Introduction to the Constitution of the Democratic Republic of São Tomé and Príncipe

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I. Origins and Historical Development of the Constitution

A. General information and an historical note

The Democratic Republic of São Tomé and Príncipe is an African island state situated in the Gulf of Guinea on the Atlantic Ocean. Its location is near the coasts of Gabon (about 250 kilometres to the west), Equatorial Guinea, Cameroon, and Nigeria (about 400 kilometres to the north). It is the second smallest state on the African continent, with an area of 1,001 square kilometres, of which 859 square kilometres correspond to the island of São Tomé and 142 square kilometres to the island of Príncipe. Under the text of the current Constitution,[1] the archipelago consists of the "islands of São Tomé and Príncipe, the islets Rolas, Cabras, Bombom, Boné Jockey, Pedras Tinhosas, and adjacent islets". The country's capital is the City of São Tomé, on the island of the same name. It has a population of 187,356 inhabitants (93,735 men and 93,621 women), according to the fourth general population census of 2012.[2]

São Tomé and Príncipe is a former Portuguese colony which gained independence on 12 July 1975.[3] The struggle for independence was led by the Committee for the Liberation of São Tomé and Príncipe (CLSTP) from 1960. The CLSTP changed its name to the Movement for the Liberation of São Tomé and Príncipe (MLSTP) in 1972.

The islands of the archipelago were not inhabited until their discovery in 1470 by the Portuguese navigators João de Santarém and Pedro Escobar. In the early twentieth century the *roças* (plantations) on the islands were the largest producers of cocoa in the world.

São Tomé and Príncipe is a founding member of the Community of Portuguese Speaking Countries (CPLP), an international organization that unites the states that have adopted Portuguese as their official language. Portuguese is the official language of São

[1] Paragraph 1 of Article 4 of the Constitution. The wording of this article dates back to the Constitution of 1975, following the constitutional revision of 1980.
[2] In 2001, according to the data of the third general population census, São Tomé and Príncipe had 137,599 inhabitants.
[3] Independence was negotiated between Portugal and the Movement for the Liberation of São Tomé and Príncipe (MLSTP), with the two parties concluding an agreement on the matter on 26 November 1974, in Algiers, which is subject to express reference in the preamble of the 1975 Constitution.

Tomé and Príncipe, and *forro* (or *são-tomense*, a Portuguese-based creole language), *angolar*, and *lunguyè* (or *principense*) are also spoken. The organs of political power, the courts, and the administration are conducted in Portuguese. Legislation is produced exclusively in Portuguese and published in the official gazette under the name *Diário da República*. Portuguese legislation in force before independence remains in force in São Tomé and Príncipe as long as it is not contrary to the Constitution or to legislation enacted subsequently after independence.[4,5]

The adoption of a multi-party system took place through a constitution subject to referendum on 22 August 1990.[6] The democratic system in São Tomé and Príncipe has functioned with relative normality,[7] despite on-going political instability and a frequent change of government.[8] It is significant that Manuel Pinto da Costa, the historical leader of the MLSTP and President of the Republic between 1975 and 1991 during the one-party regime, was elected to another presidential term in 2011, in elections considered credible, free, and fair.

Discussions on constitutional matters in São Tomé and Príncipe have focused primarily on the issue of the system of government and the distribution of powers between the President and the government. A recurring theme has been the replacement of the semi-presidential system, adopted in the 1990 Constitution, for a presidential system,[9] despite

[4] Article 158 of the Constitution. Article 48 of the 1975 Constitution, in its original wording, provided that the "Portuguese legislation in force at the date of National Independence transiently maintains its validity in all that is not contrary to national sovereignty, to this Constitution, other laws of the Republic and the principles and objectives of the MLSTP".

[5] The Data Base *LegisPalop* gives access to about 900 documents from before independence, published between 20 September 1886 and 20 June 1975, from a total of 3,871 documents comprising the written law of São Tomé and Príncipe (consulted on 9 April 2013).

[6] The referendum produced 81% of favorable votes (38,348 votes, from a total of 42,274 voters, with 1,902 votes against, 738 blank votes, and 1,286 null votes), having been participated in by about 80% of registered voters.

[7] In 1995 and 2003, two attempted *coups de état*, of military origin, without political support, took place. These were dealt with through international mediation without having caused significant damage or casualties. With the aim of "creating a climate of understanding" and avoiding "any action of persecution and retaliation", Law No. 6/2003 (*Diário da República*, 24 July 2003) gave a general pardon to all "acts committed by the military and civilians directly related to the events of July 16, 2003, contrary to the Santomean criminal legal order".

[8] São Tomé and Príncipe has had fifteen governments during the application of the Constitution in force. In this sense, taking stock of the situation of São Tomé and Príncipe since independence, Augusto Nascimento, in *São Tome and Príncipe na idade adulta: a governação e o descaso da Rua*, vol. 2, nº 3 Revista Tempo do Mundo (2010) 45 and 46, states that "[i]n a generic and simplistic assessing, these three and a half decades were marked by failures in the economic and social plans, coexisting with some political instability in the two remaining decades of the multiparty system. Paradoxically or not, this instability denotes a reasonable functioning of the institutions – particularly with regard to changes in government – and a remarkable democracy regarding freedom of political criticism, both on the streets and in the press".

[9] The attraction of a presidential system is explained by Gerhard Seibert, in *Instabilidade política e revisão constitucional: semipresidencialismo em São Tomé e Príncipe*, in: Marina Costa Lobo and Octávio Amorim Neto (eds.), *O semipresidencialismo nos países de língua portuguesa* (Lisboa, Imprensa de Ciências Sociais, 2009) 215–218, in the following terms: "As the creole society of São Tomé and Príncipe does not have a pre-colonial past, there are no direct historical references to a 'traditional' political power, as occurs in societies in continental Africa. The governor of the colonial era, who was dependent on the mainland Portugal and was the all-powerful man in the archipelago, can be compared to with the current president. Also, during the one-party period, presidential power was considered to be

the strengthening of presidential powers not normally accompanied by the provision of oversight mechanisms at the level of the representative body.

The expectations generated by the discovery of oil on the continental shelf of São Tomé and Príncipe during the 1990s have been an additional source of political instability and indecision about the development model to be adopted in the country, in that their effective exploitation has still not materialized.[10] In this context, in relation to maritime space with greater potential for oil production, São Tomé and Príncipe concluded a treaty with Nigeria, through which a Joint Exploration Zone was created.[11]

B. The 1990 Constitution

The constitution in force in São Tomé and Príncipe is the Constitution of 20 September 1990,[12] as amended in 2003.[13] The initial text of the fundamental law consisted of 126 articles. The text currently in force has 160 articles, divided into a preamble and five headings: (i) Part I – Fundamentals and Objectives (Articles 1 to 14); (ii) Part II – Fundamental Rights and Social Order (Articles 15 to 65); (iii) Part III – Organization of Political Power (Articles 66 to 143); (iv) Part IV – Guarantee and Revision of the Constitution (Articles 144 to 155); and (v) Part V – Transitional and Final Provisions (Articles 156 to 160).

The Constitution of 20 September 1990 replaced the Constitution of 5 November 1975,[14] which was adopted at the joint meeting of the Political Bureau of the MLSTP and the Constituent Assembly. The text of the first Constitution of São Tomé and Príncipe had 49 articles. It was divided into five chapters: (i) Chapter I – Fundamentals and Objectives (Articles 1 to 6); (ii) Chapter II – Rights, Freedoms and Fundamental Duties of Citizens (Articles 7 to 18); (iii) Chapter III – The Organization of State Power

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uncontested. The president of the one-party period, Manuel Pinto da Costa, was simultaneously head of state, head of government, leader of MLSTP and commander of the Armed Forces. In this context the configuration of political power introduced in 1990 was also a significant rupture with the past".

[10] The management of oil revenues will be made in accordance with Law No. 8/2004 (Framework Law of Oil Revenue), published in the *Diário da República* of 30 December 2004, and Law No. 11/2006 (Organic Law of the Petroleum Oversight Commission), published in the *Diário da República* of 29 December 2009.

