



N.B. An unofficial translation in English of the original speech in Portuguese.

Discussant's Speech

5th Congress of the World Conference on Constitutional Justice

Session D

"Fundamental Principles: The Protection of Human Rights, Democracy and the Rule of Law as a Pre-Condition for Peace"

Lúcia da Luz Ribeiro

President

Constitutional Council, Mozambique

I - Introduction

His Excellency Gianni Buquicchio, President Emeritus, Special Representative of the Venice Commission, His Excellency Anwar Usman, Chief Justice of the Constitutional Court of Indonesia, Presidents of the Constitutional Courts, Constitutional Councils, Distinguished participants, Ladies and Gentlemen.

We would like first of all to express how honoured we feel to have the privilege to speak at this Fifth Congress of the World Conference on Constitutional Justice, while transmitting on my behalf and on behalf of the delegation of the Constitutional Council of Mozambique that accompanies me, our recognition to the Constitutional Court of Indonesia, to the secretariat of the World Congress, to the organizers of the event, in particular, for the warm welcome

and the conditions that they provide to us since our arrival in this beautiful country, and to all of you participants who lend high quality to the event.

We congratulate the speaker Mr. President Namseok Yoo, from the Constitutional Court of Korea for his clear and brilliant presentation of the answers to the questionnaire, also bringing the experience of his country.

The speaker stresses the importance of the Congresses not only for bringing together the organs of constitutional jurisdiction in a single voice allowing for self-containment but also to provide for the preservation of the Rule of Law, helping to face the challenges that are often common to most of the organs of constitutional jurisdiction.

The presentation, which is divided into three parts corresponding to the questions in the questionnaire, portrays not only what is inferred from the reports, but also delves into concepts, raises questions for debate, and brings up the basic constitutional values related to peace (negative peace and positive peace) in the various countries.

Allow us in the course of our presentation not only to comment on the words of the presentation we have just heard, but also to bring up with some emphasis the case of Mozambique.

II - Appreciating

In fact, the reports of the various countries, as far as peace is concerned, allow us to understand their commitment to the maintenance of peace, the respect for fundamental rights, through various mechanisms such as, for example, constitutionality control processes, election processes and the abolition of the death penalty. In the respect for the rights of minorities¹ here with emphasis on the respect for the principle of equality as a guarantee for

¹In Mozambique, although the Constitution of the Republic advocates the principle of non-discrimination, and the legislator, through the Law n.º 23/2007, of 1 August, has taken a significant step in Subsection I, on Fundamental Principles, specifically in paragraphº 1 of its article 4 (Principles and interpretation of labour law), in the sense that "The interpretation and application of the norms of this Law obey, among others, the principle [...] of non-discrimination on the basis of sexual orientation", a giant step, it should be said, with regard to

the construction of a pluralistic society and of peace. The intervention in various matters of a social nature, emphasising in the same way the need to adopt measures that guarantee the quality of life of citizens so as to aim for social justice.

The jurisprudence brought by the countries illustrates the commitment to preserve these values, stresses the *Keynote speaker*, values that go beyond survival. Therefore, countries must adopt measures that guarantee an acceptable standard of living for citizens, we would say, at least the minimum acceptable.

The exercise of the right to demonstrate also presents itself as preponderant in the harmony in labour disputes. The imperative of the effectiveness of freedom of expression and other constitutionally enshrined rights, just to exemplify.

The cases presented demonstrate that the judiciary fulfills its constitutional duty and ethical commitment to assess the violation of fundamental rights and to correct situations at odds with the purposes of the State. It is important, as is apparent from the jurisprudence that the organs of constitutional jurisdiction apply and interpret the constitutional provisions relating to fundamental rights, as this contributes to the maintenance of peace.

We can affirm that the Mozambican legal system is at the service of the protection of the fundamental rights of citizens, resulting from article 70 of the Constitution of the Republic of Mozambique (CRM) of 2004 where the principle that "The citizen has the right to appeal to the courts against acts that violate his rights and interests recognized by the Constitution and the law" is enshrined. And further that "Every citizen has the right to present petitions, complaints and claims before the competent authority to demand the restoration of his violated rights or in defence of the general interest"². These norms demonstrate, in a way, an adequate protection to every fundamental right.

ethics, respect for the fundamental rights of individuals, individual freedoms, imposing the view of others as a being deserving of respect, there is still, however, resistance from the Government, which resists the recognition of the Mozambican association for the defence of sexual minorities.

² Article 79 (right to petition, complain and claim) of the CRM 2004.

