

# **Analysis of the process to select candidatures in the run-up to the presidential parliamentary and provincial elections**

**(Independent legal analysis commissioned by the G19 Budget Support Group)**

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## **1. Subject and objective of this note**

The note is based on relevant legislation (the Constitution and laws 7/2007, 10/2007, 15/2009, 6/2006 and 5/2008), regulation (deliberations 9, 10 and 65 of the CNE), the complaint submitted by MDM, the Constitutional Council (CC) ruling on that complaint (Acordão 09/CC/2009) and previous related CC rulings. Because the documents related to MDM are the only documents we had access to it may transpire that the note is primarily concerned with MDM. The note benefited from comments from several election experts and senior Mozambican and international legal experts.

The key objective of the note is to assess the past events in the light of the fundamental principles of this electoral process (free, fair and transparent) as well as broader political trends that have marked the country the past few years.

The note will try to determine whether this was the only possible or the best possible application of the law in the light of the basic principles of free, fair and transparent elections.

## **2. Context: the Constitution and the Constitutional Council**

### *2.1 Constitution and constitutionalism*

The Mozambican Constitution confers the State two fundamental objectives: 1) the strengthening of democracy, freedom, social stability and social and individual harmony; and 2) the promotion of a pluralist, tolerant and peaceful society. The Constitution defines as fundamental principles equality, unity, sovereignty, political pluralism and democratic rule of law. The latter entails pluralism of expression, democratic political organisation and respect for human rights.

Other relevant articles for the purpose of this note are 73 to 77 guaranteeing universal suffrage and the participation of political parties. Article 135 outlines the general principles of the electoral system. Article 79 guarantees the right of petition to demand the restitution of rights violated in or in defence of the public interest. Article 253 guarantees the right to receive information, including the right of interested parties to be notified of official decisions that involve them.

In its short history, the Constitutional Council tended carefully to a constitutionalism that goes a bit beyond a strict normative approach. In its own assessment of 5 years of activity of 30 September 2008 the CC pronounced its view on how it should deal with electoral matters (page 14 - translated): *“The Council analyses and decides with retrospection and from a distance and must do that with the necessary balance and reflection, taking into account legitimate interests and concerns, as well as the effects of its rulings on the adequate functioning of the State, but also on social stability and security. Obviously, in doing so, always safeguarding the election is free, democratic, fair and transparent and that the results must reflect the will of the voters.”*

This indicates that the CC used to take into account the impact of its decisions on institutions and society, although it would always stay close to the letter of the law. Principles were recognized but harnessed in a predominantly normative approach.

In ruling 09/CC/2008 of 13 November on a Renamo appeal against a CNE decision to exclude 2 candidates for mayor, the CC states on page 18 that: *“The electoral legislation, when regulating the candidatures, the participation of political parties, groups of citizens or voters, or when regulating the supervision by the CNE of electoral acts, and the execution of the Constitutional Council’s competencies on litigation and proclamation of results, should always be guided by the principle of the prevalence of public interest. In such manner, that nothing in this regulation or legal discipline is left to interpretation or free choice by the actors or institutions referred to, except when the law explicitly allows it.”* The CC continues saying that any opportunistic interpretations of the law would compromise the objectivity and equal treatment that need to prevail throughout the electoral process.

Confronted with manifestly imperfect or even conflicting legislation institutions can construct various legal arguments depending on the preference given to one or another part of legislation. The CC indicates that in such cases the institution should opt for the decision that best serves the public interest, and one can reasonably assume that that would mean more rather than less options for the voter.

## *2.2 Institutional profile of the Constitutional Council (CC)*

The Constitutional Council was first foreseen in the Constitution of 1990, but its electoral competences were carried out by the Supreme Court until November 2003, when the Council was finally created (law 4/2003 and law 9/2003). The nomination of the judges was completed by May 2004 and support services by a secretariat were guaranteed by October 2005.

