

ROLE OF ELECTORAL COMMISSIONS AND CONSTITUTIONAL COURTS OR COUNCILS: Complementarity, antagonism or juxtaposition?

Work plan

- I- FORMAL ORGANIZATION AND POWERS OF ELECTORAL COMMISSIONS IN AFRICA**
 - A- Formal organization**
 - B- Duties of electoral commissions**
- II- CURRENT PREVALENCE OF INSTITUTIONAL ALIGNMENT**
 - A- In view of the relative confusion of powers in favor of the executive branch of government**
 - B- With regard to the subsequent collusion of electoral commissions and constitutional councils**
- II- NEED FOR INSTITUTIONAL BALANCE**
 - A- Through the statutory rigidity of electoral commissions and constitutional councils**
 - B- Through the functional flexibility of electoral commissions and constitutional councils**

INTRODUCTION

The devolution of state power in Africa has become a real source of concern since the systemic transformations that were brought about since attaining independence and the subsequent opening up to constitutional values and principles such as those of democracy, which are now considered universal. In the African area subject to Pax Gallica,

the political opening, initiated by the speech given in La Baule, has upset the long peace established by the monarch presidents whose longevity in power has often exempted them from the perilous recourse to elections. This mechanism, which is seen as a necessary evil, guarantees a right as old as Pericles, which is the right of every citizen to be able to participate in the management of public affairs, without any discrimination. Principle reaffirmed by the African Court on Human and Peoples' Rights.

However, the African perception of power, instead of absolute power, will rather whet appetites to the detriment of the stability of political systems, due to the presence of two opposing forces that have become enemies by force of circumstance or due to men's intervention. That of the Presidential Majority, which is legally responsible for doing everything possible to ensure the effective holding of elections and which also wishes to remain in power per fas and nefas, and that of the Opposition, which absolutely wants to come to power. In view of this, the first difficulty was to designate the body in charge of the desired inclusive elections. The first reflex in most political systems has been to entrust this task to the government, more specifically to the Ministry of the Interior. However, it is clear that this would raise problems with regard to its impartiality, as it could not free itself from the electoral ambitions of the government of which he is a member. In view of this, it was decided to use independent electoral commissions that could be free of political considerations. In addition to the guarantee of judicial review by a Constitutional Court or Council, as a last resort in the event of litigation, the risks of confrontation would then be minimized. However, the existence of these institutions, which were intended to guarantee the fairness of the elections, is not making things as easy as one could think, particularly in view of the strong political footprint that underlies their functioning; which is has an impact on the nature of their relationship, the determination of which is essential for the proper conduct of the elections. The relationship that is the subject of our analysis, which can be apprehended from both a descriptive and prescriptive angle, is part of the decoding of institutional forces, which play a decisive role in the holding of elections in view of preventing electoral violence.

Thus, from a descriptive point of view, after a brief presentation of the organization and powers of electoral commissions, it will be necessary to identify the type of relationship that electoral commissions and constitutional courts or councils maintain as they stand; while from a prescriptive point of view, it will be necessary to consider the relationship that these two institutions should maintain for the success of elections. In this dynamic, while we note, on the one hand, the current prevalence of institutional alignment, we advocate, on the other hand, the need for a genuine institutional balance between the said bodies.

I. FORMAL ORGANIZATION AND RESPONSIBILITIES OF ELECTORAL COMMISSIONS IN AFRICA

In the early 1990s, African countries experienced yet another wave of democratization marked by the effectiveness of multi-party system in their political systems. This thirst for pluralist and liberal democracy, aimed at giving full powers to the people, led to several reforms and adjustments on the ideal processes and mechanisms for access to power. The immediate consequence of these reforms has been, for the majority of the countries of the continent engaged to date in a process of democratization, to select the

reduction of the control of the Executive Power (notably through the Ministry of the Interior) over the management of elections by setting up so-called “independent” electoral commissions. Thus, originated from a desired birth and symbols of a hope for reliable and credible electoral processes, these national electoral commissions have very quickly been desacralized, becoming over time Babel towers where confusion and discord between political parties lead electoral processes to socio-political crises. To understand the criticisms of the “independent” nature of these electoral bodies and assess their capacity to overcome the challenges associated with their responsibilities, we will take stock of their formal organization and identify the main duties of electoral commissions in Africa.

