

***THE CONSTITUTION WITHOUT DEMOCRATIC
CONSTITUTIONALISM: A REGRESSIVE
EXPERIENCE DEMOCRACY IN AFRICAN
COUNTRIES***

***A CONSTITUIÇÃO SEM O CONSTITUCIONALISMO
DEMOCRÁTICO: UMA EXPERIÊNCIA REGRESSIVA
DA DEMOCRACIA NOS PAÍSES AFRICANOS***

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Abstract: This article aims to understand the current state of Portuguese-speaking African countries, marked by democratic discontinuity, evidenced by dictatorial electoral systems, weak separation of powers, denial of the rule of law, deprivation of fundamental freedoms and political partisanship of state institutions, culminating in a regime of dictatorial constitutionalism, characterized by a constitution with an absence of constitutionalism. In addition, the symbolic dimension of Africa's multiple constitutions will be addressed, which in principle declare the limitation of political power and recognize fundamental rights, freedoms and guarantees, but at their core deny the minimum possibilities for the effectiveness of constitutional norms. This is because political power is exercised in an unlimited and abusive manner. Furthermore, we will analyse the models of constitutional courts in Portuguese-speaking African states and their role in making fundamental rights effective.

Keywords: Constitution without constitutionalism; Dictatorial elections; Discontinuity of human rights; Regressive democracy.

Resumo: Este artigo visa compreender o atual estado dos países africanos de expressão portuguesa, marcado por uma descontinuidade democrática, evidenciada pelos sistemas eleitorais ditatoriais, fraca separação de poderes, negação de Estado de Direito, privação das liberdades fundamentais e partidarização política das instituições estatais, que culmina num regime de constitucionalismo ditatorial, caracterizado por Constituição com ausência de constitucionalismo. Ademais, abordar-se-á a dimensão simbólica das múltiplas Constituições africanas, que a princípio declaram a limitação de poder político e reconhecem os direitos liberdades e garantias fundamentais, entretanto, no seu âmago operacional nega as possibilidades mínimas de efetividade das normas constitucionais. Isto deve-se ao fato de o poder político ser exercido de maneira ilimitada e abusiva. De mais a mais, far-se-á uma incursão para aferir os modelos das cortes constitucionais dos Estados africanos de expressão portuguesa e o seu papel para a efetivação dos direitos fundamentais.

Palavras-chave: Constituição sem constitucionalismo; eleições ditatoriais; Descontinuidade de direitos humanos; Democracia regressiva.

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1. INTRODUCTION

Firstly, I must stress that the work will be approached through a bibliographical review and will critically analyses issues surrounding constitutionalism in Africa. On the other hand, the aim of the article is to investigate the regression of democracy in Portuguese-speaking African countries, starting by analyzing aspects that involve the rejection of liberal democratic constitutionalism, which can be seen in the light of dictatorial electoral systems, constitutions devoid of normative force, the lack of independence of the judiciary and politically partisan institutions, which characterize the weakness of the rule of law.

It is important to emphasize at the outset that in states that lack constitutionalism, legal constitutions are transformed into purely political instruments that aim to present a false idea of democracy and the legitimacy of political power, which in turn is an unlimited power of the rulers over the ruled. Furthermore, the constitution is not seen as an instrument for establishing the rule of law, but rather as a mechanism for imposing a kind of arbitrary, dictatorial legality without any kind of participation by the people.

And the common denominator of states with a regressive democracy is the lack of separation of powers, discontinuity of human rights, and on the other hand, the advance of an oppressive state that limits fundamental freedoms and guarantees, as well as increased state surveillance of citizens' private lives. Furthermore, there is also a denial of political pluralism, aimed at the participation of political opponents in the electoral arena. This undermines the possibility of power shifts, as is the case, for example, in Angola, Mozambique and Guinea Bissau. These are states that have been marked by political crises and military conflicts since they gained independence. Democracy has not only stagnated, but has regressed to a classic dictatorial model, in which the presidents of the republics are absolute decision-makers, resembling monarchies absolutist. It is notorious in these democracies that there has been a process of omissive deconstitutionalization of the rights enshrined in the Constitution, because they are not rights that can be put into practice and that really lead to the transformation of a dignified life.

