

The Chadian Constitution of 1996: A Commentary

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I. Origins and Historical Development of the Constitution – From Independence to the 1996 Constitution

The former French colony, Chad, became a republic on 28 November 1958 within the French Community established by the French Constitution of 4 October 1958. The country gained independence on 11 August 1960. François Tombalbaye became the first President and on 28 November 1960 a new constitution came into force. Like the constitutions of many former French colonies in Africa, the Chadian Constitution of 1960 was modelled on the French Constitution. However, the main points of departures were that the Parliament was comprised of only one chamber, the National Assembly, and there was no Constitutional Council.¹

In the early years of his ascension to power, President Tombalbaye, the first President in Chad's history, established an autocratic rule. He used terror and repression to eliminate any form of opposition to his regime. The autocratic tendencies of President Tombalbaye reached their peak with the repeal of the 1960 Constitution and its replacement by the Constitution of 16 April 1962, establishing a one-party system.

In late 1965, the local populations of Mangalmé, in the Department of Guerra, rioted against Tombalbaye's government. The riot was the consequence of frustrations caused by the excessive taxes imposed on the local populations.² The tragic events of Mangalmé led to the creation in June 1966 of the *Front de liberation national du Tchad* (FROLINAT), the first rebel movement in the history of Chad.³ The creation of the FROLINAT marked the beginning of long years of violence and political instability.

On 13 April 1975, Chad entered a cycle of *coups d'Etat*, with the assassination of President François Tombalbaye by a group of army officers. Following this *coup d'Etat*, the military took over and the 1962 Constitution was suspended. The political indiscretions of the military, on the one hand, and of conventional politicians, on the other, fuelled instability and civil wars. The civil war of 1979–1982 nearly sent the country into total chaos. After several years of war and political instability, characterised by a series of *coups d'Etat*, the situation stabilized with the

* The views expressed in this paper are the author's own.

¹ Nadjita F. Ngarhodjim, 'An Introduction to the Legal System and Legal Research in Chad' at [<http://www.nyulawglobal.org/globalex/Chad.htm>].

² Over five hundred people, including local administrative authorities, were killed during the riot.

³ The FROLINAT was composed mainly of natives from the northern part of the country, who felt neglected and oppressed by the government of François Tombalbaye.

coming to power of Hissène Habré in 1982.⁴ Once in power, Habré rapidly transformed his administration into a mechanism for brutal repression and systematic human rights violations.⁵ The dictatorial regime of Hissène Habré ended in December 1990, following yet another *coup d'Etat*, perpetrated against him by Idriss Déby, his former Chief of Defence Staff. In his first speech to the nation, Colonel Idriss Déby declared to Chadians: 'I bring you neither gold nor money but democracy'. This marked the beginning of a new era for the democratisation process in Chad.

One of the first and major decisions of the new government that took over the Habré administration was the organization of a National Sovereign Conference (NSC).⁶ The Conference gathered Chadians from different walks of life and was held in a bid to exorcise the demons which, for decades, had plunged the country into anarchy and prevented the establishment of the rule of law.

The NSC adopted a series of resolutions which, initially, were intended to place the country on the path to democracy and the rule of law. One of the resolutions provided for the establishment of a transitional period to allow the setting up of new institutions and the adoption of a new Constitution. The transitional period was governed by a Charter of Transition, whose Article 111 stipulated that 'the Charter becomes null and void from the adoption of the new Constitution through referendum'. However, the handling of the recommendations adopted by the NSC demonstrated an unfortunate lack of real commitment and political will towards their implementation. The 1996 Constitution,⁷ a product of the NSC, has been subjected to several amendments, of which that of 2005 suppressed the term limit set for the presidency and the Senate. The two legislative elections (in 1997 and 2002) and the three presidential elections (in 1996, 2001, and 2006) were all held under very poor conditions of transparency. Political parties from the opposition have on all these occasions denounced massive electoral frauds. The 2011

⁴ Since the assassination of the first President François Tombalbaye, all his successors have taken power through *coups d'Etat*, and Hissène Habré was no exception.

⁵ After Hissène Habré's fall from power in 1990, the new regime set up a National Commission of Inquiry that was tasked with investigating serious human rights violations which the Habré administration was suspected of having committed (see Decree No 014/P.CE.CJ/90 (29 December 1990) creating the '*Commission d'enquete sur les crimes et détournements commis par l'ex- président, ses co-auteurs et/ ou complices*'). A report published by the National Commission of Inquiry after seventeen months' work indicated that not less than 40,000 people were killed during the eight years of Habré's presidency. The report also indicated that torture was used on a very large scale by the *Direction de documentation et de sécurité* (Directorate of Documentation and Security) created by Hissène Habré and placed under his direct authority.

⁶ The National Sovereign Conference was held in N'djamena, the capital of Chad, from 15 January to 7 April 1993.