[11] The Treaty between the Federal Republic of Nigeria and the Democratic Republic of São Tomé e Príncipe on the Joint Development of Petroleum and other Resources in respect of Areas of the Exclusive Economic Zone of the two States, signed on 21 February 2001, published in the *Diário da República* of 9 August 2001. The powers which the Presidents of the Republic were given by the treaty, including the appointment of members of the Joint Ministerial Council (paragraph 2 of Article 6) and members of the Board of Directors of the Joint Authority (paragraph 2 of Article 10) and the resolution of deadlocks and disputes (Part Eleven, Articles 47–49), reinforce the potential for oil exploration to be an area of conflict between the President and the Government in São Tomé and Príncipe.

[12] Law No. 7/90, published in the *Diário da República* of 20 September 1990.

[13] Law No. 1/2003 (Law of Constitutional Revision), published in the *Diário da República* of 29 January 2003.

[14] Published in the *Diário da República* of 15 December 1975. Prior to the 1975 Constitution, the Basic Law, adopted on 12 July 1975, published in *Diário da República* No. 1, 17 July 1975, was in force. In accordance with Article 1, power in the newly independent state was exercised by the following "transitional sovereign bodies": the Representative Assembly, the Political Bureau of the MLSTP, the President of the Republic, and the Provisional Government and courts.

(Articles 19 to 45); (iv) Chapter IV – Constitutional Revision (Articles 46 and 47); and (v) Chapter V – General and Transitional Provisions (Articles 48 and 49). Chapter III was subdivided into six sections, with no specific numbering: (i) Articles 19 and 20, incorporating articles of general scope; (ii) Popular Assembly (Articles 21 to 27); (iii) the Popular Assembly Standing Committee (Articles 28 and 29); iv) Head of State (Articles 30 to 34); (v) Government (Articles 35 to 38); and (vi) Justice (Articles 39 to 45). The Nationality Law, approved on 1 December 1975, with 14 articles, was published as an annex to the fundamental law of 1975. The 1975 Constitution was revised in 1980, 1982, and 1987.

Article 159 of the Constitution in force continues to refer to the earlier constitutional texts, despite the fact that political and social organization was radically changed in 1990 with the adoption of a representative democracy and the rule of law.

Constitutional Law No. 1/2003 amended the original text of the 1990 Constitution in four main areas: (i) rearrangement of the powers of the President and the other organs of sovereignty; (ii) the creation of a State Council; (iii) regulation of the Constitutional Court; and (iv) the introduction of a system of judicial review of constitutionality.

The technique used for constitutional drafting was heavily influenced by the Portuguese Constitution of 1976, both in terms of the legal systematization adopted and the legal institutions that were used.[15] Following the Portuguese Constitution, the semi-presidential system was adopted as the system of government. Part IV, on the guarantee and revision of the Constitution, is a reproduction of the articles of the Portuguese Constitution and introduced a system of judicial review of constitutionality and legality which was extremely complex for a state with the geographical dimensions of São Tomé and Príncipe, with a limited amount of legislation and a small community of jurists.

II. Fundamental Principles of the Constitution

The analysis and understanding of the fundamental principles of the Constitution of 1990 is the sum of the articles of Title I, with the expressed material limits on revision of Article 154 and the proclamations that can be found in the Preamble.

In accordance with the proclamations of the Preamble, the Constitution of São Tomé and Príncipe aims to "guarantee … independence and national unity, through the construction of a democratic state"; is based on the idea of promoting an "increasingly broad and responsible participation of the citizens in the various fields of national life"; and "represents the collective will of the Santomean people in giving their share of contribution to the universality of fundamental rights and freedoms of mankind".

[15] The author of the first draft of the Constitution of 1990 was the Portuguese constitutionalist Jorge Miranda, Professor of the Faculty of Law, University of Lisbon. The draft of the Constitution was published by its author as *Anteprojecto de constituição da República de São Tomé e Príncipe*, nº 7 Revista Africana (Porto, Universidade Portucalense) 185–212.

The 1990 Constitution adopted a model of democratic political organization of western origin, in accordance with which São Tomé and Príncipe is a "democratic rule of law state, based on the fundamental rights of the human person" (Article 6). This was reinforced, within the material limits of constitutional revision, by the constitutional revision of 2003: (i) in paragraph (d), "the rights, freedoms and guarantees of the citizens"; (ii) in paragraph (e), the "universal, direct, secret and periodic election of the holders of organs of sovereignty and the local and regional authorities"; (iii) in paragraph (f), "the separation and interdependence of the organs of sovereignty"; (iv) in paragraph (g), "the autonomy of regional and local authorities"; (v) in paragraph (h), "the independence of the courts"; and (vi) in paragraph (i), "pluralism of expression and political organization, including political parties and the right of democratic opposition".[16] Similarly, Article 10 sets out, as the primary objectives of the state, to "promote, respect and enforce personal, economic, social, cultural, and political rights of citizens" and to "promote and ensure the progress of democratization and economic, social, and cultural structures". The adoption of a concept of a democratic rule of law state ("*Estado de Direito democrático*") "means the safeguarding of justice and legality as fundamental values of collective life" (Article 7).

Under Article 1, the "Democratic Republic of São Tomé and Príncipe is a sovereign and independent state, engaged in building a free, just, and unified society, in defence of human rights and in an active solidarity among all men and all peoples". The "republican form of government" is protected by Article 154(c). A secular state is guaranteed under Article 154(b), and it is specifically stated that there is "separation of the state" and religion and "respect for all religious institutions" (Article 8). The unitary structure of the state is protected by Article 155(a), being expressly provided for in Article 5 that São Tomé and Príncipe is "a unitary state, notwithstanding the existence of local authorities", which should be linked to the creation of the Autonomous Region of Príncipe (Article 137).

The state exercises "sovereignty over the entire national territory, the subsoil of terrestrial space, the soil and subsoil of the maritime territory" and over the "natural living and non-living natural resources" that are within these spaces, in accordance with Article 4. The Constitution distinguishes in that article between: (i) the islands and islets that form the archipelago; (ii) "archipelagic waters located within the baseline"; (iii) "the territorial sea understood in a circle of twelve miles from the baseline determined by law"; (iv) the "airspace that extends over the whole land"; and (v) "the adjacent waters overlying the coasts". The powers which the state may exercise in relation to the various maritime zones, with particular emphasis on the archipelagic waters,[17] and to

[16] The Right of Opposition is regulated in Law No. 8/2001, published in the *Diário da República* of 31 December 2001. In accordance with Article 1, the status of the right to opposition is recognized in respect of "Political Parties and minorities represented in the National Assembly, and Regional or District assemblies and not part of the Government or other executive bodies".

[17] The international legal status of the archipelagic states and archipelagic waters is regulated in Articles 46–54 of the United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982. São Tomé and Príncipe signed the UNCLOS on 13 July 1983 and ratified it on 3 November 1987.

the national airspace result from the application of international law, the implementation of which takes precedence over any domestic or constitutional perspective. Although specific reference to the continental shelf is not made in the Constitution, the exercise of powers by São Tomé and Príncipe over that space is not in any doubt, because it is a maritime space inherent to any state regardless of claim or effective occupation.[18] Reference should also be made to the fact that no mention of the concept of the exclusive economic zone[19] is made in the Constitution, despite its use at the level of ordinary legislation.[20]

Political power "belongs to the people, who exercise it through universal, direct, equal, and secret vote" (Article 6(2)). The "participation and direct and active involvement of citizens in … political life" is a "fundamental condition of consolidation of the Republic" (Article 66). The Constitution refers to a mechanism of participatory democracy, namely the popular nationwide referendum.[21]

In accordance with Article 71(1), the referendum can relate to "matters of national interest that should be decided by the National Assembly or the Government through the adoption of an international convention or legislative act" with a binding effect result. The following matters are excluded from the scope of the referendum: (i) amendments to the Constitution;[22] (ii) matters relating to the legislative reserve competence of the National Assembly; and (iii) issues and acts relating to the budget or financial or tax matters.

