Separation of Powers and Independence of the Constitutional Council

I
General Framework

The first Constitution of Mozambique, which lasted from 1975 to 1990, adopted the political regime of popular democracy, based on the socialist model (Articles 1. And 4., § 5), established the one-party system and the principle of unity of power. This principle is reflected in the formal supremacy of the People's Assembly in relation to other State organs. However, institutional practice led to a concentration of power in the figure of the President of the Legislative and Executive Power.
The Judiciary appeared as one who enjoyed autonomy and independence, as the exercise of the corresponding function was reserved to the courts, giving up the independence of the judges, as evidenced in Articles 62. And 68. Of the Constitution:
- "In the Republic of Mozambique to the judicial function is exercised through the Supreme Court and other courts determined by law on judicial organization."
- "In exercising their functions judges are independent."

The principles of the reserve of the judicial function to the courts and the independence of judges have been developed, deepened and consolidated in the constitutional revision of 1990, which determined the transition state for democracy for the People's Democratic State.
The rule of law appears, in the late eighteenth century, associated with the separation of powers, conceived as an expedient to control them with a view to guaranteeing the rights and freedoms of the individual.
But before that, the theory of separation of powers had already been formulated by Charles-Louis de Secondat, Baron de MONTESQIEU, in his book "The Spirit of Laws", published in 1748, as follows:
"When the same person or the same body of magistracy, the legislature is meeting in executive power, no freedom (...). Nor is there liberty if the power to legislate is not separate from the legislative and the executive. (...) It would be lost if the same man, or even the main body, or the nobles or the people exercise the three powers: to make laws, to execute the resolutions and the public to judge the crimes or the disputes between individuals "
During the transition from absolutist to the liberal regime, the separation of powers theory was converted to the fundamental principle of the Constitutions and reference material, as is apparent from the following wording of Article 16 of the Declaration of the Rights of Man and Citizen of 1789:
"A company in which it is made for guaranteeing rights or ensuring the separation of powers has no constitution."
At present, it can be assumed that the separation of powers is a principle universally accepted, but their understanding has evolved significantly, especially the transition from the rule of law for the Liberal Social State of Law. Indeed, in today's constitutionalism, the principle is formulated in terms of "separation and interdependence of powers," it seeks to achieve a balance of state powers, through mechanisms of cooperation, assigning each of them, simultaneously, a Statue faculté faculté d'empêcher and one, ie, establishing a system of checks and balances, according to the U.S. formulation.

It is this sense that we understand the following statement BLANCO OF MORAL:
"... The principle of separation of powers requires that each constitutional body for whom the core of a state function, it must contain the limits of the powers constitutionally conferred, so that provided a model for distribution note that the functional requirements of essentiality in the distribution of public activity, and the devolution of political and legal responsibility in those activities. "
Despite the various metamorphoses of the concept of separation of powers, reserving the judicial function to the courts and the independence of judges have been regarded as constantly as specific manifestation of the constitutional principle on which it reflects the same design and basic pillars of the Democratic State .
Hence, having embraced this model of state, the Mozambican Constitution of 1990, and clarify the qualifications of the courts as organs of sovereignty, with the equal dignity of the President, the Parliament and the Government (art. 109); set them in order to ensure the legality, respect for the laws, rights and freedoms of citizens and legal interests of different agencies and entities with legal status (Article 161, paragraph 1).
The courts also received the 1990 Constitution to function on the one hand, preventive, educating citizens on voluntary compliance with laws, to establish a just and harmonious social coexistence, on the other hand, repressive, to penalize the violation of law and decide disputes in accordance with the law (Article 161, paragraph 3).
Although already in a different political context and constitutional, the 1990 Constitution remained in substantial terms, the principle of reservation of the judicial function to the courts (Article 168, paragraph 1), as was enshrined in the Constitution of 1975. In connection with the principle of independence, the Constitution of 1990 made explicit the duty of judges to obey only the law (Article 164), and established a series of guarantees of the judiciary, particularly the guarantees of impartiality and removal, the restriction of liability and criminal judges in the exercise of their functions in the cases specified by law and subject the removal of one professional judge from their function to the terms established by law (Article 164, paragraph 2 and 165).
Not least among these guarantees was the consecration of the system of incompatibilities for the judges, by virtue of which it became impossible to exercise cumulative function of judge and any other public or private, other than teaching or research (Article 166).
In the institutional perspective, the independence of judges now, since 1990, the benefit of another fundamental guarantee of a constitutional nature, which was the creation of the Supreme Judicial Council, whose powers, composition, organization and operation would be regulated by ordinary law (art. 172).
The constitutional system established since 1990, is currently developed and strengthened by the current Constitution whose text was approved in 2004. Indeed, the democratic rule of law and separation of powers in the Constitution appeared as previous political principles with conforming the state organization and political power, but implicitly, and then grasped through the interpretation and systemic understanding of the constitutional text. In the present constitution, the same principles enshrined explicitly appear in specific provisions (Articles 3 and 134).
Particularly in regard to the judicial function, the 2004 Constitution remains in essence the basic structural principles of the previous constitutions, namely the principle of reservation of this function to the courts (Article 212) and the independence of judges (Article 217, paragraph . 1). Nevertheless, the continuity, the new Constitution introduces