⁷ The 1996 Constitution was adopted on 31 March 1996.

presidential election, which saw President Idriss Déby Itno obtain a fourth successive mandate, was boycotted by the main opposition parties.⁸

The 1996 Constitution has the merit of being Chad's first democratic constitution. The Law No 008/PR/2005 of 15 July 2005, which amended the 1996 Constitution, did not make any amendment to the Bill of Rights. However, the amendment suppressed the limitation of presidential terms in office as well as the age limit for presidency. The amendment also suppressed the Senate, one of two chambers of Parliament, and established an Economic, Social and Cultural Council. Although the Senate was provided for in the first version of the 1996 Constitution, it was not operational at the time of the 2005 amendment, which established a unicameral system.

II. Fundamental Principles of the Chadian Constitution

A product of the first NSC, held after three decades of civil wars, political instability, and dictatorships, the Chadian Constitution of 1996, amended by the Law No 008/PR/2005 of 15 July 2005, encapsulates goals, values, and principles that are intended to put the country on the path to peace and social justice.

A. Constitutional Goals and Values

The goals and values of the 1996 Constitution are contained in its Preamble. The Preamble, an integral part of the Constitution, formulates the goals, objectives, and aspirations of the Constitution. The first paragraph of the Preamble states as follows:

We the Chadian people: Affirm by this Constitution, our will to live together in respect of ethnic, religious, regional and cultural diversity; to build a State of law and a united Nation based on fundamental Rights of Man, dignity of the human person, and political pluralism, on the African values of solidarity and fraternity.

Although the subsequent paragraphs of the Preamble are also devoted to goals and values, a close examination shows that they merely elaborate the values and goals proclaimed by the first paragraph. The desire to live in harmony, regardless of ethnic and religious diversities, as proclaimed by the first paragraph of the Preamble, is very significant. Indeed, it translates as the

⁸ Yorongar Ngarlédji from the Federation Action for the Republic (FAR), Wadel Abdelkader from the Union for Renewal and Democracy (URD), and Saleh Kebzabo from the National Union for Democracy and Renewal (UNDR) withdrew their participation in the election because of shortcomings in its organization.

willingness of the Chadian people to turn over a new leaf. The civil war that broke out in 1979 and ended in 1982—the greatest civil unrest that the country has ever known and which left Chadians divided until the creation of the NSC—was mainly the culmination of ethnic and religious intolerances. The values of peace and social cohesion, which have long been lacking in Chadian society, are among the main goals that the 1996 Constitution seeks to achieve.

Beyond the search for peace and social cohesion, the 1996 Constitution aims to achieve the rule of law, a united nation based on respect for fundamental human rights, other civil liberties, and political pluralism. This is important, especially in light of Chad's painful past, characterized by years of dictatorship and massive human rights violations. The 1996 Constitution promised a society free from terror, horrible human sufferings, and dictatorship. Despite some progress along the path to human rights and democracy, the road towards the realization of that goal remains a challenging one.

The last paragraph of the Preamble declares the attachment of the Chadian people to the cause of African unity and their commitment to work in every way to achieve regional and sub-regional integration.⁹ This paragraph should be considered more as an aspiration than a proclamation of an achievable goal, for the reason that African unity, as well as sub-regional and continental integration, cannot be achieved by the Chadian people alone.

B. Constitutional Principles

The Chadian Constitution declares, in its Preamble, its attachment to the principles of the Rights of Man, as defined by the Charter of the United Nations of 1945, the Universal Declaration of the Rights of Man of 1948, and the African Charter of the Rights of Man and of Peoples of 1981. Accordingly, it explicitly incorporates these instruments as part of its provisions.

The principles of democracy are embodied in the Constitution. In effect, its Article 7 states that the principle which underlines the exercise of power is that of a government of the people by the people and for the people, based on the separation of the executive, the legislative, and the judiciary. The separation of powers will be dealt with later.

Another important principle enshrined in the Chadian Constitution is the principle of state neutrality on religious affairs. This principle imposes on the three powers—the executive, the legislative, and the judiciary—a duty to refrain from meddling in religious matters or showing a preference for a particular religion in the exercise of their official functions.

⁹ See the last paragraph of the Preamble.

Furthermore, Article 3 proclaims that sovereignty belongs to the people, who exercise it directly through referendums or indirectly through elected representatives. The article goes further to declare that no community, corporation, political party, or association, trade union, individual, or group of individuals may arrogate its exercise.

III. Fundamental Rights Protection

The fundamental rights and freedoms are enshrined in the Chadian Constitution under section (*titre*) 2. Section 2, which is in fact the Bill of Rights, caters for civil and political rights, economic, social, and cultural rights, and third generation rights. The Constitution also provides for duties, which will be highlighted below.