2. AFRICAN EXPERIENCE OF A CONSTITUTION WITHOUT A CONSTITUTION

It is worth emphasizing that the existence of a written constitution does not automatically presuppose the existence of the constitutionalism typical of the post-war model, based on limiting political power and promoting fundamental rights. However, for there to be true constitutionalism, a set of political and legal presuppositions is required to be observed in a given state, the non-existence of which leads to a situation of a constitution without constitutionalism. The idea of constitutionalism aims to prevent tyranny, the arbitrary exercise of political power and violations of the fundamental rights, freedoms and guarantees of individuals (Hwo, 1993, p. 65).

The experience of African countries, especially Portuguese-speaking countries, shows the greatest degree of absence of constitutionalism. Although there are written constitutions that are very well drafted from a formal point of view, they continue to show a material deficit and do not propose a political and social commitment, either vertically or horizontally. It could be said that they are mere documentary constitutions, devoid of any pretense of effectiveness or normative force (Hesse, 1990), culminating in a gap between the constitution and the political actions of the state (Olasunkanmi, 2018, p. 32).

In order to understand these inconsistencies, it is essential to recall the concept of the Constitution, which translates into a fundamental rule of a given state, which determines the organization and composition of political power, defining the limits of that power's actions. However, the Constitution is also known as a written, fundamental document that expresses and prescribes the rights and duties of citizens, well as the limits of action of the state's governmental bodies. (Canotilho, 2000) From another perspective, this document must be taken seriously by the ruling elite and the people.

Faith in the Constitution is a crucial issue for the realization of constitutionalism, in which all social authors have an obligation to contribute to the realization of the Constitution.

idealization of constitutionalism. Systematic non-compliance with the Constitution, both vertically and horizontally, generates negative consequences for the state, such as increased inequality, poverty, economic regression,

criminality, impunity, civil wars, coups d'état and other catastrophes. The political manoeuvres used by the ruling elites for their own benefit, such as acts of passive corruption, are one of the clear examples of this.

In addition to the Constitution imposing binding and obligatory commands, it must also be seen as a set of ethical and moral obligations, in which citizens are called upon to raise awareness of it, regardless of the legal sanctions arising from its violation.

Addition to the political legal presuppositions already mentioned, the idea of constitutionalism requires necessary conditions such as the consolidation of the rule of law, the separation of powers, the independence of the judiciary from other powers, a mechanism controlling government acts, guaranteeing checks and balances, institutions committed to promoting democracy (Chirwa, 2022). Democracy is therefore a fundamental legal asset that enables access to various civil, political and social rights, the full enjoyment of which depends entirely on substantive, participatory and representative democracy.

Instead of states promoting basic social rights and ensuring the economic security of their citizens, they are more likely to carry out acts of bad governance that make economic, social and political progress impossible, and often fail to materialize due to a lack of economic resources.

In addition to the, it should be emphasized that most African states have been the scene of acts of nepotism, constant electoral fraud, persecution of political opponents, successive coups d'état, terrorism, civil wars, tyranny, perpetuation of power, nepotism, restrictions on freedom of expression and opinion, etc.

And the recent past dominated by the institutionalized apartheid of 1948 in South Africa also proves to us the idea of the existence of the constitutional document in the absence of constitutionalism, in which the unconstitutionality stemmed from the Constitution itself, which legally legitimized aspects such as the division of spaces and non-white people, accompanied by a series of violence and racial discrimination against black people. According to Bachof and Otto, this situation would constitute unconstitutional constitutional norms (Bachof, 1994). And for us, a typical example of a state with a constitution and without constitutionalism (Olasunkanmi, 2018, p. 272).

The current scenario also includes Guinea-Bissau, which experienced political and legal instability since the transition from colonial rule to independent post-colonial governments, with cyclical political and social crises accompanied by coups d'état. At the same time, poverty is on the rise in these countries, leading to an unconstitutional state of affairs that has been in place forever.

Anglophone countries such as Zimbabwe also went through similar times, under the leadership of Robert Mugabe, who remained in power for approximately 37 years, and during this period the Constitution was not observed, with the country experiencing an economic and political setback that resulted in severe collective hunger, fueling several waves of political protests. At that time, the holder of executive power and his political allies could revise or create constitutional amendments to ensure that the president remained in power; if this process was unsuccessful, the President of the Republic at the time could use military force to control any opposing demonstrations.

The same situation applies to almost all Portuguese-speaking countries, such as Mozambique, São Tomé and Príncipe and Angola. In the latter, the former head of the executive remained in power for close to 38 years, having been accused of various corruption offences involving other public officials (Casado, 2017, p. 63).

