

## **Will the Municipal elections be annulled following the partial annulment of Legislative elections in the Northwest and Southwest regions?**

### **The impact of rulings of the Constitutional Council on electoral litigation before Administrative Courts, in the context of twin elections**

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Following post-electoral litigation on the legislative elections of February 9, 2020, the Constitutional Council, on February 25 2020, rendered a historic ruling annulling the election in eleven (11) constituencies, namely ten (10) in the Northwest (Bui South, Bui Centre, Bui West, Menchum North, Menchum South, Mezam South, Mezam Centre, Mezam North Momo East, and Momo West) and one (01) in the Southwest (Lebialem). These constituencies represent 13 out of the 35 MP seats in these two regions, namely 12 out of 20 for the Northwest, and 01 out of 15 for the Southwest. It should be recalled that nationwide, a total of 40 petitions had been filed requesting a total or partial cancellation, or recount of the votes. The other 29 were rejected either on procedural grounds, or on the merits.

While this is not the first time that a partial annulment is ordered in the context of legislative elections, **the ruling by the Constitutional Council takes on particular significance since the constituencies concerned are in the Northwest and Southwest regions plagued, by a violent and bloody crisis for over three years.** Through these annulments, the Constitutional Council implicitly acknowledges the difficulty of holding credible elections amidst a violent security crisis, and lends credence to the view frequently expressed by Cameroonian stakeholders, that the said elections should only have proceeded in these regions, when security conditions would permit their taking place.

### **Conceptual framework on the effect of rulings of the Constitutional Council, on Administrative Courts hearing electoral petitions**

From a strictly legal perspective, one must question the fate of municipal elections held in these same regions, given the nexus between the two polls. In particular, it should be noted that the 9 February 2020 election was a twin election, in which voters cast their legislative and municipal ballots simultaneously. Is it then

reasonable to expect that the annulment by the Constitutional Council of *legislative* elections in those constituencies will influence the course and the outcome of the litigation underway on *municipal* elections before Administrative courts in these regions?

Responding to this question requires first of all, apprehending the broader issue of the legal effect of the Constitutional Council's decisions, which at first glance, appears to be resolved by the laws in force, notably the Constitution. Section 50 (1) of the Constitution provides in this regard: "Rulings of the Constitutional Council shall not be subject to appeal. **They shall be binding on all public, administrative, military and judicial authorities**, as well as on all natural persons and corporate bodies." Section 15 (4) of Law No. 2004/004 of April 21, 2004 on the organization and functioning of the Constitutional Council further states with respect to its decisions: "**They shall be enforced forthwith**". In the words of Professor Alain Didier OLINGA, these decisions are "**final, irrevocable and sacrosanct.**"

### **What authority do the Constitutional Council's rulings have?**

While the above-cited provisions may seem categorical, there remains a practical problem with applying in specific cases, the notion that the Constitutional Council's rulings constitute "*res judicata*" (an already-decided legal matter). In law, the concept of *res judicata* means a legal dispute on which there has been a judicial decision having the force of law, binding on the parties and on all courts, such that another judicial body cannot decide the same "subject matter" in another case. In particular, the nature and scope of authority of the Constitutional Council's rulings over decisions of Courts of the Judicial Branch, is open to debate. According to some scholars, the force of *res judicata* (that quality which exhausts any further legal ruling) should be afforded to both the Constitutional Council's legal grounds or reasoning, and its operative ruling or order. They further posit that section 50 (1) of the Constitution **lays down the principle of *erga omnes* authority, that is, authority applicable vis-à-vis all others.**

Other scholars argue however, that the *res judicata* status can only be attached to the operative part or order in the Constitutional Council's decision (and not to the legal reasoning or basis for it) and more so, that it only applies to the actual parties to the proceedings before it. For this second doctrinal viewpoint, there is therefore no absolute obligation on Courts of the Judiciary to follow the decisions of the Constitutional Council, as the latter only constitute a **source of voluntary inspiration** for the said judicial authorities. This is why scholars who adhere to this view, refer to the authority of the decisions of the Constitutional Council over judicial authorities as amounting to "**interpretative authority**" (M. Disant) or as "**only persuasive authority**" (Jacques Arrighi de Casanova).

