

The promises of new constitutional engineering in post-genocide Rwanda

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Summary

Conflict of a magnitude that happened in Rwanda owes its causes to a multitude of factors, and ultimately require multi-dimensional responses, each of which plays a role in addressing the underlying roots of the genocide. A legal response to the problem, the Constitution of Rwanda, was adopted by a referendum in May 2003. This contribution is an attempt to gauge the role of the Constitution in reordering Rwandan society along a new social equilibrium. Seen against the backdrop of the genocide that decimated a tenth of the country's population, this contribution focuses on the identification of the causes of the genocide and the evaluation of the substantive, procedural and institutional innovations of the Constitution in its attempt to build a new path for post-genocide Rwanda.

1 Introduction

In a matter of just 14 weeks, the world witnessed approximately a million Rwandans gunned down, beaten to death or literally hacked to pieces by machetes, often after being tortured or forced to watch or participate in the execution of family members.¹ Throughout the

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¹ BD Jones *Peacemaking in Rwanda: The dynamics of failure* (2001) 1.

genocide, Tutsi women were often raped, tortured and mutilated before they were murdered.² The systematic and planned killings carried out by the Rwandan government between April and July 1994 were described as 'tropical nazism',³ where the massacre was 'five times as fast as the mechanised gas chambers used by the Nazis'.⁴ The result was the greatest humanitarian crisis of this generation.⁵

The killers, now known as *génocidaires*, sought to murder every Tutsi, that is, 10% of the pre-genocide population of 7,78 million.⁶ And they did, in fact, kill over 10% of the Rwandan people, leaving only 130 000 Tutsi alive.⁷ Many ordinary citizens joined in the killings, either willingly or under coercion. The genocide was finally halted when the Rwandan Patriotic Front (RPF) took control of Kigali, in July 1994.⁸

Opinion is divided as to the underlying causes of the genocide. Some found its roots in tribalism, with the Hutus remembering past feuds and oppression against the Tutsis.⁹ For other commentators, the genocide was a result of the culmination of an ongoing struggle for power and resources.¹⁰ Thus, the lack of agreement on the causes of the genocide points to the necessity for further research.

Rwanda has subsequently embarked upon a process of post-genocide reconstruction, including constitutional reform. The new Constitution was adopted by referendum on 26 May 2003, and confirmed by the

² Human Rights Watch 'The genocide' http://www.hrw.org/reports/1999/rwanda/Geno1-3-02.htm#P22_7285 (accessed 12 March 2008).

³ J Pottier *Re-imaging Rwanda* (2002) 32.

⁴ Bill Clinton, quoted in Jones (n 1 above) 32.

⁵ Jones (n 1 above) 1.

⁶ See 'The psychocultural roots of genocide' <http://www.questia.com/PM.qst?Action=openPageViewer&docId=96461856> (accessed 12 March 2008). It is important to note that figures about the killing, of course, do not even take into account the extent of the non-deadly violence: rape, maiming, and other forms of violence that were the order of the day. Thus it is impossible to determine the number of people who died as indirect results of the genocide through disease, malnutrition, or depression.

⁷ See Jones (n 1 above) 1. Approximately three-fourths of the Rwandan Tutsi population had been murdered. Ironically, however, the ratio of Hutu to Tutsi has not changed substantially since before the genocide. Following the *en masse* return of hundreds of thousands of Tutsi refugees who had been living for decades, and sometimes for generations, in Uganda and elsewhere, the Tutsi population continues to comprise approximately 15% of the population. See E Daly 'Between punitive and reconstructive justice: The *gacaca* courts in Rwanda' (2002) 34 *International Law and Politics* 355.

⁸ The RPF was formed in 1987 by the Tutsi refugee diaspora in Uganda. The first Tutsi refugees fled to Uganda to escape ethnic cleansing committed by extremist Hutus during the first genocide of 1959. The RPF ended the 1994 genocide by defeating the civilian and military authorities responsible for the killing campaign. See Human Rights Watch 'The Rwandan Patriotic Front' <http://www.hrw.org/reports/1999/rwanda/Geno15-8-03.htm> (accessed 17 May 2008).

⁹ Pottier (n 3 above) 32.

¹⁰ See eg DN Smith 'The psychocultural roots of genocide: Legitimacy and crisis in Rwanda' (1998) 53(7) *The American Psychologist* 743-746.

Supreme Court in its Ruling 772/14.06/2003 of 2 June 2003.¹¹ It is necessary to analyse the role of the Constitution in addressing the root causes of the conflict. It is the purpose of this contribution to briefly touch upon the roots of the conflict in Rwanda and analyse the role of the Constitution in addressing these causes.

Following this introduction to the subject and the problems pertaining thereto, part 2 of this contribution presents factors underlying the conflict. The role of post-genocide constitutional responses to the conflict are appraised in part 3. In part 4, the paper looks at the road ahead for Rwanda in the country's constitutional and other (legal) efforts to reconstitute itself along a new societal equilibrium. Finally, conclusions are drawn in part 5 of the study.

The approach used is socio-legal, but the content is limited by the hazards of brevity and generalisation. Understandably, it is impossible to address all issues pertaining to the causes of the Rwandan conflict and the role of the Constitution in resolving the same in a work of this volume. Thus, this article raises only the most salient issues.

2 The causes of the Rwandan conflict

In order to gauge whether the new Constitution has addressed the underlying causes of the genocide, one needs to identify the causes. It must be stressed that a misconception of these causes may easily lead to a misdiagnosis of the nature of the conflict, which in turn may lead to the mismatch of response and the perpetuation of conflict and suffering. Such a situation is akin to picking ants from one's body while standing on an anthill. It is imperative, therefore, to identify the real causes of the conflict.

