void and the plot must be returned.

Customary legal principle cited (coutume citée):

Uwibishije umwana aravyakwa,

'He who induces a child to steal, must give back what he has stolen'.

Case No.2608/C/63 (Tribunal de Résidence de Bukeye, 24.1.1963)
A claims that he bought a plot from B. As he cannot bring any witness of the sale agreement, A loses the case.
Customary legal principle cited (coutume citée):
Icemeza ko ubuguzi bwahabaye ni inzoga y'agacabuguzi,
'That which confirms that a sale has taken place is the agacabuguzi beer'.

Together with the sharing of beer, other acts, related to the sale agreement, may be performed. For example, the parties may cut a straw in two, it is a symbolic act called guca akatsi, 'to cut a blade of grass'; expressing the conclusion of the sale contract. Unlike the beer of the sale, it is usually not brought up as evidence in case of dispute.

Case No.2002/C/56 (Tribunal de Résidence de Bukeye, 19.5.1961)
A claims that he did not sell a plot to B. The latter brings witnesses who shared the beer of sale and watched the parties cut the straw in two. The court declares that the sale has taken place.
Customary legal principles cited (coutumes citées):
Abaguze bagaca akatsi ntibaguranura,
'Those who concluded a sale and cut the straw in two cannot renege on the agreement';
Ijambo ripfa mu mvugano,
'The content of a contract is fixed by the discussion'.

In order to conclude a contract of sale, some people also perform a practice called gutambuka icumu, 'to step over the spear'. Each party steps over a spear, while making the oath that if they change their minds, they will be the victim of the spear. Such a practice means that the parties will keep their word, that they accept the sale.

Once the agreement has been concluded, witnesses and parties go to the land which has been sold in order to demarcate it by planting boundary markers (gushinga akarimbi). Boundary markers also serve as evidence in case of dispute.

Case No.2/C/79 (Tribunal de Résidence de Bukeye, 19.2.1973)

A bought a plot from B. The vendor and the buyer are dead. B's son forbids access to the plot to A's wife, arguing that the agreement between A and B was a temporary loan and not a sale. A's wife says that it was a sale because there are boundary markers, and she brings the witnesses who planted them. The court goes to the plot under consideration and acknowledges the existence of boundary markers. The court declares that the plot was sold and not lent.

Customary legal principle cited (coutume citée):

Umwana w'isema aririra ubuhawe se,

'A child who brings back luck cries to have the dough of his father'. This proverb means in this case that B's son's unfounded claim is contrary to his father's lawful action of selling the plot in question.[1]

(iii) The registration of the sale at the tribunal de résidence and the issue of an acte de notoriété: once the customary procedure has been completed, the parties go to the local court to register the sale. The buyer receives an acte de notoriété containing all details about the sale.[2] In 1979, local courts were ordered to stop delivering actes de notoriété and registering sales while new regulations concerning land tenure were under study. Hence, temporarily, land sales are officially suspended. It must be underlined that many land sales, which occurred before 1979 were not registered, especially

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1. Kwisema, 'To do something which will rebound on the doer'.
2. See Document No.29.

when the parties to the transaction were friends or relatives. In the Bujumbura area, there was another reason for not registering land sales: in Musaga, a suburb of Bujumbura where land tenure is customary, the commune authorities deliver attestation de vente upon the presentation of a written contract of sale. A tax, amounting to 10 per cent of the sale price, is then paid by the vendor. The local court registers the sale and delivers an acte de notoriété only upon the presentation of the commune attestation de vente.

Before the abolition of land-clientship, abagererwa often remained on the sold holding and acknowledged the direct interest of the new nyen'itongo, while abashumba normally followed their master.[1]

The sale of land results in the conveyance of direct control and benefit interests and obeys the principles of customary contract law.

Case No.15/C/81 (Tribunal de Résidence de Bukeye, 26.3.1975)

A has sold a plot to B for 6,000 Fbu. After he has received the sale price, he sells the plot under consideration to another person. The court decides that the first contract is valid.

Customary legal principles cited (coutumes citées):

Ugira umukobwa umwe ukaronka umukwe umwe,

'If you have only one daughter, you will have only one son-in-law';

Umugabo yihindukiza mu kirago ntiyihindukiza mw'ijambo,

'A man changes his position on his sleeping mat, he does not change his mind about what he has said'.