## **Less of an authority, and more an influence on Courts of the judiciary**

Two propositions are advanced to support this latter view of the Constitutional Council's decisions. First, the Constitutional Council's decisions are not directed at judicial authorities; the latter in any event are not institutions under its hierarchical authority. Cameroon's Constitutional Council, similar to its peer institution in France and in most French-speaking African States, is not part of the formal *hierarchy of Courts of the Judiciary*. This contrasts with what obtains in Italy and Germany, where the Constitutional Court is in effect the highest *judicial* body. Secondly, and contrary to the practice in other States, there is in Cameroon no mechanism of judicial review to ensure compliance by courts of the judiciary with the Constitutional Council's decisions. Examples of such mechanisms elsewhere are the **constitutional appeal in Germany** and the **amparo in Spain**, which allow litigants to lodge appeals to their respective Constitutional Courts, against a lower court's decision that does not follow their interpretation.

In these circumstances, the authority of its decisions over judicial authorities **can only be achieved through the will of the latter, who accept to abide by the rulings of the Constitutional Council**. It is therefore ultimately up to these courts of the Judiciary themselves, to give effect to the Constitutional Council's authority. This can only take place through a constructive dialogue between the Constitutional Council and courts of the Judiciary, in which the latter recognize the former's role as the entity entrusted with interpretation of the Constitution.

## **Constructive dialogue between the Constitutional Council and Administrative Courts as a mechanism to ensure the authority of the former's decisions over the latter, in electoral petitions**

Comparatively, in France where there is more extensive jurisprudence by the Constitutional Council than in Cameroon, two trends are discernible in this regard. On the one hand, Administrative Courts do refer to the case law of the Constitutional Council either explicitly or implicitly, while other courts of the Judiciary also progressively do the same. This convergence is however jeopardized by the scope for autonomous decisions which these courts enjoy, which leads them, in some instances, to depart from the jurisprudence of the Constitutional Council.

## **Judicial Precedent in Cameroon**

A review of electoral petitions in Cameroon demonstrates that the Constitutional Council and the Administrative Court (tasked respectively with handling electoral litigation arising from different categories of elections) have engaged in this exchange. In fact, since 2002 **Cameroonian Administrative Judges have given**

**full effect to the authority of the decisions of the Constitutional Council** through citing them expressly, and not only by indirect reference.

### **Electoral litigation arising from the 2002 municipal elections**

Illustratively, in a decision on an electoral petition arising from the 2002 municipal elections, the Administrative Judge based a decision (to annul the election on grounds of the ineligibility of a candidate to contest the said elections) on a decision of the Supreme Court (then sitting in lieu of the Constitutional Council) which had earlier found the same candidate ineligible on similar grounds. Specifically, the Administrative Judge held:

“ That the Constitutional Council, in its Judgement No. 31/CE of 17 July 2002, found that Mr. Moussa Aboubakary, CPDM candidate in the Benoue-West constituency in the North province for legislative elections of 30 May 2002 had been convicted several times, should not have been allowed to contest this election;

That the Constitutional Council subsequently annulled the legislative elections in the Benoue-West constituency; *and*

That under the provisions of Section 50 of the 18 January 1996 Constitution, **the decisions of the Constitutional Council are binding upon the State authorities and the Courts, including of course the Administrative Bench of the Supreme Court.**” (Judgment No. 83 / 01-02 of September 03, 2002, National President UNDP, Rural Council of Ngong, Administrative bench of the Supreme Court.

This same reasoning was followed by the Administrative Bench, in Judgment No. 34 / 01-02 of 03 Sep 2002, CPDM, Eseka Council (annulment of municipal elections results in the Eseka Council, following the annulment of legislative elections in the Benoue-West constituency on grounds of ineligibility of the candidate declared elected (Judgment No. 31/CE of the 17<sup>th</sup> July 2002)).