innovations of great relevance for the improvement of the national administration of justice.
The independence of the judiciary or, more broadly, the courts and their magistrates, was not excluded from the gains brought by the constitutional development operated in 2004. For example, we observed that the current Constitution regulates in some detail, the Superior Council of the Judiciary, defining it as "... the board of management and discipline of the judiciary" (Article 220), establishing the composition (Article 221) and its powers (Article 222), of which the following deserve mention:
- Appoint, assign, transfer, promote, dismiss and assess professional and take disciplinary action and, in general, perform all the acts of a similar nature relating to judicial magistrates [point a)];
- Ordering the execution of special inspections, investigations and inquiries to courts [c)].
Besides the High Council of the Judiciary, came into being, with constitutional dignity formal, two more bodies of management and discipline of magistrates, including the Superior Council of Administrative Judiciary (Article 232) and the Supreme Council of the Public Prosecution Service (Article 238).

II
Institutional Independence The Constitutional Council

1. The creation of the Constitutional Council by the 1990 Constitution
The 1975 Constitution did not provide a specialized body of constitutional justice, no specific mechanisms for review of constitutionality. It was up to the 1990 Constitution to establish the Constitutional Council, incorporated in all the organs of sovereignty (Article 109), and then defined as "the body of expertise in such matters of constitutional law" (Article 180).
Besides the power to determine and declare the unconstitutionality and illegality of normative and legislative acts of State organs [Article 181, paragraph 1 point a)], which is usually the prerogative of the specialized organs of constitutional justice, the Constitution of 1990 attributed to the Constitutional Council the powers to resolve conflicts of competence between the organs of sovereignty and rule on the legality of referenda [Article 181, paragraph 1 a) and b)]. In the particular election gave him the powers to check the legal requirements for candidates for the President of the Republic, to determine, ultimately, the electoral complaints and appeals, as well as validate and proclaim the election results under the law (Article 181, paragraph 2).
But the constitutional legislator of 1990 opted for self restrain itself in the regulation of the Constitutional Council, because, in addition to the definition and assessment of their core competencies, merely to regulate the appointment of the Chairman of the Board, in deferring to his appointment to the President, exercising his function as Head of State [Art. 120, g)], appointment lacked the ratification of the Assembly [Art. 135, No. 2, f)]. Furthermore, it established the principles of irrecorribilidade and public nature of the court (art. 182) and indicated the entities with standing to initiate the monitoring procedures of unconstitutionality or illegality. Finally, it referred to common law setting the composition, organization, operation and process monitoring and control of constitutionality and legality of legislative and other powers of the Constitutional Council (Article 184).

The first Organic Law of the Constitutional Council, the Law No. 9 / 2003 of 22 October, established the legal framework required for the installation of the organ and the exercise of their functions, which still occurred in early November 2003, ending, this mode, the long period in which these functions were performed by the Supreme Court under the transitional provision of Article 208 of the Constitution.

2. The legal nature of the Constitutional Council under this Constitution, 1990
Under this Constitution of 1990 gave rise to doubts as to the legal nature of the Constitutional Council, and the controversy was whether this should be regarded as an organ of a political nature or, conversely, of a judicial nature.
More than theory, this question has practical relevance because its answer, either way, carries important legal consequences, particularly for measuring the independent status of the Constitutional Council and its members.
Indeed, the political bodies are characterized by being active, engaged in the political function according to political criteria also, and enjoy a wide discretion in its actions. In contrast, courts are reactive, integrate necessarily independent judges who exercise the judicial function in obedience to legal criteria and bound in duty to obey only the law.
The question posed did not find clear answer either in the wording of Article 180 of the Constitution, a provision which, as already mentioned, the Constitutional Council has defined as "a body of expertise in the field of legal and constitutional matters", nor the understanding of all their skills.
The Organic Law of 2003 fixed the problem, but brought some important benefits to the debate from the outset to give the National Assembly the power to appoint five "members of the Constitutional Council," according to the criterion of proportional representation, being appointed to co-opt a member (art. 7).
Accordingly, the legislature supplemented the ordinary rules of composition of the Constitutional Council, taking into account the aforementioned rule of appointment of the President by the Head of State, subject to ratification of Parliament.
For certain points of view, the decisive intervention of the political bodies in the appointment of most members of the Constitutional Council has reinforced the understanding that this is a political body. However, the plea could not be claimed against other plausible factors that could extract the Organic Law, including the requirement that the appointment of members of the public fall on at least a degree in law or judges, which cumulatively have exercised a legal profession, at least five consecutive years (art. 8).
In addition, the Organic Act set the status of members of the Constitutional Council in terms very similar to those of judges of the courts, establishing independence, tenure and irresponsible unless the terms and limits that are blamed judges of courts of law (Articles 11, 12 and 13), and has extended to members of the Constitutional Council, mutatis mutandis, the rules governing the enforcement of civil and criminal liability of the Judges of the Supreme Court, as well as the rules for their detention (article 15) .
Although related to the guarantees of independence, the Organic Act of 2003 established the uniqueness of the Constitutional Council's disciplinary power over its members, telling them to apply the disciplinary system established by law for judges (article 14) and also making applicable to those members of the regime impediments and suspicions of the judges of the courts (Article 18).

