

Djibouti

Introductory Note

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I Origins and historical development of the Constitution

The Republic of Djibouti is a country in the Horn of Africa, with a surface area of 23,200 square kilometers and a population (Somali, Afar, and Arab) estimated at 818,159 inhabitants, approximately two-thirds of whom live in the capital city, Djibouti City.¹ Djibouti has the particularity of being a member of both the African Union and the Arab League. It is the only Francophone country in the region, and is surrounded by English-speaking and Arabic-speaking countries. The two official languages are French and Arabic.

Djibouti's population is overwhelmingly (98 per cent) Sunni Muslim of the Shafi'i school. Djibouti is a former French colony, having been conquered by France in the late 19th century, and was successively called French Somali Coast and the French Territory of the Afars and Issas. The eastern coast of Africa has always been coveted by European powers (England, Italy, and France), as well as the Ottoman Empire. The British, who were already present in Aden, settled in Zeila and Berbera. The Italians, on their part, settled in Massawa and Assab. At the start of work on the Isthmus of Suez, France sought to expand its influence into the Red Sea. After an unsuccessful attempt to conquer the island of Perim, France became interested in the harbour of Obock, located on the Gulf of Aden. For this, France signed a treaty on 11 March 1862 in Paris with Ahmed Dini Aboubekr representing Danakil (Afar) chiefs, in particular the Sultans of Tadjourah, Raheita, and Gobaad. France then decided to expand its influence in the Issa region and in Djibouti in particular. France's representative in Obock, Léonce Lagarde, signed a treaty with the traditional leaders of Issa on 26 March 1885, in Khor Ambado. The French administration had left Obock by 1888, to settle permanently in Djibouti, the capital of the French Somali Coast and Dependent Territories. Under these treaties signed with France, the colonial administration considered the Somali-Issas and the Afars to be 'true indigenous people of the country',² as opposed to 'allochtoon' populations who had come to settle in the country in order to participate in the construction of the port and railway.

Local politics began after the end of World War II under the Decree of 9 November 1945 establishing the Representative Council of the French Somali Coast (CFS). This Council was composed of two distinct electoral colleges: the French citizens' college and the native college. It was not until 10 March 1946 that the first members of the first CFS representative council were elected. The political evolution of the Overseas French Territories (TOM) was consolidated through the enactment of the 'Loi-Cadre' (Framework Law) of 23 June 1956, initiated by Ministers Gaston Defferre and Houphouët Boigny. The new statute provided for the establishment of a single college, elected by universal suffrage: the establishment of a Government Council and the establishment of a Territorial Assembly, whose thirty advisers would be elected for five years on the basis of a simple majority two-ballot election. The

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¹ <http://www.dj.undp.org/content/djibouti/fr/home/countryinfo.html>.

² Philippe Oberlé and Pierre Hugo, *Histoire de Djibouti. Des Origines à la République* ('History of Djibouti. From origins to the Republic') (Présence Africaine, 1985) 18.

territory was led by a 'Head of Territory', who was also Chairman of the Government Council appointed by the French Government. The Territorial Assembly elected the six to eight ministers of the Governing Council, and the position of Vice-President of the Governing Council was devolved to the head of the list which won the Territorial Assembly elections. It was the list of the 'Republican Union' led by Mahmoud Harbi that won the thirty Assembly seats on 23 June 1957, to the detriment of the Defence of Economic and Social Interests of the Territory (DIEST) party led by Hassan Gouled. The Assembly did not have extended powers because most of the power lay in the hands of the Head of Territory, while elected officials kept asking the colonial power for greater autonomy. In 1958, and with the advent of the Fifth Republic, France committed itself firmly to the decolonisation of African countries. In this regard, a referendum on independence was held in the French West African territories (AOF), French Equatorial Africa (AEF), and French Somali Coast (CFS). In the CFS, Mahamoud Harbi decided to campaign for immediate independence, as did Sekou Toure of Guinea Conakry. Ultimately, however, those who advocated for continued French presence under the leadership of Hassan Gouled won the referendum. On 11 December 1958, the Territorial Assembly voted for the status quo – that the CFS remains an Overseas Territory. Nevertheless, the colonial administration decided to reduce the Issa hegemony in local politics by favouring the Afar people henceforth.³

French-speaking African countries attained independence from 1960 onwards. In the region, the independent territories of British Somaliland and Italian Somalia merged to give birth to Somalia. Mahmoud Harbi, the pioneer of Djiboutian nationalism, exiled himself to Somalia in order to found the Front for the Liberation of the French Somali Coast (FLCS). He died in unclear circumstances, however, and this led to the establishment of a new party, the Popular Movement Party (PMP), created and run by followers in particular of the Member of Parliament (MP) Moussa Ahmed Idriss and Absieh Bouh. With the Afar Democratic Union (UDA) party led by Orbisso Gaditto, and during the visit of General de Gaulle, they organised a large peaceful demonstration along the presidential motorcade, from the airport to the administrative district of the capital. However, on the afternoon of 25 August 1966, several people were killed when soldiers of the Foreign Legion opened fire on militants wearing pro-independence banners while they waited to hear General de Gaulle's speech before the Territorial Assembly. After this bloody event, the PMP became the standard bearer of the struggle for the independence of the CFS and, in this capacity, called for a 'no' vote in the referendum on the continuation of French presence on 19 March 1967.

After another victory by those in favour of colonial rule, Law No. 67-521 of 3 July 1967 changed the name of the CFS to the 'French Territory of the Afars and Issa' (TFAI). This new status also transferred all powers to the High Commissioner, the representative of the French government in the colony. Just as with the previous Head of Territory, his competence extended to the promulgation of laws and decrees and the direction of all public services of the State (justice, police, defence, external relations, civil status, radio and television, foreign trade, treasury, communications, currency etc.). Few powers were vested in Territorial Assembly and in the Governing Council. Headed by a chairman, the Council was composed of six to eight Ministers and was accountable to Territorial Assembly, which had the power to dismiss them by passing a motion of censure. The Council could also ask the High Commissioner to dissolve the Assembly. From 1960 to July 1976, the President of the Governing Council Ali Aref was the strongman of the territory and actively collaborated with successive High Commissioners. In 1975, the League for the Future and for Order (LAO)

³ Ibid at 145-147.

party of Ahmed Dini, the African People's Union (UPA) party of Hassan Gouled, and the Action for Justice and Progress (AJP) party of Moumin Bahdon came together to form the African People's League for Independence (LPAI).

The independence PMP party of Moussa Ahmed Idriss was dissolved by a decree of the French government on 13 July 1967. Two parties therefore worked together to prepare for the independence of the TFAI: the LPAI at the domestic level, and the FLCS of Aden Robleh at the international level. It was thanks to the political and military actions of the FLCS (the kidnapping of the Ambassador of France in Somalia, and the hijack and hostage-taking of a school bus with French children) and its diplomatic efforts at the United Nations and at the Organization for African Unity (OAU) that the OAU Commission of Inquiry arrived in Djibouti in May 1976. French President Valéry Giscard d'Estaing recognized the desire of the CFS to become an independent state. Consequently France, through its High Commissioner Michel D'Ornano, withdrew its confidence in Prime Minister Ali Aref. This led to a revolt initiated by Senator Barkat Gourad and twelve members of Parliament. A Council of the transitional government led by Abdullah Kamil was appointed by MPs to manage the territory's affairs during a transitional period that ended in early legislative elections and the simultaneous referendum on independence on 8 May 1977. During this transitional period negotiations were held in Paris between all political parties to determine the nature of the future institutions of the Republic of Djibouti. It was thus decided that ministerial portfolios and seats in the future National Assembly would be allocated along ethnic lines. The Afar and Issa communities split cabinet posts and parliamentary seats equally.⁴ In the referendum of 8 May 1977, Djibouti voted overwhelmingly for independence and for the 65 members on the single list of the Movement for Independence party.

At independence on 27 June 1977, at midnight, President Hassan Gouled Aptidon was elected by acclamation by MPs from the first parliamentary elections of 8 May 1977. Constitutional Laws No. 1 and No. 2 were adopted by MPs on Independence Day, as well as Ordinance No. LR/77-008, promulgated on 30 June, which gave the President of the Republic unlimited powers.⁵ Constitutional Laws No. 1 and No. 2 were prepared during the transitional government by Djiboutian lawyers Chiné and Ibrahim Harbi Farah, assisted by French lawyers. However, it was at the initiative of President Gouled that his cabinet, led by Ismail Guedi Hared, developed the Ordinance which allowed the President to declare himself head of government. Indeed, Article 1 of Constitutional Law No. 2 provided that the President could legislate by decree until the ratification of a future Constitution. Prime Minister Ahmed Dini was therefore not consulted on whether to enact this Ordinance three days after independence, because he would have objected to simply becoming the 'first minister'. This decision spelled the end of the political alliance between Gouled and Dini and began a serious political crisis culminating in the resignation of Prime Minister Dini in December 1977. Four years later, he and other politicians created the first post-independence opposition party, the Popular Djibouti Party (PPD), chaired by Moussa Ahmed Idriss. In response to the plan to create the first political party, the single party system was established under the so-called 'National Mobilisation' Law of 1981.⁶ This law provided for all political parties, except the

⁴ Six Afar members of government, six Issa members of government, one Arab, one Gadaboursi, and one Is sack; thirty Afar MPs, 28 Issa MPs, two Arabs MPs, and five other Somalis MPs.