2.1 Socio-economic causes: The struggle for resources

According to Jeong, basic needs 'provide factual, objective, rational criteria for analysing and evaluating an emergent social situation that may contain in its womb the potential for generating conflict'.¹² Food and shelter constitute the minimum or the core-of basic human needs. Human needs theory posits that conflicts result from ignoring or suppressing such needs that must be satisfied and catered for if societies are to be significantly free of conflicts.¹³

The Rwandan conflict can be explained in terms of the state's unwillingness and inability to identify and respond to the basic human needs

¹¹ See Official Gazette of the Republic of Rwanda, Year 42, Special Issue 4, June 2003. See also [http://www.chr.up.ac.za/hr_docs/constitutions/docs/RwandaC\(rev\).doc](http://www.chr.up.ac.za/hr_docs/constitutions/docs/RwandaC(rev).doc) (accessed 31 March 2008).

¹² HW Jeong *Peace and conflict studies: An introduction* (2000) 70.

¹³ SG Amoo *The challenge of ethnicity and conflicts in Africa: The need for a new paradigm* (1997) 11.

of the society.¹⁴ Throughout the first half of the twentieth century, the Rwandan population was sparse and geographically mobile.¹⁵ In the latter half of the twentieth century, Rwanda found itself under the tremendous pressure of an increasing population. Consequently, land occupation became a catalogue of dwindling entitlements due to the population pressure such that¹⁶

[b]y the middle of the twentieth century, the typical Rwandan peasant family lived on a hill which supported between 110 and 120 inhabitants per square kilometer; in 1970 that same family had to make a living on a hill which supported between 280 and 290 persons per square kilometer.

Before the events of 1994, Rwanda was the most densely populated country on the African continent.¹⁷ Due to this population pressure on land, agricultural production fell far short of feeding the population. Worse, the government was unable to respond to the pressing human needs for food, partly due to Rwanda's exceptionally subordinate role in the world economy.¹⁸ Ninety-nine percent of its exports were of primary commodities — coffee, tea and tin.¹⁹ Yet, the forces of international markets worked against Rwanda in the 1990s and the prices of coffee and tin dramatically fell, causing havoc with the financing of the Rwandan economy.

Consequently, in the late 1980s and early 1990s, Rwanda was hit by institutional confusion and breakdown, owing to land shortages and poor performance in the international market. At this juncture, the rulers reframed the nature of economic hardship, and rekindled identity politics based on the past: 'Who's who? Where do my neighbours come from? ... Are they not cultivating land my ancestors once owned?'²⁰ Resource competition must be understood in the overall context of pre-genocide Rwandan politics. Extremist Hutu leaders have consistently warned the Hutus that there is a danger of Tutsis in exile returning home and claiming the lands they had been forced to abandon.

Cognisant of the acute shortage of land, long before the genocide, Rwandan authorities had declared the country 'too overpopulated to permit the return of the refugees'.²¹ Internally there were too many people on too little land. Tutsis were held responsible for overpopulation. With the reduction of the number of the Tutsis, argued those advocating genocide, there would be more for the survivors. The ques-

¹⁴ Amoo (n 13 above) 13.

¹⁵ Pottier (n 3 above) 11.

¹⁶ Pottier (n 3 above) 20.

¹⁷ ICTR judgment *The Prosecutor v Jean-Paul Akayesu*, Case No ICTR-96-4-T, para 79.

¹⁸ Africa Direct Conference <http://homepages.udayton.edu/~uwiringi/genocide/understanding.html#turmoil> (accessed 21 December 2007).

¹⁹ *Akayesu* case (n 17 above) para 79.

²⁰ Pottier (n 3 above) 10.

²¹ Africa Direct (n 18 above) 23.

tion of knowing who were to be the victims and who the survivors was heavily determined by cultural, historical and political reasons.²² In line with the long-standing discrimination, the Hutu regime had been in the habit of attacking the Tutsis, thereby forcing them into exile and then allocating the lands thus abandoned to the Hutu.²³ Thus the conflict at least partly owes its causes to the population density, the struggle for land and the means of livelihood, of which unscrupulous leaders took advantage to incite the population against each other.

2.2 Political causes: The struggle for power and the reluctance to democratise

According to the instrumentalist view, ethnicity is not a natural cultural residue, but a consciously crafted ideological creation. In other words, 'ethnic conflicts result from the manipulation of the elite who incite and distort ethnic consciousness into an instrument to pursue their personal ambitions'.²⁴

The end of the Cold War brought this view into application in Rwanda. During the Cold War, Rwanda was ruled by a military dictator who entrenched a one party system. Allying itself with the West, Rwanda was firmly located in the Cold War, with little imperative for the Western powers to modify the way in which power was exercised in Rwanda.²⁵

The end of the Cold War brought about the shift in the priorities of the Western powers in the sense that they began the search for a new source of legitimacy as the ideological war came to an end, following the disintegration of the USSR. As a result, they started experimenting with the promotion of democratic values and a free market. Desirous of recasting power relations, pressure mounted on the Rwandan government at the international, regional and national levels. Foremost, pressures came from the United States (USA), France, Belgium, the United Nations (UN), the European Union (EU), the then Organisation of African Unity and regional heads of state.²⁶ In June 1990, for instance, France announced that in the future its aid would be tied to democracy. Within a month, the Rwandan government had conceded to move towards multiparty democracy.²⁷

These developments left Rwanda entirely at the mercy of the global forces in the reordering of the post-Cold War world. Extremely dependent as it was on the West, and obtaining more income from aid than from internal sources, Rwanda could do nothing but abide by the

²² G Prunier *The Rwanda crisis 1959-1994: History of a genocide* (1995) 4.

²³ *Akayesu* case (n 17 above) para 90.

²⁴ Amoo (n 13 above) 10.

²⁵ *Africa Direct* (n 18 above) 23.

²⁶ As above.