To enhance this set of guarantees, to counterbalance the involvement of political bodies in its name, the Organic Law has determined that members of the Constitutional Council could not exercise any functions in the organs of political parties and political associations, or functions associated with them, nor develop activities of police-public nature Patidar. It also determined that the status resulting from membership in political party or association, by members of the Constitutional Council, was suspended for the office (Article 17).
All these steps of the ordinary legislator in order to safeguard the independence of members of the Constitutional Council in exercising its functions and particularly the repeated references to their own regimes of the status of judges became increasingly untenable thesis of the political nature of the Constitutional Council .
Even more, it was inevitable to extract both the Constitution and the Organic Law, the conclusion that the Constitutional Council was a body reactive because its action should be guided by the principle of the application, ie, depended exclusively on the pulse certain entities having locus standi (Article 183 of the Constitution and Articles 57, 63, No. 1, 76, No. 1 and 78, paragraph 1).
Although the Act did not make explicit reference to the duty of the members of the Constitutional Council to respect only the law, exercise any of the powers of the Constitutional Council was bound by legal standards and procedural rules of mandatory nature, as detailed in Title IV (Case) of the Act Organic (Articles 36 to 79), and did not point to some discretion.
It follows that, in light of the 1990 Constitution and Law No. 3 / 2003 of 22 October, proved wholly inadequate to qualify the Constitutional Council as a political body, based on the sole ground that the designation of Most of its members act in political bodies. Moreover, in light of the 1990 Constitution, the appointment of the President of the Constitutional Council was so similar to the appointment of President and Vice-President of the Supreme Court and the President of the Administrative Tribunal [Article 120, paragraph g) and 135, paragraph f)] and the professional judges of the Supreme Court were appointed by the President, after consultation with the Supreme Judicial Council (Article 170, paragraph 2).

3. Current position and status of the Constitutional Council
In the 2004 Constitution, the Constitutional Council continues to integrate the system of state bodies, which comprises also the President of the Republic, the Parliament, the Government and the Courts. Nevertheless, its definition appears differently, going from simple "... body of expertise in the field of legal and constitutional matters" to "... sovereign body, which is responsible to administer justice in matters of legal and constitutional nature "(Article 241, paragraph 1).
In the new definition stands an essential element for determining the legal nature of the Constitutional Council. This is the term "administer justice" that, therefore, points to its classification as an integral organ of the system of administration of justice, or organ of the judicial function.
Assuming that the rule of law, the principle of separation of powers requires the reservation of a judicial function to the courts, we can easily reach the conclusion that the Constitutional Council is a sort of tribunal, which differs essentially from other courts under the Constitution because of the expertise of its jurisdiction in the matter because it

