3rd International Symposium of the **Conference of Constitutional Jurisdictions of Africa (CCJA)**

Theme: "Electoral Justice: Transparency, Inclusion and Integrity of the Process"

14-15 October, 2021 | Maputo, Mozambique

Organized by

Constitutional Council of Mozambique

Supported by

Embaixada da Noruega

Enhancing Democracy & Electoral Processes (EDEP)
UNDP Mozambique

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3rd International Symposium of the CCJA
Maputo, Mozambique | 14-15 October, 2021

Thursday, 14 October, 2021

10:00 Official opening of the 3rd International Symposium of the CCJA

» Speech by His Excellency Vicente Joaquim, Secretary of State in Maputo City;

» Intervention by Hon. Ms. Narjess Saidane, Resident Representative of the United Nations Development Program (UNDP) in Mozambique;

» Speech by His Excellency Guilhermina Prata, representing the President of the Conference of Constitutional Jurisdictions of Africa;

» Intervention by the Hon. Mr Guy Cyrille Tapoko, representing the African Union Commissioner for Political Affairs, Peace and Security;

» Speech by His Excellency Gianni Bouquiquio, President of the Commission for Democracy through the Law of the Council of Europe (video conference);

» Speech by Her Excellency Lúcia da Luz Ribeiro, Venerand President of the Constitutional Council;

» Speech by His Excellency Filipe Jacinto Nyusi, President of the Republic of Mozambique;

» Souvenir photo;

1st Session (Morning)

THEME 1: Guarantees of transparency, inclusion and integrity of the electoral process

11h - 11h40

SUB-THEME 1: The decisive factors and criteria for the transparency, inclusion and integrity of the electoral process

Moderator / Panelists	Institution	Mode of participation
Moderator	Constitutional Council of Algeria	Face-to-face
Dr. Guilhermina Prata (20 mn)	Vice President of the Constitutional Court of Angola	Face-to-face
Prof. Lúcia da Luz Ribeiro (20 mn)	President of the Constitutional Council of Mozambique	Face-to-face

11h40 - 12h05

SUB-THEME 2: Limits of freedom of expression in electoral justice

Moderator / Panelists	Institution	Mode of participation
Moderator	Constitutional Council of Algeria	Face-to-face
Mr. El Hassane Bouqentar (25 mn)	Judge of the Constitutional Court of Morocco	Video Conference

2h05 - 12h30

SUB-THEME 3: Access to electoral information

Moderator / Panelists	Institution	Mode of participation
Moderator	Constitutional Council of Algeria	Face-to-face
Prof. Saidou Nourou Tall (25 mn)	Vice President of the Constitutional Council of Senegal	Video Conference

12h30-14h Lunch break

2nd Session (Afternoon)

14h -15h

Debates on Theme 1 sub-themes

THEME 2: The place of the citizen in the electoral process

15h-15h30

SUB-THEME 1: The criteria for determining electoral citizenship

Moderator / Panelists	Institution	Mode of participation
Moderator	Constitutional Council of Mozambique	Face-to-face
Mme Assata Koné Silué (15 mn)	Counselor Judge, Constitutional Council of Ivory Coast	Video Conference
Mr. Palouki Massina (15 mn)	Counselor Judge, Constitutional Court of Togo	Video Conference

15H 30-16h

SUB-THEME 1: The limits of convictions in electoral justice

Moderator / Panelists	Institution	Mode of participation
Moderator	Constitutional Council of Mozambique	Face-to-face
Mr. Pawélé Sogoyou	Counselor Judge, Constitutional Court of Togo	Video Conference

16h-16h30

Debates on Theme 2 sub-themes

End of the day's work

18h30-21h: Dinner offered by S. E. Hon. Ms. Lúcia da Luz Ribeiro, President of the Constitutional Council of Mozambique at the restaurant Indy Village

Friday, 15 October, 2021

3rd Session

THEME 3: The intervention of the judge in the electoral process

9h-9:40

SUB-THEME 1: Models of electoral justice: shared experience of national electoral jurisdictions

Moderator / Panelists	Institution	Mode of participation
Moderator	Constitutional Tribunal of Angola	Face-to-face
Mr. Luke Malaba (10 mn)	Chief Justice, Supreme Court of Zimbabwe	Face-to-face
Mr. Bheki Maphalala (10 mn)	Chief Justice, Supreme Court of Eswatini	Face-to-face
Mr. Clément Atangana (10 mn)	President, Constitutional Council of Cameroon	Face-to-face
Ms. Meaza Ashenafi (10 mn)	Chief Justice Constitucional Council of Inquiry of Ethiopia	Face-to-face

9h40-10h40

SUB-THEME 2: The independence of the electoral judge, guarantee of the transparency and integrity of the electoral process

Moderator / Panelists	Institution	Mode of participation
Moderator	Constitutional Tribunal of Angola	Face-to-face
Ms. Marie José Zinzindohoue (10 mn)	Judge, Constitucional Court of Benin	Video Conference
Mr. Mbalo Ranaivo Fidèle (10 mn)	High Counsellor, Member of the Malagasy High Constitutional Court, Madagascar	Video Conference
Prof. Haimoud Bâ (10 mn)	Constitutionnel Council of Mauritania	Video Conference
Mr. Idriss Abou	Judge-Supreme Court of Comores	Pre-recorded
Mr. Gama Thomas Samuel (10 mn)	Deputy Chief Justice, Supreme Court of South Sudan	Video Conference
Mr. Jerome Koffi Amekoudi (10 mn)	Judge, Constitucional Court of Togo	Video Conference
Ms. Marie Thérèse Mukamulisa (10 mn)	Vice-President, Supreme Court of Rwanda	Video Conference

10h40-11h

Coffee Break

11-11h30

SUB-THEME 3: Access to the electoral judge

Moderator / Panelists	Institution	Mode of participation
Moderator	Constitutional Tribunal of Angola	Face-to-face
Ms. Hildah Chibomba (10 mn)	President of the Constitutional Court of the Republic of Zambia	Face-to-face
Mr. Manuel Franque (10 mn)	Counselor Judge, Constitucional Council of Mozambique	Face-to-face
Mr. Amadou Ousmane Touré (10 mn)	President, Constitutional Court of Mali	Face-to-face

11h 30-11h 50

SUB-THEME 4: The control exercised by the electoral judge over the electoral process

Moderator / Panelists	Institution	Mode of participation
Moderator	Constitutional Tribunal of Mozambique	Face-to-face
Mr. Kamel Fenniche (10 mn)	President - Constitucional Council of Algeria	Face-to-face
Nadir El Moumni (10 mn)	Counselor Judge, Constitutional Court of the Kingdom of Morocco	Video Conference

11h50-12h30

Debates on Theme 3 sub-themes

4th session

12:30 Closure of the works of 3rd International Symposium of the CJCA

Reading the “Motion of Thanks”

Press briefing

13:00 Lunch

14:30 Cultural program

Part I
Opening Session

Welcome Notes

delivered by His Excellency **Vicente Joaquim**
Secretary of State of the city of Maputo

His Excellency Filipe Jacinto Nyusi, President of the Republic of Mozambique,
***Your Excellency*;**

Honourable President of the Constitutional Council;

Honourable Minister of Justice, Constitutional and Religious Affairs;

Honourable Deputy President of the Constitutional Court of Angola;

Madam Resident Representative of the United Nations Development Programme;

Dear Cooperation Partners;

Distinguished Guests;

Ladies and Gentlemen;

It is with great privilege that on behalf of the **Council of State Representation Services in the City of Maputo** and **on my behalf**, I present my compliments to the distinguished participants of this opening session of the **Third International Symposium of the Conference of African Constitutional Jurisdictions**.

We welcome you all to Maputo City, including those who are participating remotely, and we feel praised by the choice of this city to host this important meeting. We hope that your stay in the city will be pleasant and the atmosphere welcoming for fruitful work.

I would like to congratulate the Conference of African Constitutional Jurisdictions on the decision to hold this extremely important symposium in our City.

Ladies and Gentlemen,

The Conference of African Constitutional Jurisdictions is an extremely important body for member countries, as it allows for the promotion and dissemination of universal values and principles of the rule of law, democracy and human rights enshrined by the African Union, in addition to experiences.

Therefore, we hope that the debates and reflections that will take place here will bring proposals for concrete and consistent solutions that will guide the next steps of this important forum.

We wish to end our intervention inviting those present to delight in our rich and varied cuisine, observing, however, COVID-19 measures.

THANK YOU VERY MUCH FOR YOUR ATTENTION.

Speech

delivered by Her Excellency Ms. **Narjess Saidane**, Resident Representative of the United Nations Development Program (UNDP) in Mozambique

His Excellency Filipe Jacinto Nyusi – President of the Republic of Mozambique,

Her Excellency Lúcia da Luz Ribeiro – Honourable President of the Constitutional Council of Mozambique,

Their Excellencies Honourable Presidents of Courts and Council Members of the Conference of Constitutional Jurisdictions of Africa (CJCA),

His Excellency Gianni Buquicho – President of the Commission for Democracy Affairs at the Council of Europe,

His Excellency Haakon Graam Johannessen – Ambassador of the Kingdom of Norway,

Mr. Mousa Laraba – Permanent Secretary General of the Conference of Constitutional Jurisdictions of Africa (CJCA),

Mr Guy Cyrille Topoko – Director of the Democracy and Electoral Assistance Unit, representing the African Union,

Members of Parliament of the Assembly of the Republic of Mozambique - Your Excellencies,

His Excellency Mr. Eneias Comiche – Mayor of Maputo City Municipality,

Your Excellencies,

Ladies and Gentlemen,

One of the pillars based on the UN Sustainable Development Goals is the triangular or south-south cooperation developed among the countries of the southern hemisphere, established in 1978, and comprising 138 member states. This initiative is considered as "a tool for exchanging and sharing knowledge and initiatives", among others, in the areas of human rights, with a view to producing a sustainable impact on the lives of peoples.
The holding of the 3rd Symposium of the Conference of Constitutional Jurisdictions of Africa, under the auspices of the Constitutional Council of Mozambique, reinforces the commitment of the Mozambican State to fulfilling the Sustainable Development Goals by ensuring the broadest participation of citizens in democratic processes. However, with the outbreak of Covid-19 Pandemic, challenges are imposed on States in the search for solutions that can support a more inclusive and sustainable future, and we are sure that the exchange sessions and the exchange of experiences, in this symposium, regarding the preparation and holding of periodic and regular elections in difficult times will be an added value to the electoral administration and management bodies of Africa in general and Mozambique in particular, taking into account the upcoming electoral cycle.

Your Excellencies,

For the UNDP, as a means of implementing the mandate of the United Nations, the holding of the 3rd Symposium of the Conference of African Constitutional Jurisdictions occurs in the right moment as it coincides with the establishment, following the request made by the Government of Mozambique to the United Nations, and formulation of a new project for strengthening the electoral authorities of Mozambique in view of the electoral cycle 2022 to 2025, which, with the support of cooperation partners, herein represented by His Excellency Haakon Johannessen – Ambassador of the Kingdom of Norway, plans to support the national authorities during the preparation and implementation phases, until the compilation of lessons which will be learned during the upcoming municipal and district elections in 2023 and general elections in 2024.

Therefore, the findings of the exchange of experiences between African constitutional judiciaries, in this high-level symposium, will serve as a guiding instrument for the United Nations to direct its contribution and electoral support to the member states, taking into account the specificities of each jurisdiction.

Your Excellencies, ladies and gentlemen,

A word of appreciation goes to the Honourable President of the Constitutional Council, Dr. Lúcia da Luz Ribeiro, and to the Venerable Councilor Judges, our partners, with whom we have been solidifying cooperation, translated into support for the realization of various initiatives with a view to bringing citizens closer to the constitutional jurisdiction, as well as protecting the rights of minorities in a didactic way, under the principles that embody fundamental rights. We want to recognize and express our congratulations on the organization of yet another initiative with a continental dimension.

To conclude, we wish the greatest successes for this event and may it meet the objectives towards the consolidation of electoral justice.

Thank you very much for your attention.

Statement

delivered by Hon. Dr. **Guilhermina Prata**, Deputy President of the Constitutional Court of Angola representing the President of the CJCA, Dr. Laurinda Prazeres Monteiro Cardoso

Honourable Lúcia da Luz Ribeiro, President of the Constitutional Council of Mozambique,

Honourable Gianni Buquicchio, President of the Venice Commission for Democracy through Law,

Honourable Presidents of Constitutional Jurisdictions, Members of the CJCA,

Honourable Advisors to the Constitutional Jurisdictions, Members of the CJCA,

Representatives of Public Institutions and International Organisations,

Distinguished Speakers,

Ladies and Gentlemen,

On behalf of the Honourable President of the Constitutional Court of Angola and President of the CJCA, Dr Laurinda Jacinto Prazeres Monteiro Cardoso, I would like to present my compliments to all those present and those joining us by videoconference,

and on behalf of the CJCA, to thank the Constitutional Council of Mozambique, through its President, for hosting the 3rd International Symposium of the CJCA.

Allow me, first of all, to express our profound thanks to the Mozambican people and the Constitutional Council of Mozambique for the opportunity to once again visit a friendly country with which we have very strong ties that go back well before the independence of our countries, for yet another warm welcome, and for the excellent working and reception conditions created in this beautiful and welcoming Maputo City, which will certainly enable the holding of this Symposium to be a success.

A word of praise goes to the African Union (AU), as the creation of the CJCA results from a deliberation of the AU, adopted at the 15th Ordinary Session of the Conference of Heads of State and Government, held in Kampala, Uganda, from 25 to 27 July 2010, which aimed to bring together in a single forum the constitutional jurisdictions of Africa, whose mission has been to promote the rule of law, democracy and the human rights defence.

As stated in several documents of the organization, the creation of this space responded to the imperative to bring together the jurisdictions in charge of the control of constitutionality, aiming at the promotion and dissemination of the universal values of the rule of law, democracy and human rights, enshrined in the preamble of the Constitutive Act of the African Union.
This 3rd International Symposium of the CJCA, which starts today, is under the theme: "**Electoral Justice: Transparency, Inclusiveness and Integrity of the Process**".

I believe it will be a good opportunity for the sharing of experiences, best practices, difficulties and solutions to the various problems that the CJCA member jurisdictions have faced in the guise of electoral courts.

It is intended that this Symposium will contribute to an understanding of the dogmatic and scientific evolution in the field of constitutional justice, as well as to the prospect of a better approach, increasingly symmetrical, by the jurisdictions that make up the CJCA, to the electoral issues that are submitted to them, because although a universal constitutionalism is currently being advocated, the sedimentation of an African constitutionalism should not be neglected.

We live in a continent that intends to assert itself increasingly in the field of law and democracy, with the regular holding of elections, in which possible challenges are presented, by constitutional imperative, to the respective constitutional jurisdictions, for final adjudication, which always generates great expectations.

It should come as no surprise that we are living in times when electoral litigation in African countries is one of the most sensitive and divisive issues, given the level of litigation and even some of the belligerence that still exists between contenders in electoral processes on our continent.

It must be emphasized that as stated in the African Charter on Democracy, Elections and Governance, constitutional jurisdictions, in administering electoral justice on behalf of the people, are committed to ensuring that electoral disputes are decided within the timeframe prescribed by law, by conducting themselves in a manner based on transparency, integrity and inclusiveness of the process.

It is recognised, however, that there is still much work to be done in order to conduct transparent processes and thereby ensure the fairness of electoral litigation. This process should be inclusive, in the sense that all parties feel involved and properly informed, as permitted by the constitutional norms on the matter. And finally, constitutional judges must be upright, ruling on the basis of the Constitution, after a thorough and unbiased analysis in accordance with the legal canons.

As constitutional courts, our aim must be to ensure that decisions taken, even if they are again contested by some parties, are properly grounded and supported in the respective Basic Law, aiming at strengthening the democratic state and the rule of law. The constitutional courts are responsible for administering electoral justice, and as members of the CJCA we intend to use all our experience and all our knowledge to ensure electoral justice that is increasingly transparent, inclusive and complete, at the service of the people, in whom lies popular sovereignty.

We hope that this 3rd International Symposium of the CJCA will enable all participants to leave here more enriched by the various constitutional realities and experiences shared and discussed.

I conclude with the expectation that important conclusions may emerge from these two days of work to improve the quality of decisions in constitutional matters in general and in particular with regard to electoral justice, always aiming at ensuring “Transparency, Inclusiveness and Integrity of the Process”.

I declare open the 3rd Symposium of the Conference of Constitutional Jurisdictions of Africa!

Thank you very much!

Speech

delivered by Hon. Mr. **Guy Cyrille Tapoko**, Chief of Democracy and Electoral Assistance Unit, Department of Political Affairs, Peace and Security, African Union Commission

Your Excellency Mr. Filipe Jacinto Nyusi, President of the Republic of Mozambique;

Mr. Vicente Joaquim, Secretary of State of the City of Maputo;

Ms Narjess Saidane, Resident Representative of the United Nations Development Programme;

Ms Lucia da Luz Ribeiro, President of the Constitutional Council of the Republic of Mozambique;

Mrs Guilhermina Prata, Vice-President of the Constitutional Court of the Republic of Angola;

Distinguished Guests; Ladies and Gentlemen; All Protocol Observed.

It is a great honour and pleasure to stand before our erudite brothers and sisters on the African continent to discuss and address one of the major problems of our electoral democracy in Africa: the certainty of electoral justice. Allow me to convey to you the greetings of His Excellency Ambassador Bankole Adeoye, the Commissioner for Political Affairs, Peace and Security of the African Union Commission. The

Commissioner would have very much liked to attend this important conference but has asked me to convey his sincere apologies due to prior commitments. As you may know, the African Union Heads of State and Government Summit period is currently taking place in Addis Ababa, which requires his presence.

Excellences,

As you know, the African continent holds the largest number of elections in the world with an average of 15 elections per year. For the year 2021 alone, at least 17 elections are scheduled, most of which have already taken place since January 2021. This means that no other continent faces as many electoral disputes as Africa and, as a result, the immense burden on the courts to adjudicate these disputes. Since the advent of multiparty democracy in Africa in the early 1990s, experience has shown that electoral conflicts and violence have increased in many countries where elections have been held. In most of these cases, various actors resorted to violence because they refused to accept the results of the elections, either because of fraud or electoral irregularities. In some cases, actors resorted to violence because they do not trust the courts to administer electoral justice.

Distinguished Guests
Ladies and Gentlemen,

We are living in an unprecedented time in electoral practice. The COVID-19 pandemic has created a new dynamic on electoral participation on the continent, as in the rest of the world. Restrictions on people's rights to assemble because of the risks of the spread of COVID-19 have created new sets of conflicts related to electoral participation as well as access to electoral justice. At the African Union, we are developing a Guide on the conduct of elections during the COVID-19 pandemic and other public health emergencies to guide our member states in organising elections that meet international and continental standards for democratic elections in this difficult context.

Excellences,

Over the years, the African Union has played an important role in setting standards for its member states because it has realised that electoral justice cannot be achieved without upholding the rule of law. Of these normative instruments, the African Charter on Democracy, Elections and Governance is central. It sets out the democratic principles that underpin elections, including access and fairness in the administration of electoral justice. Having been involved in many electoral processes on the continent, we are aware of the immense political pressure that our judges face in the administration of electoral disputes. There is a growing body of jurisprudence in the adjudication of presidential election disputes following the annulment of the results of the presidential elections in Kenya and Malawi in 2017 and 2019 respectively. These events demonstrate the determination of the judiciary to protect and safeguard its independence and impartiality, an aspect that is crucial not only for the judiciary but also for election management bodies.

Ladies and Gentlemen,

One of the growing areas that has not received sufficient attention on the continent is the use of alternative dispute resolution mechanisms in the management of election-related disputes. A number of important institutions on the continents have helped to resolve disputes related to electoral competition and participation, which has, in effect, lightened the load of our courts. These institutions include, among others, religious institutions, multiparty liaison committees and peace councils. These institutions need to be strengthened, as do the courts, as they play complementary roles.

Excellences,

The theme of this conference captured the essence of electoral justice. The process must be transparent and inclusive. Equally, we cannot talk about democratic elections if they are not inclusive and transparent. We hope that this conference will highlight the challenges of ensuring inclusive and transparent processes in the administration of electoral justice, in order to design important political trajectories. I would like to recall that elections are not just an event and that many other processes take place before and after elections. The electoral cycle approach can help us to integrate the administration of electoral justice throughout the electoral process, as disputes arise at different stages. Only in this way we can contribute to the call for the Africa we want, as part of Agenda 2063.

I thank you for your attention and wish you fruitful deliberations.

Video Address

delivered by His Excellency **Gianni Buquicchio**, President of the Venice Commission of the Council of Europe

Madam President of the Constitutional Council of Mozambique,

Presidents of the Constitutional Courts Members of the Conference of Constitutional Jurisdictions of Africa,

Honourable Judges,

Ladies and Gentlemen,

It would have been a great pleasure for me to join you in Maputo for the International Symposium of the Conference of Constitutional Jurisdictions of Africa on the "Transparency of Elections in Africa". However, I have to be in Venice to preside the Plenary Session of the Venice Commission.

Let me start by congratulating the Constitutional Council of Mozambique and the Conference of Constitutional Jurisdictions of Africa for having been able to organise this important event in Maputo. While online conferences are certainly useful, meeting in person and exchanging with African Court Presidents and Judges directly - also off the plenary session – is very important to get a real insight into your work and your views.

I am confident that you will have fruitful discussions on the "Transparency of Elections in Africa". This topic is very close to the heart of the Venice Commission and we have worked substantially on this issue.

I should point out that the Venice Commission has adopted numerous opinions and reports in the field of elections. The cornerstone of this work is our Code of Good Practice in Electoral Matters, which is the Council of Europe's reference document.

However, we also adopted, for example, a report and guidelines on the prevention and response to the misuse of administrative resources, as well as joint guidelines on political party regulation. The issue of transparency is a key element of these standards and goes throughout the electoral process.

Elections are not a one-day event, but a whole process going from the registration of voters and candidates to the settlement of electoral disputes on the results. Transparency has therefore to be achieved on several levels.

First of all, transparency is required for the establishment and supervision of the voter registry. The electoral roll has to be published and challenges to the roll must be dealt with in an open manner.

In order to avoid abuse within political parties when they prepare candidacies, the internal accountability and democracy within political parties should be strengthened.

Another key issue is the transparency of the electoral campaigns and campaign financing. Legislation should provide for periodic, timely and transparent reporting on campaign income and expenditure.

The transparency of electoral expenses should be achieved through the publication of campaign accounts. Too often, the incumbent party unfairly benefits from public money and administrative resources. The absence of transparency in private financing may also prevent the establishment of a level-playing field.

In the event irregularities may have affected the outcome, an appeal body must have authority to annul elections. And, of course, the rules on due process, including the publicity of debates and of the judgement, have to apply in the electoral field.

In order to fight corruption, the financial status of elected representatives before and after their term in office has to be scrutinised. A commission in charge of financial transparency should take formal note of the elected representatives' statements as to their finances and deliberately incorrect statements should lead to prosecution.

The law should also provide for effective, proportionate and dissuasive sanctions for non-compliance with these rules.

President da Luz Ribeiro,

I am pleased that you are hosting the Symposium of the Conference of Constitutional Jurisdictions of Africa. We have concluded an important co-operation agreement with your Conference. The Venice Commission remains fully committed to this agreement. In addition to mutual information and participation, this agreement provides for the active contribution of your Constitutional and Supreme Courts and Councils to the Venice Commission's CODICES database.

Established in 1996, CODICES already contains some 11.000 judgments, including more than 1200 from Africa. It is a showcase of your case-law and it is essential that you present your constitutional cases to the other Courts within the region and world-wide in this way.

We are pleased about the active contribution of the African Courts to the CODICES database. In this respect, the Venice Commission is particularly grateful to your liaison officers for their invaluable co-operation.

I warmly invite the Member Courts, which have not yet done so, to appoint liaison officers as soon as possible. The co-operation with the Conference of Constitutional Jurisdictions of Africa is an important vector in the framework of the World Conference on Constitutional Justice in which you participate.
Most of your Courts present are already members of the World Conference, which unites 118 Constitutional and Supreme Courts. I call upon those of you who have not yet joined to do so urgently.

Next year, the World Conference will hold its 5th Congress on "Constitutional Justice and Peace". This Congress will be kindly hosted by the Constitutional Court of Indonesia in Bali on 4-7 October 2022.

The Conference of Constitutional Jurisdictions of Africa has already nominated outstanding Judges and Presidents as chairs and speakers for the 5th Congress. Those of you who have not yet done so, please reply to the questionnaire for the Congress.

I am pleased to announce that – for Member Courts in Least Developed Countries – the Constitutional Court of Indonesia and the World Conference are able to cover the participation of two delegates in the 5th Congress.

President da Luz Ribeiro,

Let me conclude with congratulating you for having chosen this important topic for this Symposium.

The Venice Commission and the World Conference on Constitutional Justice stand ready to continue our fruitful co-operation.

Thank you for your attention.

Speech

delivered by Her Excellency **Lúcia da Luz Ribeiro**, President of the Constitutional Council of Mozambique

His Excellency Filipe Jacinto Nyusi – President of the Republic of Mozambique,

Her Excellency Guilhermina Prata, Honourable Deputy President of the Constitutional Court of Angola, President of the Conference of African Constitutional Jurisdictions,

Honourable Presidents of Constitutional Jurisdictions,

Dear all,

Distinguished participants,

Allow me to begin by expressing our gratitude to His Excellency Filipe Jacinto Nyusi, President of the Republic of Mozambique, for honouring us with his presence in this important event of African Constitutional Jurisdictions, which reflects the commitment and interest of the Head of State for matters relating to constitutional justice.

We also avail of this opportunity to present our compliments to all of you who have come to Maputo from various parts of Africa to take part in this Symposium, which is expected to be fruitful, judging by the quality of the participants and the chosen

theme. Our compliments are also extended to all those who, not having been able to attend this event from Maputo due to different circumstances, are participating through digital platforms.

We wish to express the uncontained joy for the CJCA having accepted our offer to host the 3rd Symposium of African Constitutional Jurisdictions in Mozambique.

This occasion is a moment of joy, as the month of October is particularly special to our country. On October 4, 1992, the General Peace Agreement was signed in Rome, putting an end to the 16-year armed conflict. This achievement allowed the first multi-party general elections to be held in Mozambique, in 1994, comprising presidential elections and elections for Members of Parliament to the Assembly of the Republic of Mozambique, following the approval of the 1990 Constitution of the Republic, which introduced the multi-party system. Another noteworthy aspect is the fact that October is the month that coincidentally was chosen for the voting.

Knowing that in almost all our countries the top bodies of the Constitutional Jurisdiction or Supreme Courts are also the last instance of electoral jurisdiction, the CJCA has properly chosen the following as the theme for this symposium: "ELECTORAL JUSTICE: TRANSPARENCY, INCLUSION AND INTEGRITY OF THE PROCESS".

We are absolutely convinced that the quality of the presentations and the richness of the debates that will follow, more than identifying problems, will allow us to truly discover some realistic solutions adjusted to the reality of our continent and also applicable in other quadrants.

As we are having the privilege of holding the symposium in our country, we wish to call on the physical participation of district judges, public prosecutors based at the district courts, which during the electoral period operate as the first instance, and at the same time we also wish to extend our invitation to the National Electoral Commission to attend this event.

Ladies,
Gentlemen,
Your Excellencies,

We would like to warmly thank the United Nations Development Programme and the Kingdom of Norway for their generous and ongoing support, and everyone who has contributed to making this event a reality. Our thanks are extended to the Executive Secretariat of the CJCA for monitoring the entire organizational process of this meeting. To conclude, we avail ourselves of this opportunity to renew to you our warm welcome and we wish you to feel at home.

THANK YOU VERY MUCH!

Maputo, 14th October, 2021

Statement

delivered by His Excellency **Filipe Jacinto Nyusi**, President of the Republic of Mozambique and Head of State

Honourable President of the Constitutional Council of Mozambique;

Honourable Presiding Judges of the Constitutional Jurisdictions of Africa;

Honourable President of the Supreme Court

Honourable President of the Administrative Court;

Most Honourable Attorney General of the Republic;

His Excellency the Secretary of State in Maputo City;

Honourable Judge Advisors

Distinguished guests;

Ladies and Gentlemen!

It is with great satisfaction that we welcome the Third International Symposium of the Conference of Constitutional Jurisdictions of Africa, under the theme “Electoral Justice: Transparency, Inclusiveness and Integrity of the Process”.

We wish, therefore, to warmly welcome all participants in this event, which aims to promote constitutional justice and the exchange of experiences between the member bodies of the organization.

A word of appreciation goes to the forty-six permanent members and the three observers at the Conference, as well as to all those who are participating at this time, directly or virtually, due to the COVID-19 restrictions.

Dear Participants!

The Third International Symposium of the Conference of Constitutional Jurisdictions of Africa (CJCA) takes place at a particular moment for the country, as approximately 10 days ago, on 4th October, we celebrated the Day of Peace and Reconciliation and the Twenty-ninth Anniversary of the signing of the Peace Agreement.
The implementation of this Agreement has brought about changes in Mozambique, particularly in the organisation of the State and the Constitution of the Republic.

From the General Peace Agreement, we produced the legal basis for the establishment and registration of political parties, introduced the process of holding regular elections every five years, and the elected bodies exercise political power in accordance with the terms of office provided for in the Constitution of the Republic.
The holding of the first multi-party general elections on 27 October 1994, two years after the signing of the General Peace Agreement, established a new formula for political participation and the election of the people's representatives in Mozambique. Since then, all the planned elections have been held cyclically, without interruption, respecting the will of the Mozambican people.

These elections were preceded by systematic amendments of the electoral legislation and some improvements to the Constitution of the Republic itself, as happened in 2004 and with the one-off amendment in 2018.

Therefore, the theme chosen for this event "Electoral Justice: transparency, inclusiveness and integrity of the process" is of notable relevance as, currently, elections constitute the democratic mechanism for access to political power, a rather dynamic exercise.

Hence, the event gains a unique importance because discussing electoral justice is to reaffirm the validity of all the premises of a rule of law and the political participation of citizens in making fundamental decisions of their state.

Honourable Judges

Ladies and Gentlemen!

The electoral process in Mozambique is based on two main principles. First, the principle of inclusion and integration, allowing political parties and candidates who

meet the pre-established requirements of the electoral legislation to participate in the process.

Second, the principle of transparency through the existence of specific bodies to administer the electoral process, such as the National Electoral Commission supported by its technical branch, the Technical Secretariat for Electoral Administration.

In our country, the National Electoral Commission is a body comprised of members appointed by Parliament, considering the principle of proportionality of the parties with parliamentary seats.

It also includes members from the civil society, thus safeguarding the inclusiveness and integrity of the process.

As a way of safeguarding the independence, impartiality and responsibility of the managers and electoral administration bodies, thereby contributing to the smoothness of the electoral processes, Mozambique has counted on thousands of national and international observers throughout its democratic history.

We are also pleased to note the central role played by the media and the coverage provided by their professionals, in particular the journalists, who follow the entire electoral process from the submission of candidacies, the electoral campaigns, polling day, the appeals lodged, to the day the results are proclaimed.

Regarding electoral justice, one of the guarantees of the electoral process is the independence of the bodies of electoral administration and the role played by the judicial bodies.

In this context, greater emphasis goes to the Constitutional Council that, under our Basic Law, has the responsibility to administer, in the last instance, the electoral appeals and complaints, as well as to validate and proclaim the electoral results.

Therefore, we believe that the elections in Africa should not be the basis for post electoral conflicts, but rather an opportunity to celebrate for the People who democratically elected their leaders.

It was towards this end that the African Heads of State, in the Constitutive Charter of the African Union, defined as one of the objectives of the Union “to promote democratic principles and institutions, popular participation and good governance”.

And in the African Charter on Democracy, we recognised the obligation to “promote democracy, the principle of the rule of law as well as human rights.”

The same instrument states that “States consider popular participation through universal suffrage as an inalienable right of peoples.”

It is within the framework of these principles, commonly accepted in Africa, that we must always reaffirm the postulates of the Constitutive Charter of the African Union and the African Charter on Democracy, condemning the use of illegitimate and unconstitutional means to access political power.

Distinguished Participants!

We appreciate and recognise the role played by Constitutional Jurisdictions in upholding democratic principles and ensuring transparent, fair and integrity elections through their role as guardians of the Constitution and electoral laws.

We recognize the role that the African Constitutional Jurisdictions have in promoting and disseminating the universal values and principles of the Rule of Law, Democracy and Human Rights enshrined in the Constitutive Act of the African Union.

We are, therefore, convinced that the Constitutional Council, as well as the constitutional courts and supreme courts present here have a fundamental role in the dissemination of the Constitutions of the Republic of each African country to its citizens.

In order to successfully accomplish this mission, we recommend the use of the most widely spoken local languages and all means of information and communication so as to enhance democracy.
The constitutional jurisdictions of Africa shall always bear in mind that the constitution, as the basic law, shall position itself as the fundamental criterion and limit of action for all public and private entities.

They should be cultivated from a perspective that goes beyond mere legalism, with an approach that seeks to associate the socio-cultural aspects and the present values of each society to the norm.

Constitutional justice should function as the last backstop of democracy and its judges should assume the role of legal activism, aiming to expand its educational function to its target audience, the People.

Constitutional courts must guarantee popular participation in the life of each Nation, enhancing the practices of good governance, as a platform of “open doors”, transparency, inclusion, having as a central element the human dignity, because the affairs of the State affect humans.

We would like to take this opportunity to salute the Constitutional Council of Mozambique, which celebrates its Eighteenth Anniversary on 3 November.

Its integration in similar cooperation forums in Africa and the rest of the world will enable the sharing of experiences to enhance Mozambican democracy.

We also welcome the participation in this important event of African constitutional

jurisdictions, Mozambican citizens and electoral management bodies, aiming at enriching the debates and gathering more experiences from other territories.

Dear Participants!

We share the information that Mozambique is a candidate for non-permanent membership of the United Nations Defence and Security Council, endorsed by the African Union and SADC, and we are counting on your countries for the final decision, in order to give us the opportunity to put our experiences at the service of world security and stability.

Allow me to conclude my greeting by reaffirming our commitment endorsed by the African Union through the Charter on Democracy, which defines as one of the objectives of the Union "promoting and protecting the independence of the judiciary". We hope that the debates will be fruitful and that the objectives outlined will be achieved.

We wish all of you who have travelled to our country a pleasant stay in Mozambique.

Thank you very much for your attention!

Souvenir Photo

3rd International Symposium of the CCJA
14-15 October, 2021 | Maputo, Mozambique

Part II
First Session

THEME 1:
Guarantees of transparency, inclusion and integrity of the electoral process

SUB-THEME 1:
The decisive factors and criteria for the transparency, inclusion and integrity of the electoral process

Paper

presented by **Dr. Guilhermina Prata**,
Vice President of the Constitutional Court of Angola

Your Excellency, Dra. Lúcia da Luz Ribeiro, Honorable President of the Constitutional Council of Mozambique,

Your Excellency, Narjess Saidane, Resident Representative of the United Nations Development Programme,

Your Excellency, Ambassador Bankole Adeoye, African Union Commissioner for Political Affairs, Peace and Security,

Your Excellency, Dr. Gianni Buquicchio, President of the European Commission for Democracy through the Law - Venice Commission,

Your Excellencies Judges Presidents of the Constitutional jurisdictions, members of the CCJA,
Venerable Judges of the Constitutional jurisdictions, members of the CCJA,

Representatives of Public Institutions and International Organizations,

Distinguished lecturers,

Ladies and Gentlemen,

Allow me to starts by saying that we are pleased to present at this magnificent International Symposium the theme proposed to us, from now on, let it be said, for a very preliminary conclusion, which is as follows: to talk about of electoral process, as an act of election of the legislative and governmental bodies of a State through the

simple exercise of the right to vote, is different from talking about decisive factors and criteria for the transparency, inclusion and integrity of the electoral process.

The benefit of making this distinction bringing us closer to the doctrinally predominant idea that electoral processes exist in the world for legitimation policy of the sovereign bodies, but not all electoral processes, otherwise none, have a sublime maturity and an immeasurable wealth of factors and decisive criteria for its transparency, inclusiveness and integrity.

Dealing with this theme, it can be observed that the convergent element in most of the States is the existence of an electoral processes, or better, the democratic legitimation of political power through constituent processes, which changes, with headways and setbacks, but more advances than setbacks, in each cycle of periodic renewal of the organs of sovereignty.