What's more, in these countries there is a confusion of the role of the state, of government and of political parties, which are totally intertwined and which has hindered the consolidation of constitutionalism. In other words, the political machinery of the government encroaches on the legislative and judicial powers, which, as a rule, do not enjoy independence and autonomy and operate under the orders of the top executive, in this case, the President of the Republic.

On the other hand, it is clear that elected governments are not capable of executing state programs, which are actions established by the government by the Constitution and which must be complied with by elected governments. Too often, political party programs and agendas have been prioritized, which are paid for out of the public purse. As such, governments are no different from political parties.

Political power in Africa is exercised in a way that is incompatible with the republican principle and the logic of modern constitutionalism, adopted in the post- Second World War period. The holders of political power exercise it in an unlimited and arbitrary manner to pursue private ends, generating a circle of constitutional disobedience, especially in the vertical sphere, which starts from the top to the periphery. Constitutional infidelity also occurs horizontally, i.e. within private relations, in which society in general discredits the constitutional pact.

Disrespect for constitutional rules and principles is the natural means by which the legal system operates, in which constitutional remedies and democratic instruments such as elections, plebiscites, referendums, constitutional amendments, the control of political acts, as well as votes in parliament, are manipulated to satisfy the interests of the dominant political power, which acts almost absolutely. Undoubtedly, these actions weaken the desired idea of good governance.

Olasunkanmi shares the idea that the lack of faith in the Constitution does not only affect the political arena, but that the crisis occurs in the judiciary, which is incapable of correcting the arbitrariness of political power, since it acts under the cloak of contaminated politics, failing to fulfil the constitutional functions that are inherent to it by nature. And the lack of an independent judiciary contributes massively to this social genocide that afflicts a large part of African states, because the political authors of the executive and parliament are immune from legal responsibility, even when they violate fundamental or political rights in an open manner. They remain neutral to acts of corruption committed by public officials. And remember, impunity is the enemy of justice (Olasunkanmi, p. 276).

The weakness of the judiciary when it comes to controlling other state bodies through judicial review contributes to African states remaining in a state of political and rights crisis, far from materializing the principles inherent in the rule of law, separation of powers, public transparency and the effectiveness of fundamental rights and freedoms (Tate, 2023, p. 47).

3. REGRESSIVE DEMOCRACY

The classic idea of democracy lies in the majority decisions made by a given government. However, after the Second World War and up to the present day, this concept has undergone several changes, in which democracy is understood as a government that respects human or fundamental rights, that recognises the rights of minorities, that is committed to human dignity, equality, freedom and individual guarantees (Tushnet, 2015, p.15-17). Furthermore, democracy encompasses legal pluralism, separation of power, independence of state bodies, among other premises.

However, in the various African countries analyzed here, there has been a regressive democracy since colonial independence in the 1950s to 1975, which has seen no progress in human rights, alternation of governance, discrepancy in institutions such as the courts, where supreme and constitutional court judges are politicized bodies, i.e. they serve the interests of dominant parties.

Reverse or regressive democracies are marked by a discontinuity of human rights and the maximization of the deprivation of fundamental freedoms (Tushnet, 2015, p.28). In this type of democracy, state institutions maintain functional liberalism, attracting private companies and multinationals to keep state functioning financially and in turn generating financial agreements with political elites. And another characteristic of this type of democracy is that some may even see economic growth, but many human rights remain stagnant. And as far as African countries are concerned, regressive democracy has a direct impact on economic development. Most Portuguese-speaking African countries are plunged into extreme poverty, where the population survives on less than one (1) US dollar a day.

On the other hand, there is a process that we call the deconstitutionalization of constitutional rights, through state inertia, which does not seek to make the rights previously laid down in the Constitution effective through public policies. Deconstitutionalizing rights also means denying them ommissively, without removing them from the Constitution, but without having a political and governmental commitment to make them effective.

Therefore, in reverse or regressive democracy, there is no commitment to the objectives of the Constitution, which becomes a mere political document with no legal value. In systems of regressive democracy, the Constitution loses

its real meaning, and only the will of the leaders prevails, not the law. These states also deprive citizens of countless political and civil rights, as they live under a dictatorial constitutionalism in which the people are not part of political decisions.