A. Civil and Political Rights in the 1996 Constitution

Civil and political rights are dealt with in Articles 17 to 30 and Articles 42 to 46. These articles provide for the following civil and political rights: the right to be equal before the law; the right to life and physical integrity; the right to security; the right to liberty; the right to the protection of one's private life, home, and of his belongings; the right to strike; the right to property; the right to choose one's home or residence in any part of the country; the freedom of movement; the right to privacy of one's correspondence and communications; the right of foreigners to seek asylum in Chad; the right of political refugees not to be extradited; the freedom to join or form a trade union; the right not to be subjected to slavery; the right not to be illegally or arbitrarily arrested or detained; the freedom of movement, of expression, of conscience, of religion, of the press, of gathering; and the right to be free from humiliating and degrading treatment or punishment, as well as from torture.

Other civil and political rights, which also serve as important principles in criminal law, such as the presumption of innocence and personal responsibility for wrongful acts, are encapsulated in the Bill of Rights.

Although Article 18 provides for the right to be free from humiliating or degrading punishment or treatment as well as from torture, there is a legal vacuum concerning the issue of inhumane treatment. If some international human rights instruments, such as the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights, specifically mention the right to be free from inhumane treatment, this is because not all treatment can be classified either as torture or degrading treatment.

It is also important to mention that the Chadian Constitution says nothing with regard to the right to nationality. This is another vacuum which needs to be specifically highlighted in the context of this analysis, taking into account the particular importance of the right to nationality and the

implications of not having it constitutionally protected. Discussing the relevance of the right to nationality, the Inter-American Commission emphasized that:

[Nationality] is one of the most important rights of man, after the right to life itself, because all other prerogatives guarantees and benefits man derives from his membership in a political and social community—the States—stem from or are supported by this right.¹⁰

Article 11 of the Constitution states that the conditions of acquisition and loss of Chadian nationality are determined by the law, but it does not declare nationality to be a fundamental right. This might have serious legal consequences. It would, for example, be difficult, if not impossible, for citizens who feel that the law determining the conditions of acquisition and loss of nationality has violated their right to nationality to challenge the law in question. If it happens that the law on nationality provides for very restrictive conditions for the acquisition of nationality, or provides conditions for the loss of nationality that are unreasonable, the constitutionality of such law cannot be questioned, even though it might leave some people stateless. The truth is that statelessness is the worst form of human rights violation, because it constitutes the denial of all human and fundamental rights.¹¹ Put bluntly, the right to nationality is the right to have rights, because nationality is the legal bond between an individual and a state. In some countries, laws on nationality have been used to preclude political opponents from assuming official functions.¹²

B. Economic, Social, and Cultural Rights in the 1996 Constitution

Economic, social, and cultural rights (ESCR) are protected in the Chadian Constitution under Articles 31 to 40. The ESCR rights that are guaranteed include the right to equal access to public employment; the right to work without discrimination; the right to culture; the right to create intellectual and artistic work; the right to education, including the free and secular character of public education; the right to family welfare; the right of parents to educate their children and the right of children not to be separated from their parents; the right of youth to personal development and well-being; the right of the aged, as well as physically and mentally disabled people unable to work, to be assisted by the state; and the right to private property. The freedom to join or form a trade union and the right to strike, already mentioned above under the section on the civil and political rights protected by the Chadian Constitution, need to be mentioned again under this section, due to their mixed character.

¹⁰ Inter-American Commission on Human Rights, Third Report on the Situation of Human Rights in Chile, ch IX, 10 Inter-Am CHR OEA/Ser.L/V/II/40 Doc 10 (11 February 1977).

¹¹ Bronwen Manby, *Struggles for Citizenship in Africa* (Zed Books, 2009) 22.

¹² Manby (n11) 127–140.

Contrary to the doctrine and trend in international human rights law, nothing in the Bill of Rights of the Chadian Constitution subjects the realization of ESCR to the availability of resources or provides for their progressive realization.¹³ The sole exception is Article 40, which declares that the state strives to cater for the needs of the aged and physically incapacitated, as well as mentally disabled people who cannot work, through the establishment of social institutions. Although the notions of financial resources or progressive realization are not specifically mentioned, the manner in which the article is framed does not leave any doubt concerning the intention of the Constitution's drafters to give latitude to the state in respect of the implementation of that provision.

As Chad is a multi-ethnic and religious country, the Constitution clearly provides that customary and traditional rules are applicable in communities where they are recognized, provided that they are not in conflict with the law. Customary and traditional rules promoting inequality between citizens are prohibited.¹⁴ Those governing matrimonial regimes and inheritance require the consent of the parties concerned.¹⁵

C. Third Generation Rights in the 1996 Constitution

The right to a healthy environment is the only third generation right provided for under the Chadian Constitution. The relevant provision is found in Article 48, which declares that:

The State and the Decentralized Territorial Collectivities must see to the protection of the environment. The conditions of stocking, handling, and removal of toxic or polluting wastes originating from national activities are determined by law. The transit, importation, stocking, burying, [and] dumping on the national territory of foreign toxic or polluting wastes are forbidden.