Even more noteworthy, is Judgment No. 107/CE / 01-02 of 5<sup>th</sup> September 2002, Prince Ekale Mukete (CPDM), Kumba Urban Council, which is a **judicial precedent arising from the English-speaking regions**. In that case, in providing the reasoning for the annulment of municipal election results in the Kumba Urban Council, **the Administrative judge referred to Judgment No. 57/EC of the 17<sup>th</sup> July 2002, in which the Constitutional Council annulled the legislative election in the Kumba Central constituency** (which includes the above-mentioned Municipal council), on grounds of the same acts of violence committed during the elections. The Administrative judge stated as follows: **“following the twinned legislative and council elections of the 30<sup>th</sup> June**

2002, the Constitutional Council, whose rulings are binding on all judicial authorities by virtue of section 50 of the Constitution of the 18<sup>th</sup> January 1996 of the Republic of Cameroon, had, by judgment No. 57/CE of the 17<sup>th</sup> July 2002 and for the same reasons hereinabove stated, cancelled the legislative election in Kumba Central.”

### **Electoral litigation arising from the 2007 municipal elections**

The deference to decisions of the Constitutional Council, by Administrative Courts adjudicating electoral petitions, was maintained during litigation arising from the twin (legislative and municipal) elections of 2007. In Judgment No. 289/2006-2007/EC of August 29, 2007, Kwemo Pierre v. Bafang Council, the Administrative judge held:

“ [That the irregularities which were the object of the electoral petition] **are consistent with the findings of the Supreme Court, sitting in lieu of the Constitutional Council, in its Judgment No. 119/CEL of August 07, 2007, in which it annulled the legislative election in the Upper-Nkam constituency;**

That in effect Section 15 (2) and (3) of Law No. 2004/004 of 21 April 2004 on the organization and functioning of the Constitutional Council provides: “the rulings of the Constitutional Council [...] are binding on all public, administrative, military and judicial authorities, as well as on natural persons and corporate bodies”.

In several other cases, the Administrative Judge held that “where the **Constitutional Council invalidates a legislative election on account of irregularities found in the council area, its findings necessarily extend to elections to vote its municipal councillors**” (Judgments Nos. 191/06-07/CE, 283/06-07/CE, 288/06-07/CE and 289/06-07/CE of August 29, 2007).

This shows that a spontaneous exchange, more conceptual than organic in form, is gradually taking shape between the Constitutional Council and the Administrative Judge. Some scholars, such as Professor Jean-Claude Tcheuwa take a dim view of how this exchange has been framed by Administrative Courts. He criticizes what he terms a “copy and paste” action by Administrative Courts, who apply rulings of the Constitutional Council arising from petitions on legislative elections, to different electoral disputes arising from municipal elections, whereas the electoral stakes and voter behaviour in the two sets of elections are not necessarily identical. See J-C. Tcheuwa, “*Les principes directeurs du contentieux électoral camerounais : à propos de “l’influence significative sur le résultat du scrutin” dans sa mise en œuvre à l’occasion des élections législatives et municipales du 22 juillet 2007*», *Revue française de droit constitutionnel*, No. 86, 2011, 1-29, 25-27).

It is true that the stakes are different in legislative and municipal elections. It is also true that even when held simultaneously, voters cast their votes in each separately, and it is possible for a fraud to affect one election but not the other. **Yet, it is undeniable that twin elections take place under the same circumstances.** Voters cast their votes simultaneously for the two elections and the environment is the same, **which may serve as the rationale for adjudicating identically on both elections.** Furthermore, the existence of a *ground for annulment that is pertinent to both elections*, provides cogent reasons for this exchange between the arbiters of disputes in legislative and municipal elections, respectively.

