

BOOK REVIEW

THE MELTING-POT OF OLD AND NEW: A MULTIPLE ANALYSIS OF DISPUTE MANAGEMENT BY THE STATE COURTS WITHIN THE BURUNDI SOCIO-POLITICAL CONTEXT

Markus Weilenmann, *Burundi: Konflikt und Rechtskonflikt: Eine rechtsethnologische Studie zur Konfliktregelung der Gerichte*, Vorwort von Franz von Benda-Beckmann. Frankfurt a. M: Brandes & Apsel Verlag GmbH (1997). (463 pages. ISBN 3-86099-274-0)

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During the past five years Burundi has again been embroiled in a civil war. The assassination of Melchior Ndadaye, the first Hutu president in the history of Burundi to be democratically elected, together with several government officials by army officers on 21 October 1993 led to a chain of violence raging over Burundi. Massacres of the population took place on a daily basis. Ndadaye's successor, President Cyprien Ntaryamira was killed together with the Rwandan President Juvénal Habyarimana in a plane crash on 6 April 1994. The climate of violence was sustained by the growth of armed rebel groups and the army campaigns. In July 1996, Major Pierre Buyoya, who had previously been in power between 1987 and 1993, committed a coup d'état. This event together with the subsequent increase in violence persuaded the neighbouring states to impose economic sanctions as well as to organise peace summits. Burundi with its military government had to be confronted as the internal conflict was perceived as representing a serious threat to the security of the continent. Despite these efforts, the peace process, initiated by regional and international leaders, frequently stalled. Early in 1999 the economic sanctions were lifted as the prospects for peace became brighter. As a consequence of the Burundi conflict, many Burundi were killed and injured, and thousands of others still

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spend their lives abroad as refugees or in displacement camps in Burundi.

What are the roots of the Burundi conflict, which has been manifesting itself in military governments, failing democratic systems, coups d'état, rebellions, violence and massacres since the 1960s? While many, Burundi and others alike, reduce the conflict to one of ethnicity, the ethnologist and psycho-analyst Markus Weilenmann attempts to convince the reader in his study that more emphasis needs to be placed on the meaning of ethnicity as a specific ideology and as an inter-subjective theory of group identity and group difference. His idea of *Teilgruppenidentität* (identity of community groups) opposes the theories of descent and blood-relationship which underlie most conceptions of (non-ideological) ethnicity. He criticizes the foundations of the theory, often connected to the current conflict, of migration of the Batutsi from Ethiopia (or even Egypt) from the 15th to the 17th century, arguing that those people who left Ethiopia were not the same as those who arrived in Burundi. During the centuries of migration, the people as well as their cultural and social customs and habits changed. On the other hand, the idea that the migrating group of people carried with them a fundamental conception of state systems and structures was happily received by the German, and later Belgian colonisers. This idea legitimated the presence of the colonial administrations, as the indigenous people of Burundi (the Bahutu and Batwa) were thought to have never been able to found a state. All these beliefs have stigmatised the Batutsi as the powerful offenders and the Bahutu as the scapegoats, thereby hiding the actual hierarchical integration of the various community groups. Although the members of the various community groups tend to marry endogamously (which explains the physical resemblance of the members of the same community group), cross-marriages were and are possible. An important aspect of the Burundian culture is the concept of a patrilineal system, which leaves the woman following the group identity of her father or husband.

All these arguments brought Weilenmann to the labelling of the internal conflict in Burundi as a social rather than an ethnic one. The various community groups share the same language, the same history since the 17th century, the same geographical area, the same political authority, and the same culture. While in pre-colonial Burundi the community groups were structured vertically with the Batutsi as cattle-farmers and the Bahutu as agriculturalists, the colonial administration altered this into a horizontal structure in order to simplify the power structures. The discourse on the various conceptions of ethnicity conceals, however, the actual problem of the political rule and power structures, shaped by historical processes. Weilenmann therefore places a strong emphasis on the socio-political environment and the dynamics between culture, law and the state, within his analysis of dispute management by Burundi courts.