Case No.99/C/76 (Tribunal de Résidence de Bukeye, 12.11.1970)

A sold a plot on which there was a eucalyptus wood to B. B comes to court arguing that A has transgressed the boundaries of his holding and

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1. See p.344.

has cut several of his eucalyptus trees. Witnesses of the sale contract assert that the contract stipulated that A would have the right to cut a certain number of trees on the sold plot. B consequently loses the case.

Customary legal principles cited (coutumes citées):

Uwugurishije itongo ntaco aba akiriganzako,

'He who sells a holding has no more control over what grows on it';

Ubusoro bupfa mu mvugano,

'The content of a contract is fixed by the discussion'.

Case No. 80/C/ 83 (Tribunal de Résidence de Bukeye, 9.8.1977)

A, an old woman, sold a plot to B. Later on, A's children occupy the plot under consideration because they refuse to acknowledge the sale concluded by their mother.

B, the buyer, goes to court to complain that he cannot cultivate his plot. Here is a excerpt from the proceedings.

B: During the summer of 1973, I bought a field in the swamps (umwaba) from A, the mother of C, for the sum of 3,500 Fbu. I cultivated it for two years, but, during the third year, C, the daughter of A, sowed before me. Since that time, I have not been able to cultivate the plot I bought because it has been occupied by C. I ask the court to allow me to recover the plot because the sale was legal. I have witnesses to prove it.

J: Are you sure it was not a renting agreement?

B: Witnesses will testify that it was a sale.

C, representing her mother:

My mother is too old to know what she is doing. She agreed to a manifestly inequitable sale. I was not present nor was my brother D. When we came back home, we learnt about the sale

and summoned B to give him back his money because the sale price he had paid was not enough given the size of the field.

The judge interviews witnesses who all assert that the sale actually took place according to the customary procedure. They also confirm the fact that C and A have occupied the field under consideration, thus forbidding B to use it.

A few weeks after the court hearing, court officials go to the plot under dispute and the judge interviews A, the old woman.

J: Do you know why we are here today?

A: Yes, to settle the dispute between B and me about the field in the swamps.

J: Did you conclude a contract of sale with B?

A: Yes, but I think the sale was not concluded properly. The buyer went himself to measure the field and took more than I wanted to sell. I am too old to measure the field and to judge whether the price he offered me corresponded to the value of the land.

J: One of your daughters was at home when the sale took place. Why did she not assist you?

A: As you can see for yourself, it is possible to bear a bad child (she uses the expression kuvyara agakoko, 'to bear a savage beast'). Later I required the mediation of the local abashingantahe. B and his family did not want to resort to such a mediation and threatened to complain against me to the commune, and even to the provincial authorities.

J: What do you want now?

A. I want to give back to B the money he gave me for the field. This field is too valuable to be sold at such a price. Moreover, there has been no registration of the sale at the tribunal de résidence, and, as far as I know, a land sale is valid only if properly registered.

Court officials measure the field under dispute and it appears that it is larger than what B had claimed. It is ten metres longer than the length agreed in the contract of sale. This is a proof that B cheated A and took advantage of her old age. The court decides that the sale is void; the sale price will be returned to the buyer and the field will be kept by A.

Customary legal principle cited (coutume citée):

Uhenze umatamakazi ni nk'uhenze umwana,

'Cheating an old woman is like cheating a child'.

C. Direct control interest over land acquired by way of gift

According to customary law, a holder of direct control interest over land may give away land in friendship. It is said that the giver likes the receiver (amwikundiye), and the land, object of such a gift, if it is a holding, is called itongo ry'ingabire.

In Burundi before Independence, whereas cattle gifts were frequent (ingabire y'urukundo, 'gifts of love'), land gifts, especially of land-holdings, were rare. Plots were given more often, and the practice continued in independent Burundi. Most land gifts are made within the family, especially to daughters and sons-in-law.[1] Gifts are made in a public ceremony which includes the sharing of beer by parties and witnesses (inzoga y'ingabire). Gifts are also registered at the tribunal de résidence, and an acte de notoriété is delivered to the new

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1. See p.256.

direct control interest holder. Since 1979, registration has been suspended.

Case No.87/C/76 (Tribunal de Résidence de Bukeye, 30.4.1970)

A gave a plot to B, so that the latter could build a house on it. The gift was registered and an acte de notoriété was delivered by the tribunal de résidence. During the 1965 civil troubles, B had to abandon the plot. Later on, he returned and found his house occupied by A, who refused to give it back. B goes to court to claim the given plot. B says that A has wrongfully taken his house (kunyaga inzu, 'to deprive someone of his house'). Witnesses testify that the gift took place.