⁵ Art. 4 of Constitutional Law No.1, Art. 4 of Constitutional Law No.2, and Arts.1 and 2 of Ordinance No. LR/77-008.

⁶ Law No. 199/AN/81, Special Official Gazette No. 7 of 27 December 1981, <http://www.presidence.dj/PresidenceOld/> [accessed 16/12/2015].

People's Rally for Progress (RPP), to be dissolved and banned.⁷ The authoritarian regime of President Gouled was subjected to external and internal pressures in a bid to force it to adopt democratic reforms. Faced with the regime's reluctance to ignore the injunctions of France during the La Baule speech, the Republic of Djibouti experienced a civil war from January 1991 waged by a rebellion of the Front for the Restoration of Unity and Democracy (FRUD) party, whose militants are exclusively from the Afar community. Finally, in 1992 the regime decided to draft a new constitution and establish multiparty politics, limited to four parties. The government also tried to find a political solution to the civil war, signing reconciliation agreements with the two factions of the FRUD in 1994 and 2001, respectively.

At the first parliamentary elections after the introduction of multiparty politics, besides the RPP, the National Democratic Party (PND) of Aden Robleh Awaleh and the Democratic Renewal Party (PRD) of Mohamed Djama Elabeh, as well as two independent candidates, stood for election in 1992. Under the existing majority list system, however, the RPP won all 65 seats in the National Assembly. President Gouled, who was elected for the first time by direct universal suffrage in 1981 and re-elected in 1987, was also re-elected in the 1993 presidential elections. As Hassan Gouled had decided not to run again, a struggle for succession in the RPP in 1994 pitted the political bureau members of the Issa clan against each other, which provoked a serious political crisis. There was an open display of ambitions from the party's General Secretary and Minister of Justice, Moumin Bahdon Farah, its Second Vice-President and Chief of Staff of the Presidency, Ismail Guedi Hared, and the third party Vice-President and Deputy Chief of Staff of the Presidency, Ismail Omar Guelleh. On his return from the France-Africa Summit in Cotonou, President Gouled chose his nephew, the Deputy Chief of Staff, which led the other two candidates to join forces and oppose this dynastic succession. Following this, the party General Secretary and then other RPP MP members founded a parliamentary opposition group, the Grouping for Democracy and the Republic (GDR), in Parliament. Ismail Guedi Hared, Moumin Bahdon Farah, Ahmed Boulaleh Barreh, Ali Mahamade Houmed, and Abdillahi Guedi drafted a press release in which they accused President Gouled of wanting to 'reign through force and terror'. The regime chose to crackdown on these party dissidents by lifting their Parliamentary immunity and sentencing them to six months in prison and five years of ineligibility to hold public office. Because of this, they could not stand in the 1999 presidential elections against the candidate chosen by President Gouled, namely his Deputy Chief of Staff Ismail Omar Guelleh, who succeeded him on 9 April 1999. Following this, President Guelleh was elected in 1999 and re-elected without much difficulty in 2005 after the opposition boycott. By virtue of the 2010 constitutional amendment, which removed the limit on terms, he ran and was re-elected in 2011, and will be able to run in 2016 and even 2021. The Block Vote electoral system prevented the opposition from winning the legislative elections in 1992, 1997, and 2003, as well as the presidential elections of 1993 and 1999. As a result, the opposition boycotted all elections from 2003 until 2013. In the end, the opposition agreed to take part in the 2013 legislative elections as 20 per cent of the seats are elected through proportional representation. Citing irregularities, the coalition of the Union for National Salvation (USN), led by Ahmed Yusuf, rejected the results of the 2013 parliamentary elections in which the USN won ten seats in Parliament against 55 for the Presidential Majority Union (UMP) coalition. However following a framework agreement signed in 2014 between the government and the opposition, the ten opposition MPs finally agreed to take up their seats in the National Assembly. In December 2015, the USN coalition rejected the framework agreement after the

⁷ Art. 7 of Law No. 199/AN/81.

government refused the opposition's draft laws on the status of the opposition and the establishment of an independent electoral commission with equal representation.

Legal pluralism in Djibouti is characterized by the juxtaposition of French law, customary law,⁸ and Islamic law (Sharia).⁹ Article 5 of Constitutional Law No. 1 and Article 96 of the Constitution provide for the continued applicability of legislative and regulatory acts that were in force before independence. Djibouti courts therefor still apply pre-1997 French laws, even if they have been repealed in France.¹⁰

The constitutional history of the Republic of Djibouti begins with Constitutional Laws No. 1 and No. 2.¹¹ These basic laws, adopted by the National Assembly very soon after independence (27 June 1977, at midnight), already provided for the drafting of a 'future constitution'.¹² It was not until 22 years after independence, however, that Djibouti adopted its first constitution. In fact, the plan to draft a constitution came about during the civil war, which was launched in 1991 by Afar rebels of the Front for the Restoration of Unity and Democracy (FRUD). The President Gouled informed his fellow citizens through the media on 27 November and 19 December 1991 that the government wished to adopt a constitution. He issued Decree No. 92-0010/PR/CAB, dated 21 January 1992, establishing a Commission for the preparation and drafting of a constitution. The Commission was chaired by the Speaker of Parliament, Abdoukader Waberi Askar, and was composed of fourteen persons, all from the RPP, the single party. Other than the members of the single party and some lawyers,¹³ the majority of the population was not involved in drafting the Constitution. The National Mobilisation Act of 1981 not only prohibited all political parties, but also hampered the emergence of a genuine civil society. However, before the referendum of 4 September 1992, members of the Commission held public information and awareness meetings. The President claimed that the Constitution was a 'bulwark' (*xiirsi* in Somali) against all human rights violations. The draft 1992 Constitution shows the government's late acceptance of calls for the opening of democratic space in African countries, solemnly expressed by President Mitterrand in his speech at La Baule.¹⁴ Furthermore, far from being a voluntary adherence to constitutionalism, the development of the Constitution was more part of a goal to legitimize declining authoritarian power. By taking the initiative with this 'gifted' Constitution, the Gouled regime wanted to eliminate the spectre of 'sovereign national conferences' which started in Benin in February 1990 and had led to the dismissal of President Mathieu Kerekou.

II. Fundamental principles of the Constitution

The Constitution proclaims several principles: among others, pluralist democracy, human rights, national defence and territorial integrity, and Islam.

⁸ Customary courts, established by Decrees of 1927 and 1938, settle disputes under customary law through conciliation between the parties (*Xeer* for Somalis and *Maqda* for Afars).

⁹ Family law, the law of persons, and the law of succession are exclusively governed by Islamic law.

¹⁰ Anne Pelissier, '*La jurisprudence judiciaire, un instrument de rayonnement*' ('Judicial jurisprudence, a tool for promotion') § 8, <http://www.ahjucaf.org/La-jurisprudence-judiciaire.7176.html> [accessed 16/12/2015].

¹¹ Law No. LR/77-001 and Law No. LR/77-001 1, Official Gazette of 27 June 1977, <http://www.presidence.dj/PresidenceOld/> [accessed 16/12/2015].

¹² Art. 3 of Constitutional Law No. 1 and Art. 1 of Constitutional Law No. 2.

¹³ Houssein Aganeh Djilal, Luc Aden, Djama Amareh Meidal, Ali Dini Abdoukader, Mohamed Ali Afkada and Alain Martinet.

¹⁴ Speech by François Mitterrand at La Baule, 20 June 1990, in *Politique Etrangère de la France* (May-June 1990) 130.

A. Pluralist democracy

Importantly, Article 1 of the Constitution recalls the fact that Djibouti is a ‘democratic republic’ committed to the principle of exercise of power by a ‘government of the people, by the people and for the people.’

In the Preamble, the drafters of the Constitution committed to a ‘pluralistic democracy’. By combining the concepts of democracy and political pluralism, the drafters rejected the de facto one-party regime, which existed between 1977 and 1981, having been institutionalized by the law on ‘national mobilization’ in force from 1981 until 1992. Multiparty politics was limited to four parties until 2002, when a comprehensive multiparty system came into being. In 1992, a referendum is called in order to approve the constitution, and also on the limit of number of political parties to four.