In my country, Angola, the electoral process began in 1992, with the transition from one-party to multi-party State and carrying out the first general elections that history has ever known, 17 (Seventeen) years after the proclamation of independence, which took place in 1975.

The Republic of Angola established the Democratic State governed by the Rule of Law in 1991, with Constitutional Law No. 12/91, of 6 May, which was revised by Constitutional Law No. 23/92, of 16 September, and revoked by the Constitution of the Republic of Angola (CRA), of 2010. Finally, the CRA was amended by Law No. 18/21, of 16 August.
With this Constitution and the approval of Law no. 5/92 of 16 April – Electoral Law, the Republic of Angola held its first elections, and despite the special moment - as they took place shortly after peace was reached, the existing factors and criteria led all national and foreign entities involved in the supervision process to consider them free, fair and transparent.

However, with the release of the definitive results, one of the competitors did not recognize the result and the country returned to war.

A second electoral law was then approved, Law no. 6/05, of 10 August, giving the Constitutional Court the powers to approve the processes for the constitution of political parties and the judgment of electoral disputes.

In 2008 the second elections were held, with reinforced transparency criteria, which were considered equally free, fair and transparent by all interveners, both internal and international, but which did not cease to be contested by the opposition.

In 2010, the CRA was approved. The following year, a new electoral law was approved, more robust in terms of rules and transparency criteria, which is Law no. 36/11 of 21 December (Organic Law on General Elections - LOEG).
The Law on the Organization and Operation of the National Electoral Commission, the Law on Nationality, the Law on Political Parties, the Law on Political Party Financing,

the Electoral Observation Law, the Press Law and the Code of Electoral Conduct were also approved.

Unfortunately, these instruments and criteria have not ruled out the opposition's challenge on the transparency of the electoral process, under the pretext that the electoral system in force does not allow the participation of all those involved in the election supervision process, namely the representatives of all the competing parties, in all their phases and throughout the country.

In most countries, equally in African countries, the electoral process, involving the participation of a President of the Republic, for calling the elections, from bodies of the independent electoral administration, to carry out the ballot, and the Constitutional jurisdiction, for appreciation of electoral litigation, commonly comprises the following five phases:

i) The first phase is the **electoral registration**, which includes the process of carrying out all the registration and electoral registration litigation;

ii) The second phase is **the call for general elections** (in which it is inserted prior consultation by the Head of State, the Council of the Republic and the National Electoral Commission) and the proper act of calling the general elections;

iii) The third phase is **the submission of candidacies**, which comprises the collection of signatures by political parties or coalitions of political parties that intend to run in the general elections, the appointment of the list of representatives of the political parties, the litigation, claim and challenging the applications from the candidates;

iv) The fourth phase is **the electoral process in stricto sensu**, which includes the drawn of the candidacies, electoral campaign and propaganda monitoring, the elaboration of electoral rolls, electoral geo-referencing, indication of polling assemblies and polling stations, the counting of votes, the assignment of mandates, the declaration of the winner of the general elections, the declaration of election of the President of the Republic and the Vice-President, and its electoral administrative litigation;

v) The fifth phase concerns **the judicial electoral litigation**, where it is inserted the appeal processes of interim or definitive tabulation acts of the electoral results, carried out in the course of the electoral process.

Looking at the aforementioned phases, it can be questioned whether there are or not decisive factors and criteria for transparency, inclusion and integrity of the electoral process, that are universally recognized and welcomed in the internal public law of all States.

Although we can claim, without fear of mistake, that, rules in general, the factors and decisive criteria for the transparency, inclusion and integrity of the elections process vary depending on the electoral system adopted by each country, the answer to the above question is not difficult to elaborate, mainly because the transparency, inclusion

and integrity of the electoral process depend on almost universal rules and principles of Electoral Law, in all countries with a democratic Constitution.

However, political, social, economic and cultural factors, which vary from country to country, functional criteria of the State bodies involved in preparation, organization, carrying out and finalizing the electoral processes, are important for the analysis of this theme.

Among decisive political factors for the transparency, inclusion and integrity of the electoral process, the recognition, by the organs of the political power, of the values of democracy, the separation of powers and sovereignty of the people, can be evidenced. The importance that any State ascribes to these values creates a framework for regular and permanent exercise of both fundamental rights of freedom as much of the rights of political participation of citizens, and the political parties and coalitions, in general or autarchic elections, decisively reinforcing the transparency, inclusiveness and integrity of the electoral process.

Among social components, it can highlight the social stability, territorially widespread, associated with high collective legal awareness of citizens and political parties that, integrated into State bodies or simply participating in the electoral process, transform the common recognition that they attribute to justice, transparency and the public dignity of the act of electing, as a catalyst element for the democratic quality of the elections process.

In the economic field, stands out the free movement of persons and goods throughout the territory of the State. The approval of a sufficient budget to carry out the elections, the allocation of funds to support the candidate's electoral campaign, the investment in computerization and technological modernization of the electoral process, in the registration of all citizens of voting age, in the installation of assemblies of vote in all remote places of the country, as well as the media involvement in dissemination of the candidates's governance programs, in fact, they are decisive factors for transparency, inclusion and integrity of the electoral process.

The culture of peace, unity, reconciliation and of the one, indivisible and sovereign State, are decisive factors to the existence and permanent development of transparency, inclusion and integrity of any electoral process.

It should be emphasised however that, regarding the functional criteria of transparency, inclusion and integrity of the electoral process, these are interconnected with the acts of State bodies at every stage of the electoral process.

So, it should been taken into account that proliferation of laws regarding the organization, composition, attributions and functioning of the bodies involved in calling, preparing, carrying out and judging the general election processes, and permanent amendment, revocation or approval of such diplomas, especially in the years of general or autarchic elections, undermine the transparency, inclusion and integrity of the electoral process,

therefore, situations like that can hinder the clear understanding from the members of political parties and the citizens in general about the electoral process in which they will participate.

The predictability of laws that establish clear and objective criteria for the draw of lists of candidacies, the equal treatment, the freedom of expression and information, freedom of assembly and demonstration, definition of types of advertising and propaganda, the inspection and accountability, responsability for electoral offences, the participation of delegates from political parties in the control of all acts related to voting and scrutiny, and participation of the representatives from the political parties in the activities of tabulation and of scrutiny at all levels, are decisive criteria for transparency, inclusion and integrity of the electoral process.

The participation of national and international observers, in order to verify the impartiality of electoral bodies, the legality of administrative and jurisdictional decisions, as well as the development of the electoral campaign and the tabulation procedure carried out by the independent administrative body that conducts the ballot, is also a decisive factor for the credibility of the electoral process.

It matters to consider that, the respect of the organs of political power involved in the holding of elections, for the supremacy of the Constitution and the law, as instruments of protection of universal, direct, secret and periodic suffrage, of safeguarding the republican form of Government and guaranteeing the democratic State based on rule of law, it is also a decisive factor for the transparency, inclusion and integrity of the electoral process.

Finally, analyzing the decisive factors and criteria for the transparency, inclusion and integrity of the electoral process implies the recognition of the role of the Superior Courts with jurisdiction in matters of a political-electoral nature, since the validity of any election depends on fair and constitutionally valid decisions, issued by the aforementioned Courts with electoral jurisdiction.

Thank you!

SUB-THEME 1:
The decisive factors and criteria for the transparency, inclusion and integrity of the electoral process

Paper

presented by Prof. **Lúcia da Luz Ribeiro**,
President of the Constitutional Council of Mozambique

"The will of the people is the foundation of the authority of public powers: and it must be expressed through honest elections to be held periodically by universal and equal suffrage, with secret ballot or by an equivalent procedure that safeguards the freedom to vote."

no 3 of article 21 of DUDH [1]

Abstract

The holding of periodic, general, free, equal and secret elections is a key element of the democratic process. Elections are the mechanism through which the sovereign people legitimise the exercise of power by their representatives. This principle is indisputable and the debates it raises concern its implementation, the transparency of the process, inclusiveness and integrity. What assumptions, in the Mozambican legal system, should be considered to achieve this desideratum?

Keywords: Elections; Transparency; Integrity and inclusiveness.

1- Introduction

Elections form the basis of the concept and practice of modern liberal democracies, carrying within them a dual significance: (a) they serve as a mechanism for legitimising the political regime and (b) they provide the principal forum for both political competition and popular political participation. In both senses, elections concur to ensure popular control over government.

It is impossible to conceive a democracy or an effective rule of law that is not based on clear and precise rules that reflect in the fairest way the will of the majority of the

1 United Nations Universal Declaration of Human Rights of 1948.

population in electoral contests. That is why the adoption of electoral legislation and the organisation of electoral processes nowadays involves a constant concern with enshrining rules that ensure the transparency of the process, inclusiveness and its integrity, aiming at guaranteeing stability and peace.

What assumptions should be considered for the transparency, integrity and inclusiveness of electoral processes? Is the Mozambican legal system consistent with them? Who is responsible for supervising the various stages of the electoral process? What are the main measures aimed at the inclusion of electoral stakeholders?

In this approach, which will be based on the analysis of the positive legal framework, we will analyse the legal parameters enshrined in the Mozambican electoral law to achieve this desideratum. Thus, this approach will be composed as follows:

1 - Introduction;
2 - Positive Legal Framework;
3 - Jurisdictional Guardianship;
4 - The Ombudsman;
5 - Inclusion and Equality;
6 - Voter Registration;
7 - Freedom of Vote;
8 - Guarantees of transparency of the electoral process through the electoral bodies;
9 - Guarantees through monitoring by candidates and voters;
10 - Guarantees of transparency through election observation;
11 - Guarantees of electoral transparency through the media;
12 - Electoral Civic Education;
13 - Financing of political parties;
14 - Final remarks;
15 - References.

2- Positive Legal Framework

Mozambique is a country of approximately 27,909,798 million people, according to the 2017 Population Census[2], **although currently there is talk of just over 30 million Mozambicans.** The 2019 Electoral Census[3], resulted in 13,162,321 (thirteen million one hundred and sixty-two thousand three hundred and twenty-one) voters registered for the General Elections (Presidential and Legislative) and 12,235,655 (Twelve million two hundred and thirty-five thousand six hundred and fifty-five) voters registered for the Provincial Assembly elections. The administrative division of the country establishes 10 provinces and Maputo City (the capital), which has provincial status. These 11 provinces constitute the constituencies for general elections.

The 1990 Constitution of the Republic[4], elaborated within the framework of the institutionalization of the multiparty system, enshrined the Democratic and Social Rule

2 According to the National Institute of Statistics available at http://www.ine.gov.mz/iv-rgph-2017/mocambique.
3 Judgment No. 25/CC/2019 of 22 December, available on the Jurisprudence website (cconstitucional.org.mz).
4 1990 Constitution of the Republic, published in the Official Gazette no. 44, Series I of 2 November 1990.

of Law, thus establishing the primacy of the Constitution. This Constitution discarded the constitutionally conforming political principles of the material Constitution of the People's Republic of Mozambique of 1975, namely the structuring principles of the political regime, the form of government, political organisation in general and those of economic and social organisation.

In the wording of the 1990 Constitution, the principle of constitutionality in general was manifested in the binding of the exercise of popular sovereignty to the forms established[5] therein and in the imposition on citizens of the duty to respect the constitutional order[6]. This constitutional framework resulted from the constitutional amendment of 1990 and the consequent signing of the General Peace Agreement in 1992[7], in Rome, which put an end to a period of progressive economic crisis, of resurgence of internal political conflicts that degenerated into bloody civil war, aiming at an effective peace that offered a new course for the consolidation and strengthening of a Democratic State under the Rule of Law.

Mozambique came to enshrine a political regime guided by democratic ideals in which all citizens are called upon to participate actively and permanently in the political life of the country, thus reflecting a right and duty of citizens to participate in order to enhance and consolidate democracy at all levels of society, making it concrete, through a process of their own, in the choice of the people who will represent them in the exercise of governance.

With the end of the 16-year war, the introduction of multiparty democracy allowed for the holding of the first multiparty elections for the President of the Republic and the National Assembly in 1994, and in June 1998, the first local elections took place, which, following the adopted legislation, were limited to only 33 cities and villages.

5 Article 2(2) of the 1990 Constitution.

6 Article 85 of the 1990 Constitution.

7 The AGP included seven protocols drawn up by the parties over two years of negotiation, of crucial importance being: protocol (i) on fundamental principles, through which the parties defined the spirit that should guide dialogue aimed at achieving peace; protocol (ii) on criteria and modalities for the formation and recognition of political parties, through which the parties agreed on the mechanisms that would guide the formation and legal recognition of political parties, including Renamo, thus responding to one of the main demands of that movement protocol (iii) on the principles of the electoral law, outlining the entire framework that would serve as a basis for drafting and approving the law in reference with the involvement of Renamo and other political parties; protocol (iv) on military issues, defining the principles and mechanisms that would guide the peacekeeping process, demobilization of government and Renamo forces, formation of the new unified army for which each of the parties to the conflict should provide 50% of the men for its composition, and the social reintegration of the demobilized into civilian life protocol (v) on guarantees, in which guarantees were given for electoral processes, ceasefire, demobilization and social reintegration of ex-combatants, formation of the new unified army, repatriation of refugees, maintenance of a Renamo force responsible for the security of its leaders, and the appointment of elements of the guerrilla movement for the administration of districts located in regions it controls until the new government resulting from the elections is formed, among other guarantees; Protocol (vii) on the donors' conference, in which the parties agreed on the need for immediate mobilization of financial resources for the implementation of the General Peace Agreement, as well as for the financing of the transformation of Renamo into a political party, thus ensuring the political strengthening of the movement and, consequently, a dignified participation in the whole process of implementing the agreement in reference. As can be seen, with regard to content, the AGP was very detailed, covering the main concerns raised by the parties to the conflict at military, political, economic and financial levels.

The General Peace Agreement played an important role in the democratic transition process in Mozambique, and since then, the democratic experience has matured not only with the multiplication of political parties, but also by the extension of the electoral principle, as attested by the recent Law of Punctual Amendment of the Constitution of the Republic (Law no. 1/2018 of 12 June), which introduced the concept of decentralised governance, enabling the election of provincial governors for the first time in the 2019 elections.

It is important to note here that Mozambique has already had three Peace Agreements, specifically:

1. On the 4th October 1992 - General Peace Agreement - in Rome - signed by the then President of the Republic Joaquim Alberto Chissano and Afonso Marceta Dhakama - then President of the Mozambican National Resistance
2. On 5 September 2014 - Cease of Military Hostilities Agreement - in Maputo - signed by the then President of the Republic Armando Emílio Guebuza and Afonso Marceta Dhakama - then President of the RENAMO Party
3. On 6 August 2019 – The Final Peace Agreement - in Maputo – signed by the President of the Republic Filipe Jacinto Nyusi and Ossufo Momade - President of RENAMO

In his definition, the American scholar Robert Dahl established eight minimum formal criteria for characterising a system as democratic, of which five make direct reference to the holding of elections, namely:

(i) The right to vote;

(ii) Eligibility;

(iii) The right to political competition for support and votes;

(iv) Free and fair elections;

(v) Subjecting political decisions to the results of elections and other forms of preference articulation[8].

Elections associate democracy with political competition or contest. However, we know that elections are not only a way of appointing rulers, but are also a source and condition of the system's governability because they ensure that the system functions on the basis of a minimum social consensus, capable of isolating and maintaining the forces that challenge and propose alternative systems.

However, we all know that the reality of our countries is often different, since elections legitimise de facto and de jure governance, but these are tainted by the losers who, characterised by poverty or a "*deficient culture of democratic legality*"[9], do not accept

8 Dahl, Robert A, Democracy and its Critics, New Haven, 1989, p. 221. The other minimum preconditions for considering a system as democratic are, according to Dahl: Freedom of association, freedom of opinion, the existence of and access to various sources of information.

9 Ruling 30/CC/2009, 27 December, available at Jurisprudence (cconstitucional.org.mz).

the results and sometimes resort to armed violence, which sacrifices millions of innocent citizens and consequently increases the poverty levels of the population.
The 2004 Constitution of the Republic, in article 3, explicitly states the option for a democratic and pluralistic State based on the rule of law. The CRM presents the outlines of these conditions of democracy: the configuration of political rights and political freedoms, with universal, equal, direct and secret suffrage, the freedom to create political parties (articles 73 (Universal suffrage) and 74 (Political parties and pluralism). The two main components of contemporary democracy are political parties and periodic elections.

Political parties were created with the fundamental aim of participating democratically in the political life of the country. They contribute to the formation and expression of the political will of the people, and participate in elections by presenting candidates[10]. In fact, article 74 of the CRM states that they express political pluralism and contribute to the democratic participation of citizens in the governance of the country.

The law states that political parties must be national in scope, defend national interests, contribute, through participation in elections, to the exercise of citizens' political rights, contribute to the formation of public opinion on national and international issues, strengthen the patriotic spirit of citizens and the consolidation of the Mozambican nation, contribute to the peace and stability of the country, not advocate or resort to violence to change the political and social order of the country, not be separatist, discriminatory, anti-democratic or based on regionalist, ethnic, tribal, racial or religious groups, etc.

Political parties must have sufficient organisational capacity to achieve their main objectives, reaching out to potential members who share their interests. This relationship means that parties must possess adequate financial capacity to campaign during the election period, remain in contact with the electorate outside these periods and, if elected, research and develop policies, which aim to satisfy the public interest. It is in the Constitution of the Republic that Electoral Law, like other branches of Law, finds its structuring principles. The Supreme Law advocates the necessary legal architecture and institutions for the holding of elections. It refers to the Electoral Administration and Management Body, which comprise the National Electoral Commission (CNE), article 135.3 of the CRM (General Principles of the Electoral System).

We would say that the principles complement, condition, modify and harmonize each other, acting together in the making of the legal system. Moreover, the principles[11]

10 Political parties, established in accordance with the CRM (articles 53 and 74 to 77) and the (Law No. 7/91, 23 January, regulated by Ministerial Diploma No. 11/91, 13 February and revised by Law No. 14/92, 14 October), play an important role in citizenship education for their members and supporters, not only during election campaigns, but also when, outside of the election season, they try to attract more members and supporters by explaining their programmes and statutes, based on democratic principles, good coexistence between people, tolerance, etc.

11 For Jorge Miranda, Electoral Law is part of Constitutional Law. Thus, "the fundamental principles of political electoral Law are constitutional principles. There are no principles of political electoral Law that are not also political-constitutional principles, that do not reflect, directly or indirectly, fundamental axiological principles and that are not also projected into instrumental constitutional principles" (MIRANDA, Jorge. Constitutional Law III: Electoral Law and Parliamentary Law. Lisbon: Law Faculty Academic Association, 2003, p. 18.

of Electoral Law are enshrined in the essential content of the Constitution. This is understandable since, under the rule of law, the rules of the political process, specifically the techniques for obtaining, exercising and losing power, are constitutionally enshrined and consequently bind both the holders of power and the citizens equally.

(...) The EISA[12] observer mission noted that in response to the Principles for Electoral Management, Monitoring and Observation, the Constitution of the Republic has the following mechanisms:

(i) It guarantees fundamental freedoms and promotes the values of political stability;

(ii) It establishes mechanisms for the adjudication of conflicts arising from electoral processes;

(iii) It has mechanisms for the amendment of the Constitution, which have been applied for its continuous amendments with regard to electoral processes;

(iv) It establishes equality mechanisms in general, and gender equality in particular, although it does not have specific mechanisms for affirmative action;

(v) It establishes a defined electoral system".

To these mechanisms we can add the set of rules that establish the legitimacy of rulers in the Mozambican constitutional system, among others, the following general constitutional principles: the republican principle, the democratic rule of law, citizenship and political pluralism. As for the specific ones, we can point out those related to elections (principle of periodicity), principles related to the electoral legal system (hermeneutic principles in electoral matters), (proportional representation in relation to the collegiate bodies), (impartiality of public entities); principles pertaining to political parties (freedom of party organization and party fidelity), principles pertaining to electoral campaign (legality, freedom, responsibility, equality and judicial control), (protection of confidence) and finally principles pertaining to the Electoral Procedural Law (due legal process and preclusion).

These principles, which are the foundations of the political-electoral regime, condition the interpretation of the rules and are criteria of validity of electoral laws and justification of judicial decisions. Electoral laws, like other laws in general, must therefore be interpreted within the legal-constitutional framework to which they relate and the prevailing civic culture in each country, community or group, as well as interpreted according to the ends they are intended to achieve and in line with the development and degree of implementation of democracy. "It is imperative to scrupulously observe the constitutional and legal precepts that regulate electoral procedures, precepts that, although they discipline formal aspects, do not cease to be true legal norms of mandatory compliance, in harmony with the fundamental principles of constitutionality and legality that guide the Democratic Rule of Law[13]".

12 Report of the EISA international election observation mission, Mozambique, Presidential, Legislative and Provincial Elections in the Republic of Mozambique 15 October, Report No. 66 of the EISA international election observation mission, 2020, pp. 14-15.

13 Judgment No. 5/CC/2014 of 26 February, available at http://www.cconstitucional.org.mz.

The principles set out here are beyond the power of reform of the CRM itself, as they constitute material limits of constitutional amendment. They are structuring principles, which refer to the value of legal security proper to the conception of a Rule of Law and which translate into the bonds arising from the principle of legitimation of the exercise of political power: the consent of the people, through elections in the democratic process.

"Electoral legislation constitutes a fundamental pillar of the democratic rule of law, guarantees the rights of citizens, the effective exercise of sovereignty by the People and the establishment and functioning of the respective bodies[14]".

In our country, electoral rules succeed each other rapidly, being changed on a large or medium scale, in each election, having seen reforms in electoral legislation and regulations for the 2009, 2013, 2014, 2018, and 2019 elections.

It should be noted that the reforms introduced in the legislation for the 2019 elections were the result of negotiations between the Mozambican government and RENAMO and were supported in Parliament by the three parliamentary parties FRELIMO, RENAMO and MDM.

It is our conviction that the approval of electoral legislation by consensus is a fundamental principle for the confidence of political actors in the process. Moreover, regarding the electoral legislation, the Constitutional Council, in Judgment No. 21/CC/2014 of 29 December[15], regarding the validation of the 2014 General Elections, stated that "*the consensus in the approval of the electoral laws in Parliament (...) reinforces or should reinforce the democratic legitimacy of the legal and constitutional framework regulating the electoral processes in Mozambique*".

This approval occurred about 6 months[16] before the voting date. All amendments have been consensual, although the Constitutional Council has always commented in several judgements on the need to stabilise the electoral legislation so as to consolidate it. See the pronouncement[17] of the Body in the following terms:

> "With due recognition to the legislator's effort to increasingly perfect the electoral legislation, the Constitutional Council considers it opportune to renew the call for the need to stabilize and consolidate the electoral legislation in order to avoid, for each new election, the approval of new legislation".

14 Deliberation No. 5/CC/05 of 19 January, available at http://www.cconstitucional.org.mz.

15 Available at http://www.cconstitucional.org.mz.

16 Law No. 15/2009, of 9 April, establishes the legal framework for the simultaneous holding of Presidential, Legislative and Provincial Assembly elections), published in the Official Gazette. R. nº 14, I Series, of 9 April.

17 Judgement 02/CC/2009, of 15 January, available at http://www.cconstitucional.org.mz.
In the same sense, see the following pronouncement: "One notes once again the reiteration of the practice of approving new electoral legislation for each election, a phenomenon which, although it may be justified by the need to respond to concerns either of some political actors directly involved in the electoral processes or of observers or development cooperation partners it has not contributed to the desired stabilization of Mozambican electoral law, and it also entails the inconveniences often pointed out by this Constitutional Council in rulings concerning the validation and proclamation of the results of previous elections, Judgment No. 4/CC/2014 of 22 January, available at http: //www. cconstitucional.org.mz.

It should be noted that the late approval of the electoral laws has had implications on the course of the electoral process, a fact aggravated by the poor assimilation by electoral actors. The Constitutional Council stresses[18] that,

> "the multiplicity of electoral laws that, although regulating different elections, contain broadly the same general principles and rules, ultimately affecting the unity and coherence of the electoral law system. This, combined with deficiencies in the formulation of some norms, makes it difficult for the various actors in electoral processes to interpret and apply them. "*There is, therefore, an urgent need to move towards a better systematization and standardization of electoral legislation as a whole, through an Electoral Code*".

The legal framework provides guarantees of transparency in the electoral process. In general, the Mozambican electoral laws have been characterized by a high degree of detail on the rules and procedures to which electoral acts and operations at each stage of the process must be subjected, whether by voters, by the electoral administration and justice bodies, by political parties, by groups of citizens proposing candidates, or by candidates to enforce their rights and interests recognized and guaranteed by the legal system.

Furthermore, it is clear that the reforms of the electoral legislation, from that of 1999 to the recent one, converge in the sense of conferring ever greater transparency and security to electoral processes, by incorporating the concerns, mainly, of the political parties and the various organizations of civil society and of national and international observers, (...). This legislation enshrines a set of guarantees of transparency in the electoral process, as follows:

3- Jurisdictional Guardianship

Although in the Mozambican legal system, electoral guardianship is of an eclectic nature, since it is granted, on the one hand, to electoral administration bodies (political model) and, on the other hand, to jurisdictional bodies, with the establishment of jurisdictional guardianship through the Constitutional Council, which is responsible for judging, in the last instance, the regularity and validity of acts of the electoral process, pursuant to article 243(2)(d) of the Constitution of the Republic of Mozambique and article 116 et seq. of the Organic Law of the Constitutional Council (LOCC) and the district courts.

The role of the district courts is that of a court of first instance. The law states that irregularities in the conduct of the vote and in the partial, district or city tabulation may be addressed in a contentious appeal, provided that they have been the subject of a complaint or objection. The decision on the complaint or objection may be appealed against not only by the complainant, but also by representatives and political parties or groups of voters.

18 Judgment No. 27/CC/2018 of 13 November, available at http://www.cconstitucional.org.mz.

The petition of appeal, is not subject to any formality and should be accompanied by the elements of proof, witnesses if there are any, copy of the notice of appeal and other elements that are authentic in court, indicating the code of the polling station where the irregularity occurred, if this is the case. These District or City Courts shall deal with and judge appeals of electoral disputes with urgency and priority over the court's entire docket[19] (principle electoral process celerity)

The Constitutional Council is responsible for the final instance of litigation in matters concerning the election of the President of the Republic, the elections of the Members of the National Assembly, the elections of the Members of Provincial Assemblies and the elections of the Members of the Municipal Assemblies and of the Presidents of the Municipal Councils. Here too, the principle of procedural promptness is observed.

When it comes to the General Election tabulation or the National Centralisation carried out by the National Election Commission, there is only one appeal to the Constitutional Council. It should be noted that the decisions of this body cannot be appealed, and are mandatory for all citizens, institutions and other legal entities, and prevail over other decisions, pursuant to article 247 (Irrevocability and mandatory nature of judgements) of the CRM.

The enshrining of the district courts as courts of first instance came to remove the "electoral mistrust" this jurisdictional method imposes the existence of procedural rules, which must be stable. It is an external control, because the inspection of the rigour of the elections is made outside the interested or eligible Bodies. These judicial bodies must act in accordance with the principles of neutrality and impartiality.

The process that is embodied by a set of legal norms that regulate the intervention of the Constitutional Council covers all forms of violation of constitutional and legal norms that govern electoral procedures and it is sometimes noted the tendency of political actors, competitors and even civil society itself to want to politicize the jurisdictional bodies as well.

However, it should be borne in mind that election judges and courts are not designed to deal with the possible shortcomings of the political process of choice and the fragility of political parties. The values that electoral justice must guarantee are equality among candidates and respect for the will of the voter.

The role of electoral jurisdiction, like that of electoral rules, is to guarantee to the people, holder of sovereignty, that the electoral institutional process occurs legitimately and validly. It has and must be the spearhead of democracy, the body in which the politician, the voter, the country place their trust, so that the elections are free, fair and transparent and their results are the people's choice.

It is also important to emphasize that for the access to the Electoral Justice as an element of electoral authenticity, even if there is no obstacle of economic nature, once

19 Article 193(1) of Law No. 2/2019 of 31 May and Article 163(1) of Law No. 3/2019 of 31 May.

established the gratuity of all procedural acts related to the defence of the democratic regime and political rights, it is established the active legitimacy and marked limits for the bringing of electoral actions.

It is the case, for example, of the need for the observance of deadlines both on the part of the electoral administration bodies and on the part of the candidates themselves. We refer, for example, to the principle of prior impugnation - progressive acquisition of acts that must be scrupulously respected by the candidates. The rule of preclusion, starts from the principle that all and any procedural faculty must be exercised in its legally established phase, under the penalty of not being able to practice such act anymore.

In our view, the principle configures one of the guarantees of legal certainty of electoral acts, since the consolidated phases are not re-examined in subsequent phases. Neither can electoral bodies perform acts at a later stage that have already been completed or consolidated, nor can parties or candidates claim or appeal after the legal deadlines have expired. In either case, the acts would be irremediably invalid and null and void.

However, in relation to this preclusion we must bear in mind that, because in the process of validating and proclaiming the results of the elections, the Constitutional Council judges the facts contained in the general tabulation documents submitted by CNE in accordance with the law, and also considers the possible repercussions of the decisions on the appeals, the rejection of an appeal on the grounds that it raises questions that are preliminary and prejudicial to the hearing of its merits does not prevent the body from considering, at this stage of the proceedings, questions raised in those appeals, provided that it has sufficient reason to believe that such a consideration would contribute to clarifying the material truth[20].

This orientation is based on the distinction that, from a procedural point of view, must be made between electoral litigation and the validation and proclamation of election results. In the first case, because the right to appeal is at the disposal of the parties and the appeal is linked to the subjective interests of the appellants, the Constitutional Council's power of cognition is extremely conditioned by the prior verification of subjective and objective procedural assumptions and requirements. In the second case, since it is a process in which the public interest in the freedom, justice and transparency of the elections prevails, the Constitutional Council shall

20 In Judgement 30/CC/2009 of 27 December, in Case 38/CC/09, concerning the validation and proclamation of the results of the presidential, legislative and provincial assembly elections of 28 October 2009, the Constitutional Council established the following orientation: "It should be stressed that, in assessing the validity of the election results, the Constitutional Council is not limited, under the law, to examining the documentation submitted by the National Electoral Commission, since such an act of judgement presupposes the verification of the regularity of the acts performed at all stages of the electoral process, in order to form objectively and conscientiously, the judgement as to the freedom, fairness and transparency of the elections. To this end, the Constitutional Council shall also take into consideration information from other legally admitted sources, namely (i) appeals from electoral litigation, even if rejected on the basis of prior issues; (ii) reports from domestic and foreign observers; and (iii) information conveyed by the media. It is not within the competencies of this organ to oversee the electoral process on the field, nor to directly investigate the facts that it learns of through the aforementioned sources, but it is licit for it to prudently assess their verisimilitude and possible influence on the regularity of the process as a whole". Available at http://www.cconstitucional.org.mz.

judge, regardless of the particular interests of the candidates, all facts of which it has knowledge through the legally established channels, in order to objectively assess the legality and regularity of the electoral acts.

In the case of Validation of the elections, after obtaining the approval of all the Judge Advisors, the Public Prosecutor's Office shall have access to the case, in accordance with the provisions of article 119, paragraph 2 of Law 6/2006 of 2 August.

In the Mozambican electoral processes, it has been observed a lack of mastery of the electoral legislation by candidates in terms of observance of the legal deadlines for filing appeals at the district court level, as well as a lack of knowledge of the elements that must accompany petitions at first instance. The fact is that the gathering of evidence, which is an essential requirement of the electoral litigation process, should be done at the time the appeal is filed at the district courts, which prevents such evidence from being presented directly to the Constitutional Council, except in cases of appeals filed directly to the Body, for which the deadlines and the gathering of evidence should also be respected.

Some citizens have been calling for the Constitutional Council to act without strict observance of the Law, i.e. to judge based on subjective criteria? How far can the legal activism of the constitutional judge go? It is our understanding that the election judge should, in the cases submitted to them to judge, be guided by the observance of the law objectively.

4- The Ombudsman

The Ombudsman, a constitutional body, is configured primarily as a body for the defence and promotion of the rights and other subjective legal situations of citizens, elected by the National Assembly, with reserved legislative competence on rights, freedoms and guarantees. Elected citizens may present complaints to the Ombudsman who will appraise them and make the necessary recommendations to the competent bodies to prevent or redress injustices (Article 255 of the CRM (Definition).

On the other hand, the Ombudsman may initiate with the Constitutional Council the successive abstract review of the constitutionality or legality of electoral norms, as set forth in paragraph f) of no. 2 of Article 244 of the CRM (Request for appraisal of unconstitutionality). The Ombudsman is undoubtedly an important institution that guarantees electoral citizens, both outside of the courts and also outside of administrative bodies.

5- Inclusion and Equality

The equality of all Mozambican citizens before the law, pursuant to article 35 of CRM, should be understood as the condition that guarantees individuals equal rights and duties, regardless of colour, race, sex, ethnic origin, place of birth, religion, academic qualifications, social status, marital status of parents, profession or political option.

This principle must be present between men and women in the fields of political, economic, social and cultural life (article 36 of the CRM). Thus, both men and women have access to political positions under equal conditions, without discrimination of any kind due to gender. Regarding women, there is a continuous demand for political parties to increase the participation of women in order to achieve gender parity in relation to positions of responsibility.

The authenticity of elections is related to the definition of the electoral body - who is admitted to vote, and to be able to be elected where it is required that the citizen only has to prove that he or she is Mozambican and over eighteen years of age and does not suffer from any ineligibility. Acquiring active electoral capacity, a citizen becomes an elector and must register to vote. Only those who are voters can have passive electoral capacity.

The legal framework denies privileges or discrimination and the vote of each one is worth neither more nor less than the vote of any other. The Mozambican electoral laws have ensured the exercise of the right by persons with disabilities, enshrining that they are assisted by people of their choice at the time of voting.

In this regard, we refer to participation in the vote, Eduardo Sitoe, focusing on abstentions[21], quotes Samuel Huntington who wrote in 1984 that the emergence of [multi-party] democracy in a given society is facilitated by the following conditions: (i) high level of economic well-being; (ii) absence of extreme inequalities of income and wealth; (iii) high degree of social pluralism, particularly in the presence of a strong and autonomous bourgeoisie; (iv) an economy based on market forces; (v) great influence in that society of the current states of multi-party democracy; and (vi) a political culture characterised by compromise and tolerance and diversity. Sitoe concludes: "It is evident that in Mozambican society, economic conditions are clearly absent, given the levels of poverty prevailing in society and the strong inequalities between the few Mozambicans who have some resources and the majority who live below the poverty line. The lack of this type of requirement is problematic insofar as these are precisely the conditions that determine the opportunities for the establishment and consolidation of this type of political system". In fact, the reality exposed here is demotivating for the participation of the population in electoral processes.
The factors of inclusion in electoral processes that should be considered relevant in the electoral dispute are the political programmes and the qualities of the leaders. The factors - economic resources of the candidates, their access to the mass media and the exercise of public office or function by one of them - cannot make a difference, are irrelevant and their influence must be controlled to ensure electoral authenticity. Care must be taken that incumbents do not use public media to bolster their electoral campaigns.

6. The Electoral Census

It is a prerequisite for the exercise of the right to vote that one has active electoral

21 Sitoe, Eduardo, Abstenções: Perspectivas e Desafios para a Consolidação da Democracia, in Moçambique: Eleições Gerais 2004, Um olhar do Observatório Eleitoral, Brazão Mazula (dir), Maputo 2006, p. 157- 158.

capacity; it is a prerequisite for passive electoral capacity that one has active electoral capacity. Voter registration is one of the fundamental elements of the electoral process. As a support of representative democracy, it is also an indispensable condition for Mozambicans living in the country and abroad to exercise their right to vote.[22] The voter registration is valid for each electoral cycle, and it must be updated in the years in which elections[23] are held. It is through voter registration that the electoral capacity is declared and certified. Only those who are registered to vote and consequently only those who are registered to vote can be elected.

According to Jorge Miranda[24], registration plays an extremely important role in terms of legal security and political transparency, since, on the one hand, it is a factor of general legal security and protection of confidence, as each registered voter is guaranteed to vote, and, on the other, of political transparency, because the authenticity of the census - that is, the correspondence between voters and registered voters - is a basic condition for the correct formation of the popular will and the authenticity of the democratic system.

The fact that the citizen is not obliged to go to vote, for some fundament of free electoral participation, which is one of the most important rights acclaimed by democracy - the right to freedom, means that the increase in the number of registered voters does not automatically correspond to an increase in the number of voters. It is here where the electoral process begins, and it is from here that candidates and citizens in general must actively supervise the electoral process.

