



AFRICA POLICY BRIEF

Burundi's institutional landscape after the 2020 elections

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Burundi's forthcoming elections mark the next stage in the implementation of the Constitution of 7 June 2018. Four key institutional innovations, situated mostly at the level of the executive branch, will take effect after the elections. Contrary to the Arusha Peace and Reconciliation Agreement of August 2000 and the Constitution of 18 March 2005, the 2018 Constitution no longer requires the establishment of a coalition government. While re-introducing a prime minister, the new constitution also enhances presidential powers. Furthermore, the 2018 Constitution has an immediate and longer-term impact on the use of ethnic quotas

nomination of incumbent President Nkurunziza for a third term,² the 2020 elections are of crucial importance for a number of reasons.³ This policy brief focuses on just one dimension of the elections, namely their impact on the design of Burundi's state institutions. In fact, the elections will mark a next stage in the implementation of the 2018 Constitution and, in particular, of some major institutional re-arrangements.

President Nkurunziza promulgated a new Constitution on 7 June 2018 that was adopted by referendum on 17 May.⁴ The promulgation ceremony was, above all, marked by the incumbent's surprising announcement that he would not run again in 2020. This promise became a reality on 26 January 2020, when Nkurunziza's party CNDD-FDD (*Conseil national pour la défense de la démocratie – Forces de défense de la démocratie; National Council for the Defence of Democracy – Forces for the Defence of Democracy*) nominated its secretary-general Evariste Ndayishimiye as presidential candidate. Given CNDD-FDD's firm grip on Burundi's state institutions and despite the absence of

INTRODUCTION

Between 20 May and 24 August 2020, Burundi will hold general elections at national and local levels. After the 2015 elections, which gave rise to a serious, multi-dimensional crisis¹ triggered by the

opinion polls, it would come as no surprise if Ndayishimiye defeated the six other presidential candidates⁵ and took the oath as new president of the republic on 20 August 2020.

This policy brief looks at four institutional re-arrangements that will take effect after the elections. Attention is paid to the political implications of the new institutional landscape, but also – vice versa – to how politics are likely to determine the functioning of the new institutions.

First, however, is a brief overview of the run-up to the new constitution and of the institutional changes that have already taken place since its entry into force.

THE ADOPTION OF THE 2018 CONSTITUTION AND ITS INITIAL FOOTPRINT

Institutional (re-)engineering was a crucial instrument in Burundi's transition from armed conflict to peace. The most essential part of the Arusha Peace and Reconciliation Agreement (APRA) of 28 August 2000 – the first in a series of peace agreements that ended civil war in Burundi – was the constitutional blueprint it contained for the post-conflict state. As widely documented elsewhere, Burundi's post-conflict institutions – designed and fine-tuned throughout the peace process and constitutionalized in the Constitution of 18 March 2005 – were fundamentally based on power-sharing between two opposing elites, largely divided along ethnic lines. Power-sharing affected both security and political institutions. In the security sector, ethnic parity was introduced at the level of the national army, police and intelligence service

to end decades of dominance by members of the Tutsi (demographic minority) group. In the political sphere, typically consociational mechanisms – including a guaranteed minority over-representation in parliament and in government – were introduced to protect the Tutsi minority against the electoral weight of the Hutu (demographic majority) group.

To understand the more recent evolution, it is important to underscore that some national and international actors who were key players at the time of the APRA and its aftermath have gradually been sidelined. First, the agreement and its constitutional 'translation' were mainly negotiated between the predominantly Hutu FRODEBU (Front pour la Démocratie au Burundi; Front for Democracy in Burundi) and the predominantly Tutsi UPRONA (Union pour le Progrès national; Union for National Progress) party leadership. Twenty years later, these two parties have been largely marginalised. Together, they obtained 94% of the votes in the first multi-party elections in 1993, 29% in the 2005 (first post-conflict) elections and (approximately, after internal splits) less than 5% in the 2015 elections. Neither CNDD-FDD, the current dominant party, nor CNL (Congrès National pour la liberté; National Freedom Council), the party of main opposition figure Agathon Rwasa, took part in the APRA negotiations. Secondly, there was a decisive international footprint over the APRA agreement (in particular, the South African mediation led by Nelson Mandela) and its implementation (a UN political and military presence in

Burundi), a sharp contrast with Burundi's international isolation (also referred to as a return to *de facto* sovereignty by some government officials) after the 2015 elections. Given those crucial changes in the political environment, it is not surprising that attempts were made by the new dominant political actor, CNDD-FDD, to alter the institutional landscape contained in the 2005 Constitution.