The academic background of the ethnologist and psycho-analyst Weilenmann is reflected in his approach to the study of the conflict management of Burundi state courts. This makes the study special, and different from most conventional legal-anthropological analyses of dispute resolution institutions, structures and processes. Weilenmann, who conducted the field research during the late 1980s, tackles the main research question, of the ability displayed and the degree of success achieved by the state courts in managing disputes within the historical socio-political context of Burundi, by applying a research methodology which entails an analysis on multiple levels. His book includes: a historical socio-political sketch of Burundi; a statistical analysis of the state courts; an analysis of the legal process with emphasis on legal norms and strategies; and finally a psycho-dynamic analysis, which forms the third part of the analysis of the legal process. Consequently, a qualitative analysis, which encompasses ethnological and legal case studies, is combined with a quantitative study. This combination allows for an enriching and in-depth interpretation of the dispute management process of the state courts.

Within the historical socio-political paradigm, Weilenmann gives an account of the traditional authority which formed the political and judicial centre of the sacral-monarchical Burundi during pre-colonial times. The state of Burundi could be characterised as structurally heterogeneous in senses geographical (as an enclave system), political (as having hierarchical authority structures based on aristocracy), economic (as marked by vertical relations of dependency), social (as networks of dependents) and legal (following the political authority structures). The aristocratic customary judges, the *bashingantahe*, managed disputes on a local, regional and provincial level according to the local norms and rules. This pre-colonial heterogeneous reality was strongly emphasised by the German (1899-1916) and Belgian colonial administrations (1919-1961), who used it as the basis for the creation of the colonial authority system. The Belgians assigned political power to the aristocrats, thereby not only stimulating a consciousness of the aristocratic identity but also connecting this identity with the concept of ethnicity. They created a new social class based on a horizontal perception of Burundi society. Following a policy of cultural disintegration, the role of the regional and local *bashingantahe* as political and judicial rulers was reduced to local and family matters. Sections of the customary law were codified. Beside the customary legal culture, laws and legal institutions were created for the Europeans, thereby creating a legally pluralistic reality in Burundi. After Independence in 1961, the customary courts were integrated into the system of state courts in order to reorganise the plural character of Burundi legal culture. Further sections of the customary law such as the law of succession, the law of the family, and land law were codified. Notwithstanding these 'modernisations', the judicial arm of the state continues to be dominated by members of the Batutsi community, a legacy which indicates that the aristocratic

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hierarchy of pre-colonial times has not yet disappeared. Weilenmann concludes that the western bureaucratic state system, which was imported by the German and Belgian colonial administrations, is today tightly interwoven with the customary monarchial feudalistic culture of the Barundi. This phenomenon has usually been overshadowed in studies of Burundi by the strong emphasis on ethnic differences and conflicts between the various community groups.

Weilenmann studies the factual side of dispute management in Burundi from the perspective of the entire community in order to explain the use and functioning of the judicial institutions of the state. Hence the cross-analysis of population data with data collected by the author concerning the mobilisation of state courts, following the studies of Abel (1979) and Wollschläger (1989). Certain regional factors such as the impact of the pre-colonial political system, the economy, gender, the rate of literacy, the expected average rainfall and the population density all influence the actual use of the state courts. Unfortunately, the parameter of age of disputants, which could have been a decisive factor influencing the mobilisation of state courts has not been considered by Weilenmann. Despite the apparently homogeneous dispute management by the state, these data indicate a huge patchwork of conflicting objectives and interests. Weilenmann demonstrates through his precise and detailed quantitative analysis that, for instance, the rate of criminal litigation increases during the rainy seasons, as during these periods all family members are needed in the field and hence are able to discuss family matters and conflicts in detail. On the other hand, inheritance disputes are litigated during the first part of the year, following the family gatherings and debates over the Christmas and New Year's eve period. More significantly, memories of the monarchial system were more pronounced in those regions which were ruled directly by the King or his aristocratic leaders in pre-colonial times, a factor which subsequently explains the acceptance of the contemporary rulers to a lesser degree than in other regions. Weilenmann stresses that the most important parameters of the mobilisation of the state courts is the culture surrounding judicial institutions, including the personality of the judge, and his view of traditions and customary law, as well as the legal norms applied. According to Weilenmann, not only do almost all judges belong to the community group of the Batutsi, but also the pre-colonial model of *Bushingantahe* is hidden behind the 'modern' judicial institution of the state.

