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CURRENT STATUS OF THE LEGAL SYSTEM AND THE RULE OF LAW IN CHAD AND ITS EFFECT ON THE PRIVATE SECTOR

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INTRODUCTION

Chad is one of the poorest countries of the world. It has recently been facing extreme economic crisis exacerbated by climactic conditions and other catastrophic events occurring over the course of the last two decades. The country was plagued with severe drought during the mid-seventies and again in 1984, the latter drought being of unprecedented severity. The economic hardship engendered by these natural disasters has been compounded by other factors such as the sharp decline of the price of cotton, its main industry, in the mid-eighties and a particularly brutal period of war from 1979-1982. The real GDP was reduced by 30% during this period.

Moreover, there are other physical and social factors contributing to its economic difficulties. It is a land locked country, more than twice the size of France, located in the Sahelian region of Africa with a population of over six million people. Its land-locked situation renders the cost of some products in its remote cities such as Sahr and Abéché to be twice the f.o.b. cost for the same products in Europe. The country has very varied climactic conditions from the north to the south with desert (the Sahara desert) conditions in the north and a tropical climate in the South. Water is a serious problem for the whole country, and there are often flooding conditions in the rainy season in the south which frequently render the roads impassable in that region during that season. In addition, the country comprises widely diverging ethnic and cultural groups. The northern desert area is primarily Islamic and the south is largely Christian. Ethnic diversity has certainly been a significant factor in the frequent periods of civil strife that have characterized its history since its independence from France in 1960.

Nevertheless, there is potential for development in Chad. It has been self sufficient in food production during several periods during the last three decades and has significant potential for agricultural development. In addition, it has significant petroleum resources, which could

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serve to at least meet its own needs and may even open the door to the possibility of Chad entering the petroleum market on an international level. Yet Chad has received relatively little development aid from international donors since its independence.

For these reasons, in the last two years, Chad has been the focus of study for several international donor agencies including, the United States Agency for International Development (USAID), the French *Fond d'Aide et Coopération* (FAC), the World Bank, and the International Monetary Fund. These agencies together with the government of Chad (GOC) have been working toward the establishment of a development plan for Chad. Early on in their study of Chad's problems, these agencies and the GOC identified the reform and promotion of Chad's private sector as one of the first and primary goals of this development project.

Beginning in October of 1990, the GOC established five subcommittees to study the problems affecting the private sector in Chad. Many specific problem areas were identified, and among them was the problem constituted by Chad's very large informal sector. This is the sector of business activity which has no official status and doesn't pay taxes. In turn, it cannot rely on the government for any support or use of its courts. The formal sector in Chad is, in comparison, very small. This is a problem for the Chadian economy since as a result of this very large informal sector, a great deal of revenues, which would otherwise inure to the benefit of the GOC, are lost. In addition, a related problem was identified in that it was found that Chad does not have a legal environment or institutional framework which is conducive currently to the development of the private sector.

In the Spring of 1991 a seminar dealing with these problems was held in Chad. USAID, through the IRIS (Institutional Reform and the Informal Sector) project, arranged to provide for participation of certain experts in that seminar. At the seminar, it was decided that several experts should be hired to study various of the specific problem areas affecting the private sector in order

that they might prepare reports. It was also decided that the donor agencies and the GOC would participate in a roundtable dealing with the reform of the private sector in Chad before the end of 1992. The reports of the experts are in turn to be consolidated in a single "synthesis report," which shall be used by the parties to the roundtable. That roundtable shall be conducted under the auspices of the United Nations Development Project (UNDP.) USAID has arranged to provide for some of the necessary experts.

The IRIS project is based at the University of Maryland, and with funding from USAID it is working to enlarge knowledge about the role of institutions and to promote institutional reform in the third world through technical and organizational assistance. The stated premise of the project is "that institutions in the unsuccessful economies of the second and third worlds offer poor structures of incentives are often even force much economic activity into the informal economy."

One of the problem areas designated for a report by an expert is the legal and institutional framework affecting the private sector in Chad. USAID, through IRIS, has arranged to provide for a Property Rights and Judicial Specialist to prepare such a report. This report is written in fulfillment of that commitment.

In order to prepare this report, its author has spent the month of August, 1992 in Chad working with private sector representatives, ministries of government, jurists, and magistrates. Many of the relevant existing laws and codes have been gathered and studied as well.

After completion of the study, two major themes have motivated the preparation of this report. One of them has been the unbridled exercise of executive authority which has characterized Chad's government during most of its thirty two years of independence. The other theme involves the confusion and multiplicity of sources of legal authority which were

discovered during the course of this study of the legal and institutional framework affecting Chad's private sector.

In order to thoroughly report the relevant information, the report is divided into three parts. The first part will be a discussion of the effect, generally, on the legal system of the two themes/problems mentioned in the previous paragraph. That section shall also provide some detailed recommendations for reform. The second part of the report will identify and describe certain specific problem areas, and a third section will describe some miscellaneous areas of the law which are not necessarily problematic but which are relevant to an understanding of the legal environment in which the reform of the private sector shall occur.

I. PROBLEMS GENERALLY AFFECTING THE LEGAL SYSTEM AND THE RULE OF LAW IN CHAD.

A. Unbridled executive authority.

One of the major problems uncovered in this study, as noted in the introduction, is the unbridled exercise of executive power. This section of the report will detail the origins of that problem and elaborate its effect on property rights and the private sector in the current legal system and under the current Chadian administration. It will first trace the history and evolution of this problem in Chadian constitutional history and will then explore the effects of excessive executive power on the current administration of the courts, application of administrative law and practice of the legal profession. It should be noted that the excessive exercise of military authority emerges as a related problem. It stems from the fact that the military continues to bolster and preserve the executive authority exacting political and other favors in return. These are related factors which contribute to the lack of rule of law and to the general atmosphere of

corruption in the current system. The section will explain the impact of these problems on property rights and the private sector.

In each case where the problems are identified and described, recommendations will be made for reforms designed to correct the problems.

1. Constitutional History.

a. Description.

Chad was a French colony for sixty years before receiving its independence on August 11, 1960. In March of 1959, the Constitutional Legislative Assembly of Chad, which had been established to prepare for independence, adopted a transitional constitution (Appendix 1) which was designed to provide the skeletal framework of Chad's constitutional government and provide for the election of a National Assembly and the establishment of a government. This constitutional document was largely modeled after the French constitution of 1958. It generally established Chad as a parliamentary form of government. It contained a firm commitment to the concepts of democracy and the separation of powers. In a manner typical of parliamentary forms of government, it provided that the government should be headed by a prime minister to be chosen by the National Assembly. The prime minister would then appoint the ministers who would form the government. In addition, Articles 40 - 43 of this document provided that the government would be "responsible" to the legislature in that the National Assembly could require the resignation of the government through the procedure of a "motion of censure." This procedure is a kind of check and balance by the legislature against the executive which

characterizes parliamentary forms of government. (The clearest example being the British parliamentary system.)¹

Chad's first constitution as an independent state came into effect on November 28, 1960. It largely followed the framework set out by the 1959 document in that it provided essentially for a parliamentary form of government with the president being named by the National Assembly. Moreover, it clearly provided for separation of powers with the attributions of each branch of government--executive, legislative, and judicial-- clearly delineated. The "Government" was composed of the President and the various ministries. The president, like the prime minister in a typical parliamentary system, was to be named by the National Assembly, and was empowered to appoint the various ministers. The National Assembly was to be the only legislative Chamber. It was to be popularly elected. Article 58 established a Supreme Court, which was to be appointed by the president subject only to the prior advice of the National Assembly. By way of checks and balances, it established a High Court of Justice for prosecution of the President and other officers of government.² It also provided for a special Economic and Social Council. However, what was conspicuously missing in comparison with its 1959 counterpart was the motion of censure procedure.

While this constitution was generally modeled after the French constitution of 1958, the lack of this important check against executive power represented a significant divergence from the French constitutional scheme. In France, the motion of censure is important in maintaining a balance of power between the legislature and the executive. This is so because in the event that the parliament is displeased with the policies of the president and prime minister, it can vote a

¹ France, under the Fifth Republic, is a semi-presidential system in that while the legislature can require the resignation of the prime minister and his government through this procedure, there is, in addition, a president who acts as head of state and remains in power.

² The procedure before the High Court of Justice is roughly analgous to an impeachment procedure in the U.S.

motion of censure which will require the prime minister and all the other ministers of government to resign. While the president is not subject to the motion of censure, the power to deprive him of his prime minister and the other ministers who have been implementing his policies is a formidable weapon against unpopular executive action. It is a mechanism which has already served to keep the executive in check in the history of France's Fifth Republic. Consequently, failure to include this counterbalance in Chad's constitution of 1960 constituted the first step in the evolution toward excessive executive power.

Otherwise, this constitution began on an optimistic and idealistic note setting out a declaration of rights largely derived from the French Declaration of the Rights of Man and of the Citizen of 1789. What was of particular historical significance in terms of subsequent Chadian history was the fact that among the rights declared was the right to form political parties. Articles 6 and 7 of this constitution made it clear that multi-party rule was clearly contemplated. This was the facet of that particular constitution which led to the adoption of a new constitution soon thereafter on April 16, 1962. The 1962 Constitution provided for single party rule but was otherwise largely similar to the 1960 Constitution. Under this constitution the president was to be chosen by an electoral college as opposed to being appointed by the National Assembly. In 1969, the constitution was amended by *Ordonnance* no. 15/INT of 20/05/69, which provided in Article 1 that the President would be directly elected. This Constitution remained in effect until 1975. This is the period of the First Republic of Chad under the leadership of President Tombalbaye.

Even though the president was to be directly elected, the establishment of single party rule was another significant step in the evolution toward unbridled executive power. Since the motion of censure procedure, which would have been an important constitutional check on executive excesses had been eliminated, it should have seemed even more vital to insure that the voice of an opposition political party could act as a political counterbalance to executive power.

Nevertheless, since the 1962 Constitution established single party rule, there remained almost nothing by way of political or constitutional check on executive excesses.

The 1962 constitution came to an end with a military coup which occurred on April 13, 1975 and which cost President Tombalbaye his life. This military coup was the beginning of a period of tremendous political and constitutional instability resulting from almost constant internal strife, civil war and war with Libya. There were two constitutional documents which were drafted during this period in attempt to give some political organization and legitimacy to the military governments which were in power. The first of these was the Fundamental Charter of 1977 which never took effect due to the civil war which began in 1979. The second document was the Fundamental Law (*Acte Fondamental*) of 1982, which served to organize the government and its institutions under the rule of Hisssein Habré, who came to power on June 7, 1982 after winning a military victory over warring forces.

This document provided for a President of the Republic to be named by the CCFAN, the political/military organization which had seized power under Habré, and a government headed by a prime minister appointed by the President. The document contained no reference to the judiciary, and it is significant to note that the Supreme Court was abolished with the ascendancy of a military government in 1975.³ This document also failed to contain any guarantee of human rights. It served as Chad's constitution from 1982-1989. Legislative power under this regime, as under previous military regimes, was exercised by the President in the form of "ordonnances,"⁴ which had the force of law.

³ The Supreme Court ceased to exist for many years. However, after the adoption of the Constitution of 1989, the government began to provide for a Supreme Court, but it was never actually established as a functioning court before the coup of December, 1990. At that time the Supreme Court was abolished when the Constitution was suspended.

⁴ See the discussion of current legislative process below for an explanation of the hierarchy of laws.