A. FORMAL ORGANIZATION OF ELECTORAL COMMISSIONS IN AFRICA

Talking about the formal organization of electoral commissions means looking firstly at their legal status and secondly at the main physical or operational structuring of their functioning, in particular the composition of the central bureau or the members constituting the national governing body.

With regard to their legal status, it should be noted that in the majority of cases, electoral commissions are established by an organic law specifying their powers, composition and functioning. The electoral commissions thus present themselves as an administrative authority detached from the three State powers and which must be independent of them and of any other party in the accomplishment of its mission.

The creation of electoral commissions differs from one area to another, depending on whether one is in a French-speaking, Portuguese-speaking or English-speaking country, as it takes into account the socio-political realities of the states. In French-speaking Africa, we will focus on the case of Côte d'Ivoire and Senegal. We will then relate them to the commissions in English-speaking countries, particularly Ghana and Nigeria.

- Case of Côte d'Ivoire: The Independent Electoral Commission (CEI), provided for by the 2000 Constitution (Art. 32 par. 4) and also included in the 2016 Constitution (Art 51 par. 3) was created by **Law N° 2001-634 of October 9, 2001 on the composition, organization, duties and functioning of the CEI** (law amended several times, the most recent being Law N° 2019-708 of August 5, 2019). The CEI, a permanent commission, was established by legislation.¹

¹ IEC, Law on the Establishment of the IEC, available at <https://www.cei-ci.org/loi.php>, accessed on 20 January 2020 ² ANEC, Decree, consulted on <https://www.cena.sn/lois.php>, January 20, 2020.

- Case of Senegal: The Autonomous National Electoral Commission (CENA) was created by **Act N°. 2005-07 of 11 May 2005** establishing the CENA (Act amended by Decree N°. 2006- 410 of 2 May 2006 amending Article 9 of Decree 2005-86 implementing Act N°. 2005-07 of 11 May 2005 on the CENA). The CENA was

established, like the CEI (in RCI), by legislation. The ANEC is a permanent structure (Art L4 of the law n°2017-12 of January 18 on the Electoral Code).²

- Case of Nigeria: The Independent National Electoral Commission (INEC) was established in 1998 by the 1999 Constitution (see Sect.15, 1) and also mentioned in the 2010 Electoral Code (Sect.2). It is a standing committee.³
- Case of Ghana: The Electoral Commission of Ghana (ECG) was established by **law n°451- 1993 of July 6, 1993** in place of the Interim National Electoral Commission (INEC). The ECG is a permanent commission.⁴

1st observation: Conditions to be a member of the Commissions

- Neutral persons (not belonging to any political party), the case of almost all English- speaking countries (Ghana, Nigeria);
- Or the option of a balanced representation of the political forces taking part in the electoral competition, the case of Guinea Bissau and all the francophone countries, except Senegal⁵.

2nd observation: Life span of the Commissions

- Either the ad hoc Committees (Benin, Niger, Mali);
- Either the Standing Commissions (in all other countries of the region) ;⁶

With regard to their composition, electoral commissions are always problematic. There is no standardization on the subject. From one country to another, the number of members making up the central governing body varies and is adapted to the specific needs of the socio-political reality.

³ INEC, About INEC, found at <http://www.inec.gov.ng/home/about-inec/>, accessed January 20, 2020.

⁴ ILO (International Labour Organization), Ghana 115, repeated at http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en_isn=34171_country=GHA_count=115, accessed 20 January 2020.

⁵ Mathias HOUNKPE and Ismaila Madior FALL, Les commissions électorales en Afrique de l'Ouest : Analyse comparée, Ed. Friedrich-Ebert-Stiftung, Abuja, 2011, p.42.