In March 2014, a first attempt to change the constitution, initiated by President Nkurunziza, failed because no four-fifths majority – required for constitutional amendments – was obtained at the National Assembly. Although all CNDD-FDD MPs voted in favour, several among them – including National Assembly speaker Pie Ntavyohanyuma – were, in reality, opposed to the constitutional amendment. Some months later, in the run-up to the 2015 elections, they became known as '*frondeurs*' (CNDD-FDD dissidents opposed to Pierre Nkurunziza's third term), the most tangible expression of a long-standing tradition of internal CNDD-FDD divisions. In 2018, parliament was completely sidelined and a new constitution was adopted by referendum. Both the process (for being controlled by CNDD-FDD) and the outcome (for allegedly annulling the APRA) were heavily criticised by the political opposition and civil society organisations in exile. They demanded a return to the 2005 APRA-based constitution as part of a negotiated solution for the crisis sparked by the 2015 elections.

Since the entry into force of the Constitution of 7 June 2018, Burundi's institutional landscape has been shaped, in part, in accordance with the old 2005 Constitution and, in part, by the new 2018 Constitution. In accordance with article 288 of the 2018 Constitution, the existing institutions remained in place, pending the establishment of new institutions elected under the new constitution. While this provision seemed to suggest that the 2005 Constitution would, until the 2020 elections, continue to govern elected institutions while, on the contrary, non-elected bodies would cease to exist and be replaced or reshuffled with immediate effect, its implementation was made even more complex. Burundi continued to have two (non-elected) vice-presidents (as provided for by the 2005 Constitution). In the Senate, indirectly elected (50% Hutu, 50% Tutsi) and coopted (3 Batwa) members remained in office, while the former heads of state (senators-for-life) left the Senate with immediate effect. Article 288 also prolonged the tenure of the members of the Constitutional Court until after the 2020 elections. It is hard not to see political motivations behind these constitutional arrangements: former heads of state – most notably Pierre Buyoya, who is the subject of an arrest warrant issued on 30 August 2019 – were opposed to President Nkurunziza's third term and lost their seats, while Constitutional Court judges were 'rewarded' for their loyalty to the president.

I now turn to four key institutional changes that will take effect after the forthcoming 2020 elections. For each of them, I take a

look at their possible political implications, taking into account some patterns of political governance in post-conflict Burundi.

THE END OF THE COALITION GOVERNMENT (?)

As a typically consociational power-sharing institution, the coalition government was introduced in the APRA (and, as a result, in the 2005 Constitution) as political life-insurance for UPRONA. It provided that any party obtaining 5% of the votes at the legislative elections was entitled to a proportionate number of cabinet positions (article 129). After the 2015 elections, this provision allowed the coalition Abigenga Mizero, led by opposition leader⁶ and second vice-president of the National Assembly Agathon Rwaso, to obtain 5 (out of 20) ministerial positions. The 2018 Constitution abandons the idea of a compulsory coalition government. After the 2020 elections, the government led by a prime minister (another institutional novelty, see below) can be composed of ministers who all belong to the same political party, as long as the ethnic quotas (maximum 60% Hutu, maximum 40% Tutsi) and gender quotas (minimum 30% women) are respected (article 128). What are the political implications of this? More particularly, is this constitutional change likely to constitute a radical break with political practice thus far?

