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Editorial

*Rights, rights and rights for everyone! Even refugees deserve fair trial; they need "**paths of justice**'. Why should they desperately spend money, time and effort bringing their cases forward in negotiations, court action, or any other dispute resolution procedures? Throughout his article Jean de Dieu Zikamabahari, (LLM) a lecturer at ULK in the Faculty of Law (ULK) and a specialist in public international law, disclosed the refugees' right of access to courts and fair trial as promoted by the international legal instruments.*

Obviously, a good number of private actors advocate for refugees and safeguard the availability of legal aid to the refugee yet numerous projects are funded by international donors, and the donor approach has been one of supporting ad hoc, short term programs, rather than adopting a coherent approach aimed at establishing a permanent legal aid structure. The article explores how the price and quality of access to justice can be determined whereby the researcher attempted to explore some of the difficulties that will arise during the development of an actual measurement framework.

The right of an impartial judge is a legal principle. In recent years the impartiality of judges and their independence are subjects of debates among public and judiciary. Mr. Titien HABUMUGISHA the Dean of the Faculty of Law at ULK, Dr.Télésphore KAVUNJA,A Lecturer and Josée MUKAMAZIMPAKA , jointly wrote an article where they have analyzed the application of the principle of impartiality of judges in Rwanda. The writers have clearly illustrated the importance of an independent and impartial judiciary so as to ensure the rule of law and effective protection of the fundamental rights and freedom of the human person.

KAYITANA Evode (LLB, LLM) a Lecturer at ULK in the Faculty of Law researched on " the accusatorial and inquisitorial models of criminal procedure" with a historical and comparative approach. He pointed out that the administration of criminal justice follows one of the two exclusive models: the ***accusatorial*** *(also called adversarial) model and the* ***inquisitorial*** *model. The former is the model of the Anglo-American countries, i.e. the Common Law world, while the latter can be found in Civil Law countries. The researcher traces the origins and developments of these systems of criminal procedure and secondly endeavors to make a comparative study with the aim of exposing both the theoretical and practical differences and similarities of the two systems.*

The wise remark worth of consideration is that modern systems of criminal procedure will most likely continue to evolve in directions that less or more reflect the original models on which they are shaped. Whereas the accusatorial system was originally devised to safeguard the interest of the individual, the inquisitorial system set out in the first place to uphold the interests of society and the State. Evolution of modern systems of criminal procedure will likely continue to reflect these basic philosophical underpinnings.

What is meant by ***"lifting the corporate veil"***? When can it can be applied and What is the position of the Rwandan law on the issue of lifting the corporate veil? *MUNYAMAHORO Rene the Head of the Department of Law at ULK, expands clear insight about these questions. The writer attempted to tackle the principle of lifting the corporate veil as understood as in case of agenc, fraud, sham or façade, group enterprises and unfairness. The article explains its meaning and the extent to which it can be applied and the possibility of transplanting it in the Rwandan legal system.*

ULK expresses its deep appreciation upon the exertion of the Faculty of Law from the fact that the completion of this issue stemmed from the built credibility of lecturers from the Faculty. Most importantly, ULK has always promoted the coupling of teaching and research but today the faculty of law has provided a unique fascinating example. We salute the management of the Faculty of law for its fruitful coordination. Explore the pages and earn more.

Dr. SEKIBIBI Ezéchiel
The Rector

THE RIGHT TO A FAIR TRIAL AND ACCESS TO COURT FOR REFUGEES

By Jean de Dieu Zikamabahari, LLM in International Law (University of Cape Town), Lecturer, Department of Public Law (ULK).

Abstract

Refugees need access to a private or public mechanism that induces all contracting parties of Refugee Convention to respect their rights. They need 'paths to justice'. Walking these paths is costly. The refugees, for instance, spend money, time and effort when they bring their cases forward in negotiations, in a court action, or in other dispute resolution procedures. This article discusses refugees' right of access to courts and fair trial as promoted by the international instruments. It focuses on the evolution and history of this right by utilizing an in-depth analysis of the conventions in this area and by discussing the relevant cases.

Even if many private actors are currently making sure that some legal aid is available to the refugees, most of their projects are funded by international donors, and the donor approach has been one of supporting ad hoc, short term programs, rather than adopting a coherent approach aimed at establishing a permanent legal aid structure. This article explores how the price and quality of access to justice can be determined. It identifies the issues that have to be resolved, and select a number of options to deal with these issues. Furthermore, it explores some of the difficulties that will arise during the development of an actual measurement framework.

Introduction

The right to a fair trial and access to court[1] is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms[2]. The right to fair trial and access to court refer to the methods by which individuals are able to get legal information and legal services and resolve disputes. In other words, it includes access to a court procedure, to legal aid and to extra-legal mechanisms aimed at resolving disputes[3].

The right to a fair trial and access to court is enshrined under a number of international and regional human rights instruments.[4] Article 14 of the International Covenant on Civil and Political Rights recognizes the right to 'a fair trial and public hearing by a competent, independent and impartial tribunal established by law'.

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[1] Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. See the article 10 of the Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

[2] Lawyers committee for Human rights 'what is a fair trial' (2000) available at: http:// www.humanrightsfirst.org/pubs/descriptions/fair_trial.pdf (accessed on 25-05-2010).

[3]. Maurits Barendrecht *et ali* (2006) 'How to measure the price and quality of access to justice?' available at:

[4] Art.16 of the Convention Relating to the Status of Refugees, 1951 (1951) 139 U.N.T.S. 137; Art. 10 of Universal Declaration of Human Rights Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948; Art. 14 of International Covenant on Civil and Political Rights, Dec. 16- 1966 entry into force 3 January 1976; Art. 6 of the European Convention on Human Rights and Fundamental Freedoms Nov. 4- 1950, 213 U.N.T.S. 222, 224 (entered into force Sept. 3, 1953); Art. 8 of American Convention on Human Rights Pact of San Jose, Costa Rica available at http://www.oas.org/juridico/english/Treaties/b-32.htm (4 of 28) 12/23/2010 2:40:50 AM; Art 7 of African Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

Every person is equal before the courts and tribunals under article 14 (1).[5] Further article 14 embodies the most comprehensive and important provisions protecting the right to a fair trial and thus need to be made non-derogable even in times of emergency.

It is worth noting that in international law, as in any domestic legal system, respect and protection of human rights can be guaranteed only by the availability of effective judicial remedies.[6] When a right is violated, access to court and fair trial is of fundamental importance for the injured individual and it is an essential component of system of protection and enforcement of human rights. The right to due process, because of its importance is granted to all persons, and extended therefore to aliens, including refugees. Thus, this essay will analyse the right to fair trial and access to court for asylum-seekers or to whom the refugee's status has been granted.

According to article 16 (1) of the 1 951Refugee Convention a refugee shall have free access to the courts of law on the territory of all Contracting States and the same article (2) goes further to provide that a refugee shall enjoy in the Contracting States in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.[7]

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[5] Art.14 of International Covenant on Civil and Political Rights (supra note 3).
[6] Francesco Francioni, *The Rights of Access to Justice under Customary international Law* (2007) Oxford Press.
[7] Art. 16 of 1951 Convention Relating to the Status of Refugees (supra note 3).

Thus, from this article, the term 'free access to the court of law' is subject to many questions. Neutral access to court is, by necessity, a flexible standard because it depends upon the design of the judicial system, which changes over time[8]. Also, the details of procedure necessarily vary considerably from country to country.

The jurisdiction of States, within limits of the national territory, extends to all the inhabitants. The inhabitants, nationals and aliens (immigrants or refugees), enjoy a single protection as the national laws and authorities provide. Can a refugee demand rights different or more extended rights than nationals? Where there is no free legal aid provided even for the vulnerable nationals, can refugee claim a free legal assistance such as right to counsel or to interpreter?

With the absence of legal aid, how can a refugee exercise his right to fair trial and access to court? A refugee has a right to fair trial and access to court even if the status of a refugee is not yet to be granted to him. What happen in case of the right to fair trial and access to court is denied to him? Will he be subject to refoulement? All those questions are largely dealt with in this treatise: 'Fair Trial and Access to Court for Refugees'.

Thus, the right to access to court can be derived and defined from both the due process clauses and the structure of the national and international legal systems.[9]

[8] Jeffreyr Pankratz 'Neutral principles and the right to neutral access to the courts' (1992) *Ind.L.J.* 1.
[9] *Ibidem.*

How shall this right to neutral access to court, be applied to the issue of indigent or refugees to the courts in today's world? Further, the right to seek an asylum requires that individual asylum-seekers have access to fair and effective procedures for the examination of their claim.

II. Basic legal sources of the right to fair trial and access to court

The intention in this section is to identify and to summarize the fundamental standards of the right to a fair trial and access to court as provided for and defined in many human rights instruments. In so doing, it deals with treaty provisions on the right to a fair trial and access to court at international and regional levels.

Article 14 of the International Covenant on Civil and Political Rights recognizes the right to 'a fair trial and public hearing by a competent, independent and impartial tribunal established by law'. According to the wording of article 14 (1) every person is equal before the courts and tribunals. This article also distinguishes between the sort of fair hearing required for civil and criminal cases; article 14 for the most part deals with the minimum guarantees required in the determination of any criminal charge.[10] It further embodies the most comprehensive and important provisions protecting the right to a fair trial and it has to be granted whatever circumstances.

[10] Art. 14 of International Covenant on Civil and Political Rights (supra note 3).

Article 10 of the Universal Declaration of Human Rights provides that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.[11] Article 11 (1) protects the 'right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence'.[12]

The African Charter on Human and Peoples' Rights, the Inter-American Convention on Human Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms all contain fair trial provisions.[13] The African Commission on Human and Peoples' Rights has adopted a Resolution on the Right to Recourse Procedure and Fair Trial which elaborates on article 7 (1) of the African Charter and guarantees several additional rights to the fair trial rights, including: notification of charges, appearance before a judicial officer, right to release pending trial, presumption of innocence, adequate preparation of the defence, speedy trial, examination of witnesses and the right to an interpreter.[14]

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[11] Art. 10 of Universal Declaration of Human Rights (supra note 3).

[12] Art. 11 of Universal Declaration of Human rights (supra note3).

[13] See the article 7 and 7 of the African Charter on Human and Peoples' Rights; see also the article 8 of the Inter-American Convention on Human Rights; see the article 6 of the European Convention for protection of Human Rights and Fundamental Freedoms (supra note 3).

[14] Doc. No. ACHPR/COMM/FIN (XI)/Annex VII (1992).

Article 19 of the Declaration of Human Rights in Islam, adopted on 5 August 1990 at the Nineteenth Islamic Conference of Ministers of Foreign Affairs in Cairo, provides for equality of all individuals before the law and the right to a judicial remedy for each person.[15]

There are numerous other provisions related to the right to a fair trial. Some of those other provisions may be found in the United Nations Rules for the Protection of Juveniles Deprived of their Liberty; the Basic Principles on the Role of Lawyers; the Guidelines on the Role of Prosecutors; the United Nations Standard Minimum Rules for No custodial Measures (The Tokyo Rules); the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines); the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, etc.

Trough the wording of those human rights instruments, access to court and fair trial has acquired a variety of meanings. In a general manner, it is used to signify the possibility for individual to bring a claim before a court and have a court adjudicate it. In this context, access to the court means finding an accessible parking place, getting the steps, opening the court house doors; sittings counsel tables, entering the jury box, sitting on the bench and communicating effectively with the judges.[16]

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[15] The Cairo Declaration on Human Rights in Islam (1990).
[16] Marc Charmatz and Antionette McRae 'Access to the court' (2003) 3 *MLJ* 1.

In more qualified meaning access to court and fair trial is used to signify the rights of individual to have his or her case heard and adjudicated in accordance with substance standards of fairness and justice.[17] Undoubtedly, access to court can be used to describe the legal aid for the needy, in the absence of which judicial remedies would be available only to those who dispose of the financial resources necessary to meet the, often prohibitive, cost of lawyers and the administrative of justice.[18]

With regard fair trial to refugees, article 16 of the Convention relating to the Status of Refugees provides 'free access to courts of law and the same treatment as a national pertaining to legal assistance in the refugee's country of habitual residence'. Article 1 (1) of the Protocol relating to the Status of Refugees[19] applies article 16 of the Convention, *inter alia,* without geographical or time limitations.

In summary, under human rights instruments states parties are obliged to provide asylum seekers with fair and efficient procedures through which they can present their claims for asylum. These procedures must include an appeal mechanism if the initial decision is negative.

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[17] Francesco Francioni (supra note 5).

[18] *Ibid.*

[19] Resolution on the Situation of Refugees in Africa *CM/Res. 1040 (XLVI)* 1986.

III. Legal aid and access to court for refugees in comparative perspective

In this part of this assignment which use the laws and the cases of the admission of refugees in different context to examine a total of four factors in light of their impact on the growth of judicial power: the role of government (legal aid), the role of NGO's, the importance of the judges and finally, the structure of the appeal mechanisms.

Role of Government in providing legal aid

Under article 10 of the 1951 UN Convention relating to the Status of Refugees, a refugee is someone who: 'has a well-founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group, or political opinion; is outside his/her country of origin; and is unable or unwilling to avail him/herself of the protection of that country, or to return there, for fear of persecution'.[20] This definition is incorporated in many national refugee acts. For instance,

[20] Art. 1 of the 1951 Convention relating to the Status of Refugees (supra note 3).

both South Africa Refugee Act and Rwandan law relating to the status of refugee provide for the above definition of refugee with the extension provided in OAU Refugee Convention. [21]

Due to their vulnerability, refugees are particularly dependent on external support to make sense of the bureaucratic maze called the refugee determination process and, if necessary to launch an appeal of their claim in the courts.[22] The body before which refugees are entitled to present their claim must be established by the law, jurisdictionally competent, independent, and impartial. [23]

The government shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind. Also the government shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary to the disadvantaged persons. Professional associations of lawyers shall cooperate in the organisation and provision of services, facilities and others resources.

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[21] Art.1of Convention Governing the Specific Aspect of Refugee Problems in Africa 6-10 September1969; Section 3 (a-b) South Africa Refugee Act. No 138 of 1998; Art. 22 of the Law N° 34/2001 of 05/07/2001 Relating to Refugees, *O.G.* N° 24 TER OF 15, December 2001 Modified and complemented by Law n° 29/2006 of 20/07/2006, *O.G.* n° 15 of 1st august 2006.

[22] Dagmar Soennscken Legal aid an access to the courts for refugees in a comparative context available at: http://www.allacademic.com/meta/p_mla_apa_research_citation/1/1/7/0/0/p117002_index.html, accessed on 30/05/2010.

[23] James C. Hathaway 'The rights of refugees under international Law' (2008) 9 *HRR* 906.

Article 14 of the International Covenant on Civil and Political Rights and article 6 of the European Convention on Human Rights, specifically recognise the right to legal representation in criminal cases, and legal aid where the interests of justice so require.[24] Although not explicitly mentioned in relation to non criminal cases, the European court of human rights has found that a fair hearing requires legal representation and, in some instances, legal aid. [25]

Specifically in relation to refugee status determination, the European Consultation on Refugees and Exiles argued as follows in 1990: 'before hearing the applicant should be offered the opportunity and time to contact lawyer. Further that legal assistance should be available before the hearing in all stages of the procedures'.[26] The European Union appears to have accepted European Consultation on Refugee and exile's recommendation in its 1995 resolution, which explicitly states that the asylum seekers have the right to legal counsel during the procedure, with the rider that this be in accordance with the rules of the member State concerned.[27]

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[24] Art.14 of International Covenant on Civil and Political Right (supra note1).

[25] DJ Harris *et ali* Law of the European Convention on Humana Rights (1995) Butterworths London 197-8

[26] European Consultation on Refugees and Exile (ECRE) (1991) 'Fair and Efficient Procedure for Determining Refugees status' *IJRL* 12.

[27]European Union 'Resolution on minimum guarantees for asylum procedures' (1995) Justice and Home Affaires Council 18.

In Canada, legal aid is available for asylum seeker, and lawyers are usually involved at all stages of process, including the hearing..[28] However, funding cuts in recent years have led to some concerns about quality.

In Austria, funding cuts have also substantially reduced access of asylum seekers to government-funded legal assistance. The immigration department gives block contracts to private lawyers and community legal services to provide legal services to asylum seekers. This legal covers all detainees and non-detainees who request it. Legal aid Commission provides specialist representation, as does the community-based Refugee Advice and casework service.[29] In the Netherlands there is publicly funded legal advice and representation for asylum seekers, comprising a mixture of salaried legal advisers and lawyers in private practice employed part time by legal aid.[30]

In the United Kingdom, legal aid is available for initial advice, but not for representation at appeal. However, there is legal aid for judicial review in the courts. There are two respect specialist community based organisations, the Refugees Legal Centre and Immigration Advisory service. In the United States of America asylum seekers are given, at least, a list of local attorneys and representatives who offer free or low-cost representation.[31]

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[28] See *Providing protection: Towards fair and effective asylum procedure* Justice Immigration Law Practioner' Association Asylum Rights Campain London (1998) 30.

[29] *Ibid.*

[30] *Ibid.*

[31] Alexander Michael 'Refugee status determination conducted by UNHCR'(1999) 11 *IJRL* 271.

In Greece, the law did not introduce new substantive provisions for the recognition of refugees, but referred to the relevant provisions of the 1951 Refugee Convention.[32] Its constitution guarantees a right to fair trial and a right to appeal.[33] Before the interview, any applicant who wishes is given a reasonable time in which to prepare and to consult a lawyer who will assist him during the course of the procedure.[34]

In South Africa, the State has the duty to observe both constitutional and international law with regard to refugee protection.[35] The 1996 South African constitution establishes a clause and harmonious relationship with international law. In this constitution, it is provided that everyone is equal before the law and has the right to equal protection and benefit of the law.[36]

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[32] Art. 24 of Presidential Decree 31/1999 (*OJHR*) cited in A. Skordas and N. Sitaropoulos 'why Greece is not host Country for refugees'(2004) 16 *IRJL*26.

[33] Art. 4 of the Greek Constitution cited in A. Skordas and N. Sitaropoulos (supra note 32) 28

34. Art. 2 Presidential Decree 31/1999 (supra note 32).

[35] South Africa signed many International Conventions on human rights, for instance the International Covenant on Economic, social and Culture Right on 3, October 1994; also South Africa has signed up to the 1951 Refugee Convention and the 1969 OAU Convention which protect the rights of refugees. See the A Katz, 'Refugees' in J Dugard, *International Law: a South African Perspective*, 3ed. Cape Town , Juta, 2005, Pp 341-352.

[36] Constitution of the Republic of South Africa, Act 108 of 1996 Section (8) (1-5) and section (34 at 35).

The South African Bill of Rights and the Refugee Act spell out the rights and obligations of refugees and asylum seekers in the country.[37] These include administrative justice, legal protection, non-discrimination and access to social services.

In Rwanda, the government has for many years played a leading role in both the formation and implementation of international human rights policy. Rwanda is party of the 1951UN Refugee Convention and Protocol relating to the status of refugees.

Also, Rwanda has signed and ratified the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. The right to access to court is one of the components of the right to fair trial protected by a number of laws in Rwanda. First of all is provided in the article 16 to 20 of the Constitution of 2003.[38] According to those provisions, every human being without any distinction has a right to a fair trial. The refugees at any stages of their proceedings are included in the Rwandan constitution. Secondly, the Law n° 34/2001 Relating to the Status of Refugee sets out the procedure for applying of refugee status and granting the right to fair trial and access to court.[39]

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[37] South Africa Refugee Act. No 138 of 1998.

[38] Constitution of The Republic of Rwanda (*O.G.* N° Special of 04 June 2003).

