

**AFRICAN NETWORK OF CONSTITUCIONAL LAW  
CONFERENCE**

***“FOSTERING CONSTITUTIONALISM IN AFRICA”***

**THE CONSTITUTIONAL JURISDICTION IN  
MOÇAMBIQUE:**

**THE CONSTITUTIONAL COUNCIL**

**WORLD CONFERENCE ON CONSTITUTIONAL JUSTICE  
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**A. – THE INFLUENCE OF CONSTITUTIONAL JUSTICE ON SOCIETY**

**I. Historical background**

In order to look into this topic, there is a need to consider some aspects of the historical background related to the control over constitutionalism and legality in Mozambique.

In effect, the 1975 Constitution of the Republic of Mozambique defined the break-away with the colonial system, by establishing that all legislation that was contrary to the Constitution would be automatically revoked, and that which was not contrary to the Constitution would remain in force until amended or revoked.

The Constitution did not establish specific mechanisms for the control of the conformity of the legislation with the Constitution.

In 1978, through a constitutional review, the courts were assigned the mission of defending and safeguarding the principles enshrined in the Constitution, which could be interpreted as an attempt to introduce a diffuse control system over the Constitutionalism.

The 1990 Constitution established the Constitutional Council and defined it as a body with specialized powers in the realm of legal and constitutional issues, and it further clarified the powers of the courts regarding the actual control over the Constitutionalism.

The constitutional legislator established in article 208 of the 1990 Constitution that until the Constitutional Council was to become operational, its powers would be carried out by the Supreme Court.

This situation lasted from 1990 up to 2003 when Law nr. 9/2003 of 22 October was passed, which heralded the full birth and coming into existence of the Constitutional Council.

The Constitutional Council comprises 7 Judges, appointed as under:

- 1 Judge appointed by the President of the Republic, who becomes the president of the Constitutional Council;
- 5 Judges appointed by the National Assembly in accordance with the criteria of proportional representation;
- 1 Judge who is co-opted.

The 2004 Constitution provides for a Judge appointed by the Senior Council of the Judicial's Bond.

The Judges are appointed for 5-year mandates, which are renewable.

Initially, five Judges were appointed in November 2003, representing the initial composition of the body, and six months later they were joined by the other two.

## **II. The 2004 Constitution**

On 21 January 2004, a new Constitution came into effect, amending the definition and the powers of the Constitutional Council, and it was now regarded as a body with *sovereignty entrusted especially with the responsibility to administer justice on matters of legal and constitutional nature.*

While the new Constitution did not regard the Constitutional Council as a court, it is significant the fact that it was defined as a justice administration body, which is

tantamount to a jurisdictional body. In addition, the Constitution broadened and strengthened the powers of the Constitutional Council, which under the terms of article 224 are as follows:

- a) review and declare the unconstitutionality of the laws and the illegality of the normative acts of the State organs;
- b) resolve power conflicts amongst the organs of sovereignty;
- c) verify in advance that referenda are constitutional.

It is further incumbent upon the Constitutional Council to:

- a) verify the compliance with the legal requirements for the candidatures for President of the Republic;
- b) declare the permanent incapacity of the President of the Republic;
- c) verify the death and the loss of mandate of the President of the Republic;
- d) undertake the final consideration of electoral appeals and complaints, validate and proclaim the electoral results under the terms of the law;
- e) undertake the final decision on the legality of the constitution of political parties and their coalitions as well as to decide on the legality of their names, acronyms and symbols, and determine their extinction under the terms of the Constitution and the law;
- f) rule on cases of impugnation of elections and deliberations by the bodies of political parties;

- g) rule on cases where subject matter is the contention on the mandate of members of parliament;
- h) rule on cases where subject matter are the incompatibilities envisaged in the Constitution and in the law.

In the light of the powers referred to above, it is realized that many of them are similar to those that in other legal regimes are carried out by courts; in addition, the Constitution establishes that the rulings of the Constitutional Council have the features of overall mandatory nature, non liable to appeal which prevail over other rulings.