The first observation to be made is that, in the APRA, the idea of mono-ethnic parties or (except for the Senate) ethnically separate ballots was rejected, in order to counter the ethnicisation of politics. In other words,

there was no constitutional requirement that Tutsi ministers were nominated by UPRONA or other predominantly Tutsi parties. However, this is – to some extent – what happened after the first post-conflict elections in 2005: five out of nine Tutsi ministers and the first vice-president of the republic belonged to a predominantly Tutsi party (whereas four out of nine were CNDD-FDD members). Following the 2020 elections, all of the Tutsi ministers may well be members of a predominantly Hutu party. While that can be seen as a step forward in terms of national unity and ethnic cohabitation within political parties – two other important APRA objectives – it may enhance the perception, increasingly tangible since the 2010 and 2015 elections, that Tutsi citizens lack ‘genuine’ Tutsi representatives and that Tutsi dignitaries are mere *imperekeza* (followers of the party line). The same term was used to indicate the Hutu members who, at the end of the 1980s and early 1990s, were coopted into the Tutsi-dominated UPRONA single party and government. Seen from this angle, the 2018 Constitution enables a return to that era (but with a different political constellation, as CNDD-FDD replaces UPRONA).

Secondly, a party that loses the elections – free and fair or less so – may have some positions in the National Assembly but may well be excluded from the executive. Constitutionally speaking, there is no more carrot for the party obtaining, for instance, 25% of the votes, to accept the electoral results in exchange for a number of cabinet positions. Of course, politically speaking, the

newly elected president may, in the absence of any constitutional requirement but rather out of ‘political generosity’, decide to appoint ministers who do not belong to his party. While that may be a sound strategy to avoid (institutional or violent) contestation of the election results, there are two caveats to be made. First, the government ministers who do not belong to the president’s party are at his mercy. After their dismissal, there is no longer a constitutional requirement that the president must appoint a minister belonging to the same party nor that the president should consult that party (as under the current article 129). Second, the president may need several cabinet positions to satisfy the demands voiced by the different wings within his own party, thus facing a shortage of ministerial portfolios to share (unless he creates an oversized cabinet, which the constitution allows him to do).

Thirdly, as recent cases in Northern Ireland, Lebanon and Belgium illustrate, establishing (and sustaining) coalition governments in consociational power-sharing systems may take a long time and often turns out to be complicated. Not so in Burundi. In 2005, 2010 and 2015, establishing a (coalition) government took a matter of days after the president took the oath. The main – and unfortunate – explanation is that, in Burundi, there is no tradition of negotiations on the substance of a new coalition government agreement. The institution of a coalition government in Burundi was, in essence, an executive position-sharing mechanism, without a preliminary agreement of a government programme on the basis of

a compromise between different political ideologies. Seen from that angle, the 2018 Constitution will not affect political practice.

THE REINTRODUCTION OF THE PRIME MINISTER

Under the 2005 Constitution, the president of the republic was assisted by two vice-presidents, one in charge of the political and administrative domain, the other in charge of the economic and social domain. In a truly consociational spirit, the two vice-presidents must belong to a different political party and different ethnic group. Furthermore – and contrary to the above-mentioned arrangement for ministers – the predominant ethnic character of their political party must be taken into account (article 123). Since 2005, the second vice-president has been a Hutu member of CNDD-FDD while the first vice-president has been a Tutsi member of UPRONA. It should, however, be noted that since February 2014, following the *nyakurisation* – the government orchestrated splitting of political parties⁷ – of UPRONA, the first vice-president was no longer supported by the ‘original’ UPRONA that took part in the APRA negotiations.

The 2018 Constitution maintains that one vice-president must belong to a different ethnic group and political party than the president. However, his role becomes almost totally ceremonial, except in one particular scenario. In the event of the temporary inability of the president, the vice-president replaces him (article 121). More importantly, the 2018 Constitution re-introduces the prime minister, an institution that also

existed under Burundi's 1992 multi-party constitution. As government leader, (s)he is accountable to the president but also to the National Assembly,

which was not the case with the president as government leader under the 2005 Constitution. Assuming that parliament plays its role, this marks a step forward in terms of checks and balances. The prime minister – who can be of the same ethnic group and political party as the president – is appointed by the president, after prior approval by the National Assembly and the Senate. The prime minister can be dismissed by the president. Also, (s)he must, together with all government ministers, resign following a two-thirds majority no confidence vote in the National Assembly (article 208).