administers, particularly the constitutional justice, that is exercising jurisdiction in matters of legal and constitutional nature.
The 2004 Constitution regulates some of the matters relevant to the Constitutional Council, which had previously been relegated to the level of ordinary legislation, first the composition of the body, the method and the requirements for designation of its members.
Within the composition of the board it is symptomatic removal by the legislature's constitutional term "members" that the Organic Act of 2003 designated the members of the Constitutional Council, introducing in its place the term "Counsellor Judges (Article 242), constitutional name commonly attributed to judges of superior courts in Mozambique (Articles 226 and 229).
The new Constitution maintains the appointment of the President of the Constitutional Council - appointed by the President in the exercise of his duties as head of state, and ratification by the Parliament [Article 159, paragraph g), 179, No. 2 , h) and 242, paragraph 1, point a)] -, constitutionalize also the appointment of five judges Directors, the Assembly of the Republic according to the criterion of proportional representation [Article 242, paragraph 1, b)] by introducing, in place of the appointment, the appointment of a Judge Counsel by the Superior Council of the Judiciary [Article 242, paragraph 1, c)].
In relation to requirements for the appointment of Judges Directors, the 2004 Constitution brought about a slight change in the face of the Organic Act of 2003. While this requirement be required as a citizen of Mozambique, in full enjoyment of their civil and political rights, at least a degree in law or court of law, and also have had a legal profession, at least for eight consecutive years (Article 8), the current Constitution requires the appointment falls on those who have at least ten years professional experience in the judiciary or any forensic activity or teaching law (Article 242, paragraph 3).
The appointment of Judges of the Constitutional Council is, according to the Constitution, for a term of five years and is renewable (Article 242, paragraph 2), unlike the Organic Act of 2003 which accepted the reappointment only once (Article 9), the Constitution imposes no limitation to this renewal.
The guarantees of independence, tenure, impartiality and immunities of judges and the incompatibilities, which were enshrined in the Organic Act of 2003, now also have a seat in the new Constitution (Article 242, paragraph 2, 243).
The powers of the Constitutional Council were extended by the new Constitution (Article 244), adding to those already enshrined the previous Constitution, including the following:
- Declare a permanent disability and certify the death and removal from office of President;
- Deciding, ultimately, the legality of the establishment of political parties and coalitions, as well as assess the legality of their names, initials, symbols, and to direct their dissolution under the Constitution and the law;
- Dismiss the actions contesting elections and deliberations of the organs of political parties;
- Dismiss the actions which concern the dispute over the term of office of Members;

- Dismiss the actions incompatible with the object provided in the Constitution and the law.

In this listing, the three powers deserve special attention for having in common the expression "judge actions", a formula for us, reinforces the understanding of the judicial nature of the Constitutional Council.

In addition, the 2004 Constitution gives the Constitutional Council, under Article 247, the power to determine, based on actual monitoring, the judgments and other court decisions on questions of unconstitutionality in cases of refusal of the application of any rule on the basis of its unconstitutionality, or when the Attorney General's Office or the Public Prosecution assessment of constitutionality or legality of any rule whose application has been refused, on grounds of unconstitutionality or illegality by a court decision not subject to appeal .

Results of the above provision that the Constitutional Council is the supreme body of constitutional jurisdiction in Mozambique, as has the power to determine, ultimately, the decisions regarding the unconstitutionality of any courts including the Supreme Court and the Administrative Court, which may decide the annulment binding and final.

It is also important to note that the decisions of the Constitutional Council passed a mere "decisions" for "judgments" (Article 248), description of court decisions very collegial.

The entry into force of the 2004 Constitution resulted in a need to adapt the regulatory framework of the Constitutional Council, and in this context was passed a new Organic Law, the Law No. 6 / 2006, dated August 2.

Regarding the status of judges of the Constitutional Council, the new Act supplements the Constitution, realizing the standards pertaining to independence, removal from office, impartiality and immunities of judges (Article 11 et seq), in terms similar to the Organic Act of 2003.

It is also worth keeping, the Organic Law of 2006, prohibiting the exercise of political activities by judges of the Constitutional Council during the performance of its mandate, also involving the suspension of status resulting from membership in political parties or associations (Article 15).

III
The Independence of Constitutional Judges

It is essential to a constitutional and legal framework conducive to the independence of judges, but he is not in itself sufficient to conclude that there is indeed such independence in the exercise of their functions, because, as is well known, standard and fact and law in book law in action does not always coincide

The independence of judges depends also on other factors, over and over again, to escape legal regulation, which may be such objective or subjective, internal or external to the body of constitutional justice.

As shown in the foregoing, the constitutional independence of the judges in Mozambique has always been guaranteed in both the normative and constitutional law and, in general, has been hampered by the intervention of political bodies in the appointment of a majority of the judges, because the established system institutional guarantees and personal works as a mechanism of checks and balances, preventing any possible

influences of the political entities involved in the appointment of Judges in the performance of their duties.

In this context it is important not to confuse the issue of independence of a body of constitutional justice, and the respective judges, with the problem of politicization of justice itself constitutional, usually takes place in many countries, including Mozambique.

The politicization of constitutional justice derives principally from the fact that the organs of constitutional justice be called many times to make legal decisions on conflicts of interest that, although legal, they also have a political impact, for example when the body ensuring the constitutionality of agency functions as an electoral court, like the Constitutional Council.

In these cases it is somewhat understandable that the decisions of the board of constitutional justice are often interpreted by recipients, direct or indirect, as expressing political views of this or that group of judges, according to party political connotations attributed to them.

Do not neglect the importance of Imputs public opinion in assessing the independence of the organs of constitutional justice and its judges, although critical of the decisions of these bodies, publicly disseminated, including through the media, appearing often in circumstances of exciting and little serenity from its authors.

However, it is understood that to be more fruitful to evaluate the independence of the organs of constitutional justice and the conduct of their members has to be made fundamentally, from a reading objective and unbiased decisions, which allows us to understand, above all, direction and coherence of legal reasoning that contained them, in light of constitutional and legal regulations.