7- Freedom of Vote

The two crucial points in electoral authenticity start from the constitutional democratic configuration: freedom of vote and equality of vote. The flaws in the freedom of vote are revealed by vices in its formation, either directly - by coercion, fraud, corruption, vote-buying -, or indirectly, by restrictions or favours to certain political speeches or by biased treatment to parties and candidates. The freedom of vote is reflected in the rule of secret ballot, which constitutes a fundamental clause, the hard core of the constitutional system.

The secret ballot, in turn, should be free, obtained in a secret manner and that no one may know how the voter expresses his vote, ensuring that such an act is carried

22 Pursuant to the provisions of articles 10 of Law No. 8/2013 of 27 February and Law No. 3/2019 of 31 May, respectively. Addressing the electoral legislation, Gilles Cistac, states that the Constitutional Council relativized the principle of equality of citizens to the right to be registered, enshrining it in the sense that "the constitutional principle of equality of citizens before the law should not and cannot be interpreted in absolute terms, preventing the law from regulating differently when there are different situations that its provisions aim to regulate". Thus, for Mozambican citizens living abroad, their voter registration will only take place if the National Electoral Commission verifies that the material conditions and the mechanisms for control, monitoring and supervision of such acts are in place in regions or areas that constitute the geographical post or unit for voter registration. Therefore, they can only register and consequently vote if they comply with the law. In Manual Pratico de Jurisprudência Eleitoral, Escolar Publishing House, Maputo, 2001, pp. 18-19.

23 Pursuant to Articles 7 and 19 of Law No. 5/2013, of 22 February, as amended and republished by Law No. 8/2014, of 12 March.

24 MIRANDA, Jorge, Direito Eleitoral, Almedina, 2018, p. 134.

out according to his personal and private convictions. The secret ballot constitutes a fundamental right, which extends beyond the subjective sphere, informing the democratic principle.

The equality of voting reflects the republican ideal and the treatment with equal respect and consideration required by the democratic principle. The imposition of equality is not content with the provision of the single vote - one person, one vote - but requires other guarantees of equal possibility of participation in political decisions. For equality to be real, it is necessary not only to provide for the same weight for citizens' votes, as we have mentioned, but also the guarantee of freedom of expression and association.

8- Guarantees of transparency of the electoral process through electoral bodies

As the supervisory body for registration and electoral processes, the National Electoral Commission is composed of representatives of the political parties with seats in Parliament and members from civil society. This composition is replicated at provincial, district or town level, at the level of the Technical Secretariat for Electoral Administration and at polling station level. The provincial, district and city election commissions are also made up according to the same model. In addition to the management level, the technical staff of the central Technical Secretariat for Electoral Administration includes, for election periods, technicians nominated by the parties with seats in Parliament.

With regard to polling stations, STAE allocates polling station staff after hearing the representatives of the candidacies and to constitute the polling stations, the political parties with seats in Parliament each appoint one polling station staff member to join those recruited by STAE in accordance with the rules of an open tender procedure. Therefore, of the seven polling station members, three belong to the political parties with seats in the National Assembly.

It can thus be concluded, according to the Constitutional Council, that the electoral legislation created formal mechanisms to guarantee the transparency of electoral processes, opting for the partisanisation of the supervisory bodies of electoral processes from the top to the bottom (National Electoral Commission, provincial and district electoral commissions or from the central, provincial and district levels, including the polling stations. Thus, it was that in its Judgement No. 25/CC/2019 of 22 December, concerning validation of elections, the Constitutional Council expressed the conviction that

> "As the political parties with seats in parliament have appointed representatives at all levels of the bodies responsible for supervising, managing and administering the electoral process and for carrying out the material operations inherent to this process, it is possible to form the conviction that the legislator's objective, in partisanising the CNE, its supporting bodies, STAE and the polling stations, has been achieved, since all those formally concerned have taken the places reserved to them by law, intervening in both the supervision and monitoring and in the carrying out of the material operations inherent to the electoral process".

9- Guarantees through monitoring by electoral candidates and voters

The electoral legislation guarantees that all candidates for election appoint nominating agents to function at polling stations, nominating agents for district and provincial tabulation levels and national nominating agents for central tabulation, whose essential function is to supervise voting and tabulation of results, receiving at the end of the process in the respective stage an original copy of the minutes and the public notice, containing the respective electoral results, which allows and facilitates a parallel count with the electoral bodies[25].

Both the nominating agents and the representatives of the candidates, as well as the voting citizen have the right to present before the polling station requests for clarification, complaints, protests and counter protests in relation to voting operations and tabulation of results, without prejudice to the right to judicially impugn the decisions taken by electoral bodies at all levels[26].

However, it is noted that each party often chooses not to appoint delegates for all locations or constituencies, but only for those which it considers to be preponderant, for reasons that possibly have to do with the weak organization or incapacity of the parties, which undoubtedly compromises any possibility of presenting electoral appeals based on concrete evidence on the process of tabulation of results, since if the party has not appointed delegates to the polling stations, it will not have the necessary and decisive elements to sustain any type of jurisdictional appeal, either at district level or at the level of the Constitutional Council.

Political parties can and should contribute to the fair and free electoral process through efforts to ensure that the behaviour of their candidates and supporters[27], as well as those of other competing parties. Playing as they are guaranteed by law a direct role in monitoring each other's activities within the process. Parties will monitor others and be simultaneously monitored (see and be seen) thus lending credibility to the elections, of which they are one of the protagonists. It is political parties that must ensure free and fair electoral outcomes.

10. Guarantees of transparency through election observation

In our country, election observation is a common practice, generally well accepted and permitted by the various laws governing the elections of the various democratic bodies, both State and local.

The electoral legislation defines "election observation" as the conscious, genuine, responsible, reputable and impartial verification of the various stages that electoral acts comprise, covering all the acts and stages of the electoral process, from the date

25 (cf. articles 55, 57, 101, 110 and 149 of Law no. 8/2013, of 27 February).

26 articles 82, 93, 101, 110 and 149 of Law No. 8/2013 of 27 February and articles 103, 114, 122, 132 and 144 of Law No. 3/2019 of 31 May).

27 It is important to note here the experience of the reconciliation committees that served as an alternative electoral dispute resolution mechanism at district level during the election campaign period to resolve conflicts among stakeholders in the electoral process.

of its commencement to the validation and proclamation of the election results by the Constitutional Council[28]. In this context, electoral observation has sequentially covered voter registration, campaigning and propaganda, voting, partial, district or town, provincial and general tabulation by the National Electoral Commission.

The role of election observation is not insignificant. In fact, election observers are a mechanism that helps to increase the confidence of the national and international community in electoral processes, promoting transparency, citizen participation and the democratic conduct of elections, based on each country's legislation and on national standards of conduct created on the basis of regional and international commitments that bind the Republic of Mozambique.

The quality of the electoral process can be gauged through election observation, which gathers information related to the electoral process and makes transparent judgements on the conduct of these processes and the credibility of their results. Under the legal regime of electoral observation defined by Laws no. 8/2013 of 27 February and 3/2019 of 31 May, election observers are of two categories, national and international, and can be natural or legal persons, and such quality is acquired with the recognition by the CNE and the Provincial Elections Commissions[29].

In comparative terms, it is clear that there is a growing[30] interest of citizens and non-partisan national organisations and international organisations in the process of election observation with the aim of impartially assessing the democratic nature and transparency of Mozambique's elections, generating confidence and legitimacy through conclusions and recommendations which, although not binding, can identify areas in need of modification, thus contributing to the improvement of the quality of democracy. For example, the last general, presidential and legislative elections had the most observers.

11. Guaranteeing electoral transparency through the media

"The importance of the media in elections in our country is still significantly high in all stages of the electoral process. It is through them, for example, that the majority of citizens with electoral capacity have access to information regarding voter registration and the registration of candidates, but also to knowledge about the political parties, coalitions of political parties and groups of voting citizens in each constituency and their electoral programmes[31]".

An important vehicle for the transparency of the electoral process, its function is to disseminate, with impartiality, events relating to the course of the election acts and

28 Articles 263 and 264 of Law No. 8/2013 of 27 February and Articles 235 and 236 of Law No. 3/2019 of 31 May).

29 (cf. articles 252 and 255 of Law no. 8/2013, and articles 224 and 227 of Law no. 3/2019 of 31 May).

30 In fact, from 3,530 (three thousand five hundred and thirty) national observers in the 2014 presidential, legislative and provincial assembly elections evolved to 42,382 (forty-two thousand three hundred and eighty two) national observers and from 107 (one hundred and seven) international observers in 2014, the growth in 2019, is 537 (five hundred and thirty seven). Ruling No. 25/CC/2019 of 22 December, available at http://www.cconstitucional.org.mz.

31 Judgment No. 4/CC/2014 of 22 January, available at http://www cconstitucional.org.mz.

processes, aiming at enlightening public opinion and promoting freedom of opinion and of the press. Under the terms of the electoral legislation, media professionals have a special duty, in particular those who go to polling stations, not to act in such a way as to compromise the confidentiality of the vote, influence the direction of the vote or in any way disturb the course of electoral operations[32].

12. Electoral Civic Education

One of the basic components of free and fair elections is to ensure that voters not only know how to vote, but also have a broader understanding of their political and civil rights. In this sense, civic education becomes a crucial element in the consolidation of democracy. As a result, civic education not only disseminates messages about democratic rights but also seeks to provide organisational capacity and training in new techniques.

13. Financing of political parties

The allocation of funds to political parties is a way of providing stability to the party system. Highly capable parties are more likely to comply with the rules of the electoral process. However, most political parties in Mozambique are not provided with financial resources. Political parties with seats in Parliament receive public funds to finance their activities.

Political parties competing in the general elections receive funds[33] to support their campaign activities. These funds must be justified to CNE. This funding from the public purse is paid in tranches and must be justified, not only for the total funding, but also in a phased manner as a condition for receiving other tranches.

14. General remarks

We conclude that for transparency, integrity and inclusiveness of electoral processes, clarity about the rules of the process is a conditio sine qua non. The adoption of those rules by consensus by Parliament reinforces or should reinforce the democratic legitimacy of the legal-constitutional and legal framework regulating electoral processes in Mozambique.

Transparency and integrity is reinforced by the eclectic model adopted for the management of the same process, since the administration of the electoral process is mixed in nature, being entrusted to administrative bodies through the National Electoral Commission and to jurisdictional bodies through the Constitutional Council and district courts. The responsibilities of these bodies are also well established.

The legal framework allows for the participation of all contestants and all political forces with parliamentary representation, according to proportionality criteria, in the composition of all bodies at the various levels of the electoral administration.

32 cf. Article 86 of Law No. 8/2013 of 27 February and Article 107 of Law No. 3/2019 of 31 May.
33 Pursuant to article 38 of Law 2/2019, of 31 May and article 34, of Law 3/2019, of 31 May.

In Mozambique the rights of political parties and voters are protected by the positive legal framework. The oversight of the various acts and stages of the electoral process is incumbent on each and every candidate running for election, and the law gives them the faculty to appoint delegates to work at polling station level, representatives for the district and provincial tabulation levels, and national representatives for central tabulation.

One of the main mechanisms of inclusion and equality of candidates is undoubtedly the funding of candidates running in general elections through public funds to support their campaign activities, the guarantee of equal treatment of candidates and equal access to public resources for their electoral campaigns, as well as the exemption of costs and expenses in the judicial process.

Notwithstanding all the guarantees of the positive legal framework, one notes "the lack of mastery of the electoral legislation by the contestants to the elections, in what concerns the observance of the legal deadlines for the lodging of appeals at the level of District Judicial Courts, as well as a lack of knowledge of the elements that should accompany the petitions in the first instance[34]".

The Constitutional Council, as Gilles Cistac[35] states, "cannot, as guardian of the Constitution and the Law, adapt or make the Constitution and the Law more flexible to the circumstances de facto; the Constitutional Council is not a legislator and the Latin maxim Dura lex, sed lex finds ground in all its substance and rigour in Electoral Law, perhaps more than in other branches of Law".

This reality pointed out here leads these same contestants to justify their failure by, according to them, "lack of transparency in electoral processes" and allegations of fraud. In this regard, we agree with Teodato Hunguana[36] when he states that there is no known election whose results have been unanimously accepted by the protagonists. Although the non-acceptance of election results by those who lose the elections has become a constant in African electoral processes, a case-by-case analysis is necessary; otherwise, generalisations can be made that prevent us from knowing what is really happening.

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SUB-THEME 2:
Limits of freedom of expression in electoral justice

Paper

presented by Mr. **El Hassane Bouqentar**,
Member of the Constitutional Court, Morocco

First of all, allow me, on behalf of the President and all the members of the Moroccan Constitutional Court, to thank the President of the Constitutional Council of Mozambique for having organised this scientific event which requires an important interest in electoral justice. Unfortunately, the conditions linked to the Corona virus pandemic have prevented us from being present and sharing with you the Moroccan experience concerning the theme. While wishing your work every success, allow me to insist on the fact that freedom of expression is a fundamental right, defined and guaranteed by law. Whatever the opinions concerning the extent of this freedom, it remains closely linked to the question of living together and associated with the question of democracy.

Based on this observation, my brief presentation will be structured around two axes: the first will be devoted to the presentation of the legal framework that governs this freedom, while the second will cover Moroccan practice.

I. The legal framework for this freedom in Morocco

The 2011 Constitution has enshrined the guarantee of freedom of expression in a comprehensive manner.

Article 25: “Freedom of thought, opinion and expression in all their forms are guaranteed.”

Article 28: “Freedom of the press is guaranteed and may not be limited by any form of prior censorship.

All have the right to freely express and disseminate information, ideas and opinions within the limits expressly provided by law. ….”

These general provisions are reinforced by Article 11 which states:

“Free, fair and transparent elections are the basis for the legitimacy of democratic representation.

The public authorities are obliged to observe strict neutrality towards candidates and non-discrimination between them.”

Accordingly, it is clear that the constitution has established the general framework guaranteeing this freedom, which must be practised in an environment that allows respect for living together, and on the other hand, preserves the proper functioning of democracy.

It is a mission devolved to the law that must enforce this freedom in a context determined by competition and antagonism, namely the electoral context.

Indeed, Article 118 of Law 57-11 on general electoral lists, referendum operations and the use of public audio-visual means during electoral and referendum campaigns, has specified the matters that should not be included in the programmes as well as the programmes prepared for the electoral campaign:

- Undermining the constants of the nation as defined in the constitution: The Muslim religion, the monarchical form of the state, the nation’s democratic choice or the achievements in fundamental rights and freedoms;
- Disrupting public order;
- Infringing upon human dignity, privacy or respect for others;
- infringe on data and information protected by law;
- Involve an appeal for funds;
- Incite racism, hatred or violence.

These programmes and broadcasts should not also:

- use of national emblems;
- make an appearance in places of worship or to make full or partial use of such places;
- appear in official seats identifiable as such, whether local, regional or national;
- make appearance of elements, places or seats likely to constitute a commercial brand.

II. Freedom of expression in the practice of the Constitutional Court

Based on Article 132 of the Constitution, the Constitutional Court, heir to the Constitutional Council, is competent to rule on appeals concerning legislative

elections. Its decisions are final and cannot be appealed.

If we look at the decisions of this Court, it is clear that on six occasions it has been confronted with grievances relating to violations of freedom of expression during the electoral campaign.

In two decisions, namely 934 /2014 and 996 / 2016, the Constitutional Council annulled the election of two elected candidates on the grounds of freedom of expression:

In the first decision, the Constitutional Council validated the complaint that the elected candidate had uttered insults and words likely to undermine the honour of his opponent, as well as the leader of the party to which he belongs.

The Constitutional Council considered that these facts undermine human dignity, privacy and respect for others. Consequently, it invalidated the election.

In the other decision, on the grounds that he called his electoral list “soussia” in reference to a regionalist connotation. This behaviour is in contradiction with both the Constitution and the law governing the electoral campaign. It constitutes a fraudulent manoeuvre.

Regarding the other four decisions, 9/17, 29/17, 50/17 and 79/18, the applicants raised grievances that infringed on the freedom of electoral expression: defamatory and discriminatory remarks, use of religious symbols. The Court, while examining the supporting documents, realised that the complaints were inaccurate. This led the Court to reject the application to invalidate the elections in the constituencies concerned.

Conclusion

Two observations can be made from the above:

1 - Legally, the electoral operation is relatively well framed concerning the fight against excesses relating to the conduct of the electoral campaign. Of course, a debate on the usefulness of these limits may be imposed within the public authorities and political parties, but this is not the concern of the constitutional judge.

2 - In relation to the overall volume of electoral litigation and the set of grievances raised by the applicants, it is clear that the alleged infringements of the freedom of expression represent only a tiny part, which indicates the difficulty of proving the certainty of the allegations.

SUB-THEME 3:
Access to electoral information

Paper

presented by Prof. **Saidou Nourou Tall**,
Vice President of the Constitutional Council of Senegal

Access to electoral information: the experience of the Constitutional Council of Senegal

Constitutional and electoral justice is embodied at the highest level in Senegal by the Constitutional Council created by organic law n. 92-23 of 30 May 1992, the latest amendment of which is organic law no. 2016-23 of 14 July 2016, which gives it several powers.

According to Art. 92§1 of the Constitution of 22 January 2001 currently in vigour: "*The Constitutional Council is responsible for the constitutionality of laws, the rules of procedure of the National Assembly and international commitments, conflicts of competence between the executive and the legislative as well as objections of unconstitutionality raised before the Court of Appeal or the Supreme Court.*"

With regard to national elections (presidential and legislative), the Constitution assigns this court to be "judge of the regularity of national elections and referendum consultations and to proclaim the results" (art.92§2).

It is necessary to specify that as far as the presidential election is concerned, the CCS intervenes in the electoral chain (outside the electoral campaign) at the time of the deposit of the candidature files, to check the lists of sponsorships; to decide on the list of candidates and to proclaim the final results of the ballot, whereas as far as the legislative elections are concerned, it only intervenes downstream of the process to proclaim the final results of the election

In the exercise of these attributions, the role of the Council is therefore preeminent and access to electoral information is an important issue for the organisation of a free, transparent and peaceful election. This is why, for each election, a mechanism for collecting information is put in place with the involvement of various actors (political parties; coalitions of parties, independent candidates or entities representing

independent persons), with the support of competent administrative authorities, the Autonomous National Electoral Commission (CENA), delegates of the Court of Appeal, without forgetting the presence of national and international observers and journalists). This collection allows for the centralisation and dissemination of information in order to guarantee a transparent and democratic electoral process that respects the rights of candidates and voters.

From this point of view, access to electoral information is a guarantee of transparency and the organisation of regular and free elections that give credibility to the provisional and final results of the voting. Therefore, this access must be possible both before **(I)** and during the electoral process **(II)**.

I- The right of access to information before the electoral process

With regard to the amended Constitution of 2001, the Organic Law n°2016-23 and the Electoral Code, the Constitutional Council has developed a set of practices aimed at protecting both the right of voters and that of candidates, and this is reflected through the examination of its various decisions.

- ***The right of access to the electoral roll in order to be able to exercise an individual recourse to claim or contest such roll***

Decision No. 6/93 of 13 March 1993 (See Digest of Decisions p. 34).

In this case, the applicants argued, among other things, that the registrations on the electoral lists were made outside the exceptional revision period in violation of Articles L. 14, L. 23, L. 24, L. 27 of the Electoral Code and that, in addition, identity cards and voters' cards were improperly withheld.

In its reply, without retaining its jurisdiction, the Constitutional Council specified that appeals against the electoral roll, either in the form of a complaint or a charge, constitute an individual right that only the voter can exercise.

Consequently, the right of access to the electoral roll allows the voter to exercise this right.

- ***The right of the mandatory to be informed of the inadmissibility of his list.***

Decision No 7/E/98 of 16 April 1998 (Digest, pp 154-157)

In this case, the Representative of the UDS-R had referred the matter to the Constitutional Council, not to challenge the inadmissibility of his list declared by the Minister of the Interior pursuant to the provisions of Article L. 171 of the Electoral Code, but to argue the admissibility of such list on the basis of Articles L.171 and L.72 of the Electoral Code.

In this case, the Council recalled the provisions of Article L. 171 of the Electoral Code, which stipulate the obligation for the Minister of the Interior, if it considers that a list is not admissible, to notify the representative of the reasons for his decision within three days of the submission of the application.

The Constitutional Council noted that the inadmissibility had been notified to the representative on 9 April 1998 within the time limit prescribed by Article R. 15 of the Electoral Code which concerns all elections in Senegal.

It should be noted that the Constitutional Council enshrined the theory of acquired knowledge in its **decision n°6/E/2007 of 16 April 2007 (Recueil pp. 370-371)**

In this case, the applicant considered that his appeal should be declared admissible, as the Minister of the Interior's refusal to accept his list had not been notified, and the time limit provided for in Article L.O 174 had not begun to run.

The Constitutional Council, in its reasoning, pointed out that the applicant had produced a report of the refusal drawn up on 30 March 2007, and that therefore, even if the refusal had not been notified to him by the Minister, he had acquired knowledge of it through the bailiff's report.

- **The right of access to the list of polling stations throughout the country**

Decision on cases n. 12 to 29/E/98 of 8 June 1998 (Digest p. 175)

Following a general controversy over the number of registered voters published by the Minister of the Interior and the number announced by the National Commission for the Census of Votes, the Council, in deciding the question, found that the Minister of the Interior had fulfilled its obligation to publish the list of polling stations throughout the national territory, as required by Article 63 of the Electoral Code.

In total, for the presidential election the Constitutional Council

- must receive the candidacy files;
- must check the lists of sponsors according to the order in which the candidatures are filed at its registry (art.L.57al.10 of the EC);
- may set up a SPONSORSHIP VERIFICATION DEVICE in the presence of the candidates' mandataries (Art.L.118 al.3 of the E.C);
- must notify **forty-three (43) days**, before the first round of voting, the mandataries of the files declared invalid due to irregularities in the sponsorship (**the representative then having forty-eight (48) hours to regularise the situation by replacing the invalidated sponsor(s)**);
- must draw up and publish the CANDIDATE LIST no later than THIRTY FIVE (35) clear days before the first round of voting (art.29 Const. and art.L.121 of the C.E), by POSTING and by any other appropriate means.

Candidates have the right of APPEAL against the list of candidates, which is open to any candidate up to 48 hours after the day of posting of the list (**the CCS decides without delay).**

Apart from its jurisdictional activities, the Constitutional Council regularly organises seminars and meetings with the media (radio, TV, online media), members of the Courts of Appeal and the Supreme Court, as well as the Bar Association, in order to make the Council's competences more widely known, to maintain a fruitful dialogue in the interest of those subject to the jurisdiction of the courts, and through the intermediary of members of civil society, and to clarify the different ways in which cases can be referred to the Council, either by way of an action or an exception.

- **The Constitutional Council's dialogue with the media**

On 27, 28, 29 and 30 November 2018, the Constitutional Council, in an effort to establish dialogue with the media, organised a training workshop in view of the 2019 presidential election. Given the socio-political context of the time, this was an important stage in the political history of Senegal. In order to contribute to the work of a serene and transparent election, the Council organised this capacity building workshop for journalists for a better understanding of the texts governing the electoral process. The objective was to ensure good coverage of such election through access to electoral information. Indeed, a good knowledge of the electoral procedures allows journalists to assess the credibility of the information in an objective and informed manner.

II- The right of access to electoral information in the course of the electoral process

It goes without saying that access to electoral information cannot be limited to pre-electoral operations (registration, establishment of electoral lists, polling stations and centres, electoral campaign). It is important that access be provided at all levels and especially on polling day to enable voters to exercise their right to vote in an informed and unhindered manner, but also to enable candidates to see that the elections are conducted in a fair and transparent manner.

- **The communication of all the minutes to the National Commission for the Census of Votes**

Decision on cases No. 12 to 29/E/98 of 8 June 1998 (Digest p. 177)

All the minutes must be submitted to the National Commission for the Census of Votes. Where no minute have been received by the Constitutional Council, copies of the minutes held by representatives of candidates, political parties or coalitions of political parties and entities representing independent persons at the NCCV may be admitted to fill in the gaps.

Here, access to electoral information highlights the role of the regulatory actors of the electoral process, notably the National Commission for the Census of Votes (for provisional results) and the Constitutional Council (for the final results of the election).

- **Obligation of the Minister of the Interior to make available to ONEL (CENA) and ultimately to political parties, depending on the case, the entire electoral file or only a part of it, and also to say whether the installation of computer terminals and a website allow direct access by ONEL (CENA) to the electoral file**

Decision No 11/E/98 of 18 May 1998 (Digest, p. 166)

In its decision, the Constitutional Council considered that the referral is in fact a request for an opinion which does not form part of its jurisdictions, which are exhaustively enumerated by the texts that establish them.

- **The publication of the provisional results by the National Commission for the Census of Votes**

This publication, which concerns national elections, allows citizens, while waiting for the final results, to have an overview of the allocation of votes to candidates. (See I. M. FALL, *Les élections présidentielles au Sénégal de 1960 à 2012*[1], Dakar, L'Harmattan, 2018, pp. 263-264)

- **The Constitutional Council must notify the representatives of political parties, party coalitions or the entity grouping independent persons of the files declared invalid due to a number of sponsors lower than the minimum required by the relevant texts.**

Decision No 2/E/2019 of 13 January 2019 (Digest, p. 632)

According to articles L.57, paragraph 6 and L.121, paragraphs 1 and 2 of the Electoral Code, when, due to the invalidation of sponsorships because of their presence on more than one list, a candidate has not been able to obtain the minimum required number of voters registered in the general file and/or the minimum required number of voters per region and in at least 7 regions, the Constitutional Council notifies the representative of the political party, the coalition of political parties or the entity grouping together independent persons, of the files that have been declared invalid for this reason. However, this notification is only made if the replacement of the invalidated sponsorships can have the effect of enabling the candidate concerned to meet the minimum requirements.

- **Publication of electoral information by the Constitutional Council**

This publication concerns all national elections. The decision of the Constitutional Council on the proclamation of the final results is published in the Official Gazette, on the Council's website (www.conseilconstitutionnel.sn) and posted on the boards dedicated to this purpose in the Council's premises.

For example, on the Council's website, under the heading **"news"**, there is a diagram listing all the stages of the electoral process for the 2019 presidential election.

It also contains the sponsorship system and the modalities of its functioning **(Decision n°1/2018)**.

The **"Decisions"** section of the site contains all the decisions handed down by the Constitutional Council in electoral matters since 1993.

1 NT: Presidential elections in Senegal from 1960 to 2012

In the **“Texts”** section, you will find the texts used as a reference for the constitutionality review of laws and international commitments as well as the consolidated and updated versions of the Constitution and the Electoral Code.

THANK YOU FOR YOUR KIND ATTENTION.

THEME 2:
The place of the citizen in the electoral process

SUB-THEME 1:
The criteria for determining electoral citizenship

Paper

presented by **Mme Assata Koné Silué**,
Counselor Judge, Constitutional Council of Ivory Coast

Election is a fundamental right[1] consecrated in most democratic constitutions. Its primary function is to guarantee the sovereignty of the people by allowing them **to choose their rulers and representatives. However, the implementation of this function** has always been a source of friction.[2] Father more, when it comes to determining who is entitled to take part in the various elections organised within a country. It is this tension in public life during elections and the prevention of possible conflicts that requires that criteria for electoral citizenship be defined by each country.

In Côte d'Ivoire, this is the responsibility of Parliament which, through the electoral law, determines the conditions for the exercise of sovereignty by the people in the designation of their representatives.

In other words, in Côte d'Ivoire, the criteria for determining electoral citizenship are not the responsibility of the Constitutional Council. The role of the High Court in the electoral process lies in the control of the criteria of citizenship previously fixed by the electoral law for certain elections. Hence the rephrasing of the subject of our intervention as follows: **"the control of the criteria of electoral citizenship by the Constitutional Council of Côte d'Ivoire"**... Here again, a clarification must be made in order to better understand the role of the High Court during the exercise of citizenship for elections whose control falls within its competence. Indeed, coming from the word citizen, the expression citizenship refers to the ability recognised to the national of a democratic State to participate in the exercise of sovereignty either personally or through his representatives. Every legal subject of a democratic State is entitled to

1 Cf. Déclaration Universelle des Droits de l'Homme de 1789 (DUDH)
2 L'élection peut aussi permettre de régler une crise. Lorsqu'un débat extrêmement important divise les citoyens, le recours au suffrage universel peut permettre de trouver une solution. C'est le cas du referendum

acquire citizenship in his or her country, even if it may be withdrawn on the grounds of incapacity, unworthiness or even by court decision.[3]

The right to vote remains the symbol of citizenship. This right has two components: on the one hand, the possibility of being a voter and, on the other hand, the possibility of being eligible for an election. The modalities of acquiring the status of voter and the related complaints fall within the competence of the body in charge of organising elections in Côte d'Ivoire, i.e. the Independent Electoral Commission (IEC). Only the control of the eligibility of candidates for certain elections is the responsibility of the CC. This clarification makes it possible to underline that the subject of our presentation will be redefined and focused on **"the competence of the Constitutional Council in matters of eligibility of candidates for certain elections"**.

Hence the question: when and how does the Constitutional Council of Côte d'Ivoire verifies the eligibility of candidates for certain elections?

From the outset, it should be noted that the control of the conditions of eligibility of candidates takes place before the holding of the voting operations. Moreover, this control varies according to the type of election; this leads us to analyse the three forms of elections whose control falls within the competence of the Constitutional Council, but which we will group into two main categories, namely the eligibility of the President of the Republic (I) and the eligibility of members of parliament, i.e. members of the National Assembly and senators (II).

I. The verification of the President of the Republic eligibility conditions

The actions carried out by the Constitutional Council (CC) of Côte d'Ivoire are of two kinds. On the one hand, the examination of the eligibility criteria of candidates (A) and on the other hand, the verification of supporting documents (B).

A- The examination of the eligibility criteria

The control that the CC carries out here lies in the verification of the criteria previously fixed by the texts in force.

Some of them are set by Article 55 of the Constitution while others are prescribed by the Electoral Code. Thus, the candidate for election must:

- Enjoy their civil and political rights;
- Be at least 35 years old;
- Be exclusively of Ivorian nationality, born of an Ivorian father or mother of Ivorian origin
- Never have renounced Ivorian nationality;
- Not have already been re-elected;
- Be a qualified voter;

3 Incapacity: for persons placed under Judicial Council; unworthiness for default or by court order

- Not to be in one of the cases of ineligibility. This requires to verifying whether the candidate is or is not:
  - a persons who have been deprived of their right to stand for election by a court decision or;
  - a persons with a judicial counsel
- In addition, he/she must produce a list of sponsors;
- A receipt of payment of the fifty million dollar bond.

The Council shall also verify whether the candidate is in incompatible situation.

The incompatibility situations are provided in Article 50 of the Electoral Code, namely Not to be :

- Member of the Constitutional Council ;
- Member of the Court of Cassation, the Council of State and the Court of Auditors;
- Magistrate ;
- Member of the Prefectural Corps;
- Central or departmental accounting officer ;
- Civil servant

In addition to the control of the eligibility criteria, the Constitutional Council verifies the documents that are produced by the candidates.

B- Verification of supporting

This control activity enables the Constitutional Council to carry out a double verification: that of the completeness of the documents constituting the candidature file and that of their regularity.

1- The existence of the prescribed documents

This control concerns the verification of the material existence of the documents prescribed by the texts in force, namely:

- The declaration of candidacy with the signature of the candidate duly legalised (Article 51 and following...) containing the following information (Article 53):
  - Surnames and first names ;
  - Date and place of birth;
  - Nationality;
  - Parentage ;
  - Nationality of father or mother;
  - Residence and occupation;
  - The party or parties that have invested him/her, if applicable;
  - The colour, acronym and symbol chosen for the single ballot paper

- A birth certificate or suppletive judgment in lieu thereof;
- A certificate of nationality;
- A criminal record;
- A certificate of tax regularity;
- A copy of the receipt for the deposit;
- A letter of nomination from the party or parties or political grouping, if applicable;
- The list of sponsorships with the first names, surnames, date and place of birth, the electoral district, the number of the voter's card and the identity card of the voters who sponsor the candidate (article 54).

2- Documents regularity

Through this review, the Constitutional Council ensures that:

- The authenticity of the documents produced, i.e. the High Court verifies that the documents have been issued by the competent authorities.
- The validity of such documents by checking that they were issued within the required period, which is generally three months.

For example, the receipt for the payment of the fifty (50) million deposit, which is included in the file, must be signed exclusively by the General Director of the Public Treasury and not by an authority other than the General Director. Similarly, the legalized signature of the declaration of candidacy must be done by the candidate himself and not by his representative or another person. In the same way, the Constitutional Council must ensure the integrity and sincerity of the list of sponsorships[4] submitted with the candidature file. At this level, it is worth highlighting the challenge taken up by the Constitutional Council of Côte d'Ivoire during the last election of the President of the Republic on 31 October 2021. In reality, the control of sponsorships was a new exercise for the Council and thanks to the efficiency of the verification mechanism[5] set up, the High Court succeeded in guaranteeing the authenticity and integrity of the sponsorships by pinpointing all spurious and fraudulent sponsorships[6].

4 The purpose of the review of the sponsorship list is to ensure:
- That the candidate for the election of the President of the Republic has been sponsored by a list of voters in accordance with the requirements of the electoral code, namely, one percent (1%) of the local electorate, in at least fifty percent (50%) of the districts and regions as provided for by Article 51 of the Electoral Code;
- the authenticity of the sponsorship list;
- That the sponsor is registered on the electoral list of the concerned region or district;
- That a voter is not on more than one sponsorship list;
- That the sponsorships have not been collected in places prohibited by law, such as military or paramilitary cantonments or health facilities;
- That each list of sponsorships includes the identity of the sponsor, in particular his or her surname and first names, the number and date of issue of his or her national identity card or equivalent document, the number of his or her voter's card, his or her telephone number and his or her signature; in this respect, the Constitutional Council may carry out any other control operation aimed at detecting any irregularities in the establishment of the list of sponsorships.

5 the High Court set up a verification mechanism by decision No. CI-2020-008/28-07/CC/SG of 28 July 2020

6 Ceci a été possible grâce au croisement des données contenues dans la liste électorale et celles des CNI.

Once the verification of the conditions of eligibility is completed, the Constitutional Council takes a decision:

- If the application does not meet any of the above conditions, it is rejected in accordance with Article 57 of the Electoral Code, which means that the candidate cannot be included in the final list of candidates.
- Conversely, if the candidate fulfils all the above-mentioned conditions, he/she is declared eligible and the Constitutional Council enters him/her on the final list of candidates which it publishes. The decision to publish the final list of candidates is pronounced in public hearing by the President of the Institution[7].

Unlike the election of the President of the Republic, where the control of eligibility conditions is the exclusive responsibility of the Constitutional Council, the determination of electoral citizenship in the context of parliamentary elections (i.e. the election of deputies to the National Assembly and the election of senators) is the responsibility of the body in charge of organising the elections, the IEC (as stipulated in Article 75 of the Electoral Code). Only the litigation of these elections is entrusted to the Constitutional Council.

II- Control of the conditions of eligibility of parliamentarians

As mentioned above, the action of the Constitutional Council in the context of the election of deputies or members of parliament is limited to the resulting dispute. In other words, the Constitutional Council only rules on the eligibility of members of the parliament under the following two cumulative conditions:

- A candidature must be rejected by the Commission in charge of elections for non-conformity of the conditions of eligibility to the legal provisions in force.
- That there is a referral to the High Court on the basis of article 82 of the Electoral Code. This means that the Constitutional Council does not refer to itself.

Apart from a few differences relating in particular to incompatibilities, ineligibilities and time limits for referral, the litigation on eligibility is identical for the election of deputies as for that of senators. Thus, the emphasis will be put on the verification of the election of deputies. In this respect, two types of disputes may be brought before the High Court in the context of determining electoral citizenship. These are the registration dispute and the eligibility dispute. Here again, apart from a few exceptions relating to the time limits for referral and the status of the petitioners, the verification exercised by the High Court is almost identical, whether it is a matter of the registration dispute or the eligibility dispute.

In addition to the conditions of admissibility, the control concerns the conditions of eligibility of the candidates and the verification of the supporting documents.

7 Deux expéditions de la décision sont transmises l'une à la CEI, c'est-à dire, l'organe chargé d'organiser les élections et l'autre, au Président de la République, pour publication au JORCI. Une autre expédition est publiée sur le site Internet du Conseil constitutionnel, par voie de presse et par affichage.

However, if the Constitutional Council does not make a decision within the required three-day period, the candidature must be registered.