⁶ Ibid. p.43

According to a comparative study conducted in 2011, electoral commissions in Africa are structured according to two different patterns: *the partisan pattern that operates according to political criteria and the non-partisan pattern that relies on technical skills*

drawn from civil society (apolitical). ⁷ From the partisan pattern, the most widespread in Francophone Africa as mentioned above, it is noted that the representativeness of political parties, either individually or grouped in Presidential and Opposition Coalitions, constitutes 2/3 of the seats of the commissions; which reduces the influence of civil society, and consequently accentuates the politicization of the structure. *Such model, based on partisanship, which attempts to camouflage the risk of partiality through a balanced representation of the political forces involved, is the one most commonly used in French-speaking African countries, including the DRC.*⁸

Furthermore, it should be noted that the practical approach of a “balanced representation” is not always synonymous of “representative proportionality” of parties. As indicated above, the specific needs of a political environment in the electoral context generally dictate to parties the way in which seats on electoral commissions are distributed. For example, in Togo, following the 2006 Global Political Agreement (APG), the opposition was able to benefit from twice as many members as the government in the electoral commission; however, today, the opposition and the parliamentary majority each have five (05) members. Extra-parliamentary political parties have three (03) members. While in Benin, preference was given to proportional representation among political actors (especially among those represented in Parliament). It is worth recalling that the members of the Togolese INEC⁹ are, contrary to the practice in most other countries of the Economic Community of West African States (ECOWAS), appointed by the National Assembly. We also note that in the cases of Benin, Burkina Faso, Côte d'Ivoire, Guinea Conakry, Mali, Niger, ..., the Commissions are explicitly open to “civil society”, and therefore do not only have “political” members.¹⁰

However, a casuistic interpretation of the status of the members and the coloring of the said institutions leads ipso facto to an easy assessment of their impartiality or otherwise and their capacity to detach themselves from any influence, thus strengthening the confidence of the people in the ballot. In Guinea, where 83% of the seats in the Guinean CENI are occupied by political parties, the institution is struggling to inspire confidence in the population (55% of those interviewed disavowed it)¹¹. This quite naturally makes believe that in the majority of cases national electoral commissions in Francophone Africa have been relatively tailored in a calculation of acquisition or retention of supreme power.

B. DUTIES OF ELECTORAL COMMISSIONS IN AFRICA

⁷ Report of the International Peace and Development Studies Office: Further restructuring of the electoral commission, p.4

⁸ Nicolas Makengo NDUNDU, L'apport des commissions électorales au renforcement de la démocratie en Afrique, contraintes pratiques et perspectives, dissertation, University of Kinshasa, 2014; available at https://www.memoireonline.com/04/15/9109/m_Lapport-des-commissions-electorales-au-renforcement-de-la-democratie-en-Afrique-contraintes-pr20.html#fn136, accessed 30 January 2020.

⁹ Abbreviation meaning Independent National Electoral Commission and designating the body in charge of elections in some African countries.

¹⁰ Mathias HOUNKPE and Ismaila Madior FALL, Electoral Commissions in West Africa: A Comparative Analysis, Abuja, 2011, pp. 11-15.

Recognized as indispensable for a good democratic anchoring of countries, these structures established under various names in both Anglophone and Francophone countries of the continent are generally responsible for the organization, management and overseeing of elections.

Generally speaking, debates on the prerogatives of electoral commissions are essentially based on two assumptions:

- *That of their mastery of the electoral process, of their control over it;*
- *That of the effectiveness of their powers, and more specifically their autonomy vis-à-vis public decision-makers ;*¹²

Thus, we distinguish between electoral commissions with medium prerogatives (majority of Francophone countries), which have only a limited function, mainly to oversee and control the electoral process, and commissions with extensive prerogatives (majority of Anglophone countries), which in addition to the role of supervising and controlling the electoral process, also have a function of organizing elections.

- Case of the CENA of Senegal¹³: It has certainly important duties, but is not responsible for the organization of elections. This is the responsibility of the Ministry of Interior. The Ministry of Interior, instead of the Commission, determines the date of the elections, the location of the polling stations, the choice of the members of these stations and prepares the ballot papers. The CENA has a very limited role (the proclamation of the election results escapes to the CENA).
- Case of the CEI in Côte d'Ivoire¹⁴: The CEI, even though it has greater prerogatives (compared to the CENA covering almost the entire electoral cycle (the constitution, management and conservation of the national electoral register and the organization and supervision of electoral and referendum operations), has its limits. It is competent only for proclaiming the final results of all elections, with the exception of presidential and referendum elections, which are the exclusive competence of the Constitutional Council. It has no power of sanction, which is the responsibility of the Constitutional Council and the judicial authorities. Its role here, is to receive electoral disputes in order to transmit them to the competent authorities. Another important fact is that the CEI is not empowered to intervene in the life of political parties (strictly electoral mission). The Ministry of Interior is responsible for this.