Non-compliance with its decisions constitutes contempt, if a more serious offense is not applicable.

The core power of the Council consists therefore of the verification of the constitutionality and legality of the normative acts of the State. The verification of the constitutionality can be done in an abstract manner or on a successive basis, and concretely, through appeals lodged with the Constitutional Council pursuant to decisions taken by other courts that refuse to apply any norm on the grounds of its unconstitutionality, or whose application has been refused on the grounds of unconstitutionality or illegality declared by a judicial ruling non susceptible to appeal – paragraph 1 and 2 of article 247.

This is unconstitutionality through action and the unconstitutionality by omission is not contemplated.

On matters of the verification of the constitutionality and illegality of the normative acts of State organs, the Constitutional Court does not act on its own initiative.

With the new Constitution, the Constitutional Council started to carry out not just the successive verification of the laws but also the preventive verification of the

constitutionality. The request for the declaration of unconstitutionality of the laws or of the illegality of the normative acts of the State organs can be submitted by the President of the Republic; the Speaker of Parliament; the Prime-Minister; the Attorney General; also by at least one third of the members of parliament, by the Mediator or by two thousand citizens (article 245 of the Constitution).

The Constitutional Council also has other powers derived from the law, such as to receive and verify declarations on incompatibilities or on the assets and income of senior public office holders or government officials.

Thus, the major roles of the Constitutional Council in the Mozambican political system are to:

- be the guarantor and the verification and control body of the constitutionality and legality of the normative acts;
- ensure the correct balance of the exercise of power amongst the organs of sovereignty, resolving the conflicts of power that might arise between them;
- verify in advance the constitutionality of referenda;
- ensure the compliance with the law during the electoral processes and to validate and proclaim their results, thus carrying out the function of legitimizing the democratic process;
- review and decide on the appeals in respect of rulings and decisions pronounced on concrete cases of unconstitutionality or carry out the abstract review of the constitutionality or legality of any norm the application of which might have been refused on the grounds of unconstitutionality or illegality, by a judicial ruling non susceptible to appeal, this at the request of the Attorney General or the Attorney General's Office (article 247, paragraph 1 of the Constitution).

The position of the Constitutional Council is on par with the other organs of sovereignty: the President of the Republic, the National Assembly, the Government and the Courts (article 133 of the Constitution).

And all these organs coexist based on the principles separation of power and interdependence enshrined in the Constitution and they must comply with the Constitution and the laws (art. 134 of the Constitution).

### **III – Relationship with the executive and legislative power**

As mentioned above, in terms of powers, the relationship between the Constitutional Council and the legislative and the executive powers takes place in the context of the matters that fall within the powers of the Constitutional Council, which is a jurisdictional body with the responsibility namely for the processes of verification of the constitutionality and legality of the normative acts of the State organs, the electoral processes, the contention related to the mandate of the members of parliament, the verification of the declaration of the income and assets of public office holders and also to resolve power conflicts amongst the organs of sovereignty.

It should be added that the relationship that exists with the legislative power is also at the level of the appointment of the Judges.

The President of the Republic is the Head of Government; however, when appointing the president of the Constitutional Council he/she does so in the capacity of Head of State (art. 159 of the Constitution).

In conclusion, it can be stated that Mozambique's Constitutional Council is:

- a body to safeguard and defend the Constitution when requested to use the mechanisms established in it to remove or correct the deviations that might occur in terms of the abuse of power;

- an eminently jurisdictional body, although many of its decisions are of a strong political character and impact and in this regard the constitutional legislator was duly cautious in the phase of the legislative preparation in systematic terms, as it was included in the group of existing courts;
- the guarantor of the balance between the State organs to fine tune the weights and counterweights they use, thus acting as the controlling element of the exercise of the political power;
- the stabilizing body of the democratic political life if, as it should, it acts correctly, and it could also be the vector of instability if it does not conform to criteria of integrity and legality and that put at stake the benchmark element that the Constitutional Council should represent to all institutions and citizens;
- an organ that disseminates democratic principles and promotes the observance of the rules enshrined in the Constitution and of the legality in general, embraced as an universal value.