[39] Law N° 34/2001 of 05/07/2001 Relating to Refugees, *O.G.* N° 24 TER OF 15, December 2001 Modified and complemented by Law n° 29/2006 of 20/07/2006, *O.G.* n° 15 of 1st august 2006.

Role of the UNHCR and NGOs in providing legal aid

This section examines the practice of refugee determination as conducted by UNHCR and NGOs. It looks particularly at UNHCR's practice in number of various countries. In the most of the countries, refugee status determination is conducted by both government and UNHCR.[40] The UNHCR has a duty to supervise the application of the 1951 Convention and 1967 Protocol in contracting States and the contracting State have undertaken to cooperate with it the exercise of this duty.[41]

The UNHCR operate on macro-level with the governments, others international bodies and NGOs, dealing with issues of policy development, funding, technical assistance, trainings of international law. It increasingly sees refugee law as a part the broader field of human rights law. [42]

Generally speaking UNHCR does not provide funding for or encourage, legal or other external legal assistance for asylum seekers applying to it.[43] However, there are some lawyers provided for assistance of refugee on account of UNHCR. For instance in Asia, a number of legal and human rights organisations is involved in refugee status determination.

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[40] Michael Alexander (supra note 30) 255.
[41] *Ibid.*
[42] UNHCR Training Module ' Human Rights and refugee Protection' (1995) *RLD* 5 Chapter 1(c).
[43] 'It is not a policy of UNHCR Headquarter to provide pre-interview counselling in any countries where refugee status determination under the UNHCR mandate is conducted' comment by UNHCR Ankara on Asylum Issue raised by NGO's April 1997.

In Bangkok, for example Jesuit Refugee Service (JRS) provides information and advice to people going through the UNHCR process and in some cases more concrete legal assistance in helping to assemble evidence and formulate appeals. In Phnom Penh a Jesuit Refugee Service lawyer funded by UNHCR has the role of advising and representing asylum seekers.[44]

In relation to the European governments, UNHCR said that 'Basic minimum standards to be met in assisting asylum seekers to present their claims include [...] availability of legal counsel and interpreter'.[45] In relation to Hong Kong, UNHCR has said: 'Given the vulnerable situation of asylum seekers in an alien environment, it is important that he or she should on arrival receive appropriate information on how to submit his/her application. Such advice is most effective on an individual basis and is provided in many countries by legal counselling services funded by the UNHCR or non- governmental sources'. [46]

In the same context, UNHCR said that the possibility of obtaining legal advice and representation about appeals was concluded in what it saw as 'the basic principles of fairness applicable equally to judicial or administrative review'.[47]

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[44] Alexander Michael (note 30) 268.

[45] UNHCR 'Fair and expeditious asylum seekers' Nov.1994.

[46] UNHCR ' Note on the subject of the role of UNHCR in the Hong Kong Procedure for Refugee status determination(1990).

[47] Alexander Michael (note 30) 269.

In South Africa, apart from UHCR, there are humanitarian and human rights organisations that educate the public on their rights of refugees. Lawyers for Human Rights (LHR) promote advocacy and protect the rights of undocumented migrants, asylum seekers and refugees.[48] They provide advice and assistance in areas such as asylum application procedures, appeals, and review of rejected asylum applications, socio-economic rights, monitoring unlawful detention and repatriation. Also, in 1970 University of Cape Town started a project of Law Clinic, under which free legal assistance is provided to asylum-seekers and refugees, in particular those living in southern South Africa, by law student under supervision of the lawyers. [49]

To sum up, legal assistance providers and human rights organizations in the host country are also ideally placed to undertake advocacy and monitoring activities on the rights of recognized refugees. They can have a valuable role to play by undertaking general advocacy activities for more inclusive laws, rights and services for recognized refugees and a greater respect for international or regional human rights standards.

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[48] Enwere Corlivcs Onuoha (2006) *Human Rights and Refugee Protection in South Africa (1994-2004)* available at: http://www.wistetd.wits (accessed on 25-05-2010).

[49] University of Cape Town Law Clinic (2007) *Refugee Law Rights Project* available at: http://www.uct.ac.za/faculties/law/research/lawclinic/ (accessed on 07/06/2010).

In dealing with improvement of judicial capacity, UNHCR assists judges by offering professional development workshops on refugee law and on human rights conditions in refugees' home countries. In certain instances, UNHCR can offer its views on a particular law, issue or individual case to assist judges in their deliberations. UNHCR collaborates closely with the International Association of Refugee Law Judges (IARLJ).

Role of Judges and Judicial Remedies

In the framework of with asylum procedures, judges[50] play an important role in refugee protection, particularly where national protection system is based on legislation and not solely on administrative discretion. The court decides the legality of decision taken by the Board and also has jurisdiction over its inaction (silence of the administration). In this regard, the task of the judge is to consider not only whether the administrative decision is in accordance with substantive law, but also whether the procedure provided by refuge law is respected. [51]

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[50] The term ' judges ' or ' refugee law judges ' is used here to cover all types and levels of judicial or quasi-judicial decision-makers regardless of whether they deal with asylum or asylum-related cases regularly or only occasionally.

[51] J. Chlebny and Trojanl Wojciech 'The refugee status determination procedure in Poland' (2000) 12 *IRJL* 224.

In the course of dealing with asylum appeals, judges will depend to a great extent for their ability to make sound judgments on having before them up-to date and reliable country background information or Country of Origin Information (COI).[52] The probative value of an asylum seeker's evidence has to be evaluated in the light of what is known about the conditions in the country of origin.[53] The demands on the judge are huge. Sometimes within a very short period he may be called on to decide cases of claimants from several different countries. In this regard, it is important to note that all the jurors should be placed in position in which they may asses the facts and evidence in an objective manner, so as to be able to return a just verdict.

For instance, in *Pembele & others v. Department of Home Affairs* the court held that the Department of Home Affairs 'shall ensure that asylum seekers are given the reasons in writing for any adverse decision by the Standing Committee for Refugee Affairs'. [54]

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[52] Country of Origin Information(COI) has been defined as 'any information that should help to answer questions about the situation in the country of nationality or former habitual residence of a person seeking asylum or another form of international protection ' . See Barbara Svec of the Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), Vienna, in presentation to the IARLJ November

[53] The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979 para. 42

[54] *Pembele v. Home Affairs* cited in Enwere Corlivics Onuoha, 'Human Rights and Refugee Protection in South Africa' (1994-2004) available at.: http: www.lhr.org.za/ refugee/decisions.php, accessed on 02/042010.

This gives the asylum seeker whose applications are rejected the opportunity to know the reasons against their applications and to prepare for appeal. In India, the courts have stayed the deportation of individuals when an application for determination for refugee status is pending with UNHCR, and granted leave to detainees to travel to New Delhi to seek determination of refugee status from UNHCR.[55]

With regard to the role of judge one can therefore recognise the argument by Huyssteen that 'however limited, the law and courts have protected and furthered the interest of the marginalised and the powerless.'[56] It is proper to point out that South African courts have rejected attempts by the Department of Home Affairs to return unlawfully people to countries where they are in danger of persecution and prevent restriction of asylum seeker's freedom of movement.[57]

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[55] *Dr Malavika Karleka v. Union of India, Supreme Court of India, 25/09/1992; See also Shri Khy-Htoon v. The State of Manipur, Gauhati High Court , 11/09/90*

[56] Huyssteen E, 'The Constitutional Court Human Rights and Democracy in South Africa: A Sociological

[57] *Ibid.*

IV. Right to the free assistance of an interpreter in the context of right to fair trial

Articles 9, 14, and 15 of the ICCPR, which apply to all persons equally, contain the principal guarantees with regard to the right to a fair trial. These guarantees include amongst others, the right to free legal aid and the services of an interpreter, in the context of a criminal case. They are detailed in ICCPR as follows: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; to have the free assistance of an interpreter if he cannot understand or speak the language used in court; [...].'[58]

The right to free legal aid and to be assisted by an interpreter is of course particularly relevant to refugees. It is accordingly noteworthy that, in contrast to the provision in the ICCPR, and the article 16 of the 1951 Convention does not specifically restrict the right to legal aid to the criminal cases.

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[58] Art. 9, 14 and 15 of International Covenant on Civil and Political Rights (supra note 3).

Where States offer more generous terms to their nationals, such as the provision of legal aid and interpreter services in civil cases too, refugees can invoke the provisions of the 1951 granting to them the intentional standards of treatment.

In this respect, refugees may frequently require additional assistance, as domestic law and legal aid services are unlikely to cover the myriad of expenses related to translation and interpretation services that may be required in legal proceedings involving an alien who does not speak the host country language. Such assistance may be especially necessary in civil cases where these types of interpretation and translation services are less often included in legal aid programmes.[59]

V. Legal Aid in Civil and Criminal Matters

As has been said above, refugees should be provided access to legal aid in both civil and criminal matters on the same terms as nationals. Hence, if domestic law provides for legal aid in civil matters as well as in criminal cases, refugees should be entitled to this service as well; they are to be granted the same standard of treatment as nationals according to the 1951 Convention.

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[59] Rosa de Costa 'Rights of refugees in the context of integration: Legal standards and recommendations' POLAS/2006/02.

Systems of legal aid vary significantly from country to country. In some countries legal aid is granted for criminal cases only, while others also include civil matters. In some systems, legal aid is completely free of charge, whereas in others legal assistance is provided at reduced rates. In some countries the State or court appoints a legal representative while in others, the person is entitled to choose a legal representative themselves. With regard to these variables, refugees should be granted the same access and the benefits of legal aid on the same terms as nationals.[60]

VI. Right of Appeal

The decision on the asylum seekers must be communicated to the asylum seeker in written form. If the application is rejected, he must be informed of reasons and of any possibility of having the decision reviewed. The asylum seekers must have the opportunity, inasmuch as national law so provides, to acquaint himself with or be informed of the main purport of the decision and a possibility to appeal, in a language which he understands.[61] Like other aspects of refugee status determination process, appeal mechanisms vary to some extend from one place to another.

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[60] *Ibid.*

[61] European Union 'Resolution on minimum guarantees for asylum procedures' (1995) *Justice and Home Affaires Council* 18.

In Bangkok, appeals are usually decided by the protection officer, or where the original decision was made by the protection officer, by one of the other officers in legal protection team.[62] Until 1995 appellants were usually re-interviewed by the officer conducting the appeal. However since that time there has been a change of policy which means that appellants are re-interviewed only on a needs basis.
n New Delhi cases are reviewed by two officers other than who made the original decision. In Kuala Lumpur, there are only two officers sharing the work of status determination. Each is responsible for dealing with appeals against decisions of the other.[63]

According to UNHCR's view the notion of appeal for formal reconsideration includes some basic principles of fairness applicable equally to judicial or administrative reviews.[64] In addition, it includes the possibility for applicant to be heard by the review body and to be able to obtain legal advice and representation in order to make his submission. [65]

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[62] Alexander Michael (note 30) 279.

[63] Alexander Michael (note 30) 279-282.

[64] UNHR Handbook on procedures and criteria for determining refuge status under the 1951 convention and Protocol relating to the status of refugees (1992) para. 27.

[65] UNHR Handbook (supra note 52).

It is important to note that the notion of fairness also requires the review body to provide the grounds for its decision. The applicant can be reassured that he has had a fair hearing and the criteria have been applied properly.[66]

Article 14 of ICCPR [67] requires a right to appeal from administrative decision to a fair and public hearing by independent and impartial tribunal. Whilst there has not yet been a definitive ruling that this provision applies to asylum-seekers or who are acquired the refugee status. But many states effectively apply it.[68]

The European Union's 1995 resolution appears to accept that these human rights standards are applicable 'in the case of negative decision; provision must be made for an appeal to court or review authority which gives an independence ruling on individual cases'.[69] This is also the practice in many other countries which are party to the Refugee Convention.[70] For instance, in Australia, independent Refugee Review Tribunal conducts reviews on merits of adverse refugee status determinations by the Department of Immigration and Multicultural affairs. The appellant has the right to an oral hearing and to be represented in the proceedings.[71]

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[66] UNHR 'Note on the subject of the role of UNHCR in the Hong Kong Procedure for refugee status determination' (1990) cited in 'International Journal of Refugees Law' (1999) 11 *IJRRL* 280.

[67] International Covenant on Civil and Political Right (supra note3).

[68] Alexander Michael (note 31) 280.

[69] European Union 'Resolution on minimum guarantees for asylum procedures' (1995) Justice and Home Affairs Council, Bruxels, para. 13.

[70] Alexander Michael (note 30) 281.

[71] Jean Pierre L. Fonteye 'Overview of Refugee Determination Procedures in Australia' (1994) 6 *IJRL* 253.

In South Africa the right of appeal is granted by Refugee Act 1998 section 25 (1 at 4). This act provided that 'the Appeal Board must allow legal representation upon the request of the applicant'. [72] In Rwanda, the right of appeal is granted by article 17of the law n°34/2001 relating to refugees status. This law provides that 'If a person applying for refugee status is not satisfied with the decision taken by the National Refugee Council, he or she may file a case to the High Court of the Republic within a period not exceeding fifteen (15) working days starting from the day he or she was notified of the decision'. [73]

VII. *Non - refoulement* and Fair Trial

Professor Guy Goodwin-Gill describes the principle of *non - refoulement* as a fundamental basis of international refugee law.[74] This precludes a State from returning a person against his or her will where s/he would be persecuted or face the risk of persecution.[75] Many believe that *non - refoulement* is a part of customary international law, meaning even states which have not ratified the Refugee Convention are prohibited from expelling or turning away people seeking asylum.[76]

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[72] Section 4 South Africa Refugee Act. No 138 of 1998.

[73] Art.34 of Law N° 34/2001 of 05/07/2001 Relating to Refugees status in Rwanda.

[74] G. Goodwin-Gill *The Refugee in International Law* (1996) 2nd edn. Oxford Press 137.

[75] Amnesty international 'Refugees: Human rigts have not borders' on line www.amnesty.org/ailibi/intcam/refugee/recommended.htm at4 (accessed on 05/06/2010).

[76] G. Goodwin-Gill (supra note 73).

From this assessment, one may ask himself what will happen if the right to fair trial is denied. If this event occurs, the asylum seeker's status will not be granted. If a refugee status is denied in such circumstances and the person is deported to the State of origin, severe persecution may result, without any of human rights protections enjoyed in modern extradition practice.

The principle of *non - refoulement* has acquired a status of *jus cogens,* that is, peremptory norm of international law from which no derogation is permitted.[77] The 1951Refugee Convention obliges states party not to *refoule* a refugee in any manner whatsoever. [78] The notion of *jus congens* is expressed in international law through articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties. [79]

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[77] Jean Allain 'The jus cogens nature of non-refoulement'(2002) 13 IJRL 537 at 540.

[78] Art. 33 of the 1951UN Refugee Convention (prohibition of expulsion or refoulement) 'The benefit of this provision may not, however, be claimed by refugee whom there are reasonable grounds for regarding as danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'.

[79] Art. 53 and 64 of Vienna Convention on the Law of Treaties, 169 (1969) 8 ILM 679 'These provision provide that treaties may be invalidate upon their ratification or may later terminated if their content are in conflicts with a peremptory norm of general international law, which is accepted and recognized by international community of states as a whole as a norm from which no derogation is permitted'.

To determine whether *non-refoulement* has attained the normative value of *jus cogens,* one must investigate the dual requirements of its acceptance by international community of states as a whole and as a norm from which non derogation is permitted. In order words one must investigate its introduction into corpus *juri gentium* via customary international law. [80] In short every states has obligation to protect asylum-seeker even thought a refugee status has been died.

To illustrate, in May 2000, the British High Court (Queen's Bench Division) applied the Dublin Convention[81] in the case of *R v. Secretary of State for the Home Department ex parte Bouheraoua and ex parte Kerkeb.*[82] The applicants were Algerian nationals, who were threatened by non-state agent in their country of origin. The Court refused to allow their return to Greece because it considered that there was a real risk that the Greek authorities would apply, not protection, but the accountability principle with respect to victim of non-state agent. The court of appeal upheld this judgment.[83]

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[80]Customary international law requires two elements: States practice accompanied by *opinio juris*; see Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US) (Merits) [1986] ICJ *Reports* para.77

[81]Dublin Convention: State Responsible for Examining Applications for Asylum Lodged in one of the Member states of the European Communities available at: http://www.europaworld.org/DEVPLAWR/Refugees, accessed on 25/05/2010.

[82]Judgment of 22 May (2000) case No CO/878/1998, CO/2734/1998.

[83]Judgment of 11May 2000 [2001] *EWG* 747 C/000/2271 cited in A. Skordas and N. Sitaropoulos 'why Greece is not a safe host state country for refugees'(2004) 14 *IJRL* 26.

VIII. Concluding Remarks

Everyone has the right to seek and to enjoy in other countries asylum from persecution. Access to court is ultimately about the right to seek asylum. It ensures that asylum seekers can present their cases as effectively as possible which facilitates more effective refugee status determination and thus more effective refugee protection.

The 1951UN Refugee convention has established and elaborated upon the right to a fair trial as internationally recognized human rights norm. The right to fair trial applies to the proceedings as a whole, including the pre-trial proceedings, the trial stage, the appellate proceedings and the cassation proceedings if applicable. The right to a fair trial is a fundamental safeguard to assure that individuals are not unjustly punished. Furthermore, this right is indispensable for protection of other rights, such as the right to seek and to enjoy asylum in host State, the right to be free from arbitral detention and the right to life.

Due to their vulnerability, refugees require legal assistance for the ordinary matters of life, such as housing or property dispute, criminal matter, civil or matrimonial issues in case of a divorce or custody matter. However, what might otherwise be considered ordinary cases may require particular care in the case of refugees as they may present 'hidden' problems and security concerns (e.g. as aliens this may be a vulnerability to deportation and *refoulement)*

As refugees, they may also have more difficulty accessing or defending their rights than nationals. Refugees may have rights in law but have more difficulty exercising them in practice due to: a lack of awareness on the part of relevant government structures and civil servants on the applicable regime of rights and benefits. In such cases, legal aid providers may be required to intervene with the relevant authorities on behalf of their clients, or to help them complete the necessary forms, papers, or procedures.

The right to a fair trial as enshrined in international human rights instruments is non-derogable and therefore it may not be suspended in certain circumstances, such as times of public emergency. The host State should recognize that judicial and administrative structures necessary to guarantee the right to a fair trial and access to court are indispensable for the protection of all other human rights.

Bibliography

Conventions and Statutes

1. Vienna Convention on the Law of Treaties, 169 (1969) 8 *ILM* 679.

2. Convention Relating to the Status of Refugees, 1951 (1951) 139 U.N.T.S. 137.

3. Universal Declaration of Human Rights Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

4. International Covenant on Civil and Political Rights, Dec. 16- 1966 entry into force 3 January 1976.

5. European Convention on Human Rights and Fundamental Freedoms Nov. 4- 1950, 213 U.N.T.S. 222, 224 (entered into force Sept. 3, 1953).

6. African Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

7. The Cairo Declaration on Human Rights in Islam (1990).

8. Resolution on the Situation of Refugees in Africa *CM/Res. 1040 (XLVI)* 1986.

9. Convention Governing the Specific Aspect of Refugee Problems in Africa 6-10 September1969.

10. Constitution of The Republic of Rwanda in *O.G.* N° Special of 04 June 2003 as amended up to date.

11. Constitution of The Republic of South Africa, Act 108 of 1996.

12. Law N° 34/2001 of 05/07/2001 Relating to Refugees, *O.G.* N° 24 TER OF 15, December 2001 Modified and complemented by Law n° 29/2006 of 20/07/2006, *O.G.* n° 15 of 1st august 2006.