3rd Observation: In view of the above facts, it is obvious that the independence of the Francophone electoral commissions is almost non-existent. Rather, they appear to be institutions “under the guardianship” of political authorities, which casts doubt on their credibility. What about Electoral Commissions in English-speaking countries?

¹¹ IPED Guinea, survey on the INEC conducted in Guinea from 9 December 2019 to 7 January 2020 and involving a sample of 300 people.

¹² Mathias HOUNKPE and Ismaila Madior FALL, Les commissions électorales en Afrique de l'Ouest : Analyse comparée, op.cit., p.57.

- Case of the INEC of Nigeria¹⁵: the INEC, in addition to the traditional prerogatives existing in the French-speaking countries, has very important missions, in particular:
 - it promotes the civic and electoral education of the population;
 - it endorses any document relating to the elections before it is valid (and therefore no major legal operation relating to the elections can be carried out without its authorization);
 - It sets the date of elections itself, and may even postpone them to a later date if there is a risk of a breach of civil peace or public tranquility (a remarkable power which deserves to be underlined in an African context where the postponement of elections often feeds, rightly or wrongly, tensions between political actors);
 - it proclaims the results of all public elections and referendums, with no obligation to report systematically after an election (different in French-speaking countries, systematic reporting to the President of the Republic);
 - it has a right of “supervision” over the action of political parties (right to control their activities, their compliance with constitutional standards, regularity of their accounts), a right which is exercised by the Minister of Interior.
- Case of the CEG¹⁶: The CEG is one of the best-equipped supervisory bodies in terms of prerogatives and control over the electoral process (annual revision of voters' lists and total redesign of voters' lists every ten years (CEG, see above the “special” prerogatives of the Electoral Commission of Nigeria).

II. CURRENT PREVALENCE OF INSTITUTIONAL ALIGNMENT

Political liberalism, which was truly theorized from the 17th century onwards with John Locke, then, Montesquieu, was the nourishing sap of the separation of powers, which is today considered to be the main characteristic of ambient constitutionalism. However, while it is true that most African political systems have adhered to this ideology, it must be noted that the hypertrophy of the executive power, embodied by the President of the Republic, as well as a realistic reading of State power, has given rise to a relative confusion of powers, which is not without influence, on the political regime and more specifically on the functioning of electoral commissions and constitutional councils. They are in fact aligned with the executive, which ensures strategic control, to reduce them in *fine to* distorted, conniving relationships.

¹³ Mathias HOUNKPE and Ismaila Madior FALL, Les commissions électorales en Afrique de l'Ouest: Analyse comparée, op. cit. , p.58.

¹⁴ Ibidem, p.66.

¹⁵ Ibidem, p.79.

¹⁶ Mathias HOUNKPE and Ismaila Madior FALL, Les commissions électorales en Afrique de l'Ouest : Analyse comparée, Ed. Friedrich-Ebert-Stiftung, Abuja, 2010, p.70.

A- With regard to a relative confusion of powers in favor of the executive branch of government

The confusion of powers is the antonym of separation of powers; it implies a concentration of executive, legislative and judicial powers in the hands of a single body. When this confusion is expedited and recognized, one speaks of absolute confusion of powers; however, when the confusion of powers is noted in practice, while the separation of powers is constitutionally established, one speaks of relative confusion of powers. In Côte d'Ivoire, as in most African countries, the principle of national legislation does indeed enshrine the regime of separation of powers, but only in principle, because the facts on the ground present an entirely different reality and make it difficult to apply the rules in strict compliance with the spirit of the legislation in force.