The Constitution provides for an economic organizational model based on the "principle of a mixed economy" in order to achieve "national independence, development, and social justice" (Article 9(1)). The coexistence between "public property", "cooperative ownership", and "private property" is established (Article 9(2)).[23]

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[18] Under Article 77(3) of the UNCLOS (Rights of the coastal state over the continental shelf), according to which "the rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or any express declaration". Article 4(2) of the initial version of the 1975 Constitution made reference to the "shelf of the islands" ("*plataforma das ilhas*").

[19] Article 4 in force corresponds to the wording of Article 2 of Law No. 1/80, which was the first revision of the Constitution of 1975.

[20] Law No. 1/98, published in the *Diário da República* of 31 March 1998. Under Article 4(2), the "Exclusive Economic Zone of the Democratic Republic of São Tomé and Príncipe is set as two hundred nautical miles from the baseline from which it determines the extent of the territorial sea", which is completed by paragraph 2 of that Article when it states that in "case of special provisions of International Treaties signed with the states whose coastlines are adjacent to the Republic of São Tomé and Príncipe, the outer limit of the Exclusive Economic Zone of the Democratic Republic of São Tomé and Príncipe shall not extend beyond the equidistant median line".

[21] On this issue, see Jorge Bacelar Gouveia, *O referendo sobre os poderes presidenciais e a Constituição de São Tomé e Príncipe de 1990*, in: Jorge Bacelar Gouveia, *Direito Constitucional de Língua Portuguesa. Caminhos de um constitucionalismo singular* (Almedina – Faculdade de Direito da Universidade Nova de Lisboa) 307–324.

[22] The original version of the Constitution of 1990 provided in Article 123(2) that the "National Assembly may propose to the President of the Republic the submission of any amendment to the constitution to a popular referendum".

[23] The Attorney-General of the Republic of São Tomé and Príncipe clarified in an Opinion dated 7 May 2005, on claims of ownership and the right to *actio popularis* ("*acção popular*"), that "the new

The state is responsible "for ensuring national defence" (Article 11(1)), the main objectives of which are to "ensure national independence, territorial integrity, and respect for democratic institutions". In accordance with Article 64(1) it "is a privilege, honour and the supreme duty of a citizen to participate in the defence of the sovereignty, independence, and territorial integrity of the State".

Given the country's small military contingent, the Constitution devotes great attention to the issue of "participation of the Santomean Armed Forces in peacekeeping operations abroad or the presence of foreign armed forces in the national territory" (Article 80(h), Article 90(f), Article 97(n), and Article 111(j)).

The Constitution provides for the national flag, the national anthem, and the heraldic arms as national symbols of São Tomé and Príncipe, according to Article 14(1). Paragraphs 1 and 3 of that Article are dedicated to the description of the national flag and heraldic arms. Paragraph 2 embodies the national anthem as "National Independence", but its text was not included as an annex to the Constitution. There is no mention of the official language of São Tomé and Príncipe, although this can be inferred from the language in which the Constitution was written and the fact that no official versions of the text can be obtained in other languages.

The Constitution may be revised in accordance with an ordinary or extraordinary process. Under the ordinary proceedings it may be revised "five years from the date of publication of the latest revision law" (Article 151(2)). The opening of an extraordinary revision process implies that the National Assembly has assumed "powers of constitutional revision by a three-fourths majority of the Deputies in the full exercise of their office" (Article 151(3)). During a state of siege or state of emergency, no act of constitutional revision can be passed (Article 155). The initiative to revise the Constitution is a competence solely reserved to the Deputies and Parliamentary Groups, in accordance with Article 151(1), and proposals submitted by any sovereign organ or as a result of popular initiative are not admitted. The constitutional revision proposals must respect the material limits of revision contained within the nine subparagraphs of Article 154. The constitutional amendments must be approved by a qualified majority of two-thirds of Deputies in full exercise of their office (Article 152(1)). The new text of the Constitution resulting from the constitutional revision must be published in the *Diário da República*, after the amendments to the Constitution have been "inserted in their proper place with the necessary substitutions, deletions and additions" (Article 153). The law of constitutional revision is sent to the President, who cannot "refuse to enact" it (Article 152(3)).

III. Fundamental Rights Protection

The catalogue of fundamental rights of the Constitution of 1990 is contained in its Part II, which is devoted to fundamental rights and social order. Part II is divided into four

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revolutionary legal order, transferred to the people the ownership over land and the whole property previously illegally occupied, and safeguarded private property under the 1975 Constitution".

titles: Title I – basic principles (Articles 15 to 21); Title II – personal rights (Articles 22 to 41); Title III – social rights and economic, social and cultural order (Articles 42 to 56); and Title IV– civil and political rights and duties (Articles 57 to 65).

A. General principles

The catalogue of fundamental rights opens with reference to the following general principles: (i) the principle of equality (Article 15(1)), as supplemented by the principle of equality of women to men, according to which women should be "assured full participation in political, economic, social, and cultural life" (Article 15(2)); (ii) the interpretation and integration of fundamental rights in accordance with the Universal Declaration of Human Rights (Article 18(2)); (iii) the suspension of fundamental rights within the limits of being "strictly necessary" when a state of siege or state of emergency is authorized (Article 19); (iv) access to courts to seek redress for acts that violate the rights of citizens on the presupposition that justice cannot be denied for insufficient economic means (Article 20); and (v) the obligations of citizens to society and the state (Article 21).

The Constitution refers to the category of "rights, freedoms and guarantees" at the material limits of constitutional revision, but it is not an autonomous category within the generic catalogue of fundamental rights, and nor does the Constitution make any reference to the characteristics that are usually associated with it as to the direct applicability of its rules or the obligation of respect from public and private persons and bodies.

A state of siege or a state of emergency may be declared by the President of the Republic, subject to approval by the National Assembly, after the Government has been "heard" (Article 80(g) and Article 97(m)). The law governing the matter is the exclusive legislative competence of the National Assembly under Article 98(e).

The rights and duties of foreigners "residing or finding themselves in São Tomé and Príncipe" are equivalent to those of Santomean citizens, with the exception of "political rights", the "exercise of public functions", and "other rights and duties expressly reserved by law to a citizen". When an "agreement or international convention" is concluded, particularly in the context of international cooperation, the exercise of public functions may be permitted to foreigners provided they are of a "predominantly technical nature" (Article 17(2)). The possibility of giving foreign citizens resident in São Tomé and Príncipe, subject to reciprocity, "active and passive electoral capacity for the election of the holders of the organs of local government" is provided for (Article 17(3)).[24] The expulsion of foreigners who have "obtained a residence permit" can be ordered only by judicial authority (Article 41(3)).[25]

[24] In accordance with Article 71(3), the right to vote granted to foreigners does not include active electoral capacity in relation to referendums.

[25] The Supreme Court, in Judgment 35/2010 of 23 September 2010, decided to suspend the effectiveness of the decision of the administrative expulsion of an alien of Cameroonian nationality, understanding that

Article 21 provides that "citizens have duties towards society and the state" and may not exercise their rights (i) to prejudice the "rights of other citizens" or (ii) disregard "the just requirements of morality, public order, and national independence".

B. Personal rights

The fundamental rights included in the category of personal rights provides for the existence of a society respectful of human dignity, pluralism, and diversity.

Title II opens with the solemn proclamations that "human life is inviolable" and "in no case shall capital punishment exist" (Article 22). It follows that the "moral and physical integrity of the person is inviolable" and "no one shall be subjected to torture or mistreatment or cruel, inhuman, or degrading treatment" (Article 23), and it adds that "no one may be deprived of liberty, unless otherwise prescribed by law or by the decision of a competent court".

Articles 37 to 40 set out the basic principles for structuring criminal law and criminal procedural law[26] according to respect for fundamental rights: (i) the principle of legality of criminal law; (ii) the retroactivity of criminal law more favorable to the defendant; (iii) the ban on penalties or custodial security measures that are perpetual in nature or for an unlimited or indefinite term; (iv) the non-transferability of criminal penalties; (v) the presumption of innocence of the accused until finally convicted by a court;[27] (vi) the attribution of criminal procedural instruction to judges; and (vi) the nullity of evidence obtained through torture, coercion, infringement of the physical or moral integrity of the person, or wrongful interference with privacy, in the home, in correspondence, or in telecommunications.

