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Briefing Note 1606 October 2016 | Nick Branson

## Constitution-making in Côte d'Ivoire



On 30 October 2016, Ivorians will vote on adopting a new draft constitution unveiled only 25 days earlier. Very few citizens have read the text, which a committee of experts drew up and parliament rapidly endorsed. The government maintains that its priority has been to ensure that the new constitution is “consensual” and “impersonal”.<sup>1</sup> This would be novel in a country where the basic law has been shaped by the personal interests of one Frenchman and three Ivorians.

Constitution-making in Côte d'Ivoire has been characterised by subjective notions of national priorities and eligibility for leadership. It has shown a fixation with power and authority. There has never been a meaningful attempt to consult citizens, let alone reach a consensus. In the absence of a coherent or credible opposition, and despite the evident need for national dialogue and reconciliation, Ivorians have been deprived of a serious debate. This is a missed opportunity, but it should not come as a surprise. This Briefing Note situates the 2016 constitutional review in its historical context; and highlights contested features of a new basic law that, although dispensing with exclusionary language, is an elite project.

### *Le général français*

Côte d'Ivoire's first constitution bears the imprint of a French military officer born some 5,000km away. On 13 May 1958, an attempted putsch in Algiers led to a cabinet crisis in Paris. General Charles de Gaulle agreed to lead a government of national unity on condition that he be granted emergency powers and a new constitution be drawn up. This, he insisted, must establish a powerful presidency, to bring an end to the instability which had characterised the Fourth Republic (1946–58) in France.

De Gaulle's new basic law was approved by popular referendum on 28 September 1958. In France's African colonies this was coupled with provisions for gradual decolonisation. In advance of the plebiscite, de Gaulle travelled to Abidjan, convincing Ivorians to vote “yes” and join the *Communauté française* in preparation for independence.<sup>2</sup> On 26 March 1959, the territorial assembly transformed itself into a constituent assembly and adopted an interim constitution modelled on the Gaullist statute. The first parliament was elected on 12 April 1959, its members assuming greater responsibilities than the *conseillers territoriaux* who preceded them. The *Parti démocratique de Côte d'Ivoire* (PDCI), led by Félix Houphouët-Boigny, won all the seats in the new legislature.

Although not a Gaullist, Houphouët-Boigny had strong ties to metropolitan France. For 13 years, he represented Côte d'Ivoire in the National Assembly in Paris and served as a minister in five French governments. Houphouët-Boigny contributed to drafting the 1946 basic law as a member of two constituent assemblies; and he served on the inter-ministerial committee de Gaulle consulted on the 1958 constitution.<sup>3</sup> Houphouët-Boigny was steeped in the legal and political turmoil of the Fourth Republic and the Gaullist authoritarianism that followed. Following Côte d'Ivoire's independence on

7 August 1960, he swiftly moved to emulate the Gaullist model and centralise power in the Ivorian presidency. Houphouët-Boigny would occupy this position for 33 years, 30 of them without a prime minister.

### *Papa Houphouët*

Côte d'Ivoire's 1960 constitution repeated verbatim much of France's 1958 document.<sup>4</sup> Regardless of the grand principles articulated in the preamble, in practice citizens who wished to take part in politics had to join the PDCI – which provided all the members of the first four parliaments. Together with the party's political bureau, Houphouët-Boigny handpicked candidates for the legislature, seeking to reward loyalty and minimise opposition. The president adroitly managed political competition, co-opting opponents and recycling elites through party, government and parliamentary offices.

While firmly controlling the political space, Houphouët-Boigny liberalised the economy and promoted agricultural production, leading to a sustained period of growth. Much of this was driven by an influx of migrant labour from Upper Volta (now Burkina Faso) and Mali to the north. Workers were attracted to Côte d'Ivoire by a policy that in effect determined that anyone who would put it to productive use could occupy fertile land. As in the colonial era, land laws overrode customary tenure, inadvertently sowing the seeds of conflict between “indigenous” Ivorians and “northern” migrants, who although not citizens were entitled to vote. Houphouët-Boigny's decision to retain French nationals in the civil service and state-owned enterprises, and to permit Lebanese businesses to flourish, added to growing xenophobia.

Houphouët-Boigny remained wary of allowing any individual to emerge as his heir apparent, making constitutional succession a highly contentious issue.

In 1967, Houphouët-Boigny announced his intention to appoint a vice-president, but the plan was never realised. For two decades, he entrusted control of the legislature to Philippe Yacé. Serving concurrently as president of the National Assembly and PDCI secretary-general, Yacé was viewed as a likely heir. In 1975, the cabinet declared that the head of the parliament would assume the presidency should the incumbent die in office. However, five years later Houphouët-Boigny again announced his intention to name a vice-president, without disclosing who he intended to appoint.