In fact, we can see that key institutions of the Republic and national representations, such as the Constitutional Council or other jurisdictional body and the Independent Electoral Commission (CEI), are struggling to relinquish in the exercise of their duties the so-called absolute power of the executive, the keystone of African presidential regimes. This situation is the consequence of a partisan functioning based on a *modus operandi* biased by socio-cultural burdens and a poor democratic culture. The latter are reflected in the personality cult, idolatry of the political party, absolute recognition “to one's benefactor”, tribalism, lack of attachment to the higher interests of the nation and the Republic, etc. It is also the same feeling shared by some respondents who state: *“All electoral problems in Côte d'Ivoire are linked to the mode of appointment of members of the CEI. We have a CEI where more than half of the members have a connection to the executive. How can you trust such a structure?”*¹⁷

In this regard, it should be pointed out that the conflicts generated by the conduct of elections in Africa have been symptomatic of a crisis of confidence towards and between political actors. This is why the organization of elections has been entrusted to institutions that should restore the bond of trust between the main protagonists in order to maintain or restore political stability after elections. The creation of electoral commissions and constitutional courts or councils is precisely in line with this perspective. To this end, according to the African Charter on Democracy, Elections and Governance and the ECOWAS Protocol on Democracy and Good Governance, the main statutory characteristics of these institutions should be independence and impartiality. Thus, the African Court of Human and Peoples' Rights, in the case of APDH vs. the State of Côte d'Ivoire, considers that independence should be understood as “the fact that a person or entity does not depend on any authority other than its own or, at the very least, does not depend on the State on whose territory they exercise their functions”. In addition, it considers that “an electoral body is independent when it enjoys administrative and financial autonomy and offers sufficient guarantees as to the independence and impartiality of its members.” For this purpose, it defines impartiality as the absence of bias, prejudice and conflict of interest.

However, from the point of view of the relative confusion of powers referred to earlier, which is a form of takeover of institutions, this calls into question the impartiality of the members making up the electoral bodies, which is consubstantial with their independence. This stranglehold on the management of elections is materialized in most cases by an over-representation of the executive in electoral commissions, and by the

highly compromising political appointment of the members of the judicial body whose loyalty to the executive may defy legal constraints. Thus, in the above-mentioned case, the Court condemned the Independent Electoral Commission of Côte d'Ivoire on the grounds that the majority of the members making up the electoral body are appointed by political figures and parties participating in the elections; and that such a body cannot reassure the public about its ability to organize transparent, free and fair elections. The fundamental problem, therefore, is that of legitimate suspicion of the electoral bodies, which, because of their alignment with the executive, are both judges and parties, whereas they should only be judges; the office of the judge being that of objective, independent and impartial decision making.

In addition to this is the lack of financial autonomy of the organs in practice because they have a budget linked, by a sort of umbilical cord, to the executive, which remains the main source of supply and master of command. This is what all the people surveyed in Côte d'Ivoire denounce, who see in it a willingness on the part of the executive to keep the CEI on a leash by having a stranglehold on the institution's budget.¹⁸

In addition to the alignment with the executive, the suspicion of fraud, rightly or wrongly, against the electoral bodies sometimes relates to their technical inability to provide election results within a short period of time, which fuels rumors and psychosis. Indeed, in recent decades, most African countries have adopted the use of biometric tablets in the conduct of electoral processes, hoping to enhance the credibility of elections through the transparency and speed of the process that this new electoral technology would guarantee, as in industrialized countries. However, the implementation of these technologies (*biometric registration and verification, electronic voting - which is still rare - , live transmission of results*)¹⁹, which are supposed to bring more transparency to often contested electoral processes, is in many cases subject to two major limitations: technical failure and insufficient mastery of the use of these tablets.

According to Sindou Bamba, *the failure of the tablets should be understood to mean their limited autonomy, failures related to their use in the field and their recommended use. They may also switch off or stop working unexpectedly. As a result, their use becomes difficult or even impossible in areas not covered by telephone networks and not covered by the Internet. The lack of mastery of its use is due to the innovative nature of this technology in the electoral process. This leads to a problem of mastery of this tool by election officers. This was the case during the 2015 presidential election in our country.*²⁰

It should, therefore, be noted that this collective and institutionalized sponsorship of the executive can only lead to a relationship of complicity between the electoral commissions and the constitutional councils, which can seriously undermine their credibility vis-à-vis the electorate.

¹⁸ Mathias HOUNKPE and Ismaila Madior FALL, *Les commissions électorales en Afrique de l'Ouest : Analyse comparée*, Ed. Friedrich-Ebert-Stiftung, Abuja, 2011, p.42.