A- Examination of the conditions of eligibility, ineligibility and incompatibility of candidates for election to the National Assembly

This control is carried out by the High Court in accordance with the provisions of the Electoral Code[8] and the analysis of possible incompatibility situations of the candidate as provided for by article 87 of the Electoral Code[9]. Thus, the candidate for election to the National Assembly cannot be a senator, a member of the presidential and ministerial cabinets, a member of the Constitutional Council, a member of the Court of Cassation, the Council of State, etc...

1- The conditions of eligibility and ineligibility of the candidate for the election of Deputies to the National Assembly

These conditions are as follows:

- To be a qualified voter (art. 70 of the Electoral Code);
- Be at least 25 years old (art. 71 of the Electoral Code);
- Be Ivorian by birth (i.e. born of an Ivorian father or mother)
- Must never have renounced Ivorian nationality;
- Must have resided continuously in Ivory Cost d'Ivoire for the five years preceding the date of the elections[10];
- Must not have acquired Ivorian nationality within the last ten years;
- Must not be a member of the following category of persons: President of the Regional Council, regional councillors, mayors, deputy mayors and municipal councillors who have been dismissed for malpractice, even if they have not incurred a penalty depriving them of their civic rights, without prejudice to the provisions of the legislation relating to the organisation of local authorities.

2- Incompatibilities (cf. Article 87 of the Electoral Code)

The incompatibilities concern persons exercising, in particular, the following functions:

- Senator ;
- Member of the Constitutional Council;
- Member of the Court of Cassation, the Council of State and the Court of Auditors;
- Magistrates ;
- Member of the Prefectural Corps;
- Public accountants;
- President or director of an establishment or company with public financial participation;

8 Articles 74, 75, 76, 77, 78, 79 of the Electoral Code

9 This control can lead to an adversarial procedure.

10 However, this restriction does not apply to members of diplomatic and consular representations, persons designated by the State to occupy a post or perform a mission abroad, international civil servants and political exiles.

- Civil servants, with the exception of full professors in higher education and research directors working in research centres;
- Military and similar personnel.

Unless they have submitted an application for leave of absence for an exceptional period equal to that of the mandate.

In addition, the Constitutional Council verifies the documents in the file.

The verification of the conditions of eligibility may give rise to an adversarial procedure[11].

B- Verification of documents

Following the example of the control of supporting documents for the election of the President of the Republic, the control concerns the material existence verification of the documents produced in support of the application by the applicant (i.e. the candidate, the political party or parties or groupings which presented the candidature), but also the authenticity and validity of these documents.

In any case, the control of the conditions of eligibility of the candidate leads to the authorisation decision of registration or not registration of the candidate on the list.

In short, the Constitutional Council of Côte d'Ivoire does not determine the criteria of electoral citizenship. Its role in the electoral process lies in the control of criteria previously set by the texts in force.

11 There are two possibilities for the reporting counsellor during this control:
- The Advisor-reporter may note that the documents produced do not comply with the texts in force. In this case, he proposes in his report that the application be inadmissible.
- The Advisor-reporter may consider the application admissible. In this case, he gives notice to the candidate concerned. The latter has a period of forty eight (48) hours to take note of the request and the attached documents and to produce his written observations.

SUB-THEME 1:
The criteria for determining electoral citizenship

Paper

presented by Mr. **Palouki Massina**,
Member of the Constitutional Court of Togo

1 – To address the issue of "electoral citizenship" means to answer the following question: who in a State has the right to participate in the electoral process; in summary, who has the right to vote? The answer to this question requires first of all a definition of the term "citizenship".

Citizenship is the fact that an individual is recognised as a citizen, in other words, as a member of a city or, in general, of a State. This recognition implies, for the individual in question, the enjoyment of all his civil, civic and political rights. That is to say, the right to respect for one's private life, respect for one's home and correspondence, the right to freedom of movement, the right to freedom of thought, conscience and religion, the right to marry, to be a member of a jury, etc. (in the case of civil rights), and the right to a fair trial (for civil rights), the right to vote or to be elected, the freedom of association or assembly, for example, (for civil and political rights). It follows that the right to vote is conditional on the citizenship of the individual who wishes to vote or be eligible in an election.

2 – Citizenship of a State is not enough to be a voter; it is important to distinguish citizenship from nationality, with which it is easily confused nowadays.

As stated above, **citizenship** recognises rights and duties defined by the State of which the beneficiary - the citizen - is a member, and which allow him/her to participate in the life of that State, for example by voting.

Nationality, on the other hand, means the legal membership of an individual to a State. Although citizenship and nationality are lately linked in the sense that a citizen of a country is at the same time a national of that country, not all nationals of a State are necessarily citizens of that State. One can be a national of a country without being a citizen. This is the case, for example, in most countries, with under-18-year-olds who, although they have the nationality of those countries, are not yet citizens and therefore do not enjoy all the rights of citizenship, such as the right to vote or stand for election.

It arises that in order to have electoral citizenship, one must first have citizenship in a country. However, not all citizens of a country enjoy electoral citizenship. Only certain categories of citizens are entitled to exercise civic rights (voting, military service, etc.). The conditions necessary to have electoral citizenship are set out in three main texts in Togo: the constitution, the Togolese nationality code and the electoral laws. The nationality code (for Togo, this code is derived from Order No. 78-34 of 7 September 1978 on the Togolese nationality code) determines the conditions to be met to enjoy the country's nationality; the electoral laws supplement these conditions with requirements to determine who among the country's citizens can participate in elections. The constitution sets out the requirements for being a candidate in presidential elections.

The "electoral citizen" is not an isolated citizen governed by entirely different rules; he is first and foremost a citizen like everyone else. He is a citizen before he is a voter or eligible. That is why he has to fulfil the requirements for being a citizen of the country before claiming to be an electoral citizen.

3 - The issue of **electoral citizenship** is important. It is the first step in ensuring the credibility of elections and their results. It ensures that only those who are eligible to vote participate in the vote, that those who are not eligible to vote could not register or did not participate in the vote. Electoral citizenship is a condition for the sincerity of the processes and the reliability of the results. It is the only way to ensure that voting results reflect the choice of the electorate (citizens), the expression of the general will.

The following presentation is essentially based on Togolese electoral law.

An analysis of the applicable texts that set the conditions of electoral citizenship in Togo reveals a paradox: while citizenship requirements are marked by a certain precision, those established by electoral texts sometimes give rise to criticism that may be detrimental to the quietness of the electoral process.

The requirements of electoral citizenship are the same as those of citizenship. We will present them (I) before those specifically provided by the electoral laws for electoral citizenship (II).

I – Common Conditions to the status of citizenship and that of electoral citizen

To be a citizen of a country, one must have a link to that country. Without this link it is impossible to be a citizen. This legal link is that of nationality. Only those who have the nationality of a country can be citizens of that country. The application of this principle, however, sometimes encounters challenges.

A – A condition always required: nationality

Nationality is the condition of a person that allows him to be linked to a nation, to the point of claiming to be a member of such and such a nation and not another. It is the legal bond that unites this person to this or that nation. In international law, it makes it possible to determine the country to which a natural or legal person belongs in

order to determine the law applicable to a public law dispute between two or more countries. Consequently, any person who cannot be linked to a country is a stateless person.
Nationality is granted by the laws of States, generally referring to two criteria: filiation (i.e. being born of parents with the nationality of the country), and soil (being born on the territory of the country).

Togo applies both criteria: “A child born in Togo (soil criterion) of a father and mother born in Togo (filiation and soil) is Togolese” (art. 1, para. 1).

“A child born 1- of a Togolese father (filiation); 2- of a Togolese mother (filiation) and of a father who has no nationality or whose nationality is unknown is Togolese” (Art. 3).

Each State also provides the conditions under which nationality can be granted to foreigners.

Nationality distinguishes nationals from foreigners. The granting of nationality to a person implies the enjoyment of civil, civic and political rights by the holder. In principle, foreigners do not have the right to vote in the country of which they are not nationals, unless there is a reciprocal agreement between the two States. Within the European Union, for example, EU citizens are allowed to vote in local elections in the countries where they live. We say “local elections” for the appointment of municipal councillors, but not in national elections (presidential, senatorial or legislative elections), which are an attribute of national sovereignty (established case law in France).

Nationality is given as a condition both of citizenship in general and of electoral citizenship in particular. But, as stated above, citizenship does not *ipso facto* imply electoral citizenship.

B – Difficulties in implementing nationality in electoral matters

While States lay down conditions for recognising the nationality of their citizens or granting it to non-nationals, most States, like African States, require their citizens **to prove their nationality.** Thus, in all acts of public life, for example, to apply for a civil service job, to participate in a public tender and even to obtain a national identity card, the State requires the presentation of a **nationality certificate** issued by its competent services. That condition is intended, in principle, to exclude foreign persons from other States and to reserve the right to take part in competitions for nationals. But it also excludes Togolese who meet the conditions for being Togolese but do not have a certificate of nationality. They are even excluded from the possibility of having a national identity card, an attribute of any national.

To take part in the electoral process and vote, citizens must prove that they are nationals of the country by presenting their identity card as proof of their national identity.

This element, which is essential in civil life, can act as an obstacle to the exercise of civic rights by nationals who do not have it.

Aware of this difficulty, States have found a palliative: they accept, as a palliative to proof of nationality, the production of various cards or official documents such as the family register, birth certificate or nationality certificate or, pragmatically, the testimony of reliable persons (heads of the locality or canton, or even ordinary citizens).

Some of these means of proof, particularly testimonial evidence, are sometimes contested in large cities.

II – Specific conditions for electoral citizenship

In addition to nationality, the applicable legislation on elections provides additional conditions for participating in the electoral process and voting. These conditions are of two types: those that determine the quality of the voter and those that condition eligibility. It should be noted, however, that eligibility is subject to the requirements for being a voter.

A - Conditions for electorate and eligibility

For a Togolese citizen to be a qualified voter and to participate in voting and be eligible, he or she must meet the following conditions, even if registration is a right:

- Be registered on the electoral rolls of the commune or prefecture where he/she lives;
- Be 18 years of age or older by the time registration closes;
- Have his or her civil and political rights;
- Not be among the cases of incapacity provided for in article 40 of the electoral code: persons convicted of a crime; persons sentenced to a suspended or unsuspended prison sentence of more than six months, with or without a fine, for theft, fraud, abuse of trust, embezzlement of public funds, forgery, corruption and influence peddling or violation of custom and practice; persons convicted of delinquency; incapacitated adults; persons in undischarged bankruptcy; and persons disqualified by the courts from voting and being elected

To be registered on the electoral roll, a citizen had to produce a valid identity document: a national identity card or a passport. In the absence of either of these documents, the following documents are authorized for entry on the electoral roll: family registration book, birth certificate or nationality certificate. In the absence of these documents, the electoral code authorizes registration on the basis of the testimony of at least two persons.

The production of a document without a photograph of the person presenting it poses problems of sincerity in large cities where residents hardly know each other. This is often criticised by opposition political parties who see it as a pretence on the part of the administration to encourage the registration of people who do not fulfil the

conditions required for this purpose, in order to benefit the party in power. The people concerned are presumed to vote for the ruling party.

The long-term solution, i.e. the end of the discord, is to issue national identity cards to all nationals.

Registration on the electoral roll leads to the issue of a voter's card which enables the holder to exercise his or her right to vote on election day. How can a voter card,s issued on the basis of uncertain information or a vote where the holder of the voter card is not the real holder be considered genuine?

B – Requirements for eligibility
Eligibility imposes additional requirements, which differ according to the election in question.

To stand for presidential elections, the Constitution prescribes special conditions as follows (Article 62):

- Be exclusively of Togolese nationality. In reality, due to the number of multi-national individuals running for the presidency who have strong support in their second homeland, this condition has never been respected. It must be said that national circumstances have not favoured its respect. The term "exclusively" was adopted in 1992 under Gnassingbe Eyadema, and the condition was seen as directed against his most resolute opponent at the time: Gilchrist Olympia. Applying this requirement to the 1993 or 1998 presidential elections to exclude Gilchrist would have caused such an international outcry, so it was bypassed and candidates were asked to provide only a declaration in which they recognised themselves as Togolese nationals. This opened a chasm into which all the plurinational candidates for the presidential elections have since been plunging with delight.
- Not to be over 35 years of age at the time of application. In its 1992 version, the Constitution required a minimum age of 40 and a maximum age of 70. The maximum age was removed in the 2002 constitutional review, and the minimum age was reduced to 35 years.
- Enjoying civil and political rights (valid conditions for the electorate and eligibility for all political elections);
- Be in a state of general physical and mental well-being duly certified by three (3) doctors appointed by the Constitutional Court;
- Reside in the national territory for at least twelve (12) months. The application of this condition by the Electoral Commission to eliminate candidates for the presidential elections regularly gave rise to a major dispute before the Constitutional Court.

Candidacy for senatorial elections is subject to the following requirements (Art. 172 of the Electoral Code):

- Be Togolese by birth;
- Be at least 35 years of age on the date of the elections;

- Enjoy one's civil and political rights;
- Have resided in Togo for at least six (6) months;
- Be able to read, write and express oneself in the official language (French).

The same conditions apply to the candidate for legislative elections (art. 205, Electoral Code), except that in this case the age requirement is at least 25 years old on the date of the elections, and for local elections (regional, art. 237; municipal, art. 257).

Conclusion

Electoral citizenship is the central element in establishing the sincerity of the vote and the credibility of the electoral process. In countries where not all citizens have a national identity card (NID), its determination often leads tos the contestation of certain people's inclusion on electoral lists and of the results of votes, and sometimes to periods of instability and even violence. Democracy is undermined.

To remedy this situation, the solution is, in our opinion, to reduce the number of documents required to qualify as an eligible voter by adopting only the National Identity Card. Since the passport is a travel document issued to those who want to travel and not to all citizens, the NID should be kept for registration on the electoral roll, as it contains not only all the information allowing the identification of the holder, but also, and above all, his or her photograph; the latter makes it possible to ensure that the person presenting himself or herself for registration on the electoral roll is indeed the right person. The voter's card, presented at the time of voting, would no longer be disputed provided that the same information was included on the Identity Card, as well as the holder's photograph. Moreover, the generalisation of the NID could, in the long run, reduce certain electoral costs. If all citizens had it, it would not be very difficult to predict that they would vote with the NID, which would make the voter card unnecessary and eliminate the costs of its production and distribution.

This option, the systematic issuing of the NID to all citizens, has enormous financial consequences for the states that must organise their services for this purpose. But stability, peace and democracy are worth the price.

Lomé, 14th October, 2021

SUB-THEME 2:
The limits of convictions in electoral justice

Paper

presented by Mr. **Pawélé Sogoyou**,
Member of the Constitutional Court of Togo

Ms Narjess Saidane, UNDP Resident Representative,

H.E. Honorable Mrs Lucia Da Luz Ribeiro, President of the Constitutional Council of Mozambique,

H.E. Honorable Mada e Guilhermina Prata, Vice-President of the Constitutional Court of Angola and representative of the President of the CCJA,

Mr. GUY Cyrille Topoko, Head of the Democracy and Electoral Assistance Unit, representing H.E. the Ambassador

Bankole Adeoye, Commissioner for Political Affairs, Peace and Security, African Union,

Mr Gianni BOUQUIQUIO, President of the Commission for Democracy through Law of the Council of Europe,

H.E. Filipe Jacinto Nyusi, President of the Republic of Mozambique.

THE LIMITS OF CONVICTIONS IN ELECTORAL JUSTICE MATTER

The organisation of presidential, legislative and senatorial elections as well as referendum consultations, as provided for by the electoral code, is the responsibility of the Independent National Electoral Commission (INEC) assisted by the Ministry of Territorial Administration. The Constitutional Court, for its part, settles any electoral dispute that may arise from the organisation of these elections and consultations.

In accordance with article 104, paragraph 2 of the Constitution: The Constitutional Court shall judge the regularity of these elections and referendum consultations. It shall rule on the litigation of these consultations and elections. Violations of the criminal law arising from the elections fall within the competence of the ordinary criminal courts.

The various violations of the electoral code are treated differently, either before the Constitutional Court or before the ordinary courts. The seriousness of the violations can lead to convictions either before the Constitutional Court or before the ordinary courts. The convictions and its execution can be obstructed by obstacles either before the Constitutional Court or the ordinary courts.

A – THE LIMITS OF NATIONS' CONVICTIONS BEFORE THE CONSTITUTIONAL COURT

According to Article 104, paragraph 2 of the Constitution "The Constitutional Court judges the regularity of referendum consultations, presidential, legislative and senatorial elections. It rules on disputes arising from these consultations and elections."

Article 142 (new), paragraph 1 of the Electoral Code states: "Disputes concerning candidacies for presidential, senatorial and legislative elections as well as disputes concerning voting operations and the conformity of provisional results proclaimed by INEC fall under the jurisdiction of the Constitutional Court."

Article 143 of the Electoral Code "If the examination of the file by the Constitutional Court reveals serious irregularities likely to vitiate the sincerity and affect the validity of the result of the ballot as a whole, the Constitutional Court shall declare it annulled.

In case of annulation of the voting, the government shall fix, on the joint proposal of INEC and the Electoral Administration, the date of the new electoral consultation which shall be held no later than sixty (60) days after the date of cancellation.

Under the terms of this provision, the Constitutional Court can only note the serious irregularities that have tainted the sincerity of the result of the entire election in order to pronounce its annulment with a view to the re-run of a new election without seeking to find the perpetrators of the fraud in order to punish them criminally; since the elections have a significant financial impact on the taxpayer, the State budget is affected.

The various irregularities and their sanctions are located at several levels in the electoral code.

I. PRE-ELECTION DISPUTES

The failure of the electoral administration (CENI) to transmit a candidature to the Constitutional Court.

In case of referral for non-transmission of a candidature to the Constitutional Court on the basis of articles 142 paragraph 1, 152, 153 and 154 of the electoral code.

Where a candidate has regularly submitted his or her candidature dossier to the Independent National Electoral Commission (INEC) for an election and this Commission

has failed to forward it to the Constitutional Court even though the nominations were already closed and the specimen ballot papers had already been ordered, the candidate shall refer this failure to the Court by petition. In this case, it is absolutely impossible to regularise his candidacy and the Court chose to condemn the Electoral Commission to pay him damages. This is the case law of the Court since 2007.

The legal question is whether financial compensation can repair a probability of being elected president, deputy to the National Assembly or senator. Compensation by INEC can never replace a chance of being elected to an elective post. Moreover, the money used by INEC for compensation is public money and therefore taxpayers' money.

II- POST-ELECTION LITIGATION

In terms of post-election litigation, Article 142 states: "Litigation concerning candidacies for the presidential election, senatorial and legislative elections as well as disputes concerning the voting operations and the conformity of provisional results proclaimed by the CENI fall within the competence of the Constitutional Court.

Any candidate or list of candidates may challenge the regularity of the electoral operations in the form of a petition addressed to the Constitutional Court. The petition shall be addressed to the Constitutional Court within forty-eight (48) hours for the presidential election and five (05) days for the senatorial and legislative elections, as from the proclamation of the provisional results. The petition shall contain the grievances of the petitioner"

II-1. ORGANISATION OF THE ELECTIONS

II-1a. *Omission of logo on the ballot paper, colour difference between the logo and the one printed by CENI*

In application of Articles 77 and 78 of the Electoral Code, there can be inversion of the logo between different candidates, omission of the logo on the ballot paper, difference of colours between the logo and the one printed by the CENI. The Court found and ruled that these violations concerned a small number of votes and could not have affected the fairness of the vote. However, the Court ordered CENI to compensate the contesting candidate. It is to be regretted that financial compensation risks to become a remedy for violations of the electoral code.

II-1b. *Election propaganda at the polling places*

If it is proven that there was electoral propaganda on the polling places, article 93 of the electoral code prohibits to distribute or to make distribute, under penalty of sanction, on the day of the ballot, ballot papers and other electoral propaganda documents. What penalty is involved? Criminal, in which case it should be clearly characterised, or a civil sanction?

II-1c. *Voting by minors or foreigners*

In the case of voting by minors or foreigners, the ballot papers in casa or all the ballot papers of the electoral office concerned will be invalidated (Article 40).

In addition to invalidation, the law could provide for criminal sanctions against foreigners who voted after a judicial enquiry.

B- LIMITS TO SENTENCING FOR EXCEEDING CAMPAIGN EXPENSES

It is forbidden for political parties or candidates to incur expenses of more than five hundred million (500,000,000) for the presidential election and ten million (10,000,000) for the legislative and senatorial elections.

To this end, the candidates or political parties transmit after the election the statement of expenses with supporting documents to the president of the Court of Audit in order to refer the matter to the Public Prosecutor in case the threshold authorised by the electoral code is exceeded.

In reality, it is difficult for the president of the Court of Audit to verify the sincerity of the declarations made at his level as well as their justifications.

Whether it is the President of the Court of Auditors or the Public Prosecutor, they are below the political level and could hardly accomplish their mission without the will of the candidates and the political parties themselves.

C- THE LIMITS OF COURT CONVICTIONS

According to article 206 and following of the electoral code, taken up by articles 1184 to 1201 of the penal code, individuals whose conviction temporarily or definitively prevents them from being registered on the electoral list are ineligible during the period in which they cannot be registered on the electoral list. Individuals deprived by judicial decision of their right to stand for election in application of the laws in force, persons with a judicial council and other persons listed in the electoral code are neither voters nor eligible under the law.

However, by what means can their registration on the electoral roll be verified and prevented?

The difficulty lies in the fact that before the adoption of the law on the centralisation of the judicial record, which dates back only two (02) years, it was impossible to update the judicial convictions, which therefore lacks reliability.

Voters and the electoral administration are clearly not making any effort to request the removal of disenfranchised voters from the electoral roll. This undoubtedly indicates a lack of interest in doing so.

In conclusion, the convictions pronounced by the Constitutional Court have always given rise to financial compensation paid by the Togolese taxpayer.

When elections are marred by violence, as is the case in many other African countries, the perpetrators are identified, tried and convicted, and benefit from presidential pardons, thus rendering electoral justice ineffective.

Part III
Second Session

THEME 3:
The intervention of the judge in the electoral process

SUB-THEME 1:
Models of electoral justice: shared experience of national electoral jurisdictions

Paper

presented by Mr. **Luke Malaba**,
Chief Justice, Supreme Court of Zimbabwe

Models of electoral justice: shared experience of the Zimbabwean model of electoral justice system

INTRODUCTION

What do you think of when you hear of a 'model of electoral justice'? Do you think of the courts, specialised tribunals and the men and women charged with resolving election disputes? Do you think of a goal of a model of electoral justice – be it achieving justice between warring election candidates, the rectification of electoral malpractices or even the vindication of an individual's right to vote? Do you, perhaps, think of the reasons and bases of electoral justice models? Whatsoever each and every one of us considers a model of electoral justice to be, I am certain that there are, in some respects, similarities in our perspectives, and in others, major differences. So too, is it with perspectives of models of electoral justice at a national level. They will differ from one country to another, yet still, share basic features.

In light of this, I note that the premise of my presentation is that there is a presumption of a choice of a model of electoral justice in every electoral system. Such a choice is obviously influenced by the particular needs of a nation and the conformity of chosen electoral justice model to the electoral system in use. But experience and wisdom tell us that some comparable features of the models in other countries, may help us understand our own models of electoral justice and improve them to ensure that they serve the purpose they are designed for. I am therefore honoured and delighted to share with you about the Zimbabwean model of electoral justice. But before I relate to qualitative features of our model, I find it prudent to first traverse through the philosophical and constitutional underpinnings of our electoral justice model. Many

of these philosophical and constitutional foundational notions are not germane to the Zimbabwean context and, resultantly, will enhance our understanding of the great importance of having electoral justice models in the first place.

The political context informing electoral justice systems:

Models of electoral justice derive their design from the existential and political needs surrounding them. Today, many a country find themselves with organised electoral models. Most of these electoral models are results of centuries of political clashes, of political contestations and of political strivings. Due to the similar political processes giving rise to electoral models, there are common philosophical underpinnings of electoral justice systems worth adverting to in the presentation.

Models of electoral systems and justice are essentially means to particular ends in politics. These political ends arise out of the shared need by all human beings for the flourishing of life. As Professor Finnis argues there are basic goods like life, knowledge and aesthetic experience that all human beings pursue. To Finnis, these are "opportunities of being all that one can be," [1] which, by ethical reasoning, result in human flourishing.[2]

The shared political, economic and social goals of human beings necessitate political organisation and establishments. Political organisation of a people is not only an unavoidable process, but it is also a process that invariably leads to governance – and in an overwhelming number of cases constitutional governance. All nations thus have to make the important decision of how they will organise themselves in order to achieve their shared aspirations.

One consequence occurring after the process of political organisation is that people cede their inherent power into the hands of a leader and representatives. The leader and representatives, in turn, exercise such power on their behalf. The emerging political and social setup thus comprises of a leader, representatives and the represented people and it is sustained by the processes of political participation. There is, resultantly and by such political participation, a controlled interplay of political forces and interests as well as individual aspirations.

The leader and the representatives are placed in the positions of decision–makers. By reason of ceding individual rights to self–govern, the represented people will occasionally require to be heard, to participate in government and to be informed of the state of affairs of their government. This gives rise to political participation which is largely, but not only, carried out through elections. Political participation is not limited to elections, although voting is generally regarded as representing the most effective mode of participation. It is a channel of communication with representatives and

1 See Lisska, Anthony J. New Blackfriars 65, no. 768 (1984): 288-90 at p. 288. Accessed August 28, 2021. http://www.jstor.org/stable/43247572. See also, Hon, Tan Seow. "Justification in Finnis' Natural Law Theory." Singapore Journal of Legal Studies, 2000, 590-639. http://www.jstor.org/stable/24868152. Accessed August 28, 2021.

2 See Lisska A. J. op. cit. at p. 288.

leaders and will, on a rational analysis, not always be successful.[3] Therefore, effective political participation involves 'having a voice in decisions that affect' a people.[4]

Considering that the political organisation of a people and participation above results in an arrangement consisting of the represented people on one side and the leaders and representatives on the other, the survival of such a system will lie in its ability to remain 'up–to–date' with the political goals that it stands for. If a model of political participation is to remain relevant to the people that it serves, it follows that the model of electoral justice created for it should also be relevant. There is a complementariness in the political model. The leader, as in the Zimbabwean case, must 'uphold, defend, obey and respect the Constitution as the Supreme law.[5] So too, the representatives must protect the Constitution and promote democratic governance, as these are the foundations of political representation.[6]

Likewise, the individuals have a duty to participate in the governance of their affairs. For these reasons, proponents of the theory of the *social contract* suggest that the leader and representatives, who are usually referred to as the 'sovereign,' have a duty to ensure that citizens participate in decision making on multi–varied levels.[7] Such participation is almost always through elections. This, by implication requires electoral justice models to be able to give effect to the political design of the day – aimed at breathing life into the aspirations of the people.

In such a political system, the representatives are placed in a position of trust. One philosopher, David Gauthier, recognises trust, rationality and self–interest as the blending elements of governmental systems.[8] A key characteristic is that a single representative is placed in this position by large numbers of people. Even though there may be similarities in the aspirations of the people who place the representative in a position of trust, the representative still has to juggle exclusively conflicting interests of the people. Electoral justice systems thus recognise the importance of the task that is reposed in the leader and in the representative. An electoral system must justly yield to the will of the people of identifying the leader with the highest aptitude and sensitivity to the common aspirations of the people and understanding of the inherent conflicts of interest of his or her constituents.

Some people, rightly so, consider the need for commonality in governance and political participation as necessitating the development and adoption by all people of

3 See Sidney Verba, "Democratic Participation," The Annals of the American Academy of Political and Social Science, Sep., 1967, Vol. 373, Social Goals and Indicators for American Society, Volume 2 (Sep., 1967), pp. 53- 78 at p. 57. Available at: https://www.jstor.org/stable/1037353. Accessed on 28 August 2021.

4 See Sidney Verba, "Democratic Participation," op. cit. at p. 57.

5 See section 90(1) of the Constitution of Zimbabwe, 2013.

6 See for instance and in the Zimbabwean model, section 119(1) of the Constitution of Zimbabwe, 2013.

7 See Markus Loewe, Tina Zintl, Annabelle Houdret. The social contract as a tool of analysis: Introduction to the special issue on "Framing the evolution of new social contracts in Middle Eastern and North African countries", World Development, Volume 145, 2021, at p. 6. Available at: https://doi.org/10.1016/j.worlddev.2020.104982. Accessed on 30 August 2021.

8 See, Ann Cudd and Seena Eftekhari of the Metaphysics Research Lab – Stanford Centre for Study of Language and Information, "Contractarianism," Stanford Encyclopaedia of Philosophy, 2017. Available at: https://plato.stanford.edu/entries/contractarianism/#3. Accessed on 29 August 2021.

an equal and universal standard by which leaders and representatives will be bound and will execute their duties. Equally, this political set up requires that all elements of an electoral system are bound by the same standard – that is the leader, the representatives and the represented are subject to the same law.

It goes without saying that in elections, any person vying for a public office must be fully conversant with the complex interactions between a public office and the people who are subject to the exercise of public powers. Consequently, the electoral system and justice model through which they are enabled to assume positions and responsibilities of governance, must remain alive and informed of the interactions of their public office and the electorate. In other words, it must always give effect to the political aim of the people it serves of forming a participatory government.

A failure by an electoral justice model to live up to the political needs of its participants betrays the objective of forming a participatory government. Such a failure may recede into chaos. I will, at this point, pay homage to Thomas Hobbes' description of the 'state of nature' or 'natural condition of man' that graphically portrays the mayhem occasioned by an absence of a common power 'to keep people in awe' and 'to regulate their behaviour.'[9] Hobbes says that man would always be in a condition of war and ...:

> "In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no culture of the Earth, no Navigation, nor use of the commodities that may be imported by the Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all continua fear, and danger of violent death; And the life of man, solitarity, poor, nasty, brutish and short...."[10]

The above state of affairs, although unpleasant, crisply picture the chaos that would reign in all our societies in the absence of structures to nip the excesses of uncontrolled human behaviour especially in election contexts. Conversely, the prevailing constitutional set up in Zimbabwe as well as in many other countries that is primarily intended to catalyse human progress is brought about by just electoral processes. One may thus, rightly so, pause to possibly imagine, the likely effect of a failure in a system of electoral justice that is intended to forestall and contain the lurking 'natural condition of man.'

The emergence of models of electoral justice:

Juxtaposing the 'natural state of man' and the shared political, social and economic interests of the people, there must be a means to contain and 'make right' the fallibilities to which human beings fall in their political cum electoral endeavours. These means are embedded in models of electoral justice. Models of electoral justice are, therefore, creatures of human beings. They are designs and safeguards created to keep the

9 See A. Nuri Yurdusev, "Thomas Hobbes and international relations: from realism to rationalism," Australian Journal of International Affairs, 60:2, (2006) 305-321 at p. 310, DOI: 10.1080/10357710600696191. Accessed on 30 August 2021.

10 See A. Nuri Yurdusev, "Thomas Hobbes and international relations: from realism to rationalism," op. cit. at p. 310.

common aspirations and political aims of a people as the central goal of their adopted system of governance. Models arise out of a realisation that without them, not only are the political objects of a people shrouded in jeopardy but even their lives too.

These models therefore pursue the establishment of a government that is representative of the common aspirations of the people. Any government that exhibits itself as an antithesis of the people it is intended to serve brews discontentment, bitterness and – in the most extreme circumstances – anarchy. Such a result is counterproductive and may even 'hoist a nation by its own petard.'

Introducing the Zimbabwean model of electoral justice:

The foregoing theoretical antecedents account for the design of most models of electoral justice. For example, through their exposition it can be understood why Zimbabwe is a republic. The foundational provisions of the Constitution of Zimbabwe declare that "Zimbabwe is a unitary, democratic and sovereign republic."[11] This provision determines what a consonant model of electoral justice would look like. Even though such a provision of the Constitution hardly features in constitutional litigation and is inadvertently given less prominence in the day–to–day constitutional mechanisations, it actually stands as the cornerstone of electoral justice. The notions of democracy, of a unitary and republic state recognise the inevitability, of all people in a country, participating in their governance both directly and indirectly.

The Constitutional Democracy:

I have discussed the political contexts within which the ultimate need of an electoral justice model emerges. The electoral justice model, however, is not the only outcome of this political context. Political objectives result in other important safeguards intended to bring accord to the political aims of the people.

One result of the political context within which electoral justice models exist is usually the contemporaneous subsistence of a constitutional democracy. A constitutional democracy is a direct acknowledgment of the inherent political divergence of people in a state. It recognises that political differences can exist in perpetuity and it thus stands out as a mechanism to contain divergence of views and interests, for the good of every person. In the context of this presentation, the constitutional democracy is therefore the vehicle of electoral justice and electoral justice models.

Democratic states ought to provide mechanisms to protect electoral rights. This obligation can be gleaned from the definition of democracy itself. The word democracy is a derivative of the Greek word "demo-kratos," which can be broken down to "demos" meaning 'people' and "kratos" meaning 'rule.' Taken as a whole, democracy connotes rule by the people.[12] Such rule by the people thus includes 'both popular participation and government in the public interest."[13]

11 See section 1 of the Constitution of Zimbabwe, 2013.

12 Lindell, G., Scott, R. (1999). "A Greek – English Lexicon" at Perseus.

13 See A. Heywood, Political Ideologies: An Introduction, 3rd Edition, Palgrave Macmillan, 2003 at p. 330, cited by the Museum of Australian Democracy, Defining Democracy [Online], Available at: https://www.moadoph.gov.au/democracy/defining-democracy/#. Accessed on 29 August 2021.

In a constitutional democracy the constitution sets out who represents the people; how they represent the people and how they are elected to represent the people.[14] The wisdom of establishing a constitutional democracy is better summed up in the Ciceronian maxim *salus populi suprema lex* – that is to say the welfare of the people is the supreme law. To quote a champion of the maxim, who advocated for a civilised government based on respect of rights and the social contract, John Locke:

> "*Salus populi suprema lex*, is certainly so just and fundamental a rule, that he, who sincerely follows it, cannot dangerously err. … For it being the interest as well as intention of the people, to have a fair and equal representative; whoever brings it nearest to that, is an undoubted friend to, and establisher of the government, and cannot miss the consent and approbation of the community…."[15]

Evidently, the historical origins of democratic and constitutional governance are closely connected to the shared intentions of the people. To this end, even though the purpose of a constitutional democracy embraces all aspects of governance – pervading through any governmental conduct – it is particularly relevant in the discourse of electoral justice. Electoral justice must uphold the popular intentions of the 'demos' in setting up an electoral system. There is, therefore, a beckoning to all stakeholders in an electoral justice model to be alive to the supremacy of the will of the 'demos' who set up the model.

The Zimbabwean model of electoral justice is acutely alive to the fact that an election is a means of democratic participation. It enables the aspirations of the common men in the breadth and width of a nation to be openly presented without fear of electoral injustice, thus facilitating the assembly of these aspirations into a mutually beneficial national goal. In light of the theoretical background of electoral justice models, this ought to ring the bells signalling the enormity of the task that any person taking part in the electoral justice system is faced with. The enormity of the task of delivering electoral justice is given effect in Zimbabwe in the judicial acceptance of the fact that:

> "Under the Constitution, an election to an elective public office is regarded as a central institution in a democratic society practising a representative form of government. It is by an election that is freely and fairly held in accordance with the tenets of the Constitution and the provisions of the Electoral Law that Zimbabwean citizens can directly or indirectly through freely chosen representatives take part in the government of their affairs."[16]

The moment of choice of a constitutional democracy:

The constitutional democracy is a political creature. It is by choice. There always comes a time in the formative stages of all nations where the people choose to define how their political, social and economic affairs will be handled – this is the '*moment of choice*.' Nowadays, the moment when the constitutional democracy is chosen is a

14 See the Museum of Australian Democracy, Defining Democracy [Online], op. cit.

15 See John Locke, Two Treatises of Government [eBook], London Printed MDCLXXXVIII [1688]. Available at: https://www.gutenberg.org/files/7370/7370-h/7370-h.htm. Accessed on 29 August 2021.

16 See Tsvangirai v Mugabe and Others CCZ–20–17 at p. 9.

moment that is simultaneous with the actual adoption of a constitution by a people. Constitutional democracies are thus implanted into legal norms that are accepted by the people to whom they apply as being superior and imperative. It is the people who define their own democracy.