The existence of a pluralistic society which respects diversity is guaranteed in the Constitution through a set of fundamental rights: (i) freedom of conscience, religion, and worship (Article 27); (ii) freedom of cultural creation (Article 28); (iii) freedom of expression and information (Article 29); (iv) freedom of the press (Article 30); (v) the right to freedom of teaching and learning (Article 31); (vi) the right of assembly and expression (Article 34); and (vii) freedom of association (Article 35).

"the Service of Immigration and Borders under the law does not have the power to form a process for the purpose of expelling a foreign but only to forward this same process for a decision by the judiciary".

[26] The Code of Criminal Procedure currently in force in São Tomé and Príncipe, approved by Law No. 5/2010, published in the *Diário da República* of 10 August 2010 (which reprinted the text previously approved by Law No. 19/2009, published on 31 December 2009 with corrections), replaced the Portuguese Code of Criminal Procedure of 1929.

[27] The Attorney-General of the Republic of São Tomé and Príncipe contended, in an Opinion dated 1 April 2009, that "it does not seem possible to understand that the segment of the rule of Article 172 of the Criminal Procedure Code, which allows that preventive arrest with formal charges can be extended for one year, and in more complex cases, in theory could extend up to sixteen months until the start of the trial at first instance, devotes a period whose duration is presented as manifestly excessive and unreasonable, and cannot be compatible with the constitutional principle of presumption of innocence". The Supreme Court/Constitutional Court, in Judgment no 26/2009 of 23 July 2009, decided in full agreement that the article in question was "reasonable and takes into account new types of emerging crime and transnational crime, when the criteria contain elements linked to various countries".

C. Social rights and economic, social, and cultural order

Title III comprises two distinct categories of fundamental rights: on the one hand, the rights of Santomeans as members of a community that aims to "promote respect and enforce personal, economic, social, and cultural rights" and to "promote and ensure democratization and the progress of economic, social, and cultural structures" (Article 10(a) and (e)); and, on the other, the structural principles of economic, social, and cultural organization.

With regard to the Santomeans' rights as members of a community that seeks to attain a certain level of achievement of fundamental economic, social, and cultural rights, the Constitution of São Tomé and Príncipe provides for: (i) protection of the family (Article 51); (ii) protection of children (Article 52); (iii) protection of youth (Article 53); (iv) protection of the elderly (Article 54); (v) protection in sickness, disability, old age, widowhood, and orphanhood, through a system of public social security measures (Article 44); (vi) protection of health through a national system of health (Article 50); (vii) provision for the rights of workers (Article 43); (viii) the right to education, aiming at the complete formation of people and their active participation in the community (Article 55); (ix) the right to culture (Article 56(1)); and (x) the right to the practice of sports and the promotion of sports and physical culture by the state (Article 56(2)).

In terms of the structuring principles of economic, social, and cultural organization, the Constitution provides for: (i) the right to work and the duty to work (Article 42(1) and (2)); (ii) the right to practice the liberal professions (Article 42(4)), in particular private medicine (Article 50(3)); (iii) the creation of a state social security system (Article 44(2)); (iv) the possibility of creating private institutions to achieve the objectives of social security (Article 44(2)); (v) the right to the free establishment of cooperatives (Article 45(1)); (vi) the protection of the rights inherent in intellectual property, including copyright (Article 46); (vii) the right to private property and its transmission in life or death (Article 47); (viii) the protection of small and medium enterprises which are economically and socially viable (Article 48(1)); (ix) the authorization of foreign investment to the extent that this is relevant to the economic and social development of the country (Article 48(2)); (x) the right to housing for all, and the implementation of a housing policy (Article 49); (xi) the right to a wealthy human environment and the duty to defend it (Article 49(1)); (xii) the implementation of a planning policy with regard to use of space (Article 49(2)); (xiii) the creation of a national health system (Article 50(2)); (xiv) the establishment of a national education system (Article 55(2)); (xv) the possibility of creating private educational establishments (Article 55(5)); and (xvi) the preservation, protection, and enhancement of the cultural heritage of the people of São Tomé and Príncipe (Article 56(2)).

D. Civil and political rights and duties

The civil and political rights and duties grouped in Title IV mainly cover the rights of public and political participation, and also the duties of Santomean citizens towards the state of which they are nationals.

Article 57 provides that "all citizens have the right to take part in political life and in the direction of the affairs of the country, directly or through freely chosen representatives". In accordance with this guidance, the right of suffrage to all "citizens over eighteen years" (Article 58) is generally recognized; the right of citizens to petition to "defend their rights, the Constitution, the law or the general interest" (Article 60) is awarded; social organizations that "fit and foster [the] civic participation of citizens" (Article 62) are supported; and the right to form or participate in political organizations that "befit free and pluralistic participation of citizens in political life" is enshrined.

The Constitution refers to two duties of Santomean citizens towards the state: the duty "to participate in the defence of the sovereignty, independence and territorial integrity of the state", which is realized in particular through the "duty to perform military service" (Article 64); and also the "duty to contribute to public expenditure", through the payment of taxes (Article 65).

IV. Separation of Powers

A. General Framework

The organization of political power is based on the "principles of separation and interdependence" of sovereign bodies, pursuant to Article 69(1) and Article 154(f). The organs of sovereignty, under Article 68, are the President of the Republic (Articles 77 to 87), the National Assembly (Articles 92 to 107), the Government (Articles 108 to 119), and the courts (Articles 120 to 134).

The 1990 Constitution has adopted a semi-presidential system of government, with the aim of overcoming the excessive concentration of power in the head of state which had been granted in the 1975 Constitution. Indeed, until the constitutional revision of 1987, the President was both head of state and head of government, and also the Secretary-General of the MLSTP, the one party authorized in the Santomean political system. The model for the distribution of power in the semi-presidential system has its origin in the Portuguese Constitution of 1976 (after the revision of 1982), but the actual allocation of powers to the various organs of sovereignty is the result of the constraints of the political and constitutional history of São Tomé and Príncipe.[28] The semi-presidential system enshrined in the Constitution provides for the political responsibility of the Government to the President of the Republic and to the National Assembly, in accordance with Article 113.

In the first version of the 1990 Constitution, the balance of the semi-presidential system of government in São Tomé and Príncipe was challenged by the constitutional provision

[28] About this question, see Seibert, n9 *supra*, 201–230.

of the President to "direct the defence and security policy" (Article 76(c)) and the power to "chair the Council of Ministers whenever he chooses to" (Article 76(i)). The constitutional revision of 2003 was aimed at restricting the powers of the President, but allowed for a transitional period during which those presidential powers were maintained. Accordingly, pursuant to Article 160, the new configuration of presidential powers only came into force on the "date of commencement of the next term of the President": that is, in 2006.

The National Assembly is described, in Article 92, as "the highest representative and legislative organ of the State". The activity of the National Assembly, however, is limited, since it meets in ordinary session only twice a year (Article 105(1)). Under Article 57 of the Rules of Procedure of the National Assembly,[29] the "sessions will begin on 15 April and 15 October, and not exceed four months".

Article 74 enshrines the political, civil, and criminal liability of the holders of the organs of political power by "acts and omissions practiced in the exercise of their duties". With regard to the President of the Republic, the Constitution distinguishes between "crimes committed in the exercise of his duties" and "crimes committed outside the exercise of his duties". In the first case, the President is accountable to the Supreme Court (Article 86(1)). In the second case, the President is "accountable before the ordinary courts after ending his mandate" (Article 86(4)). Article 96(2) stipulates that "Deputies that seriously infringe their duties may be removed by the National Assembly in a secret ballot by a majority of two thirds of the Deputies in office".

