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## **Reflection by the Mozambican Bar Association on the Ongoing Process of Validation and Proclamation of the Results of the Elections of 9 October 2024 for the President of the Republic, the Assembly of the Republic and the Provincial Assemblies, by the Constitutional Council**

The Mozambican Bar Association (OAM) has been monitoring the process of validating and proclaiming the results of the 9 October 2024 elections for the President of the Republic, the Assembly of the Republic and the Provincial Assemblies by the Constitutional Council (CC), following the gross irresponsibility of the National Elections Commission (CNE), which proceeded to publish the general tabulation of the results of those same elections, warning of the existence of serious irregularities, in the form of discrepancies in the number of voters between the different elections, a high rate of abstentions in all constituencies and a high rate of blank and null votes, with the unusual claim that '( ... ) at this stage in the process of announcing the results, the National Electoral Commission would not have the objective conditions to carry out investigative actions to ascertain what really happened ( ... )'. - emphasis added.

As it happens, in an apparent act of unique transparency, the Constitutional Council called the media to show the work it is doing as part of the process of validating and proclaiming the election results in crisis. It noted that the work in question consists of comparing the notices submitted by the contestants and by the National Electoral Commission, in the sense that, for example, if the notices of two contesting parties coincide, but differ from those of the National Electoral Commission, those are validated. On the other hand, if all the notices of the parties and the National Electoral Commission differ, the notices of the National Electoral Commission are validated. With all due respect, which is a lot, this is not the legal criterion for validating documentary evidence, whether it is an authentic document or a private document. This criterion, which is being used by the Constitutional Council, for the treatment of documentary evidence represents, without a doubt, an innovation in relation to the current legal framework.

In truth, both private and authentic documents enjoy full probative force, i.e. their value relates to the respective documented statements. Therefore, the probative force of the private document is limited to the statements made in it and as made by the respective subscriber/declarant. The same applies to the authentic document, where the full proof contained in the document relates to the formation of the statement and not to its validity or effectiveness. It is therefore crystal clear that the veracity of the notices (documents) cannot be established by simply comparing them, but by testimonial evidence, because they were signed by people who must attest to their materiality. Any exercise contrary to

this is purely innocuous and illegal, which cannot be tolerated or accepted in a constitutional court such as the Constitutional Council, especially when it is, as is the case here, the highest court of appeal.

If it was or is the genuine intention of the Constitutional Council to give credibility to the electoral process by making it more transparent, then it should promote a public hearing of the respective electoral process, with the presence of representatives, journalists and electoral observers, producing evidence that is legal and admissible by law. Let it not be said that the respective legislation does not provide for public hearings, since it is clear from Article 201(1) of the Code of Civil Procedure that 'Apart from the cases provided for in the preceding articles, the performance of an act that is not permitted by law, as well as the omission of an act or a formality that is prescribed by law, shall produce nullity only when the law so declares or when the irregularity committed may influence the examination or decision of the case'. As is clear and easy to see, the holding of the public hearing does not influence the examination or decision of the case and in this case the 'case' is nothing more than the discovery of the material truth and/or electoral truth of these elections.

But that's not all. Article 14(1) of the International Covenant on Civil and Political Rights, declared by the United Nations in 1966, also states that 'All persons are equal before courts and tribunals. Everyone shall have the right to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge against him or her or in the determination of his or her civil rights and obligations. The press and the public may be excluded from part or all of a trial on grounds of public morality, public order or national security in a democratic society, either when the interests of the private lives of the parties so require, or to the extent strictly necessary in the interests of justice, in specific circumstances where publicity would prejudice the interests of justice; However, any judgement handed down in criminal or civil matters shall be made public, unless the interests of minors require otherwise, or the proceedings concern matrimonial disputes or the guardianship of minors.' Therefore, the universally accepted principle is that of public hearings in the courts, avoiding unnecessary procedural opacity.

On the other hand, but no less importantly, this confrontation of the public notices with a view to producing evidence, for subsequent certification of the regularity, validation and proclamation of the election results in crisis, affronts the principle of judicial control of the electoral process. This principle guarantees that all electoral acts can be scrutinised by the Constitutional Council, in other words, electoral litigation is broad, because it is not just about verifying the regularity of the elections, but the entire process that precedes it, and to this end the Constitutional Council must make enquiries into the facts brought to light by the parties, i.e. seek the material truth within the electoral process. As is clear, what the Constitutional Council is doing with the confrontation of the public notices, with a view to producing evidence, does not represent any material truth within the process (dispositive principle), but rather represents an initiative of this judicial control body, because they believe that this exercise corresponds to an ideal of justice, which only harms the democratic legitimisation of political power. This path will lead the Constitutional Council to over-rule, recognising a cause of action that has not been invoked.