The particular aspects of an electoral justice system are a foremost consideration in any *moment of choice* for a constitution. In this moment, the people identify the 'sentries' of their constitutional democracy, the means of changing these 'sentries' as well as the means of warding off any threats to democracy and the resolution of disputes arising from the implementation of their constitutional democracy. The fundamental values underlying an electoral justice system, the rules that will govern the electoral justice system and the rights of the participants in the electoral justice system are also spelt out.

Accordingly, the choice of a model of electoral justice is no light matter. It is a choice of an adequate safeguard against the effects of uncontrolled exercise of political whims in an electoral system. Fulfilling the dual role of being an arbiter and providing 'checks and balances' in elections, a befitting electoral justice model can forestall bloodshed, anarchy and subversion of the popular will. The International Institute for Democracy and Electoral Assistance – International IDEA – reminds us that:

> "Adopting provisions and [electoral justice] mechanisms that stem from local traditions and contexts—which are in line with the society's democratic principles and shared values—may prevent electoral disputes…."[17]

An electoral justice model should therefore be carefully chosen so that it fully caters for the democracy it serves.

Of fundamental values in electoral justice models:

I turn now to consider an important aspect of the electoral justice system.

Electoral justice models are founded on fundamental values. Fundamental values reflect the relative worth that is placed on electoral justice by a constitutional democracy. The Zimbabwean model adopts fundamental values as the anchors of its electoral model. By their nature, fundamental values are a reflection of the particular attributes and results that a constitutional democracy intends to elicit from an electoral justice system. Where an electoral system fails to reflect the fundamental values on which it is based, this is a symptom of deficiencies and failures in the utilisation of the system.

I would exhort every person taking part in the dispensation of electoral justice to pause and reflect on the fundamental values infused in their model of electoral justice. In the Zimbabwean model, fundamental values weave together various components

17 See International IDEA, "Electoral Justice: An Overview of the International IDEA Handbook," Sweden: International Institute for Democracy and Electoral Assistance; 2010 at p. 11. Available at: https://www.idea.int/sites/default/files/publications/chapters/electoral-justice-handbook/electoral-justice-handbook-overview.pdf Accessed on 17 August 2021.

of the electoral justice model that is enacted by the Constitution. These values include respect for the supremacy of the Constitution; the rule of law; fundamental human rights and freedoms; recognition of the inherent dignity and worth of each human being; recognition of the equality of all human beings; gender equality; good governance; and recognition of and respect for the liberation struggle.[18] The Constitution of Zimbabwe helpfully elaborates what the principles of good governance, which bind the State and all institutions and agencies of government at every level comprise. These include a multi-party democratic political system; an electoral system based on — universal adult suffrage and equality of votes, free, fair and regular elections, and adequate representation of the electorate; the orderly transfer of power following elections; respect for the rights of all political parties; and observance of the principle of separation of powers.

The utility of fundamental values in electoral justice models:

You will recall the seminal points I made in this presentation that individuals are a prominent feature of any electoral justice system. Additionally, I have also noted that fundamental values are a reflection of the objectives that a people wish to elicit from an electoral justice system. Taken together, fundamental values preserve the special position of the individual in the electoral justice system. It is for this reason that fundamental values have actually been regarded as the inspiration and rationale justification for both legislative action and the exercise of public authority in Zimbabwe. [19]They resemble the rights and concomitant duties on the State in our governmental and electoral justice system.

In addition, values are a reference point of the conduct required of the political parties into which the individuals are organised. Through values, electoral justice becomes attainable because they create a binding and fixed standard or measure for ensuring that the electoral system is not subjected to abuse. It is appropriate to sum up on this aspect by quoting a passage from the *Tsvangirai v Mugabe* and Others presidential petition that:

> "It is when all measures have been taken by public officials responsible for conducting an election in accordance with the Electoral Law to ensure that the election is violence free and all the necessary mechanisms for voters to cast their vote freely in secret have been put in place, that the right of every Zimbabwean citizen to a free, fair and credible election is secured and the person elected has the right to hold office. So a free, fair and credible election for any elective public office is an essence of democratic self-government."[20]

Borrowing from the *dictum* above it is perceivable that a value–oriented system of elections and electoral justice, shapes the measures that may be taken to ensure the credibility of elections and electoral justice. Thus, in the Zimbabwean case, the values portray a republic underpinned by democracy.

18 See section 3(1) of the Constitution of Zimbabwe, 2013.
19 See Gonese and Anor v Parliament of Zimbabwe and Others CCZ–4–20 at p. 21.
20 See Tsvangirai v Mugabe and Others CCZ–20–17 at p. 11.

Even though the masses are accorded a right to take part in an election to choose leaders and representatives, constitutional democracies ensure that there is a mechanism to hold the leaders and representatives accountable. I have noted that a great measure of confidence, trust and control is reposed in leaders and representatives. Accordingly, Jean–Jacques Rousseau, a leading proponent of the *social contract*, crisply simplified the activity of placing confidence, trust and control in our leaders when he stated that:

> "each man, in giving himself to all, gives himself to nobody."[21]

In light of the great deal of trust placed in leaders, I call on everyone to widen our perspectives of the importance of electoral justice. This is because electoral justice is not a momentary event applicable to the imminent election. It transcends a single election and extends into future electoral processes. A failure to uphold electoral justice in a particular election undermines the prospect of future elections, the continued existence of a constitutional democracy and the fulfilment of the common aspirations of the people.

As such, the principles of constitutional democracy, the fundamental values of the electoral system and the safeguards on the electoral justice must always be respected. The failure to honour these norms in election time and outside election time jeopardises the relevance of these values. We must, therefore, always bear in mind the underlying philosophical and constitutional aspects of the electoral justice system.

A constitution therefore stands as a sturdy means of ensuring that there is electoral accountability. Typically, a constitution carries the electoral model of a nation. It is a necessary implication of the political context within which elections occur. In the 'moment of choice' of a constitution, people usually decide on the scientific method that they will use to entrust a leader and representative with their economic, social and political concerns. In the presidential election petition of *Tsvangirai v Mugabe* and Others, the foundational function of a constitution in electoral justice was pronounced.

There was judicial recognition that "Zimbabwe is a constitutional democracy practising a representative system of government," and that "by the exercise of their sovereign authority, the people of Zimbabwe made the Constitution in terms of which they established elective public offices. They vested the offices with powers of government, to be exercised in accordance with the Constitution or any other law on their behalf and for their benefit."[22]

Based on the foundational provisions of the Constitution, electoral models are thus a necessary, scientific and organised means of ensuring the political participation and organisation of people. The Zimbabwean electoral model incorporates these qualities of being scientific and organised. It requires an election, despite the voting method used, to be 'simple, accurate, verifiable, secure and transparent.'[23]

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21 See Jean–Jacques Rousseau, quoted by Nicola–Ann Hardwick, in Rousseau and the social contract tradition [Online], Available at: https://www.e-ir.info/2011/03/01/rousseau-and-the-social-contract-tradition/. Accessed on 29 August 2021.

22 See Tsvangirai v Mugabe and Others CCZ–20–17 at p. 9.

23 See section 156(a) of the Constitution of Zimbabwe, 2013.

The Constitution of Zimbabwe also enacts the related fundamental norms that demand that there must be appropriate mechanisms to eliminate electoral violence, electoral malpractices and to ensure that electoral materials are safely kept.[24] The sum effect of these scientific characteristics of Zimbabwe's electoral model is that transparency and accountability stand out as the evidence of all valid electoral processes. In keeping with these characteristics, the electoral justice model must give effect to electoral system in use.

Additionally, the Zimbabwean electoral model recognises political parties as the primary means through which the Zimbabwean electoral system has been organised. Political parties have coalesced around common ideologies and aspirations that people share. The use of political parties thus narrows down the divergence of political goals in a nation. When people, in their political parties, gather around the same goals, order ensues.

Once there is an overall electoral system there must be a concomitant justice system to sustain it. Every system is liable to abuse, to misuse and to being misunderstood. This is neither abnormal nor is it avoidable when the astuteness of human beings is taken into account. Yet still, a robust electoral justice system will infuse dispute resolution mechanisms into it beforehand. Electoral justice systems must accept the inherency of disputes. The dispute resolution mechanisms will contain the excesses of human abuse as they arise and ensure the inviolability of the electoral justice system that a people would have committed themselves to.

Having set out the basic philosophical, historical, constitutional and jurisprudential aspects of an electoral justice system, I am now moving on to discuss some of the qualitative characteristics of the Zimbabwean electoral justice system. I earnestly hope that by this discussion, you will be able to draw lessons from our experience, which lessons will enable you to evaluate and refine the models in your own jurisdictions.

RESOLUTION OF ELECTORAL DISPUTES

It is standard practice that an emotive subject such as the election of a state's leadership ought to have mechanisms in place to determine the disputes that are bound to arise in the process. The resolution of electoral disputes in our jurisdiction is a matter within the exclusive purview of the courts of justice. In many countries, the electoral justice models arrive at the method of electoral adjudication, by reason of evolutionary and historical experiences. Zimbabwe is no exception with our electoral justice system influenced heavily by our colonial heritage. This has been the status quo since the dawn of independence.

Electoral dispute resolution is a common theme particularly in constitutional democracies where the individual is the centre of the electoral system. States have adopted different models primarily based on their intended political aim. There is the

24 See section 156(c) of the Constitution of Zimbabwe, 2013.

legislative model that is also referred to as "power verification". It is premised upon the principle of checks and balances between the arms of the state. The legislature in essence regulates its own processes. Under this model, elected legislators determine the validity of an election.

There is also provision of the specialised electoral tribunal model in other jurisdictions. The appeal surrounding this model is based on the expertise and familiarity with the subject matter of the selected adjudicators to determine and protect electoral rights. This model has been applauded as it provides for expert counsel on matters of constitutional and national interest without exposing the judiciary to allegations of interference or bias. However, it has been detracted for allowing in certain instances those in charge of organising elections, that is electoral commissions, authority to preside over their own causes. It is a model in direct competition with our chosen judicial court system.

The judicial court model of justice is nominally referred to as the English model which is an od to its origins. The model is premised upon the perceived independence of the judiciary from external influences. Challenges to election results, at any of the levels of elections, are exclusively heard by the judicial arm of the State. Its most ardent supporters point out that the task of judging and qualifying elections has a judicial nature, and as such, it must be done by a judicial authority in order to guarantee the authenticity, regularity and validity of the election. Thus, the role of the judiciary in dispensing this critical function cannot be understated as judges are inherently non–partisan in the delivery of their occupational mandate. A functional judiciary is arguably best placed to be indifferent to political and party interest in the determination of electoral challenges.

This judicial mechanism of resolving electoral challenges is different from other quasi-judicial mechanisms that have been adopted in other jurisdictions. Whereas there is recognition of specialised electoral tribunal models, the Zimbabwean model has divested such authority from the Zimbabwe Electoral Commission (hereinafter "ZEC"). The determination of electoral disputes is precluded from its influence despite ZEC's guardianship of the voters roll as prescribed in the Constitution.

There is no recognition of the concept of "judge commissioners" with ZEC completely externalised in instances of electoral petitions. The only function that the Commission provides in electoral petitions is the provision of the voters roll at the behest of the aggrieved parties looking to petition the courts. This design is a deliberate aspect of our model. The reasoning behind this is in no way intended to limit the effective resolution of electoral disputes as it is an accepted proposition that challenges to election results or the conduct of elections are a reflection of the resilience of the electoral system.[25]

Our model is intended to afford greater transparency to the process as ZEC's conduct may in certain instances form the gravamen of the electoral petition. The significance

25 Petit (2000), p. 5.

of design is then highlighted as the judiciary is a perceived impartial third party in the dispute. It also prevents the Commission from presiding over its own shortcomings and fosters public confidence in the efficacy of lodging petitions in electoral disputes.

However, the judiciary's mandate does not extend to all its levels. The authority to determine electoral disputes is vested in the High Court through its Electoral Court division except in instances of presidential petitions which are in the exclusive domain of the Constitutional Court. The High Court is a superior court of record and its endowment with the jurisdiction to determine electoral disputes reflects the sensitivity of our model to instability occasioned by electoral challenges. The court of law is also an arena that commands the respect of its users and is generally insulated from instances of sensationalism as there exists a prescribed level of comity in the conduct of its affairs. This is particularly apt in Zimbabwe where the majority of political parties and their leading candidates have an extensive legal background.

An extensive adjudication mechanism that provides redress for infringed electoral rights is central to the credibility and validity of an electoral system. The Electoral Court and by extension the High Court is thus in a position to sufficiently guarantee and determine the rights of parties in electoral challenges. This is in part also due to the level of experience as the High Court judges are experienced legal officers with the requisite legal grounding to exhaustively determine the important questions of law raised in the petitions.

The appointment of judges to the Electoral Court is a matter of serious concern. Judges of the Electoral Court are the men and women who are empowered to test the constitutionality and legality of elections – therefore, it is necessary to ensure that the 'right' judges compose the court. A decision of the Zimbabwean Supreme Court held that if the judges of the Electoral Court are improperly appointed, they lack judicial authority and that any purported exercise of judicial power by improperly appointed judges undermines the rights of litigants to protection of the law.[26] As such, it is this constitutional regard that guides the appointment of High Court judges to the Electoral Court division.

The ability to effectively determine electoral disputes is expressly highlighted by the exclusivity enjoyed by the Constitutional Court in presidential petitions. The question of the validity of the election of a head of state is a pertinent issue which is granted the audience of the most senior judicial officers in constitutional affairs. There are also safeguards in place relating to the other species of petitions where a right of appeal on a question of law is provided for by the Electoral Court. The deliberation on a question of law on appeal by the Supreme Court also provides non-presidential petitions a robust mechanism to preserve electoral rights.

The interaction between the electoral process and the judiciary is principally mediated by the right to a fair and impartial hearing. The concept of free and fair elections is embedded in the need to appoint a majority leader, who will not think on minority lines.

26 See Marimo & Anor v Minister of Justice & Ors 2006 (2) ZLR 48 (S) at p. 58.

Every Zimbabwean citizen, regardless of voting status, has a fundamental right to a free, fair and credible election. In other words, he or she has a right to a valid election held in accordance with the relevant provisions of the law governing the conduct of the election.

The judiciary then comes into focus as a guardian of these rights. The Court is enjoined in the discharge of its mandate to act in accordance with the values fundamental to any democratic society. The guiding principle is that the basis of the authority of a representative government to govern is free, fair and regular elections.

ELECTORAL COURT MANDATE IN ELECTION PETITIONS

The Electoral Court is the court designated to exclusively determine electoral petitions other than presidential petitions which is the reserve of the Constitutional Court.[27] The Electoral Court is of significance regarding local government and parliamentary petitions. The Electoral Act provides for the law that establishes the Court and sets out its functions. It is established in terms of section 161 of the Electoral Act which notes the following:

> "(1) There is hereby established a court, to be known as the Electoral Court, which shall be a court of record.
>
> (2) The **Electoral Court shall have exclusive jurisdiction**—(a) to hear appeals, applications and petitions in terms of this Act..." (*my emphasis*)

The import of section 161 is to preclude other Courts established in terms of the Constitution from exercising jurisdiction in election petitions.[28] The bar extends to the High Court which is a court clothed with inherent jurisdiction to determine any civil or criminal matter in Zimbabwe.[29] This indicates the sui generis nature of election petitions and was highlighted in the case of *Chiokoyo v Ndlovu & Ors*, 2014 (1) ZLR 473 (H) as follows

> "Where the legislature gives the other Court exclusive jurisdiction as was done by s 161 (2) of the Electoral Act, the High Court though clothed with original jurisdiction cannot hear such cases. They were lawfully taken away from it and given to another court of competent jurisdiction."

The word "exclusive", means this court, now has a domain over which, it does not share its jurisdiction with any other court. The combination of exclusive jurisdiction and the addition of powers similar to those exercised by the High Court means this court

27 Section 161 of the Electoral Act [Chapter 2:13] was amended by Act No.3 of 2012 which conferred exclusive jurisdiction upon the Electoral Court.

28 Section 162 of the Constitution provides as follows: Judicial authority derives from the people of Zimbabwe and is vested in the courts, which comprise— (a) the Constitutional Court; (b) the Supreme Court; (c) the High Court; (d) the Labour Court; (e) the Administrative Court; (f) the magistrates' courts; (g) the customary law courts; and (h) other courts established by or under an Act of Parliament

29 Derdale Investments (Pvt) Ltd v Econet Wireless (Pvt) Ltd & Ors HH 656-14, highlighted that the High Court has unlimited original jurisdiction which it exercises unless its jurisdiction is specifically ousted.

now enjoys unlimited jurisdiction over all electoral cases, except criminal cases and cases, which have been specifically, allocated to other courts.[30]

However, it is important to note that there is a stricture to the powers of the Electoral Court regarding the conference of exclusive jurisdiction in electoral petitions. This was provided in the case of Kambarami v 1893 *Mthwakazi Restoration Movement Trust & Ors* SC 66/21

> "It is clear that the Electoral Act provides for situations where the court can exercise its jurisdiction and further provides for the remedies which the court can grant. The net effect is that the nature of the jurisdiction which is granted in the Electoral Act is that the court cannot stray from the provisions of the Act. It is bound to follow the powers set out in the Act...It could not have been the intention of the legislature to give the Electoral Court the power to grant declaratory orders through the amendment of s 161 of the Act. In my view, s 161 of the Act was amended so as to provide the Electoral Court with wider powers so that it is not restricted to dealing only with election petitions as was the position prior to 2012."

The Electoral Court is essentially a creature of statute established to provide electoral justice to its petitioners. It is strictly limited to the powers provided in the Electoral Act and its verdict is not definitive. Section 172(2) of the Electoral Act stipulates that a decision of the Electoral Court on a question of law may be the subject of an appeal to the Supreme Court.

This clause serves a profound purpose as the Supreme Court is the apex court in non – constitutional matters.[31] This elevates the level of scrutiny that is afforded a petition that has been lodged with the Electoral Court. Greater transparency is afforded to the process, particularly where a contentious point of law is granted the audience of a venerable arena such as the Supreme Court.

***LOCUS STANDI* IN ELECTORAL PETITIONS**

The discretion to challenge the impropriety of an electoral outcome is restricted in our jurisdiction. The onus is upon the losing candidate to cast aspersions on the validity of the election. This is provided for in terms of section 167 of the Electoral Act which is worded in the following manner:

> **"167 Who may present election petition**
>
> A petition complaining of an undue return or an undue election of a member of Parliament by reason of want of qualification, disqualification, electoral malpractice, irregularity or any other cause whatsoever may be presented to the Electoral Court by any candidate at such election."

30 Mliswa v The Chairperson Zimbabwe Electoral Commission HH 586-15

31 S169(1) The Supreme Court is the final court of appeal for Zimbabwe, except in matters over which the Constitutional Court has jurisdiction.

The aforementioned provision on locus standi in election petitions is meant to preserve a litany of petitions from parties lacking direct and substantial interest in the matter. This benefits the participating candidates because the Electoral Court is in a position to attend to their genuine grievances which also dispenses of public interest in the matter. Akin to a petition in the Electoral Court, only an aggrieved presidential candidate shall be entitled in terms of section 93 of the Constitution to challenge the validity of a presidential election result.

Despite the restricted access to petition the Courts, our jurisdiction is alive to the need to involve the public in the process. The model aims to safeguard the interests of the individual who has cast his vote thus it is imperative that he is involved in the adjudication process in some measure. We have taken steps to protect the integrity of the electoral justice system by allowing the live broadcast of presidential petitions.

The import of this is that the judiciary's authority to determine the petitions is not exercised in a vacuum. The public is allowed to passively participate as observers in the proceedings that accord validity to the elections. This is in the public interest because the institution and determination of election petitions, has the potential to cause instability and change the composition of one of the chief organs of State.

Another notable issue that has been defined by the Electoral Court relates to the citation of the respondent in electoral petitions. The Electoral Act in section 166 of Part XXIII defines a respondent as "President, a member of Parliament or councillor whose election or qualification for holding the office is complained of in an election petition". The legislature intended to demonstrate beyond doubt the centrality of the winning candidate in election petitions. The challenge is against him or her. This is valid even where his agents or any other person with or without his approval commits acts that benefit his ascension into office. A finding that the election was tainted to such an extent as would materially affect its outcome triggers, by operation of law, the holding of a new election.

Therefore, the petitioner is entitled to cite only the person against whom he or she makes the challenge. This narrows the issues for determination and promotes the integrity of the process particularly, in circumstances where third parties have caused the irregularity, the causal link to the impugned result is sufficiently established. The integrity of the petition constitutes valid grounds for departing from the common law principle normally adhered to when selecting respondents in an electoral petition.

CONSTITUTIONAL COURT MANDATE IN ELECTORAL PETITIONS

The Constitutional Court occupies the most prominent role in electoral dispute resolution as the presidential election inarguably forms the cornerstone of general elections in Zimbabwe. The outcome of the presidential elections informs the government of the day of its leadership. As the highest office in the state, it has the potential to cause major instability as painstakingly highlighted by the deadlock in the

2008 presidential election which threatened the peace and stability of the nation.[32] Thus, it was afforded constitutional concern by the enactment of the Constitution in 2013.

Section 93 of the Constitution endows the right to challenge the presidential election. It is the primary provision that regularises the procedure to be adopted when an aggrieved candidate seeks to review the presidential election and provides the relief that can be obtained by the challenging party. The Constitutional Court is accorded extensive latitude regarding the order it can grant.

Previously, the presidential petition was not the exclusive affair of the Constitutional Court.[33] This is evidenced by the jurisprudence developed in the case of *Tsvangirai v Mugabe & Anor* SC 84/05. The applicant lodged an application to the Supreme Court for redress alleging that the rights to protection of the law and to a fair hearing within a reasonable time, guaranteed to him by the Constitution had been infringed by the High Court. The crux of his complaint was the length of the delay in hearing and determining the presidential election petition by the High Court.

However, the application lacked merit and was consequently dismissed due to other substantive points of law. Regardless the matter highlighted significant gaps in our electoral justice system particularly relating to timelines in dealing with presidential petitions. It also illustrated how the function of an incumbent government can potentially be undermined by protracted litigation surrounding the presidential office.

The developments in our electoral justice system have made concerted efforts to ensure that presidential petitions are determined both expeditiously and judiciously. Section 93 stipulates the following on the nature of a presidential election petition:

> **"93 Challenge to presidential election**
>
> (1) Subject to this section, any aggrieved candidate may challenge the validity of an election of a President or Vice-President by lodging a petition or application with the Constitutional Court within seven days after the date of the declaration of the results of the election.
>
> (2) The election of a Vice-President may be challenged only on the ground that he or she is or was not qualified for election.
>
> (3) The Constitutional Court must hear and determine a petition or application under subsection (1) within fourteen days after the petition or application was lodged, and the court's decision is final.
>
> (4) In determining a petition or application under subsection (1), the Constitutional Court may— (a) declare a winner; (b) invalidate the election, in which case a fresh election must be held within sixty days after the determination; or (c) make any other order it considers just and appropriate.

32 Brian Raftopoulo, Elections, Mediation and Deadlock in Zimbabwe? (ARI) (2008)

33 Previously the right to challenge the validity of a presidential election was exercised in the High Court.

(5) If, in a petition or application under subsection (1)— (a) the Constitutional Court sets aside the election of a President, the election of the President's two Vice-Presidents is automatically nullified; (b) the Constitutional Court sets aside the election of either or both Vice- Presidents, the President must without delay appoint a qualified person or qualified persons, as the case may be, to be Vice-President or Vice- Presidents."

The above provision provides the genesis for the formulation of a presidential petition. It is from section 93 in conjunction with section 167 that the Constitutional Court is accorded its exclusive jurisdiction in presidential petitions.[34] The endowment of exclusive jurisdiction to hear presidential challenges upon the Constitutional Court is by design as it is the apex court in constitutional matters.[35] The recognition of its rank in the hierarchy of courts imbued with jurisdiction to determine constitutional matters is illustrated in the finality of its decision regarding presidential petitions.

Once a presidential petition has been determined by the Constitutional Court, the matter is for all intents and purposes exhaustively decided. This ties into the significance of the presidential petition as its resolution accredits legitimacy to the election of the president-elect or in the event of an adverse order dissolves the presidium entirely. This is supported by section 94 of the Constitution which provides the following:

"94 Assumption of office by President and Vice-Presidents

(1) Persons elected as President and Vice-Presidents assume office when they take, before the Chief Justice or the next most senior judge available, the oaths of President and Vice-President respectively in the forms set out in the Third Schedule, which oaths they must take —

(a) ...or

1. **in the event of a challenge to the validity of their election,** within forty-eight hours after the Constitutional Court has declared them to be the winners." (*my emphasis*)

The Constitutional Court is afforded a wide range of powers in the event that the presidential petition has merit. The Court is entitled to declare a winner to give to effect to the will of the sovereign. The range of its powers is illustrated in section 93(4) where it is tasked with granting any order it considers just and appropriate instead of calling for fresh elections.

The only caveat in the exercise of these extensive powers is that the Court ought to have invalidated the election results. The exercise of the Court's powers under section 93(4) ought to be judicious as capriciousness negatively impacts the confidence of the citizenry in the institutions established to protect their rights. This is significant

34 Section 167(2) (b) of the Constitution stipulates that: (2) Subject to this Constitution, only the Constitutional Court may…(b) hear and determine disputes relating to election to the office of President;

35 Section 167(1): The Constitutional Court— (a) is the highest court in all constitutional matters, and its decisions on those matters bind all other courts;

regarding presidential petitions as the Constitutional Court is the sole legal forum that provides for the protection of the presidential vote.

The importance of timeously determining presidential petitions is reflected by the brevity of the timelines outlined in section 93 of the Constitution. These timelines regulate the amount of time that it is afforded to aggrieved contestants to petition the Constitutional Court. The aggrieved candidates are granted seven days to lodge their petitions. The reasoning behind this is not only to expedite the resolution of the petition but to ensure that in the event of substantial irregularities which nullify the result, the sanctity of the presidential election is preserved by an order of the Constitutional Court which cures the material abuse of the process.

The restrictive timelines also extend to the Court as it is obligated to resolve the presidential challenge within fourteen days. This is in line with the maxim that posits that justice delayed is justice denied.[36] The strictures on timelines also extend to an order for fresh elections which is required to be held within sixty days from the invalidation of the presidential elections.

Section 93 also serves to limit the challenge of the election to the office of Vice-President. Section 93(2) states that the election of a Vice-President may be challenged only on the ground that he or she is or was not qualified for election. This limits the scope for the challenges that are brought before the Court in respect of the presidium. This delimitation protects the dignity of the office.

However, the election to the post of Vice – President has barely been the focus of the presidential petitions that have been brought before the Constitutional Court in terms of the Constitution in 2013. Primary attention in our jurisdiction has been devoted to petitions challenging the validity of presidential elections. The most prominent presidential petitions in terms of the current Constitution are *Chamisa v Mnangagwa & Ors* CCZ 21/19 and *Tsvangirai v Mugabe and Ors* CCZ 20/17 because they established pertinent principles that guide the Court in reaching their determination.

In addition, the Electoral Act provides for the fulfilment of the rights which are highlighted under section 93 of the Constitution. It is the operational legal framework for constitutional provisions on the electoral system. The principle of subsidiarity applies to section 93 of the Constitution as such it finds expression in the Electoral Act.

The principle of subsidiarity is based on the concept of one-system-of-law. Whilst the Constitution is the supreme law of the land it is not separate from the rest of the laws. The principles of constitutional consistency and validity underscore the fact that the Constitution sets the standard with which every other law authorized by it must conform. The Constitution lays out basic rights and it is up to legislation to give effect to them. This is the nature of the symbiotic relationship between the Constitution and the Electoral Act.

Thus, the presidential petition under section 93 of the Constitution is subject to

36 Manemo & Anor v Achinulo & Anor HB 12/2002

the relevant provisions contained in the Electoral Act. One ought to adhere to the provisions of the Electoral Act when petitioning the Constitutional Court regarding presidential petitions. In other words, the Electoral Act is the enabling act of parliament for implementing the ideals set out in the Constitution regarding presidential petitions. Section 111 of the Electoral Act gives expression to section 93 of the Constitution as follows:

> **"111 Election petitions in respect of election to office of President**
>
> (1) An election petition complaining of an undue return or an undue election of a person to the office of President by reason of irregularity or any other cause whatsoever, may be presented to the Constitutional Court within seven days of the declaration of the result of the election in respect of which the petition is presented, by any person—
>
> (a) claiming to have had a right to be elected at that election; or
>
> (b) alleging himself or herself to have been a candidate at such election.
>
> (2) If, on the trial of an election petition presented in terms of subsection (1), the Constitutional Court makes an order declaring—
>
> (a) that the President was duly elected, such election shall be and remain valid as if no election petition had been presented against his or her election; or
>
> (b) that the President was not duly elected, the registrar of the Constitutional Court shall forthwith give notice of that fact to the Chief Elections Officer who shall publish a notice in the Gazette stating the effect of the order of the Constitutional Court.
>
> (3) A declaration by the Constitutional Court in terms of paragraph
>
> (b) of subsection (2) shall not invalidate anything done by the President before that declaration."

The above provision reiterates the ideals contained in section 93 of the Constitution in a manner that gives effect to the principle that norms of greater specificity should be relied upon before resorting to norms of greater abstraction. It provides the basis for aggrieved candidates to challenge the presidential elections in a manner that is consistent with the rights provided by section 93.

PROCEDURAL ASPECTS OF ELECTORAL PETITIONS

Zimbabwean courts will subscribe strictly to the procedural rules in Election petitions. An election petition is sui generis and can therefore not be governed by ordinary rules. This is so because election petitions should meet the highest standards of public scrutiny. That principle is more readily achieved when the procedures that have been

designed to guarantee the integrity of the proceedings are scrupulously observed. The law governing the manner and grounds on which an election may be set aside is to be found in statute and the Court can do no more than relate to the provisions of the Electoral Act and the Electoral Rules as promulgated.

As already mentioned, in Election petitions, the procedure must be complied with. This includes the procedure as to the format of the election petition. In Zimbabwe, there is judicial consensus that the rules on the form of election petitions are peremptory. Rule 21 of the Electoral Petitions Rules is prescriptive as to the form of the petition. It sets out several requirements. Likewise, in the Presidential petition, a respondent is limited to opposing the petition only. The courts have held that a failure by a petitioner to comply with any of these rules on format is fatal and these include: that the electoral complaint must be brought on petition and not on notice; that the names of any person accused of corruption must appear on the face of the petition; that the grounds of petition must appear on the face of the petition; and that the petition must be signed by the petitioner and not his legal practitioner.

The fastidious approach we have adopted in our jurisdiction is relevant as it creates a consistency of result. It fosters a measure of confidence, trust and control in the electoral justice system. It prevents a porous model wherein there is no regulation as to the manner an election can be challenged.

PRESUMPTION OF VALIDITY IN ELECTORAL PETITIONS

Once the petition satisfies all the procedural requirements of the relevant electoral court, the question turns to merits of the petition. There exists a presumption that once an election has been properly concluded, the emergent result is valid. Therefore, courts inherently approach electoral adjudication with a presumption of validity. The presumption conforms to the attendant burden of proof on the petitioner to prove the grounds of his or her complaints. In a recent Constitutional Court decision in an electoral petition, it was stated that:

> "There is a presumption of validity of an election. This is so because as long as the election was conducted substantially in terms of the constitution and all laws governing the conduct of the elections it would have reflected the will of the people."

The onus and burden of proof therefore rest with the applicant to motivate his claim and it is for him or her to substantiate his allegations to the satisfaction of the court. The applicant ought to produce sufficient and clear evidence to establish the grounds of the application to entitle him to the granting of the relief sought.

The discharge of the burden of proof is intrinsically tied to the standard of proof required in electoral petitions. There exists a defined standard which aggrieved candidates ought to satisfy in order to successfully challenge an electoral outcome. This standard is established in our constitutional jurisprudence. The Constitutional Court bench in the authoritative case of Chamisa v Mnangagwa & Ors (supra) defined

the logical premises of the standard of proof followed in Zimbabwe as follows:

> "The purpose of election laws is to obtain a correct expression of the will of the voters. Where the allegations of electoral malpractices do not contain allegations of commission of acts requiring proof of a criminal intent, such as fraud, corruption, violence, intimidation and bribery, the standard of proof remains that of a balance of probabilities. In allegations that relate to commission of acts that require proof of criminal intent, the criminal standard of proof beyond reasonable doubt would apply. There is no basis for departing from settled principles of standards of proof to hold a petitioner to a higher standard of proof in electoral petition cases simply by reason of their *sui generis* nature. In the view of the Court, there is no justification for an "intermediate standard of proof" to be applied in election petitions."

These principles have been consistently followed by Electoral Courts in Zimbabwe, especially where allegations imputing criminal intent are made. As such corrupt practices are required to be proved beyond a reasonable doubt. So fundamental is this principle that one court described it as having been followed 'since independence' – in other words, there is a consistent approach to matters where allegations of corruption are made against another party.

There are good reasons for prescribing such strict standards of proof in electoral matters. Zimbabwean courts are alive to the need to protect the vote of the individual, as such, it is of paramount importance in a democracy that the electoral process is not set at naught and the elected candidate thrown out unless the grounds mentioned in the Act and on which the petition was presented have been clearly and fully proved.

To this end, speculations are not acceptable evidence. Nor is it proper for a court to base its decision on findings that are based wholly or partly on findings made by a team of international observers.

Similarly, in hearing oral evidence, the court must be alive to the fact that an election petition is essentially political. Courts should be circumspect and ensure that witnesses have not tailor–made their testimony to suit the political interests of the candidate they are supporting. Therefore, it has been said that in election cases it is very easy to get the help of interested witnesses but very difficult to prove charges of corrupt practices.

INVALIDATION OF ELECTIONS UNDER THE ZIMBABWEAN ELECTORAL JUSTICE MODEL

Our electoral justice system pays homage to the doctrine of substantial compliance. In effect, the doctrine encapsulates the notion that a court should not overrule an election on the grounds of trivialities.[37] For an election to be overruled, there must be substantial non–compliance with the electoral law that has the effect of vitiating the election. The doctrine is essentially part of our law as it is entrenched within section 177 of the Electoral Act. The section is worded in the following terms:

37 See Matamisa v Chiyangwa and Anor (Chinhoyi Election Petition) 2001 (1) ZLR 334 (H) at p. 340.

> "177 When non-compliance with this Act invalidates election
>
> An election shall be set aside by the Electoral Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the Electoral Court that –
>
> (a) the election was not conducted in accordance with the principles laid down in this Act; and
>
> (b) such mistake or non-compliance did affect the result of the election."

The requirements stated above are conjunctive such that subsection (a) cannot exist independently of subsection (b). This interpretation is based upon the use of the term "and" to join the provisions. It reflects that subsection (b) is a corollary to the significance that is afforded the existence of non-compliance. The non-compliance should have a bearing on the outcome of the election to set aside the result. The Electoral Act sets out the five bases upon which an electoral outcome may be challenged, namely (a) want of qualification, (b) disqualification, (c) electoral malpractice, (d) irregularity, and (e) any other cause whatsoever.

ADJUDICATION OF PRESIDENTIAL PETITIONS

The presidential petition occupies a central position in our electoral justice system. The presidential election itself is the embodiment of the choice accorded to citizens by our model to select their leader and representatives. By voting the party candidates into power, the citizens essentially obey the law as prescribed by the constitution. The election through voters' participation organises the citizens into a common entity of purpose.

Therefore, the swift resolution of presidential challenges is imperative to the stability of the State. Prolonged delays in the determination of such petitions undermines the authority of the office. The Constitution is alive to these considerations hence the fourteen-day period fixed for the Constitutional Court to determine the merits of such a petition. Once the matter is heard by the convened bench, the Court is then called upon to make a determination that disposes of the petition in compliance with the strict timelines. The order it grants is final and definitive.

WITHDRAWAL OF PRESIDENTIAL PETITIONS

Before moving onto the requirements for voiding a presidential election, an important question has been decided in our jurisdiction. The Constitutional Court has been seized with the question of the validity of withdrawing a presidential petition before its hearing. This was founded in the case of *Tsvangirai v Mugabe & Ors (supra)* whereby the aggrieved applicant having filed his court application sought to withdraw his petition. The petitioner had challenged the validity of the president elect's victory based on corruption allegations.

The Court's determination on the petitioner's unilateral act of withdrawal highlighted several important principles guiding our electoral justice model as a republican state. It was established that there exists an intrinsic link between the right of the petitioner to be heard and the Court's obligation to determine the petition.

The absence of an express provision for the withdrawal of a presidential petition in the Constitution serves an important function. It protects the interest of every citizen in the determination of the petition. As indicated earlier on, every citizen has a right to participate in the election. By foregoing, the right of withdrawal, the Constitution places an obligation on the Court to determine the merits of the petition. This accords the elected leader the necessary legitimacy as the process is transparent and inclusive.