On the process-analytical level, Weilenmann believes that the cultural concept of a 'reasonable man' has functioned as a type of reference for actors in disputes since pre-colonial times. He provides a detailed overview of the meaning of the Burundi concepts such as *umuntu w'umutima* (a man with a heart) and *umogore w'umutima* (a woman with a heart). Unfortunately, he does not question the contemporary validity of these concepts, especially in the context of the

geographical and historical heterogeneity of the Barundi. For instance, do all Burundi women, whether living in the regions of previous monarchical influence or not, whether belonging to the community groups of the Batwa, the Batutsi or Bahutu, and whether influenced by western beliefs and ideas or not, accept the norm that a woman should always follow the authority of her husband and carry out his orders? How widely practised and accepted are these norms which constitute the concepts of *umuntu w'umutima* and *umogore w'umutima*? Is the customary law of today the same as the customary law of pre-colonial times? Weilenmann, nevertheless, demonstrates that these concepts as such are of a lesser significance during the disputing process than the concrete facts which constitute the legal conflict. Weilenmann shows through two tales, one of a conflict about divorce and the other of a conflict about inheritance, that the impact of state law on the actual legal process is minimal. The factors which lead to the mobilisation of the post-colonial judicial institutions as well as the norms applied and the decision-making process are rooted in the customary law, despite the rules of the court procedures being embedded in 'modern' law. However, two questions need to be raised in the context of these tales: firstly, Weilenmann's conception of a legal conflict focuses on the period during which the conflict is before a state court. Although in the divorce case the dispute was discussed by a family council, he regards that as neither a legal institution nor as dealing with legal matters. However, adherents of the theory of legal pluralism, who oppose the jurisprudential school of positivism, argue that such institutions as a family council, a meeting of members of the homestead, a council of elders, a council of aristocratic leaders, and a traditional authority meeting on the one hand satisfy the requirements of law, even though they are not officially recognised by the state, and on the other hand manage legal matters, and, moreover, are able to create law (Armstrong 1992: 31-32; Bennet 1985: 49-50). According to this view a conflict could often be defined as legal at a much earlier stage than Weilenmann presumes. Secondly, although Weilenmann claims to be applying the research method of the participant observer during the discussion of a divorce case with the male defendant, he sometimes appears to be rather an observing participant, showing sympathy for the applicant's perspective, airing his opinions, and attempting to convince him of the applicant's point of view.

The psycho-analysis which forms the third and latter part of the process-analysis; concentrates on the emotional side of the dispute, illuminating the relations between conflict and legal conflict. Weilenmann demonstrates through the several cases studied that conflict and legal conflict relate to each other in a dialectical rather than a causal manner. The legal conflict is a symptom of the conflict, which is actually an open heterogeneous process which differs from situation to situation and person to person. Previous relationships, past emotions and psychological incidents unconsciously contribute to the nature of a

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contemporary relationship. Daily life, including the emotions of jealousy, political ambition, power, domination, ambivalence, anger, worries about life matters, and solidarity, has impacts in various ways on the conflict processes. Whether all this leads to the making of a legal claim in a particular case depends on the parties (and others concerned) and their perceptions of the conflict. The analysis shows that the life-stories of individuals is closely connected to the social history of the state of Burundi. The emotions of anger directed at the various community groups which represent the state, mainly concern the politics and actions of these groups, the massacres and the coups d'état. The internal conflicts of Burundi are the consequence of the Burundi's growing consciousness of these emotions of anger. According to Weilenmann, the judges of the contemporary state courts are not able to deal with these (un)conscious emotions, as their actions are restricted by state law. Despite the emotions of anger directed against the state, the state president and the community groups, the psycho-dynamic analysis indicated that the state president was perceived as a sort of pre-colonial king. This cultural phantasy advanced the integration of the pre-colonial or 'old', and contemporary or 'new' legal cultures.

This publication, which asks for some skill in reading German and to a lesser extent French, makes obvious in a multi-analytical, novel and illustrative manner that the legal culture of Burundi, while officially adhering to the ideology of legal centralism, is dominated to a significant extent by the customary legal norms and traditions which have their roots in the pre-colonial monarchial system. This observation appears to be of greater importance for the contemporary political rule and power structures, including the state courts, than discourses on ethnicity and the identity of community groups. Legal pluralism, or a melting-pot of old and new, continues to be the reality of Burundi, despite the abolition of the monarchial system.

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