The irregularities announced by the National Electoral Commission in the release of the general tabulation of the election results of 9 October 2024, consisting of the discrepancy in the number of voters between the different elections, the high rate of abstentions in all constituencies and the high rate of blank and null votes, do not exclude the possibility of the voting process being cancelled if the irregularities are insurmountable or likely to influence the overall result of the elections, which can be done at any time, all under the combined terms of articles 127 and 196 of the Electoral Law and 131, 132, 137 and 153

nos. 3 and 4 of Law no. 14/2011, of 10 August. 14/2011, of 10 August, which regulates the formation of the will of the public administration and establishes rules for the defence of the rights and interests of individuals.

In the case in point, the National Electoral Commission itself recognised that it had no plausible justification for the discrepancies mentioned above, which means that they were induced and were not simple or mere errors, with the aggravating factor that the documentary evidence, especially the public notices, is of dubious validity, which leads us to a prudent decision to recount the votes or annul the elections, regardless of the financial cost that such a decision could entail. Moreover, in view of the discrepancies in crisis, assumed by the National Electoral Commission, the Constitutional Council should have ordered the process of validity and proclamation of the election results to be lowered, in order to remedy the alleged irregularities mentioned by the National Electoral Commission in the general tabulation of the elections, because, otherwise, the Constitutional Council would be substituting itself for the Electoral Administration in its electoral management function, violating the principle of separation of powers laid down in Article 134 of the Constitution of the Republic of Mozambique. This intrusion by the Constitutional Council (judicial power) into the sphere of administrative power (National Electoral Commission) is only legitimate if it is kept to a minimum, which in fact means assessing the determining motive of the administrative act, in the case of the general tabulation of elections. From Furthermore, in Ruling no. 25/CC/2019, of 22 December, of the Constitutional Council, in an unsuccessful vote, it was noted that:

- 'The vote is free and all voters made their choice according to the dictates of their conscience, in strict compliance with the law.
- The same cannot be said of what happened after the votes were counted and the respective tabulations, where several irregularities were pointed out, both by the contestants and their representatives, and by the accredited observers, jeopardising the transparency of the electoral process.
- Unfortunately, this situation is not isolated, given that it is repeated from election to election, a fact that leads me to conclude that the irregularities that occurred in these elections are an inherent consequence of the organisation, administration and management of our electoral processes' - bold and emphasis added.

In other words, the manifest irregularities in our electoral processes have always been a constant presence, damaging not only the credibility of the management and electoral litigation bodies directly linked to the electoral process, but also discrediting the results and, consequently, jeopardising the democratic legitimacy of the elected bodies. As noted in the aforementioned vote, '...irregularities...in ...elections are an inherent consequence of the organisation, administration and management of our electoral processes', which irretrievably compromise the results.

In fact, if the Constitutional Council hadn't pushed the argument that it has exclusive competence to invalidate or have a certain by-election repeated, thus removing the competence of the District Courts to hear electoral appeals at first instance, from the voter registration period to the validation and proclamation of the election results, wouldn't the Constitutional Council be in a very tight straitjacket today, because it would be much easier to judge electoral irregularities by district, given that there are more than one and a half hundred District Courts, that is, spread throughout the national territory. This illegal exercise of comparing public notices that the Constitutional Council is carrying out, given that the irregularities occurred in the general tabulation and there are doubts about the validity of the aforementioned notices, it is inglorious and useless for discovering the electoral truth. Unfortunately, the cure for this electoral process is a recount of the votes or their annulment. We must remember that the starting point for a fairer society is respect for

democratic principles, including electoral justice. The demonstrations underway in the country have evolved into social protest or revolt, and therefore have no legal basis, so we believe that a possible recount of the votes or the annulment of these elections would be the meeting point and harmonisation of society. The decision to recount or annul does not need to be declared on 23 December 2024, but can be taken at any time. It's a difficult decision, but a necessary one. We had already mentioned the need to recount the votes, but we weren't listened to. Our society is on the verge of collapse, with the total absence of the state. We are failing profoundly when we know the source of the problem but ignore it and continue, unfortunately, to 'whistle'. The credibility of institutions is not achieved with *fait divers*\*, but with respect for the legal and institutional framework of the powers that be.

Maputo, 13 December 2024.

For an Ethical, Quality and Modern Legal Profession at the Service of Society

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\* *fait divers* is French, meaning short light-weight news articles

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