13. South Africa Refugee Act. No 138 of 1998.

Cases

1. Dr Malavika Karleka v. Union of India, Supreme Court of India, 25/09/1992

2. Judgment of 11May 2000 [2001] EWG 747 C/000/2271

3. Judgment of 22 May (2000) case No CO/878/1998, CO/2734/1998

4. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US) (Merits) [1986] ICJ Reports

5. Pembeleand others v. Department of Home Affairs in the Supreme Court of South Africa (Cape of Good Hope Provincial Division) on 10th, December 1996

6. Shri Khy-Htoon v. The State of Manipur, Gauhati High Court, 11/09/1990

Books and Journals

1. Allain Jean 'The *jus cogens* nature of *non-refoulement'* (2002) 13 *IJRL.*

2. Charmatz Marc and Antoinette McRae 'Access to the court' (2003) 3 *MLJ* .

3. Chlebny Jacek and Wojciech Trojan 'The refugee status determination procedure in Poland' (2000) 12 *IRJL.*

4. European Consultation on Refugees and Exile (ECRE) (1991) 'Fair and Efficient Procedure for Determining Refugees status' *IJRL.*

5. European Consultation on Refugees and Exile (ECRE) (1991) 'Fair and Efficient Procedure for Determining Refugees status' IJRL 121.

6. Francesco Francioni *The Rights of Access to Justice under Customary international Law* (2007) Oxford Press.

7. Goodwin-Gill G. *The Refugee in International Law* (1996) 2nd edn. Oxford Press.

8. Harris DJ *et ali* Law of the European Convention on Humana Rights (1995) Butterworths London.

9. Hathaway James C. 'The rights of refugees under international Law' (2008) 9 *HRR.*

10. Huyssteen E, 'The Constitutional Court Human Rights and Democracy in South Africa: A Sociological Perspective' *University of the Witwatersrand South Africa* (2003).

11. Jean Pierre L. Fonteye 'Overview of Refugee Determination Procedures in Australia' (1994) 6 *IJRL.*

12. Michael Alexander 'Refugee status determination conducted by UNHCR' (1999) 11 *IJR.L*

13. Pankratz Jeffreyr 'Neutral principles and the right to neutral access to the courts' (1992) *ILJ*.

14. Rosa de Costa 'Rights of refugees in the context of integration: Legal standards and recommendations' POLAS/2006/02.

15. Skordas A. and Sitaropoulos N. 'why Greece is not a safe host state country for refugees' (2004) 14 *IJRL.*

16. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees UNHCR/IP/4/ Eng/REV.1 Reedited, Geneva, January 1992.

17. UNHCR 'Fair and expeditious asylum seekers' Nov.1994.

18. UNHCR 'Note on the subject of the role of UNHCR in the Hong Kong Procedure for Refugee status determination (1990).

19. UNHCR Training Module 'Human Rights and refugee Protection' (1995) *RLD* .

Internet Sources

1. American Convention on Human Rights Pact of San Jose, Costa Rica available at http://www.oas.org/juridico/english/ Treaties/ b-32.htm (accessed on 30-04 -10).

2. Amnesty international 'Refugees: Human rights have not borders' on line www.amnesty.org/ailibi/intcam/refugee/ recommended.htm at4 (accessed on 05/06/2010).

3. Dagmar Soennscken 'Legal aid an access to the courts for refugees in a comparative context'available at: http:// www.allacademic.com/meta/ p_mla_apa_research_citation/1/1/7/0/0/p117002_index.html, (accessed on 05/06/2010).

4. Dublin Convention: State Responsible for Examining Applications for Asylum Lodged in one of the Member states of the European Communities available at: http:// www.europaworld.org/DEVPLAWR/Refugees, (accessed on 05/06/2010).

5. Enywere Corlivcs Onuoha (2006) *Human Rights and Refugee Protection in South Africa (1994-2004)* available at: http:// www.wistetd.wits (accessed on 30-05-2010)

6. Honourable Mr. Justice Desai, Supreme Court of South Africa (Cape of Good Hope Provincial Division) 1996. http: www.lhr.org.za/refugee/decisions.php

7. Lawyers committee for Human rights 'what is a fair trial' (2000) available at: http://www.humanrightsfirst.org/pubs/ descriptions/fair_trial.pdf (accessed on 25-05-2010).

8. Maurits Barendrecht *et ali* (2006) 'How to measure the price and quality of access to justice?' available at: http:// www.tilburguniversity.nl/faculties/law/research/tisco/research/ projects/access/papers/06-11.pdf (accessed on 25-05-2010).

9. University of Cape Town Law Clinic (2007) *Refugee Law Rights Project* available at: http://www.uct.ac.za/faculties/law/ research/lawclinic/ (accessed on 07/06/2010).

PROBLEMATIQUE DE L'IMPARTIALITE DU JUGE EN DROIT POSITIF RWANDAIS

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Abstract

L'un des droits fondamentaux du justiciable est incontestablement d'être jugé sans partialité : il s'agit d'une condition sine qua non du système judiciaire tout entier dont les origines remontent jusqu'aux textes bibliques ; les textes internationaux et le droit interne des Etats recommandent le respect de l'impartialité du juge.

Le système judiciaire rwandais à la veille du génocide perpétré contre les Tutsi a connu des difficultés et n'a jamais réussi à accomplir sa mission de garantir aux citoyens la jouissance de leurs droits et libertés. Ces difficultés étaient liées au manque d'indépendance et d'impartialité des juges. C'est ainsi que l'impunité a été ouvertement institutionnalisée et a conduit aux tragédies qui ont endeuillé le Rwanda en 1994.
Aujourd'hui plus que jamais, la justice au Rwanda doit jouer un rôle prépondérant dans la reconstruction du pays. Cette justice a besoin des juges intègres et impartiaux afin de relever le grand défi de reconstruire le pays.

Cet article a pour but d'analyser l'application du principe d'impartialité du juge en droit rwandais; de révéler les obstacles qui handicapent l'impartialité totale du juge rwandais et de proposer des solutions qui puissent améliorer les garanties de l'impartialité du juge en droit rwandais.

INTRODUCTION GENERALE

L'impartialité du juge tient aux valeurs fondamentales de la démocratie. Sans l'impartialité, il ne peut tout simplement y avoir de justice, de sorte que le moindre incident susceptible de l'affaire suspecté compromet toute l'œuvre judiciaire.[84]

L'impartialité implique, de manière plus générale, que le juge ne peut pas statuer sur le cas de personnes proches (famille, amis) ou qu'il a des raisons de favoriser ou de défavoriser. Il ne doit pas être suspecté de prendre partie en faveur d'une personne. C'est le sens de l'allégorie de la justice : la justice a les yeux bandés, ce qui signifie que le juge ne doit pas regarder la personne qu'il juge, il doit juger tout le monde de la même manière sans prendre parti.[85]

Mais, comment le peut-il dans la mesure où, concrètement, les juridictions sont composées de personnes humaines, pétries d'histoires et opinions ? On peut soutenir qu'il le fait par héroïsme, en s'arrachant à lui-même : en revêtant son costume, il cesserait d'être homme pour devenir un juge désincarné.

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[84] J.VINCENT *et al.*, *Institutions Judicaires : Organisation, Juridiction, Gens de Justice*, 5e éd. Paris, Dalloz, 1999, p.155.

[85] G.CANIVET, *La déontologie des magistrats*, Paris, Dalloz, 2004, p.88.

A l'instar de tout individu, le juge est membre d'un groupe social avec lequel il entretient des relations personnelles. Cependant, le procès se définissant comme un « *combat* » entre deux « *camps* » adverses : l'accusation et la défense, il est donc logique que les relations du juge avec son environnement puissent jouer dans ce cas un rôle considérable sur l'issue du procès.[86] Cette position du juge peut être interprétée comme un choix implicite en faveur d'un certain « *camp* » avant même que l'affaire ne soit jugée. Compte tenu de sa situation, le juge se trouve enclin à souhaiter une issue favorable pour l'une des parties.

Concrètement, il existe toute une série de règles d'incompatibilités qui font que dans certaines situations le juge n'a pas le droit de siéger. Ainsi, l'impartialité s'applique dans la procédure de récusation, de déport et le renvoi pour cause de suspicion légitime ou de sûreté publique.

S'agissant de la procédure de récusation, le juge peut spontanément refuser de juger mais il est également possible pour le justiciable de demander à ce que le juge ne soit pas autorisé à juger. Toutes ces procédures sont importantes, car souvent le juge évolue dans un petit milieu, et il peut très bien connaître certaines personnes impliquées dans une affaire quelconque.

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[86] J. VINCENT, *op.cit.*, 156.

La récusation est un recours particulier accordé au justiciable contre tout juge qui manquerait ou risquerait de manquer d'objectivité par faveur ou hostilité à l'égard de la partie poursuivie. Ce droit constitue non seulement au regard de la loi, mais aussi du justiciable une garantie d'impartialité car, la récusation a comme conséquence la mise à l'écart du juge suspecté de partialité.

Ce recours est prévu à l'article 171 du COFCJ [87] (Les articles du Code d'Organisation, Fonctionnement et Compétence Judiciaire sont cités avec l'indication « COFCJ ») ainsi qu'à l'article 97 du CPCCSA[87] (Les articles du Code de Procédure Civile Commerciale, Sociale et Administrative sont cités avec l'indication « CPCCSA », modifiée et complétée par la loi n° 09/2006 du 02/03/2006.[88]

Les causes de récusation limitativement énumérés par ces articles sont au nombre de huit et correspondent à des hypothèses dans lesquelles l'impartialité du juge est susceptible d'être mise en doute. Ces causes ont un caractère péremptoire car dès lors que l'une d'elle est établie, la récusation doit être admise.

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[87]L'article 171 de la Loi Organique n° 51/2008 du 09/09/2008 portant Code d'Organisation, Fonctionnement et Compétence Judiciaire, in *J.O.R.R.* n°spécial du 10 septembre 2008 telle que modifiée et complétée jusqu'à nos jours.

[88]Article 97 de la Loi n° 18/2004 portant CPCCSA in *J.O.R.R* n° spécial bis du 30/07/2004 telle que modifiée et complétée par la loi n°09/2006 du 02/03/2006.

La violation du principe d'impartialité peut entraîner un motif d'appel. Mais, aucune œuvre humaine n'est parfaite. Malgré les efforts du législateur, il existe plusieurs éléments qui constituent de véritables freins considérables à l'objectivité de ces garanties. Il en est ainsi les imperfections de la procédure de récusation liées non seulement à la personne visée par la requête, mais aussi, il existe diverses autres raisons qui permettent d'affirmer que cet incident contient des imperfections qui sont autant de limites qui empêchent à la récusation de jouer pleinement son rôle de sauvegarde de l'impartialité. Il s'agit des imperfections liées aux conditions de fond ainsi que celles liées aux conditions de forme.

Ainsi, le mécanisme de récusation n'est pas à l'abri de l'échec dans sa vocation de garantie d'impartialité du juge. En jurisprudence des Cours et Tribunaux qui ont fait l'objet de notre analyse, presque la totalité des décisions de récusation que nous avons obtenu ont abouti au rejet dont la grande partie pour des raisons de non fondement, ou, soit sont liées aux conditions de fond, soit aux conditions de forme.

Quant à la procédure de déport qui fait que le juge, avant même d'être récusé, lui exige de s'abstenir dans une affaire pour motif de sa conscience, ou lorsqu'il est conscient qu'il se trouve dans les conditions de récusation. Le déport est prévu à l'article 172 du Code d'OFCJ et à l'article 98 du CPCCA. Le déport comme la récusation présentent les mêmes imperfections évoquées plus haut et constituent des limites de l'impartialité du juge.

Enfin, le renvoi pour cause de suspicion légitime qui constitue une garantie préventive de l'impartialité du juge, en ce sens qu'il intervient avant que la partialité de la décision à venir ne soit consommée, cette procédure n'est plus prévue en droit rwandais car l'article 176 du COFCJ interdit à la partie de récuser, pour quelque motif que ce soit, toute la juridiction.[89] Cette interdiction constitue une limite considérable à l'objectivité de cette garantie, et constitue au justiciable un frein non négligeable d'être jugé par un tribunal impartial dans le cas où tous les juges désignés se trouveraient dans les conditions de récusation.

Ces préoccupations juridiques nous ont poussés à nous poser les deux questions suivantes: Quel est l'état des lieux des mécanismes garantissant l'application du principe d'impartialité du juge en droit rwandais? Quels sont des mécanismes à proposer en vue d'améliorer les garanties de l'impartialité du juge en droit rwandais ?

Face à ces questions juridiques ci hautes posées, nous estimons *prima facie* que les mécanismes prévus en droit rwandais en vue de garantir l'application du principe d'impartialité du juge seraient insuffisants. En outre, la proposition des mécanismes juridiques en vue d'améliorer les garanties de l'impartialité du juge en droit rwandais serait nécessaire.

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[89] L'art.176 de la Loi Organique n° 51/2008 du 09/09/2008 portant Code d'Organisation, Fonctionnement et Compétence Judiciaire, in *J.O.R.R.* n°spécial du 10 septembre 2008.

I.IMPERFECTIONS LEGALES EN MATIERE DES GARANTIES DE L'IMPARTIALITE

L'exigence d'impartialité donne lieu à des dispositions qui s'appliquent lorsqu'il existe des raisons de suspecter au cours d'une instance donnée l'objectivité d'un ou de plusieurs juges. Mais, malgré la volonté du législateur dans le renforcement des droits de la défense, il existe des limites qui constituent un frein non négligeable à l'effectivité de ce doit particulier accordé aux justiciables.

I.1. Limites de la récusation comme garantie de l'impartialité du juge

Le mécanisme de récusation n'est pas à l'abri de l'échec dans sa vocation de garantie d'impartialité du juge. Etudions les limites liées aux conditions de fond ainsi que les limites liées aux conditions de forme.

L'article 171 du COFCJ ainsi que l'article 97 du CPCCA énumèrent limitativement 8 causes de récusation qui sont très restrictives. Or, la loi n'a pas prévu toutes les hypothèses possibles qui peuvent constituer la partialité du juge.

En conséquence, il est souvent difficile que la requête de récusation ne remplissant pas les conditions restrictives fixées par la loi puisse aboutir alors qu'il existerait dans le chef

du juge mis en cause les conditions de partialité. Cette rigueur de la loi ne permet pas au justiciable d'être rassuré qu'il serait jugé par un juge impartial. [90]

I.1.1.1. L'ombre du juge : sa propre ipséité

Dérivant du latin *ipse* c'est-à-dire soi-même, l'ipséité est régulièrement prise en considération dans des œuvres littéraires. Ainsi, les critiques littéraires ont-ils souvent l'habitude de dire que l'auteur, en rédigeant son œuvre trahit sa proper ipséité.[91]

Par exemple cette affirmation peut être prise en compte pour un juge appelé à juger une affaire de viol alors qu'il en avait été victime dans son adolescence. Dans cette hypothèse, le juge sera plus enclin à prononcer le maximum de la peine sans prendre en considération les circonstances de commission de l'infraction. Le juge arrêtera prématurément sa décision dans son fort intérieur avant la fin des débats.[92] Il en est ainsi pour le juge victime de sévices corporels dans son foyer conjugal est encline à être très sévère envers tout homme qui se trouve au tribunal contre son épouse pour divorce.

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[90]Art. 171 de la Loi Organique n° 51/2008 du 09/09/2008 portant Code d'Organisation, Fonctionnement et Compétence Judiciaire, in *J.O.R.R.* n°spécial du 10 septembre 2008 et article 97 de la Loi n° 18/2004 du 20/6/2004 portant Code de Procédure Civile, Commerciale, Sociale et Administrative in *J.O.R.R* n° spécial bis du 30/07/2004 telle que modifiée et complétée par la loi n°09/2006 du 02/03/2006.

[91]L.LENOBLE, *La crise du juge*, Paris, Bruylant, 1996, p.28.

[92]D.ROETS, *Impartialité et justice pénale*, Paris, Cujas, 1997, p.475.

Les relations privées présentes ou passées d'un juge peuvent être interprétées par l'environnement local comme un choix implicite en faveur d'un « camps ». Eu égard à sa situation personnelle, le juge se trouve objectivement enclin à souhaiter une issue favorable pour l'une des parties[93]

I.1.1.2. L'amitié ou l'inimitié entre le juge et l'avocat d'une partie

Toute relation d'animosité ou d'amitié entre le juge et une partie au procès justifie l'exclusion du premier cas[94], il ne peut pas être en même temps juge et partie. Si l'avocat a pour mission de représenter et de défendre une partie au procès, il parait normal et même logique de récuser le juge qui entretient des liens d'amitié ou d'hostilité avec l'avocat de l'une des parties.

I.1.2. Limites liées aux conditions de forme

Elles tiennent aux exigences d'ordre procédural et aux problèmes de l'information.

I.1.2.1. Problèmes liés à la juridiction compétente

La procédure de récusation est prévue par les articles 171 à 176 du COFCJ ainsi que les articles 99 à 104 du CPCCSA telle que modifiée et complétée par la loi n°09/2006 du 02/03/2006.[95]

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[95] L'article 171 de la Loi Organique n° 51/2008 du 09/09/2008 précitée et article 97 de la Loi n° 18/2004 du 20/6/2004 portant Code de procédure civile, commerciale, sociale et administrative précitée.

[96] Articles 171 à 176 du COFCJ et articles 99 à 104 du CPCCSA, *précité*.

La récusation relève de la juridiction à laquelle appartient le juge récusé (articles 101 et 102 du CPCCA telle que modifiée et complétée par la loi n°09/2006 du 02/03/2006).[96] Le fait de permettre à la juridiction à laquelle appartient le juge récusé de connaître la procédure de récusation ne facilite pas l'impartialité de cette juridiction.

I.1.2.2. Problèmes liés à l'introduction de la demande

En ce qui concerne l'introduction de la requête, l'article 173 du Code d'OFCJ dispose que le demandeur de récusation devra lefaire sous peine d'irrecevabilité à l'audience avant la clôture des débats par une déclaration motivée et actée au greffe de la juridiction dont le juge mis en cause fait partie. La rigueur de ces conditions s'explique par le souci de responsabilité de la partie récusante et la sécurité des droits de juges éventuellement lésés. Par conséquent,toute demande de récusation introduite après ce moment, bien qu'étant fondée sera rejetée[97]

Ici le législateur n'a pas prévu l'hypothèse où la cause de récusation serait née ou découverte après l'engagement des débats au fond. Il a par là privilégié la célérité de la procédure au détriment d'une justice de qualité, c'est-à-dire assortie d'une décision impartiale.

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[96] Article 101 du CPCCA, *précité.*

[97] Article 173 du COFCJ, *précité*

I.1.2.3. Inopportunité des voies de recours relative à la récusation

Les décisions de récusation sont susceptibles d'appel, les recours sont apparemment portés devant la juridiction immédiatement supérieure. Si le siège rejette la récusation, il ordonne qu'il soit passé aux débats, nonobstant appel. L'appel de la décision sur la récusation doit être interjeté en même temps que la décision au fond (article 175 du COFCJ, articles 104 et 379 alinéa 3 du CPCCA). [98]

Il nous paraît étonnant que la juridiction passe aux débats alors que l'une des parties a interjeté appel contre la décision de récusation. Ici le justiciable est privé du double degré de juridiction.[99] Un autre problème se pose au niveau du sort des actes du juge dont la récusation a été admise par la juridiction supérieure et que ce dernier est appelé à se déporter.

I.2. Problèmes du déport et de renvoi pour cause de suspicion légitime en droit rwandais

Analysons successivement les limites du déport comme garantie d'impartialité avant de parler de l'interdiction du renvoi pour cause de suspicion légitime en droit rwandais.

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[98] Article 175 du COFCJ, articles 1045 à 379 al.3 du CPCCA, *précité.*

[99] TB Kacyiru, 28/09/2009, Jugement n°RP0117/09/TB/KCY, en cause l'Organe de poursuite c/ Mutsindashyaka T. et consorts, non publié.