A return to the one-party system was definitely hampered by the will of the drafters to reject any constitutional review challenging ‘the pluralistic character of democracy in Djibouti’ (Article 92). However, the discretion granted by the legislature to the executive and, in particular, the Interior Ministry, to accept or reject the legalization of political parties, risked undermining the sustainability of political pluralism.¹⁵ The Interior Minister has the authority to request the Head of the Executive to ban an opposition party by decree.¹⁶ In fact, the power of the Interior Minister to control political parties is provided by Law No. 1/AN/92/2 L. Thus, under Article 5 of that Law, it is an administrative requirement for every political party to file its constitution with the Minister of the Interior. Political parties that contravene the provisions of this Law are liable to a prison sentence of six to twelve months and a fine. The person who files the party’s constitution receives proof of submission. Nevertheless, the Minister of the Interior and an audit commission consisting of six members perform a compliance check of the filing process (Article 9 of the Constitution). In addition to verifying the documents provided, the dossier is forwarded to the Police Headquarters to conduct an administrative inquiry. If the dossier is found to be in compliance, the proof of submission is published in the Official Gazette. If, however, the commission declares the application to be non-compliant, a duly substantiated notification will be sent to the founding members within ten days. They may appeal to the Supreme Court within 15 days of the date of notification. The Supreme Court must make a ruling within 15 days. The party is not legally recognized during this time. In practice, all political parties submit all the required documents. However, applications that are found to be non-compliant emanate mainly from political parties with links to the opposition. As such, it appears that the Minister of the Interior is not performing a compliance check but rather exercising an *a priori* approval control function. In order to participate to the legislative elections of 2013, the Model political party filed a declaration of legalization of a political party with the Ministry of the Interior, which did not react to the application. The party was accused of being supported by religious leaders, members of the two Islamic associations Al-Bir and Amal. The founders of the party rejected the allegations and appealed to the Supreme Court, which declared their appeal inadmissible.

Under Article 16 of the law on elections, the Minister of the Interior may also take precautionary measures to suspend and temporarily close the premises of a political party in case of ‘serious violation’ of laws or public disorder. Political parties must therefore, before each public meeting, request authorization from the Minister of the Interior. On 11 February 2011, authorization was given for an opposition rally in a public square in front of the Gouled

¹⁵ Unsuccessful applications for the registration of the Model and Radde political parties.

¹⁶ The MRD party was accused of committing offences involving intelligence with a foreign power.

Stadium. Before the end of the rally, police used tear gas to disperse the militants. The decision of the Interior Minister on the length of the party's suspension (a maximum of three months) must be explained and communicated to the legal representative of the party as well as to the Public Prosecutor. However, the Interior Minister is required to seize the Supreme Court within 48 hours following the suspension or closure of the party (Article 17 of the Constitution). The political party may also appeal to the Supreme Court within 15 days of the date of notification.

A legally constituted party can be dissolved by presidential decree, following a report by the Interior Minister. In fact, Article 13 of the Constitution provides that the party may be dissolved if it receives funding from abroad or implements a statutory amendment rejected by the Interior Minister, violates the Constitution through its activities, or takes a public position that is deemed to be contrary to the Constitution and existing laws. In addition, an order will be handed down for the assets of the dissolved party to be devolved. The Interior Minister can also petition the Supreme Court for the legal deregistration of a political party. The Supreme Court must rule within 30 days of being seized by the Minister of the Interior (Article 18).

The Movement of Democratic Renewal (MRD) party led by Daher Ahmed Farah was dissolved by Presidential Decree No. 2008-0167/ PR/MID of 9 July 2008. The Interior Minister submitted a report to the President of the Republic claiming that the President of the MRD had invited the President of Eritrea to invade the Republic of Djibouti and therefore threatened national independence and territorial integrity. In his report, he asked for the party to be deregistered under Article 13 of the Political Parties Act. The President of the MRD disputed the allegations and filed an appeal against the deregistration order, but the Supreme Court declared the appeal inadmissible. The Political Parties Act of 1992, which gave the Interior Minister the right to demand by decree the deregistration of a political party, is a violation of the pluralistic democracy in Djibouti. Knowing that the decision rests with the Cabinet, made up of members of the ruling Presidential Majority Union (UMP), any action on the deregistration of a legally established opposition party looks like a political manoeuvre to silence a challenger. It is noteworthy that the Interior Minister chose deregistration by decree rather than deregistration through judicial proceedings provided for under Article 18 of the Constitution. However, Article 13 provides for a simple report to be forwarded by the Interior Ministry in order to trigger deregistration by decree. By contrast, an interim order from the Interior Minister suspending a party and closing its premises may be the subject of an appeal to the Supreme Court by virtue of Articles 16 and 17 of the Constitution. The Minister did not see fit to suspend the party's activities at first, but instead chose the path of administrative deregistration. On several occasions the Minister of the Interior has had political parties indirectly dissolved by 'cloning' the party. As a matter of fact, when there is a split in an opposition political party, the Minister issues an order legalizing the faction of the party which aligns itself with the ruling party, even if this faction is led by an individual who has been disavowed by the leadership of the party. The National Democratic Party (PND), led by its founder Aden Robleh Awaleh, lost its legal status after a dissident organized a conference. The Interior Minister granted him legal status. In 2014 the ARD, led by President Ahmed Youssouf, experienced the same mishap when an order legalizing the party was issued to Cassim Ahmed Dini, a former member of the party who had been removed by the party's leadership. In order to attenuate the *a priori* approval control exerted on opposition political parties by the Interior Ministry, the USN coalition of opposition political parties introduced a draft bill giving themselves greater legal protection. This proposal was not endorsed by the parliamentary majority, which preferred to adopt a law on the status of the opposition, which did not in any way affect the Interior Minister's authority over political parties.

B. Human rights

The Preamble proclaims respect for human rights, and states that the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights are an integral part of the Constitution. This demonstrates the strong desire of the drafters to move irreversibly towards the rule of law. The inviolability of human rights enshrined in the Constitution is rooted in the affirmation of the 'sacred' nature of human beings (Article 10).

C. National defence and territorial integrity

Title II, entitled 'Rights and Duties', sets out the rights of every individual but also provides for the sacred duty of every citizen of Djibouti 'to defend the nation and its territorial integrity' (Article 17). In principle, national defence and territorial integrity are devolved to the military, but the Constitution extends this duty to civilians and every citizen of Djibouti. The inclusion of this provision might be explained by the fact that the constitutional drafting process took place in the context of civil war and partial occupation of the territory. It can also serve as a constitutional basis for enabling the executive to mobilize every citizen to defend the nation against an armed attack.

D. Islam

The Preamble to the 1992 Constitution begins with a divine invocation, in this case the formula 'in the name of God Almighty'. This is followed by the proclamation of Islam as the official religion of the State. However, the constitutional reform of 2010 incorporated this provision into Article I of the Section entitled 'State and Sovereignty'. This reflects the will of the drafters to accommodate the religious beliefs of an exclusively Muslim people, while ensuring a 'mastery of religion'.¹⁷

III. Protection of human rights

Rights and freedoms are enshrined in Title II, entitled 'Human Rights and Duties'. The Constitution only refers to the person and does not distinguish between nationals and non-nationals regarding the protection of human rights. The Constitution recognizes first generation rights, or civil and political rights, and second generation rights, or economic, social, and cultural rights. In its Preamble, the Constitution mentions third generation, or collective rights. It should be recalled, however, that the 1992 Constitution does not distinguish between the different categories of rights. According to the drafters, there cannot be a hierarchy of rights because human rights are 'universal, indivisible and interdependent and interrelated'.¹⁸

A. Civil and Political Rights

¹⁷ André Cabanis and Michel Louis Martin, *Le constitutionalisme de la troisième vague en Afrique Francophone* ('Third wave constitutionalism in French-speaking Africa') (Presses Universitaires Ryckmans/Bruylant, 2010) 43.

¹⁸ Point 5 of the Vienna Declaration and Action Programme, 1993 http://www.ohchr.org/documents/events/ohchr20/vdpa_booklet_fr.pdf [accessed 16/12/2015].

Considering the sanctity of human life, the Constitution contains a large number of civil and political rights, such as equality before the law and the rights to life, to security, and to bodily integrity (Article 10). It also guarantees freedoms of thought, conscience, religion, worship, and opinion (Article 11). The Constitution also recognizes the inviolability of the home and the privacy of correspondence and other means of communication (Article 13). It enshrines the right to move or to freely choose one's residence (Article 14) as well as freedom of expression and freedom of association (Article 15). Protections are granted to persons in conflict with the law, in the forms of presumption of innocence, the right to defence, the right to be examined by a doctor, the non-retroactivity of criminal law, and the prohibition of the death penalty (Article 10). Finally, torture and all forms of inhuman or degrading treatment are prohibited (Article 16).