After the 2020 elections, the choice of the prime minister will obviously be most crucial. The newly elected president seems to have three main options. He can choose a close ally from within his own party, at the risk of creating (or enhancing) internal resistance among other spheres of influence within his party. As an alternative option, in order to consolidate his position but, at the same time, accommodate other poles of power, he can choose a prime minister from another party wing. Thirdly, he can walk in the footsteps of President Melchior Ndadaye, who appointed Silvie Kinigi (a Tutsi woman, UPRONA) as prime minister after winning the 1993 elections. It should also be noted that the 2018 Constitution does not prevent current President

Nkurunziza from being appointed as prime minister after the 2020 elections.

ENHANCED PRESIDENTIAL POWER

After the 2020 elections, although he will continue to chair the meetings of the council of ministers (article 110), the president will no longer be the '*chef du gouvernement*' (article 129). Nevertheless, as a result of some changes laid down in the 2018 Constitution, the presidency will become a more powerful institution.

The first change relates to the presidential term in office. The president will be elected for a renewable term of seven years (with a maximum of two consecutive terms) rather than for five years. Under the 2018 Constitution, the next legislative elections will take place in 2025, while the president will remain in office (at least) until 2027. Secondly, as noted above, the president has more freedom to appoint and dismiss government ministers. Thirdly, the government will be in charge of implementing the nation's policy which, henceforth, will be determined by the president (article 136) and no longer by the government itself (current article 131). Furthermore, any law adopted in Parliament which the president does not promulgate within 30 days automatically lapses. The president thus obtains a *de facto* veto power over the legislative branch, without having to motivate and explain his refusal to promulgate in Parliament (article 204). Finally, the president will have exclusive control over the national intelligence service (SNR, Service national de renseignement). Constitutionally speaking,

the SNR is no longer one of Burundi's defense and security institutions (alongside the army and the police) (article 268). Therefore, the president no longer needs the approval of the Senate to appoint the SNR administrator general (and his deputy). Also, presidential decrees adopted to implement the new organic law on the SNR are no longer made public (article 55 of the Law of 12 July 2019).⁸ Furthermore, parliamentary control on Burundi's defense and security institutions no longer applies to the SNR (article 249).

The 2018 Constitution thus creates ample room for the new president to consolidate his power. Insofar as power in Burundi is determined by (and exercised in accordance with) the constitution, the newly elected president will clearly benefit from the new constitution. However, extra-constitutional spheres of power may well be and remain more influential. Should CNDD-FDD candidate Ndayishimiye win the elections, tension may arise between his own constitutional powers and the *de facto* power exercised by senior party cadres, including its

Eternal Leader Pierre Nkurunziza, who in March 2020 was also elevated as the country's Supreme Guide of Patriotism. Concerning the SNR, for instance, will the recently appointed Administrator-General Ndirakobuca continue to serve Nkurunziza, who appointed him, or will he rather be accountable to the new president, who has the constitutional power to replace him?

WHAT FUTURE FOR ETHNIC QUOTAS?

Burundi remains the only country on the African continent with constitutional ethnic quotas on the composition of state institutions. Under the 2018 Constitution, three – seemingly somewhat contradictory – evolutions are worth noting: in some areas, ethnic quotas are removed or diluted; elsewhere, ethnic quotas are introduced; at the same time, however, a 'soft' sunset clause seems to announce the end of ethnic quotas.

In parliament, ethnic quotas are maintained: 60% Hutu and 40% Tutsi in the National Assembly (directly elected); 50% Hutu and 50% Tutsi in the Senate (indirectly elected by provincial electoral colleges composed on the basis of the municipal elections). In both assemblies, a guaranteed representation (three members) of the Batwa minority is maintained. However, the effect of the guaranteed (over-)representation of the Tutsi demographic minority is strongly diluted. Under the 2005 Constitution, qualified majorities were required. For the adoption of legislation, a two-thirds majority was needed in the National Assembly and in the Senate. At the time of the Arusha peace negotiations, the combination of minority over-representation and qualified majority requirements was designed as a minority veto mechanism. The new constitution, however, removes the qualified majority requirement for the adoption of 'ordinary' legislation, which will be adopted by a simple majority of the MPs in the newly elected parliament. As a result, the Tutsi minority veto disappears. For a number of decisions, however, the qualified