I.2.1.Limites de la récusation personnelle comme garantie de l'impartialité

Les causes du déport sont prévues à l'article 172 du Code d'OFCJ et l'article 98 du CPCCA. Ces articles prévoient que le juge se trouvant dans une des hypothèses prévues à ces articles est tenu de se déporter, pour les autres cas, le siège appréciera discrétionnairement.[100] L'insuffisance des causes de récusation évoquée plus haut est la même que pour le déport. On déplore aussi l'absence des sanctions pour un juge qui ne se serait pas déporté alors qu'il existait une cause de récusation en sa personne et des sanctions des actes accomplis par ce dernier.

I.2.2.L'interdiction du renvoi pour cause de suspicion légitime en droit rwandais

Le renvoi pour cause de suspicion légitime constitue la garantie de l'impartialité du juge, mais l'article 176 du Code d'OFCJ interdit à la partie de récuser, pour quelque motif que ce soit, toute la juridiction. [101]

Si l'exigence d'impartialité donne lieu à des dispositions spéciales qui s'appliquent lorsqu'il existe des raisons de suspecter l'objectivité d'un ou de plusieurs juges, nous pensons que cette interdiction constitue un frein non négligeable au justiciable d'être jugé par un tribunal impartial dans le cas où tous les juges se trouveraient dans les conditions de récusation.

De par les imperfections que nous avons évoquées dans les développements supra, il sied de proposer dans le chapitre suivant, des mécanismes en vue d'améliorer les garanties de l'impartialité du juge en droit rwandais.

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[100] Articles 171,172 du COFCJ et 98 du CPCCSA, *précité*.
[101] Art. 176 de la Loi Organique n°51/2008 du 09/09/2008 portant COFCJ, *précité*.

II. PROPOSITION DES MECANISMES EN VUE D'AMELIORER LES GARANTIES DE L'IMPARTIALITE DU JUGE EN DROIT RWANDAIS

Le législateur ne peut pas tout prévoir, nous jugeons donc utile et important de proposer des solutions pour palier aux imperfections qui constituent des limites à l'application du principe d'impartialité du juge.

II.1. Solutions proposées pour palier aux limites de conditions de fond et de forme

L'œuvre humaine n'est jamais parfaite, parmi les causes de récusation prévues par la loi, le législateur a omis par exemple de prévoir l'hypothèse du juge appelé à trancher une affaire similaire à un cas dont il a été lui-même victime par le passé. De même, il semble avoir négligé l'aspect où il existerait des liens d'amitié ou inimitié entre l'avocat d'une partie au procès et le juge appelé à trancher l'affaire. Enfin, la loi n'a pas prévu notamment le cas d'un juge statuant sur une affaire concernant une partie alors que les parents de celle-ci avaient offert dans le passé, aux parents du juge une vache[102]

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[102] S. GUINCHARD, *Méga Nouveau Code de procédure civile*, 2ème éd. Paris, Dalloz, 1998, n° 1123, p. 413 ; A.VITU, La « récusation en matière pénale », *Mélanges dédiées à Jean Vincent*, Paris, Cujas, 1981, p. 427 ; D. ROETS, *Impartialité et justice pénale*, Paris, éd. Cujas, 1997, p. 1999 ; F. KUTY, *L'impartialité du juge en procédure pénale*, Bruxelles, Larcier, 2005, pp. 177-178.

Les recherches que nous avons menées ont révélé que les causes de récusation prévues ne sont pas suffisantes pour garantir l'impartialité du juge. C'est dans ce cadre que nous proposons l'élargissement des causes de récusation.

II.1.1. Elargissement des causes de récusation

La récusation est l'un des techniques que le législateur a prévu pour pallier à des situations où le juge est appelé à trancher un litige dont l'une des parties entretient des liens particuliers avec lui. La bonne compréhension et le respect des principes de l'indépendance et d'impartialité du juge font partie des fondements de tout Etat démocratique aussi bien dans les pays développés que dans ceux en voie de développement. Il ne fait aucun doute que l'application de ce principe pourrait apporter une contribution précieuse au développement national et à la consolidation de l'Etat de droit surtout dans les pays en phase de démocratisation comme le Rwanda.

Le juge est un membre de la société, il entretient des liens de différentes natures avec d'autres membres de la communauté dont il est parfois appelé à juger. Ainsi, la récusation constitue un incident qui intervient au cours d'un litige et à l'occasion duquel il est allégué qu'il existe des doutes quant à l'aptitude du juge à statuer de manière objective et impartiale sur le litige dont il est saisi. [103]

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[103] S. GUINCHARD, *Méga Nouveau Code de procédure civile*, 2ème éd. Paris, Dalloz, 1998, n° 1123, p. 413 ; A.VITU, La « récusation en matière pénale », *Mélanges dédiées à Jean Vincent*, Paris, Cujas, 1981, p. 427 ; D. ROETS, *Impartialité et justice pénale*, Paris, éd. Cujas, 1997, p. 1999 ; F. KUTY, *L'impartialité du juge en procédure pénale*, Bruxelles, Larcier, 2005, pp. 177-178.

C'est donc un droit que la loi accorde aux parties de demander qu'un ou plusieurs juges nommément désigné(s) dont elles mettent en cause l'impartialité ne connaisse(nt) pas du procès qui lui (leur) est régulièrement déféré et soi(ent) remplacé(s) par un ou d'autres juge(s).[104]

Le législateur a prévu la technique de récusation pour palier à des situations où le juge est appelé à trancher un litige dont l'une des parties entretient des liens particuliers avec lui, mais la loi ne peut pas prévoir toutes les hypothèses possibles du défaut d'impartialité. C'est dans ce cas que la jurisprudence nous donne un exemple concret dans l'affaire RCA373/07/TGI/RVU. [105] La partie récusante a formulé une demande de récusation contre un juge pour des motifs qu'il existe une grande amitié entre les parents de ce juge et son adversaire. La preuve de cette amitié était que ces derniers s'étaient offert des vaches.

Le Président de cette juridiction, se basant sur le contenu de l'article 171 du COFCJ et 97 du CPCCSA [106] a rejeté la demande de récusation parce que les motifs n'étant pas prévus par la loi, il a ordonné la poursuite des débats avec le même juge.

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[104] T. KAVUNDJA N. MANENO, *L'indépendance et l'impartialité du juge en droit composé belge, français et de l'Afrique francophone*, Thèse de doctorat en droit, Faculté de Droit, U.C.L., Louvain-la-Neuve, 25 juin 2005, pp. 532-533.

[105] TGI Rubavu, 04/05/2010, Jugement précité.

[106] Article 171 du COFCJ et article 97 du CPCCA, *précité*.

Nous pensons que cette demande de récusation était fondée, en considérant le rôle que joue la vache dans la société rwandaise. Cette amitié des parents du juge et l'une des parties ne peut pas permettre au juge de connaître l'affaire sans prendre parti. C'est ainsi que pour palier à de telle situation, il conviendrait d'introduire une autre cause de récusation qui regrouperait différentes hypothèses de récusation non énumérées à l'article 171 du COFCJ.

Nous pensons que l'on devrait prévoir comme cause de récusation *lorsqu'il existe dans le chef du juge l'ensemble des circonstances qui montrent qu'il ne présente pas les garanties d'impartialité*. Cela donnerait plusieurs possibilités aux justiciables de montrer une éventuelle partialité du juge d'autant plus que la loi ne peut pas prévoir toutes les hypothèses possibles du défaut d'impartialité. Il appartiendra ainsi à la Cour Suprême de fixer son contenu.

Et d'ailleurs, cette hypothèse est prévue en ce qui concerne la récusation de l'arbitre car la loi prévoit qu'il peut être récusé que « *s'il existe des circonstances de nature à justifier des doutes d'impartialité ou de son indépendance, ou s'il ne possède pas les qualifications convenues par les parties* » (article 14 alinéa 2 de la loi n° 005/2008 du 14/02/2008 relative à l'arbitrage et à la conciliation en matière commerciale) [107]

[107] Article 14 al.2 de la loi n° 005/2008 du 14/02/2008 relative à l'arbitrage et à la conciliation en matière commerciale in *J.O.R.R.*, n° spécial du 06 mars 2008, p.24.

II.1.2. Réforme au niveau de la procédure de récusation

Les problèmes relevés au niveau de la procédure de récusation tiennent aux exigences d'ordre procédural et aux problèmes de l'information.

II.1.2.1. Solutions proposées aux problèmes liés à la juridiction compétente

Aux termes des articles 101 et 102 du CPCCSA, la récusation relève de la juridiction à laquelle appartient le juge récusé.[108] Nous pensons que le fait de permettre à la juridiction à laquelle appartient le juge récusé de connaître la procédure de récusation ne facilite pas l'impartialité de cette juridiction.

En effet, ce juge récusé fréquente ses collègues de juridiction chaque jour, il partage avec certains peut-être le même bureau, il échange comme il en est dans la pratique, les différents points de vue sur certains dossiers judiciaires ; dans ces conditions, la juridiction à laquelle appartient le juge récusé ne présenterait pas des garanties d'impartialité. Cela devient encore plus manifeste lorsqu'une juridiction doit se prononcer sur la récusation de son président de juridiction ou le chef du ressort.

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[108] Articles 101 et 102 du CPCCA, *précité*.

Cela nous ramène dans l'affaire RP00117/09/TB/KCY.[109] La demande de récusation de ce cas précis formulée par un justiciable était dirigée contre la Présidente de cette juridiction. C'est-à-dire que d'autres juges de la même juridiction devaient examiner la demande et se prononcer si la récusation était fondée ou non et ils devaient prendre une décision.

Nous pensons que cette juridiction ne se prononcerait pas en toute impartialité dans l'affaire en raison de l'autorité hiérarchique de ce juge sur les juges de sa juridiction ou de son ressort. C'est pourquoi, nous pensons qu'à tout le moins la récusation devrait être à la compétence de la juridiction immédiatement supérieure.

II.1.2.2. Solutions proposées aux problèmes liés à l'avancement de l'exception de récusation

L'article 173 du Code d'OFCJ dispose que le demandeur de récusation devra le faire, sous peine d'irrecevabilité, à l'audience avant la clôture des débats par une declaration motivée et actée au greffe de la juridiction dont le juge mis en cause fait partie. La rigueur de ces conditions s'explique par le souci de responsabilité de la partie récusante et la sécurité des droits de juges éventuellement lésés. Par conséquent, toute demande de récusation introduite après ce moment, bien qu'étant fondée sera rejetée [110]

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[109] TB Kacyiru, 28/09/2009, Jugement précité.
[110] Article 173 du COFCJ, *précité*.

En effet, récuser un juge est une sorte de remise en cause de son serment.[111] En cas d'échec, c'est-à-dire si la demande de récusation est rejetée, fondée ou non, l'auteur de la demande de récusation se trouve face au juge dont il a demandé en vain l'exclusion.

Dès lors, il naît une sorte de *rancune* ou de v*engeance* de la part du juge récusé. Qu'il ait été suspecté à tort ou à raison, il épousera plus ou moins consciemment du ressentiment. Cette réaction humaine et prévisible, conduit naturellement à l'émergence d'un préjugé défavorable.[112] Ainsi, de garantie d'impartialité, la procédure de récusation se transforme, en cas de rejet de la demande, en quasi garantie de la partialité[113].

Nous pensons que le risque d'effets pervers liés aux problèmes ci-haut évoqués, peut être minimisé si le législateur offre au justiciable la possibilité d'introduire la demande de récusation dès que la partie intéressée découvre les causes de récusation en cours d'instance, ou le moment où elle en prend connaissance.
En France par exemple, l'art.669 alinéa 4 du NCPCF prévoit cette hypothèse : *Si les causes de récusation naissent en cours d'instance, la demande de récusation doit être effectuée à ce moment ou tout au moins au moment où la partie intéressée en prend connaissance...*[114]

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[111] Article 61 de la Constitution de la République du Rwanda du 4/6/2003 telle que révisée jusqu'à ce jour ; Article 19 de la loi n°6 bis/2004 du 14/4/2004 portant statut des juges et des agents de l'ordre judiciaire in *J.O.R.R.*du 01/05/2004.

[112] D.ROETS, *op.cit.*, p. 214.

[113] *Ibidem.*

[114] Article 669 de la loi n°75-1278 du 30 septembre 1975 portant Nouveau Code de Procédure Civile Français, in *J.O.* du 12 juillet 1975.

Aussi, l'art. 833 du Code de procédure belge stipule : *celui qui veut récuser doit le faire avant le commencement de la plaidoirie, à moins que les causes de récusation ne soient survenues postérieurement et, si la cause est introduite par requête, avant que la requête ait été appointée* [115].

II.1.2.3. Solutions proposées aux problèmes de voies de recours

Les décisions de récusation sont susceptibles d'appel, les recours sont apparemment portés devant la juridiction immédiatement supérieure. Si le siège rejette la récusation, il ordonne qu'il soit passé aux débats, nonobstant appel. L'appel de la décision sur la récusation doit être interjeté en même temps que la décision au fond (article 175 du COFCJ, articles 104 et 379 alinéa 3 du CPCCA).[116] Ici le justiciable est privé du double degré de juridiction puisque la juridiction passe aux débats alors que l'une des parties a interjeté appel contre la décision de récusation.

Il y a lieu de noter que l'on devrait attendre que la juridiction d'appel sur la récusation puisse se prononcer sur la récusation avant de continuer les débats car la récusation est un incident de procédure qui met en cause l'impartialité du juge d'une juridiction.

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[115] Article 833 de la loi n° 72-1137 portant code de procédure belge, 16/05/1972.
[116] Article 175 du COFCJ ; Articles 1045 à 379 al.3 du CPCCA, *précité*.

Cet incident suspend en principe le déroulement normal du procès jusqu'à ce que la récusation soit complètement tranchée par la juridiction d'appel. Si la récusation est rejetée, c'est à l'issue de la décision d'appel que les débats devraient reprendre devant le même juge du fond.

Se référant à la jurisprudence dans l'affaire n° RP 0117/09/TB/KCY qui a fait l'objet d'appel auprès du TGI Gasabo[117], si le justiciable avait fait un recours sur le rejet de la récusation et que par après la juridiction d'appel déclare la récusation admise, quel serait alors le sort des actes posés par ce juge ?

Nous pensons qu'il ne serait pas indiqué que l'appel de la décision sur la récusation puisse être interjeté en même temps que la décision au fond étant donné que les débats au fond n'avaient pas encore été épuisés (par un jugement) au premier degré car cela risque de priver le demandeur de récusation du bénéfice du double degré de juridiction. L'on devrait donc dissocier nettement la récusation (qui est incident de procédure) avec le dossier du fond.

Cette solution permettrait au justiciable, non seulement de jouir de son droit au double degré de juridiction, mais aussi d'éviter qu'il soit victime des actes accomplis par le juge dont la récusation serait plus tard reconnue fondée.

II.1.2.4. Solutions proposées aux problèmes liés à l'information

Les décisions de récusation sont rares dans les greffes de nos tribunaux et de la Cour Suprême. Cela peut avoir plusieurs explications. Mais, nous pensons que la principale est l'information des justiciables sur la possibilité de pouvoir récuser un juge dont on suspecte la partialité. En effet, la majorité des justiciables trouvent inadmissible pour un citoyen ordinaire de demander à ne pas être jugé par un juge.

Le manque d'information des justiciables sur la possibilité de pouvoir récuser un juge, dont on suspecte la partialité, nous a fait pensé que c'est pour cette raison, que les décisions de récusation soient rares dans les greffes de nos tribunaux. En effet, il est très difficile pour un citoyen ordinaire de demander à ne pas être jugé par un juge. Cette attitude est tributaire de la crainte que les citoyens ont envers les autorités publiques en général et les hommes de justice en particulier.

Contrairement au principe : « *nul n'est sensé ignoré la loi* », l'on peut néanmoins leur accorder le crédit de l'ignorance de la loi, car non seulement le langage du droit n'est réservé qu'à une catégorie d'initiés mais en plus, tout le monde n'a pas accès aux textes de loi malgré la vulgarisation du Code d'OFCJ et CPCCSA.[118]

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[118] Article 171 du COFCJ et article 48 du CPCCSA, *précité*.

Nous pensons qu'il serait juste d'informer les justiciables sur les droits que la loi leurs accorde en cas de doute sur l'impartialité du juge avant l'ouverture des débats.

II.1.3. Solutions proposées pour palier aux limites de la récusation personnelle

Le déport se définit comme le fait pour le juge, avant même d'être récusé, de s'abstenir dans une affaire pour motif de conscience, ou parce qu'il suppose en sa personne une cause d'incompatibilité ou de récusation. [119]

Le juge doit se récuser de toute affaire ayant un lien avec ses intérêts personnels, ceux de ses parents, de ses frères et amis, et chaque fois qu'il est évident ou qu'il existe des motifs de douter de son impartialité selon l'article 11 de la loi n° 09/2004 du 27 avril 2004 portant Code d'éthique judiciaire telle que modifiée et complétée par la loi n°09/2006 du 02/03/2006. Cette obligation vise à conserver intacte la dignité de la justice toujours peu compromise par l'intervention d'un juge récusable lors même qu'aucune des parties ne l'a récusé.[120]

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[119] G. DE LEVAL, *Institutions judiciaires*, Liège, 2e éd., Ed. Collection Scientifique de la Faculté de Droit de Liège, 1993, n° 205.

[120] Article 11 de la loi n°09/2004 portant Code d'éthique judiciaire, *précité*.

Personne ne sait mieux que lui s'il est plus disposé en faveur d'une des parties qu'envers les autres, s'il n'a pas conservé contre l'une d'elles quelque ancien ressentiment. Le déport relève de l'appréciation souveraine du juge. En effet, l'obligation du déport relève du pouvoir discrétionnaire du juge. Et ne dépend que de sa conscience et de son sentiment de délicatesse. La décision de se déporter appartient à chaque juge individuellement, le juge ne devant soumettre ses raisons ni à son résident, ni à la chambre à laquelle il appartient et, moins encore aux parties. Il s'agit d'une décision sur les motifs de laquelle le juge n'est nullement tenu de se justifier.

Les causes du déport sont prévues à l'article 172 du Code d'OFCJ et l'article 98 du Code de procédure civile, commerciale, sociale et administrative telle que modifiée et complétée par la loi n°09/2006 du 02/03/2006.[122] Ces articles prévoient que le juge se trouvant dans une des hypothèses prévues à l'article 171 du Code d'OFCJ et l'article 97 du Code de procédure civile, commerciale, sociale et administrative telle que modifiée et complétée par la loi n°09/2006 du 02/03/2006 est tenu de se déporter, pour les autres cas, le siège appréciera discrétionnairement. Or, l'article 171 du Code d'OFCJ et l'article 97 du CPCCSA énumèrent les causes de récusation. Autrement dit, les causes du déport sont les mêmes que les causes de récusation.[123]

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[122] Article 172 du COFCJ et article 98 du CPCCSA, *précité.*

[123] Article 172 du CIFCH et article 98 du CPCCSA, précité.

Dans ces circonstances, les imperfections relevés et les solutions proposées pour palier aux limites de récusation sont les mêmes que pour le déport. La Seule différence, c'est que pour le déport, il est prévu que le juge qui estime de par sa conscience qu'il n'est plus en mesure de juger l'affaire en toute impartialité doit se déporter [124]

La jurisprudence dans l'affaire n°RCA373/07/TGI/RVU[125] nous a fait penser que le juge qui ne s'est pas abstenu alors qu'il existait une cause de récusation en sa personne devrait répondre à son action de violation de ses devoirs professionnels ainsi que les actes accomplis par ce dernier devraient être remis en cause.[126]

II.2. SOLUTIONS PROPOSEES POUR PALIER AUX LIMITES DE RENVOI POUR CAUSE DE SUSPICION LEGITIME

Le renvoi pour cause de suspicion légitime est le moyen par lequel une partie suspecte la partialité de tous les juges d'une juridiction, s'adresse à une juridiction supérieure pour que sa cause puisse être renvoyée, connue, tranchée, par une autre juridiction que celle suspectée.