4. AUTHORITARIAN ELECTORAL SYSTEMS IN PORTUGUESE-SPEAKING AFRICA IN THE LIGHT OF THE MODEL DESCRIBED BY MARK V. TUSHNET

The idea of constitutionalism is also intertwined with the electoral system, which is crucial for providing a democratic environment in which citizens can express their satisfaction or dissatisfaction with a government (Tushnet, 2015, P.8). However, what mostly happens in African countries such as Angola, Guinea-Bissau, Mozambique and Gambia is the mere presence of authoritarian elections, which aim to propagate a false idea of democracy and political pluralism, in order to maintain the status quo.

In these electoral systems, they are dominated by hegemonic party models (Tushnet, 2015, p.8), which undermine the conditions for other political parties to participate on an equal footing. In these contexts, elections are marked by excessive fraud, lack of transparency and electoral justice. As an example, Mozambique held its first elections in 1994 and the last in 2024, all of which led to conflicts with opposition groups, leading to riots and human rights violations, where more than 130 people were signed by the police contingent as part of demonstrations against electoral fraud.

During the electoral period in countries like Angola, Mozambique and Guinea-Bissau, the hegemonic parties call in the police, contingents and the armed forces to prevent opposition groups from demonstrating against the elections, and to unleash other acts of repudiation against the electoral process. And one of the ways to armour these authoritarian governments is to establish firm alliances police and armed forces leaders, who use disproportionate force to intimidate and persecute oppressors, who are then alleged to be terrorists or accused of other crimes against security national, severely persecuting opposition political leaders with the greatest potential to come to power democratically.

Nevertheless, authoritarian electoral systems are characterized by the fact that they are regimes, they control the formal media, they create laws that prohibit freedom of expression, especially when it comes to criticism of the dominant parties, especially in the Angolan regime. On the other hand, electoral administration bodies are mostly made up of dominant parties, which are not independent in the exercise of their functions (Tushnet, 2015, P.8),

In addition, elections are often used to obtain external financial support and continue relations with international authoritarians, because the absence of elections would denounce authoritarian mechanisms and these states would lose international credibility and also retract foreign investment from private authoritarians. In the last elections in Mozambique, which took place in 2024, the President of the Republic of Mozambique, Filipe Jacinto Nyusi, considered the possibility of postponing the elections due to a lack of financial resources (Jornal País Moçambique, 2024).

5. FOR CONSTITUTIONAL SUSTAINABILITY

One of the great problems of constitutional unsustainability lies in the way in which constitutional revisions or amendments are exercised by the holders of political power, who abuse and forge the system, especially in the legislative sphere, in order to impose the personal wishes of the leader or the ruling political elite.

Some Constitutions impose a time limit on constitutional revisions or amendments, as well as prohibiting constitutional revisions in the context of a state of exception or public abnormality, which serves to prevent abuses in relation to constitutional revisions and amendments. Despite the fact that constitutional revisions or amendments are unconstitutionally invoked by heads of state to increase the length of the legislature, even though there are clear rules preventing acts of this nature, Congress co-operates with this initiative and the judiciary is silent in the face of these abuses (Chen, p.31, 2014).

On the other hand, there is a need to devise institutional arrangements that are capable of limiting the exercise of political power, especially by the President of the Republic in the Lusophone countries, especially Angola and Mozambique, which are presidentialism systems, grafted onto these countries,

culminating in the failure of constitutionalism. Limiting the powers and duties of the head of the executive branch is crucial for the existence of an independent organic body, for the sustainability of constitutionalism in the countries of Lusophone and Francophone Africa.

For example, Mozambique, where the President of the Republic has the power to dissolve the Assembly of the Republic under the terms of line e) of Article 159, in conjunction with Article 188 of the Constitution. In addition, under the same article, the President of the Republic is also responsible for deciding on the possibility of holding a referendum, in other contexts, these are functions of the legislative power. It is therefore reasonable to deduce that these two countries are almost heading towards autocracy. And this expansion of powers in the figure of the holder of executive power has resulted in government tyranny, at least in these states (Mozambique, Constitution of The Republic, 2004).

Democratic intuitions must fulfil their functions in accordance with constitutional guidelines, in line with the principle of separation of powers, administrative transparency, accountability and functional autonomy. These assumptions are necessary for the materialization of constitutional sustainability and good governance in African countries.

The other issue that must not be overlooked is the centralization of decision-making by the President of the Republic, who introduces a model of monocratic decisions within the state, such as the appointment of certain public officials without the opinion or approval of the Assembly of the Republic. This, in a way, reduces the content of democracy with a participatory regime of majority decisions, at least for these issues. Still at the heart of the political crisis, we can point to the crisis of representation, which is a burning issue. This problem reaches gigantic scales inherent in political institutions, which do not express the will of the voters, nor do they honor the commitment given to them by the population at the ballot box.