The Constitutional Council is a court of fundamental rights if we take into account that, for example, on the internal front, the modalities for reviewing the constitutionality of enshrined norms present virtues in the protection of citizens' fundamental rights, whether in the seat of abstract or concrete review.

Of equal value are the mechanisms for electoral and party litigation with regard to a set of rights of political participation, which constitute respect for fundamental rights. It is important to point out that in some countries there have been bloody conflicts resulting from electoral processes, i.e. after the validation of the electoral processes by constitutional jurisdiction bodies.

Electoral processes are a great challenge for the constitutional jurisdiction body and at the same time a constraint resulting from the credibility it has from society itself. This credibility is often called into question for reasons that are external to the Authority. It is true that we can also say that while it is a challenge in certain contexts, it also represents a possibility of opportunity, embodied in the possibility of its judges being able to be more "active" in responding to the requests and concerns of citizens without limiting themselves to mere legal formalism. In other words, on the basis of the protection of fundamental rights and social peace, they could broaden the scope of constitutional interpretation even in the absence of explicit legislation or when it is insufficient.

Regarding the protection of peace, it is important to highlight that within the scope of the State's insertion in the international plan, Mozambique pursues a policy of peace, only resorting to force in the case of legitimate defence, as advocated by article 22 (Peace Policy) of the CRM. Nevertheless, the country has experienced some internal armed conflicts which, like any other wars, result in the violation of the fundamental rights of citizens. These conflicts are triggered by political disagreements. This reality of facts led to the signing of three Peace Agreements³, specifically: the General Peace Agreement in 1992; the Cessation of Military

³ On October 4, 1992, the General Peace Agreement was signed in Rome. The signatories were the then President of the Republic Joaquim Alberto Chissano and Afonso Marceta Dhlakama - then President of the Mozambican National Resistance. This agreement put an end to a period of progressive economic crisis and renewed internal political conflict, which degenerated into a bloody civil war; On 5 September 2014, the Cessation of Military Hostilities Agreement was signed in Maputo by the then President of the Republic Armando

Hostilities Agreement in 2014; and the Definitive Peace Agreement in 2019. It is important here to underline that Mozambique defends the primacy of the negotiated solution of conflicts.⁴ These Agreements were preceded by long periods of dialogue and negotiation.

It was, however, in this last Peace Agreement that the political forces decided for the involvement of the Constitutional Council Body, and therefore its legitimate participation in the Country's political and institutional process must be acknowledged. These are competences that were especially attributed within the scope of the political process, the process of cessation of hostilities and the achievement of definitive peace. These are particularly sensitive competences within the political and constitutional framework, namely "within the scope of the deepening of participatory democracy and the guarantee of peace", as we have already mentioned, especially those of appraising and deliberating on the dismissal of the Provincial Governor and District Administrator by the President of the Republic⁵, appraising and deliberating on the dissolution of provincial, district and municipal assemblies by the Council of Ministers⁶.

With regard to the dismissal of the Governor, where there are sufficient grounds for such dismissal, the President of the Republic shall issue a dismissal order after hearing the Council of State.

The order of dismissal is submitted to the Constitutional Council for verification of its constitutionality and legality, by means of a decision⁷, with the respective process taking precedence over any other judicial expedient. With respect to the dissolution of the collegiate organs of the province and the autarchy, the initiative for the procedure to dissolve the Provincial and Autarchical Assemblies belongs to the Minister who superintends the area of State administration.

Emílio Guebuza and Afonso Marceta Dhlakama, then President of the Renamo Party; On 6 August 2019, the Final Peace Agreement was signed in Maputo, with President of the Republic Filipe Jacinto Nyusi and Renamo President Ossufo Momade as signatories.

⁴Article 22(2) (peace policy) of the CRM.

⁵ Article 243(d) of the CRM

⁶ Article 243(e) of the CRM.

⁷ Article 273 of the CRM

The dissolution is done by the Council of Ministers, by means of a Decree, which is submitted for review by the Constitutional Council. This process shall also take precedence over other judicial proceedings.⁸

These functions overlap the role of the Constitutional Council within the political process as the bodies referred to here have emerged from the recent decentralisation figurine approved⁹ by the punctual revision of the Constitution of the Republic by Law no. 1/2018, of 12 June 2018. As these bodies are democratically elected by direct suffrage, i.e. by popular vote, one might question the reason for the involvement of the Constitutional Council in this process however the answer is that these acts of resignation and dissolution may generate political tensions, which is also why the priority and urgency in their consideration by the Constitutional Council is required.