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[124] Article 172 du COFCJ, *précité*.
[125] TGI Rubavu, 04/05/2010, Jugement précité.
[126] L.CADIET et E.JEULAND, *Droit judiciaire privé*, 5ème éd. Lexis-Nexis, Litec SA, 2006, p.427.

Il s'agit donc d'une mesure collective en ce sens que lorsque la demande aboutit, l'affaire est retirée à une juridiction dans son ensemble parce que l'une des parties a des raisons légitimes de craindre que cette juridiction ne traitera pas sa cause avec l'impartialité et l'objectivité nécessaires.[127]

II.2.1. Bien fondé du renvoi pour cause de suspicion légitime en droit rwandais

Le renvoi pour cause de suspicion légitime constitue une garantie préventive de l'impartialité du juge en ce sens qu'il intervient avant que la partialité de la décision à venir ne soit consommée. Il peut en effet s'indiquer de confier à une autre juridiction la compétence de connaître d'un dossier afin d'éviter toute interférence d'éléments étrangers à celui-ci, lors de l'élaboration de l'intime conviction des juges.[128]

La suspicion légitime s'attache donc à l'impartialité de la juridiction saisie, la légitimité de cette suspicion devant être fondée sur des motifs sérieux et consistants. Cette procédure se distingue, nous l'avons déjà souligné précédemment, de la récusation par le fait que celle-ci ne concerne qu'un seul juge alors que la suspicion légitime concerne le tribunal tout entier.[129] Mais, cette procédure n'est pas prévue en droit rwandais puisque l'article 176 du COFCJ interdit à la partie de récuser, pour quelque motif que ce soit, toute la juridiction.[130]

[128] E. JEULAND, *op.cit.*, p.998.
[129] M. FRANCHIMONT, A. JACOBS, et A. MASSET, *Manuel de procédure pénale*, Liège, éd. Collection scientifique, 1989, p. 996.
[130] Article 176 de la Loi Organique n°51/2008 du 09/09/2008 portant COFCJ, *précité*.

L'exigence d'impartialité donne lieu à des dispositions spéciales qui s'appliquent lorsqu'il existe des raisons de suspecter au cours d'une instance donnée l'objectivité d'un ou de plusieurs juges. Ainsi, la préservation de la paix sociale passe entre autres par le règlement des différends devant une justice qui garantit à tous les citoyens un procès équitable, qui est l'une des garanties fondamentales du respect des droits de l'homme.

Nous pensons que cette lacune en droit rwandais constitue un véritable frein considérable à l'objectivité des procès, et constitue au justiciable un frein non négligeable d'être jugé par un tribunal impartial dans le cas où tous les juges désignés par la juridiction se trouveraient dans les conditions de récusation.

II.2.2. Nécessité de réintroduction de renvoi pour cause de suspicion légitime en droit rwandais

La suspicion n'est pas dirigée contre un seul juge, comme en matière de récusation, mais contre une formation collégiale dans son ensemble, pour des affaires dont il est effectivement saisi. Comme en matière de récusation, le droit à un tribunal impartial peut donc désormais fonder une demande de renvoi pour cause de suspicion légitime, au-delà des seuls cas prévus par la loi.[131]

[131] L.CADIET et E.JEULAND, *op.cit.*, p.428.

La justice impartiale permet non seulement l'instauration d'un pacte de confiance entre les citoyens et la justice institutionnelle, mais également œuvre à l'implantation de la crédibilité et du respect des pouvoirs publics. En général, dans une société, la justice est l'un des moyens, si non, celui par excellence permettant à l'Etat d'asseoir sa légitimité.

Il convient de noter que dans un pays comme le Rwanda désormais résolu à bâtir un Etat de droit, déterminé à éradiquer à jamais la culture de l'impunité, la mise en place des mécanismes pour garantir l'impartialité du juge doit être indispensable pour protéger et garantir les libertés et les droits des citoyens.

Par exemple en France, les causes de suspicion légitime sont les mêmes que celles de la récusation.[132] Lorsque ces causes ne sont pas déterminées, l'hypothèse qui conduit généralement au dessaisissement pour cause de suspicion légitime quant à l'aptitude à juger de manière objective et impartiale résulte des sentiments favorables ou défavorables qui pourraient animer un tribunal chargé de connaître d'une affaire lorsque la personnalité des parties en cause est particulière en raison de liens professionnels ou de lieux de famille ou de toutes autres considérations. Aussi, les motifs invoquées doivent être précis, sérieux et de haute gravité.[133]

[132] Article 356 de la loi n°75-1278 du 30 septembre 1975 portant Nouveau Code de Procédure Civile Français, in *J.O.* du 12 juillet 1975.
[133] L.CADIET et E.JEULAND, *op.cit.*, p.428.

Pour répondre à cette tâche qui revient à l'Etat, nous pensons qu'il serait indispensable de réintroduire le renvoi pour cause de suspicion légitime en droit rwandais, la légitimité de cette suspicion devant être fondée sur des motifs sérieux et consistants.
Le législateur rwandais pourrait envisager la récusation contre plusieurs juges au régime du renvoi pour cause de suspicion légitime, de même que le renvoi n'aurait pas été demandé, il peut également résulter de l'abstention simultanée de plusieurs juges.

II.3. INTRODUCTION DES SANCTIONS

Pour éviter l'encombrement des juridictions par beaucoup de dossiers qui résulteraient de l'élargissement des causes de récusation, nous proposons que soit introduit, en droit rwandais, des sanctions applicables pour les récusations fantaisistes et vexatoires à l'encontre du juge, qui seraient une brèche ouverte aux *« spécialistes»* des manœuvres dilatoires qui ne veulent que retarder la justice, ainsi que les sanctions contre les actes établis par le juge dont la récusation a été admise.

La récusation d'un juge est un acte grave qui ne peut être entrepris que si sa légitimité en apparaît clairement et notoirement. Tel n'est pas le cas des déclarations d'un plaideur qui procède plutôt de l'imprudence, de légèreté et de l'imprécision. .

Il en est de même du demandeur qui ne présente pas devant le tribunal un quelconque avis donné dans l'affaire par le juge récusé ou lorsque le mandataire qui a formulé la récusation ne justifie pas d'une procuration spéciale pour agir en lieu et place du récusant

II.3.1. Sanctions d'un récusant lorsque la récusation a été rejetée

Au Rwanda, les décisions de récusation que nous avons obtenues ont abouti à un rejet pour diverses raisons. Les demandes de récusation rejetées avaient pour motifs d'amitié ou l'inimitié entre le juge et l'une des parties, mais aucune preuve à l'appui de ces allégations n'avait été donnée.

Nous pensons que les motifs de ces demandes relèvent de l'imagination de ceux qui voudraient inutilement salir l'image des juges par des demandes de récusation dilatoires et vexatoires susceptibles de retarder l'issue du procès.

Pour des récusations non fondées, le droit rwandais devrait prévoir des sanctions applicables à l'égard du récusant lorsque la récusation a été rejetée alors qu'elle a été faite à la légère ou a porté atteinte à l'honneur du juge ou tout simplement dans le but de retarder le procès. Nous pensons que lorsque le tribunal rejette la demande de récusation, le demandeur devrait être condamné aux dommages et intérêts en réparation de l'injuste agression dont le récusé a été victime.

La responsabilité du récusant est fondée sur la faute, la négligence ou l'imprudence, mais aussi sur le risque inhérent à la liberté d'action en justice. Pour la réparation du préjudice moral subi du chef de la récusation, il y a lieu de prendre en considération, comme éléments d'appréciation, l'atteinte à l'honneur du juge récusé et les risques auxquels la récusation l'a exposée.

En effet, la procédure de récusation est une arme à double tranchant. Elle peut se retourner contre le plaideur qui l'a mise en œuvre en cas de légèreté. Cela devrait être le cas notamment lorsque la juridiction d'appel confirme le jugement rejetant la récusation. Cette dernière juridiction devrait alors, après avoir appelé le récusant, le condamner à une amende, sans préjudices des dommages et intérêts envers le juge mis en cause.

Nous pensons qu'il serait mieux de prévoir de telles amendes afin de décourager ceux qui voudraient inutilement salir l'image des juges par des demandes de récusation dilatoires et vexatoires susceptibles de retarder l'issue du procès. Tel est le cas en France, selon l'art. 353 du Nouveau code de procédure français qui stipule : *Si la récusation est rejetée, son auteur peut être condamné à une amende civile d'un maximum de 3.000 Euros sans préjudice des dommages-intérêts qui pourraient être réclamés.*[134]

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[134] Article 353 de la loi n°75-1278 du 30 septembre 1975 portant NCPCF, précité.

II.3.2. Sanctions des actes établis par le juge dont la récusation a été admise

Le droit rwandais n'a pas prévu le sort des actes établis par le juge dont la récusation a été admise. De tels actes doivent-ils être pris en considération dans la procédure du fond ou doivent-ils être annulés. En effet, il est indéniable qu'une requête en récusation bien fondée rétablit la partie qui l'a introduite dans son droit au juge impartial tout en renforçant la foi due à l'institution judiciaire elle-même.

A cet égard, le Code rwandais de l'organisation, fonctionnement et compétence judiciaire devrait prévoir qu'en cas d'infirmation du jugement rejetant la récusation, c'est-à-dire lorsque la décision est admise après épuisement d'appel, la juridiction qui a admis la récusation devrait annuler les actes accomplis par le juge récusé, et renvoyer les parties devant le même tribunal pour y être jugées par un autre juge ou devant un tribunal voisin du même degré, sans préjudices de l'action disciplinaire.

Nous estimons que tels actes accomplis par le juge qui ne présente pas les garanties d'impartialité sont irréguliers, n'ont pas de valeur juridique et doivent être écartés des débats, lesquels sont, après récusation, repris *ab initio* par le nouveau siège.
En conséquence, tout acte posé par un juge après qu'il s'est vu notifié la requête en récusation ou après le prononcé de la décision de récusation est nul[135].

[135] T. KAVUNDJA N. MANENO, *L'indépendance et l'impartialité du juge en droit comparé belge, français et de l'Afrique francophone*, *op.cit.* 2005, p.522.

II.3.3. Sanctions du juge lorsqu'il ne s'est pas récusé

Les causes du déport sont prévues à l'article 172 du Code d'OFCJ et l'article 98 du CPCCA. Ces articles prévoient que le juge se trouvant dans une des hypothèses prévues à ces articles est tenu de se déporter, pour les autres cas, le siège appréciera discrétionnairement. [136]

Si le juge ne se déporte pas alors qu'il était dans les conditions ci -haut citées, sa responsabilité devrait être engagée.[137] En effet, si l'indépendance du juge requiert une certaine immunité à l'égard du justiciable aussi bien que du pouvoir exécutif, ne va pas cependant jusqu'à son impunité. Le juge doit répondre de certaines fautes. A l'égard du pouvoir exécutif, cette responsabilité est mise en œuvre dans le cadre d'un régime disciplinaire spécifique.[138]

II.3.4. Sanctions des actes établis par le juge qui ne s'est pas déporté

Les sanctions proposées pour les actes du juge dont la récusation a été admise devraient être les mêmes que les sanctions des actes du juge qui ne s'est pas déporté alors qu'il était dans les conditions de récusation.

Comme nous l'avons évoqué plus haut, nous estimons que tels actes accomplis par ce juge ne présentent pas les garanties d'impartialité et par conséquent sont irréguliers et n'ont pas de valeur juridique, c'est-à-dire qu'ils devraient être remis en cause [139]

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[136] Article 172 du COFCJ et 98 du CPCCSA, *précité*.
[137] L.CADIET et E.JEULAND, *op.cit.* p.50.
[138] L.CADIET et E.JEULAND, *op.cit.* p.50.
[139] *Idem*, p.427.

CONCLUSION GENERALE

La préservation de la paix sociale passe entre autres par le règlement des différends devant une justice qui garantit à tous les citoyens un procès équitable, qui est l'une des garanties fondamentales du respect des droits de l'homme.

Le juge, en tant que régulateur de la vie en société peut provoquer, s'il est partial, la généralisation de la justice privée ou populaire synonyme de l'insécurité. Ainsi, une justice impartiale permet non seulement l'instauration d'un pacte de confiance entre les citoyens et la justice institutionnelle, mais également œuvre à l'implantation de la crédibilité et du respect des pouvoirs publics. En général, dans une société, la justice est l'un des moyens, si non, celui par excellence permettant à l'Etat d'asseoir sa légitimité.

Dans un pays comme le Rwanda désormais résolu à bâtir un Etat de droit, et déterminé à éradiquer à jamais la culture de l'impunité, le rôle du juge doit être indispensable pour protéger et garantir les libertés et les droits des citoyens qui, depuis longtemps avaient toujours été violés. Pour rendre justice, le juge doit être impartial.

Les cas jurisprudentiels ont été analysés pour nous rendre compte de l'application du principe d'impartialité dans les juridictions rwandaises. Les résultats que nous avons obtenus ont révélé que les mécanismes tels que prévus en droit rwandais contiennent des imperfections qui constituent des limites à l'effectivité et l'efficacité de ce principe.

La procédure de récusation qui est un recours particulier accordé au justiciable, contre tout juge qui manquerait ou risquerait de manquer à l'impartialité, n'est pas à l'abri de l'échec dans sa vocation de garantie d'impartialité du juge. Les jugements de récusation que nous avons obtenus ont abouti à un rejet, pour diverses raisons, soit elles ne sont pas fondées, soit sont liées aux conditions de fond ou aux conditions de forme, ce qui permet d'affirmer que ce recours spécial accordé au justiciable, contient des imperfections qui sont autant de limites qui empêchent à la récusation de jouer pleinement son rôle de sauvegarde de l'impartialité.

Le législateur a omis par exemple de prévoir l'hypothèse du juge appelé à trancher une affaire similaire à un cas dont il a été lui-même victime par le passé. De même, il semble avoir négligé l'aspect où il existerait des liens d'amitié ou inimitié entre l'avocat d'une partie au procès et le juge appelé à trancher l'affaire. Enfin, la loi n'a pas prévu notamment le cas d'un juge statuant sur une affaire concernant une partie alors que les parents de celle-ci avaient offert dans le passé, aux parents du juge une vache.

La procédure du déport qui est aussi un mécanisme de garantie de l'impartialité du juge et il est prévu en droit rwandais. Les causes du déport étant les mêmes que les causes de récusation, les imperfections relevées sont aussi les mêmes que pour la procédure de déport.

Quant à la procédure de renvoi pour cause de suspicion légitime, celle-ci n'est pas prévue en droit rwandais, puisque l'article 176 du COFCJ interdit à la partie de récuser, pour quelque motif que ce soit, toute la juridiction. Cette lacune constitue un véritable frein considérable à l'objectivité de cette garantie, et constitue au justiciable une limite non négligeable d'être jugé par un tribunal impartial dans le cas où tous les juges désignés par la juridiction se trouveraient dans les conditions de récusation.

Par ailleurs, les imperfections relevées au cours de notre analyse, nous avons proposé des mécanismes pour améliorer les garanties de l'impartialité du juge en droit rwandais.

Comme le législateur ne peut pas tout prévoir, nous avons suggéré ce qui suit :

- Elargir les causes de récusation en introduisant une autre cause qui regrouperait différentes hypothèses de récusation non énumérées à l'article 171 du COFCJ ainsi qu'à l'article 97 du CPCCSA telle que modifiée et complétée par la loi n°09/2006 du 02/03/2006. Il s'agirait d'introduire un point 9 à ces deux articles

qui pourrait être libellé ainsi: *lorsqu'il existe dans le chef du juge l'ensemble des circonstances qui montrent qu'il ne présente pas les garanties d'impartialité.* Cette formulation a l'avantage de regrouper les hypothèses non prévues par les dispositions légales rwandaises. Cette solution serait la même pour le déport ;

- Une réforme s'avère nécessaire au niveau de la procédure de récusation quant à la juridiction compétente, l'introduction de la demande et les voies de recours ;
- Que les justiciables soient informés sur la possibilité de pouvoir récuser un juge dont on suspecte la partialité ;
- Que le renvoi pour cause de suspicion légitime soit réintroduit en droit rwandais ;
- Qu'il soit introduit en droit rwandais des sanctions d'un récusant lorsque la récusation a été rejetée ; des sanctions des actes du juge dont la récusation a été admise, des sanctions du juge qui ne s'est pas déporté alors qu'il est dans les conditions de récusation ainsi que les sanctions des actes accomplis par ce dernier.

Comme il a été remarqué qu'un juge impartial rend la justice équitable, cette justice équitable est profitable à tout le monde. L'impartialité du juge doit d'abord résider dans le caractère personnel du juge, et ensuite dans les lois qui viendront la renfoncer et la consolider. Nous pensons que du côté du juge et de celui du législateur, tous doivent contribuer à garantir au justiciable rwandais d'une justice impartiale et ainsi préserver la paix sociale.

BIBLIOGRAPHIE

I. TEXTES NORMATIFS

I.1. TEXTES DE DROIT RWANDAIS

Constitution de la République du Rwanda du 4/6/2003 telle que révisée jusqu'à ce jour in *J.O.R.R.* n° spécial du 4/6/2003.

Loi Organique n° 51/2008 du 09/09/2008 portant Code d'Organisation, Fonctionnement et Compétence Judiciaire, telle que modifiée jusqu'à nos jours in *J.O.R.R.* n°spécial du 10 septembre 2008.

Loi Organique n° 51/2008 du 09/09/2008 portant Code d'Organisation, Fonctionnement et Compétence Judiciaire, in *J.O.R.R.* n°spécial du 10 septembre 2008.

Loi n° 005/2008 du 14/02/2008 relative à l'arbitrage et à la conciliation en matière commerciale in *J.O.R.R.*, n° spécial du 06 mars 2008.

Loi n° 18/2004 du 20/6/2004 portant Code de Procédure Civile, Commerciale, Sociale et Administrative in *J.O.R.R* n° spécial bis du 30/07/2004 telle que modifiée et complétée jusqu'à nos jours.

Loi n°6 bis/2004 du 14/4/2004 modifiée et complétée par la loi n° 40/2007 du 5/9/2007 portant statut des juges et des agents de l'ordre judiciaire in *J.O.R.R.* n°spécial du 17/12/2007.

I.2.TEXTES DE DROIT ETRANGER

Loi n°75-1278 du 30 septembre 1975 portant Nouveau Code de Procédure Civile Français, in *J.O.* du 12 juillet 1975.

Loi n° 72-1137 portant code de procédure belge, 16/05/1972.

II. JURISPRUDENCE

TB Kacyiru, 28/09/2009, Jugement n°RP0117/09/TB/KCY, en cause l'Organe de poursuite c / Mutsindashyaka T. et consorts, non publié.

TGI Rubavu, 04/05/2010, Jugement n°RCA373/07/TGI/RV, en cause Ndaza Vs Mboneza, non publié.

III.OUVRAGES

CADIET L. et JEULAND, E., *Droit judiciaire privé*, 5ème éd. Lexis-Nexis, Litec SA, 2006.

CANIVET, G., *La déontologie des magistrats*, Paris, Dalloz, 2004.

DE LEVAL, G., *Institutions judiciaires*, 2e éd., Ed. Collection Scientifique de la Faculté de Droit de Liège, Liège, 1993.

FRANCHIMONT, M., JACOBS, A. et MASSET, A., *Manuel de procédure pénale*, Ed. Collection scientifique, Liège, 1989.