The political austerity and suspension of human rights under these regimes were theoretically justified as emergency measures following the previous period of war and civil strife. The Habré regime particularly was characterized by dictatorial rule and political oppression. Executive power under this regime was nearly absolute, and the repressive measures which characterized the regime were undertaken by the military under Habré's direction. The military usurped more and more political power asserting its strong arm rule in almost every segment of Chadian life. Human rights abuses, including torture, were rampant. The effect on the private sector was dramatic. Private property was routinely seized without compensation, and "war taxes" were frequently imposed on Chadian businessmen by Habré's men who would force bank officials to divulge the contents of private bank accounts and then force the account holder to relinquish a portion of funds in the account.⁵ These practices created a general atmosphere of fear and distrust of government on the part of the private sector, and this fear and distrust has continued beyond the Habré regime.⁶

In 1988, Habré considered that Chad was ready for constitutional normalcy, and he appointed a constitutional committee which drafted an elaborate constitution (Appendix 2) which was put before the Chadian people by way of referendum and adopted by them on December 10, 1989.

This constitution bears striking similarity to the Constitution of 1962 and is likewise set in the mold of the French Constitution of 1958. It is a sophisticated and elaborate constitution comparable to those of certain modern Western democracies functioning under a parliamentary system of government with certain exceptions to be discussed below. It contains fourteen titles including separate titles dealing with the functioning of the administration, the jurisdiction of

⁵ See discussion of banking law below.

⁶ See discussion of the legal system below for specific examples of how fear and distrust by the private sector persist.

local authorities, the guarantee of human rights, executive, legislative, and judicial power, and a separate title is dedicated to relations between the legislature and the executive.⁷

Of particular significance for the purposes of this report is the fact that Article 1 contains a specific commitment to the development of a family code and judicial codes. In addition, in Article 26 of Title III, it states (in translation) "The administration shall combat embezzlement of public funds, corruption, waste, alcoholism, absenteeism, misappropriation, favoritism, and any other acts contrary to the general interest." Moreover, among the human rights delineated, Article 54 declares that free enterprise shall be guaranteed. The significance of these provisions will become increasingly clear in the discussion below of the problems in establishing the rule of law in Chad.

In terms of relations between the legislative and executive, however, it is significant to note that the checks and balances between the executive and legislative branches are similar to those established under the constitutions of 1960 and 1962. The president acts as the head of government, and in a fashion typical of parliamentary systems of government,⁸ he may dissolve the National Assembly and call for new legislative elections. (Article 147.) However, once again the counterbalance of this check on the legislature is missing in that the National Assembly is not empowered with the "motion of censure." The only checks available to the legislature are found in Article 145 which allows legislators to address oral and written questions to members of the government (like the question time procedure in both the French and British systems) and in Article 145 which allows the National Assembly to require the president to order an investigation of a particular member of the government.

⁷ This concept is derived from the French constitution.

⁸ The prime minister is the head of government in the French system.

The president is granted many powers which are typical of presidents in Western democracies--the power to appoint ambassadors and the justices of the supreme court, conclude treaties, represent the state in foreign relations, etc. However, the president is granted considerable legislative power as in the case of the French constitution of 1958.⁹

In addition, as in the French Constitution, the National Assembly, under Article 152 can delegate its legislative power to the president who will then adopt *ordonnances*, which will have the same status as written laws of parliament.¹⁰

Moreover, in connection with the legislative powers of the president, it is necessary to note that Article 88 of this constitution requires that all legislative acts of the president be countersigned by the ministers concerned. This provision is relevant to the current legislative process which creates some problems for the establishment of the rule of law in Chad. These problems are discussed below in the section of this report dealing with the confusion and multiplicity of sources of legal authority.

Again in keeping with the French Constitution of 1958, certain key concepts found in the Chadian constitution of 1989 are to be considered sacrosanct. They are: the republican form of government, state sovereignty, the laicism of the state, its independence, and its national unity. Any act attacking these concepts is to be considered an act of treason according to Article 11 of this constitution.

⁹ In fact, this constitution raises some of the same issues which have come to engender significant debate in this connection in the French system. The Chadian constitution grants the President "regulatory" power in Article 82. In Article 132, the legislative powers of the legislature which are not specifically enumerated fall under the President's "autonomous" regulatory power. The exact interpretation of these constitutional provisions has not yet been elaborated in either system, but they leave the door open for the exercise of significant legislative power by the President.

¹⁰ See discussion below of current Chadian legislative process.

This constitution reinstated a Supreme Court (Article 171) and endowed it with judicial review powers similar to those granted under the French constitution. It includes three chambers--a constitutional chamber, which shall exercise the power of judicial review, a "judicial" chamber, which shall act as a kind of Court of Appeal in all civil and criminal matters, and an administrative chamber, which should rule in all cases involving controversies where the government is a party. (See the discussions of current administration of the courts and of current administrative law, below.) It shall be composed of 8 permanent justices who shall sit with the chief justice in both the judicial and administrative chambers and six "counsellors," who shall be appointed for a period of eight years and who, sitting with the chief justice shall sit in the constitutional chamber. (Article 172.)

The Supreme Court is to be appointed by the President, (Article 166) upon advice by the Superior Council on the Judiciary (*Conseil Supérieur de la Magistrature*.) which is generally responsible for the judiciary and the legal profession.

It should be noted that, as in the case of the French Constitution, the judicial review power can be exercised only by the President and the National Assembly (Article 176), and only prior to the promulgation of a law. This concept of judicial review is arguably out of date and out of step with the constitutions of most democracies. As a result, it is currently the topic of considerable debate in France and is the subject of an article on this point by the author of this report. Aucoin, Louis, "Judicial Review in France: Access of the Individual Under French and European Law in the Aftermath of France's Rejection of Bicentennial Reform," *Boston College International and Comparative Law Review*, Summer, 1992, page 443.

It would have indeed been interesting to see whether this new constitutional regime would have in fact led to constitutional normalcy and would have served to loosen the iron grip on power by the executive. However, the institutions established under this constitution (the Supreme Court and the Parliament among them) had barely had a chance to function, when, within a matter of months, a military coup led by Idriss Déby ousted Hissein Habré from power on December 1, 1990. As in the case of previous military leaders before him, Déby established a Council of State, which was to govern as an interim governing body while governmental institutions were being reorganized. The constitution was suspended in the meanwhile.

On March 1, 1991, Déby promulgated the National Charter (resembling the Fundamental Charter of 1978, Appendix 3), which is to act as a temporary constitution for a period of 30 months. It provides for a President appointed by a National Salvation Council (*Conseil National du Salut*), which is a kind of central committee of the Patriotic Salvation Movement (*Mouvement Patriotique du Salut*), which is the military movement lead by Déby which brought about the coup. It also provides for a prime minister and government to be named by the president and for a Temporary Council of 31 members (the *Conseil Provisoire de la République*) which has broad advisory powers in both the legislative and executive domains. The president has broad legislative powers (Article 11) and may issue *ordonnances*, *décrets*, and *arrêtés*.¹¹ This document affirms that the current legal and judicial system shall be maintained and in Article 43 affirms the Court of Appeal as the highest court of the land and charges it with the responsibility of safeguarding fundamental human rights. These provisions are currently being interpreted to mean that all the provisions of the constitution of 1989, including those affirming human rights, remain in effect along with all of the existing laws and codes. Only those provisions of the Charter which expressly contradict the 1989 constitution and prior laws are considered to have superceded them.

¹¹ See discussion of legislative process below.

Presumably, at the conclusion of the 30 month emergency period during which the executive is exercising extraordinary powers, there will be a return to constitutional normalcy. Chadian authorities report that it is the intention of the executive to reinstate the 1989 constitution at that point.

All in all, while that constitution is generally well drafted and inclusive, there remains the concern of the opportunity it appears to afford for excessive executive power particularly in light of the constitutional history outlined above. This opportunity arises from the lack of the motion of censure procedure, the ineffectiveness of the one administrative court in Chad (See the discussion below), and the lack of access by individuals to the judicial review process. One cannot fail to note that history has proven that these factors have led to executive abuses in the past and can only expect that, absent reform, they will engender the same problems in the future.

b. Recommendations

Having concluded a description of Chad's constitutional history and current constitutional regime, this report will provide some suggestions for the future elaboration of a constitutional regime insofar as such suggestions might have a bearing on the limitation of executive excesses and the establishment of the rule of law, which would in turn have direct bearing on the effective functioning of the private sector.

As will be seen below, most of the problems of a legal nature affecting the private sector stem more from problems inherent in the legal system and inherent in the lack of rule of law in Chad. Therefore, recommendations for reform shall be most specifically elaborated in connection

with the description of those problems. Nevertheless, a few comments on the future of Chad's constitutional history will be necessary.

First, all steps should be taken to ensure that the Constitution of 1989 be reinstated at the end of the period of the National Charter. That constitution would serve generally to ensure the establishment of institutions which would in turn contribute to the independence of the judiciary and the establishment of the rule of law. It is obviously of primary importance that the institutions provided by that constitution--the legislature and the Supreme Court-- actually be established and begin functioning.

However, certain aspects of that constitution bear further analysis. As discussed above, there appears to be somewhat of an imbalance between executive and legislative power in that the President can dissolve the legislature, but the legislature does not have a reciprocal motion of censure power. This problem could be solved by interjecting a prime minister, who would act as the head of the government, which could be removed (as in the French system) by a motion of censure. This would make Chad a semi presidential system of government. In addition, expanded judicial review powers should be considered. Granting individuals access to the process would serve to hold the government accountable to the Constitution and thereby bolster the rule of law. This would also allow for challenging a law's constitutionality subsequent to its promulgation. Such expansion of judicial review powers is clearly the trend in Western democracies.

There is currently a commitment to institute a national conference in Chad. The phenomenon of the "national conference" is one which has been occurring over the last few years in many Francophone African countries. Its purpose is to institute general constitutional reforms with the goal of establishing democracy and the rule of law. A national conference in Chad would be of great benefit in terms of providing impetus for reform tending in those directions.

Indeed, this would be the appropriate forum for the discussions and decisions that will need to be made in order to decide when and how new parliamentary elections will take place. It is also the appropriate forum in which to raise large questions of constitutional reform such as those of broadened judicial review and reinstatement of the motion of censure as a check against executive excesses.

As for the Supreme Court, in the immediate future, an *ordonnance* implementing the terms of the 1989 Constitution regarding its jurisdiction and functioning could be adopted. If the president would then appoint a Supreme Court, the institution would then have more potential stability since it will be recognized by the constitution and the law and could potentially survive the suspension of the constitution were that to occur in the future.

2. The effect of excessive executive and military power on the application of administrative law, the administration of the courts and the practice of the legal profession.

a. Description.

An examination of the constitutional history of Chad certainly traces the evolution of unbridled executive power in that country culminating in the infamous excesses of the Habré regime which, among other things, served to engender so much fear and mistrust of government generally by the private sector. However, an examination of the effect of this unbridled executive authority together with the concomitant military excesses on the application of administrative law, administration of the courts and on the practice of the legal profession provides a clearer picture of the legal environment confronting entrepreneurs currently in the private sector.

(1) Problems relating to the application of administrative law.

The concept of administrative law in Chad is inherited from the French. In French law the government cannot be sued in the ordinary courts. Instead, a separate court system was established for all matters in which the government is a party. In Chad, as in France, the term "Government," spelled with a capital "G," refers the executive branch of government and all of the ministries of government which come under its jurisdiction. Disputes involving the "Government" are to be decided by these courts who in turn apply a separate branch of law called *le droit administratif* (administrative law.) This concept of "administrative law" is significantly different from the meaning that that term connotes in common law countries. In contrast with the rest of the French legal system, which is based on a strict and often mechanical application of the written law, the administrative courts function on judge made law. Consequently, over the period of time that these courts have existed their judges have evolved *principes généraux du droit* (general principles of law which have been collected in treatises which are much like treatises or restatements of the law in common law countries.) Cases in these courts are judged according to legal standards which are not entirely unfamiliar to the common law jurist--*ultra vires*, abuse of discretion, abuse of power, etc.