On 21 January 2005, a revision of the Constitution took effect. The new Constitution spells out the revised composition, role and competences of the CC (articles 241 to 248). The amended Constitution resulted in a new Organic Law of the CC (law 6/2006), that was amended in 2008 (law 5/2008). The current competencies of the CC are:

- Upon request evaluate and declare the unconstitutionality of laws and the illegality of normative acts of State institutions;
- Settle conflicts of jurisdiction between the sovereign public offices;
- Make prior evaluations of the constitutionality of referenda;
- Verify and declare the death or incapacity of the President;
- Receive and verify the declarations of assets, income and incompatibilities of senior public office holders;
- Decide on certain electoral matters:
  - Verification of the legal prerequisites of candidates for the office of President of the Republic;
  - Validation and proclamation of the results of every election;
  - Appeals against decisions made by the National Elections Commission (CNE).

Each type of case (electoral appeal, unconstitutionality, etc.) has its own procedure. Typically a ruling on an electoral appeal takes around 10 days, a ruling on a verification of constitutionality takes around 2 months, and a ruling validating the election results takes around a month.

The Council is composed of 7 judges. Its president is nominated by the President of the Republic (the Parliament does have to ratify this nomination), 5 judges are indicated by the

Parliament based on proportional representation (resulting in the fact that some judges have clear party connotations) and 1 judge is nominated by the Superior Council of the Administrative Judiciary. Judges are appointed for a 5-year term.

Since 2006, the CC has an annual budget of slightly over 1 million US\$ for recurrent expenditures. An investment of around 1,5 million US\$ to rehabilitate the premises was done spread over 2006 and 2007. Now the investment budget is around 200,000\$ a year.

The short history of CC jurisprudence can be divided in two distinct periods. Until the approval of law 6/2006 the Council almost exclusively dealt with electoral matters. Between November 2003 and December 2005 the CC ruled on 42 processes related to elections. An important change introduced in law 6/2006 is that the parties that can solicit the verification of unconstitutionality or illegalities were expanded (the President of the Republic, the Speaker of the Parliament, the Prime Minister, 1/3<sup>rd</sup> of the national deputies, the Attorney General, the Ombudsman and 2000 citizens). As a result the CC dealt with 17 requests to verify unconstitutionality in 2007/8.

The CC produces two types of decisions: deliberations (*deliberações*) and rulings (*acordãos*). Electoral matters are decided by ruling. Rulings have a compulsory character for all citizens and institutions, while deliberations are not binding. The law determines on which issues the CC can make binding rulings. Even within the binding rulings, the CC adopted from the beginning a pedagogical approach: it often gives non-binding recommendations in its rulings on electoral matters: recommendations to the legislator, the electoral institutions or to candidates and parties. This educative approach has not worked well so far as practice has shown that the CC recommendations have rarely been subsequently picked up by the parliament or electoral institutions.

Earlier this year a new President and 2 new judges were appointed. The first President of the CC, Rui Baltazar, was highly regarded and considered to be the main responsible for the "independent" reputation that the CC built up in the past five years.

### **3. Short overview of the facts**

#### *3.1 Relevant antecedents*

The antecedents of these elections go back to early 2005. The ruling of the CC validating the 2004 elections as well as various observation reports identified several weaknesses in the electoral legislation, the electoral institutions and the electoral system itself. Although there was no doubt about winners and losers, it was felt that the basic requirements of free, just and transparent elections were under pressure.

An ad-hoc parliamentary commission was set up early 2005 with the mandate to improve the electoral legislation. A similar commission had already tried the same between 2000 and 2004. Various international agencies offered technical support to the ad-hoc commission, but every offer was kindly declined. Progress in the ad-hoc commission was painstakingly slow, the main hurdle being the composition of the CNE. In May 2006, the ad-hoc commission was abolished and the revision of the electoral legislation was transferred to the regular Commission on Agriculture, Regional Development, Public Administration and Local Power, and this for a good reason. Decisions in a regular commission are taken by simple majority, while the ad-hoc commission could only decide by consensus. This implied a radical break with the past. Since the Peace Agreement all electoral legislation had been the outcome of a bipartisan process and used to be approved by consensus. In 2006 Frelimo decided to break with this tradition. Adjusted electoral legislation was approved by the regular commission and under loud Renamo protest approved by Frelimo in the Parliament late 2006. The laws on

CNE, voter registration, election of provincial assemblies and presidential and parliamentary elections were all published in 2007.