²⁷ As above.

changing rules of the game which required it to reorder its society. From 1991 onwards, France and the USA were working behind the scenes to broker a renegotiation of how power was to be exercised inside Rwanda.²⁸

This had serious implications for the Rwandan internal politics and became the power keg of the conflict. Firstly, the West's promotion of the agenda of democracy undermined existing power relations in Rwanda. In particular, it threatened the future of the one party system. Secondly, the move towards democratisation heralded competition for power. Consequently, power was soon to be shared beyond the ruling elite.

Thus, Western pressure to democratise Rwanda undermined the existing form of government, sparked competition and decisively shaped the new form that politics would take. Of paramount importance was the initiation in 1992 and conclusion in 1993 of the Arusha Peace Agreement (Arusha Agreement),²⁹ which paved the way for the incorporation into government of all political forces supporting democracy, pluralism and national unity.³⁰ Pressured by foreign donors, President Habyarimana was compelled to accept the multiparty system in principle.³¹ As a result, the new Constitution introduced a multiparty system, and this was followed by the promulgation of the law on political parties.³²

Upon its completion, the Arusha Agreement gave the President a ceremonial position, and the then ruling party, the *Mouvement Républicain Nationale pour la Démocratie et le Développement*, was allocated five out of 21 ministerial portfolios, including the defence portfolio. The RPF was given five ministerial portfolios (including the portfolio of the interior), and 50% control of the military high command. In addition, according to the Arusha Agreement, RPF forces would make up 50% of the low ranks of the armed forces.³³ The remaining ministerial portfolios went to pro-Arusha parties. Accordingly, the major opposition party, the *Mouvement Démocratique Républicain*, was given four posts, including the office of Prime Minister. The *Parti Social Démocrate* and the *Parti Libéral* were each given three portfolios, while the *Parti Démocrate Chrétien* was allocated a single ministerial position.

The rulers and supporters of the old regime realised that they risked being completely sidelined. For them to remain in power, 'a bloody last ditch war would have to be fought'.³⁴ Masterminding the genocide,

²⁸ As above.

²⁹ Peace Agreement between the government of the Republic of Rwanda and the Rwandese Patriotic Front, signed at Arusha, Tanzania on 4 August 1993.

³⁰ Africa Direct (n 18 above).

³¹ *Akayesu* case (n 17 above) para 94.

³² As above.

³³ As above.

³⁴ As above.

this small privileged group first set the majority against the minority, so as to counter the threat of a loss of power. In this process, Tutsis and sympathiser Hutus were identified with the RPF and targeted. Faced with the RPF successes on the battlefield and at the negotiation table, members of this ruling elite transformed the strategy of ethnic division into genocide.³⁵ As the architects of the genocide, they believed that the extermination campaign would restore the solidarity of the Hutu power under their leadership and help them win the war with the RPF, or at least improve their chances of negotiating a favourable peace.³⁶

The upshot of the whole process was that the 'spirit of democratisation, which seemed to be gaining momentum in the wake of the Cold War, receded and then suffered severe blows from the massacre in Rwanda'.³⁷ In effect, the violence took place in the context of a struggle for power between the old guard and the aspiring new elite associated with the multiparty initiatives and the Arusha peace process. In conclusion, one of the major causes of the Rwandan conflict identified here is the deliberate and excessively selfish choice of the elite to foster hatred and fear to keep itself in power.

2.3 The role of the media: The policy of fear

The media was instrumental in organising the genocide and disseminating hatred and fear among the population. The *akazu* (Habyarimana's household or inner circle) made every effort to demonise the RPF by making references to past Rwandan history. The essential message of this rhetoric was not only one of hate, but also one of fear.³⁸ Fear is a powerful tool for mobilisation in situations of civil war in the countries that have a history of past episodes of massacres and other forms of gross abuses,³⁹ as has been the case in Rwanda. There has been a fear of the possibility that the RPF would re-impose Tutsi rule in Rwanda.⁴⁰ The media first established the feasibility of genocide attacks by Tutsi against Hutu.⁴¹ Evidence came from a partial genocide that had been committed just the year before, across the border in Burundi. The media sought to establish the parallels between the internal dynamics of Rwanda and Burundi by pointing to the example of the assassination of a democratically elected Hutu President of Burundi by extremist Tutsi members of his own army.

³⁵ Human Rights Watch <http://www.hrw.org/reports/1999/rwanda/> (accessed 12 March 2008)

³⁶ As above.

³⁷ I Filatova 'Democracy versus state: The African dilemma' in H Solomon & I Liebenberg (eds) *The consolidation of democracy in Africa: A view from the south* (2000) 15.

³⁸ Jones (n 1 above) 40.

³⁹ As above.

⁴⁰ As above.

⁴¹ As above.

Hence, from the 1990s Rwanda saw several publications dedicated to the dissemination of ethnic hatred and incitement to violence. In December 1990, for instance, the *Kangura* newspaper (owned by the then high-ranking officials) published the 'Appeal to the conscience of the Bahutus', including the 'Ten Commandments', which called on Hutus to show contempt and hatred for the Tutsi minority, and to slander and persecute the Tutsi women. Moreover, it published a list of names of members of the Tutsi population and moderate Hutus, and the lists were later broadcast by *Radio Télévision Libre des Mille Collines* (RTLM), nominally a private radio, which eventually led to the killing of some of those listed.⁴²

Indeed, the radio was one of the chief tools in inciting and carrying out the genocide, as broadcasts were calling for the eradication of the 'Tutsi cockroach'.⁴³ Broadcasts assured the Hutu listeners that plenty of targets remained.⁴⁴ Thus, during the genocide, killers often carried a machete in one hand and a transistor radio in the other.⁴⁵ In short, the media played a pivotal role in inciting hatred and instilling fear between the Hutu and the Tutsi and in organising the genocide itself.