D. The Duties in the 1996 Constitution

Like the constitutions of many francophone countries, the Chadian Constitution imposes duties on individuals, but also on the state. Among the former are the duties to comply with the Constitution, laws, and regulations, as well as the institutions and symbols of the Republic;¹⁶ to respect and protect public properties;¹⁷ to protect the homeland and the national territorial

¹³ Nadjita F. Ngarhodjim, '*Les libertés et droits fondamentaux dans la constitution tchadienne de 1996*', juin 2008 at [<http://www.cefod.org/spip.php?article1816>].

¹⁴ Art 157.

¹⁵ Art 158.

¹⁶ Art 49.

¹⁷ Art 50.

integrity;¹⁸ to respect and protect the environment;¹⁹ to contribute to public expenditure;²⁰ and to comply with an obligation of national interest.²¹

Those imposed on the state are the duties to protect the legitimate interests of Chadian nationals abroad;²² to ensure the political neutrality of the public service and the armed forces;²³ to exercise full and permanent sovereignty on all wealth and national natural resources for the well-being of Chadians;²⁴ and to guarantee the freedom of enterprise.²⁵

Unlike the duties enshrined in the African Charter on Human and Peoples' Rights (African Charter), which is also the subject of much controversy, those set out in the Chadian Constitution constitute a necessary safeguard for the realization of the goals and values that the Constitution aims to achieve. The duties under the African Charter are subject to harsh criticism because of the very nature of the Charter, which is an instrument intended to protect individuals against the arbitrary intrusions of a state.²⁶ On the other hand, the Chadian Constitution, like other national constitutions, is an instrument whose function is to regulate the relationship between the state and its citizens, as well as the relationships between public institutions. The realization of the Constitution's goals and values would be problematic if citizens did not have reasonable duties imposed on them. The duty to protect the environment, for example, is important for the attainment of a healthy environment for all. It is difficult to imagine a state realizing the right to a healthy environment without a duty being imposed on citizens to refrain from acts which are detrimental to the environment.

When there is an obligation necessitated by the national interest, the Constitution makes it a point of duty for citizens to lend a strong hand, regardless of their religious or philosophical affiliations. This provision is a limitation of the freedom of religion, but it is reasonable taking into account the legitimate purpose it is meant to serve. However, the national interest should not be interpreted in such a manner to include illegitimate acts of the state, such as an illegal war against another sovereign state.

¹⁸ Art 51.

¹⁹ Art 52.

²⁰ Art 53.

²¹ Art 54.

²² Art 55.

²³ Art 56.

²⁴ Art 57.

²⁵ Art 58.

²⁶ Contrary to national constitutions which bind states' institutions and also individuals, the African Charter is a legal instrument which binds states only. For critics, there is no point in imposing duties on individuals because legal action cannot be taken against them for a violation of the African Charter.

E. The Enforcement of Rights Guaranteed by the 1996 Constitution

Article 12 of the 1996 Constitution declares that ‘[l]iberties and fundamental rights are recognized and their exercise guaranteed to citizens under the forms and conditions specified by the Constitution and the law.’ A literal interpretation of that provision seems to suggest that the enjoyment of the rights and freedoms proclaimed by Section 2 of the Constitution is subject to the enactment of a law to give effect to them. The consequence of this is that the legislator can use his legislative powers to take away the rights proclaimed by the Constitution. In practice, that has sometimes been the case. For example, one could cite Ordinance No 005/PR/2008 of 26 February 2008, concerning the press in Chad, which is considered to be a repressive law against journalists.²⁷

A close examination of the rights provided under Section 2 reveals two sets of rights. On the one hand, there are rights which are directly enforceable, meaning there is no need for the enactment of a law to specify the conditions for their enjoyment. A good example of such rights is provided by Article 14, which states as follows:

The State assures to all equality before the law, without distinction of origin, race, sex, religion, political opinion, or social position. It has the duty to see to the elimination of all forms of discrimination with regard to women and to assure the protection of their rights in all areas of private and public life.

On the other hand, there are rights which are enforceable only when the legislator has enacted a law to provide for the conditions of their enjoyment. These rights are easily identifiable because of the manner in which they have been formulated by the legislator. An illustration can be seen in the use of terms such as ‘the law will determine the conditions of exercise of these rights’, ‘the right is enjoyed within the parameters of the law which regulates its exercise’, etc. It is important to note, also, that there are certain rights whose limitations are supposed to be provided by the law. This is the case, for example, in Article 42, which declares the inviolability of the domicile, and goes on to state that this can be searched only in cases and forms provided by the law.

