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2019 GENERAL ELECTIONS

MOZAMBIQUE POLITICAL PROCESS BULLETIN

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Commonwealth says elections not credible, peaceful or transparent

"Given the shadow cast over these elections by the incidents of pre-election violence and the irregularities on polling day, we were unable to conclude that all aspects of the process were credible, peaceful and transparent," said the Commonwealth Election Observer Group in its report issued on 7 May, six months after the 15 October 2019 election. <https://bit.ly/MozGECComm>

Commonwealth observer reports are normally anodyne, but this one was unusually strong and critical, in part because Commonwealth and other international observers "were witness to ... intimidation and serious incidents of electoral malpractice." Commonwealth "observers witnessed persons with ballot papers outside of polling stations in the Ilha de Moçambique" and another international mission "witnessed the smuggling into polling stations of extra ballot papers" in Nampula.

Inflated registration, particularly in Gaza, was criticised and the Commonwealth observers call for more time and transparency to check the register and for "an independent audit" of the register.

Failure to register civil society observers but registering "observers unknown to the national observer community" was cited. "Commonwealth observers in Zambézia noted the presence of citizen observers in the rural voting districts of Namacurra and Nicoadala with accreditation credentials that appeared to be printed copies of official CNE credentials and cases where no organisation at all was listed on the observer credentials. These observers were reluctant to disclose their host organisation to Commonwealth observers. The Group observed a number of unnamed observer groups securing accreditation

Our final issues

This is the penultimate issue of the elections newsletter, which has been published since February 2018 and reported on the 2018 municipal elections and the 2019 general elections. We would like to especially thank our correspondents and our team in Maputo. For the 2019 elections we had 463 correspondents, of whom 235 worked for community radios; all districts in Mozambique were covered by at least two correspondents. At the peak election period, our editorial team in Maputo had 10 people, who sometimes worked late into the night to allow us to publish prompt and accurate information.

Our final issue, to be published later in June, will be our traditional report *Who is Who in the Government*, with brief biographies of ministers, key parliamentary figures, and governors and secretaries of state.

All issues of the Bulletin and important documents are posted on the web:

2019 English <http://bit.ly/GenEI2019>

2019 Portuguese and key documents

<https://www.cipeleicoes.org/>

2018 English <http://bit.ly/Loc2018>

2018 Portuguese <http://bit.ly/Autar2018>

2013-14 English and Portuguese

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Detailed elections results 1999-2014

<http://bit.ly/MozEIData>

by the CPEs in the days [just before] the elections." The Commonwealth cites national observer reports that "unknown citizen observers often voted more than once, gave instructions to polling station staff and attempted to slow down the process."

Some of its harshest criticism was for the electoral management bodies which must be reformed to ensure "that decisions are taken in the interest of the electorate and of the country, and not of one or two political parties only." The observers recognise that an electoral system governed by a whole series of constantly changing pieces of legislation "responds to the outcome of political dialogue between the main parties, Renamo and Frelimo, rather than taking a holistic review of the electoral framework." The electoral system does not create a "level playing field"

Also criticised is the lack of clarity in the law over the hierarchy in electoral bodies. CNE and STAE give the appearance of "two separate management bodies" and "STAE appeared to operate autonomously."

"The central body in Maputo [CNE] has little control over the decentralised commissions". When the CNE tried to press provincial elections commission to register observers, "it appeared instructions from the central structure were unimplemented." Governance arrangements between CNE and STAE must be reviewed, it says.

There is a call for "implementation of the existing prohibition on the redirecting of public assets for the support of the incumbent." Political parties should following the rules. "The Commonwealth Observer Group witnessed

government vehicles transporting Frelimo supporters in Nampula province."

The counting process should be simplified, and "publication of original copies of polling station results for public verification on the CNE website would increase transparency and confidence."

The CNE must give more information to civil society. It must engage with civil society "during the electoral process and provide it with access to information." The CNE should "provide public lists of accredited [observer] organisations to lend transparency to the accreditation process."

CNE in limbo

The term of National Elections Commission (CNE) members expired on 30 April, but parliament did nothing to appoint a new CNE, so the members remain in office.

By law, the term is 6 years, but due to a Renamo boycott, three groups started at different times and thus ended at different times. Frelimo and MDM members and their allied civil society members took office in May 2013, while Renamo and its allied civil society members took office in March and April 2014. In July 2019 parliament extended the mandate of all members to 30 April 2020.

The law states that the members of the CNE only cease functions when new members take office. Parliament has not even scheduled a date to discuss the issue in parliament, so the present members remain in post.

The CNE has 17 members: 5 Frelimo, 4 Renamo, 1 MDM and 7 civil society.