3 Addressing the causes of the conflict: The role of the Constitution

With their dark past, the way ahead for Rwandans was bound to be extremely difficult and the path towards peace and reconciliation would be bumpy. While much can be learnt from the past, the events of the last decade reveal that there is much to discard and much to achieve in the future. Underpinned as it is with various causes, the conflict can only be addressed properly if various responses are adopted. In other words, a single strategy is rarely sufficient for a multi-causal conflict of this nature and magnitude. Each cause must be addressed on its own terms. While there is 'no single superior strategy or institutional model for addressing the [Rwandan] problem',⁴⁶ the role of the Constitution in reversing the causes of the conflict is of paramount importance.

⁴² Amended indictment of *The Prosecutor v Hassen Ngeze*, Case No ICTR-97-27 para 6.10.

⁴³ 'The United Nations and Rwanda 1993-1996' (1996) 8 *United Nations Bluebook Series* 10.

⁴⁴ As above.

⁴⁵ S Power 'Bystanders to genocide: Why the United States let the Rwandan tragedy happen' (September 2001) *Atlantic Monthly* 88-89.

⁴⁶ S Gloppen 'Reconciliation and democratisation: Outlining the research field' <http://www.cmi.no> (accessed 11 March 2008).

3.1 Healing ethnic divisions and deconstructing racialisation

The fragmentation of ethnicity was one of the basic causes underlying the Rwandan genocide. With political manipulation of ethnicity as the culprit for the eventual massacre, the Constitution must facilitate co-operation among all groups by calling them back to an inclusive social system. The Hutus and the Tutsis have lived together for centuries, with little mutual hostility.⁴⁷ Reintegration of the ethnic groups of the country must occur to establish a unified national consciousness. One of the means of achieving unity is by submitting all citizens to the same rights and equal access to public resources and by providing for a supreme legal basis for all Rwandans to share in the spirit of national unity.

Predictably, the Constitution is wary of using divisive terms and in its Preamble talks of 'We, the people of Rwanda', thereby underlining the unity of all groups in the country. The Constitution is based, *inter alia*, on the principle of 'eradication of ethnic and regional divisions and promotion of national unity'.⁴⁸ The aspiration is to change the focus from ethnicity and race to the creation of a common Rwandan national identity.

In line with such an approach, the government itself is referred to as a government of national unity, and every Rwandan citizen is now a *Banyarwanda*. 'Whatever inter or intra-ethnic fault lines there may be in Rwanda today', argues Zorbas, 'references to ethnicity or any other "divisive" or "political" category are substituted with the concept of the *Banyarwanda*, the people of Rwanda.'⁴⁹ Reference to identities other than the officially-sanctioned *Banyarwanda* are regularly met with informal public shaming campaigns, labelling the individuals uttering these propositions as *génocidaires*, sympathisers and even negationists who promote divisionism.⁵⁰

3.2 The non-divisive political competition and equitable sharing of power

In post-war situations, electoral systems serve prominent purposes: *Inter alia*, they move the conflict from the military battleground to the political arena, and initiate and consolidate the democratisation process. Yet, there is an increasing awareness that ill-timed, badly-designed or poorly-run elections can undermine both peace and democratisation in post-war situations.⁵¹ In situations where ethnic relations are tense and volatile, as is the case in Rwanda, the introduction of competitive

⁴⁷ E Bradley 'In search for justice — A Truth and Reconciliation Commission for Rwanda' (1998) 7 *Journal of International Law and Practice* 129.

⁴⁸ See Preamble.

⁴⁹ E Zorbas 'Reconciliation in the post-genocide Rwanda' (2004) 1 *African Journal of Legal Studies* 43.

⁵⁰ As above.

⁵¹ See UNDP *Electoral systems and processes: Practice note* (2003) 9-10.

politics, especially the majoritarian electoral systems of 'winner takes all', can provide the stimulus for an explosion along ethnic lines. The salience of ethnicity in competitive politics creates ascriptive majority-minority problems where elections more or less become a census of the adult population. Thus:⁵²

[E]lectoral systems have a role in fostering and retarding ethnic conflict. The delimitation of constituencies, the electoral principle (such as proportional representation or first-past-the-post), the number of members per constituency, and the structure of the ballot all have a potential impact on ethnic alignments, ethnic electoral appeals, multi-ethnic coalitions, the growth of extremist parties, and policy outcomes.

If the Constitution fails to address problems about the rules of the game of power sharing, parties develop along ethnic lines and contest extremely divisive elections, according to which the largest ethnic group takes power in the majoritarian electoral system. In such a case, identifying the voters of each party is a simple matter as ethnic and party identifications would become synonymous. In the Rwandan context, this would practically lead to permanent rule by the Hutu, to the exclusion of the Tutsi and the Twa. Such a situation would engender the feeling of permanent exclusion on the part of the minority who would be locked out of office because of their number, and this sense of permanent exclusion generates a predisposition to a spiral of violent opposition and conflicts.⁵³

The critical factor is the electoral formula which determines how votes are translated into seats. In post-war situations, the main test is how the system handles challenges of reintegration and representation. There is consensus that simple majority rule is not an effective form of democracy for such situations. A system requiring an absolute majority may induce alliances between political parties during the electoral campaign, but may also create permanent minorities. Proportional representation and power-sharing techniques that encourage broad-based governing coalitions are more appropriate.⁵⁴

More recently, electoral innovations have been used by a growing number of severely divided societies in Asia and Africa as a vehicle for inter-ethnic accommodation. Consociational democracy, described as 'a model of democracy that seeks to resolve political differences by techniques of consensus rather than majority rule',⁵⁵ is considered a viable solution. The leaders of each ethnic group form a ruling coalition where a joint rule is based on the distribution of high-level offices.

⁵² DL Horowitz *Ethnic groups in conflict* (1985) 628.

⁵³ Amoo (n 13 above) 19.