majority requirement is maintained. For instance, the appointment of the ombudsman requires a three-quarters majority in the National Assembly and a two-thirds majority in the Senate. Furthermore, Tutsi MPs wanting to veto the adoption of legislation retain the – highly theoretical – possibility of collectively boycotting the parliamentary sessions. Indeed, although the two-thirds majority voting requirement disappears, the two-thirds quorum requirement is maintained in the 2018 Constitution (article 180). In reality, Tutsi MPs are very unlikely to boycott a session collectively, as they run the risk of being expelled from their party and, as a result, of losing their seat in parliament, in accordance with the Electoral Code. When drafting the 2018 Constitution and removing the qualified majority requirement, were presidential advisors motivated by a desire to annul the Tutsi minority veto? Perhaps, but not necessarily. In fact, Tutsi MPs never made use of their veto power in parliament. When, in 2007-2008, legislative work in parliament was blocked for several months, the blocking minority was composed of Hutu as well as Tutsi MPs, both from opposition parties and CNDD-FDD dissidents. Inspired by this precedent, the real motivation may well have been to alter the balance of power between the legislative and the executive branch, to the advantage of the government.

As noted above, ethnic quotas are also maintained for the composition of the government (60% Hutu, 40% Tutsi ministers). This is also the case for the staff

of state-owned companies (60% Hutu, 40% Tutsi). At the local level, a maximum of 67% of the municipality administrators can be of the same ethnic group (article 273), as under the 2005 Constitution. Within the security sector, ethnic parity (50% Hutu, 50% Tutsi) is maintained for the army and the police. Because the SNR is no longer a defence and security institution (see above), the quota requirement no longer applies to this powerful intelligence service. Its new organic law merely encourages the

recruitment of SNR staff that reflects the diversity of the Burundian people, without imposing quotas (article 12 of the Law of 11 July 2019).

A novelty compared to the APRA and the 2005 Constitution, the 2018 Constitution introduces ethnic quotas at the level of the judiciary (60% Hutu and 40% Tutsi, with a 30% quota for women), although the text remains very vague as to how this should be implemented (article 213). At first sight, this provision seems incoherent with the government's overall policy that tends towards the reduction or elimination of ethnic quotas (see also below). However, it is in line with the government's desire to apply ethnic quotas in those spheres where Hutu, 15 years after the first post-conflict elections, are allegedly still underrepresented. In 2017, ethnic quotas have, for instance, been imposed on the local staff of foreign non-governmental organisations.⁹ For CNDD-FDD, ethnic quotas are also – and perhaps above all – an instrument of affirmative action and a remedy for decades of Hutu discrimination,

rather than a typically consociational mechanism of (Tutsi) minority representation.

Finally, the Constitution introduces a new – but soft – sunset clause. Within five years of the 2020 elections, the Senate must evaluate the use of the quota system and advise on its extension or its termination (article 289). This is an important but soft sunset clause, because the actual removal of the ethnic quotas would require another constitutional amendment.

What are the political implications of these constitutional reforms for ethnic power-sharing? Will the 2018 Constitution mark the start of a new era? As this overview of constitutional innovations has shown, the new constitution suggests an evolution rather than a revolution in terms of ethnic power-sharing or, more accurately, in terms of ethnic position-sharing. Furthermore, it is important to recall the gradual erosion of ethnic power-sharing that, in practice, had already taken place before the constitutional amendment, both in the security and in the political sphere. Two examples illustrate this evolution. In the security sphere, the army today plays a completely different role than it did when the APRA was signed. Transformed into a peace-keeping army, its earlier role in daily security (or insecurity) enforcement is today, to a considerable extent, taken up by the *imbonerakure* CNDD-FDD youth – who, depending on the local context, act in conjunction with the local administration, dominant party officials and the police¹⁰ – and who are not subject to ethnic quotas. In the political sphere, years before the 2018 Constitution

was adopted, the veto-power of Tutsi members of parliament designed at Arusha had become *de facto* meaningless, for a number of reasons explained elsewhere.¹¹

CONCLUSION

The 2018 Constitution redesigns Burundi's institutional landscape. To some extent, the constitutional reform has already been implemented. Other changes will take effect only after the 2020 elections. While this policy brief sketched some key forthcoming institutional innovations, it did not offer an exhaustive overview. Other institutional reforms, not covered here, may also turn out to have major real-life importance. For instance, at the local level, the constitution alters the balance of power between the municipality council and the municipality administrator (article 271). Provincial governors no longer need to be civilians (article 144). It will be possible for the president to appoint military governors, in line – once again – with longstanding practice under the single party UPRONA republic.