3 changes that could make a difference

Since at least 2009, the Constitutional Council has been calling for parliament to approve a unified electoral code to replace the current plethora of constantly changing and contradictory electoral laws. The Commonwealth Observer Group noted that it "did not receive any complaints from either Frelimo or Renamo" about the "heavily multiparty composition of CNE" and STAE that is "unique" to Mozambique. "It appeared that it had provided a satisfactory way of running elections for both parties." There seems no interest in moving toward what the Commonwealth called an electoral system working "in the interest of the electorate and of the country."

There seems no serious pressure from civil society, political parties, or the international community for the major project of drafting an electoral code. Without that pressure, the ruling party Frelimo will not give up any of the advantages that produced its 2019 landslide; it needs to win again in 2024 to be in power when gas revenues begin to flow.

Nevertheless, the ruling party Frelimo faces unprecedented criticism, and for the first time there is widespread international belief that the 2019 election was not free and fair, and that misconduct

was egregious and excessive. It is possible that a mix of external and civil society pressure combined with the realisation that this election made Mozambique look bad could create a small window of opportunity.

In light of that, we propose three changes to electoral procedures and laws which would make the electoral process somewhat less unequal and remove a few of the most gross blots on the electoral process. The first two do not require changes in the law, and can be done with agreement of the main parties. The third is a

change in the law which could be done without a complete law redrafting. They are:

Choosing independent members of the CNE. Seven CNE members come from civil society organisations (CSOs) chosen by parliament. The law does not set a system, so political parties choose CSO members from their own parties. For choosing the new CNE, which should be done soon, we suggest the system should be more open and reflect the law which says CNE members do not represent political parties. This could be done under the present law.

Transparency. Since 1994, the CNE has opted for obsessive secrecy not normal in electoral democracies. Electoral laws do not specify either secrecy or transparency, and making the electoral system more open would increase trust.

Stop the inclusion of fraudulent results. Under Renamo pressure, the parties agreed an electoral court system which could intervene to redress misconduct and errors by election commissions, STAEs, and polling stations. But it retained criminal penalties for individuals, which unexpectedly has been used to block interventions by electoral tribunals. This led to the absurd situation that if an electoral fraud is the result of a crime, then the fraudulent results stands and cannot be changed. Small changes to the law governing electoral tribunals would correct this.

Civil society members to be non-partisan

Members of the National Elections Commission (CNE) "do not represent the public or private institutions or political or social institutions they come from, and defend the national interest", says the electoral law.

But in the politicised Mozambican system, parties always nominated CNE members in proportion to seats in parliament, and they always represented party interests. For the 2008-9 elections, parliament (AR) agreed a dramatic change - a majority of CNE members, including the chair (presidente) were nominated by Civil Society Organisations (CSO) to try to force some independence and neutrality. But from 2013 CSO members were cut back to a minority. Furthermore, the choice of CSO members was done by parliament it was agreed unofficially that choices would be made by parties, in proportion to seats in parliament. This gave Frelimo a majority, and in 2018-9 this was used blatantly in party interests, such as approving inflated registration in Gaza.

But this agreement between Frelimo and Renamo to select party aligned CSO members is not specified in the electoral law and clearly goes against the spirit of the law. Within the existing law,

it is possible to return to a system of eminent, non-party CSO members of the CNE.

Under the present law, there are 10 party members (5 Frelimo, 4 Renamo, 1 MDM) and 7 CSO. The AR nominates an ad hoc commission which during 30 days invites proposals from CSOs for the 7 CSO seats. The ad hoc commission then produces a short list of 12-16 and parliament chooses the 7. The law sets no other rules.

If Frelimo and Renamo were willing, a few changes could transform the CNE. And it is important to do it now, because even with the current partisan majority, no single party would have a majority. Equally importantly, a less partisan CNE could participate in revising the electoral laws.

We suggest:

- The ad hoc commission should be equal - one each from Frelimo, Renamo, and MDM (or two each, but keep it small).
- The ad hoc commission should set some basic criteria: no CSO candidate can have held a party post in the past five years, candidates should have university degrees (education is now widespread and provincial CSO now employ university graduates), and they should have some management experience.
- There should be public hearings, in which the commission and the public can question the candidates, and these should be broadcast on the radio and Facebook.
- Negative voting should be used to create the 12-16 person shortlist. In rotation, the ad hoc commission members would veto people to reduce the list. Obviously, each party would veto people aligned to other political parties. The remaining group would be more genuinely neutral and representing civil society.

All of this is allowed under the present law.

Provincial, district and city election commissions are chosen in a similar way under the present law, but with a civil society majority (3 Frelimo, 2 Renamo, 1 MDM and 9 civil society). The CSO members are chosen by the level above, so the CNE chooses provincial election commission CSO members and the provincial elections commission chooses for district and city.

The same procedure could be used at province, district and city. A 3-member commission, public hearings using community radio and Facebook, and negative voting to allow those with known political affiliations to be excluded.