⁵⁴ See generally JD Barkan 'Rethinking the applicability of proportional representation for Africa' in TD Sisk & A Reynolds (eds) *Elections and conflict management in Africa* (1998); R Vengroff 'Governance and the transition to democracy: Political parties and the party system in Mali' (1993) 31 *Journal of Modern African Studies* 541.

⁵⁵ Jeong (n 12 above) 237.

Each group has a veto power over important government policies. The ability of the minority to veto issues of particular importance provides a high degree of autonomy. The key success of consociationalism therefore lies in the ability and willingness of elites to negotiate inter-group compromises that are acceptable to all segments of society. The choice of a particular electoral system depends, among other things, upon a country's inter-ethnic power dynamics, history and aspirations and there is no single electoral system that can be prescribed for all countries and situations. Each has its own merits and demerits.

The new Rwandan Constitution incorporated various solutions to deal with the problem of divisive majoritarian electoral politics. Firstly, under article 54, political parties are prohibited from identifying themselves with any race, ethnic group, tribe, clan, region, sex, religion or any other divisive element, as they 'must constantly reflect the unity of the people of Rwanda'. The Senate is empowered to submit a complaint to the High Court against a political party that has 'grossly violated' the duty to reflect the unity of the people of Rwanda.⁵⁶ If the party is found in breach of this duty, the High Court may impose a sanction that ranges from a formal warning to the dissolution of the party.⁵⁷ Yet, the question remains as to how and on what basis one can gauge whether a party reflects the unity of the people of Rwanda. A possible interpretation might be that a party must show the inclusion of Hutus, Tutsis and Twas. The downside of this approach is that it jeopardises the notion of *Banyarwanda*, as parties would be required to show how they have incorporated all ethnic groups, thereby revealing which member belongs to which ethnic group. Thus, in an attempt to move away from ethnicity in the political arena, the Constitution might have inadvertently drawn attention to the issue of ethnicity. However, only the future will reveal the actual application of the provisions of articles 54 and 55.

A second constitutional mechanism that is designed to ensure power sharing is the limitation imposed upon the number of deputies representing a ruling party in the Cabinet. The majority party in the Chamber of Deputies 'may not exceed 50% of all the members of the Cabinet'.⁵⁸ This restriction presumably constitutes a strong structural constraint on the power of the main party, potentially forcing it into cross-party alliances and compromises.

Thirdly, members of parliament are elected on the basis of proportional representation.⁵⁹ The principal merit of the proportional electoral system is to be found in its ability to reflect more accurately the preferences of voters in terms of the seats in parliament. Voters are said to be more willing to cast votes for smaller parties when they

⁵⁶ Art 55.

⁵⁷ As above.

⁵⁸ Art 116.

⁵⁹ Art 77.

know that their votes will produce tangible results, and when seats are allocated on the basis of the share of the popular vote. Arguably, because minority views are not marginalised, political discourse and political participation are strengthened in proportional representation electoral systems.

In addition, the Constitution requires the parties to be broad-based. A political organisation or list of independent candidates which fails to attain at least 5% of the votes cast at the national level during legislative elections cannot be represented in the Chamber of Deputies,⁶⁰ and cannot benefit from grants given to political organisations by the state.⁶¹ Thus, constitutional safeguards to avoid the exclusion of segments of the society have been put in place.

Furthermore, the President of the Republic and the Speaker of the Chamber of Deputies may not be members of the same political party.⁶² This arrangement will help to enhance the balance of power among the top officials, will provide a mechanism of close checks and balances between the legislative and the executive and should contribute towards the prevention of excesses and abuses of power, the very factors which contributed to the genocide. This arrangement would ideally reduce the possibility of excessive domination of a party over others. While the power sharing introduced under article 58 apportions power among parties, the real problem for the Rwandan conflict has been much more of an inter-ethnic competition for power. Even if the President and the Speaker of the Chamber of Deputies come from different parties, they can still be from the same ethnic group, and the arrangement may lead to the domination of top-level offices by members of the same ethnic group. The Constitution seems to be overly obsessed with power sharing among political parties without ensuring such among the ethnic groups; yet it was the latter that was at the root of the conflict in Rwanda.

In order to prevent or remedy the transgression of powers by the executive and the legislature, independent and impartial courts are established by the Constitution with a power to adjudicate, *inter alia*, disputes pertaining to the conduct of the other branches of the state.⁶³ The decisions of the courts are binding on all public authorities and individuals.⁶⁴

3.3 Dealing with discrimination

Habyarimana's regime implemented an open policy of discrimination

⁶⁰ As above.

⁶¹ Under art 57 of the Constitution, political organisations which are duly registered are entitled to grants by the state.

⁶² Art 58.

⁶³ Art 140.

⁶⁴ As above.

against the Tutsi by applying the quota system in universities and government services.⁶⁵ A policy of systematic discrimination was pursued even among the Hutu themselves, in favour of those from Habyarimana's native region.

The genocide brought attention only to the Tutsi and the Hutu, leaving the Twa largely ignored.⁶⁶ Thus, the Constitution should recognise the equality of its citizens without discrimination. At the conference on constitutional development in Rwanda, a working group addressed the need for the protection of political minorities.⁶⁷ This can be achieved through a constitutional equality clause coupled with a prohibition of discrimination clause.

Cognisant of this fact, the Constitution prohibited discrimination by declaring that '[a]ll Rwandans are born free and remain free and equal in rights and duties'.⁶⁸ Besides, any discrimination based on ethnic origin, tribe, clan, colour, sex, region, social origin, religion, opinion, economic circumstances, culture, language, social situation, physical or mental disability or any other form of discrimination is prohibited and is punishable by law.⁶⁹

3.4 Regulation of the media and hate speech

Freedom of expression is a fundamental human right, recognised as a core value and bare minimum of an open society, essential to the discovery of truth, the promotion of democracy and personal fulfillment.⁷⁰ However, the assertion that the right to expression and media freedom is fundamental does not imply that the right is absolute.⁷¹ Freedom of expression may be limited in proportion to the extent of the necessity to protect the rights of others and by the legitimate needs of the society. Obviously, the reasons for limiting a right as fundamental as the right to expression need to be exceptionally strong. Thus, '[i]t is recognised that public order, safety, health and democratic values

⁶⁵ *Akayesu* case (n 17 above) para 93.