Therefore, to facilitate this understanding, the Constitutional Council has been guided by reasons for their decisions and judgments with the greatest breadth and depth possible, always trying to exhaust the questions raised by applicants and by the defendants and observing the principles of the application and the adversarial within the legal limits of his power of cognition.

Independence in performing functions, which should result in objectivity, impartiality, neutrality and fairness of decisions, much depends on the stance of each judge, which can be influenced by multiple factors, such as moral and civic education, personality, character and the way they perceive and face the public service mission that entails the discharge of duties.

Overall, we still consider the positive experience of the functioning of the Constitutional Council, with regard both to their effective independence in the face of other organs of state as compared to assuming the principle of independence of judges by their directors.

There are many examples we could to raise is to demonstrate the above assertion, but we believe that we list below are the most enlightening.

The President has asked the Constitutional Council to verification of the constitutionality of laws passed against the wishes of the opposition, the parliamentary majority leader whose party is, as it is sometimes the laws of the initiative of the Government who also heads .

Regarding the successive control abstract, much of the control processes of unconstitutionality of laws has been the initiative of deputies of the parliamentary group of the opposition. The same members of the parliamentary opposition have often

challenged the unconstitutionality or illegality of normative acts of the President and the Government before the Constitutional Council.
All these cases have been examined and decided by the Judges of the Constitutional Council, with an unsuspected level impartiality and objectivity, denying or upholding the respective claims, mostly by consensus, regardless of the quality of procedural subjects, applicants and defendants.
Note that the observance of the positive decisions of unconstitutionality or illegality regulatory bodies whose actions are sanctioned by the Constitutional Council is generally positive and proactive. An example is the fact that the President of the Republic to repeal its own initiative, normative acts of his own, relying on the jurisprudence of the Constitutional Council ruling constant precedent that has declared unconstitutional a presidential decree.
In the process of electoral disputes, the resources of redress for decisions of the electoral administration bodies come mostly from political parties and candidates of the opposition, but this does not usually inhibitory neutrality and impartiality of the judges of the Constitutional Council, which decides the requests positively or negatively depending on the evaluation of submissions and the evidence adduced in the proceedings.
Validation processes and announcement of election results, the Constitutional Council shall examine the full electoral process in question in all its phases, in order to assess the legality and regularity of the elections carried out. The deliberations and judgments of this scope, most of which are adopted by consensus of the judges, and consider the positive aspects of each electoral process, often called attention to several problems, among others, those resulting from shortcomings in the electoral law or of its implementation by various actors, or the organization and management processes.
The parliament has taken into account for the improvement of electoral legislation, many of the observations and recommendations expressed in the deliberations and judgments of validation and declaration of election results.
Moreover, the ongoing process of revising the electoral law, we have repeatedly heard the deputies of the majority and the opposition to speak of the need to observe the recommendations of the Constitutional Council.
Another interesting case is that at the end of last year, the Constitutional Council decided by consensus to uphold the appeal against the nine requests for removal from office by opposition MPs, sanctioned by resolution of the Standing Committee of Parliament, with the ground that they adhered to the party than that for which they had been elected, since their names appear on lists of candidates of that party in the parliamentary elections of 2009.
The relevance of this specific case, under the question of independence of the judges of the Constitutional Council, is the fact that the contested decision was adopted by consensus at the time of the two parties represented in parliament, majority and opposition, they proposed that the five judges Directors appointed by parliament, according to the criterion of proportional representation.

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IV

Operating Procedures of the Constitutional Council

The Constitution allows a third at least of the Members of Parliament or two thousand citizens requesting the Constitutional Council to declare the unconstitutionality of laws or illegality of normative acts of state bodies (Article 245, paragraphs c) and g). Also, the Constitution requires be submitted to the Constitutional Council of the judgments and other decisions of the courts, whatever their nature, on the grounds of unconstitutionality, particularly in cases of refusal to apply any rule based on its constitutionality (Article 247).

The provisions referred to show that in a constitutional system Mozambican parliamentary minority, provided that consists of at least one third of the members may, in successive control processes, require the declaration, in force generally, the constitutionality of laws or illegality of normative acts. The same option is given to groups of citizens in a minimum number of two thousand and not to individual citizens. In either case the request to the Constitutional Council is not mandatory but optional. The obligation to submit legislative acts to the Constitutional Council, for the purpose of controlling unconstitutional or illegal, is only for the courts and only in cases of successive control concrete when the ground rules disapply unconstitutionality or illegality under Article 214 of Constitution, which states, "[n] the matters brought to trial courts can not enforce laws or principles contrary to the Constitution."

The Organic Law of the Constitutional Council Law No. 6 / 2006, dated August 2, enshrines the principle of adversary proceedings for the supervision of constitutionality and lawlessness, giving notice, after acceptance of the application of the national author to the challenged rule, wanting to rule within a certain time limit (Article 51).