Particular attention will be paid to the right to life, religious freedom, and freedom of expression and of the press.

1. Right to life

Having enshrined the right to life in the 1992 Constitution, the 2010 constitutional revision incorporated the abolition of the death penalty in Article 10(3). With the incorporation of this Article, a significant emphasis is placed on the right to life as the Republic of Djibouti had already ratified the Second Additional Protocol to the International Covenant on Civil and Political Rights. By doing so, Djibouti became one of the few Arab and Muslim countries to abolish the death penalty. Indeed, Islamic law provides for the death penalty and it is out of respect for religious precepts that Islamic countries are reluctant to abolish it. Moreover, some lawmakers in Djibouti had raised the contradiction between the abolition of the death penalty and Article 1 of the Constitution enshrining the official religion of the State, but the text was adopted due to the monolithic character of Parliament.¹⁹

The right to life can also be violated by the excessive use of force against civilians. On 21 December 2015, in Bulduquo, a poor neighbourhood of the capital, clashes took place between security forces and members of the Issa-Yonis Moussa clan, who had gathered to celebrate a religious ceremony (*Ziyara*) in honour of their ancestor Yonis Moussa. The Minister of the Interior banned the rally on the basis of Decree No. 2015-316/PR/PM on the 'implementation of exceptional measures', which only dealt with the monitoring of military bases and foreign embassies as well as the borders. This was the first time in the history of Djibouti that a religious ceremony was prohibited. Members of this community refused to cancel the celebration and clashed with the Police. It is reported that defence and security forces used live ammunition, which resulted in the death of seven people (according to the government) or more than twenty (according to the Djibouti League for Human Rights (LDDH)). The police arrested and detained the leaders of this community on the same day. They also intervened at the home of Advocate Amareh Meidal, where the coalition opposition leaders of the Union for National Salvation (USN) had gathered. During the intervention an opposition MP, a former minister, and the President of the USN were seriously injured. The politicians neither met at the venue of the religious ceremony nor were part of the organizing committee. Moreover, this was not the first time the police had used live ammunition against civilians. At the beginning of the civil war, on 18 December 1991, the disproportionate use of

¹⁹ The opposition was not represented in the National Assembly from 1977 to 2013.

force caused the death of dozens of members of the Afar community living in the popular district of Arhiba, who had protested against home searches undertaken by security forces.

Given that Article 10 of the Constitution recall the sanctity of human life and requires the State to protect it, it is for the Prosecutor to open a judicial enquiry to determine who bears responsibility for these acts. To date, and despite the violation of the right to life, the law enforcement officials have not been held accountable either for the Arhiba crackdown or those at Bulduquo.

2. Religious freedom

Declaring Islam as the State religion (Article 1) and including the words ‘In the Name of God Almighty’ in the Preamble of the Constitution perfectly illustrates the important position of Islam in the legal system.²⁰ Unlike the constitutions of other Francophone African countries,²¹ the drafters of the Constitution of Djibouti did not follow the drafters of the French Constitution in reference to the secular nature of the State or to the separation of state and religion. However, reference to the official religion of the State is balanced by guaranteeing freedom of religion and worship (Article 11). The proclamation of Islam as the state religion is not an obstacle to Christians’ free exercise of religion or to the right to education in private religious schools.²² This notwithstanding, freedom of religion was restricted by the closure of the Al Rahma mosque and the banning of the Al-Bir and Amal non-government organizations (NGOs) in 2013.²³

Just like the constitutions of other sub-Saharan French-speaking countries, Article 1 recognizes equality under the law without distinction of religious affiliation, and abolishes *de jure* any discrimination based on religion (Article 3). There are definitely provisions of Islamic law which may conflict with certain human rights.²⁴ In such a case, arbitration between the two standards means finding ‘a precarious balance between Islamic law and modern demands for freedom’.²⁵

3. Freedom of expression and freedom of the press

Article 15 of the Constitution guarantees freedom of expression and freedom of the press, but the drafters were also careful to include the fact that these rights may be limited by law and out of respect for the honour of others. Thus, Law No. 2/AN/92/2nd L on freedom of communication was adopted in order to regulate freedom of the press. A National Communication Commission was established to issue press licenses. This Law also criminalizes press offences. Articles 78 to 80 provide for imprisonment from three months to one year for insulting the President of the Republic, from one month to six months for insulting a foreign head of state or government, or for insulting an ambassador. A sentence of

²⁰ Sharia courts were replaced by a Court of Personal Status, established under Law No. 8/AN/03/5th L. This court has exclusive jurisdiction in matters relating to family law, the law of persons, and the law of succession. The judges of this court are all graduates of Islamic law and administer justice in accordance with Sharia.

²¹ Article 1 of the Senegal Constitution, Article 1 of the Cameroon Constitution, Article 1 of the Burundi Constitution, Article 1 of the Chad Constitution, Article 2 of the Benin Constitution, etc.

²² There are three churches (Catholic, Protestant, and Orthodox) located in the administrative district of the capital city. There are three denominational schools: the school of the Nativity, Notre Dame de Boulaos Social Welfare Home, and the Protestant School (also attended by Muslim students).

²³ United States Department of State, Djibouti Country Reports on Human Rights Practices, 2014 at 11.

²⁴ The equality between men and women in the division of property in a case of succession.

²⁵ Cabanis and Martin, *Le constitutionnalisme* (n17) at 57.

one to three years is provided for those accused of spreading false information. Articles 81 and 82 of the Law impose heavy fines on audiovisual companies operating without a licence from the Commission and for newspapers without an editor. Indeed, Article 15 requires each news outlet to appoint a publication manager of Djiboutian nationality and resident in Djibouti. If the said manager enjoys any kind of immunity, he or she must appoint a co-editor who can be prosecuted. This was what happened on 19 January 2016 to the coalition opposition newspaper *Aurore*, whose director was a Member of Parliament with immunity. It was therefore the deputy publication manager Kadar Abdi Ibrahim who received a two-year suspended sentence by the *Flagrante Delicto* court for having covered a police crackdown in Buldhuquo, a shantytown in the capital. The newspaper was also suspended for two months. The deputy publication manager, who was a lecturer and researcher at the University of Djibouti, was also dismissed from the public service by decree for failing to the duty of reserve. Ismail Djilal, lecturer and researcher, was also subjected to the same kind of dismissal for expressing a critical opinion on social networks. Since the adoption of this Law, there has been no private audiovisual media organization. After the suspension of *Aurore*, there is only one privately-owned newspaper, the monthly *Renard*.

B. Economic, social and cultural rights

Djibouti's Constitution only recognizes some second generation rights: the right to property, the right to form a union, and the right to strike. One may wonder why the drafters left out rights which are vital for the 'harmonious development of the national community', such as the right to education, the right to access to healthcare, the right to an adequate standard of living, the right to drinking water, etc. The fact that Djibouti is one of the least developed countries may explain this omission. Given the endemic poverty in Africa, however, states parties to the African Charter on Human and Peoples' Rights 'are obligated to prioritise the realisation of minimum essential levels of socio-economic rights'.²⁶ French doctrine also rejects the justiciability of social rights, considering them more as objectives to be achieved than as enforceable individual rights.²⁷ However, the justiciability of social rights is now recognized in other legal systems, including by the South African Constitutional Court.²⁸

C. Collective rights

Paragraph 2 of the Preamble to the Constitution proclaims that the rule of law must guarantee the full enjoyment of 'collective rights' as well as 'the harmonious development of the national community'. The drafters did not clearly enumerate these collective rights, and nor did they recognize the right to development in Section II, dealing with human rights. However, the right of foreigners to be protected under the law is specifically provided for in Section II, Article 18.

²⁶ Danwood Mzikenge Chirwa, 'Africa's regional human rights system, the promise of recent jurisprudence on social rights', in: *Social Rights Jurisprudence, Emerging Trends in International & Comparative Law* (Malcom Langford (ed.), Cambridge University Press, 2008) 338.

²⁷ Laurent Pech, 'France: Rethinking 'droits-créances'', in: Malcom Langford (ed.), *Social Rights Jurisprudence, Emerging Trends in International & Comparative Law* (Cambridge University Press, 2008) 267.

²⁸ Constitutional Court of South Africa, *Government of the Republic of South Africa and Others v Grootboom and others* 2001 (1) SA (CC).