As far as situations of exceptional circumstances are concerned, Article 87 explicitly provides that they cannot be a justification for violations of the right to life, to moral and physical integrity, and to the jurisdictional guarantees granted to individuals. The 1996 Constitution has therefore placed the right to life and the right to moral and physical integrity as the only non-derogable rights. Interestingly, in the famous Communication 74/92 concerning the violation of the right to life and physical integrity, the Chadian Government argued in its defence that the

²⁷ The law provides for a sentence of imprisonment for journalists for slander or libel. Under an amendment to the law in 2010, the imprisonment sentence has been removed, but journalists are still subjected to heavy fines for slander or libel.

violations were committed under exceptional circumstances—a situation of war—and that the authors were private actors. Examining the merit of the Communication, the African Commission on Human and Peoples' Rights (the African Commission) took the view, first, that states have the responsibility to protect the fundamental rights of people living under their jurisdiction, and in the case of human rights violations committed either by private actors or by state agents, the responsibility is on the state.²⁸ Second, the African Commission stated that exceptional circumstances cannot be a justification for the violation of human rights.²⁹

IV. Separation of Powers

The separation of powers is a principle clearly entrenched in the Chadian Constitution. In fact, Article 7 states that the overriding principle governing the exercise of power is that of a government of the people, by the people, and for the people, based on the separation of the executive, the judiciary, and the legislative powers.

A. The Executive

The executive comprises a President of the Republic, elected directly by the people for a renewable six-year term, and a government led by a Prime Minister appointed by the President. While the government defines and implements the political agenda of the nation,³⁰ the President ensures respect for the Constitution and the proper functioning of public institutions, as well as the continuity of the state. The President is also the guarantor of independence, sovereignty, and national unity, of territorial integrity, and of respect for international treaties and accords.³¹

Like many countries of francophone Africa, Chad's political regime is of the presidential type, characterised by the supremacy of the President of the Republic.³² The Constitution grants important powers to the President, without real counterbalance mechanisms. If, on the one hand, the President has the power to dissolve the National Assembly in circumstances of persistent conflict between the executive and the latter,³³ on the other hand, only the responsibility of the Prime Minister and that of his ministers can be engaged by the National Assembly, through a

²⁸ Communication 74/92, *Commission nationale des droits de l'homme et libertés c/Tchad*, para 36 at [<http://caselaw.ihrda.org/fr/doc/74.92/view/>].

²⁹ Communication 74/92 (n28) para 37.

³⁰ Art 94.

³¹ Art 60.

³² André Canabani et Michel Louis Martin, *Les Constitutions d'Afrique francophone* (éditions Khartala, 1999) 69.

³³ Article 83 of the Constitution provides that when the functioning of public institutions is threatened by persistent crises between the executive and the legislative branches, or if within one year the National Assembly twice overthrows the government, the President of the Republic can, after having consulted the Prime Minister and the Speaker of the National Assembly, decide to dissolve the latter. New legislative elections are organized within forty-five days after the dissolution of the National Assembly.

vote of no confidence under the same circumstances.³⁴ The government is therefore the shield which protects the President against any deposing attempt during his term of office.

The Constitution sets requirements to stand for the presidency. One must, among other conditions, be Chadian by birth, born from parents of Chadian origin, and possess no other nationality except Chadian.³⁵ Although states have the right to restrict access to the supreme function, the above-mentioned requirements, provided by Article 62, raise questions from a human rights perspective. The right to participate in government is a right asserted by international human rights treaties, such as the African Charter, and such a restriction constitutes a violation of that right. One does not choose one's parents. It therefore follows that to prevent individuals born of parents who are not Chadians of origin from vying for the presidency deprives them of their rights solely based on who they are. This is contrary to the notion of equity, which is the very foundation of law as a discipline. As the Chadian Constitution is silent on issues related to citizenship and nationality, the term 'Chadians of origin' contained in that provision could mean anything.

Provisions similar to Article 62 in constitutions of other African countries have been used in countries, such as Ivory Coast, to disqualify political opponents from standing for elections. The case filed by the *Mouvement Ivoirien des Droits de l'homme* (MIDH) before the African Commission on Human and Peoples' Rights, regarding Article 35 of the Ivorian Constitution, has given the African Commission an opportunity to declare that preventing a citizen born in a country to stand for elections because one of his or her parents is not born in that country is a violation of Article 13(1) of the African Charter, which declares the right of every citizen to participate freely in the government of his country, either directly or through freely chosen representatives.³⁶ The African Commission drew inspiration from General Comment No 25 of the Human Rights Committee of the United Nations on participation in public affairs and the right to vote. In that General Comment, the Committee observed that

the effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education residence or

³⁴ The circumstances under which the responsibility of the government can be engaged through the vote of no confidence are provided by Articles 138 and 139.

³⁵ Art 62 .