In this sense, before a declaration of unconstitutionality of a law, the Constitutional Council shall notify the National Assembly to rule on it. This statement is not mandatory, so the Assembly may refrain from sending it, letting the deadline that was set running out, and in this case the process will continue its further proceedings (Article 63, paragraph 1 of Locc).

Experience shows that the National Assembly, when notified of applications for review of constitutionality of laws, has always called, and the announcement has been made by a resolution of its Standing Committee, adopting the opinion of the Parliamentary Committee on Constitutional Affairs, Rights Human Rights and Legality.

Both seem like the resolution is approved in the respective committees with the participation of opposition MPs. In most cases, members who represent the majority parliamentary group in the Constitutional Affairs Committee give their opinion to the effect that the law is hurt not contested as unconstitutional, contrary to members of minority representatives. To this end, joins the opinion of the constitutional commission a statement showing the voting understand why the same law should be declared unconstitutional.

At the moment of decision, the judges of the Constitutional Council appreciate and confront all the reasons adduced in the proceedings with equal dignity and decide whether the position of the parliamentary majority. Therefore, although most have always understood that there was no unconstitutionality in the law subject to review by the

Constitutional Council, often judges decided to uphold the corresponding claims of unconstitutionality.

The Mozambican Constitution provides two main types of review of constitutionality, the preventive control and successive control.

The preventive review of constitutionality, which focuses only on laws passed by parliament, can only be triggered within the deadline for the promulgation of the law by the President, who alone, under the Constitution, holds the initiative procedure (Article 246 of the CRM).

The successive control can be abstract or concrete, covers the control of both the illegality and unconstitutionality of legislative organs of state, and the process can be unleashed at any time during the term of the norm and, in the case of control concrete, when applying the standard by courts and expertise, as the Administrative Court (articles 245 and 247 of the CRM).

The two types of review of constitutionality, and subsequent preventive influence in many ways the relationship between the Constitutional Council and other powers. Consider this:

a) Anticipatory review

The president has frequently asked the Constitutional Council to check in advance the laws passed by parliament and submitted to the enactment, and in many cases, their initiative is motivated by concerns that are transmitted by civil society organizations or other State agencies such as the Attorney General's Office, or even the lack of consensus among the majority and minority on the constitutionality of the law, disclosed at the time of its discussion and approval in parliament. Among these requests for verification of unconstitutional laws passed by Parliament appear on the initiative of the Government which is headed by the President.

When the Constitutional Council declares the unconstitutionality of a law in the process of preventive control, the effect of the veto decision is mandatory and the law back to parliament for review (Article 246, paragraph 5 of CRM). Accordingly, we affirm that in the context of separation of powers, the Constitutional Council contributes to the functioning of the mechanism of interdependence or the checks and balances in the relationship between the legislative and executive power.

Moreover, considering that the President is, first, the head of the majority party in Parliament, on the other, the head of government, he realizes that, to request verification of constitutionality, it is assumed as the Chief State and guarantees of the Constitution, distancing himself thus of his party and the Executive.

Exercise reiterated by the President, initiated surveillance of the constitutionality of laws adopted by the parliamentary majority they can identify with politically, is a sign of confidence not only to the Constitutional Council as well as a climate of good relations between the two organs.

b) monitoring successive abstract

In successive control abstract, most requests for a declaration of unconstitutionality and illegality are submitted by deputies of the parliamentary minority. Some requests are subject to laws passed by Parliament and promulgated by the President, others focus on presidential decrees or decrees of the Council of Ministers, which are, respectively, normative acts of the President and the Government.

It is noticed that sometimes, when addressing the Constitutional Council for a declaration of unconstitutionality of a law, the minority transfers to the constitutional justice to their concerns that, in the legislative process are not met by the majority. Thus, the Constitutional Council has just functioning as a kind, "the arbitrator subsequently" conflict between majority and minority, and when it is declared unconstitutional, the minority feels more valued and most, just moderating the use of its power to make pass laws, even without the agreement of the opposition, increasingly seeking consensus in the legislative process.
The procedures for the declaration of unconstitutionality and illegality of normative acts of the President and the Government have led to discussion about the materialization of separation of powers, as we discuss them, usually the constitutional limits of legislative competence of the executive branch over the Legislative Branch, namely the problem of booking the reservation of the law or the legislative jurisdiction of Parliament.
In this context, it is clear the role played by arbitration Constitutional Council, having already declared unconstitutional and illegal, and some presidential decrees of the Council of Ministers in review processes initiated by members of the parliamentary opposition and two thousand citizens.
The compliance with the decisions of the Constitutional Council by the President and the Government is quite positive. Praxis has been repealed by the President on his own initiative, his decrees based on constitutional jurisprudence expressed in previous ruling that declared the unconstitutionality or illegality of a Presidential decree. Another phenomenon that happens with some frequency, consists of the President or the Government, which is headed by that, advance to the Constitutional Council's decision to repeal a law whose regulatory oversight process is still underway.
The facts described show that the decisions of the Constitutional Council in subsequent abstract review processes of unconstitutionality and illegality have positively influenced the attitude of the executive branch against the principle of separation of powers.