¹⁹ Jeune Afrique, *Elections: Biometrics and new technologies are not guaranteed*, accessed at <https://www.jeuneafrique.com/mag/538612/politique/elections-biometrie-et-nouvelles-technologies-ne-sont-pas-des-garanties/>, on 20 January 2020.

²⁰ Centre de Recherche Politique d'Abidjan, *Report of the Panel of 18 November 2015*, p.10, consulted on <http://www.crapa-ci.org/sites/default/files/document/Paneldu18novembre2015.pdf>, 20 January 2020.

B- With regard to the subsequent collision of electoral commissions and constitutional courts or councils

The relationship of institutional collision between electoral commissions and constitutional councils is a perverted form of collaboration. Because of the alignment with the executive branch, this can be interpreted rightly or wrongly as complicity in a broad plot hatched by the presidential majority. However, the laws, as drafted, should in no way lead to such a confiscation, insofar as, the missions of these institutions are clearly defined; some dealing with the administrative aspect of elections and others being in charge of electoral litigation in order to guarantee peace through law. However, the gender mix that this unnatural rapprochement brings about, because of the executive branch of government, has ended up emptying these institutions of their content in some countries. By way of illustration, we could speak of Gabon, where the Constitutional Court is ironically nicknamed the Tower of Pisa; in that it always tilts in favor of the executive power. In the same way, we could mention middle finger that the Senegalese opposition has shown towards the Constitutional Council by considering, following the last elections, that it would serve no purpose to refer the matter to the Constitutional Council for dispute. We are therefore witnessing the recurring citizen initiatives to monitor ballot box transportation and ballot counting operations because of the distrust shown towards election commission officers. In countries with strong political rivalry, such a diversion of electoral bodies could inevitably lead to an electoral or post-electoral crisis of serious intensity.

In the case of APDH vs. the State of Côte d'Ivoire, the African Court of Human and Peoples' Rights condemned the defendant, finding that it had violated its obligation to protect the right to equality before the law and to equal protection by the law; to do so, it exalted a recital that was not subject to any form of ambiguity. Indeed, it considered that in view of the unbalanced composition of the Ivorian electoral body, *"it is therefore clear that in the event that the President of the Republic or another candidate belonging to his political group became a candidate in any election, either presidential or legislative, the contested law would put him in a more advantageous situation compared to other candidates. The Court therefore considers that by failing to place all potential candidates on an equal footing, the challenged law violates the right to equal protection of the law, enshrined in the various international human rights instruments (...), particularly Article 10 of the African Charter on Human and Peoples' Rights and Article 3 of the Charter of Human Rights"*.²¹

This observation is a consequence of the collusion of the electoral bodies, which work together for the triumph of a personality or a party, generally the presidential majority. However, while it is true that this relational modality is the principle in most African political systems, the exceptional case of the presidential elections held in 2010 in Côte d'Ivoire should be noted. In fact, for the first time we witnessed a real antagonistic relationship between the Independent Electoral Commission (CEI), chaired by Mr. Youssouf Bakayoko, from the opposition at the time, and the Constitutional Council, chaired by Prof. Paul Yao N'Dré, close to the presidential majority. The obvious divergence of interests has led to institutional turmoil, triggering a serious post-election crisis. under unprecedented conditions. This case eloquently demonstrates that the

²¹ Judgment of the African Court of Human and Peoples' Rights in the Case of APDH v. State of Côte d'Ivoire, available at https://fr.african-court.org/images/Cases/Judgment/ARRET%20_%20REQUETE%20No%200012014%20_%20APDH%20C.%20LA%20RE PUBLIQUE%20DE%20COTE%20DIVOIRE.pdf, accessed January 21, 2020

It all began when the provisional results published by the CEI, proclaiming the victory of the opposition, were entirely invalidated by the Constitutional Council which, for its part, had awarded victory to the Presidential Majority after having cleared up the electoral dispute denunciation of collusion, in no way implies, as it stands, a choice in favor of antagonism between the electoral commissions and the Constitutional Courts or Councils. In both cases, the consequences could be dramatic, since the political dynamics behind them are vicious and obviously passionate.

The real difficulty, in our view, is to guarantee the republican nature of the electoral bodies, which as such must work for all, without working for any particular person or entity. In reality, it is a question of immunizing them against political assaults from all sides that could harm their missions made indispensable by the great interest in elections in Africa. This can only take shape within a framework that ensures an institutional balance between electoral commissions and constitutional courts or councils.