The court decides that B can recover his house and the plot on which it is built. He will give beer to A in order to thank him for having taken care of the house during his absence. This beer is called inzoga y'inyugururanzu, meaning 'the beer to open the house'. It is comparable to umuzibukiro, the customary reward which is given by the nyen'itongo to the one who has taken care of his land when he has been away.

D. Benefit interest over land acquired by way of loan

In pre-colonial Burundi, the renting of land in return for a cash fee was unknown. People either concluded free loans or loans in return for some form of payment in kind. In the present section, free loan will be examined, whereas loan in return for a payment in kind will be described later in the section dealing with the renting agreement.[1]

In Kirundi, 'to loan' is gutiza and 'the loan' intizo. Free loans are normally made among people who know each other well, and are

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1. See p.336.

considered as a sign of friendship. The procedure is normally the following: someone who is in need of a field asks a friend for one; such a petition is called gusaba ubwatsi, which means 'to ask for a plot'. The agreement is informal and the loan is normally made for the length of time needed to grow the crop the borrower wants to plant in the field under consideration. At the time of the harvest, the borrower usually brings to the lender a beer called inzoga y'ubwatsi bw'intizo or inzoga y'agataka, which is shared by the umuryango. Both parties then make a speech explaining the purpose of the beer. It will serve as proof of the loan in case of dispute.

Case No.270/C/78 (Tribunal de Résidence de Bukeye, 3.2.1972)

A claims that he lent several fields to B, which he wants back. B refuses to give them back, arguing that his father had bought the fields under consideration from A's father many years before. He has been cultivating them for nineteen years and has never given inzoga y'agataka to A.

A is not able to bring witnesses of the beer-sharing, which is customary in case of loan, and all the witnesses of the sale are dead. The court decides that there is no loan and that B can keep his fields.

Customary legal principle cited (coutume citée):

Uwutije ubwatsi ahabwa inzoga y'agataka iyo atayihabwa ntaba yaratije aba yaraguze,

'He who lends a plot receives inzoga y'agataka; when he does not receive anything, it means that he has not lent but sold the land'.

Loans are inheritable and often last for very long periods, being renewed year after year.

If the loan is made between relatives the beer given is called inzoga y'umuryango and the petition for a loan is gusaba buryango, to ask within the family.

A loan results in the conveyance of benefit interests over land for a definite or indefinite period. The direct control interest holder may take back the land at any time (gutitura, 'to cancel a loan'), provided that he lets the borrower harvest that which he has planted. A loan never results in the conveyance of a direct control interest.

Case No.49/C/81 (Tribunal de Résidence de Bukeye, 16.12.1976)

A lent a plot to B. The latter later claims that it was not a loan, but a gift (ingabirano). A brings witnesses to confirm the loan. B loses the case.

Customary legal principle cited (coutume citée):

Ico umuntu atijwe aragisubiza,

'What a man has borrowed, he must return'.

Case No.48/C/79 (Tribunal de Résidence de Bukeye, 16. 6.1973)

A lent a plot to B. The latter regularly brought inzoga y'agataka. He cannot pretend that it is a gift.

Customary legal principles cited (coutumes citées):

Intizo ntiba ingabire,

'A loan never becomes a gift';

Ijambo ripfa mu mvugano,

'The content of a contract is fixed by the discussions'.

Case No.290/C/78 (Tribunal de Résidence de Bukeye, 19.2.1972)

A father gave a land-holding to his son (ingabirano). Later on, the son bought another holding. Within this holding, the son lends a field to his father. After a few years, the son wants to cancel the loan. The father becomes angry and asks his son to give back the holding he had received from him as ingabirano. The son suddenly dies and the father takes back the land under dispute from the widow. The latter goes to court to complain about her father-in-law's behaviour.

The father claims that a mutual loan was concluded between his son and himself (gutiririkanya, 'to lend mutually'). When his son took back the plot he had lent him, he did the same with the other plot. However, several witnesses assert that the plot under dispute had been given by the father and not lent.

Customary legal principle cited (coutume citée):

Ntawunyaga umwana ico yari yamuhaye iyo asize impfuvyi,

'No one deprives a child of that which he has been given when the child leaves orphans'.

There is a form of conveyance of benefit interest over land, which is akin to the loan. Someone may allow another person to occupy temporarily a field or a holding. It is called gusembera, which means 'to occupy temporarily'. No formal agreement is necessary because it is a precarious and short-term arrangement. For example, a person immigrates to a given area; during the period he is looking for a suitable holding to settle on, he may stay with a relative or an acquaintance who allocates him a plot on which to build a temporary shelter as well as fields to cultivate.