Once the legislation was approved, the Parliament nominated 5 CNE members (3 Frelimo and 2 Renamo). These were responsible for the selection of an additional 8 CNE members coming from civil society (CS), including the future president of the CNE. There is no established procedure for this selection. The CNE law only states that the 5 solicit nominations from CS. Clearly the 5 overstepped their authority and usurped powers that were not given to them by law. For the provincial and district election commissions, the law clearly states that the party representatives co-opt the CS representatives, in the case of the CNE the law does not use the same co-optation mechanism – that means that co-optation by the 5 party representatives was not the legislators' intended mechanism for the selection of the 8 CS representatives in the CNE. Some civil society networks organized a selection campaign and submitted the winners of that process to the group of 5. Other organisations made bilateral submissions. Practically all selected members came from the last submissions. The process was widely perceived to be biased in favour of Frelimo who would have used civil society organisations to propose individuals that are close to the party.

The first activity of the new CNE was the organization of a new, electronic, voter registration. This process took place in two phases: from 24 September to 15 December 2007 and from 15 January to 15 March 2008. The result was an impressive 88% registration of the voting age population.

In the meantime, it was decided to postpone the provincial assembly elections that had to take place before 21 January 2008 and hold these simultaneously with the 2009 general elections. This required a constitutional change and thus the collaboration of Renamo in the Parliament. Consensus was reached and collaboration granted. Attention shifted to the municipal elections of November 2008.

Just as in 2005, the CC ruling (02/CC/2009) to validate the municipal election results contained harsh criticism and pointed to several illegalities committed by the CNE. The ruling dedicates 3 pages to the selection of candidatures and blames the CNE for having been too flexible with respect to the timeframes established by law, but the CC does not say that the CNE did not apply sufficiently strict criteria for the approval of candidates. On the contrary, it emphasises the importance of respecting every step of the process: submission-verification-correction-decision-substitution-decision-complaint. It is equally clear that this process applies to individual candidates and that a decision on the validity of the list is taken at the end of the process.

The CC stresses that it adopted the strict respect for this sequence since 2003 because as a key to guarantee equality of opportunity. And indeed, similar explicit statements emphasizing that all legally required steps need to be respected can be found in several other rulings of the CC (e.g. 09/CC/2008 and 29/CC/2004).

In April 2009 Frelimo proposed and approved (by simple majority) a law to allow the harmonisation of the general and provincial elections. This odd piece of legislation severely increases the bureaucratic requirements to submit candidatures for national and provincial assemblies (the 2007 legislation only required a declaration of candidature, in practice a standard form to be signed, and an identification; now all candidates will need to gather 5 documents for national assemblies and 6 documents for provincial assemblies), it allows the submission of lists based on a provisional distribution of mandates for national and provincial assemblies, it increases the polling staff from 5 to 7, and it offers CNE a broad mandate to regulate the electoral legislation where required. On some crucial aspects, but in particular of the tabulation process for the 3 elections this law remained silent. It is a short law of only 20 articles that only deals with parts of the electoral process. Law 15/2009 does not state that it

revokes earlier legislation. As a principle the most recent law normally has priority, but only on the matters it deals with and not on other matters. In some aspects, namely the process of submission of candidatures, where both 7/2007 and 10/2007 establish exactly the same procedures and therefore required no harmonisation whatsoever, 15/2009 goes beyond harmonisation and actually changes parts of the nominations process.

In fact, it was anticipated that the Parliament would approve one comprehensive law covering various elections, but it added yet another law. Instead of one, we now had three laws. Shortly after the approval of this law, the President of the Republic decreed the election date.

### *3.2 Chronology of recent events*

On 14 May the CNE published a calendar for the preparations of the elections and the regulation for the submission of candidatures (Deliberations 9 and 10). Parties were given from 1 June to 29 July to register and submit candidatures. On 4 June, the CNE published the provisional distribution of mandates for national and provincial assemblies. Provisional because it was based on the results of the 2008 voter registration and a registration update still had to be done before the final distribution of mandates could be calculated. A party wanting to participate in all three elections over the full territory needed to submit a minimum of 1469 candidatures (only Frelimo managed to get this done, but not without a few incomplete lists). Each individual file ("processo individual") consists of 5 documents:

- Certified copy of ID card or birth certificate
- Certified copy of the voters card
- Extract of criminal record
- Declaration of acceptance of the candidature and party agent
- Declaration that the candidate complies with eligibility conditions
- Proof of residence (for provincial assemblies)

Presidential candidates also need at least 10.000 signatures and pay a deposit of 100.000MTn.