³⁶ Communication 246/02, *Mouvement Ivoirien des Droits de l'Homme (MIDH)/ Cote d'Ivoire*.

descent, or by reason of political affiliation. No person should suffer discrimination or disadvantage of any kind because of that person's candidacy.³⁷

The African Commission espoused the reasoning of the Committee to opine that Article 35 of the Ivorian Constitution was discriminatory because it applies different standards to the same category of citizens, in that citizens of Ivory Coast are treated on the basis of the place of birth of their parents.³⁸

B. The Legislature

The first version of the 1996 Constitution provided for a National Assembly and a Senate as the two chambers of Parliament. However, since the 2005 amendment which saw the suppression of the presidential term of office, the Senate has been suppressed and replaced by the Economic, Social and Cultural Council (ESCC). The ESCC has no function other than advising the government on economic, social, and cultural matters.

The power to pass laws is not granted by the Constitution exclusively to the National Assembly. In effect, such power belongs concurrently to the National Assembly and the executive.³⁹ Article 122 enumerates specific issues which fall within the ambit of the reserved legislative domain. These issues are, for example, those related to civic rights, nationality, the family code, and the state of emergency, to name but a few. All other matters which do not come within the scope of the reserved legislative domain fall under executive domain.

The Constitution also provides that legislation existing at the time of its adoption on matters falling under the prerogative of the executive can be modified by decree taken after consultation with the Administrative Chamber of the Supreme Court. Laws coming into existence after the adoption of the Constitution can be modified by decree only if the Constitutional Council confirms that they fall within the ambit of the executive domain.⁴⁰

Also worthy of mention is that during discussion of a Bill, if the government deems that a proposition or an amendment made by the National Assembly does not fall under its prerogative, it can draw it to the attention of the National Assembly by raising the inadmissibility (*irrécevabilité*) of such proposal or amendment. In case of disagreement between the government

³⁷ CCPR/C/21/Rev.1/Add.7, General Comment No 25 (General Comments), para 15 at [[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument)].

³⁸ Communication 246/02 (n36) para 86.

³⁹ Art 131.

⁴⁰ Art 123.

and the National Assembly, the Constitutional Council, at the request of either party, shall decide on the matter within eight days.⁴¹

C. The Judiciary

The judiciary is composed of the Supreme Court, the Courts of Appeals, the Tribunals of first instances, and Justices of the Peace. It is managed by the High Council of the Judiciary (HCJ), which is responsible for the appointment, promotion, and discipline of judges and magistrates, who are civil servants and serve on a permanent basis. The HCJ is chaired by the President of the Republic, with the Minister of Justice and the Chairperson of the Supreme Court serving, respectively, as first and second vice-chairs. Even though the Constitution provides that when sitting on disciplinary matters, the HCJ should be presided over by its second vice-chair, the fact that the President chairs the HCJ raises some questions with regard to the principle of separation of powers. In Communication 266/03, *Kevin Mgwanga Gunme et al / Cameroon*, the African Commission opined that the fact that the Cameroonian judiciary was managed by a High Council of Judiciary chaired by the President of the Republic constituted a violation of Article 26 of the African Charter.⁴²

Like other countries of civil law tradition, the Chadian legal system is composed of two types of jurisdictions: the administrative courts and the ordinary courts. The administrative courts are competent to entertain matters brought against the state by individuals or opposing state institutions. The ordinary courts, on the other hand, are competent to examine cases involving individuals only. The idea of creating administrative courts arose from the strong tradition of the separation of powers, which was the fruit of the French Revolution of 1789. Within that tradition, the judiciary is seen as not competent to render decisions on the legality of administrative action.⁴³ In countries having a civil law system, it is also believed that the state should not be given the same treatment as individuals, due to its mission of public service.⁴⁴

Although, formally, Chad has only one legal order, the reality is that there are two separate chambers within each jurisdiction. For countries of civil law tradition that have two separate legal orders, the administrative court of last resort is the *Conseil d'Etat*, while the ordinary court

⁴¹ Art 133.

⁴² Communication 266/03, *Kevin Mgwanga Gunme et al/Cameroon*, paras 211 and 212 at [<http://caselaw.ihlda.org/doc/266.03/view/>]. Article 26 of the African Charter states that 'states parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter'.

⁴³ James G Apple and Robert P Deyling, *A Primer on the Civil-Law System*, 25 at [[http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf)].

⁴⁴ Marie-Christine Rouault, *Contentieux administratif* (Lextenso editions, Paris, 2008) 39–40.

of last resort is the Court of Cassation. In lieu of the *Conseil d'Etat* and a Court of Cassation, there is in Chad a Supreme Court, within which there is an Administrative Chamber playing the role of the *Conseil d'Etat*, and a Judiciary Chamber assuming the function of the Court of Cassation. Besides the administrative and ordinary courts, the Constitution has established a Constitutional Council, which is an independent body with a specific mandate. The Constitutional Council will be dealt with below, under the issue of constitutional adjudication.