6. THE BREAKDOWN OF THE SOCIAL CONTRACT AND THE CRISIS OF REPRESENTATIVE LEGITIMACY

It is under the contractualist fiction that the essence of modern states is justified, in which individuals discard the state of nature to form a new society, the result of the voluntary association of individuals through an implicit social contract, which allows the sovereign to legitimately lead a government for all.

Thomas Hobbes (1968) conceives of the state of nature as imaginary or logical hypothesis characterized by a state of permanent war of all against all, in which by force or cunning, man is seen as another man's wolf. However, the social contract would put an end to this egoistic conflict of man, in which each man pursues his individual interests. And in the social contract, individuals transfer power to a third party, in this case the sovereign who runs the state (Leviathan), in order to safeguard common interests such as the security and peace of the members of a given society. In view of this, all civil laws would emanate from the state, guaranteeing social control and cohesion (HOBBS, 1968).

For John Locke (1998), the state of nature is characterized by relative peace, in which each man enjoys the natural right to property, which must not be violated by the state, and the limit of property will be defined by individual labour (Ribeiro, 2004). Locke's contractualism is based on the possessive liberal matrix, in which life, property and freedom are inalienable goods for the individual, and the state has no limited power in the face of these rights.

Jean-Jacques Rousseau (1987), on the other hand, took a different view from his predecessors, in which the state of nature was characterized by happiness and balance. For him, the social contract is a form of association that aims to achieve the common good determined by the general will, which emanates from the sum of the wills of individuals. This is where the sovereign comes from, who will be the entity legitimized to enforce the conventions established by the social contract. In this sense, legislation will be a reflection of the general will, which will serve as a mechanism to ensure public freedom and the authority of governments.

In this way, a social pact emerges, based on the association of members with a view to defending the common interests of the participants, who will then have the freedom and equality of all. In this sense, the sovereign, however absolute he may be, is not allowed to act beyond the limits imposed by the general will or the established convention.

With these contractualist premises in place, which are historically aligned with modern liberal democracies, it is important to understand the legitimacy of the democratic pact made by the constituent power and the powers instituted through suffrage and other democratic rules for the composition of rulers today, especially in Portuguese-speaking African states, where pacts come to represent the general will and resemble a contract (Nascimento, 1988).

One of the aspects that characterizes the crisis of modern states, especially in the states discussed here, is the precarious relationship between the constituted powers and the citizens who have legitimate trust and expectation that the common interests established by the constituent will be realized by the public power chosen to enforce the pacts or public agreements set out in the Constitution.

However, it is notorious in the post-colonial period for the continuity of a state of political crisis, in which the representative entity is the main author of the ruptures in the social contract, imposed through constitutional guidelines, which weakens the rules of the democratic game, co-operating only to maintain the privileges or prerogatives of political agents.

In this context, political legitimacy is stolen and used symbolically to gain power. The rulers are not concerned with maintaining the stability of democracy in order to pursue the general interests of the people. It is also clear that there is a lack of popular participation in democratic procedures in order to scrutinize the government's actions. It can be assumed that the ideology of contracts in the constitutional mold only serves to mediate and enable the personal wills of the leaders.

'These governments also suffer from a continuing crisis of legitimacy on the part of the political authorities, whose policies are not aimed at the interests of the governed, but rather at the will of the hegemonic power elite. In this sense, trust with the people is broken and, in turn, they end up having no relevance in the political framework in a way that allows for a self-assessment of the government. This crisis of political legitimacy takes the form of a model of government in which the interests of the people are of concern to the government. And the way to maintain this crisis is to propagate an authoritarian government based on fear, in which citizens are repelled and afraid to express their dissatisfaction with the state.

7. YES OR NO TO JUDICIALIZATION AND JUDICIAL ACTIVISM IN LUSOPHONE AFRICA?

The judiciary can play an important role in reversing the current systemic picture poor governance in African countries, which are riddled with high levels of passive corruption, which in a way affects the realization of social rights, which are entirely dependent on the country's economy, which is captured by political power. And the state can only give what it has. Hence the need to understand the phenomenon of the judicialization of politics and activism, which may offer some solutions or may also undermine the democratic limits of the separation of powers.

In recent years, there has been a huge increase in judicialization in countries such as Brazil, Colombia and South Africa, where the judiciary has played an active role in making social rights effective, specifically the right to health. Judicialization is therefore understood to be acts that are generally decided and implemented by the political bodies of the Administration and end up being decided by the courts and judges in the last instance.