All parties submitted candidatures between 27 and 29 July. According to its own deliberation 10/CNE/2009, CNE has to verify upon receipt if the required documents are there (chapter 5, articles 4 to 9). The submitting party then gets a document with a ticked off checklist confirming the existence of the required documents and a copy of the submitted lists with a stamp from CNE. The confirmation of receipt is signed by a CNE member. If a submission does not meet the required conditions the CNE should not have received the files. This does not seem to have happened with any submission, allegedly because too many parties submitted their candidatures at the last minute and therefore it was impossible to run a physical check. According to CNE Deliberation 10 this is the moment where the MDM lists should have been rejected because of insufficient support documents, if that were the case.

This is also the point where the calendar gets blurred. Deliberation 9 with the official calendar refers to the 2007 and 2009 legislation and determines that the verification, correction and complaint procedure should be completed between 29 July and 28 August. There is no reference whatsoever to an extra 8 days (28 August to 5 September) in the official calendar. Deliberation 10, issued in the same Boletim da República of 14 May as Deliberation 9 describes only two steps: (1) verification, notification and correction; (2) publication of the final lists. This is what the CNE has done, but this procedure omits several important steps described articles coincides with the timeframes determined in articles 174-177 of law 7/2007 and 143 to 146 of law 10/2007. On 1 August the CNE decides how the verification will be done (this deliberation is not public). According to the 2007 legislation, the CNE has 8 days counting from 29 July to verify the files and notify the parties to correct irregularities. The CNE takes its time and notifies between 10 and 15 August on irregularities that require correction for the legislative lists. Replies are received between 15 and 20 August. In the

meantime the verification of provincial assembly candidates is still ongoing and notifications are sent the last week of August.

The CC issues its ruling on the selection of presidential candidates on 14 August in which it introduces a novelty: the irregularities noted in relation to the supporting signatures are no longer considered a process irregularity, but a substantive irregularity that does not qualify for correction. The CC argues that the candidates had criminal intent by submitting false or repeated signatures. The files of all 9 candidates had these problems, but the substantive irregularity only applied to the files of the candidates that were left with less than 10.000 valid signatures. This ruling was later used by the CNE as the jurisprudence to justify the exclusion of MDM lists, but in its ruling on the MDM appeal the CC on its turn stated that this justification does not apply.

Almost simultaneously with the presentation of candidatures, an update of the voter registration takes place (15 June to 29 July). The final results of that update were made public through posting on the CNE website the second week of September. The official Deliberation (64/CNE/2009 of 5 September) is not public. According to art. 38 of law 9/2007 the CNE needs to publish the registration data in the Boletim da República within 30 days after having received the results from STAE.

While the publication of lists was anticipated to happen on 28 August, in line with the official calendar (and in line with the date printed on the official lists) that did not happen. Publication for legislative elections happened between 5 and 7 September. The publication of provincial assembly lists was completed by 15 September. This seems to be well outside the legal timeframe.

The draw was rushed on 7 September and basically closed the process of presentation, verification and correction of candidatures, thus excluding the possibility to substitute candidates and to complain against CNE decisions.

A decision of the CNE that partially clarifies the selection process was issued on 16 September, dated 5 September.

#### **4. Fundamental flaws in the selection of candidatures**

4.1 There was no transparent and predictable calendar of what had to happen (sequence, timeframes, ...) between 29 July and early September. While there are 8 days for verification and notification, CNE was still notifying until at least 1 September. Strict timeframes seemed to have applied to the parties, but not to the CNE. The required transparency of the calendar is further compromised by the fact that CNE has clearly backdated several documents (at least all final lists and Deliberation 65). On 5 September the CNE decides on the final distribution of mandates, yet the approved lists (based on the final distribution of mandates) are all dated 28 August. How can CNE decide on final lists on 28 August if it only decided on the final distribution of mandates on 5 September?