Provincial and district elections commissions with Frelimo majorities were responsible for failing to accredit thousands of observers and for allowing significant misconduct in registration, polling, and counting. Does Frelimo believe it can only win in 2024 if it retains such power? Or is it confident enough to allow a non-partisan civil society majority?

Transparency to restore trust

From the first election in 1994 there has been an obsessive secrecy in the electoral system that is not allowed in other electoral democracies. At first, it was to allow Frelimo and Renamo to negotiate and reach secret deals in the post peace accord period when there were high levels of distrust, and the first election commission presidents pushed for consensus to keep both sides on board. The increasing number of Renamo members on elections commissions and embedded in STAE and more recently polling station teams reflected the naïve Renamo view that the more people it had watching, the better it could control Frelimo. Secrecy also allowed Renamo to use threats and filibuster to force concessions from Frelimo. But by 2018-19 elections, the position was reversed. By taking control of the naming of civil society members, Frelimo gained a majority on election commissions at all levels, and secrecy meant that the public and press did not realise that the era of consensus had passed, and all decisions were by vote and Frelimo majority.

Lack of transparency was a particular problem in 2018 and 2019, with small and large decisions taken in secret and neither announced nor explained; vote tabulation was largely secret. In elections all over the world, websites are frequently updated before, during and after the election. STAE and CNE have a website which they hardly use.

The culture of secrecy even applies to election results. Without noting that it had done so and without explanation, when the CNE announced its results on 27 October 2019 it excluded 144,918 votes. The Conselho Constitucional (Constitutional Council, CC) twice changed its results in secret, without ever saying changes had been made.

STAE compiles a complete data base of individual polling station results, called the "provisional count". which was partly posted on its website in 2018. In Alto Molocue and Monapo the official results gave victory to Frelimo but the STAE provisional count showed Renamo had won. STAE responded by keeping its data secret in 2019. The Commonwealth Observer Group specifically said this data should be made public.

The CNE refused to explain decisions about allocation of funds, places on the ballot paper, registration targets and many others. The inability to check or audit the obviously inflated Gaza registration figures was noted by independent media and international observers. CNE secrecy increases with each election, as does the belief that secrecy is used to cloak misconduct and incompetence.

Increased openness and transparency is essential to create trust, prevent misconduct, and rapidly correct honest mistakes. The law does not require secrecy nor prevent transparency. Openness can be done now, without changing the law. The CNE has the power to change its own working practices. But it requires Renamo to understand that, in recent elections, its defeat was partly due to secrecy. And it requires Frelimo to want to say that it does not need misconduct cloaked in secrecy to win in 2024.

Unbelievable: **Fraudulent results can't be changed if they are crimes**

If an electoral fraud in a polling station is the result of an electoral crime, the case may be tried and the perpetrators of the offence sanctioned, but the results of that polling station are not changed. The fraudulent result remains valid. This totally incomprehensible situation arises from the dual jurisdiction of electoral conflicts and the way it interpreted by the courts.

A special electoral court system was created to deal urgently with electoral issues during the electoral period. But this has not worked as expected, because the electoral law differentiates between administrative irregularities and electoral crimes or offenses. Administrative irregularities are acts or omissions by electoral bodies that damage the interests of the parties or voters. A special system of electoral jurisdiction has been introduced to judge administrative matters; parties or voters must submit their appeal to the electoral count. Administrative irregularities are judged quickly to accompany the electoral process, and the electoral courts can order action to be taken by electoral commissions.

But the law also specifies electoral offences which are crimes and follow the normal criminal procedure, with the prosecution undertaken by the Public Prosecutor's Office in criminal sections of ordinary courts. With the slow pace of Mozambican justice, in many cases the alleged offenders are only tried after the electoral cycle and without effect on the election results.

The problem is there is often an overlap, and thus there is a lack of clarity in the law about what is an electoral offence or crime and what is an administrative act or omission that damages the interest of the contestants. For example, if a polling station results sheet (edital) is falsified and then approved at the polling station, the approval is an administrative act that can be challenged before the electoral court, but the falsification is a criminal matter and must be submitted to the criminal

section of the court for investigation, prosecution and criminal liability of those indicted.

If the electoral court treats it as an administrative issue, it can order a recount of votes and correction of results. But if the case is treated only as an electoral crime, even if the falsification of results is proven and the perpetrator is tried and convicted, the falsified results at the polling station remain valid and are included in the final election results.

The Supreme Court's spokesperson, Judge Pedro Nhatitima, told journalists on 29 October 2019 that the district courts in Zambézia proceeded correctly in rejecting complaints about ballot box stuffing that were submitted to electoral courts as contentious appeals because ballot box stuffing is an "electoral offence and should have been treated as criminal proceedings". (<http://bit.ly/Nhatitima>)

In other words, electoral courts can only admit petitions from parties and voters that do not deal with crimes. Electoral offences, such as falsification of electoral results or ballot box stuffing, must be referred to the ordinary courts as criminal cases.