The fundamental principles of justice, transparency and accountability act as a compass that guides the conduct of the Constitutional Court in the adjudication of presidential petitions. The Court is conjoined to determine the petition once it has been properly filed by an aggrieved presidential candidate. Thus, our electoral jurisprudence upholds this constitutional ideal by outlawing the withdrawal of a petition lodged under section 93(1) of the Constitution.

REQUIREMENTS FOR INVALIDATING A PRESIDENTIAL ELECTION

The determination of the Constitutional Court on the presidential petition promotes the transparency of our electoral justice system. The citizenry has an absolute interest in the determination of a presidential petition that is lodged in the Constitutional Court. This interest is established in the Constitution. It is the people who, in the exercise of their sovereign authority, decided that when a petition is lodged with the Court challenging the validity of an election of a President they are entitled to know the veracity of the allegations upon which the validity of the election is impugned.[38] This is significant as once a presidential petition is heard the Court is compelled by the strict timelines to provide a definitive order on the allegations.

In our model, section 93(4) provides the remedies which can be granted by the Constitutional Court regarding presidential petitions lodged by aggrieved candidates. The scope of the authority accorded to the Court is extensive. Once a presidential election is invalidated, the Constitutional Court is well within its rights to grant an order it deems just and appropriate to the prevailing circumstances.

The Zimbabwean position on the annulment of presidential elections follows the doctrine of substantial compliance. This approach was elucidated in the pre-eminent case of *Chamisa v Mnangagwa (supra)* wherein a two-pronged stage was highlighted as follows:

> "the Court must be satisfied that this breach has affected the results of the election. In other words, an applicant must prove that the entire election process is so fundamentally flawed and so poorly conducted that it cannot be said to have been conducted in substantial compliance with the law. Additionally, an

38 Tsvangirai v Mugabe & Ors CCZ 20/17

election result that has been obtained through fraud would necessarily be invalidated"

The aforementioned case also established the template for the invalidation of a presidential election. The requirements were set out in the following manner:

"...a court will only invalidate a Presidential election in the following circumstances -

1. Upon proof of commission of electoral malpractices of such a nature and scale as to make it impossible for the court to hold that the result of an election represents the will of the electorate.

2. The Presidential election was so poorly conducted that it could not be said to have been conducted in accordance with the principles for conducting a free, fair and credible election prescribed by the Constitution and the law of elections.

3. The proved irregularities, whilst showing non-compliance with particular provisions of the law of elections, are of such a nature and effect that they affected the result of the Presidential election"

Thus, it is trite in our jurisdiction that the requirement of non-compliance and its effect on the result of a presidential election operate conjunctively in determining the validity of a petition before the Constitutional Court. Therefore, in instances where irregularities have been proven to the Court's satisfaction, the issue turns to their nature and effect on the Presidential election. In circumstances where they are found to be immaterial or negligible, the presidential petition fails to invalidate the result.

CONCLUSION

The electoral justice system in Zimbabwe is reflective of the ideals contained in the Constitution. These ideals are highlighted by fundamental electoral rights contained in sections 67, 69 and 155 of the Constitution. They are buttressed by the provisions of the Electoral Act which is the primary statutory mechanism for the preservation, promotion and development of electoral rights. Protection is afforded to the electoral rights of participants and public interest in the outcome of general elections.

The model is cognisant of the importance of the individual who is the essence of the electoral system as established by the Constitution. The design is clearly intended to achieve a political aim. The citizen is given a right to participate in the election process. This right is generally exercised under the guise of political parties. These become the principal vehicles through which the electoral justice system functions.

The political parties provide the candidates who represent the interests of the public once elected into office. The multi-party system is intended to advance the interests of the general public. It is in the advancement of this public interest that our model provides mechanisms for safeguarding these electoral rights.

The Constitution of Zimbabwe, 2013 is the foundational bedrock of our model of electoral justice. Its principles pervade through the entire electoral justice model. Chief among these principles is that the rule of law must prevail in order for other constitutional imperatives on the conduct of elections to be given effect.

The Courts occupy an important position in the dispensation of electoral justice. There exists a hierarchy in the composition of Courts as forums for electoral rights. The Constitutional Court is accorded sole jurisdiction regarding the important question of presidential petitions. This is distinct from the Electoral Court which is accorded exclusive determination to deal with any other electoral challenge except the presidential challenge. A right of appeal is also vested in the Supreme Court regarding the Electoral Court's verdict.

In summation, the electoral justice system in Zimbabwe is premised upon the interplay between the ideals contained in the Constitution and their protection by the judiciary. The constitutional principles are interpreted by the Electoral Act through the advent of the established judicial forums which promote the transparency, inclusiveness and integrity of the system.

SUB-THEME 1:
Models of electoral justice: shared experience of national electoral jurisdictions

Paper

presented by Mr. **Bheki Maphalala**,
Chief Justice, Supreme Court of Eswatini

1. It is a great privilege and honour for me and my delegation to be invited to the 3rd International Symposium of the Conference of Constitutional Jurisdictions of Africa. Most importantly, I am greatly humbled to the Convenor and Organizers of this Conference for giving me this opportunity to share my thoughts on the theme of this symposium being: *"Electoral Justice: transparency, inclusion and integrity of the process"*. The sub-theme which forms the basis of my intervention and presentation is *"Models of Electoral Justice: Shared Experience of National Electoral Jurisdictions"*. I sincerely wish to thank the Judiciary and Government of the Republic of Mozambique for the great hospitality afforded to me and my delegation since our arrival for which we shall forever be grateful.

2. We meet at a time in the history of our continent when Africa is being ravaged by the dreaded COVID pandemic which has brought untold suffering to our people. It is an understatement to mention that a majority of African countries suffer from financial constraints to buy the vaccines, and those with financial resources cannot find the vaccines due to the hoarding of the vaccines by the advanced countries.

3. Similarly, African people are facing the impact of terrorism and neo-colonialism which have caused untold suffering, death and poverty as well as their displacement throughout the world. Some of the African people are drowning in the Mediterranean Sea trying to escape the ravages of hunger, poverty and unemployment caused by terrorism and neo-colonialism.

4. Electoral Justice involves the mechanisms available in a country for ensuring that the electoral process complies with the constitutional and legal framework. It also involves the protection and restoration of electoral rights. Most importantly electoral justice should provide constitutional and legal remedies to Electoral Litigants who are aggrieved by the electoral process. A formal and credible system of Electoral Dispute Resolution (EDR) is indispensable to achieve electoral justice as a pre-requisite to electoral litigation. The respect for the rule of law has the propensity to trigger a decrease of electoral disputes leaving only the most contentious and obvious disputes which require a resolution.

5. The credibility of the electoral process is underpinned by a free, fair and genuine elections which are characterised by the absence of gross irregularities. The Electoral Commission should display independence and impartiality to promote justice, transparency, accessibility, inclusiveness and equality. Electoral justice prevents fraudulent elections which are characterized by rigging and ensure that the results of the election are a true reflection of the will of the people. Electoral rights which require constitutional protection includes the right to vote and to run for elective office in free, fair, genuine and periodic elections conducted by universal, free, secret and direct vote.

6. The essence of democracy is to promote and guarantee free and fair elections which are characterized by free political participation of all citizens with the legal right to vote and be voted into office. Any political participant who is aggrieved by the violation of free and fair elections should have access to justice before an impartial court of law; hence, the issue of judicial integrity becomes the mechanism for electoral justice. The right to vote and participate in periodic elections at all levels of Government is a basic human right guaranteed by all democratic constitutions. This fundamental human right to political participation in the electoral system can only be enjoyed where the judicial system is independent and possesses integrity.

7. Acceptance of the electoral results depends largely on the existence of institutions and mechanisms created to prevent electoral fraud and avail judicial remedies through an independent judiciary. Such mechanisms should be entrenched in a constitution which enjoys the principle of Constitutional Supremacy, equality before the law, accountability to the law, the respect for the Rule of Law as well as the independence of the judiciary.

8. Electoral Justice contributes positively to economic growth by entrenching political stability, social justice and strengthening accountability and good governance. It encompasses the right to vote and be voted into a political position, the freedom of assembly, gender equality and transparency as well as the absence of political intimidation and violent confrontation. The essence of electoral justice is that the election must be free, fair and credible.

9. Access to Justice is fundamental to the Rule of Law. The justice system should respect and provide equality of all people before the law. Electoral Courts are critical in holding governments and political players accountable. By conducting themselves impartially and independently Electoral Courts manage political turmoil, establish legitimate governments, improve the quality of governance and advance the Rule of Law.

10. An impartial judiciary can guarantee an electoral process that is characterized by integrity which has inclusivity, transparency, accountability and security. Such an impartial judicial system can provide the credibility and legitimacy of electoral results by guaranteeing the resolution of electoral grievances and complaints.

11. The adjudication of electoral disputes should be underpinned by an independent judiciary which decides matters brought before them impartially on the basis of the evidence adduced as well as the applicable law without improper and undue influence, bias, prejudice, inducement or interference. The Bangalore Principles of judicial conduct are instructive that judicial independence is a pre-requisite to the Rule of Law and a fundamental guarantee of a fair trial; and, that Judges should uphold and exemplify judicial independence in both its individual and institutional dimensions.

12. Public access to judicial hearings of electoral disputes provides transparency to the judicial system, and it is fundamental to a democratic society. Similarly, the judgment should be delivered within a reasonable time, and, it should be made accessible to the public in order to foster the transparency and accountability of the Judiciary. The judgment should be reasoned and easily understandable, and it should be written in a simple language.

13. The principle of access to Justice seeks to avail Electoral Courts within reasonable distances of the electorate through decentralization countrywide. It further seeks to ensure that justice is affordable and further capable of providing remedies to all people equally and fairly. Other countries have adopted alternative conflict resolution mechanisms such as arbitration, conciliation and mediation inclusive of Human Rights Commissions, Ombudspersons as well as other Electoral Bodies which are established to resolve electoral disputes. The critical issue in the resolution of electoral disputes is the functional independence of the Courts as well as the Electoral bodies and Commissions established to resolve electoral disputes.

14. It is now recognized internationally that the judiciary in the exercise of its mandate has jurisdiction to annual national elections where there is evidence of gross irregularities to the extent that the elections constitute a nullity. This principle is essential to protect and advance electoral rights and electoral justice. Political players who have won the elections are entitled to form the government whether at the national, regional or local levels.

15. Every electoral system should establish a mechanism to prevent and avoid electoral disputes, correct irregularities and discipline perpetrators. The Electoral Commission should adhere to the principles of legality, certainty, objectivity, independence, neutrality and impartiality in order to be reliable and credible and help prevent electoral disputes.

16. The Parliament of Eswatini is bicameral consisting of the House of Assembly being the Lower Chamber and the Senate being the Upper Chamber. The National General Election is by secret ballot in a first-past-the-post system of voting. Members of both Chambers serve for five-year terms. All candidates run on a non-partisan basis.

17. The House of Assembly consists of sixty-six members, fifty-five elected from the fifty-five constituencies and ten appointed by the Head of State to represent various interest groups such as minorities and marginalized groups. The Speaker presides over the House of Assembly and is elected by members of the House from inside or outside the House. The Senate consists of thirty Senators, twenty who are elected by the House of Assembly and ten appointed by the Head of State and representing various interest groups.

18. Qualifications for Members of Parliament require that they must be at least eighteen years of age, a citizen of the country, be a registered voter, and, they should have paid all taxes or made satisfactory arrangements to the Commissioner of Revenue Authority. Disqualifications are being insolvent without rehabilitation, being of unsound mind, sentenced to death or more than six months in prison for a criminal conviction.

19. The Elections and Boundaries Commission is responsible for the overall elections in Eswatini including overseeing voter registration, ensuring free and fair elections as well as reviewing and determining constituency boundaries. The Commission is independent, and, it is appointed by the Head of State on the advice of the Judicial Service Commission. The members are appointed for a single term not exceeding twelve years.

20. Persons aggrieved by the electoral process have a right to appeal to the Commission; alternatively, they may approach the High Court on an urgent basis for redress. Decisions of the High Court are appealable to the Supreme Court which is the final court.

21. In order to ensure gender balance the Constitution provides that the minimum Female Members of the House of Assembly should be a minimum of 30%. If upon the conclusion of the general election and during the first sitting of the House it appears that the Female Members are less than 30%, the House shall constitute itself into an Electoral College and elect four Female Members of Parliament from the four regions of the country.

22. The available legal remedies where there has been evidence of irregularities include modification of the election result with a consequent change of winner, nullifying the votes received at a certain polling station as well as nullifying the entire election. Our law requires the existence of a serious gross irregularity to interfere with the election results.

SUB-THEME 1:
Models of electoral justice: shared experience of national electoral jurisdictions

Paper

presented by Mr. **Clément Atangana**,
President, Constitutional Council of Cameroon

Case study of Cameroon

INTRODUCTION

Pursuant to all the international legal instruments that enshrine political rights as Human Rights, all citizens have the right and possibility to vote and be elected during periodic, free and fair elections.

In this regard, the Constitution of Cameroon of 8 January 1996 provides for the right to vote and makes it the foundation of democracy and the Rule of Law.

A legal arsenal that governs the electoral system confers duties on the different institutions during the organisation of elections.

Although the decision and the material organisation of elections are the reserve of the Administration *(Ministries and an independent body,* ***Elections Cameroon*** *(ELECAM))*, the management of the resulting disputes falls within the jurisdiction of the Election Court.

Generally, during the election period, there is always conduct resulting in disputes at the different phases, thereby giving rise to disputes that are often ruled on by election courts.

Electoral justice, an essential instrument in a free, fair and inclusive electoral process, stems from the Constitution, the Electoral Code and the laws to organise the Constitutional Council and the Judiciary.

It takes into account the obligation of non-interruption of the electoral process and guarantees the credibility of the electoral results. The dispute must be settled in the sole interest of respecting popular will; that is, the fairness of the poll.

In this regard, the lawmaker has chosen a fair and coherent structure with a simple election dispute, the management of which is entrusted to separate judicial institutions. Besides, administrative courts entertain jurisdiction to rule on disputes resulting from local political elections, while the Constitutional Council has jurisdiction to rule on disputes resulting from national political elections.

I - THE CONSTITUTIONAL COUNCIL, THE COURT IN CHARGE OF NATIONAL POLITICAL ELECTIONS

The Constitutional Council, set up by the Constitution of 18 January 1996, rules on disputes on presidential elections, parliamentary elections and referendum operations.

However, pending its effective establishment in February 2018, the same Constitution provisionally established the Supreme Court as a transition election court.

A –The Supreme Court as a transition election court

From 1996 to 2018, **the Supreme Court** had to rule as the Constitutional Council, on disputes on the elections of members of the National Assembly of 1997, 2002, 2007 as well as disputes on the very first election of Senators of 2013 in Cameroon and, the presidential elections of 1997, 2004 and 2011.

At the end of all these disputes, the role of the election court emerged on the basis of case law gradually built up through hundreds of rulings.

B – Status of the Constitutional Council

Since its establishment on 7 February 2018, the Constitutional Council as guarantor of the regularity of presidential elections and parliamentary elections (Senators and members of the National Assembly), performs its judicial function.

Proceedings are standardised at both the pre-electoral and post-electoral phases.

1 – The Constitutional Council and pre-electoral disputes of national elections

Pre-electoral disputes are mainly disputes on ineligibility, disputes on candidacies and disputes on colours, initials and emblems of political parties.

a) Disputes on ineligibility

Ineligibility is established by the Constitutional Council within three (3) days from the date the matter is brought before it by any interested person or the Legal Department.

b) Disputes on candidacies and disputes on colours, initials and emblems

Disputes on candidacies highlights all challenges and claims arising from the decision of the Electoral Board of Elections Cameroon to publish the names or lists of candidates authorised to take part in a national election.

Petitions shall be for the validation of a rejected candidacy or against the validation of one or more candidacies or list(s) of candidates.

With regard to disputes on the colours, initials and emblems adopted by a candidate or a political party for an election, the election court is empowered to settle disputes between candidates or political parties on some elements relating to the external appearance of their ballot papers.

In all cases of claims or challenges relating to candidacies or colours, initials and emblems adopted by a candidate, the petitioner brings the matter before the Constitutional Council by simple petition within a time limit of two (2) days of publication of the list of candidates.

The Constitutional Council has a time limit of ten (10) days of the filing of the petition to deliver its ruling.

As soon as the Constitutional Council delivers its ruling, it is served forthwith on the Electoral Board of ELECAM and the other parties for execution.

B) The Constitutional Council and post-electoral disputes

The Constitutional Council entertains jurisdiction to rule on all matters on the regularity of presidential elections and parliamentary elections.
The terms and conditions of such control, form and time limit, procedure and decision are laid down by law and the Standing Orders of the Constitutional Council.

1 – Form and time limit for petitions

Matters may be brought before the Constitutional Council for the partial or total cancellation of a given election, by any candidate, political party, representative of a list of candidates or any person serving as Government Agent.

Matters may be brought before the Council by simple petition within **a time limit of 72 hours** of the close of the poll.

The Constitutional Council has fifteen (15) days to rule on the dispute before proclaiming the results.

2 – Procedure

Throughout the procedure, the parties may be assisted or represented by a lawyer or any other person they expressly designate in writing.

The Constitutional Council may, by reasoned decision, reject the petition deemed inadmissible or based on claims that cannot influence the result of the elections concerned.

The investigation follows a written adversarial procedure, with exchange of briefs between the parties.

The Constitutional Council deliberates on the rapporteur's report in plenary session.

3 – Ruling

The Constitutional Council delivers reasoned and final rulings that become enforceable from their delivery.

Since they are *res judicata* rulings, they cannot be appealed against. They are binding on all public authorities and on all administrative, military and judicial authorities, as well as on natural persons or corporate bodies.

Depending on the matter, the Constitutional Council can either disallow the dispute, validate the election, or cancel same in a given constituency where election operations influence the fairness of the poll. This in principle, will require the organisation of a new election.

It is in this regard that petitions on the election of Senators of 25 March 2018, the election of President of the Republic of 7 October 2018 and the election of members of the National Assembly of 9 February 2020 were brought before the Constitutional Council and it not only examined the said petitions both at the pre-electoral and post-electoral phases in the form and time limits provided for by law and pursuant to the principle of adversarial proceedings but also delivered a number of important rulings: **23 rulings on disputes on the election of Senators (2018), 33 on disputes on the election of President of the Republic (2018) and 86 on disputes on the election of members of the National Assembly (2019 and 2020).**

Through such rulings, the Constitutional Council either cancelled the results in some constituencies, or invalidated the candidacy or election of a candidate where and whenever objectivity in the control of the regularity of the election so required.

II - ADMINISTRATIVE COURTS ON DISPUTES ON LOCAL ELECTIONS

With the effective implementation of decentralisation, the organisation of elections of Municipal and Regional Councillors resulted in a large number of disputes involving the administrative court.

1) Pre-electoral disputes on local elections

Pre-electoral disputes of local elections are based on the same nomenclature as that of national elections, with disputes on ineligibility and disputes on candidacies, colours, initials and emblems.

a) Disputes on ineligibility

The Order of the Minister in charge of Regional and Local Authorities to establish the

ineligibility or forfeiture of a municipal or regional elected official may be challenged before the competent administrative court.

b) Disputes on candidacies, colours, initials and symbol

- Disputes on candidacies

With regard to **council elections**, disputes on candidacies (accepted or rejected) are brought by a simple petition before the competent administrative court within a time limit of five (5) days of publication of the list of candidates by ELECAM.

The petition may be filed by a candidate, a representative of a list or a voter registered on the electoral register of the council concerned.

The court rules within a time limit of five (5) days of submission of the petition.

With regard to **regional elections**, the matter is brought before the competent administrative court by simple petition within a time limit of five (5) days of publication of the said list or following service of the decision to reject the candidacy, by a candidate, a representative of a list or a member of the Electoral College.

The court has a period of seven (7) days of receipt of the petition to deliver its ruling.

- Disputes on colours, initials and emblem

The matter may be brought before the competent administrative court within a time limit of three (3) days of publication of the lists of candidates or establishment of the alleged facts.

The administrative court has a time limit of four (4) days of submission of the petition to deliver its ruling.

2) Post-electoral disputes on local elections

The regime of disputes before the administrative court is unique and simple.

- the matter is brought before the competent administrative court by a candidate, a voter or a Government Agent, a representative of the State in the Region seeking the total or partial cancellation of the election in the Council or Region concerned by a simple petition within a time limit of five (5) days of the proclamation of the results by the Council Supervisory Commission.

- the administrative court must rule within a time limit of forty (40) days of submission of the petition.

Its decision may be appealed against.

III – ELECTORAL JUSTICE FOR THE INTEGRITY OF THE PROCESS

Elections can generate unethical behaviour to influence the results, and consequently, electoral integrity that is relevant to the credibility of electoral processes and the legitimacy of their results.

In Cameroon, there are criminal sanctions for acts that undermine electoral integrity, the application of which is the responsibility of the criminal court.

CONCLUSION

From the foregoing, it should be concluded that in Cameroon, electoral justice strengthens the different pillars on which a democratic electoral process is based, namely, its transparency, its inclusiveness and its integrity.

SUB-THEME 2:
The independence of the electoral judge: guarantee of the transparency and integrity of the electoral process

Paper

presented by Mr. **Mbalo Ranaivo Fidèle**,
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INTRODUCTION

Article 5 of the Malagasy Constitution emphasizes that sovereignty belongs to the people, the source of all power. In a representative system such as Madagascar's, this is achieved through the exercise of the right to vote.

The right to vote is a fundamental right that allows each citizen to elect the representatives of his choice. It is also a democratic weapon allowing the people-voters to get involved in politics during elections.

Democratic regimes protect and guarantee fundamental rights by granting a right of appeal to the independent electoral justice system.

Indeed, within the framework of the electoral process, the electoral judge during the electoral dispute must know and apply meticulous and complex procedures. In order to give credibility to the electoral process, the electoral judge must be neutral, credible and independent.

During my presentation, we will discuss the following points: independent electoral justice, electoral disputes, referral to the electoral court, procedures to follow, the role of the electoral judge in the electoral process, criminal offences in electoral matters.

Principles of electoral justice

The free, fair, credible and transparent election must be conducted under the control of an independent, impartial and sovereign electoral justice.

Two fundamental principles govern electoral disputes: the sincerity of the ballot and the strict application of electoral texts.

1. The sincerity of the ballot

The sincerity of the vote and the authenticity of the ballot imply that the results of the electoral operations reveal the real and exact choice of the voters.

The following rules guarantee the sincerity of the vote:

1.1 Equal opportunity for candidates

During the 2015 communal elections, the Administrative Court of Fianarantsoa ordered the holding of a new election in the electoral district concerned because a candidate was omitted from the specimen ballot prepared by CENI. This omission violates the principle of equality.

1.2 Freedom to vote

By judgment No. 11-CES/AR of 06 February 2014, the Special Electoral Court annulled the votes obtained by a candidate in the Commune concerned because a public official of this locality abused his prerogative of public power and the motorbike belonging to the Commune to get a candidate elected.

1.3 The theory of decisive influence

The electoral judge must proceed to annul the results or the votes obtained by a candidate if it is demonstrated that there is moral pressure that could influence and change the direction of the vote.

The infringement of the sincerity of the ballot is decisive in the work of the electoral judge.

2. Strict application of electoral texts

The electoral judge must strictly apply electoral texts.

In principle, the conditions of admissibility of the petition are strict, i.e. any failure to comply is sanctioned by rejection.

However, the electoral judge may be lenient for formalities that can be regularised.

Case of additional supporting documents (proxy, evidence,)

The powers of the electoral judge according to the electoral texts

Apart from any request, the electoral judge carries out a systematic verification of the electoral documents which are submitted to him.

Whether or not the matter is referred to him, depending on the irregularities found, the

electoral judge can:

- Adjust the results after finding anomalies or recounting votes;

During the 2019 Communal elections, the Administrative Court of Antsiranana rectified the results in the 09 voting stations.

- Annulate partially or totally the votes obtained by a candidate;

During the legislative elections of 20 December 2013, the Special Electoral Court annulled the votes obtained by the candidate MARA Niarisy in the 4 communes.

- Annulate the results in one or more voting stations or in an electoral district;

During the legislative elections of 20 December 2013, the Special Electoral Court annulled the electoral operations in 68 voting stations. It also annulled the electoral operations in the 04 electoral districts.

- Order a new election.

During the legislative elections of 20 December 2013, the Special Electoral Court ordered a new election in the 4 electoral districts.

What are the different types of litigation?

<table>
<tr><th>Type of litigation</th><th>Jurisdictional competence</th></tr>
<tr><td>Litigation on the electoral list:
Cases of omission of name from the electoral list</td><td>Civil Jurisdiction</td></tr>
<tr><td>Litigation of the application:
Case of refusal to register an application</td><td rowspan="3">Electoral jurisdiction</td></tr>
<tr><td>Litigation of electoral operations:
Cases of denunciation of irregularity during the electoral campaign</td></tr>
<tr><td>Disputes over results:
Cases of contestation of provisional results</td></tr>
<tr><td>Law enforcement litigation</td><td>Criminal Jurisdiction</td></tr>
</table>

Role of the High Constitutional Court in electoral matters

The High Constitutional Court is the competent court to hear electoral litigation in presidential and legislative (parliamentary) elections, and referendums.

What are the conditions for the admissibility of the electoral petition?
The applicant must meet the following requirements:
- The standing to act
- The time limit for the appeal
- The subject of the application
- The form and content of the application
- Place of filing the application

Who has standing to act?
Article 202 of the Organic Law No. 2018 - 008 of 11 May 2018 on the general regime of elections and referendums has restrictively listed the persons who can file a petition.
- The candidate.
- The elector who has effectively participated in the vote
- The candidate's delegate
- The candidate's proxy
- The national observers approved by INEC.
- The INEC

In what form should the petition be submitted?
The petition must:
- Be in writing;
- Be drawn up in triplicate;
- Contain: the name of the applicant, his or her address, a legalized copy of his or her voter's card or the document in lieu thereof;
- Contain the object, the facts, the legal arguments in support of the request.

Where to submit the petition?
Generally, the petition must be submitted:
- at the registry of the electoral court directly, or by registered letter with acknowledgement of receipt (LRAR), the postmark being taken as proof;
- at the clerk's office of the CFI of the place of voting, either directly or by bailiff's writ.

The CFI shall promptly transmit the request to the registry of the electoral court concerned;
- at the level of the CENI (Electoral Administration).

For remote localities:
- At the head of the administrative district who will quickly transmit the request to the registry of the court concerned
- At the disbands of INEC (CEP, REC, CED, CEC)

What are the time limits for appeals?
The time limit for appealing against an electoral dispute varies according to the type of litigation.

Type of litigation	Time for appeals
Application litigation	48 hours after CENI's decision to refuse
Challenging the irregularity of the voting process	From the day after polling day until the publication of provisional results
Litigation on results	From the day after the publication of the provisional results until the day before the official announcement of the final results.

During the examination of the substance of the petition:
The electoral judge verifies and examines the supporting documents submitted by the applicant.

The assessment of the probative value of the evidence is the sovereign power of the electoral judge. The electoral judge verifies if the alleged irregularities had an impact on the results.

What are the possible irregularities in the electoral process?
Irregularities concerning the electoral list
Irregularities concerning the electoral campaigns
Irregularities that may be found during the voting process
Irregularities relating to the counting operations
Irregularities concerning the electoral documents
Other anomalies

Law enforcement litigation
In electoral matters, criminal litigation falls within the competence of the criminal judge. It punishes wrongful acts which may, beyond their effect on the election, disturb public order.

The Public Prosecutor's Office prosecutes any irregularity of a penal nature, provided for by the electoral texts.

In the case of a criminal offence, the electoral judge assesses whether it has a direct impact on the results of the vote. He is obliged to transmit the case to the competent criminal court.

Some examples of criminal offences:
Buying and selling of votes on polling day and in the vicinity of the voting station;
Fighting, assault and battery, vandalism on voting day
Defamation committed (writing, drawing, speech during a propaganda),...

The electoral judge does not impose fines or imprisonment

Criminal offences can be categorised as follows:
Offences constituting fraud in the exercise of the right to vote;
Offences relating to electoral campaigning;
Offence constituting an obstacle to the sincerity of the election;

Who can report criminal offences?
Criminal offences can be reported by the following persons:
The electoral judge,
The INEC and any other administrative authority,
The Public Prosecutor,
Any person who has an interest.

In summary, the fundamental mission of the electoral judge is to defend the choice of voters in good faith against all frauds and manoeuvres aimed at distorting the results of electoral operations and not to proceed to their systematic annulment.

Electoral justice is at the service of the people, the source of all power. As such, each time the electoral judge accomplishes his mission, he is accountable to the citizens - voters - taxpayers. And in fulfilling his fundamental mission, one can say that the electoral judge is independent.

The independent electoral judge is a neutral, credible, competent and honest judge. Independent electoral justice is a guarantee of political, social and economic stability.

Ladies and Gentlemen

I thank you for your intention.

SUB-THEME 2:
The independence of the electoral judge: guarantee of the transparency and integrity of the electoral process

Paper

presented by Ms. **Marie Thérèse Mukamulisa**,
Vice-President, Supreme Court of Rwanda

I. INTRODUCTION

On the threshold of the end of the devastating war that was described as global, there was a burning quest to pursue the legitimate mode of access to and exercise of power, equality and freedom according to the currents of thought developed earlier by the philosophers of the Enlightenment, as well as the desire to embrace Abraham Lincoln's famous principle that "Democracy is a government of the people, by the people, for the people.

Thus, various international instruments have opened up new horizons in the field of human rights, and among the rights enshrined in these various international instruments is the right to vote and to participate freely in the conduct of the public affairs of one's country, which is a foundation of democracy and a fundamental civic right.

The spirit behind these instruments has been taken up by the legislations of many countries including Rwanda, notably in the Constitution of 2003 revised in 2015, in its articles 1 paragraph 3 and 27 paragraph 1 where it specifies that this participation is done either directly or through representatives who are freely and legally chosen.

The evocation of choice undoubtedly alludes to the electoral process and, as in other social relationships, the exercise of this right deserves special attention from the public administration to prevent potential disputes from arising, otherwise recourse to the judicial system to rule on the dissatisfactions of some and others remains the last and most effective way to achieve justice.

Furthermore, according to Charbonneau, measuring citizen participation in the management of public affairs implies taking a close look at various aspects of political life, such as the rate of participation in electoral processes, the level of social commitment and militant action, the effectiveness of the various methods of public participation, civic competence and the level of social ethics of citizens[1].

1 Charbonneau, J. P. (2005). From democracy without the people to democracy with the people. Éthique publique. International Journal of Social and Governmental Ethics, 7(1).

While the right to vote is a foundation of democracy and a fundamental civil right, the judge is the guardian of electoral formalities, but also the guarantor of the sincerity of the vote[2]. Therefore, the electoral judge must be independent and free to decide cases brought before the court, without being subject to interference or influence from anyone.

We will present the electoral process in Rwanda with regard to the independence of the judge in case of electoral disputes.

1. The overview of judicial independence

Judicial independence is a recognised principle in a democratic society. It is a precondition for a society to function on the basis of the rule of law, as one of the most important elements of the rule of law respecting human rights is an independent and transparent judiciary. The independence of the judiciary is one of the key elements of the legal framework that must surround the judge and his or her action in order to guarantee his or her authority to maintain public confidence in the judicial system.

Various international instruments further underline the importance of judicial independence including the Universal Declaration of Human Rights[3] and the International Covenant on Civil and Political Rights[4]. In particular, the UN Basic Principles on the Independence of the Judiciary state that: "The independence of the judiciary shall be guaranteed by the State and set forth in the national constitution or legislation. It is the responsibility of all institutions, governmental and otherwise, to respect the independence of the judiciary[5]".

Thus, in the view of the European Court of Human Rights, the independence of the judge is inseparable from that of the court, and the Court considers that in order to establish whether a court can be described as "independent", several elements must be taken into account, including the method of appointment and the duration of the term of office of its members, the existence of protection against external pressure, and whether or not there is an appearance of independence[6].

However, judicial independence is often misunderstood as being in the interest of judges, which is not the case as it provides the public with the assurance that a judge is impartial, thereby protecting individuals and the community.

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2 Ghevontian, R. (2012). The Constitutional Council, electoral judge and freedom of expression. *Les Nouveaux cahiers du Conseil constitutionnel*, (3), 45-54.

3 See Universal Declaration of Human Rights, G.A. 217 A (III), art. 10, U.N. Doc. A/810 (1948) : Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

4 See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art 14, 19 Dec, 1999, 999 U.N.T.S. 17: Everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

5 Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from 26 August to 6 September 1985, and reaffirmed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

6 Findlay v. United Kingdom, 25/02/1997 and Brudnicka and others v. Poland, 3/03/2005

It is a prerequisite of the principle of legality and the fundamental guarantee of a fair trial and for this reason a judge will uphold and exemplify judicial independence in both its individual and institutional aspects[7].

From an individual point of view, it is not enough to have independence, it must also be protected. It is from this perspective that it has been said that individual independence is protected by three elements, including (1) security of tenure, usually provided by a constitutional provision that a judge can only be removed from office for cause, such as gross misconduct or serious incompetence; (2) decent remuneration and conditions of service (i.e. financial security); and (3) immunity from civil liability for losses caused by the performance of judicial duties. However, individual independence is also supported by the existence and enforcement of a code of ethics for judges and other court personnel[8].

In the African context, incidents of judicial independence not being upheld are recurrent and manifest themselves in various forms such as intimidation of judges to render decisions favourable to the government, or coercion to resign and in the worst cases, executions for not cooperating with the illegal actions of the regime[9]. This shows us how far judicial independence still has to go.

From an institutional point of view, the independence of the judiciary refers to the other branches of government, i.e. the legislative and the executive. This aspect is expressed by the principle of separation of powers which states that each branch of government has separate powers, and generally each branch is not allowed to exercise the powers under the other branches. However, judicial independence is frequently challenged because the judiciary is more vulnerable to pressure or influence.

Indeed, the judiciary takes decisions that could negatively affect the executive or the legislature. This is the case, for example, when the courts rule that a law initiated by the government and adopted by the legislature is unconstitutional. This is why some constitutions, in addition to providing for the separation of powers, grant the courts the power of budgetary and administrative control. This is intended to enable the courts to prepare and administer their budgets without pressure mainly from the executives[10].

2. The Legal Framework of Judicial Independence in Rwanda

Article 140 of the 2003 Constitution of the Republic of Rwanda enshrines the institutional independence of the judiciary and states that: "*The judiciary is independent and distinct from the legislative and executive branches of government. Judicial decisions are binding on all parties concerned, whether public authorities or individuals. They can only be challenged through channels and procedures determined by law*". By

7 Article 1 of the 2001 Bangalore Draft on a Code of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity and revised at the Round Table of First Presidents held at the Peace Palace in The Hague on 25-26 November 2002).

8 Rugege, S. (2006). Judicial independence in Rwanda. Pac. McGeorge Global Bus. & Dev. LJ, 19, 411.

9 Ibid.

10 Harre, G. E. (2000). Some reflections on executive discretion and judicial independence. Commonwealth Law Bulletin, 26(1), 567-571.

virtue of this article, these three powers are separate and independent of each other but complementary. Their powers, organisation and operation are defined in the Constitution (Article 61(1)). Paragraph 2 of this article specifies that the State must ensure that the functions within the legislative, executive and judicial powers are exercised by competent and honest persons[11].

The independence of the judiciary is manifested in the principle that neither the government nor, a fortiori, the administrative authorities subordinate to it, nor parliament, may give an order or exert any direct or indirect pressure on a judge to rule in a particular way. In addition, the Constitution specifies that the judiciary is independent and enjoys administrative and financial autonomy.[12]

Also, article 151 paragraph 1, point 5 of the Constitution guarantees the personal independence and thus requires the impartiality of judges in the following terms: *in the exercise of their judicial functions, judges must adhere to the law and remain independent of any other power or authority.*

Article 157 of the same Constitution provides for the procedure of dismissal which is only possible in case of serious professional misconduct, due to unworthy behaviour by the President and Vice-President of the Supreme Court, the President and Vice-President of the High Court and the High Court of Commerce. This dismissal is only possible if it is initiated by three-fifths of the Chamber of Deputies or the Senate and if there is a two-thirds majority vote in each chamber[13]. It should be noted that since 2017, the introduction of the Court of Appeal between the Supreme Court and the High Court confers on the judges, president and vice-president of this court the same protection as that granted to the judges of the above-mentioned courts.