It has been rightly pointed out that the drafters of the 1992 Constitution failed to include environmental protection, unlike the constitutions of other African countries, with the exception of the Maghreb countries.²⁹

In the Preamble, the people of Djibouti proclaim that the provisions of the Universal Declaration of Human Rights (UDHR) of 1948 and the African Charter of Human and Peoples' Rights (ACHPR) of 1981 are 'an integral part of the Constitution'. This implies that the provisions of these international and regional instruments can be invoked before national courts. It means that the three categories of human rights contained in these two instruments complement the list of rights and freedoms guaranteed in the body of the Constitution. In practice, some lawyers have invoked the rights and freedoms enshrined in the UDHR and the ACHPR in their memorials for the defence. According to Advocate Zakaria, lawyer and President of the Djibouti League for Human Rights (LDDH), judges have not referred to international and regional human rights instruments in their judgments. This is in disregard of Article 70 of the Constitution, which enshrines the primacy of ratified treaties over domestic law and thus the direct applicability of duly ratified treaties.

D. Exceptions

Human rights are not absolute. While the Constitution provides for several human rights, it also allows for restrictions on their enjoyment. The Constitution stipulates that the enjoyment of human rights may be limited by laws and regulations, respect for order, or the honour of others. This is a rule that could give the executive authority to limit by decree the rights and freedoms guaranteed to citizens. Basing their actions on Decree No. 2015-316/PR/PM dealing with 'exceptional measures', on 21 December 2015 defence and security forces used disproportionate force against members of the Issa Yonis Moussa sub-clan who were celebrating a religious festival in Buldhuquo in honour of their eponymous ancestor.³⁰ This Decree, which was introduced to combat risks of terrorism, does not contain any provision restricting the right of assembly. Rather, it only provides for the monitoring of borders, embassies, and foreign military bases. In the Francophone legal system, the citizen only has limited recourse to the Constitutional Court. In Djibouti, citizens cannot appeal directly to the Constitutional Council to censure a law or regulation that places a restriction on human rights. Even the objection of unconstitutionality raised by an individual before the courts must be appraised beforehand by the Supreme Court.

E. Obligation of the state to respect human rights

Under Article 10, the State is responsible for the protection of and respect for human rights. Article 8 also requires state institutions to guarantee the enjoyment of human rights and civil liberties. For the drafters of the Constitution, the State has the greatest propensity to commit human rights violations. This is the old concept of vertical accountability, not taking into account human rights violations by other entities such as NGOs, multinational companies, etc.

IV. Separation of powers

²⁹ Cabanis and Martin, *Le constitutionalisme* (n17) at 35.

³⁰ *Aurore Monthly*, No. 5, Monday 11 January 2016, at 1.

Article 16 of the 1789 Declaration on the Rights of Man and the Citizen states as follows: ‘Any society in which rights are not guaranteed, nor the separation of powers determined, has no Constitution’. A system of absolute or rigid separation of powers is not desirable, as it occasions a risk of preventing the regular functioning of institutions. The ideal model is one that provides a balance between the different powers, and limits one power from encroaching on or taking an upper hand over the prerogatives of the others. The Constitution of Djibouti does not clearly refer to the liberal dogma of the separation of powers, even though the powers of each organ are well-defined in Article 7, and Article 71 enshrines the independence of the judiciary in relation to other organs.

Djibouti’s political system is a presidential regime characterized by a strict separation of powers that has more similarity with the political system of the United States than to the French constitutional model. The President, who is also head of government, cannot dissolve Parliament, and Parliament cannot censure the government. However, the Djibouti model is unique in the hegemonic role of the executive branch embodied by the President with respect to the legislative and judicial branches.

A. The executive

Djibouti has the particularity of a decentralized executive,³¹ with a President of the Republic – the Head of Government (Article 21) – who is responsible for ‘determining and conducting national policy’ (Article 30), while the Prime Minister is only responsible for ‘the coordination of government action’ and implementing ‘the policy of the President of the Republic’ (Article 40).

1. Symbolic role of the Prime Minister

The Prime Minister is appointed by the President, who also has the discretionary power to dismiss him (Article 40). The drafters of the Constitution used the same wording as Article 4 of Constitutional Law No. 2, which allowed President Hassan Gouled to replace two Prime Ministers between 1977 and 1978.³² It is undeniable that the Prime Minister is confined to a peripheral role as mere collaborator of the President, in the sense that he cannot preside over Cabinet meetings³³ and nor does he have the power to dismiss a Minister. However, the President may delegate some of these powers to him (Article 42) and he may act as interim president in the event of a temporary vacancy (Article 28). However, the drafters of the Constitution ruled out the possibility of a dual executive power by proclaiming that executive power rests with the President of the Republic (Article 21). The constitution drafters in French-speaking African countries did not use Article 20 of the French Constitution of 1958, which gave the Prime Minister and head of government the power to ‘determine and conduct national policy’.³⁴

In order to take ethnic balance into account, an unwritten rule stipulates that the President, who is always a member of the Issa community, must always appoint a Prime Minister from

³¹ F. Bankounda-Mpele, ‘*Repenser le Président Africain*’ (‘Rethinking the African President’) VII French Congress of Constitutional Law 25, 26 and 27 September 2008, at 4, <http://www.droitconstitutionnel.org/congresParis/comC6/BankoundaTXT.pdf> [accessed on 16/12/2015].

³² Ahmed Dini (July to December 1977) and Kamil Abdallah (February to September 1978).

³³ Role devolved to the President according to Article 41.

³⁴ Cabanis and Martin, *Le constitutionalisme* (n17) at 92.

the Afar community.³⁵ Since the political crisis between President Gouled and Prime Minister Dini in 1977, there is still an ongoing debate in political circles on strengthening the powers of the Prime Minister by constitutional means. Ali Mohamed Daoud, also known as Jean-Marie, the President of the FRUD party, proposed the creation of a post of Vice-President, like in the United States, who would, in the event of permanent vacancy, succeed the President and complete the current term. If this option is agreed upon, a constitutional amendment would be required because under Article 29 it is the President of the Supreme Court who would act temporarily. He or she cannot, however, stand as a candidate in the elections, which must be scheduled no later than 45 days after the Constitutional Council formally declares the vacancy.

2. The prominent role of the President

Unlike the Prime Minister, who is appointed, the election of the President occurs ‘exclusively on the basis of (his) legitimacy’.³⁶ The President is elected by direct universal suffrage in two rounds for a period of five years and may be re-elected for an unlimited number of terms (Article 24). The 2010 constitutional reform removed the two-term limit provided under Article 23 of the 1992 Constitution. The drafters did not include a term limit in the list of provisions that cannot be revised (Article 92). Indeed, the provisions limiting the number of presidential terms can be used as ‘a possible bulwark against the looming alarming signs of democratic collapse’.³⁷ This constitutional reform was introduced to give the incumbent President Ismail Omar Guelleh the possibility of running for a third term in the 2011 presidential elections and also to allow him to remain in power until 2026. The revision was readily adopted, thanks to a monolithic National Assembly in which all 65 parliamentary seats are occupied by the Presidential Majority Union (UMP). The limit of 75 years of age, also introduced in 2010 (Article 23), had the ulterior motive of disqualifying some opposition leaders from standing as presidential candidates.³⁸ In addition, candidates with dual nationality and those who have been stripped of their civic rights following a criminal conviction are also excluded from standing as candidates in the presidential election (Article 23).

The President wields the traditional prerogatives of commander-in-chief of the armed forces (Article 32) and the power to appoint all senior civil servants, military and diplomatic personnel. The President symbolizes national unity and is the guarantor of territorial integrity, national security, judicial independence, and finally, respect for the Constitution and treaties (Article 22).

The President’s lack of political accountability is a demonstration of his pre-eminence. He cannot be the subject of a vote of no-confidence by Parliament. By contrast, the President has the right to intervene in legislative procedures, such as the power to initiate laws and the right to amend legislation (Article 58), the power to enact regulatory acts (Article 30), and to promulgate and implement laws adopted by Parliament (Article 34). By virtue of Article 67, the government may discuss legislative projects and proposals endorsed by the executive. By

³⁵ John du Bois de Gauduousson, Gérard Conac and Christine Desouches, *‘Les constitutions africaines publiées en langue française’* (‘African Constitutions published in French’), Volume 1 (Documentation française/ Bruylant, 1997) 278.

³⁶ Cabanis and Martin, *Le constitutionnalisme* (n17) at 61.

³⁷ Charles Fombad and Nathaniel A. Inegbedion, ‘Presidential term limits and their impact on constitutionalism in Africa’, in: Charles Fombad and Christina Murray (eds.), *Fostering Constitutionalism in Africa* (2010) 213.