⁶⁶ A Wing & M Johnson 'The promise of a post-genocide Constitution: Healing Rwandan spirit injuries' (2002) 7 *Michigan Journal of Race and Law* 465.

⁶⁷ See 'Rights of minorities, disadvantaged, women and children' in Conference on Constitution Development, Kibuye-Rwanda (24 August 2001) (comments of Claudine Gasarabwe of Rwanda) (unpublished) 80-83.

⁶⁸ Art 11.

⁶⁹ As above.

⁷⁰ 'Expression' is a wider concept than 'speech' and includes, but is not limited to, activities such as displaying posters, painting and sculpting, dancing and the publication of photographs.

⁷¹ Under art 19 of the International Covenant on Civil and Political Rights (CCPR), to which Rwanda is a party, freedom of expression can be limited for purposes of ensuring 'respect of the rights or reputations of others' and for 'the protection of national security or of public order (*ordre public*), or of public health or morals'. See CCPR, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976.

justify the imposition of restrictions on the exercise of fundamental rights'.⁷²

As applied to media freedom, limitations are justified by, *inter alia*, the historical context of a country and the role and contribution of the media towards the making of that history.⁷³ Given the prominent role that the media played in the years that preceded the 1994 genocide in Rwanda, the regulation of hate speech is of paramount importance. The propagation of hate speech continued unabated in the post-genocide period as well, as radio stations and newspapers run by extremists in exile continued to foment ethnic hatred in Rwanda.⁷⁴ Seen against the backdrop of the infamous role and contributions of the media in the pre-genocide Rwanda, 'the Rwandan government's [post-genocide] approach to the media has been shaped largely by the need to erase the harsh experience inherited from the misuse of press freedoms during the genocide'.⁷⁵ It is natural, therefore, that article 33 of the Constitution stipulates that '[p]ropagation of ethnic, regional or racial discrimination or any other form of division is punishable by law'.⁷⁶

The Media Bill imposes a minimum jail term of 20 years for any local journalist found guilty of using the mass media to incite any section of the Rwandan population to engage in genocide.⁷⁷ Under article 89, it stipulates that anyone who successfully uses the media to incite Rwandans to genocide will receive the death penalty.⁷⁸ Article 166 of the Rwandan Penal Code 21/77 criminalises 'any speech made at public meetings or in public places which is designed to cause the citizens to rise up against one another'. Thus, through constitutional and other legislative prohibition of hate speech, an attempt has been made to curtail the potentially destructive role of the media.

3.5 Land redistribution and participatory development

As has been outlined above, agriculture is the life artery of the Rwandan economy as it provides the means of livelihood for 87% of the

⁷² n 71 above, 144.

⁷³ Eg, in 1995, the Burundian radio station, *Radio Democracy*, coupled with extremist newspapers, was to blame for the bloodbath that claimed the lives of not less than 156 000 people. See Article 19 *Broadcasting genocide censorship, propaganda and state-sponsored violence in Rwanda 1990-1994* (1996) 175.

⁷⁴ GM Khadiagala 'Country paper: Governance in post-conflict situations: The case of Rwanda' Bergen Seminar Series, Bergen, Norway, May 2004 13.

⁷⁵ As above.

⁷⁶ So, too, under art 20 of CCPR, '[a]ny propaganda for war shall be prohibited by law ... advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.

⁷⁷ L Louw 'Hate speech in Africa: Formulating an appropriate legal response for a racially and ethnically divided continent with specific reference to South Africa and Rwanda' in C Heyns (ed) *International yearbook of regional human rights Master's programmes* (2001) 186.

⁷⁸ Louw (n 77 above) 187.

population of Rwanda.⁷⁹ Population pressure and the struggle to have access to land were among the most pressing causes of the genocide. By forcing the Tutsi into exile, the previous governments have been allocating land left behind by the Tutsi to the Hutu.

In addressing the problem, the Constitution has provided that '[n]o Rwandan shall be forced into exile'.⁸⁰ Besides, the 'right to private, individual or collective property' has been guaranteed and is 'inviolable'.⁸¹ Because of non-discrimination and equality clauses, these rights can be availed by all citizens on an equal footing. This is a response to the 'bad land sharing process'.⁸²

Still, equitable land redistribution must be achieved sooner than later, as the persistence of problems relating to land continues to serve as reminders of past crises. There is a pressing need to reallocate land so as to accommodate the interests of Rwandan refugees who have been returning from years of exile in other countries.

3.6 Democratic and human rights institutions

The need to promote or rediscover democratic governance in post-conflict societies necessarily entails recreating a wide range of institutions and mechanisms against the backdrop of political polarisation. Khadiagala rightly observed:⁸³

Where violence has decimated social consensus and civic norms, post-conflict governance involves resuscitating effective state authority, correcting past human rights violations, and promoting social reconciliation. The transition to a post-conflict dispensation may also require crafting new institutions to manage problems spawned by the conflict. In most post-conflict societies without a tradition of democratic governance, the institutional challenge inheres in building systems of accountability, transparency, and participation.

Mindful of this, the Rwandan Constitution establishes a handful of institutions that are charged with the responsibility of upholding and enforcing human rights and democratic ideals. With the general aim of enabling the conduct of free and fair elections, the Constitution establishes an independent National Electoral Commission,⁸⁴ responsible for the preparation and the organisation of any local, legislative and presidential election and referendum. This Commission also has the duty to ensure that elections are free and fair.