While activism consists of a range of creative and audacious interpretations of the Constitution by the judiciary in order to remedy the omissions and moratorium of the legislative power, in this sense, the higher courts begin to exercise atypical functions, creating or editing norms through hyper-extensive interpretations.

And with regard to the possibility of judicialization in these countries, it is worth mentioning that it is no easy task to conclusively answer the above question, whether it is up to Portuguese-speaking African countries to start thinking in this paradigmatic logic or whether they should remain tied to traditional structures, which in turn are ineffective in realizing basic social rights.

Judicialization has different contours, which vary from state to state. In some cases, judicialization has achieved positive effects, in the context of the realization of certain social rights, but on the other hand, there is intense criticism of the intrusion of the judiciary, which acts like a Messiah, interfering intensely in the actions of other sovereign bodies (Da Roda, 2020, p. 13-16).

South Africa is a good example of the contribution made by judicialization, which has massively achieved positive effects such as access to health and housing rights, in the sense that judges and courts have orders on governing bodies to provide health rights (Rosevear, 2018).

In Brazil, judicialization has given rise to different opinions. For some, judicialization is the emancipation of the judiciary, which is relinquishing its technical and specific role in order to enforce the Constitution in the citizens' sphere; for another group, judicialization is a violation of the democratic principle of separation of powers, which makes monocratic decisions possible. Another problem linked to judicialization in Brazil has to do with the inequalities increased by the judiciary in access to health, becoming a form of biopolitics, due to the budgetary burden placed on a minority of the population (BIEHL, 2016, p. 77-105). Interference in the public budget by management bodies has sacrificed the singular interest to the detriment of the collective interest.

Still in the Brazilian context, the number of health-related lawsuits increased by 130% between 2008 and 2017, with the total number of lawsuits growing by 50%. According to the Ministry of Health, in seven years there has been a 13-fold increase in its spending on lawsuits, reaching R\$1.6 billion in 2016. This amount, although small compared to the public budget for health, represents a substantial part of the amount available for discretionary allocation by the public authority, reaching levels sufficient to impact the policy of purchasing medicines, one of the main objects of lawsuits (CNJ, 2019).

According to the National Council of Justice, the judicialization of health is also a highly complex phenomenon. The scientific literature, for example, differs on who goes to court to demand health services and products (the poor or the rich?), on what they demand (medicines and services that are part of lists, protocols and contracts or not?) or on the effects of these lawsuits on general public and private health policy. In addition, the divergence even goes beyond the very normative assumptions of the conflict, i.e. what the parameters of justice should be and whose competence it is to decide.

Thus, there is a fear that courts and judges will not be able to exercise the functions of gods, assuming executive responsibility. In other words, the limits of the judiciary are limited to the act of judgement and the exercise of fiscal authority, and not to the implementation of public policies.

Returning to our central theme of judicialization in African states, we must first understand the maturity of the judiciary in the countries mentioned here, and whether the judiciary plays an effective role in the context of the rights crisis or they would become arbitrary messiahs, causing another institutional chaos perpetrated by the judiciary.

On the other hand, the issue of judicialization should not be dismissed out of hand, perhaps it would have a mitigating effect, at least in these countries, given that most of the fundamental rights crisis stems from the inertia of political bodies, i.e. the executive and parliament. In this context, it would be unreasonable for us to witness the sacrifice of basic constitutional values in the face of the inertia of African politics, based on the self-restraint of the judiciary, which is the post of judicialization (Cunha, 2015, p.195). Traditionally, the judiciary was purely and simply a technical function, obeying strict legality without political interventionism.

Dirley da Cunha Júnior emphasizes that the transformation of the state in the social context has inevitably led to it overcoming its traditional role of protection and repression, moving towards a libertarian paradigm of the watch night state. Bearing in mind that most of the constitutional texts of the states studied here adopted the French- inspired welfare model (CUNHA, 2015). In this context, the state assumes a commitment of responsibility in the realization of social rights, demanded by social justice. And when the state proves to be remiss in its commitment to social rights, it becomes legitimate for one of the state's sovereign bodies to live up to this responsibility, and in the context of the growing globalization of judicialization, it would be up to judges and courts to enforce social rights when there are factual and legal conditions for their realization.