#### **IV- The Influence of Constitutional Justice on Society**

As we have seen, before the Constitutional changes of 2004, the role of the Constitutional Council was very limited in scope, fundamentally dealing with the electoral jurisdiction, which would not generate much interest except during political elections.

These changes had a strong impact on the substantial development of the activities of the Constitutional Council and on the affirmation of its privileged position in the legal-constitutional space and debate in the Country.

Thus, it can be unreservedly stated that the constitutional convention of 2004 was aligned with the position that favoured the expansion of the powers of the Constitutional Council,

assigning to this body a greater role in the context of the exercise of the powers reserved for sovereign organs.

For example, in its deliberation n° 19/CC/2004, of 11 August, the Constitutional Council was asked by the party Renamo-União Eleitoral, to rule about an appeal to a Deliberation (n° 24/2004, of 21 June) of the National Electoral Commission on the “undertaking of Voter Registration abroad”.

The Constitutional Council reaffirmed that Mozambicans living abroad are entitled to vote and to be elected; that the constitutional principle that all citizens are equal under the law is formally set out in Art. 66 of the Constitution of Mozambique and that “however, the constitutional principle that all citizens are equal under the law should not and cannot be interpreted in absolute terms, preventing the law from disciplining differently when confronted with different situations that its provisions will seek to regulate”.

Another example is related to the Deliberation n° 1/CC/2007, of 12 April. Here the Constitutional Council was not playing the role of a judge with respect to a norm or decision by a State organ, but was notified to comply with a decision that it considered to be unlawful stating that “therefore, based on principle of the constitution and the law it has the special responsibility of not applying, in order to refrain from acting unlawfully”...

Lastly, the example of the Judgment n° 5/CC/2007, of 6 November that for the first time ruled that Presidential Decree was unconstitutional.

Indeed, the Constitutional Council following an application by 1/3 of the Members of the National Assembly ruled the unconstitutional condition as for the application first of all because of the lack of a legal basis and secondly because it breached the principle of separation of powers. The Constitutional Council ruled firmly before the organs of sovereignty its willingness to defend the constitutional balance and defend such norms, which by the constitutional imperatives, everybody without exception, must abide by.

Thus, it can be concluded that each and every citizen has the duty to respect the Constitution and the breach thereof is subjected to a sanction (art. 18 of the Constitution), and although the duty of ensuring that the Constitution is respected falls under various other political players, such the President of the country (art. 146 n° 2 and art. 150), the Members of the National Assembly (art. 177, subparagraph a ), and the Government (art. n° 203 and 204), the Courts (art. 214), the Attorney General's Office (art. 234 n° 2 and art. 236) and generally the administration, in the broader sense, the Courts and the Constitutional Council have very specific responsibility to uphold the Constitution.

Our Constitution also contains social and economic rights

The Constitutional Council as the Administrative Organ of the Constitutional Justice makes rulings aimed at its protection. This was the case with Judgment n° 02/CC/2007 of 20 June that ruled as unconstitutional the Law that revoked Law n° 9/87 of 19 September that sanctions certain practices that are harmful to the economy.

“In fact, the Constitutional Council contributes in a notable way to the development of the Mozambican “Constitutionalism” construed as a movement aimed at subjecting the functioning of the public powers to a set of rules set out in the Constitution.

“... The Constitutional Council managed to influence the behaviour of the national public powers and influenced the content and the development of constitutional norms” - Gilles Cistac, Professor at the UEM, Workshop on Constitutional Jurisdiction in Mozambique – Beira.

In Mozambique, with the recent constitutional review coupled with the principle that “sovereignty rests with the people” it has embraced the principle that “the State is subjected to the Constitution and founded on legality” – art. 2, n° 3 of the Constitution.