⁷⁹ National Unity and Reconciliation Commission *Opinion survey on participation in gacaca and national reconciliation* (2003) Annex 2 5.

⁸⁰ Art 25.

⁸¹ Art 30.

⁸² National Unity and Reconciliation Commission *Report on the evaluation of national unity and reconciliation* (2002) 21.

⁸³ Khadiagala (n 74 above) 1.

⁸⁴ See art 180.

The Public Service Commission is an independent public institution responsible for the recruitment of public servants in central government and in public institutions.⁸⁵ Its establishment is indicative of a constitutional effort to address discriminatory practices in the area of employment that has prevailed for a long time. The Public Service Commission ensures the equitable distribution of employment in public institutions. Article 178 establishes the National Unity and Reconciliation Commission, which is responsible, *inter alia*, for the co-ordination and promotion of national unity and reconciliation, and to denounce and fight against acts, writings and language that are likely to promote all kinds of discrimination, intolerance and xenophobia. In addition, the Commission for the Fight against Genocide has been provided for under article 179, and it is charged, *inter alia*, with the responsibility of organising a permanent framework for the exchange of ideas on genocide, its consequences and the strategies for its prevention and eradication.

Article 182 of the Constitution establishes the Office of the Ombudsman, which is generally responsible to act as a link between the citizens on the one hand and public and private institutions, on the other. The Ombudsman is empowered to prevent and fight against injustice, corruption and other related offences in public and private administration. With the aim of educating and sensitising the population on human rights, the establishment of the National Commission for Human Rights is provided for under article 177. It is also responsible for examining the violations of human rights committed on Rwandan territory by state organs, public officials using their duties as cover, by organisations and by individuals, for carrying out investigations of human rights abuses in Rwanda and filing complaints in respect thereof with the competent courts.

The Constitution thus throws up promises of addressing the problems underlying the Rwandan conflict, not only through its substantive guarantees, but also via the establishment of the necessary institutional framework responsible for translating those promises into reality. However, much still depends upon the willingness and ability of these institutions to translate the constitutional guarantees into practice.

4 Bridging the past and the future: Towards national reconciliation

It is trite that constitutions attempt to provide solutions for existing or pre-existing social, economic and political problems that a given society has experienced.⁸⁶ This is equally true of the new Rwandan

⁸⁵ Art 181.

⁸⁶ M Haile 'The new Ethiopian Constitution: Its impact on unity, human rights and development' (1996) 20 *Suffolk Transnational Law Journal* 3.

Constitution, which should be praised for incorporating a wider Bill of Rights, providing for mechanisms for the deconstruction of racial discrimination and the reasonable control of hate speech, equitable power sharing, multiparty politics and other democratic ideals.

Nevertheless, constitutional guarantees are indispensable but insufficient in themselves to heal deep-rooted conflicts. At best, 'the political constitution establishes an overarching framework that can hopefully facilitate the co-existence of all socially constituted entities, extending in size from the socially constituted self to the political community at large'.⁸⁷ Yet, a constitution cannot create 'a track from which no one can deviate. It is simply not humanly possible.'⁸⁸

Much about the prospect of constitutional success or failure hinges upon the implementation of its promises and guarantees. To have an exemplary constitution is one thing. To implement it is quite another. The present Rwandan government must demonstrate the political will and commitment to implement the Constitution, thereby causing the Constitution to play its part in uprooting the causes of the conflict. Although the constitutional provisions are promising — both from the point of the human rights catalogue and the institutional mechanisms it provides for — the achievement of the level of protection envisaged by the Constitution requires a political effort of monumental proportions. Observers have warned that post-conflict constitution-making processes have been met with mixed results:⁸⁹

New constitutions have been promulgated in some post-war situations, and the results are mixed. At its best, constitution making can generate social consensus on constitutive issues and simultaneously serve as a healing process in deeply divided societies. At its worst, it can be a quick-fix legitimacy exercise that gives the incumbent a thin veil of legitimacy but remains a dead letter — an instrument that is abused or ignored — and thereby discredits the democratic process itself.

Even if it were implemented, due to the multitude of underlying causes of the conflict, the Constitution cannot be regarded as a panacea for all wounds. Needless to state, 'below the surface, in the hearts and minds of the population ... the real damage has been done'.⁹⁰ Because the human rights violators are fellow citizens, living alongside everyone else, the victims cannot simply forgive and forget.⁹¹ As the proverb has it, 'the bitter heart eats its owner'.

⁸⁷ C Willis *Essays on modern Ethiopian constitutionalism: Lectures to young lawyers* (1997) 3 (unpublished).

⁸⁸ Willis (n 87 above) 30.

⁸⁹ See *Governance interventions in post-war situations: Lessons learned* Bergen Seminar Series, Bergen, Norway 5-7 May 2004 4 (unpublished).

⁹⁰ S Fisher *et al Working with conflicts: Skills and strategies for action* (2000) 125.

⁹¹ Fisher *et al* (n 90 above) 131.

This reality points to the pressing need for reconciliation whereby the society brings together the concepts of truth, mercy and justice.⁹² Reconciliation does not happen overnight, or simply because a constitution is adopted. The full and active participation of the people who have been affected by the violence is crucial to the process of reconciliation and the establishment of peace.⁹³

An attempt at a successful reconciliation is inextricably intertwined with the striving to discover the truth, to render justice and mercy. The search for the truth is based on the assumption that knowledge about the past and about the people who were responsible for planning and executing crimes and abuses can be a road to reconciliation.⁹⁴ Its major contribution hinges on the recognition of the truth of past violence by giving a voice to victims and by creating a common memory for the future. Fisher argues that the process by which the truth is reached is in itself of great importance, as it provides an avenue whereby people learn again how to relate to each other positively.⁹⁵ It has been observed thus:⁹⁶

A remembering process should be a chance for the victims to confront and defeat their fears, for the perpetrators to acknowledge and understand their actions and for the members of a community or society to embark on a deep process of social awareness that examines the causes and consequences of violence. Lessons need to be drawn that enable people to avoid a repetition of history.⁹⁷

For justice to lead to reconciliation, the perpetrators must be held responsible and be punished for their crimes. However, justice cannot be taken solely as a means of retribution or revenge. It must focus on healing social relationships and must attempt to build the type of society that reflects the values of those who suffered.⁹⁸ Retributive justice is as relevant in Rwanda as restorative justice itself. It individualises a responsibility in the sense that trials help differentiate perpetrators of the heinous crimes from among members of a group, so that it cannot

⁹² As above.