For the most part, the judiciary in Portuguese-speaking African states is in agreement with harmful ideologies, inert towards the realization of well-being, allowing the greatest wave of attacks on the fundamental premises of modern constitutionalism, rooted in values such as human dignity, justice, equality and freedom. There is a proliferation of what we call the partisan politicization of the judiciary, i.e. the judiciary being subordinated to the ideologies of political parties.

8. CONSTITUTIONAL CONTROL SYSTEMS: A QUEST FOR INSTITUTIONAL IMPROVEMENT TO REALIZE FUNDAMENTAL RIGHTS

8.1 Cape Verde

The idea of starting with the Republic of Cape Verde is based on the fact that it is a country that has enjoyed a better democratic environment, as we emphasized at the end of the first chapter, with an alternation of power, freedom of expression and opinion among the population, accompanied by an effective judicial system, which influences the realization of fundamental rights.

With regard to constitutionality control, the past Constitution of Cape Verde stipulated the following: it is the responsibility of the Supreme Court of Justice, sitting in plenary session: to assess the constitutionality of norms and resolutions with normative or individual and concrete material content. It should be noted that Cape Verde's constitutional court at this time was not a court of specialized jurisdiction. In addition, the same body was responsible for examining and judging other common cases, also as the final appellate body and with original jurisdiction to judge persons who enjoy a privileged forum such as the president of the Republic, vice-president and other holders of sovereign office, which has been maintained to this day (Leitão, 2008, p. 58).

It should be made clear that the constitutionality model adopted in the 1992 Constitution is characterized by a mixed model, recognizing both diffuse and concentrated control. Finally, the 1992 constitutional text underwent a constitutional change, which brought great novelty: a specific court was created to judge constitutional matters, known as the Constitutional Court, and all the competence of the Supreme Court that assessed and judged constitutional cases came to be judged by the Constitutional Court, which has specialized competence. In this context, the nature of mixed control is maintained, i.e. diffuse and concentrated.

Cape Verde has stood out in the field of constitutional justice, being the country with a constitutional court that has judged the most cases related to the constitutionality of norms.

According to the Constitution, the President of the Republic, the President of the National Assembly, Members of Parliament, the Prime Minister,

the Attorney General and the Ombudsman have legal standing to request an abstract review of constitutionality. However, it is important to emphasize that there is a crucial issue to be raised, relating to the lack of a section of the population and other civil society actors with legitimacy to sue the court, unlike what happens in Mozambique, which legitimizes the number of 2,000 citizens as active parties to propose a concentrated control of constitutionality. This would prove effective in terms of the participation of the population, which often encounters procedural barriers to accessing the judicial system. Looking at the current scenario of democratic uncertainty in Africa, attention needs to be paid to the democratic instruments through which citizens can play a more active role in the defense of fundamental rights. The institutional crisis in Africa can only be reduced to the extent that citizens can exercise more political rights. It would be extremely important for the Cape Verdean legislature to be able to add to the list of active legitimized parties, as well as national associations.

8.2 Constitutionality control in Guinea-Bissau

According to Filipe Falcão (2005), Guné-Bissau's model of constitutionality review is a concentrated model, by incidental means, firstly when it is analyzed by the Supreme Court and its decisions have general binding force. Secondly, when exercised by the lower courts, in supervening matters (Oliveira, 2005, p. 76), as follows from article 126 which stipulates the following:

- Art. 126: 1. In cases before them, the courts may not apply rules that contravene the provisions of the Constitution or the principles enshrined therein.
2. The question of unconstitutionality can be raised of its own motion by the court, the Public Prosecutor's Office or any of the parties.
 3. Once the question of unconstitutionality has been admitted, the incident goes separately to the Supreme Court of Justice, which will decide in plenary.
 4. Decisions taken on matters of unconstitutionality by the plenary of the Supreme Court of Justice shall have general binding force and shall be published in the Official Bulletin.

The Guinean Constitution does not provide for a specialized court to hear and decide cases inherent to constitutional justice, and there is an accumulation of jurisdiction for common and constitutional cases, which are judged by the

Court of Justice. Furthermore, the same body currently acts as the final court of appeal for diffuse and common constitutional matters.

Although the Constitution does not provide for a Constitutional Court (Ferreira, 2008), for all intents and purposes, the Supreme Court fulfils this need, however, the constitutional text should be clear and exhaustive in relation to the competence of the Supreme Court in matters that concern it and more exhaustive on constitutionality control. Another aspect has to do with the active legitimized parties, which include a small number of bodies.