Furthermore, with regard to legal protection, according to the Law on the Status of Judges and Other Judicial Personnel, judges can only be dismissed for reasons of serious misconduct, serious incompetence, or inability to perform judicial duties for reasons other than illness if, after a disciplinary procedure, the Supreme Council of the Judiciary headed by the President of the Supreme Court, decides so.

The appointment process of judges also affects their independence. Although Supreme Court judges are appointed for life, subject to retirement age, the President and Vice-President are appointed for a term of 5 years, renewable once.

Thus, for all judges, except those of the Supreme Court and the Court of Appeal, the executive plays no role in their appointment.

3. The Legal Framework for Elections

The structure, powers, functions and responsibilities of electoral management bodies

11 Article 61 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

12 Article 150 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

13 It should be noted that these constitutional guarantees are relatively new as they date back to 2003, with the adoption of the current Constitution which was revised in 2015.

are defined by the legal framework of each country, specifically in the provisions that deal with the electoral process.

The comprehensive legal framework governing elections can be based on a wide variety of sources, including international and national documents. For example, Article 25 of the International Covenant on Civil and Political Rights states that "Every citizen shall have the right and the opportunity, without any discrimination as referred to in Article 2 and without unreasonable restrictions (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country."

The African Charter on Democracy, Elections and Governance states that "State Parties reaffirm their commitment to hold regular, transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa[14]".

It is within this framework that Rwanda created the National Independent Electoral Commission to prepare and organise elections at the grassroots level, legislative, presidential and referendum elections and any other election that may be provided for by law. It also ensures that elections are free and transparent[15].

In Rwanda, elections are governed by the Constitution and various laws. Thus, Article 1 (3) provides that "national sovereignty belongs to Rwandans who exercise it directly by referendum, by elections or by their representatives". As for the organic law n°001/2019.OL of 29/07/2019 governing elections, it determines the modalities relating to presidential, legislative, local, National Councils and referendum elections while the law n°30/2018 of 02/06/2018 determines the competence of jurisdictions according to the type of election.

4. Organisation and conduct of elections in Rwanda

a. Establishment of the electoral list

Apart from citizens who have been declared guilty of murder or assassination, genocide or crimes against humanity, rape of a minor as well as prisoners and refugees, any Rwandan who has reached at least the age of eighteen (18) years or who will have done so on polling day, has the civic duty to register on the voters' list of the Village or the Embassy before the period of registration on this list is closed, by producing his/her identity card or any other document issued by the competent authority attesting that he/she is a Rwandan national[16].

The registration on the voters' list may be appealed before the National Electoral

14 Article 17 of the African Charter on Democracy, Elections and Governance

15 Article 3 of the law nº 31/2005 of 24/12/2005 on the organisation and functioning of the national electoral commission

16 Articles 6 and 7 of the Organic Law n° 001/2019.OL of 29/07/2019 governing elections

Commission of the jurisdiction where the dispute occurred and all its final decisions concerning the registration on the voters' list and its correction may be appealed before a competent court[17].

b. Applications

Only citizens may stand as candidates, provided that they have not been convicted of any criminal offence involving deprivation of civic rights or ineligibility, and subject to incompatibility with other functions such as those of magistrates. Candidates must make a declaration of candidacy, which may be refused by the administrative authority that has a grievance against the person concerned.

c. The electoral campaign

It is dominated by the main principles of transparency, sincerity of the ballot and respect for the equality of candidates. It must take into account, independently of the internal rules, the principle of freedom of communication which is guaranteed by Article 33 of the Constitution of Rwanda. For any election, the candidate has the right to use posters and other means of campaigning not contrary to the law.

d. The elections

Polling stations shall be set up in public buildings or public utilities or in any other places determined by the Commission. For presidential elections, direct parliamentary elections and the referendum, polling stations outside Rwanda shall be open throughout the jurisdiction of Rwandan Embassies. The Ambassador may, upon authorization of the Commission, designate another place within his or her jurisdiction to serve as a polling station. The chairperson of the polling station shall ensure the coordination of the voting operations at the polling station. The organisation of the vote in each polling room is ensured by the polling room coordinator and the assessors.

Each candidate is also free to be represented in each voting room or at the polling station by a person with a written mandate issued by the competent authority within the political party, a coalition of political parties or by an independent candidate. The ballot box with only one opening for the ballot paper to pass through must, before the start of the ballot, be empty and presented open to the population and to the representatives of the candidates and election observers, if they are present, by the agents responsible for the ballot. Before the opening of the ballot, it is sealed to be re-opened at the beginning of the counting.

After the count, the ballot box containing the used ballot papers is sealed again. The ballot box shall be placed in a place visible to any person in the voting room[18].

The opening of votes is public and includes the counting of votes and envelopes. The envelopes are opened by the scrutineers appointed by the candidates. The result is proclaimed publicly, after the drafting of the minutes of the results which are then centralised.

17 Articles 17 and 19 of the Organic Law n° 001/2019.OL of 29/07/2019 governing elections
18 Articles 31, 34 and 39 of the Organic Law n° 001/2019.OL of 29/07/2019 governing elections

5. The scope of judicial review in general

The nature of the appeal will differ depending on whether it is made before or after the election. The pre-electoral appeal essentially concerns the revision of the electoral list and aims to rectify an error or irregularity committed by the administration. As for the post-electoral appeal, it aims at the annulment of the election and the judge has the power of reformation by rectification of the results or annulment of the elections.

a. The power of reversal by rectification of results

First of all, in case of obvious anomalies, the judge rectifies the number of votes obtained by a candidate, and in this case he can attribute votes to a candidate and subtract them from the one who was the beneficiary of irregular votes. On the basis of these recalculations, he may declare certain candidates elected, instead of others whose election he annuls. However, it only has the power to do so if the evidence available to it allows it to restore with certainty the will of the voters.

If the rectification of votes is based on a hypothetical simulation, this power is not available to the court, and in this respect the line between the certainty of the result obtained by rectifying an irregularity and the hypothetical simulation may be delicate.

b. The annulment of elections

The judge can annul the elections in case of irregularities committed on the sincerity of the ballot and the burden of proof lies with the plaintiff. Thus, in the majority of cases, irregularities in the conduct of the electoral process only lead to the annulment of the election if there is a small difference in the number of votes between the candidates or lists of candidates. Partial or total annulment entails the organisation of new elections. An exception to this principle is made in the case of partial annulment of elections involving a list candidate when, in the case of blocked list elections, the court is able to declare elected the candidate following the one who has been excluded.

6. Electoral Judge, guarantee of transparency and integrity of the electoral process in Rwanda

In Rwanda, the guarantee of transparency and integrity of the electoral process lies in the fact that the jurisdictions share the same fundamental guarantees, including the independence and impartiality of judges, the existence of an effective appeal and the need to rule within a very short timeframe.

a. The existence of an effective appeal

The participation of an independent and impartial judge is not enough to ensure the transparency and integrity of the electoral process, it is necessary that the court is called upon to decide on a protest or challenge, with the fundamental guarantees that are attached to any trial, particularly the adversarial nature, public, motivation of the decision and possibly the right to appeal because the right of access to a court is one of the two expressions of the right to appeal. The right to appeal is the right

of any person to be able to challenge a measure taken against him/her, before an authority invested with the power to reform this measure and/or to repair its harmful consequences[19].

In order for the appeal to the electoral judge to be effective, it is also necessary that the deadlines imposed on him to give his opinion are very short, and must allow the difficulty to be settled without too much delay so as not to compromise the normal conduct of the election.

In Rwanda, all disputes relating to the elections of local administrative authorities fall under the jurisdiction of the High Court in their specialised chambers for social and administrative matters[20]. The High Court hears disputes relating to the elections of administrative authorities at the level of the Province and the City of Kigali[21], while the Supreme Court is competent to rule on disputes relating to the referendum, the election of the President of the Republic and parliamentarians[22].

b. Petitions to contest the results of the referendum and the presidential and legislative elections[23]

The application to contest the election results is based on the registration of candidates, the electoral procedure, the conduct of the vote and the counting of votes. The right to appeal to the Supreme Court belongs to any citizen, any candidate, any political party or the National Electoral Commission. The application shall be made within forty-eight (48) hours from the day of publication of the list of candidates or the provisional proclamation of the electoral results and shall not be subject to payment of legal fees.

The applicant shall reserve a copy of the complaint to the National Electoral Commission and the complaint shall not suspend the implementation of the results. The elected candidate remains in office until the dispute is resolved[24].

The hearing of the election petition shall be public and only written evidence shall be admitted. The bench shall consist of at least five (5) judges. When the Court finds the petition well-founded, it may, as the case may be, annul the contested decision or the contested election, or else reform the results.

Where the Supreme Court finds that the errors in the petition substantially change the results of the elections, it shall issue a judgment annulling the elections and declare that new elections shall be held within ninety (90) days from the day the annulled elections were held.

Where the Supreme Court finds that the errors in the petition cannot lead to the annulment of the elections, it shall highlight these errors so that they can be corrected.

19 Serge Guinchard, Droit processuel: Droit commun et droit compare du procès équitable, 4th Ed. Dalloz 2007, page 420.
20 Article 36, 1° of the law n°30/2018 of 02/06/2018 determining the jurisdiction of the courts
21 Article 49 of the law n°30/2018 of 02/06/2018 determining the jurisdiction of the courts
22 Article 69 of the law n°30/2018 of 02/06/2018 determining the jurisdiction of the courts
23 In this section we will only deal with the procedure before the Supreme Court.
24 Article 76 of Law No. 30/2018 of 02/06/2018 determining the jurisdiction of courts.

The Supreme Court has a period of fifteen (15) days from the last day of appeal to make a decision.

The decision of the Supreme Court shall clearly state the reasons for the decision. The decision shall be notified to the applicant, the Chairman of the National Electoral Commission and the Minister in charge of elections. Where the Supreme Court finds that the application does not meet the preconditions, it declares it inadmissible and the inadmissibility of the application confirms the provisional results provided by the National Electoral Commission[25].

So far, it should be mentioned that the cases before the Supreme Court mainly concern the approval of senatorial candidates other than those appointed by the President of the Republic. Here are some illustrations:

- In the case RS/SPCL/SPEC 0002/2019/SC rendered on 24/09/2019, the Supreme Court approved one of the candidates for the post of senator. However, the second nomination was not approved on the grounds that the candidate (she) did not meet all the requirements.

- In the case RS/SPEC/0002/16/CS rendered on 14/11/2016, out of eight senatorial candidates presented to it, the Supreme Court approved five who fulfilled the requirements, while two others were not approved.

- In the case RS/SPEC/0001/15/CS of 30/04/2015, the Supreme Court ruled that all 4 candidates were eligible.

- Case RS/SPEC0002/11/CS issued on 23/08/2011: the Supreme Court approved the 58 candidates who met all the requirements while the other 4 candidates were rejected.

Regarding the post-election challenge, it is worth mentioning the RS/SPEC/OOO1/13/CS judgment delivered on 26/09/2013 by the Supreme Court.

In this case, the applicant, one of the candidates for the post of representative of persons with disabilities in the parliamentary elections held on 18/09/2013, challenged the provisional results of the elections after which his competitor was declared the winner. He then filed a petition with the Supreme Court requesting the invalidation of the results of these elections.

The Supreme Court first analysed the objection of inadmissibility raised by the defendant who alleged that the applicant had not submitted his challenge to the National Electoral Commission before the Supreme Court was seized. The Supreme Court ruled that the petition was admissible because it was in conformity with the law in force.

25 See Article 77 of Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts.

On the merits of the case, the petitioner complained that there had been influence peddling insofar as his competitor was President of the National Council for the Disabled. He also claimed that this candidate paid bribes worth 500,000 Frw to voters in order to secure their support. Another allegation related to the fact that his competitor allegedly campaigned well before the start of the elections whereas, according to the electoral law and the instructions of the National Electoral Commission, campaigning should be done on the day of the election and before the electorate.

II. CONCLUSION

The electoral law is based on an essential guarantee, that of a wide and effective access to the judge. As a counterpoint, the nature of the judge's supervisory powers is based on a method of sanctioning cases where the sincerity of the ballot is compromised, the idea being to preserve the results of the elections when the irregularity committed has no impact on its conclusions.

While modern democracies present the right to vote as a fundamental civic right, inclusive, transparent and participatory elections, where all those entitled to vote have the opportunity to choose their elected representatives, are at the heart of Democracy. This is why the judge, the guarantor of the sincerity of the vote, must be independent. It is clear that judicial independence is a crucial factor in stabilising society and promoting democracy.

In Rwanda, the electoral judge enjoys the same constitutional and legal guarantees as those granted to other judges. Thus, although there is still some way to go, with the Constitution in force, there is a major advance in the protection of the independence of the electoral judge

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SUB-THEME 3:
Access to the electoral judge

Paper

presented by Ms. **Hildah Chibomba**,
President of the Constitutional Court of the
Republic of Zambia

INTRODUCTION

May I begin by thanking you my Lady, the President of the Constitutional Council of Mozambique and the organising committee for inviting me to attend the 3rd International Symposium of the Conference of African Constitutional Jurisdictions and to share my views on the topic: "**ACCESS TO THE ELECTORAL JUDGE**".

To me, the word "access", means "**a right, opportunity or to communicate with the Courts**". Therefore, when we talk about access to the electoral Judge, we are referring to citizens, political competitors and other stake-holders being in a position to seek legal redress from the Courts of the land over election disputes and receiving effective remedies. This entails that the access to a Judge is to an independent, effient and impartial Judge who is adequately prepared legally to hear and determine electoral disputes.

Access to an electoral judge is a human rights imperative which is fundamental and in most cases it is not only guaranteed by the Constitution of a State but also in international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR). These instruments recognise the equality of all persons before the law and their entitlement to its due process and protection and the right to take part in the affairs of one's country.

ZAMBIAN EXPERIENCE

Article 45 of the Constitution of Zambia has enshrined the right to freely exercise one's political right and to vote as espoused in the above. The Zambian Electoral Process Act equally prescribes electoral rules and processes that seek to ensure and uphold free and fair elections.

However, like any process subject of human interactions, the electoral process has to be shielded from threats of corrosion and this is where the judicial mechanism comes

into play. Hence, access to the Electoral Judge is a key element in the quest for free and fair elections as it guarantees the protection and respect for electoral rules.

This paper tackles the topic from a practical point of view under the Zambian electoral system. I propose to approach the topic in three parts, namely, Access to the Electoral Judge before elections; Access to the Electoral Judge during the campaign period up to election day and results announcement; and Access to the Electoral Judge post elections period.

Let me begin by giving a brief background to the Zambian electoral process. Historically, starting with the 1964 Independence Constitution, Zambia has been holding tripartite elections every five years to elect a Republican President, Members of Parliament and Local Government Civic leaders. The stakes in these elections are usually very high and tense as political parties compete for power to govern. As such, election related disputes are common place in our Court system. The Zambian Judiciary thus plays a pivotal role throughout the electoral cycle, in resolving electoral related disputes before, during and post elections.

The modes for bringing or commencing such disputes in the Courts of Zambia differ depending on the nature or type of dispute. The most common mode is by a petition in either the Constitutional Court or in the High Court. Election related cases that are criminal in nature such as political violence or assault, damage to property etc, are tried in the Subordinate Courts except for serious cases such as Manslaughter or Murder that go to the High Court.

PART ONE: ACCESS TO THE ELECTORAL JUDGE BEFORE THE ELECTION

This part of the electoral cycle relates to the period before the commencement of the campaign period and dissolution of Parliament.

As the honourable participants may be aware, Zambia recently held its tripartite elections on 12th August, 2021. The Constitution in Article 81(3) provides for the dissolution of Parliament 90 days before elections. The last General election before the 12th August, 2021 elections were held on 11th August, 2016. A number of election petitions were filed before the High Court and the Local Government Election Tribunals challenging the election of members of the Parliament and Councillors.

In order to expedite the resolution of electoral disputes, the Zambian Constitution and electoral laws have assigned jurisdiction to the Constitutional Court to hear presidential election petitions. The High Court has jurisdiction to hear parliamentary election petitions while the Local Government Election Tribunals have jurisdiction to hear local government election petitions.

The Constitution of Zambia provides for time frames for challenging such elections and also for the Electoral Judges to hear and determine such disputes. This period is therefore a busy period for the adjudicators in Zambia. Decisions of the High Court Judges and Tribunals are appealable to the Constitutional Court whose decisions are

final. This is the period the Zambian electoral Judges are now in following the 12th August, 2021 general elections.

During the period following the determination of election petitions and the appeals by the Courts, citizens and political parties continue to bring disputes relating to the electoral processes before the Courts in Zambia. Citizens who felt that their political or electoral rights had been or were likely to be infringed applied to the Courts for redress. Examples of such cases are:

1. **Godfrey Malembeka (suing as Executive Director of PRISCA v Electoral Commission of Zambia and the Attorney General Selected Judgment NO. 34 of 2017**

   The petition was filed in the Constitutional Court of Zambia concerning the rights of persons in lawful custody to register as voters and to vote in the 2021 elections and thereafter. The Petitioner challenged the constitutionality of certain sections of an Act of Parliament which prohibited persons in custody from registering as voters and from voting in an election. In a landmark decision, the Constitutional Court ruled in favour of the Petitioner and held that persons in custody could vote in future elections.

2. **Steven katuka (suing as Secretary General of the United Party for National Development) and LAZ v Attorney General and Others Selected Judgement No. 29 of 2016**

   This was a petition filed in the Constitutional Court challenging the continued stay in office of cabinet and provincial ministers following the dissolution of Parliament.

3. **Bizwayo Newton Nkunika v Lawrence Nyirenda and the Electoral Commission of Zambia 2019/CCZ/005**

   This was a petition which challenged a sitting Member of Parliament on ground that he did not have the minimum academic qualification for election prescribed by the Constitution of Zambia.

4. **Isaac Mwanza v Electoral Commission of Zambia and Attorney General 2020/CCZ/008**

   The Applicant moved the Constitutional Court to interpret whether a councillor could rescind a resignation under Article 157 (2) (b) of the Constitution of Zambia.

5. **The People v Electoral Commission of Zambia, Ex Parte Chama Fumba and others 2020/HP/0934**

   The High Court was moved by a group of Zambian Musicians who challenged a decision of the Electoral Commission of Zambia (ECZ), the body charged with the conduct of elections in Zambia, over its decision to dispense with the old voters' roll.

6. **Chishimba Kambwili v Attorney General 2019/CCZ/009**

   The Petitioner moved the Constitutional Court challenging the ruling of the Speaker of the National Assembly, declaring his parliamentary seat vacant on ground that he had crossed the floor.

   The above cases are an example that the electoral judge can be accessed before the campaign period under the Zambian legal system.

PART TWO: ACCESS TO THE ELECTORAL JUDGE DURING NOMINATION, CAMPAIGN PERIOD AND ACTUAL ELECTION DAY

The Constitution of Zambia in Article 52 enjoins candidates to file their nomination papers to a returning officer, supported by an affidavit stating that they are qualified for nomination as President, Member of Parliament or Councillor. The Returning officer is obliged to scrutinise the nomination paper and to thereafter accept or duly reject a nomination paper where a candidate does not meet the qualifications or procedural requirements for election. Article 52(4) of the Constitution of Zambia however empowers a person to challenge a nomination of a candidate. It also empowers a person whose nomination paper is rejected by the Returning officer to challenge, before a Court or tribunal as prescribed, the rejection of his nomination paper. A period of seven days is prescribed for filing such a challenge. The Court is mandated to hear and determine a nomination related dispute within twenty-one days of its lodgement. Article 52 (5) of the Constitution, provides that the nomination challenge cases be completed by the Courts at least thirty days before a general election. This is to allow the election body time to print the names of candidates on the ballot papers before the elections.

As can be deduced from the above time frame, this period is an intense period for adjudicators as they are required to hear and determine such cases within the time stipulated in the Constitution.

The following cases were brought during this period:

1. **George Muhali Imbuwa v Electoral Commission of Zambia 2021/CCZ/A/001**

   This was an appeal from the decision of a High Court Judge which dismissed the appellant's petition on ground that the petition was filed out of time. The Constitutional Court however dismissed the petition on ground that the Constitution of Zambia and the electoral law did not provide for appeals from decisions of the High Court concerning nomination related cases.

2. **John Sangwa v Electoral Commission of Zambia and Attorney General 2021/CCZ/0021**

   The petitioner challenged the content of an affidavit for nomination of presidential candidates.

3. **Sishuwa Sishuwa and Another v Nkandu Luo and others 2021/CCZ/0028/0032**

   This was a petition challenging the nomination of running mates of all the presidential candidates that had duly filed their nomination papers with the Returning officer. The allegation was that they did not pay the prescribed nomination fees and they did not bring the requisite number of supporters as prescribed for presidential candidates.

4. **Legal Resources Foundation Limited and Others v Edgar C Lungu and Attorney General 2021/CCZ/0025 and 0027**

   The Petitioners moved the Constitutional Court challenging the nomination of a presidential candidate.

5. **Charles Maboshe v Steven Nyirenda and Others 2021/CCZ/31.**

   The Petitioner challenged the validity of the nomination of the Respondent as a presidential candidate sponsored by a political party.

6. **Batuke Imenda (suing as Secretary General to the United Party for National Development) v Zambia National Broadcasting Authority 2021/HP/0921**

   The Applicant moved the High Court by way of judicial review against the public television station's decision, denying them coverage and advertisement of campaign messages.

7. **Batuke Imenda (suing as Secretary General to the United Party for National Development) and Sky Trails Limited v Attorney General and The Air Commander 2021/HP/0919**

   This case was commenced by judicial review in the High Court challenging the Air Commander's inaction on applications for flight clearance. It was alleged that the inaction prevented the candidates from conducting campaigns and therefore made the political landscape skewed towards the ruling party. The High Court granted leave for judicial review, two days before elections.

8. **Batuke Imenda (suing as Secretary General of the United Party for National Development) v ZambianInformation and Communications Technology Authority, Zambia Telecommunications Company Limited, Airtel Holdings Limited and MTN Zambia Limited 2021/HP/949**

   The High Court was moved by a petition alleging contravention of the bill of rights on the part of the statutory body that regulates among others, internet service in the country. It was alleged that the Respondent had shut down internet services such as WhatsApp, Instagram, Twitter, etc, in the country from 12th August, the election day, and 15th August, 2021 when the service was restored.

9. **Chapter One Foundation Limited v Zambia Information and Communications Technology Authority 2021/HP/0955**

The High Court was moved by judicial review challenging the Respondent's decision to block social media platforms such as Facebook, WhatsApp, Instagram, Twitter and Messenger service across all internet service providers from 12th August, 2021, the election day, up to 15th August, 2021. The High Court Judge granted leave to the Applicant to commence judicial review proceedings and ordered that the leave so granted operate as a stay against Respondent.

The above cases are examples that aggrieved persons have unfettered access to the Electoral Judge during the campaign period as well as on actual election day and thereafter.

PART THREE: ACCESS TO THE ELECTORAL JUDGE POST ELECTION PERIOD

As stated above, this period is another busy period as matters challenging election results have time limits. The Constitution of Zambia and the Electoral Process Act as afore-stated, stipulate the time frames for filing, hearing and determining the election petitions.

In terms of a presidential election petition, prior to the 2016 constitutional amendment, there was no time limit for hearing a presidential election petition.

The 2016 constitutional amendment has now prescribed a period of 14 days for hearing a presidential election petition.

The status of the post 12th August 2021 general elections is that although no presidential election petition was filed, over 50 parliamentary election petitions have been filed in the High Court and 267 Local government election petitions were filed and are currently being heard in different parts of the country. These are yet to be determined and appeals are expected.

Experience from the 2016 elections has shown that the reliefs most sought by the petitioners in post elections petitions is nullification of the election results of the winning candidate. The petitioners mostly allege that the elections were not conducted in accordance with the law as they were marred by: bribery, corruption, treating, defamatory statements, intimidation, undue influence, use of government transport or facilities for campaign purpose, abuse of position of power, privilege or influence and violence, etc.

Conclusion

From the above, it is quite clear that the need to have unfettered access to the Electoral Judge during the entire electoral cycle cannot be over emphasised as the access to the electoral Judge is cardinal in the promotion and enforcement of electoral laws that enhance free and fair elections, thereby fostering democracy, rule of law and accountability. This should thus be coupled with adequate remedies, so that the will of

the voters is respected and protected. It is thus incumbent on the electoral Judge to properly control the Court process by ensuring fairness to all the parties and thereby ensuring integrity and independence in resolving electoral disputes.

I thank you

SUB-THEME 3:
Access to the electoral judge

Paper

presented by Mr. **Manuel Franque**,
Counselor Judge, Constitucional Council of Mozambique

Under the terms of articles 62 and 70, both of the Constitution of the Republic of Mozambique (CRM), all citizens have the right to access the courts against acts that violate their rights and interests recognised by the Constitution and the law.

In turn, it is the courts' responsibility, among other duties, to guarantee and strengthen legality, respect for laws and ensure the citizens' rights and freedom.

With regard to constitutional justice, pursuant to Article 240(1) of the Constitution of the Republic of Mozambique, the Constitutional Council is the body that is especially responsible for administering justice in matters of a legal and constitutional nature.

In particular, with regard to electoral justice, the Constitution of the Republic of Mozambique grants the Constitutional Council the competence to i) verify the legal requirements for candidates running for President of the Republic and ii) consider in the final instance, electoral appeals and complaints, and validate and proclaim the electoral results under the terms of the law, all in accordance with Article 243(2)(a) and (d) of the aforementioned Constitution.

It is based on these postulates of the Constitution of the Republic of Mozambique that any interested party, within the terms of the law, may have access to the election judge.

In Mozambique, the election judge of first instance is the district court, with appeal to the Constitutional Council, which judges in a sole and final instance.

Access to the election judge may take place:

1 - In a single instance, when the Constitutional Council verifies the legal requirements for candidates for the office of President of the Republic.

To this end, Law 6/2006 of 2 August, the procedural law that regulates the procedures of all cases that must be judged by the Constitutional Council (LOCC), notwithstanding what is also provided for in the various electoral laws, the presentation of candidacies is made in the Constitutional Council, up to 120 days before the date set for the elections, and the said candidacies must be proposed by a minimum of ten thousand and a maximum of one thousand voters (article 136 of Law 2/2019 of 31 May).

Candidates must be Mozambican nationals by birth and have no other nationality (Article 23 of the Constitution of the Republic), be at least thirty-five years old, and be in full exercise of their civil and political rights.

The term of office of the President of the Republic is five years and he may be re-elected only once (Article 146 of the Constitution of the Republic of Mozambique).

After the deadline for the presentation of candidacies, the Constitutional Council verifies the due regularity of the processes, the authenticity of the documents and the eligibility of the candidates (article 89.1 of the LOCC).

If procedural irregularities are found, the candidates or their representatives shall be notified to correct them within five days, under penalty of rejection of the respective candidacy, and ineligible candidates shall also be rejected (article 89.2 of the LOCC).

Pursuant to article 130 of Law No. 2/2019 of 31 May, citizens are ineligible for the office of President of the Republic if they:

- do not possess active electoral capacity;

- have served two terms of office;

- are convicted to a long-term imprisonment sentence for a felonious crime, as long as the respective sentence has not expired;

- are not habitually resident in the country for at least twelve months before the date of the election;

- are convicted of theft, robbery, breach of trust, swindling, forgery or intentional crime committed by a public servant, as well as habitual offenders who are difficult to correct, when they have been declared by a court decision.

2 – In the first instance, when the district judicial courts hear electoral appeals from the period of voter registration until the validation and proclamation of the electoral results by the Constitutional Council, in what is commonly called electoral litigation (paragraph 1 of article 8 of Law No. 2/2019).

The decision of the district courts can be appealed to the Constitutional Council, which judges in a sole and final instance (paragraph 5 of article 8 of Law no. 8/2013).

Unless stated otherwise, access to the election judge starts with an appeal to the Electoral Process Management Authority, which in Mozambique is the National Electoral Commission (CNE) and its supporting bodies, namely the provincial election commissions and the district and city election commissions (article 42 of Law no. 6/2013).

Pursuant to this Law, CNE is an independent and impartial State body, responsible for the supervision of voter registration and electoral acts, which ensures equal treatment of citizens in all acts of the electoral process, receives and appraises the legality and regularity of candidacies to legislative, provincial and municipal assembly elections, reports to the Public Prosecution any acts of electoral malpractice of which it becomes aware, etc. (article 9 of Law 6/2013).

During the voter registration phase, interested parties appeal the decision of the registration entity to the electoral management bodies and, not agreeing with the outcome, have access to the election judge.

It should be noted that voter registration, which is unofficial, compulsory and unique for elections by universal, direct, equal, secret, personal and periodic suffrage, is a prerequisite to acquire the right to vote, because only those who are registered can vote (articles 2 and 8 of Law No. 5/2013).

During voting and the tabulation of votes, interested parties can appeal the decision of the polling station and, not being satisfied with the outcome, have access to the election judge.

This is what we call the principle of prior impugnation, according to which irregularities occurring during voting and in the partial, district or city, provincial, general and national tabulation can only be assessed in a litigation appeal provided that they have been the object of a complaint or protest.

In the event of such a situation, the interested party may file an appeal to the election judge, which is configured as a means of judicial impugnation of the acts of the Electoral Administration, with the objective of obtaining a judgement on merits, which decrees the admission or exclusion of a candidate, the annulment of an administrative act of a body of the Electoral Administration in a matter related to the electoral process.

Any interested party who considers that their rights have been infringed may lodge an appeal with the electoral court:

- Voter registration: any citizen voter, political party or coalition of political parties is entitled to complain to the census body about omissions or incorrect entries, within three days of the discovery of the irregularity;

- Voting and tabulation: any citizen voter, candidacy delegates, candidates and their representatives and the political parties or groups of citizen voters, within 48 hours of the publication of the announcement of the election results;

- All decisions of the National Electoral Commission concerning electoral matters may be appealed to the Constitutional Council by any person who considers that their rights have been violated within three days of the date of notification by the appellant of the decision of the National Electoral Commission on the complaint or protest submitted.

In order to have access to the election judge it is necessary to verify some procedural assumptions, such as:

- Competent court: the district courts and the Constitutional Council are electoral courts, as mentioned above, and, according to some author[1], the minimum requirements necessary for the identification of a court (and of its members, the judges...), are the suitability, independence, irremovability and impartiality, requirements that are present in the aforementioned courts, according to the Constitution and the Law.

- Legitimacy: Voters, candidates and their representatives, political parties or coalitions of political parties and groups of voting citizens may appeal;

- Appealability of acts: Irregularities occurring during the electoral process, from the period of voter registration to the validation and proclamation of the election results by the Constitutional Council, may be appealed;

- Deadline: The deadlines for lodging appeals or complaints are set out in the various electoral laws;

- Subject: An appeal may relate generally to the electoral process as a whole, from voter registration to validation of the election results.

Appeals to the electoral courts shall not be subject to preparation, costs or any other charges, except in cases where the claim is manifestly contrary to the law, in bad faith, or merely dilatory in nature, and it is not necessary to appoint a legal representative (articles 47 and 121 of the LOCC).

In the first instance, the court notifies the interested parties, in whose presence the trial hearing must take place, but their absence, when duly notified, does not jeopardise the trial.

In practical terms, the biggest constraints that political actors face during electoral processes are the non-observance of the principle of prior impugnation and the deadlines.

As I have often said, thank you very much for listening to me.

Maputo, October 2021.

1 CANAS, Vitalino. The processes of review of constitutionality and legality by the Constitutional Court, nature and structuring principles. 1986. Coimbra Editora, pg 22.

SUB-THEME 3:
Access to the electoral judge

Paper

presented by Mr. **Amadou Ousmane Touré**,
President, Constitutional Court of Mali

Your Excellency Madam President of the Constitutional Council of Mozambique;

Madam President of the Constitutional Court of Angola, President of the Conference of Constitutional Jurisdiction of African (CCJA)

Distinguished Presidents of the Constitutional Courts members of the CCJA;

Honourable guests ;

Ladies and Gentlemen

Allow me to thank the Mozambican authorities for the warm welcome given to our delegation and the symposium organisers for their assistance.

ACCESS TO THE ELECTORAL JUDGE

This 3rd Symposium of African Constitutional Jurisdictions whose central theme is "Electoral Justice: Transparency, Inclusion and Integrity of the Process" is an opportunity for the participating courts to exchange experiences and best practices.

Mali, on the eve of general elections, has every reason to join the panel on the sub-theme "Access to the electoral judge".

Democracy, power of the people, by the people and for the people, can only find its expression through the participation of the greatest number of people, under conditions that are previously and clearly defined, i.e. transparent, not excluding any member of society through discriminatory laws, and thus ensuring a free and sincere vote.

This requires the existence of a general framework for access to the electoral judge, the guarantee of the effectiveness of the exercise of the rights granted, all of which is crowned by the submission of the various actors to the results of the vote box after their clearance by the electoral judge.

This will be the structure of our presentation.

I. GENERAL FRAMEWORK FOR ACCESS TO THE ELECTORAL JUDGE

The framework for access to the electoral judges in Mali is based on the Constitution of 25 January 1992, on Law n°97-010 of 11 February 1997, as amended, establishing the rules of organisation and functioning of the Constitutional Court as well as the procedure followed before it, on Electoral Law n°02016-048 of 17 October 2016, as amended by Law n°2018-014 of 23 April 2018, as well as on international and regional instruments to which Mali has subscribed.

Article 2 of the Constitution states that "all Malians are born and remain free and equal in rights and duties. Any discrimination based on social origin, colour, language, race, sex, religion and political opinion is prohibited. Under Article 4 "... freedom of thought, conscience, religion, worship, opinion, expression and creation within the law" is a right for all. Article 27 states that "Suffrage shall be universal, equal and secret" and open to all "citizens of voting age, enjoying their civic and political rights".

The electoral law, for its part, deals, among other things, with the bodies in charge of elections (Articles 3 to 26), the conditions required to be a voter (Articles 29 to 33), the conditions of registration on the electoral lists (electoral list: Articles 34 to 39; voter's card : Articles 61 and 62), conditions of eligibility and non-eligibility (Articles 63 to 67), declarations of candidacy (Articles 68 and 69), the electoral campaign (Articles 70 to 81), ballot papers (Articles 80 and 81), polling stations (Articles 82 to 85), voting and counting operations (Articles 86 to 105), and voting by proxy (Articles 106 to 114).

Under Title I on common provisions, the electoral law provides for criminal sanctions ranging from one month to one year's imprisonment and a fine of 25,000 to 250,000 CFA francs against the perpetrators of various behaviours qualified as offences and listed in Articles 115 to 136 of the law, including registration or attempted registration on an electoral roll under a false name or capacity, the use of fraudulent means to register or deregister a citizen, the holding of an electoral campaign in a place of worship, etc.

Other texts complete the chain of the general framework of the election, namely law n°0045 of 07 July 2000 on the Charter of political parties, law n°00 047 of 13 July 2000 on the status of opposition political parties as amended by law n°2015-007 of 04 March 2015, law n°92-038/ANRM of 24 December 1992 on the creation of the Superior Council of Communication.

Granting rights is one thing, but another is to guarantee the effectiveness of their exercise.

II. EXERCISE OF THE RIGHT OF ACCESS TO THE ELECTORAL JUDGE

If in the context of this symposium, the electoral judge is understood as the constitutional judge, it remains that in Mali, in electoral matters, the judicial court and the administrative court intervene alongside him.

For the election of national councillors, and under the terms of Article 190 of the electoral law, 'Any voter, any political party, any grouping of political parties and any representative of an independent list may demand the annulment of the electoral operations by addressing his or her request to the president of the Supreme Court'.

The Court shall rule within forty-five (45) days from the registration of the petition.

For the election of councillors of territorial communities, article 205 of the electoral law states: "Any voter, any political party, any grouping of political parties and any representative of an independent list can claim the cancellation of electoral operations by addressing his request to the president of the territorially competent Administrative Court.

The court rules within a maximum of one month from the registration of the appeal. Its decision is subject to appeal to the Administrative Section of the Supreme Court, which has 45 days to rule.

As far as the constitutional court is concerned, general elections and referendums can be considered. Whether it is a question of referendum operations or legislative and presidential elections, the petitioners may be different

For referendum operations, Article 26 of Law n°97-010 of 11 February 1997 on the organic law determining the rules of organisation and functioning of the Constitutional Court as well as the procedure followed before it, states that the Court "...shall be consulted by the Government for the organisation of referendum operations". Similarly, under Article 28, 'the right of referral belongs to any person registered on an electoral list, to any political party or representative of the State in the administrative constituency...'.