In Chad, there is one court which has such jurisdiction--the *Chambre Administrative de la Cour d'appel*.. See the discussion of this court below in the section dealing with administration of the courts in Chad. Individuals are granted direct access to this court under the law. However, in the history of this court, its jurisdiction has hardly ever been invoked. This is largely for political reasons. Under the Harbré regime, it was common knowledge that anyone seeking the jurisdiction of this court would be subject to persecution and threats by the government. The current regime's attitude toward this court is unclear, but what is unfortunately clear is the continued reticence of the people to invoke the jurisdiction of this court. Moreover, since the court so rarely exercises its jurisdiction, there has been no opportunity for it to develop a body of case law against which disputes in which the government is a party can be judged.

This underdeveloped status of administrative law in Chad is thus the direct result of abuses of executive power.

Nevertheless, one recent event (since Déby's ascendancy to power) is encouraging. One citizen who sought authority to form a new political party was denied the necessary authorization by a government official. He challenged this administrative act before this court and won. However, given the history of this court, one would have to conclude that at this point in Chadian history, the "Government," in practice, has had a tradition of acting with immunity and impunity before the law.

This reality has had dramatic consequences for the private sector. One example of such a consequence is found in the area of eminent domain. While there are laws requiring notice, hearing and compensation in the case of a government taking of real property (See the discussion below of the law relating to land tenure), it is reported that it was a widespread abuse of the Habré regime, which has not entirely disappeared under Déby, to take land without providing compensation or without complying with any of the other requirements of the law. In Chad, as in any other country of civil law tradition, the remedy in such a situation would be to challenge the government in the administrative courts. Due to the reticence of citizens in Chad to invoke the jurisdiction of its only administrative court, these illegal takings are almost never challenged.

(2) Problems arising in the administration of the courts.

Prior to describing the problems associated with the administration of the courts, it will be necessary to describe the Chadian court system.

The administration and jurisdiction of the courts is governed generally by *Ordonnance* No. 6-67/PR/MJ (Appendix 4) of 21 March, 1967. In addition, certain provisions of the codes of civil and criminal procedure govern the functioning of the courts.

There are five categories of ordinary courts in Chad: the Court of Appeals, the criminal courts, the Tribunals of First Instance, the Justices of the Peace, and the Labor Courts.

There is only one Court of Appeals in Chad and it is located in N'Djamena. It is the court of last resort for the entire country. It sits as a three judge court. It fulfills the role often occupied by a Supreme Court in some other countries. It is interesting to note that in some civil law countries such as in France and Germany, there is a different Supreme Court based upon particular areas of jurisdiction. For example, in France, the *Conseil Constitutionnel* is a kind of supreme court in constitutional matters, the *Cour de Cassation* is the supreme court in all civil and criminal matters, and the *Conseil d'Etat* is the supreme court for matters involving administrative law (the term being used in the civil law sense.) The Court of Appeals in N'Djamena fulfills all of these functions.

However, one particularity of this court must be noted. In the area of administrative law, it is designed (by the terms of the *ordonnance*) to be a court of first instance, from which there is no appeal, or as the Chadian jurists describe it, it is the court of first and last resort in administrative matters. A separate *ordonnance* No. 26-27/PR/MJ of 19 August 1967 (Appendix 5) governs the procedure to be followed in this court. It allows for an appeal by private citizens from decisions or acts by government officials to the administrative chamber of this court. (*Chambre Administrative de la Cour d'Appel*.) Article 3 of Chapter 1 sets the appeal period at three months from the administrative act or decision. Article 6 imposes a filing fee of 5000 CFA. Chapter 9 provides rehearing as the only recourse from a decision of this court, and a request for rehearing will be considered only where it can be shown that false evidence was presented,

evidence was withheld, or there was a material error. Many Chadians question the effectiveness of this court for the reasons discussed above.

Next in line, below the Court of Appeals in the hierarchy of courts, are the Criminal Courts. A crime in Chad is an offense carrying a penalty of death, life at hard labor, or 5 to 10 years at hard labor. Criminal Courts do not sit permanently and are assembled in a given geographical area when someone is accused of a crime. They are composed of the president of the Court of Appeals, two counsellors to the Court of Appeals, and four lay assessors taken from lists of citizens kept much like jury lists in common law countries. The assessors participate in the determination of guilt, the imposition of sentences, and the awarding of civil damages. (Civil damages are awarded in criminal actions in civil law countries.) The judge decides questions of law and procedure.

Next in line are the Courts of First Instance. There is one for each *préfecture* in Chad. They have general civil and criminal jurisdiction, and the law authorizes these courts to be divided into sections. They are courts of first and last resort for all civil matters involving less than 90,000 CFA in principle or less than 8000 CFA in interest. For matters involving greater sums they act as a court of first instance with appeal to the Court of Appeals. In the criminal area, they have jurisdiction over *délits* which are criminal offenses involving a sentence of 15 days to 10 years in prison and a fine of more than 20,000 CFA. They are presided over by one judge who will seek the aid of specialized assessors in those cases involving the application of principles of customary law (See discussion of customary law, above.)

On the lowest end of the hierarchy are the Justices of the Peace. They act as a court of first instance for all other civil matters and for minor criminal offenses called *contraventions*.

Matters involving real estate, mortgages, nationality, and business law (*le droit des sociétés*)¹² are specifically excluded from their jurisdiction. They are the courts of first and last resort for matters involving less than 35,000 CFA in principal or less than 4000 CFA in interest. They also have jurisdiction over certain minor infractions to be enforced on the local level, which are listed in Article 29 of Chapter III of the *ordonnance*. There are 42 Justices of the Peace located in the various localities of Chad.

The Labor Courts are established under Articles 25, 29 and 244 of the Labor Code and are largely modeled after the French Labor Courts. The Labor Code provides for a procedure according to which a Labor Inspector (*inspecteur du travail*) attempts to help the parties to a labor dispute resolve their differences amicably. If an amicable solution cannot be found, then there is recourse to the Labor Court, which is composed of a magistrate and a lay assessor from management and a lay assessor representing labor.¹³

In addition, there are two courts of specialized jurisdiction outside of the ordinary courts—the Military Court (*la Cour Martiale*) and the Special Court of Justice (*la Cour Spéciale de Justice*). The jurisdiction of the Military Court is limited to cases involving the military (*Ordonnance* No. 001/PR/91, Appendix 6) and the jurisdiction of the Special Court of Justice involves special infractions committed by public servants in the course of their public duties (See

¹² This fact raises an interesting anomaly in Chadian law. While, as noted below in the section dealing with lack of codification, there is very little applicable law in Chad dealing with the subject of business law, this area of the law seems to be implicitly recognized since this *ordonnance* excludes this area from the jurisdiction of the justices of the peace. This is because, again as noted below, in practice, concepts of business law, while not officially applicable in Chad, are borrowed from modern French law as a practical means of resolving disputes.

¹³ There is a perception reported by Chadian businessmen that these courts operate with a bias in favor of the worker, but to the extent that this is true, it would appear to be more a function of cultural attitudes than of any problem inherent in the legal system. Labor law is one of the few areas of Chadian law which is clearly codified, and the jurisdiction of the Labor Court is clearly established.

the discussion of the rule of law, below) and is governed by *Ordonnance* No. 03PR/MJ/85 of 5 February 1985(Appendix No. 7).

Having described the court system, it will now be necessary to identify those problems in the system which are related to the unbridled exercise of executive power.

The current design of the court system in Chad is at least in part due to the desire by the executive to keep the judiciary in check. For example, had the 1989 constitution ever been fully implemented, a supreme court would have been established and staffed. The National Charter, established under Déby, is emphatic in abolishing the supreme court and in establishing the one Court of Appeals as the court of last resort.

One of the problems engendered by the current system is its centralized structure. With only one centralized court in the country exercising appellate jurisdiction, it is easier for the executive to undermine the independence of the judiciary than it would be were the jurisdiction decentralized. (See discussion below for a description of the ways in which the executive has traditionally tampered with the independence of the judiciary in Chad.) In addition, having one appellate court in N'Djamena renders the jurisdiction of that court inaccessible to Chadians living in remote areas.

With the existence of a supreme court, it would follow that the Court of Appeals in N'Djamena would not have to be the court of last resort. Under this scenario, one could clearly envisage several courts of appeal (perhaps one for each major population area) with a right of appeal to the centralized supreme court. In this way the courts of appeal outside of N'Djamena would be much less subject to direct influence by the executive, and the Supreme Court might afford a remedy in those cases where the independence of the courts is violated. In addition, Chadians in remote areas would have access to the court system.

Some of the same reasoning applies to the one chamber of the Court of Appeals exercising jurisdiction in the area of administrative law. Since that chamber acts as a court of first and last resort, it is easily subject to direct influence by the executive (See discussion of problems in the application of administrative law above), and its location in N'Djamena makes it nearly inaccessible for those living in remote areas.

In addition, there is another problem related to the design of the current court system which is not so much related to executive excesses which deserves passing mention. The problem stems in part from the lack of applicable law in the area of business and commercial law--a problem which is discussed in detail below. The solution which has been recommended by many authorities, Chadian and otherwise, who have studied this problem in Chad is to establish a commercial court with specialized jurisdiction. No discussion of problems in the administration of the courts should fail to underscore this important missing piece.

However, there are two problems which are evidence of the harmful effect of executive excesses on the judiciary. One problem lies in the existence of a very well developed, illegal system of "courts" which operate in a corrupt fashion and illegally exercise judicial authority parallel to that legitimately exercised by the regular courts. The other lies in the direct influence exercised by the executive in individual cases. Both of these problems serve to demonstrate the lack of independence of the judiciary and to severely undermine the rule of law in Chad.

The first of these problems--the existence of a totally parallel system of dispute resolution--is entirely the result of corruption engendered by the power and influence exercised by the executive and the military serving under it. The frequent periods of war and the destruction of laws and legal records (See discussion, below) have also served to create the kind

of instability which could foster the development of such a system. In fact, it is reported that citizens often bring complaints of a legal nature to recognized authorities in their local areas rather than bringing them to courts. These local authorities are the *commissaire de police* (local police commissioner), the *commandant de brigade* (commander in chief of the local military brigade), or a *gendarme*, which is a kind of military police. These figures have no authority under the law to exercise civil or criminal jurisdiction. However, they set fines, impose costs and sentences and order damages. The fines and costs go for the most part into their pockets rather than into the state treasury. It is reported that one of these local figures in N'Djamena had gone so far as to construct his own jail with no state authority.

Justice under such a system depends more on one's connections with local police and military authorities than on other factors. In addition, this parallel system has resulted in the populace viewing all legal matters as being quasi criminal and as coming within the jurisdiction of the military. It is reported that in rural areas traditional chiefs often function in the role of judge in a similar fashion even though the law does not give them this authority.

These figures who exercise this quasi judicial authority illegally clearly come within the purview of *Ordonnance* No. 003, (Appendix 7) referred to above. Article 3 of that act covers not only trafficking influence (which would appear to cover this situation), it also covers misappropriation of public funds, fraud, and related offences. However, at this point in Chad's history, there is no evidence that these provisions are being enforced against these public employees.

The second problem--direct influence by the executive upon the courts--is reported by Chadians in the ministries of the Government and the magistrates. They report that when a case is close to resolution in the courts, often the courts will receive a direct order, either orally or in writing, directing the judge to rule in a particular way. Given the appointment and removal

process of judges discussed below, the judges do not feel that they have any choice but to comply. There are two *ordonnances* which could bear upon this practice--*Ordonnance* No. 0023/PR/MJ/89 of 2 September, 1989 (Appendix 8) and *Ordonnance* No. 003/PR/MJ/85 of 5 February, 1985 (Appendix 7). They both concern the *Cour Spéciale de Justice*, which is a special court designed for the oversight and prosecution of civil servants who stray in the line of duty. *Ordonnance* No. 003, discussed above, criminalizes "trafficking of influence," and this infraction would appear broad enough to cover the situation where an officer of the Government attempts to influence the decision of a judge. Under the *ordonnance*, such an act could result in the officer's being removed from office and subject to criminal penalties. While it is difficult to imagine a more egregious attack on the rule of law, again there is no evidence that these provisions are being enforced to correct this abuse.