Case No.44/C/64 (Tribunal de Résidence de Bukeye, 18.4.1963)

The widow of Y temporarily lent a plot to the brother of her husband, called Z, while he was looking for a holding. Z claims that his brother himself bequeathed the plot under consideration to him, and he settles on it.

The daughers of Y, after the death of their mother, go to court to claim the plot. As Z cannot bring any witness to the bequest, he loses the case, and the daughters of Y recover the plot.

Customary legal principles cited (coutumes citées):

Ivyagiye kera ivyagurukana irago,

'The cow which rests too long will get up with its blood having been

drained by a bleeding spear'. This saying means that gusembera is, by nature, a temporary arrangement. He who does not acknowledge the precarious character of the arrangement will forcibly be evicted from the plot;

Ico umuvyeyi asize nico arerewa,

'Those a parent leaves must be brought up on his behalf'.

When a direct control interest holder over land leaves his holding for a long period, he usually entrusts it to a relative or a neighbour. To describe this practice the term imbitso is sometimes used. Imbitso literally refers to the loan of a cow with the right to benefit from its milk and dung. Land imbitso is finalized by a formal ceremony in which beer is shared by the nyen'itongo and the trustee. The latter will have the benefit of the land. When the nyen'itongo wishes to recover his holding, he will give to the trustee a reward to thank him for having taken care of the land. This reward is called umuzibukiro.

E. Benefit interest over land acquired by way of renting

It must first be noted that several authors have used terms related to renting, such as louer, locataire, bail à ferme, loyer, to describe interests over land which have nothing to do with renting as envisaged in the present context. R. Bourgeois, for example, asserts that the subjects of a political authority in pre-colonial Burundi used to rent their holdings from this authority. The tribute they paid was, in fact, a renting fee:

> Le fermage comporte les tributs et corvées dus aux autorités indigènes par les fermiers qu'elles ont installés à l'occasion de l'exercice de leurs fonctions politiques ou éventuellement par leurs fermiers personnels.
>
> Aujourd'hui les Bahutu et les Batutsi on perdu de vue qu'ils payaient une redevance locative aux authorités politiques lors du versement de l'impôt.[1]

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1. R. Bourgeois, Banyarwanda et Barundi, p.249.

Renting has also been equated by some with ubugererwa.[1] For example, one may find the following statement in a court decision rendered in the forties about the relationship between land and land-client:

> Le fait, pour le locataire, de quitter un terrain à lui cédé par le propriétaire à cause de ce dernier, oblige le propriétaire de donner des dommages et intérêts.[2]

There was no proper term referring to the temporary conveyance of benefit interest over a piece of land in return for a fee. The word gutiza, to lend, was used, and is still used in present-day Burundi. Recently the verb gukotesha, which is of Kiswahili origin, has come into use to describe a renting agreement in return for a cash fee.

1. The traditional renting agreement with a rent in kind

It originates in the petition of an individual in need of a plot to cultivate. The petitioner goes to the nyen'itongo with a pot of beer called either inzoga y'agataka, 'the beer of the small land', inzoga y'ikibando, 'the beer of the stick used to clear bush', or inzoga y'ubwatsi, 'the beer of the plot'. During this visit he formally asks for a plot to rent, and gives details about the crops he wants to grow on it as well as about the terms of the agreement. This procedure is known as gusaba ikiui[3] or gusaba ubwatsi.[4] If the land-holder agrees to rent a plot, he will also make a speech, as well as define the limits of the plot by drawing a small ditch around it. The parcelling out of a plot in favour of a tenant is called gukeba ubwatsi, 'to cut out a plot'. Gusaba ubwatsi and gukeba are made in the presence of the umuryango members (family and neighbours) who act as witnesses.

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1. C. Kayondi, "Murunga, colline du Burundi", p.187. A. Delacauw, "Droit coutumier des Barundi", p.495.
2. Tribunal de Territoire de Ruyigi, Décision du 28.4.1948 in (1948) B.I.R.U., p.407.
3. C. Kayondi, op.cit., p.187
4. A. Delacauw, op.cit., p.495.

In most cases, the term of a renting agreement is determined by the length of time needed to grow a particular crop or by a given crop's rotation cycle. For example, one of the most common rental agreements lasts for nine months, the period needed to grow beans, followed by sorghum.