Article 174 of the Constitution also provides for the establishment of a High Court of Justice, which is competent to prosecute the President of the Republic and members of the government, as well as their accomplices, for acts of high treason. The article defines high treason as any act infringing on the republican form and secularity of the state, and on the sovereignty, independence, and integrity of the national territory. Also considered as high treason are serious human rights violations, the embezzlement of public funds, corruption, drug trafficking, and the importation of dangerous or toxic wastes for the purpose of transit, as well as their dumping or storage on the national territory.⁴⁵ The High Court of Justice is composed of fifteen members, which include ten members of the National Assembly, two members of the Constitutional Council, and three members of the Supreme Court designated by their respective peers.

V. Federalism/Decentralisation

The Chadian Constitution provides for a decentralised government, to bring the administration closer to the population and ensure democracy at the grass roots level. To this end, the Constitution states that each administrative subdivision is to be governed by elected local assemblies. However, no local election has yet taken place.⁴⁶

Chad has been divided since February 2008 into twenty-two regions.⁴⁷ The subdivision of Chad into regions was operationalized in 2003 as part of the decentralisation process, as a result of which the government abolished the previous fourteen prefectures. Each of the twenty-two regions is headed by a governor appointed by a presidential decree. There are sixty-one departments, administered by Prefects, within the regions. The departments in turn are divided into 200 sub-prefectures composed of 446 cantons. The cantons are scheduled to be replaced by rural councils (*communautés rurales*), but the legal and regulatory framework for this change is yet to be completed.

VI. Constitutional Adjudication

⁴⁵ Art 174.

⁴⁶ The first local elections were scheduled to be organized by the end of 2011.

⁴⁷ *Ordonnance No 002/PR/08 portant Restructuration de certaines Collectivités Territoriales Décentralisées.*

A Constitutional Council is established by the Constitution to ensure that treaties and international accords comply with the Constitution. Besides that role, the Constitutional Council receives applications for the Presidency of the Republic, finalises the list of applicants, hears complaints relating to presidential and legislative elections, and proclaims the results. The Constitutional Council is composed of nine counsellors, including three magistrates and six highly qualified lawyers. Five of the members of the Constitutional Council are designated by the President of the Republic and the four others are designated by the Speaker of the National Assembly for a non-renewable term of nine years, during the course of which they are irremovable.

The Constitutional Council cannot be seized directly by citizens. They can, however, seize it indirectly through an exceptional route (*voie d'exception*), meaning that during the course of a case in which he or she is party, an individual can raise the unconstitutionality of a law to challenge the application of the law in the case. If necessary, the judge is obliged to refrain from deciding the matter and seize the Constitutional Council, which must decide within forty-five days on the constitutionality of the law in question. If the law is declared unconstitutional, it would not be applied in the case where its constitutionality has been raised.

In view of the impossibility for citizens to have direct access to the Constitutional Council, it would be appropriate at this stage to briefly discuss how fundamental rights and freedoms guaranteed by the Constitution are adjudicated. While examining how the constitutional rights of citizens are enforced in Chad, it is important to bear in mind that Article 144 of the Constitution declares that the judicial power in Chad is exercised by the Supreme Court, the Courts of Appeals, the Tribunals, and the Justices of Peace. The article goes further to state that the judicial power is the guardian of liberties and of individual property, as well as for other fundamental rights. From a reading of Article 144, it clearly appears that the Constitutional Council is not part of the judiciary. In a decision on unconstitutionality raised by the victims of political crime and repression relating to the criminal case initiated against members of the Documentation and Security Directorate of Hissène Habré, the Constitutional Council itself declared that

the Constitution of 31st March 1996 [...] recognizes that only the Supreme Court, the Courts of Appeal, Tribunals and Justices of the Peace expressly mentioned at Article 148 have the judicial power; consequently, any jurisdiction which is not among the jurisdictions listed by that provision is not part of the judiciary. The law No 004/PR/98 of 28 May 1998 complementing Article 148 of the Constitution in its first Article, clearly declare that justice is made in the Republic of Chad by only one legal order comprising: the supreme Court, the Courts of appeal, the Criminal Courts, the Tribunals of first instances, Labor Tribunals, Trade Tribunals and Justices of the Peace.⁴⁸

Given the constitutional adjudication powers granted to the Constitutional Council, the Constitution should have established safeguards in order to ensure its independence. The fact that

⁴⁸ Constitutional Council, Decision No 002/PCC/SG/01 of 6 April 2001. Quoted from Nadjita F Ngarhodjim (n13).

the Constitutional Council is composed of nine members,⁴⁹ among whom five are appointed by the President of the Republic and four by the President of the National Assembly, who usually happens to be from the ruling party, does not favor the independence of that important organ. It would have perhaps been more appropriate had the three magistrates and the six jurists of high level, who were supposed to compose the Constitutional Council, were proposed by their peers following specific criteria and appointed by the President of the Republic after a vetting process by the National Assembly.