(3) Problems arising in the legal profession.

Many of the problems in the legal profession are the result of the unbridled executive power that has been described in this section. It has taken its toll on both lawyers and magistrates and thus deeply affects the legal profession generally.

One of the major problems with Chad's legal system currently affecting the private sector is the fact that there are so few lawyers and judges. At the moment of this report there are precisely seven practicing lawyers and less than 100 judges for a population of upwards of six million people. Given this dire scarcity of lawyers and judges, it is not surprising to find that there is such a sweeping ignorance of the law at all levels of the society since so few people have a legal education, and there is so little opportunity to consult a lawyer even in those cases where an individual might have the means and the awareness to do it.

In the case of lawyers, the scarcity results from a few different factors. Of primary importance is the fact that the profession is one which inspires fear of the Government on the part of anyone who might consider the private practice of law. In fact, this year a lawyer who was acting as the vice president of the Human Rights League here was murdered, and it is widely rumored that he was assassinated by the Government as a result of his human rights work. At the time of his death the number of lawyers in Chad was reduced to four, and during the month of August, three new lawyers were sworn in bringing the number to seven. The truth of the rumors is difficult to determine but is, at the very least, indicative of the view of the general public in connection with this profession. It is reported that the Habré administration was reputed to harass and threaten lawyers whenever they advocated for clients or causes whose interests may have been contrary to those of the Government. This appears then to be yet another area where the legacy of the repression of the Habré regime seems to be taking its toll. In addition, it is reported that not many people in the society have the financial means to set up in business as a lawyer. Furthermore, there is a clearly discernable attitude that higher education exists almost exclusively for the preparation of civil servants who will at least have the guarantee of a government salary. This is another symptom of a very underdeveloped private sector. It also serves to explain why there are more magistrates (judges are generally called magistrates in the French system) than there are lawyers.

As for magistrates, however, their lot is not much better. Their salaries are minimal since they are paid according to the pay scale of other public servants and are likewise subject to the 40% pay cut which was imposed effective last May in the public sector. Their salaries before the pay cuts ranged between 75,000 and 181,000 CFA (\$300-\$720) per month for justices of the peace and between 112,000 and 274,000 CFA (\$450-\$1100) for magistrates. Their salaries in dollars currently range between \$180-\$444 for justices of the peace and between \$370 - \$660 for magistrates. In addition, they are overworked (the three magistrates in the Court of First Instance

in N'Djamena handled more than 2000 cases in the year 1991), and they report that they often lack even the most basic material supplies to perform their work.

Despite the immense problems in the legal profession, there are laws designed to set educational standards and ensure the competence of both lawyers and judges. They shall be described in this section.

Décret No. 235-66/PR.MJ of 3 November, 1966 (Appendix 9) governs the education and competence of lawyers. In order to become a practicing lawyer in Chad, one must be a citizen of Chad or any other Francophone country or any country with which Chad has a relevant treaty. In addition, one must be 25 years of age or older, possess a *licence en droit* (the equivalent of a bachelors degree in law), have participated in an apprenticeship of two years in a law firm or in a ministry of justice in a Francophone African country. (Title I, Articles 5 and 12 of this decree.) Finally, one must succeed in a kind of bar exam and pay a deposit of 50,000 CFA in cash (roughly \$200). At that point, the Ministry of Justice conducts an investigation of the candidate's qualifications, and that investigation is reviewed by the Court of Appeals which in turn submits its recommendations to the Council of Ministers which then formally establishes the appointment (Article 6). Before being admitted to practice, there is a ceremony during which the attorney is required to take an oath.

This decree (in Title III) otherwise sets out a code of discipline for lawyers which is enforceable by a disciplinary council. It contains provisions common to codes of ethics of lawyers in many other countries (rules governing the handling of clients' funds, for example) and contains a prohibition against lawyers holding public office of any kind. Article 19 provides for a disciplinary council under the supervision of the Ministry of Justice which deals with disciplinary matters involving lawyers.

Article 16 of this title contains a requirement which is potentially repressive, particularly in light of the general fear which is reportedly engendered in connection with the practice of law in Chad. That article states that lawyers must never fail to respect "the institutions of the State or attack the principles of the Republic." This provision would appear to allow the disciplinary council to begin disciplinary proceedings against a lawyer at any time that it is determined that he or she is acting against the interests of the Government. This is yet another opportunity for the executive to extend its influence on the practice of the legal profession.

The education and competence of magistrates is governed by *Ordonnance* No. 17-68/PR.MJ of 8 August, 1968 Appendix 10). It is somewhat complicated in that there are two basic categories of judges and different echelons within each. The two categories are magistrate and justice of the peace. In general, magistrates must have a *licence en droit* and have successfully completed two years of apprenticeship. They may also have a degree from a recognized French school for magistrates (the French schools are specifically named in the *ordonnance*), in which case they are not required to have successfully completed an apprenticeship. Article 17 allows discretionary appointment of anyone who can demonstrate the necessary competence. This would presumably apply to those who have worked in other areas of public administration and who have acquired a particular competence in the law. (Some civil servants have a *licence en droit*.)

Justices of the peace need only to have a *baccalauréat*¹⁴ or a certificate from the French schools of judicial training. Their fitness is determined by a test. Those succeeding on the test are then allowed to participate in a one year apprenticeship. All judges are named by the Council of Ministers.

¹⁴ The *baccalauréat* is the diploma one receives at the end of a secondary education in the French system or in a system derived from the French system. It entails somewhat more than a high school diploma in the American system and is sometimes compared to an Associate's Degree in the U.S.

The *ordonnance* otherwise contains general provisions designed to guarantee the independence of the judiciary. Article 2 of Chapter 1 states that judges shall not be interfered with in any way in the exercise of their profession nor shall they in any way be held accountable for their decisions, and Article 10 states that they shall not be threatened or attacked in any way for the fulfillment of their duties. As was mentioned above in connection with the discussion of the administration of the courts, the independence of the judiciary is often flagrantly violated by the Government which orders particular rulings in particular cases.

There is a disciplinary code for magistrates within this chapter. Article 6, for example, states that they must not exercise any other private or public profession. Chapter II provides that the disciplinary authority shall be exercised directly by the President of the Republic together with a disciplinary commission organized by the Ministry of Justice. While article 25 provides that a magistrate can not be suspended for longer than three months, it is reported that magistrates can and are often permanently removed by the President when their actions are found to be offensive. In the case of the Court of Appeal, Article 45 of the National Charter gives the President the power appoint and remove the judges of that court.

Having reviewed the effect of excessive executive power on the legal system, it is clear that at this point in time that effect is profound. It has prevented the development of administrative law and foster the development of a court system centralized in N'Djamena where it remains subject to direct influence and control of the government. In addition, the legal profession remains underdeveloped and the both magistrates and lawyers practice their profession under fear of repression and retaliation.

It is widely reported that this general legal environment has resulted in the fact that the private sector has almost no legal representation and is very mistrustful of the courts. This

contributes to the pervasive ignorance of the law discussed below in the section dealing with sources of legal authority and encourages the growth of the informal sector to the detriment of the society at large.

b. Recommendations

The application of administrative law presents a difficult problem to solve in the short term. The body of administrative law which is available in France is so specific to French administration as not to be appropriate for direct application in Chad. The only feasible recommendations to be made in this connection relate to the reform of the administration of the courts.

There are several reforms which could be undertaken in connection with the administration of the courts. One reform would occur automatically were the Constitution of 1989 to come into effect at the expiration of the 30 month period of the National Charter--the Supreme Court would be instituted. This fact alone would tend to bolster the independence of the judiciary since at least part of the court would be appointed for life. See also the recommendations in connection with constitutional history above.

In addition, a separate commercial tribunal should be established. The French model for such a tribunal would seem to be appropriate since it is composed of judges who are trained jurists and others who are chosen because of their experience in commerce and industry. This model relies heavily on arbitration, which is a method of dispute resolution which could in some cases avoid the corrupt influence of government authorities described above and offer some reliability to the private sector in the process. Having such a separate tribunal would help to develop awareness of commercial law and ensure uniformity of its application. This would serve in turn to inspire confidence in these courts on the part of the private sector.

Likewise, a separate administrative tribunal should be established. Since administrative law is so underdeveloped in Chad, a specialized tribunal in this area would serve to create a body of judges whose sole function would be to develop and apply the law in this area. This again would serve to increase awareness of remedies against arbitrary government action. Since the current administrative chamber of the Court of Appeals is a court of first and last resort, the new tribunal should be a court of first instance with an appeal to the Administrative chamber of the Supreme Court. Many of the procedures for the filing of administrative claims contained in *Ordonnance* No. 26-27/PR.MJ of 19 August 1967, (Appendix 5) could apply in this court. This tribunal should have a court of first instance in each of the major cities of Chad-- N'Djamena, Moundou, Sahr, and Abéché. By decentralizing the current administrative jurisdiction and affording an appeal to the Supreme Court, administrative law should be allowed to develop more freely than it has in the past.

With respect to the existence of a "parallel" system of dispute resolution, a strong recommendation should be made to the government that it use the jurisdiction of its special court of justice to actually prosecute and remove from office those government officials who try to interfere with the independent functioning of the legitimate courts. In addition, under the same authority, military and police figures and traditional chiefs who illegally act as judges should be prosecuted to the full extent of the law so that this parallel system of "quick justice" can be totally eliminated. Until that happens, there will be no rule of law in Chad.

Reforms in the legal profession are called for as well. Lawyers should not be appointed by the Council of Ministers. This subjects the legal profession to direct control by the executive. While it is traditional in most societies that judges are appointed by the executive, there is little justification for placing the entire legal profession under such influence. An organization similar

to a bar should be established for the appointment and admission of candidates to the legal profession.

In addition, it is significant to note that the requirements for entry into the legal profession are such that anyone with the appropriate level of legal education in a Francophone country who had completed two years of apprenticeship is arguably eligible for the practice of law in Chad. Volunteer lawyering by the French could offer a badly needed support for the Chadian legal system, if this were to fit the profile of any of their aid programs. This used to be done by American Peace Corps Volunteers. Such voluntarism could serve an obvious educational function as well.

Decree No. 235-66/PR.MJ of 3 November, 1966 (Appendix 9) should be amended to eliminate the repressive language of Title III, Article 16. Instead, the penal code should be amended so as to make it a crime for any government official to threaten or attempt to intimidate any attorney on account of his or her representing a particular client or defending a particular cause. Lawyers clearly need some legal protection given the fear associated with the exercise of the profession.

In the case of the appointment of judges, it is regrettable that the *Conseil Supérieur de la Magistrature*, referred to in the constitutions does not actually exist because it could at least guide the executive in the appointment of qualified and independent judges.¹⁵ In addition, with the existence of a legislature, it would be desirable to require confirmation by parliament. This would require a constitutional amendment.

¹⁵ It has been reported that a decree has established a commission which is to assume some of the functions of this *Conseil*, but the author of this report was unable to obtain the decree or verify its existence.

As for removal, if the Constitution of 1989 is in fact restored, there will be a Supreme Court which shall not be subject to removal by the president. There should, however, be a constitutional amendment which makes it clear that none of the judges of the lower courts, including the court or courts (assuming there will be more than one) of appeal shall not be subject to removal by the president.

In addition, in the immediate future the current *ordonnance* reducing the salary of public officials¹⁶ should be amended to provide an exception for magistrates. If that reform were undertaken along with the elimination of the illegal exercise of judicial authority proposed below, then funds would be made available to recoup what would be lost to the state treasury by failing to reduce judge's salaries. "Fines" which have heretofore been going into the pockets of military officials and traditional chiefs could be made available for this purpose.