B. Appointment, powers and removal from office of political bodies

1. President of the Republic

The President of the Republic is "elected by universal free, direct and secret suffrage" under Article 78(1). The presidential candidates, in accordance with Article 78(2), must fulfill five requirements: they must (i) be citizens of São Tomé and Príncipe; (ii) be children of a Santomean mother or father; (iii) be more than 35 years of age; (iv) not possess another nationality; and (v) have resided continuously in São Tomé and Príncipe for the "three years immediately preceding the date of the candidature".[30] The election of the President requires a majority of the votes cast, but there may be a second round of elections if this majority is not achieved by any of the candidates.[31]

The presidential term is five years and a President may not serve more than two consecutive terms (Article 79(1) and (3)). The possibility of applying for a new mandate

[29] The Rules of Procedure of the National Assembly were approved on 31 December 1986, and amended in 1988, 1995, 1999, and 2002.

[30] The Supreme Court/Constitutional Court, in Judgment 6/2006 of 13 July 2006, interpreted this requirement as follows: "The law says nothing about what constitutes permanent resident, despite pointing to common sense fact that someone who for whatever reason leaves the country for a considerable period of time (i.e. years) cannot be considered to be a permanent resident. However, what the law does not prohibit it permits, which assertion constitutes one of the golden rules of law."

[31] Article 14 of Law No. 11/90 (Electoral Law of the Democratic Republic of São Tomé and Príncipe), published in the *Diário da República* of 26 November 1990.

after a minimum period of five years from the previous exercise of presidential functions is contemplated (Article 79(3)). The President may resign, in which case he or she "cannot be a candidate for the immediate elections" nor for any that will be held during the following period of five years (Article 79(4)).

The powers of the President of the Republic are set out in Articles 80 to 82. The Constitution distinguishes between the competence of the President (Article 80), competence in relation to other organs (Article 81), and competence in international relations (Article 82). The wording setting out the presidential powers in force after 2006 has reduced the predominant power of the President under the semi-presidential system of government of São Tomé and Príncipe so that now he (i) can only "preside [over] the Council of Ministers on request of the Prime Minister" (Article 81 (c)) and (ii) should conduct the negotiation process leading to the conclusion of international agreements in the area of defence and security "in consultation with the Government" (Article 82 (e)). Pursuant to Article 87(1), the interim replacement of the President of the Republic by the President of the National Assembly (or his substitute) is established in two situations: (i) "temporary impairment" and (ii) "vacancy of office". The powers of the acting President of the Republic are similar to the powers of the President in office, with two exceptions. In accordance with Article 87(3), the acting President cannot (i) "pardon and commute sentences, after hearing the Government", in accordance with Article 80(f); and (ii) cannot "dissolve the National Assembly, subject to the provisions of Article 103 and after consultation with the political parties that have seats in it", according to Article 81(e).

The constitutional reform of 2003 created the State Council, which acts as the "political body that advises the President of the Republic" (Article 88). Its composition, in accordance with Article 88(2), is broad, and includes: (i) the President of the National Assembly; (ii) the Prime Minister; (iii) the President of the Constitutional Court; (iv) the Attorney-General; (v) the President of the Regional Government of Príncipe; (vi) the former Presidents of the Republic who have not been removed from office; (vii) "three citizens of recognized suitability and merit, appointed by the President for the period corresponding to the duration of its mandate"; and (viii) "three citizens elected by the National Assembly, in accordance with the principle of proportional representation, for the period corresponding to the duration of the legislature". Consultation with the Council of State by the President is required in the situations referred to in Article 90: (i) dissolution of the National Assembly (Article 103(1)); (ii) dismissal of the Government (Article 117(2)); (iii) declaration of war and making of peace (Article 82 (c)); (iv) "treaties involving restrictions of sovereignty" and "the participation of the country in international organizations for collective security or military"; and (v) the "participation of the Armed Forces on operations abroad or the presence of foreign armed forces in national territory". Opinions of the State Council should be "made public on the occasion of the act referred to" (Article 91(2)).

2. National Assembly

The Constitution provides for the existence of a single chamber, with the designation of the National Assembly. The number of Deputies is fixed by ordinary law under Article 93(3), being now fifty-five. It is expressly provided that Deputies "represent all the people, not just those constituencies from where they are elected" (Article 93(2)). Although the "rights, privileges and duties of Deputies" are regulated by law (Article 96(1)), the text of the Constitution specifically safeguards the fundamental core of parliamentary immunity: (i) the Deputy cannot be "harassed, persecuted, arrested, imprisoned, tried or convicted for the votes and opinions that he casts in the performance of his duties" (Article 95(1)), and (ii) the Deputy cannot be prosecuted or arrested for crimes committed outside the course of his duties, except in cases of "flagrant crime and crime punishable by imprisonment" or when there is "consent of the National Assembly or its Standing Committee" (Article 96(2)).

The legislatures of the National Assembly have an expected duration of four years (Article 102).[32] The legislature begins with the "swearing in of all its members" (Article 102(2)), with the continuance in office of deputies in the event of the "dissolution of the National Assembly" being expressly provided for.

The National Assembly, in accordance with Article 105(1), meets in two ordinary sessions per year, and "the report of the activities of the Government and the discussion and vote on the State Budget for the next financial year" should be discussed in one of them.

The President of the Republic may dissolve the National Assembly in "case of severe institutional crisis that prevents its normal functioning" (Article 103). This is a political decision, the legality of which is dependent on the fulfillment of three conditions: (i) a formal requirement, "preceded by the assent of the Council of State", under penalty of being legally invalid (paragraph 1); (ii) a temporal requirement: the dissolution cannot take place in the "twelve months following its election" or during the "last semester of office of the President" (paragraph 2); and (iii) a circumstantial requirement that the dissolution cannot take place "during the duration of a state of siege or state of emergency" (paragraph 2).

The competence of the National Assembly is provided for in Article 97. In accordance with the interdependence between the organs of sovereignty, it is within the competence of the National Assembly: (i) to "appoint and dismiss judges of the Supreme Court"; (ii) "to approve the State Budget"; (iii) to "approve development plans"; (iv) to "consider the state accounts for each financial year"; (v) to "discuss and approve the Government's programme and control its implementation"; (vi) to "propose the dismissal of the Prime Minister to the President"; and (vii) to "consider the acts of Government and Administration".

[32] The Ninth Legislature of the National Assembly of São Tomé and Príncipe began on 11 September 2010.

Article 97(q) provides for a political review of constitutionality which is incompatible with the constitutional system of judicial review of constitutionality that was introduced by the constitutional revision of 2003, and it should be understood as not being in force. The provision in question was in line with Article 111 of the original version of the Constitution when it prescribed that "decisions on the unconstitutionality of the National Assembly are generally binding and will be published in the *Diário da República*".[33]

During the first meeting of each legislature, the National Assembly elects "the President and other officers" (Article 104(1)). The Standing Committee, which works "outside periods of effective functioning of the National Assembly" and "during the period in which it is dissolved", is chaired by the President of the National Assembly and is composed of the Vice-Presidents and Deputies provided for in the Rules of Procedure of the National Assembly (Article 107(2)). In accordance with Article 104(2), the National Assembly may (i) create "specialized committees"[34] and (ii) "establish committees to deal with certain issues".

3. Government

The Government consists of the "Prime Minister, the Ministers and the Secretaries of State" (Article 109(1)). The Prime Minister is the head of government and "is responsible for directing and coordinating the activities of [the Government] and ensure the execution of the laws" (Article 109(2)). The actions of the members of Government, in accordance with ministerial solidarity, are subject to the approved government programme and the decisions taken by the Council of Ministers (Article 119). Members of the Government "can take part and speak at plenary sessions of the National Assembly" (Article 106), although they are not members of the parliamentary body.

The Prime Minister is appointed by the President of the Republic, "in view of the election results", after consulting the "political parties represented in the National Assembly" (Article 110(1)). The office of Prime Minister can be exercised only by someone who: (i) is a "citizen of Santomean origin"; (ii) is "a child of a Santomean father or mother"; and (iii) "has no other nationality". Ministers and Secretaries of State are appointed by the President of the Republic on the recommendation of the Prime Minister (Article 110(2)).

The Council of Ministers comprises the Prime Minister and the Ministers (Article 112(1)). Specialized Councils of Ministers can be created according to Article 112(4).