### Le dauphin

At the PDCI's seventh congress in October 1980, the president abolished Yacé's position of party secretary-general and replaced it with an executive committee. That November, Yacé was removed as head of the National Assembly. His successor was former finance minister Henri Konan Bédié. In November 1990, Houphouët-Boigny confirmed that Bédié, as president of the National Assembly, would assume the duties of head of state *ad interim* if the role became vacant. However, to check Bédié's power the president amended the constitution to appoint the first prime minister since independence, Alassane Dramane Ouattara. A former Africa director at the International Monetary Fund (IMF) with roots in the north of the country, Ouattara was tasked with implementing major structural reforms.

For ten months during 1992–93, Houphouët-Boigny was hospitalised in Europe and many of the duties of head of state fell to Ouattara. Bédié's National Assembly condemned the prime minister's attempts to privatise state-owned enterprises, inflaming antipathy between "sons of the soil" and "northerners". In line with the constitution, however, the Supreme Court named Bédié interim president following Houphouët-Boigny's death on 7 December 1993. Ouattara resigned as prime minister and returned to the IMF in Washington, DC.

Bédié took advantage of his incumbency to amend the electoral law, aware that Ouattara might defeat him if he returned to contest an election, given the latter's support among the large voting bloc of "northerners". Henceforth, candidates for the presidency had to be resident in the country and provide evidence that all four of their grandparents had been born in Côte d'Ivoire. Ouattara's family was scattered across both sides of the border and he had completed his secondary education in Upper Volta. The legal emphasis that Bédié ensured was placed on *ivoirité* – an exclusionary concept of national identity which stressed the primacy of ethnic indigeneity – in effect eliminated his main competitor from the presidential election on 22 October 1995. It also fomented ethnic hatred and precipitated xenophobic attacks on northerners, dividing the country that Houphouët-Boigny had endeavoured to build.

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### Le général ivoirien

A bloodless military coup on 24 December 1999 initially provided hope for those suffering the damaging effects of *ivoirité*. Junta leader General Robert Guéï promised to "sweep the house clean", declared a state of emergency

and tasked a commission with organising elections and drafting a new basic law. 27 experts synthesised the recommendations of several hundred civil society representatives. However, personal ambition again trumped the national interest. Faced with the same electoral predicament as his predecessor, Guéï resorted to incorporating the principle of *ivoirité* in the proposed constitution, further formalising the exclusion of "northerners" and entrenching animosity.

The new basic law was adopted by popular referendum and promulgated on 1 August 2000. Article 35 stated that candidates for the presidency must be "of Ivorian origin, born of a father and a mother of Ivorian origin". The president of the National Assembly remained the constitutional successor if the incumbent died in office, while the prime minister was responsible for forming a government.

In October, a newly appointed Supreme Court disqualified 14 of the 19 candidates for the presidency, including Ouattara and Bédié. When initial results from the polls went against Guéï, he dissolved the electoral commission and declared himself the winner. Supporters of his main adversary, Laurent Gbagbo, a university lecturer-cum-trade unionist and leader of the *Front populaire ivoirien* (FPI), took to the streets. When the army deserted him, Guéï fled the country, enabling Gbagbo to take power. Ouattara and his supporters called for a new ballot that would include all the candidates excluded by Guéï's "kangaroo court". Gbagbo refused.

Opposition from Ouattara's party, *Rassemblement des Républicains* (RDR), initially made it impossible to hold legislative elections in the north of the country. With the RDR boycotting the polls, Gbagbo's FPI took 96 of the 225 parliamentary seats and Bédié's PDCI 94. When the RDR agreed to contest subsequent municipal elections, the party won 63 councils, ahead of the PDCI on 60 and the FPI on 33. Amid such divisions, a military rebellion in September 2002 instigated a protracted civil war between "northerners" resentful of their exclusion from power and forces loyal to FPI government.

In January 2003, the signing of the Linas-Marcoussis Accord provided for the removal of divisive and exclusionary *ivoirité* provisions from Article 35. However, Gbagbo delayed elections until October 2010, perhaps conscious that he faced a formidable opponent. Ouattara's RDR and Bédié's PDCI had united under the banner of the *Rassemblement des houphouëtistes pour la démocratie et la paix* (RHDP). Like Guéï before him, Gbagbo refused to accept electoral defeat in a run-off election held on 28 November. A dubious ruling from the politicised *Conseil constitutionnel* provided a pretext to disregard results in Ouattara's strongholds.<sup>5</sup>

More than 3,000 Ivoirians were killed before Gbagbo was forcibly removed from the presidential palace. On 11 April 2011, this was captured by "northern" rebels with support from the French army. Ouattara was inaugurated as president on 6 May and invited Guillaume Soro, a former rebel leader and prime minister under Gbagbo, to form a government. Following legislative elections on 11 December, Soro was appointed president of the National Assembly and thus became the heir apparent. While Soro continues to serve at the pinnacle of the Ivorian state, Gbagbo is being tried for crimes against humanity at the International Criminal Court in The Hague. This

has led to accusations of victor's justice.