As Burundi's initially widely applauded transition has shown, constitutions matter for resolving conflicts and sustaining peace. They lay down the rules of the game. In the aftermath of ethno-political conflict, they are ideally based on a compromise between a broad range of political and societal actors. Although both the 2005 and the 2018 Constitutions were adopted by referendum by the Burundian people, the context of their adoptions differed importantly. While the draft 2005 Constitution was the result of protracted

negotiations and public debates between most of the relevant actors, the 2018 constitutional reform process was not very transparent and was exclusively CNDD-FDD driven.

Substantively, however, though definitely moving Burundi's state institutions further away from the institutional design that was agreed upon in the APRA, the 2018 Constitution does not constitute a radical break with the 2005 Constitution, which was based on the constitutional blueprint laid down in the peace agreement signed in August 2000. Furthermore, and arguably more problematically, some of the constitutional novelties are a reflection – and a ‘constitutionalisation’ – of the political evolution of the past decade: stronger presidential powers (to the detriment of Parliament); a dominant party that controls state institutions;¹² the erosion of ethnic power-sharing; and fewer checks and balances, for instance, on the powerful intelligence service.

Endnotes

¹ Van Acker, T. (2015) *Understanding Burundi's predicament*. Brussels: Egmont Institute.

² Vandeginste, S. (2016) 'Legal Loopholes and the Politics of Executive Term Limits'. *Africa Spectrum* 51(2), 39-63.

³ Some risks were identified by Wilen, N. (2019) *Burundi on the brink again? Identifying risks before the 2020 elections*. Brussels: Egmont Institute.

⁴ All constitutions of Burundi, including the Constitution of 7 June 2018, are available here: <https://www.uantwerpen.be/en/projects/centre-des-grands-lacs-afrique/droit-pouvoir-paix-burundi/constitution/aperçu-historique-constitutionnel/>

⁵ These are Dieudonné Nahimana (independent candidate), Domitien Ndayizeye (KIRA), Leonce Ngendakumana (FRODEBU), Francis Rohero (independent candidate), Agathon Rwasa (CNL) and Gaston Sindimwo (UPRONA).

⁶ Constitutionally speaking, this is an inappropriate term because “a political party with a cabinet member cannot claim to be an opposition party” (article 173).

⁷ See, i.a., Courtois, A-C. (2019), ‘Rupture et continuité d’un *ethos* politique autoritaire: les noms de partis au Burundi’. *Mots. Les langages du politique* (120)2, 109-125.

⁸ When in November 2019, Gervais Ndirakobuca became SNR administrator general, the decree on his appointment was not published.

⁹ Vandeginste, S. (2019) ‘Ethnic quotas and Foreign NGOs in Burundi: Shrinking Civic Space Framed as Affirmative Action’. *Africa Spectrum* (54)3, 181-200.

¹⁰ Burundi Human Rights Initiative (2020) *A façade of peace in a land of fear. Behind Burundi’s human rights crisis*.

¹¹ McCulloch, A. and Vandeginste, S. (2019) ‘Veto power and power-sharing: insights from Burundi (2000-2018)’. *Democratization* (26)7, 1176-1193.

¹² *Mutatis mutandis*, the Constitution of 11 July 1974 sheds light on the current situation: “*Le Parti décrit l’orientation politique de la Nation et inspire l’action de l’Etat. Il contrôle l’action du Gouvernement en du pouvoir judiciaire. Le Parti reflète les aspirations profondes du peuple. Il l’éduque et l’encadre: il le guide pour la réalisation de ses aspirations*” (articles 19-20).



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