[33] In Article 32(k) of the 1975 Constitution, revised in 1980, the National Peoples' Assembly was defined as being able to "guarantee the observance of the Constitution and other laws of the Republic and review the acts of the Government or public administration, including declaring them generally not binding, except in situations created by final decisions of the courts and the unconstitutionality of any rules".

[34] The matter is regulated by Articles 48 and 49 of the Rules of Procedure of the National Assembly. The National Assembly of São Tomé and Príncipe has the following specialized committees: (i) the First Committee – Constitutional, Political, Legal and Institutional Affairs; (ii) the Second Committee – Economic and Financial Affairs; (iii) the Third Committee – Social Affairs; (iv) the Fourth Committee – Public Works and Natural Resources; and (v) the Fifth Committee – Human Rights, Gender and Citizenship.

The Government, in accordance with Article 108, "is the executive and administrative organ of the state, and is responsible for conducting the general policy of the country". In line with its status as a sovereign body with autonomy of action, the Government shall, in accordance with Article 111: (i) "define and implement the political, economic, cultural, scientific, social, defence, and security activities, and external relations, included in its programme"; (ii) apply the "development plans and the State Budget"; and (iii) have the responsibility of "directing the State administration, coordinating and controlling the activities of Ministries and other central bodies".

The Constitution, in Article 117, provides for a set of situations from which the dismissal of the Government may result: (i) the "beginning of a new legislature"; (ii) the "acceptance by the President of the resignation of the Prime Minister"; (iii) the "death or long-term incapacitation of the Prime Minister"; (iv) the "rejection of the Government programme"; (v) the "non-approval of a vote of confidence"; and (vi) the "adoption of a motion of censure by a majority of the Deputies in the full exercise of their office".

The President may also dismiss the Government "when this is necessary to ensure the regular functioning of democratic institutions" (Article 117(2)). This is a political decision, the legality of which is dependent only on the completion of a formal requirement: a hearing of the State Council.[35]

C. Legislative powers and legislative procedure

The National Assembly and the Government have legislative competence, pursuant to Article 97(b), Article 98, and Article 111(d). The National Assembly has a relatively small area of exclusive legislative power, resulting in very broad areas in which there are concurrent legislative powers between the Government and the representative body.[36]

The exclusive legislative competence of the National Assembly is provided for in Article 98. It corresponds to the issuing of laws on matters of the structural organization of the state and society, whose legislative choice is generally protected by the material limits of constitutional revision: (i) "citizenship" (connected with Article 154(d)); (ii) the "personal and political rights of citizens" (connected with Article 154(d)); (iii) "elections and other forms of political participation" (connected with Article 154(e) and (i)); (iv) the "judicial organization and status of judges" (connected with Article 154(h)); (v) a "state of siege or state of emergency" (connected with Article 154(d)); (vi) the "organization of national defence"; (vii) the "property sectors of means of production"; (viii) "taxes and tax systems"; (ix) "requisition and expropriation for public purposes" (connected with Article 154(d)); (x) the "monetary system"; (xi) the "definition of crimes, penalties and security measures and criminal prosecution"

[35] In the initial version of the Constitution, the President could freely dismiss the Prime Minister, in accordance with Article 76(g).

[36] Since 1990, the National Assembly has passed about 200 laws, while the Government has approved about 400 decree-laws and 400 decrees.

(connected with Article 154(d)); (xii) the "general organization of the State Administration"; (xiii) the "status of officials and civil liability of the Administration"; (xiv) the "local authority" (connected with Article 154(h)); and (xv) the "status and capacity of persons" (connected with Article 154(d)).

The exclusive legislative powers of the National Assembly under Article 98 may be delegated to the Government through legislative authorization pursuant to Article 100. The legislative authorization conferred by the National Assembly to the Government "should establish its subject, its extent and duration" (Article 100(1)). The legislative authorization expires: (i) at the "end of the legislature", (ii) when there is a "change of government"; and (iii) at the termination of the legislative authorization. The Constitution provides that the authorized decree-laws approved by the Government through the use of delegated legislative powers must be submitted to the National Assembly for "ratification" (Article 101 and Article 97(d)). The National Assembly has a period of five plenary sessions to consider decree-laws issued by the Government through the use of delegated legislative powers until a month before each legislative session, after which they "are considered ratified".[37]

The legislative (exclusive) competence of the Government is settled under Article 111(c).[38] This competence corresponds to the issuing of decree-laws and decrees by the Government on "matters relating to its organization and functioning". The delimitation of the matters that may be included in these legislative powers should result from an analysis of the content of Article 98(l), in which it states that it is the responsibility of the National Assembly to make laws on "the general organization of State Administration, except as provided in subparagraph c) [of] Article 111".

The Constitution provides for a very complex system of normative acts in Article 70, owing in particular to the existence of an autonomous region with legislative powers. In accordance with Article 70(1), legislative acts are "laws, decree-laws, decrees, regional decrees and regional executive decrees". The Constitution also makes reference to the following legislative acts: (i) laws of constitutional revision, approved by the National Assembly, in accordance with Articles 151 and 152; (ii) legislative authorizations approved by the National Assembly, in accordance with Article 97(c) and Article 100; (iii) basic principles of legal regimes, in Article 70(2); (iv) general laws of the Republic, in Article 70(3) and (5), as "the laws and decree-laws the *raison d'être* of which involves its application nationwide unreservedly";[39] and (v) organic laws (Article 145 (3)). It should be noted that the references to "basic principles of legal regimes" and

[37] The Rules of Procedure of the National Assembly, in Article 189, extend the parliamentary consideration of legislation to all decree-laws approved by the Government and not merely to those that are issued under legislative authorization.

[38] Since there is no provision that specifically assigns concurrent legislative powers to the Government, Article 111(c) of the Constitution is similarly used to justify the exercise of this type of legislative power by the executive.

[39] The matters of specific interest to the Autonomous Region of Príncipe are contained in the 38 paragraphs of Article 35 of the Political and Administrative Statute of the Autonomous Region of Príncipe.

"organic laws" do not correspond to any specific legal regime or special legislative procedure in the articles of the Constitution in force.[40,41]

The legislative initiative lies with the Deputies and the Government (Article 99(1) and Article 111(f)).[42] The approval of laws is a power of the National Assembly (Article 97(b)), without it being provided with any specific type of majority for that effect.[43] The President of the Republic can promulgate laws or exercise the right of veto within 15 days of their receipt (Article 83(1)). The veto of the President of the Republic in relation to laws may be overruled after review by the National Assembly "if they get a favourable vote of a qualified majority of Deputies" (Article 83(2)). The approval of decree-laws and decrees is a power of the Government, exercised by the Council of Ministers (Article 112(3)). The President of the Republic must promulgate laws or sign legislative acts of government within 20 days after their receipt, or otherwise they are considered "legally non-existent" (Article 83(3)).

D. Courts

Courts exercise the "judicial function", being the organs of sovereignty "with the power to administer justice on behalf of the People" (Article 120). Pursuant to Article 120(2), it is for the "Courts to defend the rights and legally protected interests of citizens, settle disputes of public and private interests and suppress violations of the laws".

The structure of the courts under the Constitution includes: (i) the Constitutional Court; (ii) the Supreme Court: (iii) courts with general jurisdiction, which include the Court of First Instance, the Regional Court, and the District Courts;[44] (iv) Audit Courts; (v) the Military Tribunals, which have jurisdiction in relation to the "prosecution of crimes essentially military as defined by law"; and (vi) "arbitral tribunals".[45]

The constitutional status of judges is appropriate to the exercise of the judicial function: judges (i) "are immovable and cannot be transferred, suspended, retired or dismissed

[40] The reason for the reference to "general basis of legal regimes" can be found in the identical wording, in Portuguese, of Article 70(2) of the Constitution of São Tomé and Príncipe and Article 112(2) of the Portuguese Constitution of 1976.

[41] The justification for the reference to "organic law" can be found in the identical wording, in Portuguese, of Article 145(3) of the Constitution of São Tomé and Príncipe and Article 278(4) of the Portuguese Constitution of 1976.