Moreover, in the recent past the CC (09/CC/2008) ruled that the electoral process must respect the principle of “progressive acquisition”: one phase of the process should be closed before another phase starts. In particular any disputes about the acceptance of candidatures should not overlap with for example the campaign, because that would affect the fairness of the process. This and other examples could (at least theoretically) make the CNE guilty of contempt as foreseen in article 248 of the Constitution and article 4.2 of the organic law of the CC.

The CNE adopted a strategy of legal “cherry-picking” and creatively combined articles of different laws, while omitting others. It crafted, sometimes ex-post, an own logic and by doing so it negatively affected the predictability, equality and transparency of the process.

4.2 Procedural and legal flaws. The legal argument for exclusion by the CNE is nullified by the CC. On its turn the argument of the CC can be fundamentally challenged by the fact that the final distribution of mandates was only decided after the publication of the final lists. The final distribution of mandates resulted in changes in 4 electoral districts for the Parliamentary elections and in 20 electoral districts for the Provincial Assembly elections, yet the CC builds its case on the fact that lists submitted on 29 July must be “blocked and closed” in order to guarantee a National Parliament with 250 deputies based on a proportional distribution of mandates as the Constitution prescribes. Blocking the lists of 29 July would result in a “disproportional” Parliament.

The CC builds its argument on the hypothetical case that one party should have enough candidates on its list to occupy all mandates just in case they would get all votes. Hypothesis is not an acknowledged principle for judicial decision-making. The CC could have decided based on common sense and fairness embedded in a good knowledge of the social and political reality in which it intervenes.

Furthermore, in previous rulings the CC stated explicitly that a candidature can only be nullified when formal irregularities have not been corrected within the legal timeframe. A candidature can thus not be nullified at the time of presentation which is what both CNE and CC argue. The CC also ruled before (29/CC/2004) that it is perfectly legal to submit new candidatures after the deadline for submission of lists if it is to substitute a candidature that has been nullified. This time around both CNE and CC have strongly argued that this is not possible, yet there have been no substantial changes to this part of the electoral legislation since these previous rulings.

There are also basic flaws as to the use of evidence. The fact that primary sources cannot be verified and that the way different parties have been dealt with cannot be compared makes it impossible to confirm with evidence that all parties and candidatures were handled in the same way. In fact various reports in the media and some of the final lists surely suggest double standards in the conduct of the CNE. The CC also “selects” parts of certain documents (for example the notification from CNE and reply from MDM), while ignoring the rest of the same documents. The main pieces of evidence used by the CC are the mapas de controle of the CNE. Not MDM, let alone the public have seen the evidence used for the CC decision-making.

The frequently used argument that CNE follows the instructions given by the CC in its ruling on the municipal elections does not hold either. In that ruling (Acórdão 02/CC/2009) the CC argues that all steps (verification, notification, correction, substitution, complaints, final lists and draw) need to be taken within strict timeframes and that there should be no overlap with subsequent phases. The strict legality the CC insists on refers primarily to the adherence of all sides to a predictable and transparent calendar, and not to a highly restrictive interpretation of the criteria to admit or reject a list.

While some decisions just lack legitimacy other actions and decisions clearly violate Mozambican legislation:

- The backdating of official documents.
- Changes made to lists after 28 August (see ruling 02/CC/2009: “declaring lists final implies the legal impediment for changes to be made by the CNE, except for the cases foreseen by law: death, illness or voluntary withdrawal”).

- The repeated denial of the constitutional duty to immediately notify interested parties (art. 253).
- The failure to motivate decisions in precise and discriminated terms.
- The overlap of distinguished phases of the process (in this case again the selection process of candidatures and the campaign).
- The rejection of lists without having respected the possibility to substitute nullified and rejected candidates.