8.3 Constitutionality control in the Saint Tome and Principe system

The Constitution of São Tome and Principe is one of the texts that has an exceptional value compared to the other Constitutions of the Portuguese-speaking African countries. It was improved with the constitutional revision (amendment) of 2003, in which it introduced a system of constitutionality review by a specialized court, in which case the Constitutional Court now has specific jurisdiction to assess and rule on constitutional matters in the context of a successive abstract control, under the terms of article 147 (Couto, 2003, p. 15-23).

In the past, the Supreme Court of Justice had jurisdiction to analyses and declare the unconstitutionality of a normative act that was incompatible with the Constitution. With the new constitutional revision, jurisdiction was transferred to the most recent body, which has a model of judicial review within the scope of the judiciary, which reviews constitutional matters in a specialized way, thus marking a huge advance in the field of constitutional justice. And it seems to us to be a more developed model because it reduces the overload on the higher courts, making them experts in matters of constitutional justice, which has a positive impact on procedural speed. On the other hand, this Constitution allows for preventive control.

The following bodies have legal standing to request the unconstitutionality of a legislative act: The President of the Republic, the President of the Assembly of the Republic; one tenth of the Members of the National Assembly; the Regional Legislative Assembly and the President of the

Regional Government of Príncipe (Article 147(2)(a), (b), (c), (d), (f) of the CRDSTP-2003).

8.4 Mozambican model of Constitutional control

Mozambique is a peculiar case in terms of its constitutionality control system, unlike other Portuguese-speaking countries. The organic design of the Mozambican constitutional control system is inspired by France and, in turn, admits concentrated control, diffuse control and control by omission and preventive control, the latter raised by the President of the Republic. And the body with the power to supervise is called the Constitutional Council. Therefore, the Constitution of the Republic of Mozambique fails to distinguish the nature of these bodies, whether they are political or judicial, but for the overwhelming majority of scholars, this body is political in nature, exercising a jurisdictional function, and it is not a body that makes up the judiciary and much less the legislature (Clève, 2000), but it is a political body endowed with jurisdiction to exclusively exercise control of the Constitution.

The Mozambican system is one of the only ones that admits two thousand citizens as active legitimates to sue the Constitutional Council (CISTAC, 2013).

Under the terms of Article 145 of the CRM, they can ask the Constitutional Council to declare laws unconstitutional or normative acts of state bodies illegal:

- a) the President of the Republic;
- b) the President of the Assembly of the Republic;
- c) at least one third of the deputies of the Assembly of the Republic;
- d) the Prime Minister;
- e) the Attorney General of the Republic;
- f) the Ombudsman;
- g) two thousand citizens.

Although the Constitution provides for two thousand citizens to bring a concentrated constitutionality action, this instrument has been difficult to realize in practice. Gathering two thousand signatures for a society with digital and educational deficits turns out to be a huge obstacle. And this affects issues of

access to justice, for example, when you want to file a concentrated action to challenge the constitutionality of a normative act that violates diffuse rights, which in a way undermines the realization of fundamental rights.

In addition to the above-mentioned jurisdiction, this court also acts as the Electoral Court of Justice, and is responsible for hearing all disputed matters of questions elections. And one of the major problems with this body is that its decisions cannot be appealed, according to article 248 of the CRM (Da Roda, 2020). We see this as a violation of the values of justice and the rule of law. This rule lacks procedural justification, since appeals play a crucial role in the effectiveness of the adversarial process and due process of law, as weapons of democratic balance. Appeals are important even in matters of material and procedural errors. This court is not a God so it can't make errors in judgement.

In electoral matters, especially in disputes with ruling parties, it can be empirically deduced that most of the body's decisions are in favor of the party in power. This shows that it is a biased body that works in favor of the current government.

9. FINAL CONSIDERATIONS

The progress of constitutionalism, the rule of law, democracy, good governance and development enjoy a symbiotic relationship inherent in the value and respect given to the legal Constitution. Therefore, there is a need to conceive of the Constitution as a normative act endowed with normative force, which binds the holders of public powers and citizens. The lack of this constitutional commitment will allow most of the African continent to continue to be plunged into dictatorship, nepotism, successive coups d'état, electoral fraud, persecution and a lack of democratic alternation.

In order to mitigate these problems, constitutional courts must play an active role as the ultimate guardian of the Constitution, and must act fairly and impartially when provoked. In these circumstances, judicial activism and judicialization will be necessary to curb abuses of power perpetrated by political power holders.

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