[42] Parliamentary legislative procedure is governed by Articles 136 to 175 of the Rules of Procedure of the National Assembly. In the 1975 Constitution, as amended in 1980, Article 66 provided that the legislative initiative was a power of a wide range of entities: (i) the Deputies of the National People's Assembly; (ii) the Standing Committee; (iii) the President of the Republic; (iv) the Council of Ministers; (v) committees of the National People's Assembly; (vi) the National Directorates of Mass Organizations; and (vii) the Supreme Court, in matters concerning the administration of justice.

[43] Article 112(1) and (2) of the Rules of Procedure of the National Assembly, in a similar fashion, simply provide that "decisions are taken by majority vote" and "abstentions do not count in calculating the majority".

[44] Law No. 7/2010 (Basic Basis of the Judiciary), published in the *Diário da República* of 6 August 2010, provides, in Article 15(1), for the existence only of "courts of first instance and the Supreme Court".

[45] The Basic Law of the Judiciary provides, in Article 57, for the possibility of creating the following specialized courts: (a) criminal investigation; (b) family and children; (c) work; (d) commerce; (e) maritime; and (f) execution of sentences.

unless in situations provided by law" (Article 125(1)); and (ii) "cannot be held responsible for their decisions, unless otherwise provided by law" (Article 125(2)). The judges of the Supreme Court are appointed and dismissed by the National Assembly (Article 97(e)).

The functions of the Constitutional Court are temporarily exercised by the Supreme Court under Article 156. The Supreme Court is composed of five judges, appointed for a term of four years, inclusive of a judge appointed by the President and a judge elected by the National Assembly (Article 157), during the temporary period in which it exercises the functions of Constitutional Court.

The Public Prosecutor's Office, in accordance with Article 130(1), has the power to review legality, represent the public and social interests in courts, and institute criminal proceedings.[46] The Public Prosecutor's Office is organized according to a "hierarchical structure under the direction of the Attorney-General of the Republic" (Article 130(2)). The Attorney-General is appointed and dismissed by the President of the Republic on the proposal of the Government (Article 81(l)).

V. Decentralization

São Tomé and Príncipe is a unitary state (Article 5), with a structure of partially regionalized territorial organization.[47] Article 137 provides that "the island of Príncipe and islets that surround it form an autonomous region with its own political and administrative statute,[48] taking into account its specificity".[49]

The Constitution defines local authorities, in Article 138(2), as "territorial entities, with representative bodies, with the purpose of pursuing the specific interests of their populations". The bodies of local and regional authorities have their "own finances and assets" (Article 136(3)).

In accordance with the Constitution, the territory of São Tomé and Príncipe is divided into districts (Article 139). The organization of local government in each district has, in accordance with Article 139: (i) "an elected District Assembly with deliberative powers", and (ii) a "collegial executive body, called District Council". Members of District Assemblies "are elected by universal, direct and secret ballot of the resident citizens" (Article 140(2)), for a term of three years (Article 141). The District Council, "composed of a chairman and councillors" is "elected from amongst the members of each District Assembly" (Article 142(1)), being "politically responsible to the District Assembly".

[46] The Statute of the Public Prosecution in force was approved by Law No. 13/2008, published in the *Diário da República* of 7 November 2007.
[47] Local authorities are regulated in the Framework Law of Local Government, revised in 2005 by Law No. 10/2005, and published in the *Diário da República* of 15 November 2005.
[48] Political and Administrative Statute of the Autonomous Region of Príncipe, Law No. 4/2010, published in the *Diário da República* of 18 June 2010.
[49] The Autonomous Region of Príncipe was established in 1995. The island of Príncipe, located 136 km from the island of São Tomé, has a population of 7,542 inhabitants, according to the data of the fourth general population census of 2012.

The Government has "administrative supervision over the Autonomous Region of Príncipe and on local authorities" (Article 111(l)). The government also has power to "exonerate the President of the Regional Government and Regional Secretaries" (Article 111(m)), and to "dissolve the Regional and District Assemblies, observing the principles defined in the law" (Article 111(n)).

VI. Constitutional Adjudication

The 1990 Constitution provides for a very complex system of review of constitutionality and legality, organized according to the system of the Portuguese Constitution of 1976, which includes: (i) prior review of constitutionality (Article 145); (ii) abstract review of constitutionality and legality (Article 147); (iii) concrete review of constitutionality and legality (Article 149); and (iv) unconstitutionality by omission (Article 148).[50]

A prior review of constitutionality focuses on: (i) norms of international agreement or treaty; and (ii) norms of law and decree-law. A prior review of constitutionality must be requested by the President of the Republic within eight days after the receipt of the document for ratification or enactment. The Constitutional Court normally has twenty-five days to rule on the issue; this period may be shortened for reasons of emergency. Article 71(6) further provides that the President of the Republic shall submit the referendum proposals that have been forwarded to him by the National Assembly or the Government to prior mandatory review of constitutionality and legality.

When the Constitutional Court ruling is that of unconstitutionality under a prior review of constitutionality, the President is obliged to veto the legislation and return it to the organ that has approved it. In the case of legislative acts from the National Assembly, the situation can be overcome by modifying the document or by its confirmation by a qualified majority of two-thirds of the Deputies present, provided that the majority is greater than an absolute majority of all Deputies in full exercise of their office. Regarding rules of international commitments, owing to the participation of other subjects of international law, their ratification can take place only if the agreement or treaty is approved in the National Assembly by a qualified majority of two-thirds of the Deputies present, provided that the majority is greater than an absolute majority of all Deputies in full exercise of their office.[51] Confirmation by the National Assembly does not preclude a future requirement of abstract review of constitutionality of the legislative act or international commitment that was ruled as unconstitutional under a prior review of constitutionality.

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[50] On this issue, see Jorge Bacelar Gouveia, *A fiscalização da constitucionalidade no direito constitucional de São Tomé e Príncipe,* in: Jorge Bacelar Gouveia, *Direito Constitucional de Língua Portuguesa. Caminhos de um constitucionalismo singular* (Almedina – Faculdade de Direito da Universidade Nova de Lisboa) 325–385.

[51] Article 204 of the Rules of Procedure of the National Assembly provides for the possibility of formulating reservations to the treaty, when the treaty permits it, which can happen only in the case of multilateral treaties.

An abstract review includes a review of constitutionality and a review of legality. A review of legality includes assessing: (i) the "illegality of any provision of legislation on grounds of infringement of a superior law"; (ii) the "illegality of any provision of a regional legislative act based on the violation of the Political-Administrative Statute of the Autonomous Region of Príncipe or of a general law of the Republic"; and (iii) the "illegality of any provision of legislation issued by the organs of sovereignty on the grounds of the infringement of the rights of the Autonomous Region of Príncipe enshrined in its Statute".

A declaration of unconstitutionality or illegality, with generally binding effects, may be required by the President of the Republic, by the President of the National Assembly, the Prime Minister, the Attorney-General, by a tenth of the Deputies of the National Assembly, the Regional Legislative Assembly, and the President of the Regional Government of Príncipe.

A declaration by the Constitutional Court of unconstitutionality or illegality with generally binding force produces effects from the entry into force of the rule declared unconstitutional or illegal (original unconstitutionality). If the rule declared unconstitutional has revoked an earlier rule, this legislation will be reinstated and become effective again. In situations where the rule that was violated came after the rule deemed unconstitutional, the effect of the declaration of unconstitutionality will take place only from the moment when that rule entered into force, with the effects that had been produced so far being safeguarded (supervening unconstitutionality). The Constitutional Court may decide, however, that the effects of the declaration of unconstitutionality or illegality will not be retroactive, or it may decide that they are retroactive only up to a certain moment in the past, if it understands that reasons of legal security, equitable grounds, or special circumstances of public interest justify that attitude. In general terms, the cases decided definitively by the courts are not affected by a declaration of unconstitutionality or illegality. The Constitutional Court, however, can rule to the contrary where a provision related to "criminal or disciplinary offences" has been applied and its content was less favorable to the defendant.