B. Problems relating to the multiplicity and confusion of sources of legal authority.

1. Description of the problem.

The legal system of Chad is not unlike an edifice of antiquity seriously damaged by successive periods of war. The task of the jurist asked to report on the system and suggest reform is like that of an archaeologist who finds some pieces of the edifice totally in tact, leaving him to rely on oral tradition in order to come up with hypotheses allowing him to reconstruct the

¹⁶ As part of the reform of Chad's private sector undertaken by some of the international donor agencies described in the introduction, the IMF has imposed certain conditions on the GOC. One of those conditions is that the GOC take steps to reduce salaries in the public sector (given the lack of revenues to sustain them.) In May of last year an *ordonnance* was adopted establishing the reduction of all public sector salaries.

edifice. In an analogous fashion, certain areas of law such as the law relating to civil procedure and land tenure, for example, are clear, well developed, and accessible. In other areas of the law there are gaping holes like those left by repeated bombings, as in the areas of business law and commercial law. If one considers the fact that one of the reasons for the state of Chad's legal system is the fact that many of the laws and related records were destroyed in repeated attacks on the Ministry of Justice, the analogy passes almost from the figurative to the literal.

Against this background, the rule of law in Chad becomes an illusive concept. This is so because in the current state of disarray which characterizes the system, there has developed a great confusion of the multiple sources of legal authority which are arguably applicable. This confusion results from the lack of codification and applicability of colonial codes, from problems with the adoption of post colonial legislation and regulation, and problems relating to the application of customary law. Consequently, these are the problem areas that will be examined in this section.

a. Lack of codification and applicability of colonial codes.

As a result of its French colonial past, Chad's legal system is largely based on the French legal system. As such, it is a legal system of the Romano-Germanic legal tradition, or as it is sometimes referred to--the civil law tradition (the terminology being derived from the *Corpus Juris Civilis* of the Roman Empire.) One of the main distinguishing factors of the civil law tradition is its strict reliance on the written law. It is a legal tradition characterized by a mistrust of judges, which results in judges being assigned the role of a rather mechanical application of the written law. In the absence of the written law, and in contrast with the power and role of judges in common law countries, civil law judges are forbidden to establish rules and thereby make the law. The law making role is seen as belonging exclusively to the legislature. For this reason, civil law countries typically have vast codes, such as the Napoleonic code (or

civil code) in the French system, which will allow for the written law to bring everything within its scope.

These aspects of the civil law system have resulted in some significant problems in the Chadian legal system since its separation from France at the moment of independence. The problem lies essentially in the fact that the Chadian legal system has not adopted elaborate codes adapted to its own contemporary society. To date, it has adopted a code of civil procedure, a code of criminal procedure, a penal code, a tax code, a customs code, a forest code, an investments code, a labor code, nationality code, and a public markets code, and it is reported that a code of family law is currently being established. However there are large areas of the law which have neither been adapted to the Chadian context nor codified. This problem is confounded by the inaccessibility (due at least in part to the repeated pillage and destruction throughout the various periods of war) of all legal texts. In addition, there is considerable confusion about the applicability of the French codes even prior to independence, and there is also confusion about whether those codes existing at that time are currently applicable.

For example, there are portions of the French civil code in the personal archives of some of the magistrates. These portions of the civil code deal with the law of obligations (which in the French system is roughly the equivalent of contracts law and related equitable concepts), *le droit delictuel*, (which is roughly the equivalent of tort law), family law, sales, property law (both real and personal property and landlord/tenant law), inheritance law, and some basic notions of business law. (It must be noted that there are laws currently applicable in Chad which deal with family law, real property, contracts, and inheritance law only insofar as these current laws establish rules as to when the "written" law or customary law shall be applied in those areas.) These portions of the civil code date from 1947 - 1953 and were presumably in effect during the colonial period. The term "presumably" is key here since, as the table of contents of these materials indicate, every provision of the French civil code in the colonial period had to be

officially adopted in the colony in order to become officially applicable. A French expert has reported to the author of this report that in Mali where he has drafted a new commercial code currently applicable, he spent three and one half years of research determining which portions of the French commercial code had become applicable in Mali, also a former French colony. There is no centralized index indicating which portions of the French civil code became applicable in Chad during the colonial period. This uncertainty is compounded by the fact the fact that it is reported by some that a decree of 1958 rendered the French civil and commercial codes then extant applicable in Chad. In order to understand the effect of such a decree, it would be necessary to study its terms, but the author of this report has been unable to locate this decree or confirm its existence.¹⁷

As for the French commercial code, some version of which was clearly applicable during the colonial period (as was some version of the civil code), the only version of the commercial code available in Chad dates from 1807. This code contains some basic notions of corporate law in that it at least recognizes the corporate entity, but it fails to deal with the concept of limited liability, and is silent on the establishment and sale of securities. In addition, it contains some basic notions of bankruptcy law. However, of course, all of these concepts have evolved tremendously under modern French codes. While this text does indicate that some of its sections were updated, it is once again impossible to know which portions of the French commercial code had actually become applicable in Chad.

The problem with this situation is that the French codes have greatly evolved since the colonial period, and nothing has happened in the Chadian context to officially take account of that

¹⁷ This fact is not entirely surprising given the fact that so many documents were either lost or destroyed during the various periods of war.

evolution. As a result, for lack of a better solution, judges in Chad, to the extent that they know French law, apply the civil and commercial codes which are currently in effect in France.

There are several problems with this practice. From a purely technical point of view, judges are without authority to apply modern French law since there is no legal text in Chad which officially recognizes the current French code. This contributes to the lack of reliability of the legal system since the inapplicability of these concepts could be raised at any time and compound the lack of confidence in the legal system which is pervasive here. From a more practical point of view, this is a problem in that it results in a lack of uniformity since the result in a given case will depend upon a particular magistrate's knowledge of modern French law, and there are no official sources of modern French law readily available in Chad. This lack of uniformity was particularly evident from the comments of the various magistrates and jurists working in the ministries of the government. Some reported that the French law as it existed prior to independence is officially applicable in Chad. As mentioned above, it was impossible to determine whether this was in fact true. Others reported that modern French law is officially applicable in Chad. Research on this point proved that this is simply not true since there is clearly no legal or constitutional text which renders modern French law officially applicable. Others reported that in key areas affecting the private sector, there is no law in Chad and that judges were therefore obligated to make their own rules. One highly placed minister with a legal education reported that there is no corporate law in Chad or law relating to forms of business. Research conducted in this connection revealed a paradox in that laws relating to business registration, adopted since independence recognize various forms of business including the corporate entity. (See discussion of business registration below.) Yet it is clear that there is in fact no law directly providing for these various forms of business. One magistrate reported that these areas of the law were covered by treaties established on the regional (UDEAC)¹⁸ level.

¹⁸ Union Douanière des Etats de l'Afrique Central. This is an organization of central African states which represents an increasingly unified market.

Research revealed that while there are a couple of major projects of legal reform under way on a regional level, there has been no official "reception" by Chad of the legal concepts recommended by these reforms. (See discussion of the regional proposals for reform discussed below.)¹⁹ Thus, it became clear that some judges apply what they believe to be concepts of modern French law, others apply concepts of French law which they believe were officially applicable prior to independence, some apply concepts which they believe to have become officially applicable through international agreements, and others still make their own practical rules tailored to the exigencies of a particular case.

Moreover, to the extent that modern French law is applied, it clearly fails to take into consideration factors which are peculiar to Chad. For example, the view is often expressed among Chadian jurists that the standards to which "merchants" are held in most modern legal systems do not make sense when applied in the Chadian context. The concept of "merchant" which often applies on an international level presumes a fair amount of sophistication on the part of a merchant dealing in particular goods. For this reason, sometimes "reasonable" terms can be read into contracts between "merchants" on the assumption that any savvy merchant would intend these terms to apply. Similarly, a merchant is not considered to be dealing at arms length with a consumer and may have certain responsibilities which become obligatory in dealings with consumers. These concepts are a bit incongruous when applied to the Chadian peddler in the informal sector who one week may sell a few bags of sugar in NDjamena and two months later sell something totally different with only sporadic "commercial" activity in between. In addition, there are aspects of the French codes which are not appropriate in the Chadian context especially

¹⁹ For example, if one studies the international agreement on banking law discussed below, one sees that that agreement requires member countries to adopt certain uniform concepts of corporate and business law. They provide for the establishment of the various kinds of corporate entities which exist under French law--*société anonyme*; *société en commandite*; *société à responsabilité limitée*; etc.; but so far Chad has not taken steps to adopt those measures in Chad.

since they naturally fail to take into account any influence of Chadian customary, tribal law. (See discussion of customary law, below.)

Consequently, Chadians are encouraged to conduct their commercial affairs in the informal sector. When a dispute arises, they are much more inclined to rely on the parallel system of "justice" described above in the section dealing with the administration of the courts, and in rural areas they will rely on traditional chiefs who will act in the role of judge even though the law does not give them that authority. For a Chadian operating in the informal sector, there is little interest for him to enter the formal sector and pay taxes in order to avail himself of the ineffectual protection of the courts when his influence in the parallel system might be much more effective from his point of view in resolving a legal dispute in his favor.

In the formal sector businesses are formed and dissolved using modern French concepts of business, corporate, and bankruptcy law, but many of these notions have no official application in the Chadian legal system. While judges will generally apply modern French concepts in cases brought before them, they can't be counted on for uniformity. All of these factors, together with the problems discussed below in connection with the difficulties in the enforcement of judgments and the lack of the rule of law, result in a profound lack of confidence in the courts on the part of the formal private sector.

The cost to the economy of Chad generated by this state of affairs results from the fact that the formal sector is consequently extremely small. As a result, a significant portion of revenues that would go to the government through taxes are entirely lost. In addition, public revenues are lost to corrupt military officials and tribal chiefs who act as judges pocketing the "fines" which they impose in almost all cases. This aspect of the lack of rule of law is particularly daunting for potential foreign investors who would not in most cases have any clout before these corrupt officials illegally usurping legitimate judicial authority.

b. Problems with the adoption of post colonial legislation and regulation.

Before the problems which arise currently in the adoption of the written law in Chad can be explained, some information on the hierarchy of laws in Chad will be necessary. The concepts underlying this hierarchy of laws are almost entirely derived from the French legal system in the post colonial period. At the top of the hierarchy is constitutional law, followed by the written law--both that adopted separately by parliament, and that contained in the codes. On the same plane with these two sources of written law is the "*ordonnance*". In France, the constitution of the Fifth Republic of 1958 specifically delineates those areas where the parliament is authorized to legislate and establishes parliament's exclusivity in those areas. This grant of legislative power thus creates the exclusive domain of the written law. Nevertheless, the constitution also authorizes the parliament to delegate its legislative authority to the president. When this is done, the president then legislates in the domain which is normally reserved exclusively for the written law of parliament. When the president so legislates, his acts are called "*ordonnances*," and these acts occupy the same position in the hierarchy of laws as the written law of parliament. In addition, the President is granted regulatory power. Pursuant to this power, the president can issue "*décrets*," which are acts designed to implement or "execute" the written law of parliament and are thus subordinate to it. Nevertheless, it is interesting to note that the difference between the *décret* and *ordonnance* is somewhat blurred and confused in the French system, as noted above, by the fact that the residue of the power not granted to parliament in the constitution resides with the president. This gives the executive broad decree power outside of the domain of the written law. Decrees are adopted by the president sitting in the Council of Ministers. Finally, the regulatory power granted to the president can be delegated to his ministers. When a ministry acts to implement the law pursuant to such a delegation of authority, its acts are called "*arrêtés*." These acts, like regulations in the American system, are totally subordinate to the written law and must be consistent with it.