II- THE NEED FOR A GENUINE INSTITUTIONAL BALANCE

The balance we are talking about here is intended to enable electoral commissions and constitutional courts or councils to fully assume their function. As regards the modalities of this balance, previous developments have enabled us to understand that, neither collusion, nor antagonism, due to institutional alignment can reasonably be envisaged. We cannot also advocate juxtaposed reports that would not really adhere to either the letter or the spirit of the texts establishing the said commissions and councils, because only proper coordination between these bodies can ensure fair, free and transparent elections. So, what's left? Complementarity? To tell the truth, this may turn out to be a real synthesis, but it can only take shape in the strict internalization of the statutory peculiarities; which in no way excludes an inclusive functioning of the two institutions.

A- through statutory rigidity of electoral commissions and constitutional councils

The normative provisions that should guarantee the autonomy and strict neutrality of these two institutions during electoral processes carry within themselves the seeds of contradiction, not to mention the political power relations they face.

Indeed, it is not enough to specify in certain articles of the statutory provisions that electoral commissions and constitutional courts or councils are independent and impartial for this to be the case. In this instance, can the designation procedures and mechanisms provided for in these rules guarantee this or not? All measures must be taken in a complementary manner, if not one will prevail over the other according to the interests and means of political pressure of each other, even more so in a social environment where the *duty of ungratefulness*²² is not the strength of republican practice.

²² In a speech to Le Monde in 1982, Robert Batinder spoke of the "duty of ungratefulness" that board members owe to the person who appointed them. It is about the independence of judges.

The recommendation of this statutory rigidity should not be seen only as an opportunity to recall the legal rules governing the functioning and organization of electoral commissions and constitutional courts or councils. These rules themselves, in some respects, pose real difficulties in terms of their application. Rather, it is a process of clarification with respect to the political society, in particular, which generally dictates the coloring that these institutions should take. From this perspective, it should be noted from the outset that the two organs respond to clearly defined dynamics from both an organic and a functional point of view.

Firstly, from an organic point of view, electoral commissions are independent administrative bodies. The mention of the epithet “independent” is not accidental, as it is intended to overcome all forms of prejudicial subordination that its administrative character might lead to. Indeed, the administrative function is one of the sub-functions of the executive branch alongside the governmental function. Thus, independence is a way of protecting this institution from the inclination to domesticate that would result from the implementation of a hierarchical control inherent to the administrative organization. Moreover, this independence from other public authorities is a consequence of the principle of separation of powers. In this dynamic, the current constraints that interfere with the functioning of the independent electoral commissions are linked to an intrusion of the politician who makes sure he takes hold of it. However, these commissions can only credibly organize elections with high political stakes if they themselves are apolitical. We should therefore think about a composition that does not allow a presumption of bias to take root, which would cast doubt on the independent nature of the institutions. This is what the African Court of Human and Peoples' Rights suggests when it considers that the appointment by personalities and political parties of members of electoral bodies is not likely to guarantee free and transparent elections. This position is moreover compatible with the principle of political neutrality which must characterize any administrative authority.

In the same vein, constitutional courts or councils are courts. In this respect, it should be a truism to speak of independence and impartiality, as these characteristics are consubstantial with their jurisdictional nature. For example, the European Court of Human Rights estimated that “in order to maintain the independence and impartiality of a court, appearances may be important”. These appearances also take on their importance in the procedures for the appointment of judges or members with a view of ensuring a sufficient distance from politics mainly, in the name of the necessities imposed by the office of the judge, and above all with regard to the principle of separation of powers.