In a rental agreement the tenant is called umusabisha w'umubindi, 'the petitioner of the pot of beer', and is defined as the person who has a benefit interest over a plot of land belonging to someone else, but who goes to sleep elsewhere after having worked on the rented field. This definition points up the difference between the tenant and the land-client who lives on the plot which he has been allocated.

Renting agreements are only made for growing temporary crops: if a banana grove is rented, the tenant will only harvest the crops he has planted, while the nyen'itongo will collect the bananas.

After the harvest, the tenant brings a basket of the harvest produce to the nyen'itongo. If the crop is sorghum, this rent in kind is called urutete rw'amasaka, 'a basket of sorghum'. This expression has been expanded to include any rent in kind. It is the proof of the renting agreement in case of dispute about the nature of interests over land. The tenant also has the obligation of gushikanira, 'to make an offering of beer', called in the present case, inzoga y'agataka, or inzoga y'ubwatsi.

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1. M. Byagagaire, and J.D.C. Lawrence, "The effect of customs of inheritance on the sub-division and fragmentation of land in South Kigezi", in Land Tenure in Uganda, Entebbe, 1957, p.20. "Lease agreements are usually verbal and the term of the lease short, not more than two seasons normally. There are also two implied conditions in such agreements: the first is that no permanent crops are permitted and that no buildings may be erected".

Case No.24/C/82 (Tribunal de Résidence de Bukeye, 8.3.1976)

B received a plot from A's mother in return for urutete rw'amasaka and inzoga y'agataka. After the death of A's mother he keeps the plot claiming that A's mother gave it to him as ingabirano, 'gift'. A comes to court to complain about B's behaviour. He brings with him witnesses who assert that B has always performed the duties attached to renting (gushikanira). As B cannot present any witness of the supposed gift, he loses the case.

Customary legal principle cited (coutume citée):

Ubusoro bupfa mu mvugano,

'The content of a contract is fixed by the discussions'.

The rent fee in kind (urutete rw'amasaka) is not fixed in advance: when the harvest is bad, the basket will be small, when good, large. If nothing has grown because of a natural disaster, no rent is expected.[1] The traditional renting agreement is embedded in personal relationships between the tenant and the nyen'itongo, consequently the obligations of the tenant are not precisely defined.

Sometimes the rent fee may be work for the nyen'itongo; however, this arrangement is rare.[2]

2. The modern renting agreement with a rent in cash

With the introduction of cash, a new form of renting appeared, namely renting in return for a cash fee.[3] According to J. Bonvin's inquiry, it has become the most usual form of renting in the regions of Bubanza and Ngozi, oriented towards the production of cash crops, while it is still rare in the Ruyigi region.[4] It started first in the urban

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1. E. Simons, "Coutumes et institutions des Barundi", p.232.
2. J. Bonvin, op.cit., p.21.
3. For example, see Jugement No.222 in (1953) B.J.I.R.U., p.575.
4. J. Bonvin, op.cit., p.21.

areas for the renting of houses and was slowly adopted by peasants for the renting of fields. Gukotesha, 'to rent in return for a cash fee', has become the most widespread form of renting in many regions of Burundi, and is directly linked with the availability of cash.

In the modern renting agreement, personal relationships between the parties are not of a basic importance. The base of the agreement is the payment of a cash fee in return for the conveyance of a benefit interest over a given plot of land for a determined period of time and a specific use. Whereas in urban areas the conclusion of renting agreements often lacks any form, a situation leading to many problems, in rural areas, the offering of inzoga y'agataka by the petitioner is practised even when the rent is paid in cash. It serves as evidence in case of dispute.

Case No.330/C/67 (Tribunal de Résidence de Bukeye, 24.4.1964)

A claims that he bought a plot for 300 Fbu. He then rented it to B for a cash fee of 50 Fbu per year. When B has paid the equivalent of 300 Fbu as rent, he keeps the plot for himself, claiming that he is the owner.

B says: "Six years ago, we acquired two neighbouring plots at the same time for a price of 300 Fbu each. As I did not have enough cash, I borrowed 300 Fbu from A, which I have repaid at an annual rate of 50 Fbu. Now that I have repaid my debt, A has no more claim to the plot".

A brings witnesses to the sale, while A cannot bring any witness who have shared inzoga y'agataka, which should have been offered by B in case of renting. Consequently A loses the case.

Customary legal principle cited (coutume citée):

Uwibesh' inda bamubesha ibiheko,

'She who falsely believes herself to be pregnant, will be falsely promised something to develop the foetus by witch doctors'.