For the legislative and presidential elections:

» The electoral judge may be seized either by the Independent National Electoral Commission (INEC), or by political parties, or by candidates of any dispute relating to the registration of candidacies (Article 31 paragraph 2 of the organic law);

» With regard to the validity of candidatures received, Article 31 paragraph 5 of the organic law allows any candidate, any political party and the representative of the State in the administrative constituency to refer to the Constitutional Court;

» In addition to the above-mentioned referrers listed in article 31, the possibility is given to any member of a voting station;

» With regard to the validity of the election, Article 87 of the Constitution establishes the principle of referral to the Court. Also, article 32 of the organic law indicates that within 48 hours of the proclamation of the provisional results of the first and second rounds of the election of the President of the Republic and the deputies, any candidate, any political party, the delegate of the Government (article i7 of the internal regulations) may refer the matter to the electoral judge to contest the results.

It remains to be determined for which causes, in which form the electoral judge can be seized, the procedure applicable in the treatment of these causes and the scope of the decisions to be rendered.

III. TREATMENT OF CASES BY THE ELECTORAL JUDGE

The competence of the Court as an electoral judge results from the provisions of articles 86 of the Constitution on the one hand, and 26 and 31 of the organic law on the other.

Under the terms of Article 86 al5 of the Constitution, the Court rules on 'the regularity of presidential and legislative elections and referendum operations whose results it proclaims'.

Article 31 of the organic law adds that 'all disputes relating to the election of the President of the Republic and the deputies to the National Assembly are under the competence of the Constitutional Court'.

» **Grounds and form of referral to the Court:**

Without being exhaustive, from the compilation of the judgments rendered, we note the following irregularities which were the object of referral and decisions of the Court: irregularities relating to the person of the candidate (judgement n°97-018/CC-EL of 22 March 1997), to the person of the applicant (judgement n°02-144/CC-EL of 09 August 2002), to fraud (judgement n°02-144-CC-EL of 09 August 2002), to the procedure of publication of the results (idem), to the organisation and functioning of the voting station (judgement n°05-166/CC-EL of 07 November 2005).

» The case shall be referred to the Court by an application addressed to the President containing the subject matter of the application and the means of supporting it. The application shall be in writing, dated and signed by the applicant or his representative. It must indicate, on pain of inadmissibility, the surname, first name and address of the applicant. The applicant must elect domicile at the seat of the Court (Articles 34 and 35 of the Organic Law). According to article 17 of the Internal Rules of the Court adopted on 28 August 2002, the application may also be addressed to the representative of the State in the administrative district, who shall immediately notify the President of the Constitutional Court by telegram, fax or any other means of rapid communication and shall ensure the transmission of the application referred to him.

» The procedure before the Court is written and free of charge. The details of the deadlines for referral are provided for in Article 16 of the Court's Internal Regulations: 5 days following the date of the first and second round of the election of the President of the Republic or of the deputies to refer to the Court any dispute on the voting operations; 48 hours following the proclamation of the provisional results of the first and second round of the election of the President of the Republic to contest the election of a candidate

With regard to challenges to the registration of candidacies or their validity, the Court, when seized of the matter, is required to rule without delay (Article 31 of the Organic Law).

» The processing of petitions starts with the appointment of one or more rapporteurs who carry out all the necessary investigative measures: communication and exchange of documents, hearing of the parties, transport to the scene or issue of letters rogatory

» At the end of this investigation, and under the terms of Article 40 of the organic law, "When it grants an application, the Court may, depending on the case, annul the contested election or reform the results and proclaim the candidate who was duly elected".

» The debates are not public, but the judgments of the Court are pronounced in open court. They are reasoned and signed by the President, the councillors who sat and the Registrar.

» Under the terms of Article 94 of the Constitution, "The decisions of the Constitutional Court are not subject to appeal. They are binding on the public authorities, on all administrative and jurisdictional authorities and on all physic and legal persons.

They are only subject to rectification in the event of a material error in their wording, either *ex officio* following deliberation by the Court, or at the request of any interested person.

CONCLUSION

In view of the above presentation, it is easy to see that in Mali, access to the constitutional court, as an electoral judge, is guaranteed, as the legislative and regulatory framework is complete. In addition, the guarantee of the exercise of rights granted in this area is assured.

However, improvements and corrections seem necessary, as the current time limits for dealing with disputes concerning presidential and legislative elections are very short. Similarly, the electoral law should be subject to control of its conformity with the Constitution.

Finally, the forthcoming introduction of the procedure for the Priority Question of Constitutionality (QPC) and that of the exception of unconstitutionality would allow any citizen, outside any electoral period, to submit to the Court a law that he or she considers unconstitutional. This would contribute to the promotion of rights and the protection of freedoms.

Thank you!

For the record

402 Judgments on electoral matters from 1995 to 2021

The Constitutional Court of Mali, with only nine **(9) Councillors**, is called upon to manage the elections organised in **22,147 voting stations** spread over a territory of **1,241,238 km^2**, within **55 electoral districts** and **12,462 voting centres for 7,663,464 voters.**

SUB-THEME 4:
The control exercised by the electoral judge over the electoral process

Paper

presented by Mr. **Nadir El Moumni**,
Counselor Judge, Constitutional Court of the Kingdom of Morocco

Your Excellency Mrs Lucia da Luz RIBEIRO, President of the Constitutional Council of Mozambique,

Honourable Presidents of friendly African Constitutional Courts,

Honourable Representatives of International Organisations,

Honourable colleagues present and online,

Ladies and Gentlemen

I have the honour to convey to you the cordial greetings of President Said Ihrai and the members of the Constitutional Court of the Kingdom of Morocco,

I would also like to congratulate, on my own name and on behalf of the President and members of the Constitutional Court of the Kingdom of Morocco, Her Excellency Mrs. Lucia da Luz RIBEIRO, President of the Constitutional Council of Mozambique, whose presidency symbolizes the emergence of an African female leadership in the field of constitutional justice. The merit of organising this privileged moment of exchange of plural reflection on electoral justice belongs to President RIBEIRO and the leaders of the CJCA. I thank them all.

Ladies and Gentlemen,

Allow me to share with you, within the limits of the time allotted, some elements concerning the **control exercised by the constitutional court, acting as an electoral judge, over the process of electing members of Parliament.**

It should be recalled, by way of introduction, that litigation concerning the election of members of Parliament is a competence that has always been assigned to successive constitutional courts. This choice was adopted since the Constitution of 14 December

1962 and then ratified by the Constitutions of 31 July 1970 and 10 March 1972.

In a logic of continuity, the aforementioned competence was recognised to the Constitutional Council by the Constitution of 9 October 1992, then enshrined by the Constitution of 7 October 1996.

Succeeding the Constitutional Council, the Constitutional Court, established by Article 129 of the Constitution of 29 July 2011, was given the competence to rule on the regularity of the election of members of parliament (Article 132 §1).

The devolution of the competence to rule on the election of members of Parliament to the Constitutional Court is not only part of a historically established choice but also marks the emergence, under the current Constitution of 2011, of a "**constitutional right to elections**" characterised in **particular** by the enshrinement of a series of principles guaranteeing the regularity, freedom, sincerity and transparency of electoral operations (Article 2, last paragraph and Article 11).

In the same context, the constitutionalisation of neutral and independent observation of elections (Article 11), the attribution to the law of the definition of "*provisions likely to favour equal access of women and men to elective function*" (Article 30 §1) as well as the determination of "principles for the division of electoral districts" (Article 71).

In examining electoral disputes of members of parliament, the Constitutional Court applies the Constitution, as well as the organic laws relating to the House of Representatives and the House of Councillors, as appropriate. It also applies the law on general electoral lists, referendum operations and the use of public audio-visual media during electoral and referendum campaigns, as well as other legislative and regulatory texts.

As regards the litigation procedure, the Constitutional Court applies the relevant provisions of the Organic Law n°066.13 on the Constitutional Court, in particular the general provisions relating to the examination of cases submitted to it (art.17), as well as the provisions of section VI relating to the litigation of the elections of the members of the Chamber of Representatives and the Chamber of Councillors (art.32-39).

The Constitutional Court renders three types of decisions on electoral disputes. It may, for this purpose:

- decide, without prior investigation, on the inadmissibility of petitions as they stand, or reject them if they contain only complaints which clearly could not have influenced the results of the election (Art. 38 §2)

- validate a petition and annul the contested election (Art. 39);

- validate a petition and reform the results announced by the census commission and proclaim, if necessary, the candidate who was duly elected (Art. 39).

It should be stressed, moreover, that by virtue of the last paragraph of Article 132 of the Constitution, the Court rules on electoral disputes involving members of Parliament within a period of one year from the date of expiry of the legal time limit for appeal. However, by way of derogation, it may rule beyond this time limit, by reasoned decision, if the number of appeals or their nature requires so.

On the basis of these elements, a brief overview of the Constitutional Court's case law on electoral disputes will be given. To this end, some elements will be highlighted concerning the determinants of the control exercised by the electoral judge on the electoral process **(I)**, the fundamental principles protected by the jurisprudence **(II)**, as well as the main techniques used by the Court in this framework **(III)**.

I : Determinants (examples from case law)

A) Unit of the electoral operation

Although the Court is competent to rule essentially on appeals concerning decisions on the admissibility of candidacies, decisions taken by polling stations and census commissions, and in general all electoral operations from the submission of candidacies to the proclamation of the results, the Court's control extends to operations preceding the submission of candidacies if it is established that they had an effect on the result of the ballot, on its regularity or sincerity

This line of jurisprudence, initiated by the Constitutional Council (599/2005, 792/2010, 802/2010), was later established and confirmed by the Constitutional Court.

In a recent decision, rendered in 2020 (110/2020), the Court enshrined the principle of "unity of the electoral operation" by assessing a decree issued by the Head of Government in the context of the state of health emergency which postponed the date of a by-election by about three months. The Court found that this postponement was not such as to undermine the unity of the electoral process, insofar as the decree upheld the candidatures filed before the state of health emergency came into force and did not deprive the applicant of an effective remedy before the competent electoral courts (110/2020).

B) Derogation to the rule of non-ultra petita

In the context of disputes concerning the annulment of results, the Court has had to depart from the rule of ***non-ultra petita*** in certain cases by ruling beyond the requests of the applicants. For example, if a first recount of the votes, carried out on the basis of the grievances invoked by the applicant, results in a statistically significant reduction of the difference in votes between the last elected candidate and the first non-elected candidate, the Court proceeds, within the framework of its objective vision of the electoral dispute, to the recount of all the blank and void ballots and to the reformation of the results in accordance with article 39 of the organic law relating to the Constitutional Court (26.17, 41.17).

C) The pleas raised ex officio

According to its holistic conception of electoral litigation, the Court raises ex officio any plea relating to eligibility. It considers, like the previous constitutional courts, that eligibility is an element of public order which constitutes a fundamental condition for candidacy in elections and the continuous representation of the Nation. Its loss, at any time, naturally entails, as a consequence, the prohibition to stand as a candidate or the cancellation of the elections or the forfeiture of the parliamentary mandate. On the basis of this principle, eligibility can be invoked ex officio (39/17, 45/17).

D) The distinction between the offices of the repressive and electoral judges

The successive constitutional courts have recalled that their fundamental function in electoral matters consists in ruling on the regularity of the ballot by controlling its credibility and sincerity, without this function implying the penal sanction of the authors of the acts leading to its annulment, which remain within the competence of the repressive courts.

On the basis of this fundamental distinction, the former Constitutional Council considered that if the courts of the judicial order, when ruling on criminal matters, only render their judgment of conviction if the incriminated facts are established (in accordance with the principle of the presumption of innocence) and cannot be satisfied with the doubt which is interpreted in favour of the accused and constitutes, it is sufficient for the Constitutional Court to declare the sincerity and regularity of the ballot suspicious and to decide, consequently, to annul the contested election (644/07).

II : Overview of the principles protected by the Court's case law

Since its installation on 4 April 2017, the Constitutional Court has endorsed in continuity the evolution, a jurisprudential line that aims to guarantee **the freedom, sincerity and transparency of the ballot.**

In this respect, the Court defined the scope of the constitutional principles protected in the context of the exercise of electoral rights. The withdrawal of a party from an electoral dispute has no effect, since it is an objective dispute aimed at protecting the freedom, fairness and transparency of the ballot (58/17).

However, it should be stressed that the Court has also developed a consistent body of case law on the protection of procedural rights. It has recalled, in this respect, that the objective of judicial review of admissibility conditions (in electoral disputes) is to ensure that defendants benefit from their rights, while respecting the principle of adversarial proceedings and a reasonable time limit, and that they are able to produce their statements in reply (46/17). This case law is in line with the constant aim of protecting the right to a fair trial.

In the same context, the Court has consolidated the principle of equal opportunities between candidates in electoral disputes (10/17).

These principles determine the jurisprudence of the Court on the different aspects of electoral operations.

With regard to electoral communication, the Court adopts a line that tends to protect freedom of expression, while ensuring effective compliance with the legislative and regulatory framework governing communication in the context of elections. To this end, the Court applies the common regime of electoral communication to social networks (10.17, 49.17). An analysis of the Court's consistent case law on social networks shows that the status of these networks as vehicles for election propaganda material is determined by the attribution, purpose, content and conditions of use of the networks (49.17, 53.17, 69.18, 78.18, 21.17).

The temporal scope of Article 118 of Law 57.11 governing electoral communication is limited to the campaign period. The Court has extended this rule to social networks and verifies whether the use, in whatever form, of these networks was made contrary to the provisions of the aforementioned article 118 (10.17, 34.17, 67.18, 74.18, 87.18). The same logic applies to electoral communication published in the written press (11.17 and 46.17), in brochures (41.17) and thus to electoral propaganda material in any form.

The Constitutional Court has also developed important jurisprudence on the transparency of information about candidates in elections. The Court considered, in this respect, that the transparency of the electoral campaign, within the framework of the list ballot, implies the obligation to make known to the voters the names and the ranking of the candidates on the competing lists of candidates. This is what appears from the reading of article 23(§4) of the organic law relating to the House of Representatives. (6.17, 8.17, 18.17, 22.17, 25.17, 30.17, 32.17, 54.17, 58.17, 60.17).

This line of reasoning was subsequently consolidated, basing this requirement on the principle of the fairness of the vote (35.17, 36.17, 44.17).

Proceeding from a global approach, the Court adopted, in a logic that stems from the joining of cases, the principle of complementarity of the means of proof produced by the parties, namely the applicants and the persons whose election is contested in this matter (16.17, 20.17).

As the guarantor of the regularity of the electoral process, the Court systematically examines the applicants' allegations concerning the accuracy of the results recorded in the minutes, and the irregularities relating to their compilation, on the basis of the copies produced by the applicants, and/or the copies of the minutes drawn up by the polling stations, the centralising offices and the census commissions. The same approach applies to complaints relating to the composition of the polling stations, the counting of votes by the centralizing offices and the counting commissions and the forwarding of the minutes.

III : Overview of the main techniques used by the Court

As the judicial guardian of the fairness of the election of members of parliament, the

Court applied **the criterion of the decisive influence of the irregularity committed on the results** in the following cases: the placing of a very limited number of posters on spaces dedicated to another candidate (7. 17) or of a single poster on a prohibited space (24.17), the speaking for electoral purposes by a candidate in the place of worship in a residence, the Court annulled the votes obtained by the candidate in the polling station located in the jurisdiction of the residence (13.17).

The Constitutional Court applied the criterion of decisive influence in the case of promises of benefits to voters in a municipality, in violation of Article 62 of the Organic Law on the House of Representatives. To this end, it annulled the votes obtained by the candidate in the polling stations of this municipality (17.17).

In the same vein, the electoral sanction applied in the case of displaying the national flag on the facade of a house intended for an electoral meeting, the Court annulled the votes obtained by the candidate in the polling stations of the municipality in which the house is located (20.17).

The impairment of the sincerity of the election is often linked to two parameters: the difference in votes and the decisive influence of the irregularity that caused the impairment. It should be noted, however, that the Constitutional Court has annulled the election of the contested candidate, without taking into account the criterion of influence on the results, in the case of serious electoral offences, such as the organisation of a meeting with the means of the administration (10.17), or the attempt to obtain the vote of the electors by promises of free access to health care in a private hospital with a view to influencing the vote (33.17). The Court reserves the competence to establish a specific electoral sanction in addition to the criminal sanction entailed by the electoral offence (7.17).

When a petitioner raises complaints about the composition of certain polling stations, or the holding of an election meeting in a place of worship, or the use of means belonging to public bodies during the election campaign, or the assaulting of members of a polling station, the Constitutional Court orders an investigation on the basis of Article 37 (§2) of the Organic Law on the Constitutional Court (28.17, 52.17, 62.17, 72.18).

The Court also defined the preconditions for conducting a recount of the ballots and possibly annulling or reforming the results. In this respect, it is incumbent on the applicants to provide a minimum of evidence to enable the Court to proceed with the recount (47.17, 62.17, 77.18, 79.18.), given that the vote counting operation is presumed to be regular until proven otherwise. The applicant must, in support of his or her complaints, specify the places and numbers of the polling stations, as well as the reason(s) for the dispute, taking into account the difference in votes between the last elected candidate and the first non-elected candidate. (26.17, 59.17).

This brief overview shows that the Constitutional Court, like its predecessors, continues to deploy various techniques to ensure the protection of the principles of **freedom, sincerity and transparency of the ballot.** This deployment is facilitated by

a body of "*constitutional electoral law*" which is conducive to the development of a constitutional jurisprudence that protects constitutionally guaranteed electoral rights, and which allows for **an effective concretization of these norms** within the framework of electoral disputes. For example, the Court has used a literal interpretation of the Constitution to recall the requirements arising from the presumption of innocence in the context of electoral disputes (63.17 and 77.18). In the same context, the Court frequently resorted to **deductive-syllogistical reasoning, easily recognisable by the use of the formula "it appears that"** based, depending on the case, on a literal or systemic interpretation of the Constitution or the organic law relating to the House of Representatives, to establish the obligation for candidates to inform voters of the names and rankings of candidates on competing lists of candidates (56.17, 36.17, 32.17, 30.17, 25.17, 16.17, 8.17 and 6.17);

In another case, the Court used the method of teleological interpretation to ensure, in the context of electoral disputes, the protection of the procedural guarantees deriving from the right to a fair trial (46.17).

The fundamental characteristics of the constitutional norms of reference in electoral matters define the otherwise wide window of possible interpretation techniques.

These choices are not limited to the traditional techniques inherited from civil law interpretation, and also allow the use of reservations of interpretation as a means of interpretative pedagogy. In this respect, the Court issued **a guiding reservation** to draw the attention of the legislator, in the context of electoral disputes, to the system of ineligibility, which should be reviewed, "*with due regard for the relevant constitutional provisions", "to ensure that there is no regression in relation to the established guarantees and that proportionality is respected*" (23.17).

Part IV
CLOSURE

Motion of Thanks

delivered by Mr. **Moussa Laraba**,
Secretary General of the CJCA

The Presidents of Supreme Courts and Constitutional Courts and Councils of **Algeria, Angola, Cameroon, Ethiopia, Eswatini, Mali, Zambia, Zimbabwe** and the Representative of the **African Union**, present in Maputo as well as members of other jurisdictions from **Benin, Burundi, Comoros, Cote d'Ivoire, Madagascar, Mauritania, Morocco, Rwanda, Senegal, South Sudan, Togo** and **the President of the Venice Commission**, who participated online in the 3rd International Symposium of the Conference of African Constitutional Jurisdictions (CJCA), organized in partnership with the United Nations Development Program (UNPD), on the theme "***Electoral process: Transparency, inclusion and integrity***" and held in Maputo - Mozambique, on October 14 and 15, 2021, present their thanks and congratulations to the high authorities of the country, to **HE Ms Lúcia da Luz Ribeiro**, President of the Constitutional Council, to the Judges, to the staff of the Council for the excellent organization of this event, which contributed to the success of the work of this Symposium.

They express their feelings of deep gratitude to them.

Done in Maputo, on Friday, October 15 2021.

Statement

delivered by Dr. **Eneas da Conceição Comiche,**
Mayor, Maputo Municipality

Honourable President of the Constitutional Council of Mozambique, Prof. Lúcia da Luz Ribeiro,

Honourable Presidents of Constitutional Councils, Constitutional Courts and Supreme Courts of Africa,

Ladies and Gentlemen,

On behalf of the townspeople of Maputo, municipal council members and on my own behalf, I present my compliments to all the speakers present in this room. I also wish to present my compliments to the speakers in Maputo, who are participating virtually in this Closing Session of the Third Symposium of the Conference of African Constitutional Jurisdictions.

We have followed your work and congratulate you on the progress you have made.

I am honoured to be here before you and I thank you all for bringing to this beautiful City of Acacias and Jacarandas the fresh air that has been blowing over our Mother Africa since the early 1990s, when the democratisation movement began, characterised by profound amendments to our States' Constitutions.

We feel that the reflection on the electoral mechanisms that you have done will contribute to the improvement of democratic election processes and access to decision-making positions.

During these two days that you, the office holders and representatives of the Constitutional Councils and Courts of Africa, have reflected on and discussed the theme of Electoral Justice, we believe that you have succeeded in bringing together your stances and approaches, as well as the role that your institutions play, in favour of compliance with the law and the protection of the citizens' rights and freedom.

More than this, our assessment is that you have driven African regional integration, which is done through knowledge and comparison of the practices in force in each

country, and through the exchange of experiences, which is key to the adoption of mechanisms to resolve conflicts that are often exacerbated during election periods.

I must, therefore, congratulate you on the choice of the theme and sub-themes because they highlight the fundamental values underlying all electoral processes.

Ladies and Gentlemen

Let me reiterate our commitment to continue our efforts to strengthen democracy and the rule of law, with respect for the principles of popular participation, transparency, inclusiveness and adherence to the popular will expressed through vote.

This is a process rooted in the African Union, which advocates for the non-recognition of representatives of countries that have seized power by violent or fraudulent means.

We believe that with this meeting of reflection we have emerged more determined to fulfil the mission of creating a world of peace and security while respecting the independence of constitutional bodies.

United and Cohesive, we shall make Maputo
a more Beautiful, Cleaner, Enterprising and Prosperous City!

With these words, I declare the Third Symposium of the Conference of African Constitutional Courts closed.

Closing Speech

delivered by Her Excellency **Lúcia da Luz Ribeiro**, President of the Constitutional Council of Mozambique

Your Excellency Eneias da Conceição Comiche - President of the Municipal Council of Maputo City,

Your Excellency Guilhermina Prata, the Honourable Vice President of the Constitutional Court of Angola, President of the Conference of African Constitutional Jurisdictions,

Your Excellencies the Presidents of the Constitutional Jurisdictions,

Your Excellencies the present Authorities,

Distinguished participants,

After two days of intense work, we can say that today we know more about each other, that we have more information and experience and, perhaps, we are more enriched and cohesive as a continental organisation.

The theme chosen for this symposium was great and pertinent, as attested by H.E. Jacinto Filipe Nyusi, President of the Republic of Mozambique, and by all those who took the floor, and reveals the concern of the African constitutional jurisdictions to be part of the solution and not of the problems that affect the electoral processes.

Indeed, electoral processes in various parts of the world - and Africa is unfortunately no exception - often become points of contention and hotbeds of tension and violence. By choosing the theme “ELECTORAL JUSTICE: TRANSPARENCY, INCLUSIVENESS AND INTEGRITY OF THE PROCESS”, we have sent an unequivocal message to the world that as a constitutional or electoral jurisdiction, we are aware that our processes are not perfect and have problems, but we have also shown our firm resolve to contribute in the search for answers.

We have joined with political actors, academia, the judiciary and civil society, and we have taken another step along this path.

Ladies and Gentlemen,

The presentations made and the debates that followed were rich and, although we cannot speak of magic solutions or formulas applicable to all, some aspects allow us to identify some lines of convergence:

- Encoding - The codification of electoral legislation is an important aspect, due to the need for stability, concentration and systematization of the norms in question.

The legislative prolixity does not allow for knowledge and appropriation by the various actors in electoral processes and may even create hermeneutic problems and significant tension with other relevant legislation, such as criminal and administrative legislation, just to cite a few examples.

As Jorge Miranda would say:

"The understanding of the norms of electoral law becomes inseparable from political participation. Therefore, it is advisable that they be contained in a single, clear, synthetic and well-organized text, instead of being fragmented into several diplomas, with multiple separate amendments."

- **The use of new information and communication technologies** is welcome and poses new challenges of various kinds, but a balance must be found between ICT and the real situation of economic deprivation in which populations live in various regions of our continent, so that they do not become causes of exclusion.

- We have argued that exercising the right to vote is one of the most important manifestations of citizenship.

Therefore, **the level of literacy of the population** is a permanent challenge, because the better educated the population is, the more aware they are of their rights, the more aware they are of the power of the vote and the responsibility that voting brings, both for voters and for those elected.

- **Deadlines** for disseminating results should be speeded up.

- It is necessary to address **new challenges** that alter the way electoral processes traditionally take place, such as the COVID-19 pandemic, threats to public security and order.

The procedures and credibility of the bodies and institutions involved in electoral processes affect - I would go as far as to say more - determine the way in which citizens view the processes and dictate whether they participate in them to a greater or lesser extent; in other words, they determine the levels of voter abstention. Here, one can discuss whether **voting should be a right or a duty**, but perhaps the starting

point should be the quality and credibility of the process and institutions, and this is the responsibility of us all.

These and many other issues were brought to the fore in this symposium and I do not intend to exhaust them here.

Ladies and Gentlemen,

Hosting this symposium was an honour, but at the same time a great challenge.

As we said before, it was a calculated risk, which turned out to be a moment of great pleasure for the company, affection, support and encouragement we received from all of you.

We are aware that some things may not have gone to everyone's satisfaction, but believe us, we strive to provide the participants in general and our visiting African brothers in particular with an experience worth remembering with pleasure.

To all those who joined us for this symposium, to the different teams that worked on the organisation and to the cooperation partners who once again gave us material support, any words other than profound thanks would simply be inappropriate.

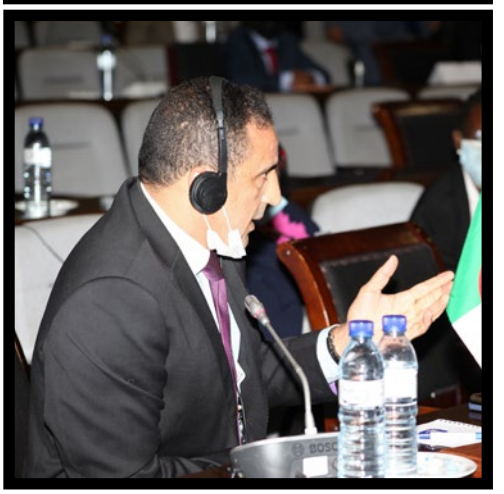
We are certain that we will meet again very soon, hence: see you soon!

THANK YOU!

Photo Highlights of the Symposium






3° Simpósio



3° Simpósio
da Conferência das Jurisdições
Constitucionais Africanas (CJCA)

Attendance list

Jurisidiction / Country	Name and first Name	Position	Theme
Constitucional Council of Algeria	Mr. Kamel Fenniche Ms. Khadija Abbad Mr. Brahim Boutkhil	President Judge Judge	Le contrôle exercé par le juge électoral sur le processus électoral
Constitucional Tribunal of Angola	Ms. Guilhermina Prata Ms. Julia Ferreira Mr. Claudio Mota Mr. Joaquim Moginga Mr. Bartolomeu Jose	Vice-Pdt Judge Assesseur Protocole Escort	Facteurs et critères décisifs pour la transparence, l'inclusivité et l'intégrité du processus électoral.
Constitucional Court of Benin	Ms. Marie José Zinzindohoue Mr. Rigobert Azon	Judge Judge	l'indépendance du juge électoral, garantie de la transparence et de l'intégrité du processus électoral
Constitucional Court of Burundi	Mme Jeanne Habonimana Mr. Ntibazonkiza Salvator	Judge Judge	
Constitucional Council of Cameron	Mr. Atanga Clément Mr. Malego Joel	President SG	Les modèles de justice électorale : expérience partagée des juridictions électorales nationales
Supreme court of Commores	Mr. Idrisse Abdou Mr. Abdou Said	Judge Judge	L'indépendance du juge électoral, garantie de la transparence et de l'intégrité du processus électoral
Constitutional Council of Ivory Coast	Mme Assata Koné Silué Mr. Diomandé Aboubacar Sidiki	Judge Chef de Cabinet	Les critères de détermination de la citoyenneté électorale
Supreme court of Eswatini	Mr. Bheki Maphalala Ms. Eunice Makhosazana Maphalala Mr. Bongane Vilane Sergeant Moses Ndlangamandla Constable Nontobeko Nhlabatsi Constable Wandile Vilakati	Chief Justice Spouse Police Officers	Electoral Justice Models, Shared Experience of National Electoral
Constitucional Council of Inquiry of Ethiopia	Ms. Meaza Ashenafi Mr. Desalgen Denta	Chief Justice Secretary general	Models of electoral justice: shared experience of national electoral jurisdictions
High Constitucional Court of Madagascar	Mr. Mbalo Ranaivo Fidèle, Mme Andriamaholy Ranaivoson Rojoniaina	Judge Judge	The independence of the electoral judge, guarantee of the transparency and integrity of the electoral process
Constitutional Council of Mauritania	Prof. Haimoud Bâ	Professor	The independence of the electoral judge, guarantee of the transparency and integrity of the electoral process
Constitucional Court of Morocco	Mr. Nadir El Moumni Mr. El Hassane Bouqentar	Judge Judge	The control exercised by the electoral judge over the electoral process""Limits of freedom of expression in electoral justice
Constitucional Court of Mali	Mr. Amadou Ousmane Touré Mr. Mohamed Abdourahmane Maiga	President Judge	Access to the electoral judge

Constitucional Council of Mozambique	Ms. Lúcia da Luz Ribeiro	President	The decisive factors and criteria for the transparency, inclusion and integrity of the electoral process
	Mr. Manuel Franque	Judge	Access to the electoral judge
Supreme court of Rwanda	Madame Marie Thérèse Mukamulisa	Vice-Présidente	The independence of the electoral judge, guarantee of the transparency and integrity of the electoral process
Constitutional Council of Senegal	Mr. Saidou Nourou Tall Mr. Madiena Bakhoum Diallo	Vice President Chief of Staff	Access to electoral information
Supreme Court of South Sudan	Mr. Gama Thomas Samuel	Deputy Chief justice	The independence of the electoral judge, guarantee of the transparency and integrity of the electoral process
Constitutional Court of Togo	Mr. Palouki Massina	Judge	The criteria for determining electoral citizenship
	Mr. Jerome Koffi Amekoudi	Judge	The independence of the electoral judge, guarantee of the transparency and integrity of the electoral process
	Mr. Pawélé Sogoyou	Judge	The limits of convictions in matters of electoral justice
Supreme Court of Zimbabwe	Mr. Luke Malaba Mr. W. T. Chikwana Mr. P. Hurungudo	Chief Justice Secretary to the Judicial Service Commissio Protocol officer	Models of electoral justice: shared experience of national electoral jurisdictions
Constitutional Court of Zambia	Ms. Hildah Chibomba Mr. Joseph Masiye Mrs. Agness Musonda Mrs. Elita Funkuta Sinkala	President Research Advocate Aid de Camp Protocol Officer	Access to the Electoral JUDGE
CJCA	Mr. Ndiaw Diouf (Sénégal)	Secretary general	
CJCA	Mr. Moussa Laraba (Algeria)	Permanent Secretary general	
African Union	Mr. Guy Cyrille Tapoko	Head of Democracy and Electoral Assistance Unit	Representing H.E. Ambassador Bankole Adeoye, Commissioner for Political Affairs, Peace and Security, African Union
Commission de Venise	Mr. Gianni Buquiquio	President	

NATIONAL GUESTS

1. Adelino Manuel Muchanga, President of the Supreme Court
2. Lúcia Fernandes Maximiano do Amaral, President of the T.
3. Beatriz Buchili, Attorney General of the Republic
4. Osório Soto- Vice President of the Assembly of the Republic
5. Vicente Joaquim, Secretary of State for the City of Maputo
6. Teodato Huaguana, Former Judge Counselor of the Constitutional Council
7. Duarte Casimiro, President of the Bar Association
8. Amade Miquidade, Ministry of Interior
9. Ana Comoane, Minister of State Administration and Public Service
10. Luís Bitone, President of the National Human Rights Commission of Mozambique
11. José Mandra, Magnificent Rector, ACIPOL
12. Jorge Ferrão Magnificent Rector of the Pedagogical University
13. José Magode_ Joaquim Chissano University
14. Orlando Quilambo- Magnificent Rector of Eduardo Mondlane University
15. Severino Ngoenha- Rector of UDM University
16. Henriques Henriques_ Director of the Faculty of Law-UEM
17. Eduardo Chiziane_ Academic, UEM
18. Teodoro Waty, Academic, UEM
19. Paulo Mateus Wache_ Academic, Joaquim Chissano University
20. Guilherme Mbilana, Academic
21. Manuel Guilherme, Academic
22. António Boene, President of the first commission of the AR
23. Maria do Céu Omar do Amaral – 4th Committee of the A.R.
24. Zacarias José – 4th Committee of the A.R.
25. Antonio Chipanga
26. Brazao Mazula
27. Jorge Chicamba - CESDICIF
28. Geraldo Saranga – MINEC
29. Belmiro Quive – BDK

ELECTORAL BODIES

30. Dom Carlos Matsinhe, President of the CNE
31. Carlos Cauio, First Vice-President of the CNE
32. Fernando Mazanga, CNE
33. Maria Anastácia Xavier, CNE
34. Barnabé Ncomo, CNE
35. Alice Baze, CNE
36. Salomão Moyana, CNE
37. Felisberto Naife, Secretary General of STAE

AMBASSADORS/ AND HIGH COMMISSIONERS OF PARTICIPATING COUNTRIES

38. Siphiwe Nyanda, High Commissioner of the Republic of South Africa to Mozambique
39. Mohamed Meziane, Ambassador of Algeria to Mozambique

40. José João Manuel, Angolan Ambassador to Mozambique
41. Hatem Elalfy, Ambassador of the Arab Republic of Egypt to Mozambique
42. Abdelli Ezzaqui Rahali, Moroccan Ambassador to Mozambique
43. Victor Matemadanda, Ambassador of Zimbabwe to Mozambique
44. Paul Willian Lumbi, High Commissioner of the Republic of Zambia to Mozambique
45. Embaixador da Noruega, Haakon Gram Johannesen
46. Narjess Saidane, UNDP Resident Representative
47. Francisco Roquete, UNDP Deputy Resident Representative
48. Andres del Castillo, CTA of UNDP Electoral Project
49. Almeida Mabutana, UNDP Program Officer

CIVIL SOCIETY ORGANIZATIONS

50. Edson Côrtes, Director of CIP - Center for Public Integrity
51. Ericino de Salema, EISA
52. Miguel Orlando Brito - IDEA
53. Felicidade Chirinda, President of the Christian Council of Mozambique
54. Luís de Brito, CEDE- Center for Democracy and Development Studies
55. Tomás Viera Mário, Journalist and Activist
56. Fernando Lima, Journalist and political analyst
57. Adriano Nuvunga, CDD
58. Borges Nhamirre, CIP9

JUDICIAL COURTS

59. Armando Machona- Kamaxaqueni District Judicial Court
60. Francisca António Gimo- Kampfumu District Judicial Court
61. Armando Machona-Kampfumo
62. Francisca Luis Antonio Gimo-Kampfumo
63. Jafete Fremo - TJP
64. Helena Matola - TJP
65. Zito Nhatave - TJP
66. António Calisto-TJP
67. Salomao Manhica - TJP
68. Holden Phele - TJD
69. Lina Machava-TJD
70. Cardoso Maculuve-TJD
71. Deisy Mate - TJD
72. Edite Figueiredo – TJD

OFFICIALS OF THE CONSTITUTIONAL COUNCIL

73. Paulo Assubuji, Secretary General
74. Paulo Machava
75. Mário Almeida
76. Paulo Machado Ribeiro
77. João Chicote

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79. Elysa Vieira
80. Neide Txuma Jone
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87. Sílvio Jacinto Marrime
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90. Alzira Magalhães
91. Osvaldo Amâncio Macksen
92. Sérgio Menomussanga
93. Ancha Paulo Ravia
94. Yolanda Jaftalina Goma
95. Maria Malecua
96. Arsénio Mahanjane
97. Samuel Chaguala
98. Laurinda Alberto
99. Hélio Alberto Manguer
100. Obed Uamusse