GUINCHARD, S., *Méga Nouveau Code de procédure civile*, 2ème éd. Paris, Dalloz, 1998.

JOSSERAND, S., *L'impartialité du magistrat en procédure pénale*, Paris, L.G.D.J., 1998.

KUTY, F., *L'impartialité du juge en procédure pénale*, Bruxelles, Larcier, 2005.

LENOBLE, L., *La crise du juge*, Paris, Bruylant, 1996.

ROETS, D., *Impartialité et justice pénale*, Paris, éd. Cujas, 1997.

VINCENT J., *et al.*, *Institutions Judicaires : Organisation, Juridiction, Gens de Justice*, 5e éd. Paris, Dalloz, 1999.

IV. ARTICLES DES REVUES

VITU, A., La « récusation en matière pénale », *Mélanges dédiées à Jean Vincent*, Paris, Cujas, 1981.

DE RIEMAECKER X. et LONDERS, G., « Déontologie et discipline », in *Statut et déontologie du magistrat*, Bruxelles, éd. La Charte, 2000.

V. THESES

KAVUNDJA N. MANENO, T., *L'indépendance et l'impartialité du juge en droit comparé belge, français et de l'Afrique francophone*, Thèse de doctorat en droit, Faculté de Droit, U.C.L., Louvain-la-Neuve, 25 Juin 2005.

THE ACCUSATORIAL AND INQUISITORIAL MODELS OF CRIMINAL PROCEDURE: A HISTORICAL AND COMPARATIVE APPROACH

By KAYITANA Evode (LLB, LLM)

ABSTRACT

In most legal systems around the world, the administration of criminal justice follows one of two models: the accusatorial (also called adversarial) model and the inquisitorial model. While the former is the model of the Anglo-American countries, i.e. the Common Law world, the latter can be found on the European continent, ie Civil Law countries.

This article traces the origins and developments of these systems of criminal procedure and secondly endeavors to make a comparative study with the aim of exposing both the theoretical and practical differences and similarities of the two systems.

1. Introduction

In most countries, including Rwanda, the administration of criminal justice follows one of two models: the accusatorial (also called adversarial) model and the inquisitorial model. While the former is the model of the Anglo-American countries, i.e. the Common Law world, the latter can be found on the European continent, ie Civil Law countries. As a result of colonisation, these two models of criminal procedure were also exported into Africa, Asia and South America.

It should not be overlooked, however, that, as Professor Joachim Herrmann correctly says[140], there are some important exceptions from this dichotomy. In the course of the last hundred years several Civil Law countries have reformed their justice systems by moving from the inquisitorial to the adversary model. Spain was the first country to do so in 1870 after a revolution had brought about an era of liberalism. In 1887 Norway passed a new legislation that was strongly influenced by English law. Denmark followed in 1916 and Sweden in 1946, each enacting integrated codes of criminal and civil procedure. After World War II Japan replaced its inquisitorial system which was modelled on German law by a new code that, to a great extent, followed the American system.

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[140] J Herrmann, "Various Models of Criminal Proceedings" South African Journal of Criminal Law and Criminology 2, no. 1 (1978), p. 3.

2. Early developments

Both the accusatorial and inquisitorial systems were historically preceded by the system of private vengeance in which the victim of a crime fashioned his own remedy and administered it privately, either personally or through an agent. The vengeance system was a system of self-help, the essence of which was captured in the Old Testament biblical slogan "an eye for an eye, a tooth for a tooth."[141]

The very first form of litigation in post-primitive society in Western Europe was by means of an **accusatorial process**: instead of private vengeance, there was now an open confrontation between two **equal parties**, the complainant and the accused, before an impartial arbiter, the judge or tribal council. It was broadly the procedure in ancient Greece, in Rome, (in the case of *delicta privata*)[142] and among the Germanic tribes. The procedure was **verbal and public**, and there had to be a **specific complainant. The criminal procedure was identical to the civil procedure.**[143]

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[141] U Kayitesi and Dr R Haveman, Rwandan Criminal Procedure, National University of Rwanda, Butare, 2008, p. 9.

[142] Both the old Germanic and Roman laws, as well as other ancient legal systems, drew a distinction between purely (*delicta privata*) and wrongs with which the community or its sovereign had to deal with (*delicta publica*).

[143] CR Snyman, "The accusatorial and inquisitorial approaches to criminal procedure: some points of comparison between the South African and continental systems" The Comparative and International Law Journal of Southern Africa, (1975), p. 101.

Towards the end of the middle ages the inquisitorial process gradually displaced the abovementioned procedure. This development culminated in the introduction of this procedure into the ecclesiastic courts by Pope Innocentus III towards the end of the thirteenth century, and later in the famous *Constitutio Criminalis Carolina* of Charles V in 1532.[144]

The characteristics of this new process were the following: **trials** were mostly initiated not by a private complainant, but by the **public authorities**. **The judge** was an official who, in principle, **investigated the case himself**. The accused being a passive party, and merely the object of the inquiry, he could not challenge or contradict the contents of the protocol in the case drawn up by the judge. **He had no procedural rights**. The whole procedure was conducted in **secret**. **One of the main purposes of the inquiry was to obtain confessions from the accused, even by torture, if necessary**. [145]

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[144] Idem. The ***Constitutio Criminalis Carolina*** (sometimes shortened to **Carolina**) is recognised as the first body of German criminal law (*Strafgesetzbuch*). It was also known as the *Halsgerichtsordnung* of Charles V. The Carolina was agreed in 1530 and ratified two years later. Under the terms of the *Constitutio Criminalis Carolina*, actions such as murder, manslaughter, robbery, arson, homosexuality and witchcraft were henceforth defined as severe crimes. In particular the Carolina specified that those found guilty of causing harm through witchcraft should be executed with fire. It was also the basis for the use of obtaining confessions by torture. The aim of the *Constitutio Criminalis Carolina* was to unify the legal system of the Holy Roman Empire, and thereby put an end to the penal jurisdiction which had until then varied haphazardly between the Empire's states.

The whole process basically amounted to a confrontation not between two equal parties (the accused and the complainant), but **between the accused and the judge or court**-a dual in which the weapons were obviously most unequal. **Whereas the accusatorial system was devised to safeguard the interest of the individual, the inquisitorial system set out in the first place to uphold the interests of society and the State.** [145]

3. Inquisitorial reforms

As a result of the liberal forces in German and the French revolution at the end of the eighteenth century, the use of torture was abolished, trial by jury, or by lay-judges, was introduced to counteract the power and malpractices or the official judges, and **trials were once more verbally conducted in public**. The duty of investigating the case, assembling the evidence and laying it before courts was entrusted to a separate agency, namely the **state prosecution.** [146]

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[145] CR Snyman, Op. cit, p. 102.

[146] Idem, p. 103. Through the influence of such writers as Grotius and Pufendorf, who espoused the theory of natural law, Montesquieu, Rousseau and Voltaire in France and Beccaria in Italy, emphasis was placed in the new criminal procedure on the individual and his personal rights. In 1789 the Declaration of Human Rights in France materially protected the rights of an accused to a "fair trial". Many of these ideas were incorporated for the first time in the French *Code d'Instruction Criminelle* of 1808.

4. The chief characteristics of the two systems: a comparative overview

The special qualities of the two systems of criminal procedure are best observed at the trial stage.

The trial that follows the adversary model is **party-centered**[147] in the sense that the **judge's role** at the adversary trial is **mainly passive**. He, **in theory**, has only to listen to the evidence that is presented to him and hear the arguments by the parties and render his decision accordingly. In other words, he merely adjudicates upon the matter presented in the light of the evidence placed before him by the parties. [148]

The adjudicator (judge) is an **umpire** (referee or arbiter) whose role is to ensure that the parties abide by the rules, but is passive even in that regard; he or she intervenes only if there is an objection from one side against the conduct of the other. To prepare the trial, not only the prosecution but also the defence has to collect its own evidence. The parties are also entitled to limit the issues of the contest through plea-bargaining.[149]

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[147] J. Herrmann, Op cit, p. 5.

[148] CR Snyman, Op.cit, p. 103.

[149] J Mc Ewan, Evidence and the adversarial process-the modern law,1992, p. 4.

In sharp contrast to the umpireal judge in the adversary system of criminal procedure, trials that follow the inquisitorial model are **judge-centered**.[150] The prosecution and the defence play comparatively minor roles at the trial; the procedure can be considered a **quasi-scientific search for the truth** rather than a **dispute**. The judge is in no way bound merely to consider the facts and evidence adduced by the parties, but must (in accordance with the original meaning of the term *inquisitio*-a searching after) himself see that the information and considerations necessary to decide the issue are investigated and borne out at the trial.[151]

Sometimes it is said that because of his wide powers, the judge in inquisitorial systems searches the *material* truth, whereas the judge in the accusatorial systems is merely bound by to search for the *formal* truth, because he merely relies upon the information placed before him by the parties. [152] As almost all questioning of witnesses is done by the judge the distinction between examination-in-chief and cross-examination is unknown in inquisitorial systems.[153]

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[150] J Herrmann, Op cit, p. 5.

[151] CR Snyman, Op. cit, p. 103.

[152] Ibidem.

[153] In adversary systems law, cross-examination is the interrogation of a witness called by one's opponent. It is preceded by direct examination (in England, Australia and Canada known as examination-in-chief) and may be followed by a redirect (re-examination in England, Australia, and Canada). The main purposes of cross-examination are to elicit favourable facts from the witness, or to impeach the credibility of the testifying witness to lessen the weight of unfavourable testimony. Cross-examination frequently produces critical evidence in trials, especially if a witness contradicts previous testimony.

Because the office of the public prosecutor is not a party opposing the accused, in his search for the truth the investigating officer must also investigate or consider all factors, which may exonerate the accused.[154] Both the prosecutor and judge must objectively consider and examine all evidence with a view simply of discovering the truth.

In this pursuit of truth the inquisitorial judge is as much an active party as the prosecutor and is in no way dependent upon the latter for his knowledge of the circumstances of the case. In practice however, the theory of an 'active inquisitorial judge' is nothing more than a myth. In most cases, the 'inquisitorial judge relies entirely on the facts and evidence contained in the dossier that has been compiled by the police and the prosecutor. Actually, much of the '*inquisitio*'-that is investigation-is done by the police; which is logically normal because the police learn about the crime first and are better trained than prosecutors or judges to use the technology of fact finding. In practice therefore, the 'inquisitorial judge' is not more active than his British or American counterpart.[155]

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[154] CR Snyman, Op. cit, p. 103

[155] On the theoretical and practical differences and similarities, see A. S. Goldstein and M. Marcus, 'The Myth of Judicial Supervision in Three 'Inquisitorial' Systems: France, Italy, and Germany', 87 YALE LJ 240 (1977);

5. Critique and evaluation

Whether the "continental" modern inquisitorial systems afford a better method of finding the truth than the Anglo-American adversarial systems, has been the subject of considerable debate.

A brief consideration of some points of criticism levelled by the one system against the other, must be of some assistance in evaluating the merits of each of them.

The main point of criticism against the continental inquisitorial system, is the double role which the judge must necessarily fulfil. He has to be both the investigator, himself searching for the material truth and especially all facts and circumstances necessary to build up a case against the accused, and, at the same time, the arbiter who must objectively evaluate all these facts and considerations. These two functions of the inquisitorial judge contradict each other, critics say.[156]

In addition, critics say, it is difficult for the inquisitorial judge to be completely unprejudiced against the accused, if he virtually has to be both prosecutor and judge at the same time. Even if one defends the inquisitorial system with the argument that the judge also actively has to look for circumstances in the accused's favour, one still has the position that in the eyes of the accused, the judge is not wholly impartial, but is ratherassociated with the state prosecuting authority, of which he is seen to merely be a representative. The judge is therefore regarded by the accused as his opponent [157]

[156] CR Snyman, Op.cit, pp. 107-108.

[157] Idem, p. 108.

Moreover, in the English-speaking world the term "inquisitorial" often seems to imply vestiges of the old inquisitorial procedure with secret proceedings, the duty of the accused to make a confession, and enforcement of that duty by torture. This is however not true. As said above, during the first half of the nineteenth century on the European continent the old inquisitorial procedure was replaced by reformed inquisitorial systems which were based upon liberalism and human rights.[159]

Finally, the inquisitorial system is also criticised as favouring a presumption of guilty rather than of innocence. In a book on criminal justice in England that was published in the early thirties the following statement of French procedure can be read: "The prisoner must satisfy the jury that he is not guilty. To the French mind the presumption of innocence is the essence of hypocrisy".[160] Bearing in mind however, that the inquisitorial systems also recognize the right to remain silent, that the prosecution must prove guilty beyond doubt (*le doute profite au prévenu*) and that the presumption of innocence has been recognized in most modern constitutions, this argument cannot be taken very seriously.

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[159] J Herrmann, Op.cit, p. 4.

[160] P Howard, Criminal Justice in England: A Study in Law Administration, New York 1931, p. 381.

The Anglo-American accusatorial system, on the other hand, has been branded as being too much **a contest between two parties opposing each other.** In order to give his verdict, the judge merely relies on what he has been told by the parties, and they, in order to favor their own cases, can manipulate the truth.

The result is that the final verdict of the judge cannot be described as reflecting the "material truth", but at most-so it has been described-the "formal truth". The aim of each party, critics say, is to "win the case", regardless of whether the outcome of the case is in accordance with truth and real justice.[162]

As Professor Christopher Snyman rightly says however, to describe the judge in the Anglo-American system as merely a passive referee, who decides merely on issues and considerations presented to him by the parties, is to oversimplify the system's basic character to the extent perhaps of even distorting it. It is also in these systems the task of the court or judge to ascertain the truth and to do justice according to law.[163] In the adversarial systems, it is the prerogative of the judge to decide on the admissibility of all evidence tendered by the parties.[164] All these considerations clearly indicate the extent to which the purely accusatorial character of the Anglo-American criminal procedure is qualified by inquisitorial traits.

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[162] Idem.

[163] CR Snyman, Op cit, p. 110.

[164] CR Snyman, Op. cit, pp. 110-111.

6. Conclusion

This article has strived to trace the historical origins and developments of the inquisitorial and accusatorial models of modern systems of criminal procedure. It has also tried to examine the special qualities of one system as compared to the other.

It has been observed however, that today reality all over the world is, a mixed system, with some countries tending more towards the inquisitorial model (Europe and most of its former colonies), and others tending more towards the adversarial model (Great Britain and most of its former colonies, as well as the United States).

It has been seen that existing criminal systems follow the adversary or the inquisitorial model in a more or less strict manner. Some systems are more adversary than others. The same is true as regards inquisitorial systems.[165] Every country's particular mode of searching for truth, still remains a mirror of the historical, sociological and cultural origins of its society.[166] Moreover, it should also be recalled that the one system, just as much as the other, endeavours to arrive at the truth in each individual case; it is the manner in which this is effected which differs from the one system to the other.

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[165] J Herrmann, Op. cit, p. 6.

[166] CR Snyman, Op. cit, p. 111.

Whether the Accusatorial or the Inquisitorial system presents the best way of achieving this aim, will probably always be the subject of debate. In this regard, in the words of Professor Christopher Snyman[167], it is perhaps fitting to bear in mind that no system of procedure, being the product of human beings, can claim to be so devised as to reveal the absolute truth, or truth at all costs.

However, modern systems of criminal procedure will most likely continue to evolve in directions that less or more reflect the original models on which they are shaped. Whereas the accusatorial system was originally devised to safeguard the interest of the individual, the inquisitorial system set out in the first place to uphold the interests of society and the State. Evolution of modern systems of criminal procedure will likely continue to reflect these basic philosophical underpinnings.

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[167] Idem, p. 111.

BIBLIOGRAPHY

Books

1. J Mc Ewan, Evidence and the adversarial process-the modern law,1992,

U Kayitesi and Dr R Haveman, Rwandan Criminal Procedure, National University of Rwanda, Butare, 2008.

P Howard, Criminal Justice in England: A Study in Law Administration, New York 1931.

H J. Rothwax, Guilty: the collapse of criminal justice, Random House, 1996.

Articles

A. S. Goldstein and M. Marcus,"*The Myth of Judicial Supervsion in Three*

1. '*Inquisitorial Systems*: *France*, *Italy, and Germany*." 87 Yale Law Journal 240 (1977);
2. C. R. Snyman, "The accusatorial and inquisitorial approaches to criminal procedure: some points of comparison between the South African and continental systems" The Comparative and International Law Journal of Southern Africa, (1975)
3. J. Herrmann, "Various Models of Criminal Proceedings" South African Journal of Criminal Law and Criminology 2, no. 1 (1978).

J. H. Langbein & L. L. Weinreb, "Continental Criminal Procedure: 'Myth' and Reality," 87 Yale Law Journal 1549, (1978).

MEANING AND APPLICATION OF THE PRINCIPLE OF LIFTING THE VIEL OF INCORPORATE IN COMPANY LAW

By MUNYAMAHORO René

Abstract

The law recognizes two categories of persons: human being or physical persons and moral persons or juristic persons. The latter, is a group of physical persons which may have the nature an association or a company having a legal personality. A commercial company or associations, after getting its legal personality, come into existence. The legal personality is process by which a group of people are constituted and then enabled to carry on a business in such a way that the business is legally regarded as a legal entity. That is altogether separate from the members of the group, individually or collectively. With that separate legal personality, companies are then different from their members. For any debt contracted in the name of the company, their members cannot intervene in its payment.

It has to be paid by the assets of the company. Under this veil, members of the company are totally different from it. However, in some cases, the rule that a company is at law different person from its members has been modified in instances which have come to be known in company law as ***"lifting the corporate veil"****. The principle of lifting the corporate veil is sometimes used for example in case of agency; fraud; sham or facade; group enterprises; and unfairness. This article aims at explaining its meaning and the extent to which it can be applied and the possibility of transplanting it in the Rwandan legal system.*

Introduction

In company law, it is an obligation for every company to register. After registration the company gets its legal personality. The procedure of conferring the legal personality to the companies is commonly known as "incorporation". Incorporation is defined as "a merging together to form a single whole; conferring legal personality upon an association of individuals, or the holder of a certain office, pursuant to domestic rules[168].

For the purposes of company law, this principle, denotes the legal process by which a group of people are constituted and then enabled to carry on a business in such a way that the business is legally regarded as "a legal entity" that is altogether separate from the members of the group, individual and collectivity.[169]

The fact that an incorporated or registered company is a different person altogether from the subscribers to its memorandum and its other members means that the company's debts are not debts of its members. If the company has borrowed money, it and it alone is under an obligation to repay the loan. The members are under no such obligation and cannot be asked to repay the loan. In case the company is unable to pay its debts, the creditor(s) may petition the commercial tribunal for an order to wind it up[170].

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[168] M. C. OLIVER, and A. M ENID, *Company law*, 12th Edition, London, Pitman Publishing, p.12.
[169] *Ibidem*.
[170] Article 3(4) of the Organic law organizing commercial tribunals in Rwanda

During the procedure of winding up members will be called upon to pay the amount subscribed but non paid or in case of a limited company by guarantee to pay the guarantee subscribed at the moment of the creation of the company.[171]

During the procedure of winding up of companies, creditors find themselves unpaid not due to the fact that subscribers to the memorandum of association are in impossibility of paying them but simply because their liability is limited to either their shares or the guarantee they agreed when creating their company. That fact for shareholders of limiting their liability can be named *"the incorporate veil"*.

In some legislations [172] the rule that a registered company is at law a different person altogether from subscribers to the memorandum of association and other persons who join the company later on as its members has been modified in instances which have come to be known in company law as "lifting the veil of incorporation" in this research we will attempt to precise its scope of application as well as its role.