4.3 Lack of constitutionalism: rules prevail over principles. The CC basis its jurisprudence on the principle that public interest prevails, yet this seems to conflict with the very restrictive normative approach taken in its ruling. Does the rather purist discussion about the difference between rejecting a candidature and rejecting a list live up to the constitutional right for political participation? Are the mapas de controlo of the CNE the ultimate gatekeeper to the constitutional right for political participation? The CC fundament its decision to nullify the lists on the Civil Code, rather than on the Constitution. None of the laws define when a list is nullified, so the CNE and the CC had to deduct it (in this case from art 162/1 of law 7/2007). It is a widely accepted principle in law that issues related to fundamental rights (in this case the right to vote and be voted for) can not be decided by a restrictive interpretation. Article 30 of the Constitution states that to be a Member of Parliament one has to have original Mozambican citizenship, so in fact this could be the only basic or substantive conditionality. All other conditionalities would therefore be mere "formalities".

## 5. Conclusion

There is not a shred of doubt that the CNE and the CC could have conducted the process in a different, still perfectly legal and more constitutional manner. The CNE and CC were not coerced by law to the decisions they made. They had other options: a principled reading of the existing legislation could have optimised competition and maximised the freedom to run for office and the freedom to vote. Instead both CNE and CC have systematically opted for an over-restrictive, narrow, partial and unequal application of the law. The CNE could have opted to respect the legal provisions that allow substitution, complaints, appeals and the CNE could have opted for communication with the parties that are directly involved (in fact this is a constitutional duty). The CC could have ruled in consistency with its jurisprudence (in particular deliberation 29/CC/2004, but even the very recent 02/CC/2009), but instead opted for a completely different logic.

This attitude is not only due to political bias, as there are also clear indications that the available capacity within CNE is deficient (this is visible in numerous mistakes in their Deliberations) and that both CNE and CC have to deal with conflicting mandates. The CNE has to supervise, implement and control the elections. It is both player and referee. The CC has to combine a mandate to uphold constitutionality with that of an electoral tribunal and both mandates require different and possibly conflicting approaches.

The question whether files were submitted or not, disappeared or not is secondary. If MDM had not handed these files in on 29 July the CNE could simply have notified the party and given them 5 days to present complete files. Failing to do so, MDM should have received another 5 days to submit new candidatures. By doing so the CNE would have acted perfectly within the law and would not have exposed itself to broad public criticism and widely spread scepticism as to its true motivations.

The decisions do affect negatively the freedom, fairness and transparency of the electoral process, but not only (see annex 2). The CNE and CC decisions are the product of a political culture of dominance while at the same time reinforcing that culture. The decision-making

bodies are highly politicized and their respective presidents are direct appointments by the President of the Republic. The situation occurring today is only possible because of the institutional architecture that is fixed in the same Constitution counted on to protect the public against dominant interests.

Political pluralism has reduced since 1999. The Parliament is more homogeneous now than it was a decade ago and all but one municipality are under Frelimo control. In 21% of municipal assemblies Frelimo has 100% of the seats, and in another 21% the opposition has only one seat. The result of the selection process for the provincial assemblies by itself guarantees a Frelimo majority in all provinces. The decisions of the CNE and CC to exclude lists have immediate as well as lasting effects on the plurality and democratic character of the Mozambican politics and society.

The way the electoral process is being conducted provides a fine insight in the fundamental characteristics of the dominant party-state.

## Annex 1: Technical notes on the selection of candidatures

- CNE seemed to have faithfully implemented the procedure described in chapter VI of Deliberation 10, but this procedure overlooks important articles of the electoral legislation (art. 174/3 to 177 of law 07/2007 and art. 143/3 to 146 of law 10/2007). Deliberation 10 does not conform to laws 7 and 10/2007 and, being a regulatory instrument, the Deliberation can never prevail over actual laws. A Deliberation can not arbitrarily restrict the opportunities guaranteed by law to correct/complete supporting documents for candidatures.
- The CC used evidence selectively. In some instances the ticks and crosses on the notification and the reply by MDM are referred to as evidence (in particular where it concerns crosses), but in all other cases this evidence seems to have been ignored.
- There are 3 sources that suggest that CNE did receive the supporting documents from MDM on 29 July:
  - a. The statement “recebido e conferido” on the CNE signed and stamped letter MDM received when the files were handed over to CNE;
  - b. Deliberation 10/CNE/2009 explicitly states that CNE refuses to receive candidatures that do not have the necessary supporting documentation;
  - c. The detailed notification indicating 4 missing individual files seems to suggest that all other files were received (albeit with individual documents missing as specified in the same notification).
- There are anomalies in the chronology of events:
  - a. CNE receives lists on 29 July. The lists are based on a provisional distribution of mandates as published on 4 June.
  - b. CNE does the verification of the MDM files between 1 and 10 August;
  - c. The notification to MDM on lists for Parliament was received on 12 August and a reply by MDM was submitted on 17 August.
  - d. The notification on lists for provincial assemblies was received on 24 August and MDM replied on 29 August, within the legally established 5 days.
  - e. The CNE publicly displayed approved lists between 5 and 15 September. All lists are signed and dated 28 August, yet it is known that at least 1 party (PLD) still received a notification on 1 September.
  - f. On 5 September the CNE decides on the final distribution of mandates; yet the approved lists (based on the final distribution of mandates) are all dated 28 August.