Nhatitima admitted the law is unclear to many people involved in the process, including opposition parties and courts. "In Zambezia Province there seems to have been some confusion between electoral offences and administrative complaints. There are some crimes, especially multiple voting, but complaints were submitted to electoral counts as administrative. The courts did not admit them; these were crimes and should have been treated as criminal proceedings, but the complaints were introduced as administrative appeals. Petitions to electoral tribunals relate to administrative acts performed by the polling station during voting and tabulation. Only those acts can be challenged in an electoral tribunal; everything else is criminal", said Nhatitima.

Few people know when something is an administrative irregularity which can be challenged before the electoral courts, and when the administrative decision results from an electoral offence and therefore criminal proceedings should be requested against those who have committed it.

This confusion means that the most serious irregularities involving fraud are not corrected. If the results have been falsified and this is proven in court, the results have already been included in the final count and are not annulled. The electoral courts can intervene only where there is no crime, according to Judge Nhatitima's explanation. Thus the dual jurisdiction of electoral conflicts hinders the realization of electoral justice and benefits those who practice fraud.

The most glaring case in the 2019 elections is the manipulation of voter registration in Gaza Province, where the Provincial Election Commission (CPE) irregularly added more than

300,000 voters to the voter register, thus inflating the total number of voters registered to vote in this province. The fraudulent increase in voters benefited Frelimo, which elected 8 more MPs in that province. Renamo appealed to the Constitutional Council (CC) to challenge the National Electoral Commission (CNE) decision approving the national voter registration list, alleging inflation of voter numbers in Gaza. This was an electoral appeal to an electoral court. The Constitutional Council rejected Renamo's appeal without considering the merits of the case, arguing that Renamo should have challenged the results of the Gaza voter registration before the judicial courts of that province which serve as the local electoral jurisdiction (see Judgment No 6/CC/2019 of 9 July).

But against the same act, Renamo referred a complaint to the criminal court. The Public Prosecutor's Office (PGR) confirmed in a letter from the IPC that a complaint about the crime of falsification of electoral documents submitted by Renamo was in progress. To date the case has not been resolved, however the members of parliament chosen by Gaza's ghost voters have taken office and are already legislating. Even if the case brought by Renamo as an electoral offence is tried by the court and the people involved are tried and convicted, the elections will never be annulled in that province. The Members of Parliament will continue to exercise their mandates until the end of the parliamentary term, so the fraudsters win.

Fraud pays. It is clearly untenable and unfair for an election to be influenced by fraud and for people who have committed fraud to be sanctioned, but the fraudulent election results remain untouchable. Ways must be found to correct the impact of electoral fraud that may favour election results, as this situation generates electoral conflict and tarnishes the credibility of the election.

Our proposal is that in cases where electoral offences may have been committed, the electoral courts must have the responsibility both to refer the case to the Public Prosecutor's Office for prosecution and also to take the decision to alter the fraudulent results.

Electoral courts already regulate the electoral process. But in the event of a complaint of electoral crime, the courts must have the power to order the recounting of votes, the inspection of ballot papers and other investigations, as well as to order the publication of documents from the electoral commissions and STAE. In cases that cannot be resolved by a recount, the electoral courts must order a new registration or a new vote at some of all polling stations.

The law should be revised to establish that in cases of electoral crime, the electoral courts have the responsibility to intervene to correct the offence

committed or to force the repetition of the process. The courts' action should be rapid. It cannot ask how it influences the overall result, as specified in some places in the electoral law, because a district court cannot be called upon to judge how misconduct at the polling station can affect the result at provincial or national level.

Finally, since electoral offences benefit competing parties and candidates, it is also important to find ways for parties benefiting from fraud to be sanctioned by the action of their members and sympathisers.

Partners:



The image shows four logos: CIP (Centro de Integridade Pública), the Mozambique Political Process Bulletin logo, the Norwegian Embassy (EMBAIXADA DA NORUEGA) logo, and the UKaid logo (from the British people).

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Detailed coverage 2019 national elections is again being provided by the *Mozambique Political Process Bulletin*, which has covered all of Mozambique's multi-party elections. We will have a large team of local journalists throughout the country, ensuring that our reports are accurate and verified.

The elections newsletter is also in Portuguese; para subscrever <http://eepurl.com/gnZXPz>

The newsletters covering the 2018 local elections are on <http://bit.ly/LocEI2018>

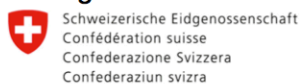
Newsletters from 2013 local elections and 2014 national elections are on <http://bit.ly/2H066Kg>

There are two archives of historic elections data, at IESE on <http://www.iese.ac.mz/eleicoes-resultados/> and at London School of Economics on <http://bit.ly/MozEIdata>

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