From this perspective, we have formulated these questions of research:
When can the lifting the corporate veil can be applied?
What is the position of the Rwandan law on the issue of lifting the corporate veil?
These are questions which will guide my research in this article.

[171] J. J. ONGOLA, *company law*, Focus books, Nairobi, 2003, p.9.
[172] For this purpose, one can name for example English company act, Australian company act, that of Malaysia, etc.

CHAPTER ONE: DEFINITION AND ORIGIN OF THE PRINCIPLE OF LIFTING THE VEIL OF INCORPORATION

I.1. Definition

In common law legal system, the case of Salomon v Salomon Ltd[173] laid down the legal principle of corporate personality. What this means in law is that once a Company is registered, it is given an artificial personality. Subsequent to registration, the Company can sue or be sued as a person. Furthermore, the Company and its members are separated and distinct from one another. If the Company owes money to the bank, the creditors cannot sue its members but can only recover their debts from the Company. If the Company is unable to meet its debts, it goes into insolvency (closed down). Even if the Company's owners are rich, the creditors are barred from suing its Directors or shareholders expect when it is a partnership company.[174]

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[173] *Salomon* had incorporated his boot and shoe repair business. He transferred the business to a company own by him. He took all the shares of the company except six which were held by his wife, daughter and four sons. Part of the payment for the transfer of the business was made in the form of debentures (a secured loan) issued by the company to *Salomon*. *Salomon* transferred the debentures to *Broderib* in exchange for a loan. *Salomon* defaulted on payment of interest on the loan and *Broderib* sought to enforce the security against the company. Unsecured creditors try to put the company into liquidation. Is *Broderib* or the unsecured creditors (*Salomon* himself) had priority in relation to payment of the debts? It was argued for the unsecured creditors that *Salomon's* security was void as the company was a sham and was in reality the agent of *Salomon*.

[174] C. CHIGBO, *Lifting the corporate veil*, in lifting the Corporate Veil http://www.acca.org.uk/archive/corpsecrev/44/895748, accessed on 4th August 2009.

From this principle, a company once incorporated becomes a legal personality, a juristic entity, separate and distinct from its members and shareholders, capable of having its own rights, duties and obligations and can sue or be sued in its own name. This is commonly referred to as the doctrine or principle of corporate personality and it carries with it the concept of limited liability which ordinarily flows from the aforementioned doctrine of corporate personality. No case illustrated the above principles better than the noted House of Lords decision in Salomon v. Salomon Ltd.[175]

However, in some circumstances, courts have intervened to disregard[176] or ignore the doctrine of corporate personality and limited liability, especially in dealing with group companies and subsidiaries and where the corporate form is being used as a vehicle to perpetrate fraud or as a "mere facade concealing the true facts." The procedure thus introduced is known as the "lifting the veil" and this normally occurs where the court may "pierce" or "lift" the veil of incorporation. At the same time, courts have acknowledged that the corporate veil of a company may be pierced to deny shareholders the protection that limited liability normally provides.

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[175] M. C. OLIVER, and A. M ENID, *op. cit.*, p. 14.

[176] M. IAN RAMSAY, "Piercing the Corporate Veil in Australia", in Wordpro\Centre.CL\Piercing the Corporate Veil Study, accessed on 4th August 2010.

Then "**Piercing the corporate veil**" or "**lifting the veil of incorporation**" refers to the judicially imposed exception to the separate legal entity principle, whereby courts disregard the separateness of the corporation and hold a shareholder responsible for the actions of the corporation as if it were the actions of the shareholder.[177]

For some scholars, these two words mean the same but for others they are different. In the case *Atlas Maritime Co SA v Avalon Maritime Ltd*".[178] To *pierce* the corporate veil is an expression that I would reserve for treating the rights and liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To *lift* the corporate veil or *look behind* it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose merits".[179] HILL J, in *AGC (Investments) Limited v Commissioner of Taxation (Cth[180])*, stated that the "circumstances in which the corporate veil may be lifted are greatly circumscribed."

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[177] D. B NOAKES, "Piercing the Corporate Veil in Australia", available at *Word-pro\Centre.CL\Piercing the Corporate Veil Study*, visited on 06th August 2010.

[178] *Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)* [1991] 4 All ER 769 cited by D. B NOAKES, *op. cit*, p.3.

[179] *Ibidem.*

[180] V. PEATE, in federal Commissioner of Taxation (1964) 111 CLR 443 (HC, McTiernan, Kitto, Taylor,
Windeyer and Owen JJ)..

However, a rigid application of the piercing doctrine has been widely criticized as sacrificing substance for form. WINDEYER J, in *Gorton v Federal Commissioner of Taxation*, stated that this approach had led the law into "unreality and formalism. Indeed, it has been argued that the fundamental problem with the decision in *Salomon* is not the principle of separate legal entity, but that the House of Lords gave no indication of: "What the courts should consider in applying the separate legal entity concept and the circumstances in which one should refuse to enforce contracts associated with the corporate structure".[181]

I.2. Origin of the principle of lifting the corporate veil

The concept of a corporate personality traces its roots to Roman Law[182] and found its way to the American colonies through the British. After gaining independence, the states, not the federal government, assumed authority over corporations.

Although corporations initially served only limited purposes, the Industrial Revolution stimulated their development. The corporation became the ideal way to run a large enterprise, combining centralized control and direction with moderate investments by a potentially unlimited number of people.[183]

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[181] OGOLA, J. J., *Company law*, Focus book, Nairobi, 1997, p. 8.

[182] X, http://legaldictionary.thefreedictionary.com/Lifting+the+corporate+veil, Accessed on 4th august 2010.

[183] *Ibidem.*

The corporation today remains the most common form of business organization because, theoretically, a corporation can exist forever and because a corporation, not its owners or investors, is liable for its contracts. But these benefits do not come free. A corporation must follow many formalities, is subject to publicity, and is governed by rules and regulations of the country[184].

In the United States, the concept of the veil of incorporation was adopted from English company law. The principles of the veil of incorporation were first illustrated in 1897 in the English case of Salomon v. Salomon, in which it was ruled that subsidiaries within a conglomerate were to be treated as separate entities of the parent company. Prior to this time, people did very little investment because of the personal risk involved. In the United States, many cases involving the question of the veil of incorporation have focused on environmental damage and the responsibility held by parent companies, such as was the case of the United States v. Best foods (1998)[185].

I.3. Justification of the Corporate Veil

When courts pierce the corporate veil, they can remove the protection of limited liability otherwise granted to shareholders. Five reasons, based upon principles of economic efficiency, can be provided for why companies are granted limited liability[186].

[184] *Article 3 of the Rwandan company law*
[185] J. J OGOLA, *Op. cit.*, p. 8
[186] These reasons are drawn from F Easterbrook and D Fischel, *The Economic Structure of Corporate Law*, 1991, pp. 41-44.

First, limited liability decreases the need for shareholders to monitor the managers of companies in which they invest because the financial consequences of company failure are limited. Shareholders may have neither the incentive (particularly if they have only a small shareholding) nor the expertise to monitor the actions of managers. The potential costs of operating companies are reduced because limited liability makes shareholder diversification and passivity a more rational strategy.

Secondly, limited liability provides incentives for managers to act efficiently and in the interests of shareholders by promoting the free transfer of shares. This argument has two parts to it. First, the free transfer of shares is promoted by limited liability because under this principle the wealth of other shareholders is irrelevant. If a principle of unlimited liability applied, the value of shares would be determined partly by the wealth of shareholders. In other words, the price at which an individual shareholder might purchase a share would be determined in part by the wealth of that shareholder which was now at risk because of unlimited liability.

The second part of the argument (that limited liability provides managers with incentives to act efficiently and in the interests of shareholders) is derived from the fact that if a company is being managed inefficiently, shareholders can be expected to be selling their shares at a discount to the price which would exist if the company were being managed efficiently. This creates the possibility of a takeover of the company and the replacement of the incumbent management.

Thirdly, limited liability assists the efficient operation of the securities markets because, as was observed in the preceding paragraph, the prices at which shares trade does not depend upon an evaluation of the wealth of individual shareholders.

Fourthly, limited liability permits efficient diversification by shareholders, which in turn allows shareholders to reduce their individual risk. If a principle of unlimited liability applied and the shareholder could lose his or her entire wealth by reason of the failure of one company, shareholders would have an incentive to minimize the number of shares held in different companies and insist on a higher return from their investment because of the higher risk they face. Consequently, limited liability not only allows diversification but permits companies to raise capital at lower costs because of the reduced risk faced by shareholders.[187]

Fifthly, limited liability facilitates optimal investment decisions by managers. As we have seen, limited liability provides incentives for shareholders to hold diversified portfolios. Under such circumstances, managers should invest in projects with positive net present values, and can do so without exposing each shareholder to the loss of his or her personal wealth.
However, if a principle of unlimited liability applies, managers may reject some investments with positive present values on the basis that the risk to shareholders is thereby reduced. "By definition, this would be a social loss, because projects with a positive net present value are beneficial uses of capital.[188]

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[187] *Ibidem.*
[188] *Ibidem.*

CHAPTER II. FRAMEWORK OF THE PIERCING THE CORPORATE VEIL

Cases under which the lifting corporate veil is applied can be regarded in two aspects. It may be provided by the law or it may result from case laws. In this chapter we will analyze the two cases.

II.1. Lifting the corporate veil under case laws

According to JENKINSON J, in *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation*[189], "The separate legal personality of a company is to be disregarded only if the court can see that there is, in fact or in law, a partnership between companies in a group, or that there is a mere sham or facade in which that company is playing a role, or that the creation or use of the company was designed to enable a legal or fiduciary obligation to be evaded or a fraud to be perpetrated.[190]" In some countries, courts have recognized a number of discrete factors that may lead to a piercing of the corporate veil; these factors might be grouped into the following broad categories:

(a) agency;

(b) Fraud;

(c) Sham or facade;

(d) Group enterprises; and

(e) unfairness/justice.

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[189] *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation* (1988) 79 ALR 267 (FC, Woodward, Jenkinson and Foster JJ).

[190] *Ibidem.*

II.1.1. Agency

The Full Federal Court, in *Balmedie Pty Ltd v Nicola Russo*[191], noted that: "It is trite law that a company is a separate entity, and distinct legal person, from its shareholders and does not become an agent for its shareholders simply because of the fact that they are shareholders[192]."

However, the "agency" ground has been used to argue that the shareholder of a company (whether it be a parent company or human shareholder) has such a degree of effective control that the company is held to be an agent of the shareholder, and the acts of the company are deemed to be the acts of the shareholder. Agency has also been used interchangeably by the courts with the phrase "alter ego[193]".

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[191] *Balmedie Pty Ltd v Nicola Russo* (Unreported, Ryan, Whitlam and Goldberg JJ, Federal Court, 21 August 1998).

[192] *Ibidem.*

[193] For example, Bray CJ in *Brewarrana v Commissioner of Highways* (1973) 4 SASR 476, at 480, referred to an argument that the plaintiff was "merely the agent trustee or *alter ego*...".

The requirement in tort law of a relationship of proximity is also closely linked to the doctrine of piercing the corporate veil. Rowland J, in *Barrow v CSR Ltd*[194], in finding a parent company responsible for the actions of a subsidiary in relation to an employee of the subsidiary that had contracted asbestosis, stated that: "Now, whether one defines all of the above in terms of agency, and in my view it is, or control, or whether one says that there was a proximity between two companies, or whether one talks in terms of lifting the corporate veil, the effect is, in my respectful submission, the same[195]".

Cases of pure negligence, such as *Briggs v James Hardie & Co Pty Ltd*[196], demonstrate the difficulty that the courts are faced with in attempting to reconcile piercing principles with traditional tort notions of foreseeability and causal nexus. The different judicial approaches to the question of whether a company has acted as an agent make it difficult to rationalise the judgments.

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[194] *Barrow v CSR Ltd* (Unreported, 4 August 1988, Supreme Court of Western Australia, Rowland J

[195] *Idibem.*

[196] Farrar has noted that: "Canadian practitioners are beginning to argue tort principles as a way of circumventing the strict logic of the *Salomon* principle whether these tort cases are regarded as outside *Salomon's* case or examples of piercing the corporate veil does not seem to matter. The end result is the same. The law is in a state of flux." Farrar, above, n 20, 478-79.

In *The Electric Light and Power Supply Corporation Limited v Cormack*[197], the earliest judgment refused to pierce the veil of a one-man company. The defendant had contracted with the plaintiffs to use their power supply for his works for two years, and not to install any other form of motive power during that period. During the two-year period, the defendant sold his works to a company of which he was the manager and shareholder.

The new company then installed motive power other than that supplied by the plaintiffs. RICH AJ refused to find that the defendant had breached the contract, viewing it as a personal undertaking. RICH AJ held that "these acts are in fact being done, not by the defendant personally, but by him as agent for A.W. CORMACK LTD., which even if a "one-man company" is a different entity[198] ". Rich AJ found no evidence that the sale of the business by the defendant was done with the object of evading his personal obligations.

Since this decision, in some countries, courts were more prepared to pierce the separate legal status of a company. In the case of a small company, courts are perhaps more willing to apply agency principles, certainly where the control has been absolute such that the company can properly be seen as a mere agent for the shareholder[199].

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[197] *The Electric Light and Power Supply Corporation Limited v Cormack* (1911) 11 NSWSR 350
(SCNSW, Rich AJ).

[198] *Ibidem.*

[199] *Ibidem.*

Fullagar J, in *Ampol Petroleum Pty Ltd v Findlay*, examined a contract claim in which the defendant sought to pierce the veil of his own private company to show that the losses of the company were his losses, thereby increasing the quantum of damages payable. Fullagar J stated:[200]

"If the defendant does embark on establishing loss of profits (or capital or goodwill) at an enquiry as to damages, I consider on the present state of the evidence that the "corporate veil" may be pierced for these purposes, that is to say, I consider that the defendant will be entitled to include losses to his company or companies flowing from the breach, provided he establishes (in addition to causation) that the loss to the company was his loss...The evidence presently before me strongly suggests that the defendant wholly controlled the relevant companies and their monies and other assets, and dealt with the monies and assets as though they were his own."[201]

A court may sometimes apply agency principles to reduce the severity of a penalty, which is a controversial use of the doctrine of piercing the corporate veil. In two cases, charges were laid against companies under the *Occupational Health and Safety Act* 1983 (NSW) following the death of employees.

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[200] *Ampol Petroleum Pty Ltd v Findlay* (Unreported, Fullagar J, Supreme Court of Victoria, 30 October 1986).

[201] *Ibidem.*

In both cases, the companies successfully argued that their own veil should be pierced to reveal a partnership[202] and an individual, thereby substantially reducing the applicable penalty. In the first case, Fisher CJ found that piercing was appropriate because the company was "a shelf company structure operating for the convenience of accounting". In the second case, Fisher CJ stated that the penalty ought to be paid by "an individual whose one man company may qualify as a corporation merely because it has been convenient to employ a shelf company for the purposes of business and taxation arrangements[203]."

In both cases, a substantially reduced penalty was paid by an individual who stood behind the company, because Fisher CJ found that to be the "commonsense matter" and "industrial reality" of the circumstances. It is submitted that recourse to piercing principles in order to reduce the penalty for a manslaughter conviction is, in the absence of evidence that the company is unable to pay the fine and other relevant factors, an inappropriate use of the doctrine.[204]

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[202] *Workcover Authority of NSW v Baker-Duff Pty Limited* (Unreported, Industrial Relations Court of New South Wales, Fisher CJ, 2 April 1993).
[203] *Ibidem.*

[204] *Ibidem.*

II.1.2. Fraud

An argument of "fraud" relates to the alleged use of a corporation by the controller to evade a legal or fiduciary obligation. To be successfully argued, the controller "must have the intention to use the corporate structure in such a way as to deny the plaintiff some pre-existing legal right".[205] In *Re Edelsten ex parte Donnelly*[206], the trustee of Dr Edelsten's estate in bankruptcy commenced an action claiming that certain property owned by the VIP Group of companies had been obtained by Edelsten before the bankruptcy had been discharged. The trustee argued that the companies had been incorporated and used for the purpose of evading a legal obligation or perpetrating a fraud. Northrop J, at first instance, held that: "Even if the whole scheme of the companies was devised by Dr Edelsten for the purpose of defeating his creditors the overall facts of this case do not justify the conclusion that the property of VIP Health Corporation is the after acquired property of Dr Edelsten and thus vests in the trustee."

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[205] Note that we do not argue that companies should in all events be the liable party. Sometimes, a company may be insolvent, making an order against the company a futile exercise and thereby providing an opportunity for piercing the corporate veil to fix responsibility on directors and shareholders. See S Chesterman, "The Corporate Veil, Crime and Punishment: *The Queen v Denbo Pty Ltd and Timothy Ian Nadenbousch*" (1994) 19 *Melbourne University Law Review* 1064, for discussion of a case where the prosecution for manslaughter of a director who was also one of two

shareholders in the company was dropped in exchange for a guilty plea by the company, which was subsequently unable to pay the fine because it went into liquidation less than a month before the trial. The company in *Workcover Authority of NSW v Krcmar Engineering Pty Ltd* was insolvent (although it is not evident from the judgment that this was a reason for the decision to fine the shareholder personally) but the company in *Workcover Authority of NSW v Baker-Duff Pty Ltd* was not. The "reality" of the circumstances may be that the shareholder will pay the fine, but that should not mean that the appropriate level for the fine should be reduced to the amount of a fine for an individual. This is particularly so where Fisher CJ did not impose the highest fine allowable for an individual in either case. This was despite, in the case of *Workcover Authority of NSW v Krcmar*, Fischer CJ's reference (at 2) to the "neglect and negligence" of the employer and the "major and obvious deficiencies of the safety equipment."

[206] *Re Edelsten ex parte Donnelly* (Unreported, Federal Court, Northrop J, 11 September 1992

On appeal by the trustee, the Full Court of the Federal Court of the United States, upheld the decision of Northrop J. The Full Court also held that an argument of fraud is closely related to an argument that the corporate form is a sham or facade. The court stated: "The argument of fraud is, of course circular. It can only succeed if the argument of sham succeeds, because if no property was acquired by, or devolved upon, Edelsten, no duty capable of being evaded could arise under the Act the submission that the VIP Group had been used to perpetrate a fraud was coincident, and stood, or fell, with the submissions which sought to have the transactions, by which the VIP Group acquired property, treated as shams" .[207]
Therefore, no "fraud" had been perpetrated, because the court found that the creation of a business was not to be characterised as a sham merely because "it was undertaken for the purpose of ensuring that any property acquired after bankruptcy did not fall into the hands of a trustee in bankruptcy".[208]

The more 'blatant' the sham, the more likely it is that a fraud has been perpetrated. In *Re Neo*[209], the Immigration Review Tribunal was asked to review a decision to refuse an application for a visa where sponsorship had been arranged by a company formed on the same day as the application was lodged, and the company did not carry on any business. The Tribunal held that: The Company was merely a vehicle used to circumvent Australian migration law. It was only a façade, its true purpose being to allow the applicants to remain in the country."

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[207] *Ibidem.*
[208] Ibidem.
[209] *Re Edelsten ex parte Donnelly* (Unreported, Federal Court, Northrop J, 11 September 1992

II.1.3. Sham or facade

An argument that a company is a "sham" or "facade", is used to pierce the corporate veil on the ground that the corporate form was incorporated or used as a "mask" to hide the real purpose of the corporate controller. A facade is "used as a category of illusory reference to express the court's disapproval of the use of the corporate form to evade obligations, although the courts have failed to identify a clear test based on pragmatic considerations such as under capitalisation or domination".[210]

Lockhart J, in *Sharrment Pty Ltd v Official Trustee in Bankruptcy*[211], stated that: "A 'sham' is (...) something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is falsem or deceptive."