It is noteworthy that the manner in which members of the Constitutional Council are designated raises concerns regarding their powers to examine complaints relating to presidential elections and proclaiming election results thereof granted to them by the Constitution. This clearly puts at risk the democratic goals the Constitution seeks to achieve. The fact that a significant number of the Constitutional Council's members are presidential appointees raises some legitimate questions of conflict of interest in cases where the incumbent is seeking another term or his party is seeking to retain the presidency. The recent events in Ivory Coast, where the Constitutional Council proclaimed Laurent Gbagbo, the outgoing President, as the winner of the 2011 presidential elections while the Independent Electoral Commission and the international electoral observers declared his challenger, Allassane Ouattara, as the true winner, shows the confusion that may result in granting the power to entertain disputes related to elections to a political institution such as the Constitutional Council. Such powers should have been attributed to the Supreme Court, as is the case in some francophone African countries. It is our contention that the establishment of a Constitutional Council with such important powers is not suitable for a politically unstable country such as Chad.

VII. International Law and Regional Integration

The Constitution gives to the President of the Republic the power to negotiate and ratify international treaties.⁵⁰ Some specific treaties—such as peace treaties, defence treaties, commercial treaties, treaties concerning the use of national territory or the exploitation of natural resources, agreements concerning international organizations, those that involve state finances or those concerning the well-being of persons—may be approved or ratified by the President of the Republic only upon the authorisation of Parliament.⁵¹ However, for treaties involving the transfer, exchange, or the addition of territory, the consent of the concerned populations should be obtained through a referendum prior to their ratification.

As the Constitution is the supreme law of Chad, international treaties and accords should comply with all of its provisions. The prerogative to seize the Constitutional Council regarding the

⁴⁹ The Constitution explicitly requires that among the nine members of the National Assembly, three are magistrates and the other six are jurists of high level. See art 161 of the Constitution.

⁵⁰ Art 219.

⁵¹ Art 220.

constitutionality of an international commitment belongs to the President of the Republic and the National Assembly. If the Constitutional Council is seized regarding the constitutionality of an international commitment, and declares that the latter includes a clause contrary to the Constitution, then the authorization to ratify that international commitment may occur only after a revision of the Constitution.⁵²

As a monist country, international treaties become automatically part of the domestic legislation in Chad once they are ratified. There is no need for the enactment of a law incorporating the international treaties into the domestic order. Thus, international human rights treaties ratified by Chad can be relied upon before Chadian courts as soon as they are ratified and published in the Official Gazette. Article 222 of the Constitution provides that treaties and agreements already ratified have, as soon as they are published, greater authority than that of other laws, as a condition for each agreement or treaty to be applied by the other party.

VIII. Amendment of the Constitution

Because the Constitution is the supreme law of Chad, its provisions are entrenched and their amendment is bound by strict requirements. In effect, the power to initiate a process of modification of the Constitution vests concurrently with the President of the Republic and the Speaker of the National Assembly. In order for a proposed amendment of the Constitution to be taken into consideration, the proposal should obtain two-thirds of the vote of the members of the National Assembly. Once approved by the National Assembly, such amendment will be submitted to the people for approval through a referendum.

The constitutional provisions on territorial integrity, independence, national unity, the principle of separation of powers, the rights and fundamental freedoms of citizens, and political pluralism cannot be subject to amendment.⁵³ This clearly means that the enumerated principles constitute sacred values, which should be preserved at all times. Although the Constitution is the will of the people, there are certain values that transcend temporary political dispensations. Together with international treaties, ordinary laws, regulations, customary law, and court decisions, the Constitution is one of the main sources of law in Chad.

IX. Conclusion

The state of constitutionalism in Chad is very poor. With the 2005 amendment which suppressed the presidential term of office, the country is directing itself towards a kind of monarchy, with life presidency as the main feature. Despite the fact that Chad joined the restricted club of oil-

⁵² Art 221.

⁵³ Art 225.

producing countries in 2003, the country remains one of the poorest in the world.⁵⁴ The Chadian Government has mobilised substantial financial resources in order to address the issue of poverty in the country, but this has not been matched by concrete measures to fight rampant corruption and to address social injustices whose eradication is crucial for any progress in its path towards development and social stability.

Although there are a few positive developments in the field of human rights, fundamental rights and freedoms are still being violated on a large scale. The judiciary has been bold on some occasions in taking decisions against the Chadian Government, but these decisions have simply been ignored in most cases.⁵⁵ Impunity is also an issue of particular concern in Chad. There are several instances of human rights abuses which remain unaddressed, and some individuals sentenced to prison by courts for crimes they have committed never serve their sentence.⁵⁶ These show that the road towards the establishment of the rule of law remains long.

On the basis of the foregoing, one could say that a revision of the Chadian Constitution is imperative. A good starting point would be to reintroduce the presidential term limit, as well as strengthening the legal protection of fundamental rights and other civil liberties. It is also vitally important that there is concrete and unequivocal commitment on the part of the Chadian authorities, particularly the executive, to respect and implement court decisions where appropriate, and to effectively fight rampant corruption, as well as to end the culture of impunity. It is only then that constitutionalism and the rule of law can flourish.

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