In Chad, the provisions of the Constitution of 1989 relating to the hierarchy of laws and to the legislative process are almost identical to those of the French Constitution of 1958 described above. Article 132 contains the specifically enumerated legislative powers which are exclusively granted to parliament and constitute the domain of the written law. Among them, for example, are human rights, administration and jurisdiction of the courts, property rights, the budget, labor law, business law, and the protection of the environment. Article 152 authorizes the parliament to delegate its exclusive authority to the executive, but such a delegation must be time limited. When the president legislates pursuant to such authority, he does so by "*ordonnance*." In addition, Article 83 authorizes the president to legislate by way of "*ordonnance*" when the parliament is not in session or in the case of an "absolute emergency." In that case, two conditions are attached. The president must obtain specific authorization from the Bureau of the National Assembly for each measure so taken and each one must be reviewed by the chief justice of the supreme court before it is published. Finally, each such measure must be ratified by the National Assembly in its next legislative session or it becomes null and void. Article 82 grants the president regulatory authority and allows him to delegate that authority to his ministers. Article 88 provides for decrees of the president to be signed by the ministers concerned.

Under the National Charter which is currently in effect in Chad, this hierarchy of laws is implicitly referenced in Article 11, which states "The President of the Republic has the power to legislate by way of *ordonnance* and to regulate by way of decrees established in the Council of Ministers, simple decrees, and *arrêtés*. The decrees which are established in the Council of Ministers shall be signed by the prime minister and 'the ministers concerned.'" This constitutional provision can only be interpreted with reference to French and Chadian constitutional tradition. Thus, the president issues *ordonnances* in those areas which would normally be reserved as the exclusive domain of parliament were there actually a parliament

sitting. In all other areas, he issues decrees, some of which are established with the Council of Ministers, some of which are established by the president and only those ministers whose domain is affected by the particular decree. When a decree is established with the Council of Ministers, the prime minister must sign it as well. Certain measures under the charter, such as the declaration of a state of siege or a state of emergency, must be taken by decree with the Council of Ministers and signed by the prime minister. (Article 17.) In Chad this power has been given in constitutional texts which it has adopted throughout its 32 year history, and this has been so even when a military council fulfilled the role of executive. Finally, under the National Charter, the *Conseil Provisoire de la République* (CPR) plays an advisory role. (See the discussion, above) Consequently, it is reported that in practice, the CPR is consulted when the president issues *ordonnances*. In addition, they are established with the Council of Ministers. There is a certain logic to this practice even if the executive's authority in this area is somewhat subject to question. If it can be assumed that the CPR and the Council of Ministers are functioning to some degree in the role of parliament in the absence of an actual parliament, then it makes sense that they should be consulted since *ordonnances*, as we have seen, involve areas which would normally be exclusively the domain of that body. In addition, it must be noted that a tradition has developed in Chad whereby the *arrêtés* are signed by the president.

Against this background, the current problems in the adoption of the written law in Chad can be elucidated. They are twofold.

First, it is reported that this hierarchy of laws is not observed. For example, businessmen in the private sector complain that even though the *ordonnance* establishing the investment code provides certain privileges to certain industries, ministries will nevertheless adopt *arrêtés* which violate those privileges. In France, there would be a clear remedy for such a problem. The *arrêté* would be attacked in administrative court as being *ultra vires*. There is an administrative remedy in Chad which would involve bringing an action directly in the

Administrative Chamber of the Court of Appeals, which is the single court with such jurisdiction in Chad from which there is no right of appeal. See discussion above. However, it is reported that Chadians are either reticent in invoking the jurisdiction of this court or they are ignorant of their rights in this regard. Similarly, it is reported that decrees are adopted which are either inconsistent with the *ordonnances* or are inconsistent with each other. This can be understood from the fact that not all of the ministries have to be consulted for the adoption of all decrees. They can be adopted, as explained above, under circumstances whereby only the "concerned" ministries are consulted. This state of affairs in turn encourages the Presidency and the ministries to issue rules in authoritarian fashion with little regard for existing law.

It must be noted here that the Legislative Service of the Secretary General of the Government (*Sécretariat Général, Direction de la Législation*) has a specifically assigned role. In the normal course of events, all laws and regulations have to pass through this office in order for the measure to receive a formal "visa" of approval indicating that it is not incompatible with existing legislation. In those cases where a visa is not granted, this legislative service will submit a written report explaining why they feel that the measure is incompatible with existing legislation. It is reported that what happens in practice is that either the government obtains the visa without actually having the measure reviewed for its compatibility or the comments of the legislative service are ignored. In either case, the result is that the measure is adopted in spite of its inconsistency or incompatibility with existing law.

Second, there are problems which arise in the "promulgation" and "publication" of the law which serve to seriously undermine the rule of law in Chad. An article has been written in the French international review of comparative law which exposes these problems with singular clarity. Moyrand, Alain, "Réflexions sur les incertitudes de l'état du droit au Tchad," *Revue Internationale de Droit Comparé*, No. 3, 1989, page. 595.... Under French administrative law, which, as noted above, is a system of case law, a law cannot not take effect until it is published.

The logic of such a legal principle is obvious. According to the principle, citizens cannot be held accountable to laws when there is no notice of their existence. Without notice, the adage "ignorance of the law is no excuse" (an adage which holds true in the French system as well) makes no sense. Consistently, within months of independence, *Décret* No. 7 of April 24, 1959 was adopted. It provided that all legislative acts became officially applicable one day after the arrival of the *Journal Officiel* in the district where the law or regulation is to be applied. The decree also provided for an alternative of publication in the newspaper, the *Bulletin Quotidien*. Otherwise, the same rule applied--the law would take effect one day after the arrival of the newspaper in the territory. This decree proved to be unworkable because it resulted in a situation where legislative and regulatory acts did not become applicable in the provinces until six months after they became applicable in the capital, and this was, of course, especially true during the rainy season. As a result, a practice developed in the early period of Chad's history as an independent republic whereby written acts were considered to be applicable from the moment they were signed. This practice was strongly criticized by some who pointed out that it was in clear violation of traditional principles of French administrative law.

Consequently, on June 9, 1967, law No. 19 was adopted by the parliament addressing this problem. The parliament, in a somewhat surprising move, decided to attempt to legitimize the practice rather than attempt to bring it into conformity with traditional French administrative doctrine. The law provides two procedures.

According to the "normal" procedure provided by the law, a law becomes applicable 10 days from the moment of its promulgation (signature by the president) and for regulatory acts, 10 days from the date they are signed (signature by the president and the ministers.) The second procedure is an "emergency procedure." It allows a law to become applicable at the moment that a notice of its existence is published on the radio and in the *Bulletin Quotidien*. Such a notice provides a general description of the law without setting out its exact terms. Moreover, the effect

of the law was watered down by a decision of the Administrative Chamber of the Court of Appeals which held that publication in the newspaper without a public radio announcement was sufficient to render the law applicable. The "emergency" procedure--newspaper publication-- has become the rule rather than the exception.

The basic problem with both the law and practice is that there is no requirement in either the normal or emergency procedure that the law be published in the *Journal Officiel*. Consequently, no one is put on notice of the exact terms of the law. Under traditional doctrine of French administrative law, citizens must be put on notice of the exact terms of the written act so that they can have a meaningful opportunity to challenge its validity in the administrative court. (This does not hold true for laws of parliament which, as noted above, cannot be challenged by the citizen.) Moreover, this state of law encourages laxity in the publication of laws in the *Journal Officiel*, and in fact, legislative and regulatory acts are not consistently recorded in the *Journal Officiel*. The author of the article in the French review cited above did a study of all the laws and *ordonnances* adopted between 1959 and 1975 and found that 272 of them were never recorded in the *Journal Officiel*.

These problems stemming from lack of publication in the *Journal Officiel* lead to another problem with the applicability of *ordonnances*. It must be recalled that during the period when there were constitutions in effect and a parliament established (1959 through 1975) *ordonnances* which were adopted either in between sessions of parliament or pursuant to a delegation by parliament had to be ratified within a year or become null and void. Since many *ordonnances* were adopted under these circumstances between 1959 and 1975, a determination must be made as to whether they were ever ratified in order to know whether they are currently applicable. This is a difficult task since the *Journal Officiel* has not been kept with consistency. Moreover, it is clear that *ordonnances* which were in fact not ratified are still being applied.

Finally, a consideration of these problems arising in the publication and promulgation of the laws illustrates the broad and pervasive underlying problem in enforcing the rule of law in Chad--ignorance of the law. The ignorance of the law and its inaccessibility constitute dramatic problems at this point in the history of Chad's legal system. Moyrand reports, and this has been confirmed by the research conducted by the author of this report, that in some cases regulatory and legislative acts are not recorded anywhere and cannot be found. In other cases, one copy exists in the office of one the ministries. In any event there is no centralized system for the recording or collection of the laws. As a result, even the judges are often ignorant of the law. This situation results in a lack of uniformity in judicial decisions and contributes generally to the lack of reliability of the legal system and to the lack of confidence in the legal system which is pervasive in the private sector.

c. Problems relating to the application of customary law in Chad.

The Constitution of 1989 (Appendix 2) contains three articles which deal with the application of customary law in Chad--Articles 180-182. They provide that customary laws apply in the communities where they are recognized. In a conflict between customary rules, the national law shall apply, and finally no remedy of customary law can be enforced through state action. These principles appear contradictory in and of themselves. They appear to recognize and not to recognize the applicability of customary law. In addition, while Article 181 deals with the situation where there is a conflict between customary rules (each ethnic group having different and sometimes conflicting customary rules), there is no legal text dealing with the situation where there is a conflict between national and customary law except where customary law can be viewed as being contrary to the "*ordre public*," which is a general concept derived from French law referring generally to public welfare or morals. (See Article 72 of *Ordonnance* No. 6-67/PR.MJ of 21 March, 1967 (Appendix 11) dealing with organization of the judiciary.)

In addition to the constitutional provisions discussed, there are precisely two *ordonnances* and one *décret* dealing with the application of customary law.

Ordonnance No. 6 of 6 May, 1970 (Appendix 11) gives traditional chiefs authority in the maintenance of public order and security and gives them law enforcement authority in rural areas. In those areas, they are required to oversee sanitary conditions and the maintenance of public roadways in rural areas. *Décret* No. 102/PR.INT (Appendix 12) of the same date implements this *ordonnance* by delineating the hierarchy of traditional chiefs and specifying their authority. The sultan is the traditional chief responsible on the geographic level of the prefecture, the *chef de canton* on the level of the canton (similar to a county), and the village chief on the level of the village. The sultan and *chef de canton* are to be named by the President of the Republic sitting in the Council of Ministers. The village chief is appointed by the assistant prefect. This decree also sets up these traditional chiefs as tax collectors (particularly for tax on cattle) in local areas. They are to oversee the public order in the market places and at fairs, etc., and they are to generally oversee sanitary conditions in their local area and take necessary action in the case of fires or epidemics or attacks by wild animals.

Ordonnance No. 7 of 6 May 1970 (Appendix 13) deals with the role which traditional chiefs are to have in criminal and civil procedure. Article 1 specifies their authority in "customary civil matters." Generally, they are to act as mediators in an attempt to bring about a settlement of a civil dispute. No definition of what constitutes a "customary civil matter" is provided. Where settlement cannot be reached, the parties are to seek the authority of the regular courts under Article 9 of the code of civil procedure. Settlements are given the authority of a judicial decree. There is actually a fairly formal procedure whereby the traditional chief presents an official "*procès verbal*" to the court detailing the terms of the settlement. In the criminal area, traditional chiefs are authorized to take immediate action in cases of theft of animals, homicide

and assault and battery. However, their remedies in such a case must be of a civil nature and must be approved by judicial and administrative authorities. In no case can they impose a fine.