³⁸ Ismail Guedi Hared (UDJ) or Aden Robleh Awaleh (PND).

virtue of this provision, inspired by the French Constitution of 1958, the government can theoretically prevent proposals which have not been approved in advance from being put on the agenda, discussed, and voted upon.³⁹ It can also postpone the enactment of a law by returning it to Parliament for a second reading (Article 34). It also has the power to seize the Constitutional Council for an *a priori* constitutional review on a law passed by the National Assembly (Article 35). It can equally seize the Constitutional Council to amend, by decree, a statute that has been adopted but which falls under the competence of regulation (Article 57). It also has the ability to seize the Constitutional Council to rule on the admissibility of draft laws and amendments that are not in the field of law (Article 59) or that are unconstitutional (Article 35). It has the power to consult the people in a referendum on any draft legislation (Article 33). The President may initiate a constitutional amendment, but he also has the power to exclude the constitutional review process by referendum if he obtains a two-thirds majority approval of the draft (Article 91).

Finally, in the event of a serious crisis, he can assume exceptional powers by enacting legislative measures (Article 39). Article 39 literally repeats the threshold conditions contained in Article 16 of the French Constitution of 1958. By providing strict conditions for assuming emergency powers, the drafters' aim was to dissuade the President from 'using any trouble as a pretext to abrogate personal power'.⁴⁰ These legislative powers conferred on the President highlight the predominant role of the executive over the legislature. He also has judicial powers, such as the prerogative of clemency (Article 32), the right to chair the High Council of the Judiciary, to be the guarantor of judicial independence (Article 73), and above all to ensure the execution of legal decisions (Article 36).

B. The legislature

Under the separation of powers, the drafters of the Constitution did not give the President the possibility of dissolving the National Assembly, and nor did they give Parliament the power to impeach the President. Since independence in 1977, the Republic of Djibouti has had a unicameral Parliament with a single chamber (Article 44) of 65 seats. However, the constitutional reform of 2010 introduced a provision foreseeing the future creation of a second chamber, subject to meeting the 'necessary conditions' for its implementation (Article 97).

An original feature of Djibouti's institutional system is the distribution of parliamentary seats according to ethnic criteria, without any legislation governing this practice, which dates back to the first parliamentary elections of 8 May 1977. The Constitution does not provide for representation based on ethnic criteria either. It only recommends that Parliament consist of 'representatives of the national community'. According to this practice, however, some members of the national community will never be represented in Parliament. This is the case for citizens from a marginalized Somali clan.⁴¹

1. Elections

Members of Parliament are elected by direct universal suffrage for a term of five years and must be of Djiboutian nationality, enjoy civic rights, and be at least 23 years of age (Article 45). They may be re-elected, especially as there is no age limit. Only registered political

³⁹ G. Burdeau, F. Hamon and Michel Troper, *Droit Constitutionnel* ('Constitutional Law') (24th ed., LGDJ, 1995) 137.

⁴⁰ Cabanis and Martin, *Le constitutionnalisme* (n17) at 86.

⁴¹ The Toumal clan.

parties may present a list of candidates.⁴² The voting system in force in 1977 was the two-round proportional representation system, without vote-splitting or preferential votes. However, under the reformed electoral law, 20 per cent of seats in Parliament are open for proportional voting and the remaining 80 per cent for majority vote. Disagreement subsists between the opposition and government on the function of the National Independent Electoral Commission (CENI). The government is satisfied with the supervisory function assigned to the CENI, while the opposition wants to reform this body to enable it organize the electoral process in accordance with the African Charter on Elections and Governance, which is ratified by Djibouti.

2. Powers

Legislative power lies with Parliament, which therefore has a monopoly on legislation (Article 55). Members of Parliament have the power to initiate and to amend laws in the same manner as the President (Article 58). However, the drafters framed the power of the legislature by expressly enumerating a list of issues on which Parliament can legislate (Article 56). This is a standard clause, based on Article 34 of the French Constitution of 1958, which amounts to a 'limitation on the law'.⁴³ However, Parliament has the power to ratify treaties and declare war. Parliament debates and votes on the national budget in a plenary session before 15 November every year. Within 35 days of its submission, Parliament can vote after the first reading to reject or amend the budget. In this case, the government may request a second reading and, if the budget is not approved before 1 January, the President is entitled to 'renew the previous year's budget by provisional twelfths' (Article 69).

One of the core competencies of the legislature is to check political control of government action (Article 60). There are various means at the disposal of MPs, such as oral and written questions, commissions of inquiry, questioning the government, and the annual debate on the state of the nation. In addition, MPs enjoy immunity in the exercise of their duties (Article 50).

The legislature also has judicial power, such as to indict the President and members of government before the High Court of Justice (Article 84) exclusively for high treason. Members of the High Court of Justice are appointed by Parliament; they elect a Chair from among themselves, and put the indictment to a two-thirds majority public vote. This exceptional procedure is the only way the legislature can apply pressure on the executive.

The Speaker of the National Assembly takes part in appointing members of the Constitutional Council by choosing two members out of six (Article 76). The Speaker of the National Assembly or MPs may approach the Constitutional Council to rule on the constitutionality of a draft bill (Article 79). Finally, MPs may submit a proposed constitutional amendment that must be subsequently approved by referendum or by two-thirds of Parliament (Article 91).

C. The Judiciary

The Decree of 2 September 1887 'On the organization of legal services in Obock' stipulated that the French legal system was applicable in the colony. Faced with the reluctance of local people to replace customary law with French law, France enacted laws in 1894, 1900, and 1904 to 'integrate local social and cultural realities'. France also accommodated Islamic

⁴² Organic Law No. 1/AN/92 on elections, Art. 32.

⁴³ Burdeau, Hamon and Troper, *Droit Constitutionnel* (n39) at 627.

courts. Customary courts were provided for in the Decrees of 1927 and 1938. Finally, the French legal system became applicable throughout the territory from 1946, after the customary courts lost their criminal jurisdiction. Until independence, there was a co-existence of customary law, Islamic law, and French law.

At independence, the political authorities decided to create the Judicial Court by Ordinance of 16 November 1978. This Court, headed by a First President, is composed of both trial chambers with a single judge as well as appeal chambers with three judges. Members of the Judicial Court can sit either as judges in the court of first instance or as appeal judges. The Judicial Court consists of a civil and commercial division, a criminal division, a labour court, an indictment division, and a criminal court. The Judicial Court had the peculiarity of being chaired by a French judge, Claude Horsing, under the French technical assistance programme. In 1989, two French judges were also members of this Court, in addition to the First President.⁴⁴ As a form of South-South cooperation, two Senegalese judges were seconded by their countries to the Office of the Prosecutor and the Supreme Court, respectively.⁴⁵

The Supreme Court, established by an Ordinance of 10 April 1979, has jurisdiction over all appeals from the Judicial Court as well as the Administrative Litigation Council. The Supreme Court has always been presided over by a Djiboutian judge, who would have to act as interim president of Djibouti in the event of a vacancy.

A reform of the judiciary was introduced on 10 October 1994 with the creation of a Court of First Instance and a Court of Appeal. A new provision amending the organization and jurisdiction of the Supreme Court was established by Law No. 63/AN/10/6th L.

Title VII of the Constitution is dedicated to the judiciary. Article 71, in particular, enshrines the independence of the judiciary *vis-à-vis* the executive and the legislative branches of government. Judicial Courts are divided into the Courts of First Instance, the Court of Appeal, and the Supreme Court. The Court of Auditors and the Administrative Court are administrative courts. In accordance with French legal tradition, there is a dichotomy between administrative courts and judicial courts. This rule is not applied to the letter in Djibouti, due to the absence of a *Conseil d'Etat* or an Administrative Court of Appeal. Thus the Supreme Court may hear appeals from the Administrative Court and the Court of Auditors and also appeals against judgments of the Judicial Courts.⁴⁶

Judges are only guaranteed constitutional protection if they 'only obey the law' to safeguard themselves from 'any form of pressure' from a third party (Article 72). Article 72 recalls that sitting judges have tenure and cannot be removed, unlike public prosecutors who do not enjoy this right. They are hierarchically subordinate to the Minister of Justice. Curiously, it is the executive – the President of the Republic – who is the guarantor of the independence of the judiciary (Article 73). It is also in his capacity as President of the High Council of the Judiciary,⁴⁷ assisted by the Minister of Justice, that he is involved in the management of judges' careers. Here there is a clear contradiction between Article 71 and Article 73 because

⁴⁴ Yves Nouguerede, 'D'une coopération Nord-Sud à une coopération Sud-Sud: Djibouti 1977/1990' ('From North-South cooperation to South-South cooperation', in: 156 *La Justice en Afrique* (Justice in Africa) *Special edition Afrique Contemporaine* (Contemporary Africa) (Jean Du Bois de Gaudusson and Gérard Conac (eds.), 1990) 161.

⁴⁵ Yoro Bocar Sy and Abdoulaye Thiam.

⁴⁶ Law No. 63/AN/10/6th L on the reform of the Supreme Court, Article 21.