How can CNE decide on final lists on 28 August if they only received the correction of irregularities on 29 August for the provincial lists and if CNE only decided on the final distribution of mandates on 5 September? The final lists are dated 8 days before the number of mandates was confirmed. The final distribution of mandates implied changes in 4 provinces for legislative elections and in 20 districts for the provincial assembly elections. On what grounds did CNE adjust the approved and final lists on 5 September taking into account that it emphasizes so much that lists cannot be changed after 29 July?

- In Deliberation 65, CNE explicitly recognises the absence of individual files as one of the various “process irregularities” they were confronted with (page 7, no.4). The law foresees the possibility to correct all process irregularities (art 174 of law 7/2007 and 143 of 10/2007). Yet on page 9 and 14 of Deliberation 65 the absence of individual files (as opposed to the failure to correct the irregularity) becomes a reason by itself to reject a list. This suggests an inconsistency as the character and consequence of an irregularity changes within the same Deliberation.
- On page 11 of the same Deliberation the CNE states that, if after the correction, lists no longer have the minimum required valid candidates, then the list is automatically rejected, because possible substitution would only apply to candidates that have been approved. This is an unprecedented, extremely restrictive reading of art. 174/3 and 143/3-4, that can certainly be read in a different, more lenient way, namely that

the law guarantees an opportunity to substitute invalidated candidates. It certainly is an interpretation that differs strongly from the existing jurisprudence of the CC (see Acórdão 02/CC/2009, pp 8-10; Deliberação 29/CC/2004, pp.3-4). The CNE made verification coincide with submission. This part of the CNE deliberation is not in line with the legislation, where verification is foreseen after the period for submission.

- The CC identifies one MDM candidate in Gaza that was declared ineligible on the basis of a criminal record. The law explicitly foresees the possibility for substitution (art. 175 of law 7/2007) in such case, but that opportunity was never given. The CC confirms the rejection, but does not mention the omission of the substitution.
- The CNE, seconded by the CC, states that MDM filed an incomplete list of effective candidates for Tete (19 instead of 20), yet the change from 19 to 20 was a result of the update of the voter registration. MDM submitted the list of 19 candidates on 29 July according to the provisional distribution of mandates, the final CNE lists are dated 28 August and the decision that Tete would have 20 mandates is dated 5 September. In fact, according to the instructions of the CNE parties had to present lists by 29 July based on the provisional distribution of mandates, so submitting a list of 19 names was the correct thing to do.
- Deliberation 65 says in chapter III.2.b that lists submitted to CNE by 29 July cannot be changed except for those cases foreseen by law (rejection, desistence and substitution). How can the lists than be altered last minute to conform to the final distribution of mandates decided on 5 September? CNE invokes in Deliberation 65 art 4.2 of law 15/2009, but that article only says that CNE should recalculate the distribution of mandates as soon as it has the update registration numbers. The article does not mandate the CNE to alter lists.
- If the case was so clear (i.e. 43 individual files missing), one could expect the CNE to be explicit about this right from the start. If this information would have been made public early August, immediately after the verification, the position of the CNE would have been much more convincing. Given the sensitivity of the issue and the relevance for the public interest the CNE should have made this clear from the beginning. This would have greatly benefited the transparency of the process. But it was not mentioned in the notification (except for 4 cases that were duly corrected), it was not mentioned in meetings with the press or the international community and it was not mentioned in their Deliberation 65.