c) Appeals
The review procedures are rare on constitutionality, counting only four cases since 2003, three of which started by the Administrative Court and the other by a Customs Court. In neither case was declared unconstitutional or illegal, but the decisions of the Constitutional Council in this area have helped to clarify the division of jurisdiction in the matter between the tribunals and ordinary courts.
The occurrence of such processes confirms and strengthens the position of the Constitutional Council as a superior body of constitutional justice in the country, to the extent that, in terms of constitutionality, assesses and decides, ultimately, "resources" of the decisions of any court, including the Supreme Court and the Administrative Court.
The Constitution enshrines the supremacy of its rules in Article 2, paragraph 4, which provides that "[t] he constitutional precedence over all other rules of law." This provision expresses clearly the principle of constitutionality that binds all organs of sovereignty (Article 134 in fine of CABG), but whose security is paramount and special task of the Constitutional Council (Article 244, paragraph 1, point a) of the CRM).
The constitutional jurisprudence in Mozambique, and in cases of preventive or enforcement processes in successive control, concrete or abstract, have had significant consequences for the implementation of the principle of constitutionality and

strengthening the role of primal constitution in the legal system. Besides clarifying rules on rights, freedoms and guarantees, the decisions of the Constitutional Council contribute greatly to the development and consolidation of legal and constitutional culture in the community and national organs of political power.

We can say that the public debate on questions of constitutionality in the country has evolved greatly since the entry into operation of the Constitutional Council in November 2003, and state organs at various levels have been paying increasing attention to the imperative nature of constitutional norms.

The procedure in the Constitutional Council is contradictory nature, but not oral. As was mentioned before, the Organic Law provides for notification of the agency issuing the standard of which the declaration of unconstitutionality or illegality is asked to rule, willing, within the legal deadline (Article 51).

The principle of orality seems more advantageous when it comes to increasing the transparency of the court, but may in some way, does not favor the constitutional independence of judges, especially in contexts of incipient pluralistic democracies, as is the case of Mozambique.

The constitutional process in Mozambique is governed by the principle of the application (Article 245, paragraph 2, 246, 247 and No. 1 in CRM and Article 48, paragraph 1, of Locc). Rests with the author's request the burden of "... specify, in addition to the standards which [...] requires assessment, standards or violated constitutional principles" (Article 48, paragraph 1, of Locc). These specifications are so indispensable that his "lack, insufficiency or obscurity" requires notification of the author to supply the deficiency "(Article 48, paragraph 2, of Locc), the request should not be admitted" ... when the deficiencies that present have not been met "(Article 49, paragraph 1, of Locc). Moreover, the application, made in the above terms, defines the powers of cognition of the Constitutional Council, as this "... can only declare the unconstitutionality or illegality of rules whose assessment has been requested," although it can substantiate the statement rules or principles other than those constitutional or statutory violation which has been invoked (Article 52 of Locc).

Whatever kind of process of review of constitutionality, the law does not permit the withdrawal of the application (Article 50 of Locc), and this implies, to the Constitutional Council, the obligation to consider and decide all requests that have been admitted in Article 48 of the Locc, regardless of any supervening disinterest on the part of the respective authors.

Limiting the power of cognition of the Constitutional Council by the subject of the request may seem contradictory to the fact that the process of review of constitutionality, especially of abstract review, there is a process of parts, because the action of unconstitutionality is not related to subjective interests the procedural subjects, seeks to preserve or defend the constitutional order in objective terms. However, if the law did not provide for this limitation, we would be on the verge of the possibility of initiative "ex officio" of the body of constitutional justice, which probably would not be in harmony with the principle of separation of powers and the democratic principle.

It is necessary to distinguish between the assessment and declaration of unconstitutionality "ultra petita" or "beyond the request" of assessment and declaration of unconstitutionality "extra petita" or "out of order." The decision "ultra petita" differs from the decision "extra petita" given the nature of things. Thus, in the first case the judge