## Succession in Côte d'Ivoire's Third Republic

Ouattara is eager to stress his commitment to peace and reconciliation. In March 2015, he promised that if he was re-elected that October, he would revise the basic law to clarify succession and formalise the electoral calendar. The push for constitutional reform has been framed as delivering on the Linas-Marcoussis Accord – a document endorsed by the United Nations Security Council.<sup>6</sup> In this regard, Ouattara is on shaky ground: the agreement commits its signatories to *revise* rather than *replace* the statute.

The distinction has not escaped the attention of either the FPI or the PDCI. The former has split into two factions in Gbagbo's absence, while the latter is visibly divided over Bédié's willingness to serve as a junior partner to Ouattara. Conscious of the predominance of subjectivity or "personal preferences" in the history of constitution-making in Côte d'Ivoire, civil society representatives have also urged Ouattara to revise controversial parts of the existing text – such as Article 35 – rather than become embroiled in writing a new document.<sup>7</sup> Nevertheless, the president has shown his intention to emulate the Gaullist model, which treats constitutional reform as an elite project rather than an opportunity for dialogue and consensus.

“Regardless of the imperfections of the new dispensation, the current succession provision is far from perfect either.”

In May 2016, Ouattara appointed a committee of experts led by Prof. Boniface Ouraga Obou. A former dean of the law faculty at the University Félix-Houphouët-Boigny in Cocody, Abidjan, and ex-member of the *Conseil constitutionnel*, Ouraga Obou is a founding member of the FPI who presided over the body responsible for the 2000 basic law. Ouattara's proxy in the process has been Dr Cissé Bacongo, a special adviser who was also involved in the 2000 constitutional review. The whole process is supported by Minister of Justice Sansan Kambilé a former judge and government secretary-general. Following consultation with 40 stakeholder groups, the committee delivered a draft constitution to the president on 24 September. The text was put before the cabinet on 28 September and parliament on 5 October.

Not everyone in the government has welcomed the review process. Soro initially continued to refer to "reforms to the constitution" rather than a new constitution. The introduction of a vice-president, who would be able to complete the term of the incumbent in the event of his death – and thus "guarantee the continuity and stability of the executive and ensure that the electoral calendar is respected"<sup>8</sup> – could be seen as diminishing the status and authority of the president of the National Assembly.

The vice-president is to be elected on a joint ticket with the head of state from 2020, but under an interim dispensation Ouattara is entitled to appoint a deputy when he promulgates the new basic law. That Ouattara has already expressed a desire to stand down before 2020 has led to criticism that he is attempting to install a successor by the back door.<sup>9</sup> The appointment of a vice-

president would have greater legitimacy if parliament were involved, a point stressed by the *Plateforme de la société civile pour l'observation des élections en Côte d'Ivoire* (POECI)<sup>10</sup> and members of parliament.<sup>11</sup>

Regardless of the imperfections of the new dispensation, the current succession provision is far from perfect either. While the president of the National Assembly is able to fill a power vacuum temporarily, the requirement to organise elections within 45 to 90 days is ambitious. Given the history of incumbents amending electoral laws and manipulating institutions, it is by no means certain that Soro, a former rebel leader, would respect the constitution. Having so far been insulated from any legal repercussions for his role in the civil war, he might prefer to benefit from the immunity afforded to a sitting head of state.

## Article 35, the Senate, the diaspora and the chiefs

Those intent on contrasting the 2000 basic law with the 2016 document point to evidence of the subjectivity that is typical of constitution-making in Côte d'Ivoire. They argue, for example, that Bédié (aged 82) and Ouattara (aged 74) have good reason to support a reduction in the number of conditions dictating eligibility for the presidency from 12 to four. They cite the removal of a maximum age limit of 75, and the lowering of the minimum age threshold from 40 to 35 years. Yet this was precisely the wording agreed at Linas-Marcoussis in 2003, when Soro was only 30.<sup>12</sup> A less frequently heard criticism concerns the omission of a requirement for medical reports on presidential aspirants. These were an integral part of Article 35 of the 2000 constitution, whereas the Linas-Marcoussis Accord only required the incumbent to make details of his annual medical checks public.

Appropriating wording from the peace agreement, presidential candidates will no longer be required to prove that *both* their parents were Ivorian, and that they had never renounced Ivorian citizenship or assumed another nationality. Nor will they have to have been resident in Côte d'Ivoire for five consecutive years before the election. This could be regarded as advantageous to Gbagbo, who has been held in The Hague since November 2011. Curiously, the FPI has fixated on a clause from the 2000 constitution, which required that any changes to the presidential mandate be put to a single-issue popular referendum, seemingly oblivious to the fact that these provisions entrenched the exclusionary tactics first implemented by Bédié, expanded by Guéi, and maintained by Gbagbo.