## **Annex 2: Issues affecting the basic principles freedom, fairness and transparency of the current electoral process**

### **1) Freedom to vote and be voted for**

- Last-minute bureaucratisation of the support documents for candidatures (law 15/2009).
- The criteria to exclude candidates and lists are not mentioned in the law, but deducted by the CNE and the CC: it concerns restrictive interpretations (CNE and CC have different interpretations) of the law and not an explicit legal imposition. Even if parties would not have submitted individual files by 29 July, the CNE could have allowed parties to correct that error within 5 days, if the parties did not manage to correct the CNE could have given the parties 5 days to substitute nullified candidates. That would have been a perfectly legal procedure, and more in line with the Mozambican Constitution than the option taken by the CNE, and later the CC. Previous rulings of the CC explicitly say that the CNE must allow substitution after the deadline for presenting lists. The argument that CNE and CC were coerced by the law into the decisions they made is manifestly wrong. The criteria deducted for exclusion were also not known in advance by the parties.

### **2) Fairness and equal treatment**

- Politicized representation of civil society in the CNE, and therefore in practice a bipartisan CNE with a heavy Frelimo majority.
- Politicized (bipartisan) selection of judges for the Constitutional Council (6 out of 7 judges are political nominations).
- There were biases in the density of voter registration brigades and polling stations (higher in Tete and Gaza; lower in Zambezia).
- Strong indications of double standards in the application of legislation (draw to rank parties was not based on the principle of equality as ruled by the CC in January 2009; distribution of campaign funds biased in favour of Frelimo and Renamo; PLD could correct candidatures even in early September; UDM was allowed to re-arrange incomplete lists to a complete list for Sofala,...).
- Conflicting information in official CNE correspondence on which supporting documents it had actually received and which not.
- Use of state resources (human, material and financial) by the ruling party as amply documented by media and observers.
- Active and visible presence and participation of police and military in Frelimo/Guebuza campaign caravans and events.
- General bias in reporting by public media (TVM, Domingo,...).

### **3) Transparency of institutions and procedures**

- Conflicting legislation (law 15/2009 creates the possibility for new interpretations of the 2007 laws; CC legislation not in line with electoral legislation).
- There was and is insufficient (timely) information on the decision-making (some deliberations are public, most are not).
- The distribution of mandates for the national parliament continues to include an element of arbitrariness. The process described in the law results in the allocation of 247 seats (total must be 248) and 249 seats for the final distribution of mandates. According to mathematical logic the CNE should have taken away a mandate from Tete instead of from Nampula. Law 15/2009 says that CNE should regulate where necessary, but the CNE did not explain or establish criteria to deal with such cases.

- The predictability of the electoral calendar was lost after 29 July because the CNE “cherry-picked” timeframes
- The backdating of documents (approved lists published between 5 and 15 September all backdated to 28 August; CNE deliberation 65 published on 16 September backdated to 5 September;...) confuses the calendar and reduces the possibility to submit timely complaints as proven by the ruling on MDM’s appeal on exclusion for provincial assembly elections.
- No due notifications sent to interested parties explaining for example why a certain list was excluded. The right to be notified is enshrined in the Constitution (art.253).
- Overlapping phases of the electoral process (appeals on candidatures overlapping with campaign).
- Conflicting sequences: decision on the final distribution of mandates dated 5 September while final lists are dated 28 August.
- The voters roll is not shared with interested parties as international and regional standards prescribe. This is important because the current register is probably inflated with around 10%.
- There was no list of polling stations with the number of registered voters for every polling station available.
- There were various versions (newspaper, website) published of the list of polling locations (after the legally established deadline) showing discrepancies with registration posts. In fact, until Election Day there was no clearly consolidated and publicly known list of polling stations.
- CNE refuses to update the election observation regulation and grant nation-wide and full access to the process in line with the country’s commitment to various international conventions. Freedom of movement is a favour to the international observers that does not apply to national observers.
- Several incomplete Frelimo and Renamo lists were approved for provincial assembly election (Nangade, Homoíne, Vilanculos, Boane, Matola, Monapo, Montepuez, ...), and seem to have been changed after they were published by the CNE.
- There was/is no consolidated public information on the parties that were approved to run in each district for the provincial assembly election (at least not until Election Day).