### **The Administrative Judge and election petitions arising from the municipal elections of February 9, 2020**

Should we expect that Administrative Courts, before which have been filed petitions to annul the municipal elections in several constituencies, will take a similar approach to their predecessors in 2002 and 2007? As noted above, it is possible that petitions filed in respect of simultaneously held legislative and municipal elections may obtain different judicial outcomes, although they arise from coterminous (or the same) geographic areas. **In this regard it should be noted that legislative election petitions are heard by a single, central arbiter (the Constitutional Council) whereas municipal election petitions are heard by the ten (10) Administrative Courts which sit at the level of each Region.** It is therefore not certain that the petitioners will have the same teams of legal advisers and lawyers in both sets of litigation. It is also possible that a petition filed in respect of the municipal elections could be dismissed for procedural reasons, thus precluding its being ruled upon on the merits.

However, in addition to the precarious security conditions in which the twin elections took place, in our view **two factors lean in favour of alignment by Administrative Courts with the position of the Constitutional Council**, an approach which would consolidate further the above constructive exchange between both sets of electoral adjudicators, in place since 2002.

### **Existence of a ground for annulment applicable to both elections**

The first factor is the reason for the annulment by the Constitutional Council, which was **the grouping of normally disparate polling stations into consolidated locations.** In this case, the Constitutional Council decided that **this grouping of the polling stations made their location difficult and thus adversely affected voters' ability to exercise the right to vote.** Given the twin (simultaneous) nature of these elections, the polling locations created served for both elections. If having grouped them constituted an irregularity which tainted

the integrity of the legislative ballot, there is no reason why the same should not hold for the municipal ballot. In other words, **the existence of this ground for annulment that objectively applies to both elections, can constitute a valid reason for aligning the position of the Administrative Judge with that of the Constitutional Council.**

It is possible that another interpretation be given to the grouping of polling stations in the same location. At the Constitutional Council's hearings, the representative of Elections Cameroon (ELECAM) stated that the polling stations had not been "clustered" but had been "created" by the Director General of Elections to whom the law grants this power, which is exercised at his discretion. An Administrative Court may decide to follow this interpretation to uphold the election of municipal councillors. However, it is hoped that **it aligns with the interpretation given by the Constitutional Council and sanctions the obstruction of the right to vote of the voters by this method used by the Director General of Elections.**

**The hierarchical superiority of the Court that established judicial precedents in this area**

The second factor relates to the **hierarchy of Courts of the Judiciary**, given that when the above-mentioned exchange between the Constitutional Council and the Administrative Judge began, Administrative Courts per Region had not yet been set up, although already provided for in the 1996 Constitution. Hence, **all matters within their jurisdiction were handled by the Supreme Court**, namely the Administrative Bench at the first instance, and the Full Bench on appeal. The written, Civil Law legal tradition on which Cameroonian administrative law is based, does not enshrine the principle of the *binding precedent* which obtains under the Common Law system. That notwithstanding, the jurisprudence of litigation in *municipal* elections deferring to the Constitutional Council's observations on simultaneous-held *legislative* elections was established by the Supreme Court (Administrative Bench). **Given the Supreme Court's superiority, Administrative Courts which presently hear municipal election petitions, would be expected to follow the deferential exchange established by the former.**

In conclusion therefore, keeping aside the possibility of procedural defects which could result in the inadmissibility of some petitions, one could advance that in the current state of Cameroonian electoral law, **the municipal elections will be annulled for Councils of the Northwest and Southwest regions, that correspond to those in which legislative elections were annulled by the Constitutional Council.**

Under section 194 (3) of Cameroon's Electoral Code, in municipal elections litigation, the Administrative Court has a period of forty (40) days from the filing of petitions to render its ruling. The handing down of those rulings will offer an opportunity to determine if those Courts align themselves with or differ from the rulings recently delivered by the Constitutional Council. In the latter case, this would mark a break with the approach of the Supreme Court, which preceded them in this function.

In our assessment, the influence of the Constitutional Council's decisions on Courts of the Judiciary in electoral matters, for which the above constructive exchange between the two organs lays the foundation, is highly laudable. It **provides legal certainty, thereby avoiding the legal uncertainty which would result from discordant rulings by different judges on the same facts.** Above all, it allows the Constitutional Council, a central body that hears petitions from the highest-level elections, to **ensure the unification of electoral law,** through its rulings becoming a guiding framework for other judicial bodies to follow.

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