At this level, it should be pointed out that, depending on the constitutional systems, there could still be a semantic nuance between the Constitutional Court and the Constitutional Council. In Côte d'Ivoire, for example, until the Constitution of 1 August 2000, the term “Constitutional Court” was used to refer to a chamber of the Supreme Court which, as such, was clearly incorporated into the judicial authority. In 2000, a Constitutional Council was created; the name makes sense, as the former Constitutional Chamber was transformed into a Council and became a separate entity from the Supreme Court, which is still a component of the judiciary. However, the Constitution of 8 November 2016, by maintaining the term “Constitutional Council”, makes it an institution no longer belonging to the judiciary, which is now represented solely by the Supreme Court and the Court of Auditors. The resulting sui generis nature of the Constitutional Council poses a problem

in that it can no longer be clearly inserted into a public authority in order to make the theory of the separation of powers work effectively. However, its composition and the mode of appointment of its members suggest a strong influence of the executive; which may be incompatible with the power of *juris dictio* which is recognized in the Constitutional Council, as a judge of electoral disputes alongside its classical function of jurisdictional guarantor of the constitutionality block which enshrines the principles of the African Charter on Democracy, Elections and Governance among which is mentioned in golden letters the right to free, fair and transparent elections.

Secondly, from a functional point of view, electoral commissions are generally responsible for the impartial and independent organization of elections. To this end, they receive, examine and approve applications in accordance with the provisions in force. In addition, they organize the vote, provide electoral material, collect the minutes and, in most cases, announce provisional results which are purely trend based, pending the settlement of disputes at the jurisdictional level. In this regard, Constitutional Courts or Councils are responsible for monitoring upstream operations; this is an *ex post facto* control carried out upon referral by the parties to the elections with a view to the final proclamation of the results, thus sealing the fate of the candidates. These are two institutions that cannot be confused by any means. Therefore, we believe that a regional mechanism should be set up to ensure the effective and robust functioning of these institutions; because as electoral bodies, they participate in the promotion of universal values and principles of democracy, as provided for in the African Charter on Democracy, which, according to the African Union Commission, can be considered “*a relevant human rights instrument*”²³ (The mere violation of human rights, which can justify various legal operations aimed at restoring normality).

In view of the above, the execution mission recognized to the electoral commissions and the mission of control of the constitutional courts or councils, being clarified, are not however excluded. They must, out of necessity, work together; this is achieved through the establishment of functional flexibility.

B- Through the functional flexibility of electoral commissions and constitutional councils

Functional flexibility in the relationship between the electoral commissions and the constitutional councils does the exact opposite of the collusion described above. It only makes sense with the awareness of the statutory particularities mentioned above and the common goal of achieving peaceful elections, free of all forms of electoral violence. If the purpose of collusion is the triumph of a particular candidate, the purpose of functional flexibility is republican. It aims at facilitating the electoral process until the final proclamation of the results. If the political leadership does not interfere with such operations, such collaboration should be self-evident, respecting the deadlines, forms and procedures imposed by law. Moreover, guided by the same republican objective, the electoral bodies should provide each other with all the information in time to make decisions at the appropriate time.

The Electoral Commission and the Constitutional Council are bodies with the same objective, which is the preservation of democracy and the rule of law. Therefore, these republican institutions must be entirely apolitical or non-partisan in order to protect the

interests of the people. In addition, each at its own level should be able to play its role throughout the elections. However, it is only by working in synergy, without hazardous interference from one another, that they will succeed in giving credibility to electoral processes.

In that regard, we cannot fail to recall the particular tensions that have prevailed in Côte d'Ivoire between the Independent Electoral Commission and the Constitutional Council. These bodies have shown a deficiency in their collaboration which has not effectively been made possible for reasons mentioned earlier. Thus, we recall the conclusive manner in which the provisional results proclaimed by the CEI were received, to the great displeasure of the Constitutional Council, whose denial of the said results was enough to heighten the suspicion about the whole election, which was already evident.

In short, electoral commissions and constitutional courts or councils can only contribute to eradicating the current prevalence of belligerent and often deadly elections by establishing an institutional balance that is profoundly apolitical and republican, involving neither collusion, antagonism, nor juxtaposition, but a satisfactory synergy, for free, fair, transparent and above all peaceful elections.

²³ Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

Solution Think Tank members:

- CIREs (Côte d'Ivoire)
- CRPA (Côte d'Ivoire)
- CADERT (Togo)
- CROP (Togo)
- CAPES (Burkina Faso)
- Chatham House (Royaume-Uni)
- IPED (Guinée)
- Stat View International (Guinée)
- IREEP (Bénin)
- Afrobaromètre (Bénin)
- Social Watch (Bénin)
- Konrad-Adenauer-Stiftung (Allemagne)
- WATHI (Sénégal)
- Institut de Stratégies (Côte d'Ivoire)