The courts that comprise the judicial organization of São Tomé and Príncipe may refuse the application of any rule on the grounds of its unconstitutionality or illegality. There will be an appeal to the Constitutional Court for the purposes of a concrete review on constitutionality when the courts have: (i) refused to "apply any norm on the grounds of unconstitutionality", or (ii) have applied a "norm whose constitutionality has been raised during the process". There will be an identical appeal to the Constitutional Court for a concrete review of legality when the courts have: (i) refused to "apply a norm of a legislative act on the grounds of unlawful infringement of a superior law"; (ii) refused to "apply a norm of regional law on the ground of illegality in violation of the Political and Administrative Statute of the Autonomous Region of Príncipe or of a general law of the Republic"; (iii) refused to "apply a norm of an act issued by a sovereign body on the

grounds of illegality in violation of the Political and Administrative Statute of the Autonomous Region of Príncipe"; or (iv) have applied a "norm the legality of which was raised during the proceedings on any of the grounds" specified in (i), (ii), or (iii). When the unconstitutionality or illegality of a rule has been examined and declared in three specific cases, the Constitutional Court should declare the unconstitutionality or illegality of that rule as generally binding.

The Constitutional Court also has jurisdiction to review and verify unconstitutionality by omission. In this case, in order to ensure compliance with the Constitution, the Constitutional Court will consider and determine whether the "legislative measures necessary to implement the constitutional provisions" were taken. The recognition of unconstitutionality by omission can be requested by the President of the Republic or the President of the Regional Legislative Assembly when there is concern over the violation of the rights of the Autonomous Region of Príncipe. The powers of the Constitutional Court in this matter are limited to the mere finding of unconstitutionality by omission, the existence of which will be made known to the appropriate legislative body.

VII. International Law and Regional Integration

Article 13 regulates the reception in the Santomean legal order of the most important sources of international law, international custom, general principles of international law, and treaty law. The "rules and principles of general or common international law" produce legal effects in the Santomean legal order automatically, without any type of incorporation, as sources of international law, without the necessity for the issuing of any internal act which permits or regulates it. Rules of international conventions, treaties, and international agreements produce effects in the legal order of São Tomé and Príncipe after the completion of the applicable procedure of international commitment.

In terms of the hierarchy of the sources of law in São Tomé and Príncipe's legal order, conventions, treaties, and international agreements are placed in an intermediate position between the Constitution and legislative acts. Accordingly, Article 13(3) provides that international commitments "prevail (...) over all legislation and internal regulations" after the completion of two conditions: (i) their approval and ratification by the internal organs that are competent in accordance with domestic rules; and (ii) their entry into force domestically and internationally. Article 144(2) seems to make an exception for the production of effects of international commitments where there are irregularities in the completion of the internal procedure, provided that there is implementation by the other party. Its application is very limited, since it is difficult to conceive of situations of organic or formal unconstitutionality of international treaties

regularly ratified where, at the same time, there has been no violation of a constitutional provision.[52]

The competence to negotiate international commitments is distributed between the Government and the President of the Republic, without a clear distinction in this matter between agreements in simplified form and solemn treaties. The competence of the President to perform in concert with the Government is restricted to "international agreements on defence and security" (Article 82(e)). The authority to sign international commitments is not expressly established, but it should be understood as belonging to the Government by reason of Article 111(e), when it provides that the Government "concludes agreements and international conventions". The confirmation of the internal manifestation of consent of the state to be bound by international treaties, to be pursued through ratification,[53] is a competence of the President of the Republic in accordance with Article 82(e).

Two groups can be distinguished with regard to the internal approval of international commitments. A first group—the exclusive approval competence of the National Assembly, in accordance with Article 98(j)—includes, on the one hand, the treaties that concern matters of law included in the exclusive legislative competence of this body of sovereignty provided in Article 98 and, on the other hand, "treaties that involve the participation of São Tomé and Príncipe in international organizations, treaties of friendship, peace and defense". A second group—the concurrent approval competence of the National Assembly and the Government—includes all other international commitments. The mention of international treaties in the constitutional text should be understood as covering solemn treaties and agreements in simplified form, taking into account the autonomy of the two categories in Article 145(1), in relation to the prior review of constitutionality.

The Constitution provides a set of directives for action in international relations in Article 12, ensuring that the state: (i) contributes to "safeguarding world peace"; (ii) contributes to "establish[ing] relations of equal rights and mutual respect of sovereignty amongst all States"; and (iii) contributes to the "social progress of mankind". The activities to be done in those areas by the state of São Tomé and Príncipe must have at their base the "principles of international law and peaceful coexistence" (Article 12(1)).

[52] On this subject, in general, see Jorge Bacelar Gouveia, *O Direito Internacional Público no direito de Portugal e dos Estados de língua portuguesa*, in: Jorge Bacelar Gouveia, *Direito Constitucional de Língua Portuguesa. Caminhos de um constitucionalismo singular* (Almedina – Faculdade de Direito da Universidade Nova de Lisboa) 126–132.

[53] Although international law does not provide for the ratification of international agreements, Article 145(1) provides that the President may require "prior review of the constitutionality of any provision of an agreement or international treaty that has been submitted for ratification". This wording is not in line with the provisions of Article 82(b), which empowers the President of the Republic with competence in the field of international relations to "ratify international treaties after they have been duly approved".

Within the framework of international cooperation, Article 12(3) states that São Tomé and Príncipe should (i) maintain special ties with the Portuguese-speaking countries and countries receiving Santomean migrants, and (ii) promote and develop special close ties with countries in the region.

VIII. Conclusions

The Constitution of 20 September 1990, as amended in 2003, is structured according to a model of western democratic political organization, so that the Democratic Republic of São Tomé and Príncipe respects the rule of law, and is organized as unitary state, with an autonomous region in the island of Príncipe and the islets that surround it. Fundamental rights, included in the category of personal rights, provide for the existence of a society that respects human dignity, pluralism, and diversity in São Tomé and Príncipe.

The 1990 Constitution adopted a semi-presidential system of government with the aim of overcoming the excessive concentration of power in the head of state which had been granted in the 1975 Constitution. The model of distribution of power in the semi-presidential system has its origin in the Portuguese Constitution of 1976 (after the revision of 1982). In the initial version of the 1990 Constitution, the balance of the semi-presidential system of government in São Tomé and Príncipe was challenged by the constitutional provision of the President to "direct the defence and security policy" (Article 76(c)) and the power to "chair the Council of Ministers whenever he chooses to" (Article 76(i)). The constitutional revision of 2003 was aimed at restricting the powers of the President of the Republic, but the President still has the power to dissolve the National Assembly in the "case of severe institutional crisis that prevents its normal functioning", and to dismiss the Government "when this is necessary to ensure the regular functioning of democratic institutions". The competence applicable to the negotiation of international commitments is also distributed between the Government and the President, but the competence of the President is now restricted with regard to matters of defence and security.

The Santomean political system has functioned with relative normality for more than two decades, despite on-going political instability and a frequent change of government. The main constitutional discussions in São Tomé and Príncipe have focused primarily on the issue of the system of government and the distribution of powers between the President and the Government, despite the efforts to achieve a balanced system that were made during the constitutional revision of 2003. The replacement of the semi-presidential system, in accordance with the Portuguese constitutional experience, with a presidential system is a recurrent theme of discussion in the country, nowadays reinforced following the adoption of a presidential system in Angola in 2010.

The technique used for constitutional drafting was heavily influenced by the Portuguese Constitution of 1976, in keeping with the importance of the Portuguese legislation in

force before independence that is still in force in São Tomé and Príncipe. For that reason, a correct understanding of some of the provisions of the Constitution's text can be achieved more satisfactorily by making a comparison with the similar articles of the Portuguese Constitution of 1976, particularly with reference to the system of the guarantee and revision of the Constitution. It should be emphasized that the 1990 Constitution provides for a highly complex system of review of constitutionality and legality, which includes prior review of constitutionality, abstract review of constitutionality and legality, concrete review of constitutionality and legality, and unconstitutionality by omission.

It must also be stressed that the Constitution provides for a very complex system of normative acts in Article 70, in particular owing to the existence of an autonomous region with legislative powers. The National Assembly and the Government have legislative competence, but the National Assembly has a relatively small area of exclusive legislative power, with the result that the two organs have a broad area of concurrent legislative competence.

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