⁴⁷ Organic Law No. 3/AN/93/3rd L of 7 April 1993 and Organic Law No. 10/AN/01/4th L amending certain provisions of the previous law.

the involvement of the executive undermines the independence of the judiciary. The current arrangement ideally suited for a hybrid semi-presidential system such as in France, is ill-adapted to presidentialist regimes as it tends to favour 'legitimising dependence of the judge'.⁴⁸ Interference by the executive in the domain of the judiciary has been happening since 1996. Indeed, 1996 was an eventful year in Djibouti. The Union of Primary School Teachers (SEP) and the National Union of Secondary School Teachers (SYNESED) organized demonstrations to protest against the late payment of salaries. In addition, the struggle to succeed President Hassan Gouled caused a serious political crisis within the ruling party, the RPP. President Gouled's Chief of Staff Ismail Guedi Hared, the former Ministers of Justice, Defence, and Transport, as well as a senior party official, were imprisoned for six months and barred from holding public office for five years.⁴⁹ The Minister of Justice, Hassan Farah Miguil, distinguished himself by interfering in the proper functioning of the courts, replacing the Chief Prosecutor Ali Mohamed Afkada and challenging the tenure of four of the five judges of the Court of Appeal.⁵⁰ Zakaria Abdillahi Ali, judge of the Court of Appeal, was dismissed; Emile David and Chantal Clément, judges of the Court of Appeal, were sent back to the public service; and Nabiha Djama Set, also a judge of the Court of Appeal, was transferred to the Prosecutor's Office. The Minister violated the judge's security of tenure, guaranteed by the Constitution in Article 72.

The interference of a Minister of Justice can go as far as interrupting court proceedings and replacing a judge who has acquitted several opposition activists, as was the case in 2011. During the Arab Spring, the leaders of the opposition coalition Union for a Democratic Alternative (UAD) held a large demonstration on 18 February 2011. In the late afternoon, the police intervened to disperse the demonstrators and apprehended several dozen opposition activists. Judge Mohamed Souleiman had to hear their cases, as President of the *Flagrante Delicto*. Because of arbitrary arrest, the judge proceeded to acquit forty of the eighty defendants who appeared before him. Hearing of the judge's decision, the Minister of Justice, Mohamed Barkat Abdillahi, went to the courthouse, ordered the suspension of the hearing that was underway, and replaced Judge Suleiman with the President of the Court of First Instance, Hassan Idriss Samrieh,⁵¹ who remanded twenty-five opposition activists in custody. First, Judge Souleiman was suspended from all judicial functions and then transferred to the public service without a specific appointment. After writing a pamphlet criticizing the executive, he was arrested at his home on 21 November 2011 and imprisoned without regard to the right of defence or the presumption of innocence.⁵² In keeping with its disciplinary powers, and by virtue of its disciplinary jurisdiction, the High Council of the Judiciary handed down a decision striking Judge Souleiman from the body of judges on 8 December 2011. In previous trials involving activists and opposition leaders, the intervention of Ministers of Justice had been limited to telephone instructions to judges; in this case, however, for the first time the Minister physically went to the courthouse. Although Article 72 of the Constitution states that the judge only follows the law and is protected against any form of pressure aimed at undermining his independence, the involvement of a member of the executive in the course of a hearing illustrates the subordination of the judiciary to the executive.

⁴⁸ Jean Du Bois Gaudusson, 'Le statut de la justice dans les Etats d'Afrique francophone' ('The status of justice in French-speaking African States'), in: 156 *La Justice en Afrique* (Justice in Africa) *Special edition Afrique Contemporaine* (Contemporary Africa) (Jean Du Bois de Gaudusson and Gérard Conac (eds.), 1990) 9.

⁴⁹ United States Department of State, Djibouti Country Reports on Human Rights Practices, 1996.

⁵⁰ *Ibid.*

⁵¹ FIDH, <https://www.fidh.org/fr/regions/afrique/djibouti/Djibouti-Elections-presidentielles> [accessed on 10/03/2016].

⁵² Avocat Sans Frontières Network, <http://en.asf-network.org/web/en/141-djibouti-mohamed-cheick-souleiman-cheick-moussa.php> [accessed on 10/03/2016].

V. Decentralization / devolution

Articles 85 to 88 of Title X of the Constitution are dedicated to decentralization. Local authorities are divided into regions⁵³ and into towns; they have legal personality and financial autonomy. The capital city is governed by a special statute⁵⁴ and is divided into three towns (Ras Dika, Boulaos, and Balbala). There are five regions (Arta, Ali-Sabieh, Dikhil, Tadjourah, and Obock).

The principle of free administration of local authorities is enshrined in Article 86 of the Constitution. Decentralization in Djibouti, like in French-speaking countries, is inspired by the 1982 law abolishing *a priori* approval control and introducing *a posteriori* approval of legality. Thus, acts that have been deliberated and enacted by municipal or regional authorities are fully enforceable but the *Préfet*, the representative of the State in the region or municipality, has the power of *a posteriori* approval of legality. Through the procedure of prefectoral compliance, the *Préfet* can seize the Administrative Court and ask for the annulment of an unlawful act.

Although Article 85 of the Constitution provides for financial autonomy, local authorities are dependent on state budget subsidies because local taxation has been on the cards since the first municipal and regional elections of 2006. Local authorities' lack of financial autonomy is a form of control that the central government wields over local communities.

The central government has not transferred powers to local authorities, except in civil status matters. Djibouti is a highly centralized city-state, where all the branches are concentrated in the capital. For example, there is only one courthouse, located in the administrative area, and therefore no courts outside the capital. Some government departments, however, have established decentralized government services in the regions. Decentralization reform has not yielded the expected results. According to the chairman of the FRUD, Ali Mohamed Daoud, decentralization remains an 'empty shell'.

VI. Constitutional adjudication

The Constitutional Council of Djibouti is a judicial body provided for under Title VIII (Articles 75 to 82) of the Constitution, whose rules of procedure are determined by an organic law.⁵⁵ This body replaces the Constitutional Committee foreseen under Article 3 of Constitutional Law No. 2.⁵⁶ The Constitutional Council has jurisdiction to hear cases relating to ensuring the constitutionality of laws by way of an action (Article 79) or by way of exception (Article 80). The constitutional review of ordinary laws and treaties prior to their promulgation is not mandatory to the extent that it would depend on referral to the President or the Speaker of the National Assembly. However, it is compulsory to test the constitutionality of organic laws before their promulgation and National Assembly rules of procedure before they are implemented (Article 78).

⁵³ Law No. 174/AN/02/4th L and Act 139/AN/06/5th L amending certain dispositions of the previous law.

⁵⁴ Law No. 122/AN/05/5th L.

⁵⁵ Law No 4/AN/L 93 3é, 7 April 1993.

⁵⁶ Created by Ordinance No. 77-060 of 23 November 1977.

Another objective of the Constitutional Council is to ensure the protection of rights and freedoms contained in the Constitution. The Constitution, inspired by the French constitutional model, does not allow self-referral to the Constitutional Council or permit the ordinary citizen to seize the Constitutional Council directly. If this were possible, it would have been an effective way to strengthen the protection of rights.⁵⁷ Failing that, the objection of unconstitutionality is a remedy provided by the Constitution. Thus a promulgated law whose provisions are contrary to human rights may be referred by any litigant to the Constitutional Council as a defence in their trial. In this event the trial court forwards the case to the Supreme Court, which has one month to remove the exception or refer the matter to the Constitutional Council, which must also rule within one month. This complex legal mechanism, giving 'indirect' jurisdiction to the Supreme Court to interpret legislation, is little used.⁵⁸

The Constitutional Council also has exclusive jurisdiction to monitor the regularity of elections. It has jurisdiction over all electoral disputes and the authority to declare election results. The Constitutional Council can be seized by the Prime Minister or the Speaker of the Assembly to certify the vacancy of power. Finally, the Council may be consulted before the implementation of exceptional measures under Article 39 of the Constitution.

Decisions of the Constitutional Council have the force of *res judicata*, are not subject to any appeal, and are binding on all organs of the State, all natural and legal persons, and all judicial and administrative authorities.

Irrespective of its extended jurisdiction, constitutional justice plays a leading role in strengthening the rule of law. For this, members of the Constitutional Council must distinguish themselves by their moral rectitude and their legal expertise, but especially be recognized for their independence. The method of appointing the six members of the Constitutional Council is set out in Article 76 of the Constitution. Two members are appointed by the President, two by the Speaker of Parliament, and two by the High Council of the Judiciary. The President of the Constitutional Council is appointed by the President of the Republic. This person figures twice in the nomination process because he is also President of the High Council of the Judiciary. This may undermine the independence of the Constitutional Council.