⁹³ See generally DA Crocker 'Truth commissions, transitional justice and civil society' in RI Rotberg & DF Thompson (eds) *Truth v justice: The morality of truth commissions* (2000); H Adelman 'Rule-based reconciliation' in A Suhrke *et al* (eds) *Roads to reconciliation* (2004); A Honwana 'Children of war: War cleansing in Mozambique and Angola' in Suhrke *et al*, above.

⁹⁴ Gloppen (n 46 above) 52.

⁹⁵ Fisher *et al* (n 90 above) 134.

⁹⁶ See UNDP *Electoral systems and processes: Practice note* October 2003, 14.

⁹⁷ As above. There is a reason to declare that '[t]hose who forget the past are doomed to repeat it' (emblazoned at the entrance to the museum in the former Nazi concentration camp in Dachau, Germany).

⁹⁸ Archbishop Desmond Tutu's statement is instructive in this regard: 'Confession, forgiveness and reconciliation in the lives of nations are not just airy-fairy religious and spiritual things, nebulous and unrealistic. They are the stuff of practical politics.' From the final report of the Truth and Reconciliation Commission of South Africa (1998) as quoted in the report 135.

be said that all Hutu are guilty of genocide.⁹⁹ More importantly, it helps fight the culture of impunity in matters involving serious crimes, such as the crime of genocide and crimes against humanity.

One of the innovative means used by Rwanda in ensuring *génocidaires'* accountability for their part in the genocide is the resort to the traditional form of justice, namely, trial by *gacaca* courts as a means of local participatory justice. Because these courts are a traditional form of justice, they make the discovery of truth about the genocide easier. Presumably, perpetrators of the genocide would find it easier to come forward and confess their wrongdoings. *Gacaca* courts are also of crucial importance in boosting the formal justice system in bringing to justice the *génocidaires*, whom the formal judicial system might never be able to punish because of the large number of people involved.¹⁰⁰ However, concerns have been raised about the low level of education of the judges of the *gacaca* courts, problems associated with fair trial, a lack of procedural safeguards against error and the partiality of the judges.¹⁰¹

Mercy includes the concept of forgiveness, but it is also a function of the ability of people who have been affected by violence to cultivate respect for their common humanity and to agree that it is possible for them to co-exist. Within this context, reconciliation is about the way in which societies torn apart by internal conflict mend their social fabric and reconstitute the desire to live together. Accordingly, mercy presupposes the uncovering of the truth, and the knowledge of what had happened before.¹⁰² To that end, the National Unity and Reconciliation Commission of Rwanda shoulders an immense responsibility.

5 Conclusion

Competition for access to power and resources has turned those peoples who for centuries have lived together harmoniously in

⁹⁹ See Daly (n 7 above) 375.

¹⁰⁰ See K Hornbergera 'Rwandan *gacaca* courts in crisis: Is there a case for judicial review?' (2007) 3 *Africa Policy Journal* 9.

¹⁰¹ Hornbergera (n 100 above) 11. A case has been made that 'in the post-genocide context the *gacaca* courts were the best opportunity for Rwanda to attain some semblance of closure'. See Hornbergera (n 100 above) 1.

¹⁰² The words of a witness at the Port Elizabeth (South Africa) human rights violation hearings touch the heart: 'Thank you, Bishop [Desmond Tutu], but I am sorry, there is something else that I would like to ask. Do not take me wrong, my Bishop, you cannot make peace with somebody who does not come to you and tell you what he has done. We will have peace only when somebody comes to you and says: "This is what I did. I did this and this and that and that." If they do not come, if we do not know who they are, we will not be able to. But now I will forgive who has. That is the whole truth, Sir. We take it that the people who are listening and the people who are coming to the [Truth and Reconciliation] Commission will be touched as well. Their conscience will tell them that if they want forgiveness they should come and expose themselves so that they can also get the healing that the victims are getting' (quoted in Fisher *et al* (n 90 above) 135).

Rwanda into deadly enemies. The media added fuel to a house that was already on fire through deliberately calculated hate propaganda. In order to close the door on this gloomy past, the promulgation of the new Constitution heralded a new era of reunion of all Rwandans. Together, Rwandans could start building their new identity under the new Constitution.

It is, however, not a case of all differences suddenly disappearing. As constitutions are vital instruments for social engineering, the new Constitution marks a move away from mutual insecurity towards mutual empathy. Nevertheless, there still remain questions of power sharing among the ethnic groups. The Constitution seemed to have ensured equitability of power sharing among the political parties instead of ensuring a balance of power among the ethnic groups. Yet, it was the lack of equitable access to power and, through it, access to resources among the ethnic groups that served as the powder keg of the heinous massacre. The Constitution seems to have evaded the intractable problem of power sharing among the ethnic groups, which has been at the heart of the Rwandan crisis. That said, the implementation of the multifarious economic, social, political and judicial guarantees of the Constitution has to be tackled before the Constitution will be able to fulfil its promises of reconstituting Rwanda on a new social, economic and political equilibrium. Although there is a bright light at the end of the tunnel, the implementation of the constitutional promises is bound to involve a long walk along a bumpy road.