FPI politicians inside and outside the country may also fail to appreciate the steps being taken to provide them with a means to influence legislation. The absence of the party from the National Assembly following their boycott of the 2011 elections has been addressed in Ouattara's plans to create a new Senate (upper house). Two-thirds of the new body will be indirectly elected by Côte d'Ivoire's *collectivités territoriales* (14 districts and 31 regions), which should provide those in less densely populated areas with a greater voice than in the National Assembly. The remaining 33 senators are to be appointed by the president, who may pick from among "Ivorians outside the country and members of the political opposition".

Attempts to engage the diaspora in domestic politics

may help to heal old wounds and promote a diversity of views. Issiaka Konaté, director-general for Ivorians outside the country, told ARI that “Article 30 entitles the diaspora to participate in national affairs. Under the Third Republic, I hope that Ivorians abroad will be considered the 32nd region”. On paper, bicameral parliaments also provide opportunities to promote a greater role for under-represented groups, such as women, young people and the disabled, to influence legislation. This would be constructive in a country where 77% of the population is under 35 years old and where women play a limited role in political life.

However, Ouattara may resort to using the Senate as Houphouët-Boigny did the National Assembly. Plans for Bédié’s PDCI and Ouattara’s RDR to merge, formalising the RHDP alliance under a new party, are supposed to be realised before legislative elections, due by December 2016. With competition for selection on an RHDP ticket expected to be fierce, those who lose out in primary elections are likely to seek a consolation prize in the upper house, either by popular ballot or presidential appointment. Ouattara has an incentive to maintain a friendly parliament. Under new rules, the head of state would be able to suggest amendments to any part of the basic law, subject to a two-thirds majority in a plenary session of the National Assembly and Senate.

The additional parliamentarians will not be the only new “big men”. Ouattara plans to enshrine in the constitution a “National House of Traditional Chiefs and Kings”, emulating Ghana. Both Ouattara and Houphouët-Boigny were born into royal households and have used tribal leaders for political advantage. Mamadou Koulibaly, a former president of the National Assembly, argues that institutionalising chiefs would lead to jurisdictional disputes with municipal government.<sup>13</sup> In contrast, Gilles Yabi of West African think tank WATHI believes that a house of traditional leaders “could play an important part in promoting national unity, provided that its role, function and composition is clearly specified.”<sup>14</sup>

Had Ivorians been consulted on the drafting of a new basic law, chiefs could have convened debates in rural communities. The RHDP coalition may yet enlist traditional leaders in a belated attempt to educate villagers on the proposed constitution and cajole them into voting in the plebiscite. Turn-out is unlikely to be strong. POECI argues that rural folk do not view changes to the statute as pressing; more urgent priorities are national reconciliation, the rising cost of living, unemployment and security.<sup>15</sup>

## My constitution

Marie-Joelle Kei, co-ordinator of the West African Network for Peacebuilding—Côte d’Ivoire has called for the constitutional referendum to be delayed until early 2017, to allow time for greater popular participation.<sup>16</sup> Even RDR activists have expressed a lack of preparedness for the campaign.<sup>17</sup> By any standards the timetable is rushed and does not attest to profound deliberation. Many Ivorians will undoubtedly regard the new basic law as another presidential project.

Ouattara remains determined to get the vote out of the way and loath to provide a disparate opposition with a political cause behind which to unite. Initial calls for a constituent assembly made good sense, and might have offered the opportunity for inclusive deliberations over

the text. But the opposition’s willingness to engage in rational debate became questionable when 23 parties resolved to reject the constitution before the text was released.

Many of those who have spoken out against the new basic law have done so because they remain loyal to Gbagbo and refuse to acknowledge the legitimacy of the Ouattara regime. Opposition politicians have described the proposed constitution as “treacherous”,<sup>18</sup> “undemocratic, illegal and illegitimate.”<sup>19</sup> Despite its ethos of exclusion, they maintain that the 2000 document is “progressive, modern and *avant-garde*”;<sup>20</sup> and that the government’s attempt to overhaul it risks provoking “a new socio-political crisis” and poses a “threat to peace and stability.”<sup>21</sup> One group has even vowed to “block Ouattara’s path.”<sup>22</sup>

Such hyperbole and reactionary behaviour does nothing to promote reconciliation or dialogue over issues of national importance. Ouattara’s decision not to open up the process may be a result of the recalcitrant nature of the opposition, but he has also displayed a preference for the Gaullist model. Anyone familiar with the history of constitutional reform in Côte d’Ivoire should not be surprised that the most recent version of the basic law has been fashioned by the incumbent in the absence of popular consultation.

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