It is evident that the law in this area is conflicting. How can traditional chiefs exercise jurisdiction in cases of theft of animals, homicide and assault and battery if they cannot impose a fine and if none of their remedies can be enforced by an ordinary court? How can they exercise their public welfare responsibilities if they have no enforcement power? The answer to these questions in practice is that the traditional chiefs exercise a great deal of power in local areas—imposing fines and other criminal sanctions in open contradiction of the written law.

The *ordonnance* dealing with judicial organization, referenced above clearly contemplates the application of customary law by the ordinary civil courts. Article 69 of that *ordonnance* provides that when customary law is to be applied, two assessors with knowledge of customary law are to be appointed and must sit as part of the civil tribunal and have a voice in the establishment of the verdict. Article 70 provides for specific rules for the application of customary law in the areas of domestic relations, inheritance, and contracts. In the contract area the *ordonnance* provides that the contract shall be interpreted in accordance with the law which the parties intended to apply at the time the contract was made, and Article 71 states that where customary law is silent, the written law shall apply.

The problems in the contract area are evident. For example, how does Chadian law resolve the problem which arises when one party to a civil contract action wants the matter to be decided by the written law and the other party wants it to be decided under customary law, assuming further that the parties had no agreement on this issue at the time of the conclusion of the contract. The written law offers no solution. Moreover, what is to be implied from the principle whereby written law applies where the customary law is silent. Does it then follow that customary law will trump written law to the contrary? In addition, muslims here reportedly

consider Islamic law to be "written" law and therefore argue that it should be applied in the case of a conflict. These and many other questions and problems arise from the lack of clarity of the texts.

In the civil area generally there is no way under the written law to determine whether a case involves a "civil customary law." There is therefore no way to determine consistently when assessors need to give their expert advice on customary matters. These decisions are left to the discretion of individual judges again contributing to the lack of uniformity. It also makes it difficult for parties to know what law will be determined to be applicable in a given case.

Finally, it must be noted that land tenure is governed to a large extent by customary law, although there is a considerable body of written law on the subject as well. This is an area which doesn't appear to give rise to significant conflict between the two regimes. See the discussion below of land tenure in the section on "Miscellaneous Areas of the Law."

In any event the sparse written law available on the application of customary law seems to give traditional chiefs broad powers with one hand and take them away with the other leaving a general sense of confusion. In addition, there are very few clearly delineated written rules establishing clear lines of demarcation of the jurisdiction of customary law or for the application of that law by the ordinary courts.

2. Recommendations for reform relevant to the multiplicity and confusion of sources of legal authority.

One of the questions which arises at the outset of a consideration of necessary reforms in this area is what kind of legal system Chad should strive to develop in the future. In this respect, it is important to note that it might appear to some as though Chad is currently operating with a

kind of common law system since judges seem to be creating their own rules where the written law is either missing or unclear. It would nevertheless be counterproductive to try to influence Chadian jurists toward the adoption of a legal system more akin to that of common law countries than that of civil law countries.. Despite the confusion which currently reigns, Chadian jurists are quite well educated in French law and in the French legal tradition. They have a tradition of trying to adapt that system to their own circumstances. The institution of any major change in that orientation would, as a result, probably be impossible.

Nevertheless, if the Chadians are to evolve in the civil law tradition there remains the formidable problem of codification. There are several measures that could be taken as interim measures and some for the long term to deal with this problem. What will be needed on a long term basis is a review of both the French civil and commercial codes by a team of legal experts. This team should be composed of legal experts familiar with the concerns of the various donor agencies²⁰ and the GOC. The team should ideally include American, French, and Chadian experts. At least one member of the team should be an expert in comparative law in order to be able to bring to the task the knowledge of how various legal principles work in differing legal systems. The team must also include Chadian experts since they will be most able to identify those areas of the modern civil and commercial codes which are not workable in Chad. The team should develop a proposal for Chadian Commercial and Civil Codes which would incorporate all of the useful portions of the modern French codes and offer proposals for amendments and additions where the relevant areas of the law need to be adapted to the Chadian context. The reforms will clearly need to take into consideration Chadian customary law.

²⁰ Some of the concerns or proposed reforms by some of the donors may seem foreign to the legal tradition of the others. For example, volunteer lawyering is an area where an American jurist could bring to bear the American experience in other third world countries, while the French would consider this a strange concept given their legal tradition. Having all parties represented will ensure a more wholistic reform.

In addition, it is clear that a commercial court will need to be established. The French model of the commercial court would appear to be appropriate for this purpose. Many Chadian jurists already know a great deal about the functioning of these courts in France. These courts could greatly expand the awareness and reliability of commercial law in Chad. See the discussion of recommendations in connection with the administration of the courts, above.

In the short term, *ordonnances* should be adopted officially recognizing the modern French civil and commercial codes. To aid in the application of the law during a transition period while the long term reforms are being considered, the FAC should arrange to have current copies of the codes available to all at the library of the CEFOD. Provision should also be made for periodic updates coming from jurists in France who would supply the library with official case reports and amendments to the codes. The adoption of the *ordonnances* and the availability of the French law should be announced in the local media. Related *ordonnances*, *décrets*, and treaties dealing with regional reforms (the UDEAC reforms in banking law, for example) should be made available to the library and that availability should be published in the media and announced in the *Journal Officiel*.

It would appear to be counterproductive to spend the time required to determine what law was applicable during the colonial period. It may be that, given the state of the destruction and loss of laws and legal records, it would turn out to be an impossible task. In any event, the team of jurists working to reform the legal system could better spend their time devising clear and well adapted codes for application in the future.

Steps must be taken to find the material means to ensure that the *Journal Officiel* is published regularly and promptly in all the major cities. Once this is accomplished, the law should be amended through *ordonnance* or written law of parliament requiring all regulatory and

legislative acts to be published in the *Journal Officiel* and specifying that these acts shall not take effect officially until they are so published.

The problems in connection with the application of customary law are vast and will likewise require long term reform. Reform in this area again raises the larger question of the importance of the role that customary law should play in the legal system. This problem has been encountered in many other African countries. Since, in Chad, as in other areas of Africa, customary law differs greatly from one ethnic group to another, it poses an almost insurmountable obstacle to it being considered as the major source of law for the entire country, and this is so particularly since it is not codified. It is for this reason that the trend in most African countries is to clearly limit the application of customary law to certain clearly defined areas.

Consequently, in the short term, an *ordonnance* should be proposed which would clearly establish the superiority of the written in law in any case where there is a conflict with customary law. In this way, there will be greater uniformity and reliability in the legal system throughout the country. For the long term, elaborate written rules for application of customary law in all relevant areas of the law should be proposed. This would involve at least a review of domestic relations law, contract law, real estate law, criminal law, and civil procedure. Unambiguous rules for the application of customary law in all of these areas must be established. It is reported that there is a French project which is undertaking that very task. Inquiry about this project needs to be made.

II. Specific Problem areas.

A. Enforcement of Judgements.

One problem with the legal system which is frequently reported, particularly by the formal sector, is the difficulty which is encountered in enforcing judgments issued by the courts exercising civil jurisdiction. This is a complaint which was raised vociferously in the seminar in May as well. It is a problem which especially affects the banks here who need to be able to count on the courts for meaningful enforcement when customers default on loans. The banks report that it often takes them as long as four to five years to enforce a judgment. Furthermore, they report that this difficulty in enforcing judgments seems to be encouraging delinquency amongst debtors since the potential for delay and difficulties in enforcing judgments have become common knowledge.

From a legal point of view, the problems arise in portions of the code of civil procedure which, while it is generally a well conceived code adapted to current realities, still contains some archaic French procedures inherited from the French colonial period. There is, for example, a procedure required by the code of civil procedure, called *consiliation obligatoire* which in practice means that the parties have the obligation to pass through a period where they are expected to attempt to settle the matter amicably. As the banks report, this is something they usually have done in the six months leading up to their decision to pursue civil action in the courts. This procedure usually takes a year. In addition, after this year there are then problems encountered in connection with default judgments. Under the code of civil procedure, defendants are generally granted broad rights in appealing from default judgments which serve to reopen the case and result in further delay. Finally, executing on mortgages entails some of the same problems because the relevant sections of the code of civil procedure refer the parties back through the procedures described above.

According to the code of civil procedure, the above procedures are to be the general rule. However, there is an exceptional procedure which can be used when the debt involves, for example, a commercial contract for less than 150,000 CFA (\$600 roughly) or other kind of

contract for less than 35,000 CFA (\$140 roughly.) That procedure appears in the third part of Title I of the Code of Civil Procedure. According to that procedure, a creditor can request the court to issue an order to pay. (*requête à fin d'injonction de payer.*) The court then makes a decision on the merits, and the debtor is given one month in which to appeal. If within that period the debtor appeals from the order, the judge will then order the parties to proceed in accordance with the non-exceptional procedures. The problem here, particularly for the banks, is that because of the limitations of the exceptional procedure they are unable to use it in most cases.

Informed sources report that there is currently a proposed *ordonnance* being considered which would amend the relevant portions of the code so as to make the exceptional procedure available to a much wider category of transactions and to make it available in cases where the creditor is attempting to execute on a mortgage or other guarantee. It is reported that the proposed *ordonnance* would make the exceptional procedure applicable to all debt collection by certified banks and parastatals, making this procedure the general rule rather than the exception for them.

Reform of this nature should be supported because of its potentially positive effect on the economic health of the formal sector and because it will generally serve to bolster the rule of law in Chad.

B. Business Registration.

Another complaint of the private sector at the seminar in May was that business registration procedures were so complex and cumbersome as to make it difficult for Chadian citizens to start a business in the formal sector. The problem was considered so important that an expert was hired by IRIS to study precisely this problem and to recommend solutions. Therefore, this report will merely provide a reference to the laws which appear to be readily

available on this subject. They are: *Ordonnance* No. 006/PR/84, (Appendix 14) *Decret* No. 168/PR/MEC/ of 14 April 1984, (Appendix 15) and *Arrêté* No. 11/MCI/SE/DG/DO/DCI of 5 July 1989 (Appendix 16). In addition, there are two "notes de service," ²¹ which are administrative policies--*Note de Service* No. 45/MCI/SE/DG/DO/DCI of 24 January 1990 (Appendix 17) and *Note de Service* No. 001/MCI/SE/DG/DIC of 3 February 1988 (Appendix 18).

However, it should be noted that some of the business registration procedures which are reportedly required do not appear in these documents. It may be that there are other laws which are not readily accessible on the subject or it may be that the requirements have arisen in practice. In an event, the requirements and their source will be described in the report of the expert studying this problem.

C. The Investment Code.

The investment code is often criticized in Chad as being responsible for problems for which it is clearly not the source. For example, it is frequently cited as the source of the cumbersome business registration procedures mentioned above. In fact, the investment code, which was established by *Ordonnance* No. 025/PR/87 of 8 December 1987 (Appendix 18) sets out four categories of business enterprises doing business in the formal sector which receive certain privileges in exchange for investing in the Chadian economy. The privileges essentially involve exoneration from various taxes for a period of 5 - 15 years depending upon the category and other factors. The *ordonnance* merely sets out the various categories, identifies the

²¹ This is akin to an administrative policy.

privileges, and establishes the requirements and procedures for granting them. In addition, it reaffirms the exclusivity of the public markets which are reserved for the public enterprises.²²

It is true that at the seminar in May, it was decided basically that the government of Chad could not afford to offer these tax exonerations. For that reason, a plan has been recommended for phasing them out in the coming years, except in the case of category A, which is the category of small and medium sized enterprises. It was thought that it will be nevertheless advantageous generally to the economy to continue to accord tax advantages to them in order to stimulate the economy generally and to act as an incentive specifically for businesses to join the formal sector.

Since there are already recommendations for the phasing out of these privileges, this report will limit its task to the description of the privileges and procedures for establishing them as they currently exist.