In fact, since the landmark Council's Decision No 96-01/CC of 31 July 1996, successive Presidents have used their discretion to select Presidents of the Constitutional Council based more on their loyalty or political proximity than on their legal experience.⁵⁹ This was not the case, however, with the first Constitutional Council, in which all members as well as the President were selected from experienced lawyers and appointed by Decree N° 93-0043/PRE of 21 April 1993. However, in this decision the independence of the Constitutional Council

⁵⁷ Abdoulaye Diarra 'La protection constitutionnelle des droits et libertés en Afrique noire francophone depuis 1990, le cas du Mali et du Bénin' ('The constitutional protection of rights and freedoms in French-speaking black African countries since 1990: the case of Mali and Benin') 27, <http://afrilex.u-bordeaux4.fr/sithes/afrilex/IMG/pdf/2doc8diarra.pdf> [accessed 16/12/2015].

⁵⁸ Bahdon Abdillahi Mohamed, 'La juridiction constitutionnelle en république de Djibouti : enjeux et perspectives de la garantie du respect des droits et des principes fondamentaux' ('Constitutional jurisdiction in the Republic of Djibouti: challenges and prospects for the respect for human rights and principles') 15 Cuestiones Constitucionales (July-December 2006) 21, <http://www.ejournal.unam.mx/cuc/cconst15/CUC1501.pdf>.

⁵⁹ Former ministers and members of the RPP Omar Chirdon Abass, Ahmed Ibrahim Abdi, and Abdi Ibrahim Absieh.

was considered a challenge to executive power. On 20 June 1996 the Parliamentary Group for Democracy and Justice (GDR), made up of eleven MPs, brought an application before the Constitutional Council for the annulment of a decision of the Bureau of the National Assembly waiving their parliamentary immunity, and thus allowing legal proceedings to be instituted against MPs Moumin Bahdon Farah, Ahmed Boulaleh Barreh, and Ali Mahamade Houmed. These former ministers and members of the Political Bureau of the ruling party, the Popular Rally for Progress (RPP), had accused the President of the Republic in a press release of wanting to ‘rule by force and terror’. The Minister of Justice, the Public Prosecutor, and the Attorney General had requested the Bureau of the National Assembly to lift the parliamentary immunity of the three MPs. The three had not been granted a hearing by the Bureau of the National Assembly. Nevertheless, the Speaker of the National Assembly, in a letter dated 15 June 1996, informed the Minister of Justice that the Bureau of the National Assembly had decided to authorize their prosecution. The Constitutional Council held that Article 64 of the National Assembly’s Rules of Procedure provided that a request to waive parliamentary immunity should emanate from a resolution, and that the authorization of the Bureau of the Assembly could not be considered a resolution. In addition, the Rules of Procedure stipulated that the committee to which a request to waive immunity was submitted had to grant a hearing to the MP in question. The Constitutional Council held that the right of defence enshrined in Article 10 of the Constitution was a human right enjoyed by everyone in terms of the Constitution, and should be guaranteed by the Constitutional Council in keeping with Article 75. The Council also held that not granting the three MPs a hearing constituted a violation of the right to defence. Of the six members of the Constitutional Council, only four deliberated and declared the decision of the Bureau of the Assembly to be unconstitutional. One member did not sit, as he had not yet been sworn in as a judge; the other had recused himself because he had been the investigating judge in the case. Although Article 81 of the Constitution states that decisions of the Constitutional Council have the force of *res judicata*, that they are not subject to any appeal, and that they are binding on all administrative and judicial bodies, the three MPs were prosecuted, imprisoned for six months, and had their civic rights revoked for five years. In addition, *Le Progrès*, the party newspaper, severely criticized the four eminent judges of the Constitutional Council. On 6 May 1997, the Judge President and two of the other three judges of the Constitutional Council were replaced as judges by Decree No. 97-0057/PRE.⁶⁰ This was the first and last time that judges of the Constitutional Council have ruled independently in a case involving the violation of a constitutional right, in this case the right of defence.⁶¹ The decision was published in the Official Gazette, but administrative authorities and the courts refused to implement it.

Since that case, the Constitutional Council has lost all credibility as well as its role as guarantor of respect for human rights. The Council has limited itself to its role as an electoral court, consistently rejecting all appeals from opposition parties and candidates following the announcement of results in parliamentary elections (1997 and 2003), presidential elections (1999),⁶² and the 2013 legislative elections.⁶³ It is clear that the Constitutional Council, now seen as subservient to the executive, receives fewer and fewer applications, both in electoral disputes as well as litigation involving human rights issues.

VII. International Law and Regional Integration

⁶⁰ Judge President Djama Amareh Meidal, and Judges Mohamed Aden Houssein Dini and Aganeh Djilal.

⁶¹ Decision No 96-01/CC of 31 July 1996.

⁶² Mohamed, *La juridiction constitutionnelle* (n58) at 24.

⁶³ Decision No 07/2013 of 27 March 2013.

A. International law

The 2010 constitutional reform introduced Title VI, consisting of Article 70, which is entirely devoted to international commitments. Under Article 70, the authority to negotiate and approve treaties and other international agreements rests with the President. He must submit the negotiated and approved treaty to Parliament, which has the sole power of ratification under Article 62. However, the Constitution does not distinguish between simple treaties, which are binding upon signature, and treaties requiring a ratification procedure.

The Constitution is silent on customary international law.

Regarding the hierarchy between international and domestic law, the drafters of the Constitution indicated clearly in Article 70 that a duly ratified treaty, after its publication, takes precedence over domestic law, subject to the rule of reciprocity. This is the same wording as Article 55 of the Constitution of the Fifth French Republic, enshrining the primacy of international treaties over domestic law. A treaty provision may contradict the Constitution. In this case, Article 70 of the Djibouti Constitution states that the treaty can only be ratified after a revision of the Constitution. This clearly indicates that it is the Constitution that must comply with the treaty, and not the reverse. The interpretation should be that the treaty is superior not only to ordinary laws but to the Constitution as well.

The question of incorporating a ratified treaty into domestic law does not arise, because French-speaking countries such as Djibouti are inspired by the French constitutional model. In monist systems, a ratified treaty is an integral part of domestic law.⁶⁴ This shows that international and regional instruments ratified by the Republic of Djibouti can be invoked in domestic courts.

B. Regional integration

Djibouti is a party to regional organizations such as the Intergovernmental Authority on Development (IGAD), the Common Market for East and Southern Africa (COMESA), and the African Union. The Preamble to the Constitution proclaims the country's determination to cooperate with other peoples who share the same values. However, these cooperation agreements must be based on mutual respect, national sovereignty, and territorial integrity. Article 9 of the Constitution expressly provides for the accession of the Republic of Djibouti to regional and international organizations, subject to respect for its sovereignty. These provisions suggest that regional integration must take place within the limits of sovereignty and territorial integrity. Conversely, a ratified regional cooperation agreement that calls sovereignty into question would be unconstitutional. In the case in point, Article 92 precludes any constitutional review process that calls into question the country's sovereignty or territorial integrity. The Constitution promotes regional economic integration, but precludes any process of political integration which would impair the sovereignty of the nation.

VII. Concluding remarks

The 1992 Constitution addresses the aspirations of the people of Djibouti, who wish to eliminate despotism, the one-party state, personal power, and civil war. Djibouti's

⁶⁴ Frans Viljoen, *International Human Rights Law in Africa* (Second ed., Oxford University Press, 2012) 518.

Constitution enshrines human rights and all democratic principles. However, Djibouti has not yet entered into an era of ‘peaceful democracy’ because a dominant party (the RPP) has ruled the country since independence. Moreover, the 2010 constitutional revision removing the limit to presidential terms has definitively established Djibouti as an ‘illiberal’ democracy. Many challenges need to be overcome in order for constitutionalism to emerge in Djibouti. In this light, the executive should refrain from manipulating the Constitution and using the judiciary and the authority of the Interior Minister over political parties and elections to derail any possibility of alternation of power; otherwise there is a risk of causing the evils of the past (such as dynastic succession, life presidency, civil war, etc) to resurface.

Also, constitutional reform should be introduced to limit the number of presidential terms to two, while incorporating this provision on the list of immutable principles. Moreover, there would be greater respect for human rights and constitutionality if the Constitutional Council was transformed into a Constitutional Court, or at least, if it were to provide for direct individual access, as is the case in Benin. Furthermore, in order to limit the subordination of the judiciary to the executive, the High Council of the Judiciary should be modelled on the common law system and be composed exclusively of professional judges and headed by the President of the highest court. Finally, ending the Interior Minister’s control over elections and political parties would be beneficial, as well as establishing a joint independent electoral commission to organize and supervise elections like those that came into effect following the national conferences in West Africa.

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