In contemporary Burundi, the renting of fields is frequent. Many land-holdings are too small to support a whole family. Some people also rent fields in various special ecological zones: for example, many highlanders from Mugamba rent fields in the Imbo region to grow bananas or cassava. C. Kayondi states that in Murunga, an over-populated hill of Mugamba, 42 per cent of the land-holders rent plots on less-populated hills in the neighbourhood.[1]

F. Benefit interest over land acquired by way of pledge

In ancient Burundi, ubugwati, 'pledge', primarily involved cattle; people used to give cattle as collateral for a debt. The head of cattle handed over to the creditor was called ingwati, the object of the pledge; it was returned to its owner after it had given birth to a calf, which was kept by the creditor as reimbursement for the debt. Land, as object of an ubugwati agreement, is a fairly recent practice, according to informants.[2] Two instances may occur:

(i) A lends a cow to B. The collateral of the loan is a plot of land. The benefit interest over it is transferred to the creditor until the debt is reimbursed.

(ii) A lends money to B. The collateral of the loan is a plot of land. The benefit interest over it is transferred to the creditor until the debt is reimbursed.

Ubugwati is also called ubugwatirizo, a term coming from the verb kugwatiriza, 'to pledge'. As soon as the debt is honoured, the plot reverts to its owner. Otherwise, it comes under the direct control of the creditor unless the family of the debtor pays off the debt.

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1. C. Kayondi, op.cit., p.178.
2. Pledge, as a customary practice, is common in Buhaya. See R.W. James, Land Tenure and Policy in Tanzania, Dar es Salaam 1971, p.339.

Case No.X/C/64 (Tribunal de Résidence de Bukeye, 1963)

A goes to court and says: "My mother lent a cow to the paternal grandfather of B. In order to secure the loan, B's grandfather gave a plot to my mother as a pledge (kugwatiriza). Since then, the plot in question has been cultivated by my family, at first by my mother and now by me. B wants to take it back. I agree to give it back, but first I want to recover the lent cow".

B says: "I do not know anything about what A says. My grandfather died in 1934. At that time I was old enough to understand what was going on. At my grandfather's kuganduka (grande levée de deuil)[1] A was present. She did not speak about any existing debt or pledge. Furthermore she has never cultivated the plot under dispute. If there is any witness of the pledge agreement or anyone who can assert that A has cultivated the plot, then I have lost the case".

As A is not able to bring any witness of the pledge, he loses the case.

Customary legal principle cited (coutume citée):

Uwishuza ico adaheraniwe arakibura,

'He who asks for a debt which does not exist, does not get it'.

Case No.Y/C/64 (Tribunal de Résidence de Bukeye, 1963)

A lent 3,000 Fbu to B. The latter gave a plot to A as collateral for the loan. Some time later B takes the plot back, without having repaid the debt. A goes to court, bringing with him witnesses of the loan and pledge. The court decides that the creditor has a benefit interest over the plot as the debt has not been reimbursed.

Customary legal principles cited (coutumes citées):

Ijambo ripfa mu mvugano,

'The content of a contract is fixed by the discussions';

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1. See p.299.

Ntawutwara ikintu yagwatirije atagicunguye,

'No one recovers a thing he has put under pledge without buying it back'.

Case No.X/C/78 (Tribunal de Résidence de Bukeye, 1971)

A borrowed some money from B and gave him a cow as collateral for the loan. A's widow wants to take back the cow because she claims that the debt has been paid. B claims that the cow was not collateral, but a gift (ingabirano). As witnesses confirm the ubugwati agreement, the court decides that the cow has to be given back to A's widow.

Customary legal principles cited (coutumes citées):

Ibara ry'ingwati ntiryiva mugahanga,

'The colour of ingwati does not leave the forehead of the cow';

Uwemeye ingwati arayigwatura,

'He who accepts ingwati accepts the consequences of the pledge'.

Today, some State-owned banks, such as the Caisse d'Epargne du Burundi (CADEBU) or the Banque Nationale de Développement Economique (B.N.D.E.) agree to lend money in return for the collateral of a piece of land held under customary tenure. The acte de notoriété is lodged as security (nantissement) during the period of the repayment of the loan. A convention de garantie is concluded between the bank and the borrower; it stipulates that during the period of the repayment of the loan, all interests held by the nyen'itongo over the pledged land are transferred to the bank. Such agreements are rare because of the precariousness of the security provided by a customary title, resulting mainly from vague definitions of customary interests over land.