Therefore, we have that the constitutional jurisdiction also acts in a political way, contributing to the democratic and institutional stability, and in the interest of the State, when it arbitrates political conflicts, in the function of forming consensus base between political adversaries. It is intended that the constitutional justice offers consensus in these decisions of dismissal of the Provincial Governor and District Administrator by the President of the Republic, and of dissolution of provincial, district and local assemblies by the Council of Ministers.

These particular competencies of the Constitutional Council are understandable if we take into consideration the partisan mosaic that may result from the general elections. We may have Provincial Governors and Assemblies, coming from different party backgrounds than the President of the Republic or the Council of Ministers. This solution will not arouse political mistrust, as it is well known that mistrust between political parties still prevails in our society.

It is because, "In our circumstances, and in the complex process of transition from the one-party Party-State to the Democratic Rule of Law, a process in which the resistance of the past,

⁸Articles 15 and 16 of Law No. 5/2019 of 31 May - Law on the administrative tutelage of the State over decentralised entities.

⁹ It should be noted that the constitutional revision was approved by consensus of the three parties represented in Parliament, namely FRELIMO (Frente de Libertação de Moçambique), RENAMO (Resistência Nacional Moçambicana) and MDM (Movimento Democrático de Moçambique).

which has not yet become completely past, the affirmation of Progress, still lacks broad consolidation [...]. It is in this context, that of a dynamic process, marked by tension, (of political actors) and sometimes contradictory, that the challenges are projected and the essential vocation of the Constitutional Council is materialized¹⁰ ." Therefore the vocation referred to is to be the guarantor of the maintenance of peace and political stability in the Country¹¹ . In our reality it was imperative for the achievement and consolidation of Peace in Mozambique to safeguard the fundamental rights of citizens.

The relevance of constitutional jurisdiction in Mozambique is thus growing in an extraordinary way. In fact, constitutional justice has become a premise of democracy: legal democracy, democracy with legitimacy. The Constitutional Council, emerging with an important moderating role, has endowed itself with a form of neutral legitimacy with regard to the other politically institutionalized powers (Executive and Legislative Powers), and more recently as a neutral power between the Government and the opposition party in armed conflict, counterbalancing them under the principle of the balance of powers, *check and balance*.

In fact, the Constitutional Council is materially the Guardian of the entire constitutional order and safeguard of the democratic rule of law and, by concentrating the power to judge the laws, it has the essential function of arbitrator of the conflict between the powers of national political life. Thus, it is not limited to guaranteeing the supremacy of the Constitution over ordinary law. It is also called upon to intervene directly in the protection of citizens' fundamental rights and freedoms and in the mechanisms guaranteeing peace. It is well known that this peace is more than the absence of war, but a premise that implies economic

¹⁰HUNGUANA, Teodato, *Das competências do Conselho Constitucional e dos actos não normativos*, in, *Princípios Estruturantes da Constituição da República de Moçambique*, Edição Conselho Constitucional, O Guardião 2 - (vários autores) 2021, Maputo, p.39.

¹¹ It is worth remembering here that the legitimacy of or confidence in the Body dates back to the time when its implementation was imperative, i.e. when it came into force. At that time, towards the end of 2003, Mozambique was entering a new electoral cycle (which had just begun). According to the major local political forces represented in Parliament, it was imperative for the Constitutional Council to come into operation, as a true electoral "court", which would provide the process, especially the political parties, with guarantees of impartiality, transparency and the fairness of the electoral process, thereby giving it greater credibility. We are convinced that these and other reasons have dictated the choice of the Constitutional Council for the "prior review" of the dismissal and dissolution orders.

development and social justice and why not also the safeguarding of the global environment and much more.

In fact, more than exercising the powers of the Body, it is the people who should feel that the organs of constitutional jurisdiction have a preponderant role in guaranteeing their Rights.

If the internal armed conflicts have been resolved through successive agreements, the terrorism that is currently being experienced in the north of the country, in Cabo Delgado Province, does not allow us to speak of complete and effective peace.

III - Conclusion

The role of the organs of constitutional jurisdiction is crucial when it comes to the realisation of the fundamental rights of citizens, the realisation of democratic principles, in the rational formation of the political will of the people, in the balance of the powers of the state, with respect for the principle of the separation of powers, in the construction of peaceful relations between the majority and the minority and in the guarantee of political alternation through fair and transparent electoral processes, legal security, as pointed out, is fundamental when it comes to the rule of law.

Thank you very much