gives more than is required, but allows things of that nature. In the event of decision "petita extra" amount may be higher or lower, but the nature of the thing is different from that requested.
In process of review of constitutionality or the legality, decision "ultra petita" would, for example, be held unconstitutional or illegal consequential, or those standards that has not been specified in the request, keep direct and immediate relationship with the rules declared unconstitutional or illegal. These cases do not seem to substantiate the phenomenon of initiative "ex officio" of the judge, but the principle of consistency of decision and, in a sense, the independence of the constitutional court.
The possibility for the judge to decide, even after the withdrawal of the application, where this is permitted, it has to do with the nature of the predominantly objective process to examine the constitutional where the public interest in upholding the supremacy of the Constitution overrides on any particular interest.
Under the successive control abstract, attends to the Constitutional Council the power to determine and declare, in force generally, the constitutionality of laws and other normative acts of illegality of the State (Article 245, paragraph 1, the CRM). In general, its rulings are binding for all citizens, institutions and other corporations are not subject to appeal, and in case of failure to comply, the offender incurs in committing the crime of disobedience, is a more serious crime does not fit (Article 248 of the CRM).
We have the Organic Law, the declaration of unconstitutionality and illegality with generally binding effect "ex tunc" and determines to reinstate the rules repealed by the Act or regulation declared unconstitutional. In the case of unconstitutionality or illegality of supervening declaration to take effect only since the entry into force of the constitutional or legal subsequently violated (Article 66, paragraphs 1 and 2 Locc).
The feedback effects of the declaration of unconstitutionality or illegality shall not affect the cases tried, but the Constitutional Council may decide otherwise, when the norm is syndicated from penal or disciplinary framework and content more favorable to the defendant (Article 66, paragraph Locc of 3). Similarly, limit the retroactive effect of the declaration, given the demands of legal certainty as well as reasons of fairness or public interest of exceptional importance and the reasons therefor (Article 66, paragraph 4, of Locc)
Indeed, and in the wake of Kelsen, when declaring the unconstitutionality of a law, in force generally, the Constitutional Council acts as a "negative legislator" since removing it from positive law rules made by the "positive legislator".
The first limit to the 'legislature negative "of the Constitutional Council is the principle of order, which prevents him from carrying" ex officio "to review the constitutionality of laws, leaving his intervention dependent on the initiative of certain entities sanctioned by the Constitution (Article 245 , No. 2), namely the President, President of the Assembly, one third at least of the Members of Parliament, Prime Minister, Attorney General's Office, Ombudsman and two thousand citizens. The second limit is the definition of the power of cognition of the Constitutional Council for the purpose of the request referred to above.
From another perspective, the principles of separation of powers and democratic legitimacy and relevance to the functional require a Constitutional Council of its powers self-restraint in sticking to the mere assessment of conformity of laws with the constitutional requirements that must be objectively make without interfering in political

and legislative choices of the democratic legislator, as well as within its sphere of freedom of conformation to the juridical-positive by the densification and implementation of the Constitution.

Moreover, the Constitutional Council has observed the principle of "presumption of constitutionality of laws," applying the directive consistent with the interpretation of the Constitution, ie in the limit of demand is unconstitutional sufragar between the various senses of the standards, some of which unconstitutional, which is most suited to the Constitution.

The Mozambican Constitution does not provide for review of unconstitutionality by omission, but we understand that, as expected, she must be accompanied by constitutional enshrinement of the most appropriate mechanisms for the legislature to impose the respect of their declaratory judgments of unconstitutionality, under penalty of ineffectiveness of the means of assurance of constitutionality.

Therefore, rather than a problem of the independence of the constitutional, it is the broader question of the role of constitutional jurisdiction as the guarantor of the Constitution paramount in all its normative dimensions in which precepts are self-enforceable standards, hetero- and workable program, depending on the effectiveness of the latter two in the intermediation of the ordinary legislator.

Indeed precepts not achievable standards for themselves and the program standards, beyond the regulation of matters of its purpose, containing orders addressed to the legislature to legislate, that orders should not be obeyed under penalty unconstitutional negative.

The decisions of the Constitutional Council are taken by consensus or, failing this, by majority vote of Judges present, whose quorum shall not be less than two thirds of those on active roles, including the President or his substitute, and each judge of one vote, except the President who has a casting vote (Articles 31 and 33, paragraphs 1, 2 and 3, the Locc).

The dissenting judges have the right to farm dissenting opinion (Article 33, paragraph 4, of Locc) and if the dissenter is the Judge-Rapporteur, this is replaced by another judge (Article 58, paragraph 2, of Locc) according to the order of substitutions established annually by lot at the first session of the year (Article 43 of Locc).

Most of the decisions of the Constitutional Council are taken by consensus, which does not mean absence of different views among the judges Directors. The adoption of a decision has been preceded by a lengthy debate, which, without prejudice to comply with the procedural time, lasts long enough to reach consensus. In the discussion, each judge has the opportunity to freely express personal opinions on the subjects of decision, which may not coincide with the views of other colleagues. Yet still manages to reach consensus, through an effort to reconcile the divergent positions.

Although uncommon, there have been numerous cases of judges who disagree with the majority position permanently, exercising the right to cultivate dissent that, when properly motivated, translates one of the manifestations of the independence of the judge.

V
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