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[210] J Farrar, 'Legal Issues Involving Corporate Groups' (1998) 16 *Company and Securities Law Journal* 184, 185.

[211] *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 82 ALR 530 (FC, Lockhart, Beaumont and Foster JJ).

As noted above, a "fraud" argument is dependent upon a "sham" argument as the courts have held that no fraud can be perpetrated where the corporate form is real and not a facade. It has been argued that the courts have gone too far in piercing the veil of companies deemed to be "shams", on the grounds of the "inutility" of the proposal that a properly incorporated company could be anything other than "real". [212]

The same commentator has noted that: "Although the behaviour of the controlling shareholder is contemptible, it is suggested that this method of disregarding the company's separate entity has gone too far. Not only it is against the legal system: taken too literally, but also, it deprives the courts themselves of the possibility of issuing orders against the company as such, if and when they deem fit".[213]

Windeyer J, in *Peate v Federal Commissioner of Taxation*, stated that: "If a company is duly incorporated and registered under the Act and the proper records are kept in due form and the prescribed returns are made, it continues to exist as a legal entity. In that sense, it is a reality and not a sham."[214]

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[212] See H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law*, 9th ed, 1999, where the authors state: "To say that a company is a sham does not advance debate. When the law says that a corporation is a person it is expressing conventional acceptance of a falsehood or pretence. It does that for many socially useful purposes. A company will be seen to be a sham only when the conditions for that conventional acceptance are not fulfilled."

[213] *Ibidem.*

[214] *Ibidem.*

A "sham" argument refers to the use of a legitimate company as a "front" to "mask" the real operations. In *ICT Pty Ltd v Sea Containers Ltd*, the Court of Appeal of the Supreme Court of New South Wales noted that the use of the description "sham" does not easily explain the doctrine of piercing, stating that: "A sham is an apparent transaction intended to cloak a different one, and not intended to take effect in accordance with its terms. If the apparent transaction is a sham it must be disregarded and legal rights and liabilities determined according to the real transaction...The so-called sham principle is merely an application of the principle that an apparent agreement will not give rise to a binding contract if the parties had no intention of entering into legal relationships".[215]

Normally, it is not necessary for the sham company to have been incorporated for the purpose of perpetrating the fraud, as "a fraud is no less of a fraud because a preexisting company is used and an intention is no more of an intention because a wholly new company did not need to be set up for the purpose".[216]
A court may pierce the corporate veil on the ground of "group enterprises" where there exists a sufficient degree of common ownership and common enterprise. Some relevant factors were identified in *Bluecorp Pty Ltd (in liq) v ANZ Executors and Trustee Co Ltd*:[217]

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[215] *ICT Pty Ltd v Sea Containers Ltd* (1995) 39 NSWLR 640 (SCNSW, Clarke, B Handley and Sheller JJA).
[216] *Taylor v Santos Ltd* (Unreported, Supreme Court of South Australia, Doyle CJ, Prior and Olsson JJ, 11 September 1998).
[217] *Bluecorp Pty Ltd (in liq) v ANZ Executors and Trustee Co Ltd* (1995) 18 ACSR 566 (SCQ, Macrossan CJ, Fitzgerald P and Davies JA).

"The inter-relationship of the corporate entities here, the obvious influence of the control extending from the top of the corporate structure and the extent to which the companies were thought to be participating in a common enterprise with mutual advantages perceived in the various steps taken and plans implemented, all influence the overall picture".[218]

A judicial reluctance to pierce the corporate veil in the case of corporate groups is evident in the decision of the High Court New South Wales in *Walker v Wimborne*.[219] Mason J continued this formal separation between the legal identities of parent and subsidiary in *Industrial Equity Ltd v Blackburn*.[220] Here, the High Court rejected an argument that the profits in subsidiaries lie within the disposition of the parent company which may, by virtue of its capacity to control the general meeting of each subsidiary, ensure the distribution of profits to it by declaration and payment of dividends.

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[218] *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation* (1988) 79 ALR 267, 272. Also see *James Hardie & Coy Pty Limited v Putt* (1998) 43 NSWLR 554 (SCNSW, Sheller, Beazley and Stein, JJA), where Sheller JA stated (at 579-580) that: "The characterisation of a group of companies, linked by shareholding, as a single enterprise where one is an actor, whose acts or omissions should be attributed to another or others within the group, involves either "lifting the corporate veil", treating the actor as an agent or imposing upon another or others within the group a duty by reason of the degree or manner of control or influence over the actor. The distinction between these ideas is easily blurred."

[219] *Walker v Wimborne* (1975-76) 137 CLR 1 (HC, Barwick CJ, Mason and Jacobs JJ)

[220] *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567 (HC, Stephen, Mason, Jacobs, Murphy and Aickin JJ).

MASON J stated that: "It has been said that the rigours of the doctrine enunciated by *Salomon v Salomon & Co Ltd* have been alleviated by the modern requirements as to consolidated or group accounts...But the purposes of these requirements is to ensure that members of, and for that matter persons dealing with, a holding company are provided with accurate information as to the profit or loss and the state of affairs of that company and its subsidiary companies within the group... However, it can scarcely be contended that the provisions of the Act operate to deny the separate legal personality of each company in a group.[221]

Thus, in the absence of contract creating some additional right, the creditors of company A, a subsidiary company within a group, can look only to that company for payment of their debts. They cannot look to company B, the holding company, for payment (see *Walker v Wimborne*)[222]

Furthermore, courts appear reluctant to become involved in cases where parties have clearly reached a contractual bargain in relation to which piercing the corporate veil would produce a different result.

As Professor Thompson notes: "Because the market-related reasons for limited liability are absent in close corporation and corporate groups,

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[221] *Ibidem*

[222] *Ibidem*.

the most important justification for limited liability is permitting parties in a consensual relationship to use the corporate form to allocate the risks of the transaction and the enterprise."[223]

In *Pioneer Concrete Services v Yelnah Pty Ltd*, Young J refused to treat a contractual promise in a deed executed by a subsidiary company, for the purposes of a claim by the promisee that there had been a breach of the contractual term, as a promise also by the parent company. Young J stated that: "It would appear that the parties have deliberately chosen not that there should be a covenant by the Holding company but rather a covenant by the subsidiary which covenant is to be guaranteed by the Holding company, obviously a very different sort of obligation. When one sees a deed couched so deliberately it is very difficult to apply some broad brush commercial approach to give it some meaning other than its literal meaning."[224]

The absence of any evidence that the subsidiary company had the purpose of avoiding a legal obligation was also relevant to Young J's decision. In the case of corporate groups, courts will typically not pierce the veil on the ground of control alone. The mere exercise of control over a subsidiary by a parent company is an insufficient reason to pierce the corporate veil in the group situation.[225]

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[223]The empirical study of the frequency with which courts in the United States pierce the corporate veil: R Thompson, 'Piercing the Corporate Veil: An Empirical Study' (1991) 76 *Cornell Law Review* 1036; and a similar study in the United Kingdom: C Mitchell, 'Lifting the Corporate Veil in the English Courts: An Empirical Study' (1999) 3 *Company Financial and Insolvency Law Review* 15.

[224] *Pioneer Concrete Services v Yelnah Pty Ltd* (1986) 5 NSWLR 254.

[225] A Nolan, 'The Position of Unsecured Creditors of Corporate Groups: Towards a Group Responsibility Solution which gives Fairness and Equity a Role' (1993) 11 *Company and Securities Law Journal* 461, 479-480.

Rogers AJA, in *Briggs v James Hardie & Co Pty Ltd* [226], examined a "group enterprises" argument that the plaintiff (a former employee of a subsidiary company who had contracted asbestosis) was entitled to pierce the corporate veil to sue the parent company, because it had the capacity to exercise complete dominion and control over its subsidiary and had in fact exercised that capacity. Rogers AJA dismissed this argument as "entirely too simplistic". He went on to state that: "The law pays scant regard to the commercial reality that every holding company has the potential and, more often than not, in fact, does, exercise complete control over a subsidiary. If the test were as absolute as the submission would suggest, then the corporate veil should have been pierced in the case of both *Industrial Equity* and *Walker v Wimborn e*."[227]

ROGERS CJ, in *Qintex Australia Finance Ltd v Schroders Australia Ltd* [228], noted that the development of the rigid application of the separate legal entity principle to corporate groups is problematic, often resulting in a divergence between the "realities of commercial life and the applicable law." He considered that the piercing the corporate veil doctrine had a larger role to play in the case of corporate groups, as long as it is used appropriately and fairly distributes the burden and benefit of the corporate form amongst

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[226] *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549.
[227] *Ibidem.*
[228] *Qintex Australia Finance Ltd v Schroders Australia Ltd* (1990) 3 ACSR 267 (SCNSW, Rogers CJ).

the various corporate actors. He reflected that: "As I see it, there is today a tension between the realities of commercial life and the applicable law in circumstances such as those in this case. In the everyday rush and bustle of commercial life in the last decade, it was seldom that participants to transactions involving conglomerates with a large number of subsidiaries paused to consider which of the subsidiaries should become the contracting party.

A graphic example of such an attitude appears in the evidence of Ms Ferreira, a dealer in the treasury operations department of the defendant. In her written statement...she said:'In my discussions with either Craig Pratt or Paul Lewis when I confirmed deals undertaken for Qintex, it was not my practice to ask which of the Qintex companies was responsible for the deal. I always treated the client as Qintex and did not differentiate between companies in the group. Paul Lewis and Craig Pratt always talked as being from "Qintex" without reference to any specific company.[229]
It may be desirable for parliament to consider whether this distinction between the law and commercial practice should be maintained. Regularly, liquidators of subsidiaries, or of the holding company, come to court to argue as to which of their charges bears the liability... As well, creditors of failed companies encounter difficulty when they have to select from among the moving targets the company with which they consider they concluded a contract.

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[229] *Ibidem.*

The result has been unproductive expenditure on legal costs, a reduction in the amount available to creditors, a windfall for some, and an unfair loss to others. Fairness or equity seems to have little role to play"[230]

Comments such as those of Rogers CJ, and a general concern resulting from holding companies walking away from insolvent subsidiaries leaving creditors of the subsidiaries unpaid, led to the Australian Commonwealth Parliament amending the Corporations Law in 1993 to introduce section 588V. This section imposes liability on the holding company of a subsidiary where the subsidiary trades while it is insolvent and certain other conditions are satisfied.[231]

II.1.4. Unfairness

Sometimes a party may seek to pierce the corporate veil on the grounds that to do so will bring about a fair or just result. In *RMS Glazing Pty Ltd v The Proprietors of Strata Plan No 14442*,[232] the court heard an argument based upon the interests of justice in relation to piercing. A body corporate sued the plaintiff company and Mr Lo Surdo (a director and shareholder of the plaintiff) for losses in relation to contracts entered into with the plaintiff.

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[230] *Ibidem.*

[231] For discussion of section 588V, see I M Ramsay, 'Holding Company Liability for the Debts of an Insolvent Subsidiary: A Law and Economics Perspective' (1994) 17

[232] *University of New South Wales Law Journal* 520
RMS Glazing Pty Ltd v The Proprietors of Strata Plan No 14442 (Unreported, Supreme Court of New South Wales, Cole J, 17 December 1993).

The body corporate argued that the company was a 'body of straw' and that, because Lo Surdo had played an active part in the case and had a stake in the outcome, the interests of justice required that an order be made against Lo Surdo. Cole J disagreed, finding that with the company's record of profitable trading it could not be said to be a body of straw. Cole J continued: "Quite apart from that I am not satisfied that justice would require the making of such an order. The Body Corporate dealt with RMS over a period of more than a decade.[233]

It was prepared to deal with the company rather than Mr Lo Surdo personally and to enter into contractual relationships with the company resulting in the payment of many millions of dollars. I do not think that the interests of justice require that it now be permitted to simply disregard the corporate veil."[234] A shareholder in a company may also seek to pierce the corporate veil to get to the underlying reality of the situation, in order to avoid an unfair outcome.

In *Harrison v Repatriation Commission*,[235] the applicants sought a review of the decision of the Commission in relation to their application for service pensions under the *Veterans' Entitlements Act* 1986 (Cth). The applicants were joint shareholders in two companies whose only assets were debts owed to the companies by the applicants.

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[233] *Ibidem.*
[234] *Ibidem.*
[235] *Harrison v Repatriation Commission* (Unreported, Administrative Appeals Tribunal, Barbour SM, 18 October 1996).

The applicants sought to pierce the veil of their own companies to prevent the Commission from attributing a separate value to the companies' assets in the form of loans and the shareholders' assets in the form of shares (in order to avoid the effect of double-counting their asset level).

The Administrative Appeals Tribunal held that the asset value of the shares, for the purpose of calculating the applicants' assets, should be regarded as nil. Barbour SM stated that: "It would be an unreasonable outcome in the circumstances of this case to simply rely on the fact that the companies are a separate legal entity. It is appropriate to lift the corporate veil to consider the reality of the situation and the nature of the relationship between the applicants and the companies. The way in which the [Commission] has calculated the assets provides an unfair result and a result which is inconsistent with the beneficial interpretation of the requirement in the legislation to value a person's assets ".[236]

The Commission appealed to the Federal Court on the basis that the Tribunal had acted contrary to the law in piercing the corporate veil in holding that the shares had no value. Tamberlin J agreed, holding that the Tribunal "treated the shareholder directors and the corporate entity as indistinguishable for the purpose of calculating the value of the shareholders' assets." Tamberlin J stated that piercing the corporate veil in this case would be "contrary to settled principle."

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[236] *Ibidem.*

Tamberlin J's "remarkable decision", although "traditionally correct", overturned the Tribunal's treatment of "the legal position as, in effect, the economic or commercial position."[237] The decision had the effect of enforcing the separate legal status of the companies despite the economic reality that the companies were no different to the applicants, and despite the fact that this resulted in an outcome that was unjust.[238]

II.2. Statutory provisions applying the principle of the corporate veil

Since the establishment of Rwandan company law, the only provisions we have are those providing for the existence of own legal personality to companies.[239] The principle of lifting the corporate veil as we said is mainly a common law creation. That is why among various illustrations that we will base our comments are of countries using common law legal family. Like in English company law, Kenyan company law in various sections

provides for the principle of lifting the corporate veil. According this law, the principle of lifting the veil of incorporation can be used in seven cases namely:

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[237] *Repatriation Commission v Harrison* (1997) 24 ACSR 711 (FC, Tamberlin J).
[238] R Baxt, "The Corporate Veil Remains" (1998) 16 *Company and Securities Law Journal* 49, 50.
[239] See law n0 06/1988 and the law n0 07/200, governing companies in Rwanda.

a. In case Membership fallen under bellow statutory minimum,
b. Non publication of a company's name,
c. Group accounts,
d. Investigation of company's affairs,
e. Investigation of company's affairs membership,
f. Take-over bids,
g. Fraudulent trading.

We think, since now Rwanda is a member of the Commonwealth and the East African country should put into place rules accepting and regulating the lifting corporate veil. In the same veil, courts should also adopt the same principle as it is done by their fellows from countries from the aforementioned communities.

CONCLUSION

The registration of commercial companies confers to them the legal personality. That legal personality gives to them the rights to own their own property, they can sue, be sued before courts. Furthermore, the Company and its members are separate and distinct from one another. If the Company owes money to the bank or its creditors, the creditors cannot sue its members but can only recover their debts from the Company because the company is totally different from its shareholders.

However, the demarcation between the property of the company and that of its shareholders has been considered as a source of abuses. From this principle, a creditor of a company has to pursue the payment of his credit from the same company even if its shareholders have other properties. If the Company is unable to meet its debts, it goes into insolvency (closed down). Even if the Company's owners are rich, the creditors are barred from suing its Directors or shareholders.

In some circumstances, the courts is some countries, have intervened to disregard or ignore the doctrine of corporate personality and limited liability especially in dealing with group companies and subsidiaries and where the corporate form is being used as a vehicle to perpetrate fraud or as a "mere façade concealing the true facts." The procedure thus introduced is known as the "lifting the veil" and this normally occurs where the court may "pierce" or "lift" the veil of incorporation.

In this research we find that courts have recognized a number of discrete factors that may lead to a piercing of the corporate veil; these factors might be grouped into the following broad categories: agency; Fraud, Sham or facade, Group enterprises, and unfairness/justice. It has also been accepted in the following cases: Non publication of a company's name, group accounts, Investigation of company's affairs, Investigation of company's affairs membership, Take-over bids, Fraudulent trading.

As the Rwanda is now country member of the commonwealth, the legislator should start thinking on the opportunity of integrating in our legislation the principle of the lifting the corporate veil. This can also be justified by the fact that some countries in the region like Kenya and others have integrated this principle in their legislative arsenal.

BIBLIOGRAPHY

1. LAWS

1. Law n°07/2009 of 27/04/2009 relating to commercial act *O.G.*., n° 17 bis, of 27/04/2009
2. Law n°12/2009 of 26/05/2009 Relating to Commercial Recovery and Settling issue arising from insolvency *O.G. n° special of 26/05/2009*

2. CASES

1. *The Queen 1. v Denbo Pty Ltd and Timothy Ian Nadenbousch*" (1994) 19 *Melbourne University Law Review* 1064.
2. *Workcover Authority of NSW v Krcmar Engineering Pty Ltd Re Edelsten ex parte Donnelly* (Unreported, Federal Court, Northrop J, 11 September 1992.
3. *ICT Pty Ltd v Sea Containers Ltd* (1995) 39 NSWLR 640 (SCNSW, Clarke, Handley and ShellerJJA).
4. *Taylor v Santos Ltd* (Unreported, Supreme Court of South Australia, Doyle CJ, Prior and Olsson JJ, 11 September 1998).

5. *Bluecorp Pty Ltd (in liq) v ANZ Executors and Trustee Co Ltd* (1995) 18 ACSR 566 (SCQ,Macrossan CJ, Fitzgerald P and Dav

6. *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567 (HC, Stephen, Mason, Jacobs, Murphy and Aickin

7. *James Hardie & Coy Pty Limited v Putt* (1998) 43 NSWLR 554 (SCNSW, Sheller, Beazley and Stein, JJA),

8. *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation* (1988) 79 ALR 267, 272.

9. *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549.

10. *Qintex Australia Finance Ltd v Schroders Australia Ltd* (1990) 3 ACSR 267 (SCNSW, Rogers CJ).

11. *RMS Glazing Pty Ltd v The Proprietors of Strata Plan No 14442* (Unreported, Supreme Court of New South Wales, Cole J, 17 December 1993).

12. *Harrison v Repatriation Commission* (Unreported, Administrative Appeals Tribunal, Barbour SM, 18 October 1996).

13. *Repatriation Commission v Harrison* (1997) 24 ACSR 711 (FC, Tamberlin J).

14. *Walker v Wimborne (*1975-76) 137 CLR 1 (HC, Barwick CJ, Mason and Jacobs JJ)JJ).

15. *Pioneer Concrete Services v Yelnah Pty Ltd* (1986) 5 NSWLR 254.

16. *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 82 ALR 530 (FC, Lockhart, Beaumont and Foster JJ).

3. BOOKS

1. BAXT, R "The Corporate Veil Remains" *Company and Securities Law Journal* 49, 50. (1998

2. FARRAR, J., 'Legal Issues Involving Corporate Groups' *Company and Securities Law Journal* 184, 185, 998.

3. Ford H A J, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law*, 9th ed, 1999.

4. NOLAN, A, 'The Position of Unsecured Creditors of Corporate Groups: Towards a Group Responsibility Solution which gives Fairness and Equity a Role' *Company and Securities Law Journal* 461, 1993.

5. OLIVER, M. C and A. M ENID, *Company law*, 12th Edition, London, Pitman Publishing.

6. J. J. ONGOLA, *company law,* Focus books, Nairobi, 2003.