Regardless of the size of the enterprise, in order for it to be considered for privileges of any one of the four categories, it must be engaged in one of ten kinds of industries:

1. transformation or conditioning of products.
2. transformation of vegetable, animal, or fish products.
3. mineral extraction, enrichment or transformation of mineral substances, or related transportation enterprises.
4. mineral or petroleum research.
5. energy production.
6. manufacture or assembly of objects for mass consumption.

²² This subject is discussed in connection with the Public Markets Code below. Public Markets are those which remain essentially in the control of the state.

7. tourism.
8. construction and public works.
- 9 maintenance of industrial equipment.
10. specific activities or sectors (discretionary category.)

The four categories are as follows:

1. Regime A: Small and Medium sized enterprises with an investment plan involving between 15 and 500 million CFA. Its capital and its direction must be Chadian by majority, and it must use Chadian primary materials and local products. Where that is impossible, it may import from UDEAC countries.
2. Regime B: Enterprises whose activities are confined to the territory of Chad with an investment plan of between 500 million and 2.5 billion CFA.
3. Regime C: Enterprises whose principal market involves two or more UDEAC countries.
4. Regime D: Enterprises involving more than 2.5 billion CFA in investments, considered of great importance for the social and economic development of Chad.

In addition to setting out these four categories, the code provides for the various privileges which can be granted in each one of the categories. It also sets out the procedures for the granting of those privileges. Basically, the privileges are decided in a contract called an "*agrément*," which is concluded between the enterprise and the state and which fixes the tax advantages which will apply to that enterprise for the period of the contract. The period may be anywhere from five to fifteen years, and in the case of regime D, the period can be extended to 20 years. The tax advantages can include a 5% import tax and a partial or total exoneration of export, land, mining, income, corporate, and/or capital gains taxes for the entire period of the contract.

The Investment Code also includes *Décret* No. 446/PR/MCI/87 of 8 December 1987 which deals exclusively with the procedure which must be followed in establishing and recording these contracts establishing these privileges under these four categories. The procedures are very complex and include presentation of business plans, market studies, descriptions of activities and investments, personnel to be hired, projected accounting, materials to be used, etc., etc.

It has been suggested at the seminar in May that these procedures are much too complicated for the small and medium business enterprises of Category A, which is the only category which the seminar proposes to retain. Therefore, it is recommended that ways be found to simplify these procedures for Category A. This problem will need to be studied by an expert, and new procedures will need to be established by means of a decree amending the one referred to above.

D. The Public Markets Code.

One of the codes which Chad has developed as mentioned above is the public markets code. Basically this code deals with the way in which government contracts are awarded. One of the problems raised by the subcommittee of the seminar held in May was that the procedure required for responding to government bids under this code was too complex.

Articles 7 and 8 of that code require that persons or businesses responding to government bids must not have been deprived of their civil rights by operation of a criminal conviction and must not be in bankruptcy.²³ Consequently, they are required to obtain what is referred to here

²³ Even though there is scant law in Chad dealing with bankruptcy, courts often afford bankruptcy protection using concepts of modern French law.

as a "*casier judiciaire*,"²⁴ which is obtained from the Ministry of Justice. In addition the condition of Article 16 must be met. Those conditions generally require the contractual candidate to provide certain information about how he intends to go about fulfilling the contract and detailing his previous work experience and providing proof of professional licenses where required. Upon examination of these requirements, they appear not overly burdensome at all.

On further inquiry of businessmen here it was discovered that the real complaint here is twofold. One aspect of the problem is that many of the people who would like to be able to respond to government bids are illiterate and need help in meeting these minimal requirements as a result of their illiteracy. Secondly, it is reported that an even more frustrating problem arises in the amount of time it takes for those who have responded to the bids to receive a response. The procedure for responding is set out in Articles 34 and 35, and neither of these provisions contains a deadline. This problem, however, seems to be more of an administrative nature than a legal one.

Perhaps, the administrative procedures could be studied to see if there is any way to expedite them. Otherwise, it would seem appropriate to the *Chambre Consulaire*²⁵ to be assigned the responsibility of helping illiterate business people respond to these bids.

E. Banking Law.

There is really only one problem which has been raised in the seminar in connection with banking law, and that is the problem of banking secrecy or confidentiality. During the Habré regime, it is reported that government officials would often force banks to reveal individual

²⁴ This is one's legal file at the Ministry of Justice which should contain things like one's criminal record and records of bankruptcy.

²⁵ The *Chambre Consulaire* is a state-run Chamber of Commerce.

account balances. At the same time they would force the individual, often a business person, to pay some sort of "tax" that would have been invented for the occasion. Since they would know how much the individual had in his account, he could not refuse to pay. For this reason, citizens have lost confidence in banks, and it is a commonly reported practice here for merchants to deposit their proceeds and the end of a day only to remove all of the funds from the account the following day.

There is no law in Chad which precisely addresses the problem. Section 237 of the Criminal Code establishes professional secret generally. This is the section which covers, for example, doctor/patient and lawyer/client privilege. The section is drafted in very broad terms and applies to "all persons" who acquire professional secrets in the course of their work. It is generally agreed that that section would apply to bankers. However, that section imposes criminal penalties on the professional who reveals the secret, which, in this case, would be the banker. Since it is not entirely clear that the section applies to bankers and especially since the law does not reach the government officials who might engage in the abuse which has been described above, this section clearly does not adequately address the problem.

Therefore, it is strongly recommended that the criminal code be amended to include a section which would clearly impose a penalty both on a banker who violates banking secrecy and the government official who forces or attempts to force a banker to violate the privilege. This section will also need to specify the circumstances under which the government can legitimately have access to such information--where, for example, an individual is reasonably suspected of a crime etc., etc.

Since banking law was not cited otherwise at the seminar as a particular problem area, this report will merely make reference to the body of law in this area and to the major project for regional reform which is currently being considered by all of the UDEAC countries.

Prior to Chad's entering into an international agreement with the UDEAC countries concerning the reform of banking law, that subject was generally covered in Chad by *Décret* No. 20/PR.E.T. of 4 February 1965 (Appendix 20). However, on January 17 of this year, Chad entered into a convention with the UDEAC countries entitled *Convention Portant Harmonisation de la Réglementation Bancaire dans les Etats de l'Afrique Centrale* .(Appendix 20) Under that agreement Chad has undertaken to bring its banking law into conformity with all of the terms of that document.

III. Miscellaneous Areas of the Law.

A. Land Tenure.

The law relating to land tenure is governed by both customary and written law. There is a considerable amount of written law on the subject. There are Laws Nos. 23, 24, and 25 of 23 July, 1967 (Appendices 21, 22, and 23) and *Décrets* Nos. 186,187, and 188 of 1 August, 1967 (Appendices 24, 25 and 26). These laws and decrees are fairly complex, and since this area of the law doesn't present a particular problem for the private sector, only the major principles contained therein will be presented here.

There is one general principle governing the perimeters of what land is to be governed by customary law and what land shall be governed by the written law. According to that principle, all land in Chad which was subject to customary law at the time of the adoption of the laws of 1967 cited above remain subject to customary law. The customary law relating to land tenure is the same as found in many other areas of Africa.

Land under customary law is seen as a gift from God to the ancestry of each lineage. Therefore, no individual actually owns land, but the tribal chief accords usage of the land to members of the lineage according to two basic principles: Each man should possess enough land to allow him to feed himself and his family, and no one person should be allowed to control more land than he actually needs for that purpose.

Under the written law the State is otherwise the owner of all of the national territory, which is divided by the laws and decrees set out above into two basic categories--the public domain of the state and the private domain of the state. The public domain is further subdivided into two sub-categories--natural and artificial. These categories simply indicate that the natural resources of the state--lakes, ponds, water ways, mineral and mining sites, etc. are considered to be the natural part of the public domain, and the highways, airports, and office buildings of the state are considered to be the artificial part of the public domain. The key concept distinguishing the public and private domain of the state is that the public domain is considered to be inalienable whereas the state can convey property in the private domain of the state to private individuals and businesses. However, there are provisions for the authorization of the use of land in the public domain by private individuals and businesses. In addition, there are provisions for declassifying lands in the public domain in order to make them part of the private domain of the state.

In general, once the land in the private domain is conveyed to a private individual or business, and the land becomes registered by that person or business, (*Décret* No. 186 governs these recording procedures), (Appendix 24) the land becomes freely transferrable among private parties. There is a distinction between urban areas (which generally fall into the private domain of the state) and rural areas. The distinction lies in the fact that any Chadian citizen can obtain up to 100 hectares of rural land for free. If the citizen can demonstrate that he has put the land to good use, he will be allowed to record his title to that land (an order is issued by a court) and he becomes the private owner.

Finally, it is important to note that the laws and the decrees contain several provisions which govern the expropriation of land by the state. In general, all of the rights arising in connection with eminent domain in Western democracies are guaranteed in these laws. This fact is important to note in that it is widely reported that these laws were notoriously violated during the Habré regime leading to a situation whereby the general population is once again unaware of its rights in this regard.

B. Regional Reform.

It should at least be noted that it has been reported to the author of this report that there are several reforms of a regional nature which are under way in the Francophone countries of Africa. Some of the reforms are occurring among the UDEAC countries (customs and tax reform and banking reform, referred to above). In addition, there is a broad project being considered by the French which would occur on the level of the franc zone and include working to harmonizing the law in certain areas and create regional courts. This project is currently being considered on the highest levels of French government. It is a development which should be closely monitored in the future since it could potentially overlap with some of the reforms which are currently being undertaken.

CONCLUSION

The reforms to the legal system which will be necessary in order to foster confidence on the part of the private sector can be grouped around the central themes which have motivated the discussion of Chad's legal and institutional framework found in this report. The first theme involves the abuse of executive power that has so characterized Chad's government since independence. These reforms will require a strong commitment on the part of the executive

currently to accept and promote limitations of executive power in the future. The reforms will need to include the revisions of the constitution as recommended in the first part of this report. An important aspect of the constitutional reform should include reinstatement of the 1989 constitution. The up-coming National Conference should be the appropriate forum for the consideration of such reforms and should also serve as the appropriate forum for establishing parliamentary elections. The reinstatement of parliament should be one of the first steps taken toward the establishment of constitutional normalcy.

The reforms will also need to include some important revisions of existing law to bolster the independence of the judiciary, including changes in the way judges are appointed and removed. Existing laws relating to corruption and trafficking of influence will need to be strictly enforced so as to eliminate the illegal parallel system of dispute resolution described in the report. In addition, significant changes will need to be made in the administration of the courts. At the very least, the Supreme Court should be reinstated, and it should be endowed with jurisdiction in administrative matters. In addition, commercial courts should be created to adequately respond to the needs of the private sector.

There will also need to be sweeping reforms to correct the problems relating to the confusion and multiplicity of sources of legal authority described at length in this report. In order to accomplish this task, a team of jurists--Chadian, French, and American--should be designated to draft elaborate codes adapted to the Chadian context which will fill the huge gaps in legal authority currently present in the Chadian legal system. In addition, a study of customary law will need to be undertaken and laws clearly drafted establishing rules relating to when customary law and written law shall be applicable. In addition, material means need to be sought and systems developed for the systematic and reliable recording of laws and regulations. This will need to be designed as a short and long term project of legal reform of major proportions.

The commitment of the current GOC of Chad will be needed throughout the reform process, and it will need to make a commitment to the observation of the hierarchy of laws already existing.

If these major reforms are undertaken, it is certain that a great deal will have been done to engender the confidence and trust of the private sector. They will also serve to encourage the reform of the informal sector, which is another area of reform which will be considered and promoted at the rountable. Finally, they will foster the potential for stability and establishment of the rule of law in Chad, and these developments are potentially of great significance for the economic and political future of the country.