The Adversarial Principle Before the Constitutional Court

A Case Study of Côte d'Ivoire and Senegal

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Abstract

The gradual jurisdictionalization of the Constitutional Court's activity is supported by a proceduralization of constitutional litigation, which is marked by the use of adversarial proceedings. A fundamental principle of a fair trial, adversarial proceedings give a new face to the courtroom of the constitutional judge. In Côte d'Ivoire and Senegal, this principle is subject to different degrees of normative consecration, and its application varies according to the type of control. It is more common in electoral disputes than in the exception of unconstitutionality and *a priori* control, where the nature of the control is difficult to reconcile with contradiction. Thus, there is a need to adapt or reorganize this principle in order to legitimize judicial decisions and rationalize the constitutional order in Africa.

Keywords

Contradictory, Constitution, constitutional judge, trial, constitutionality review, Côte d'Ivoire, Senegal

Introduction

"The formalities of justice are necessary to liberty", wrote Montesquieu (1961, p. 125). Procedural rules are essential to the preservation of the legal order. Just as all rights require judges to protect them, all justice requires a procedure (Caterina, 2002). In this sense, the Latin *audi alteram partem*[1], also expressed in normative form as "no party can be judged without "having been heard or called[2]", is a fundamental principle of

1 *Audiatur et altera pars* ou *Audi alteram partem* literally mean "to hear the other or others". They refer to the right to be heard.
2 This formula has been translated by various legislators, often in codes of civil procedure. In France, these are the provisions of articles 14 to 19.

procedural law[3]. It spans various disciplinary fields[4], including constitutional litigation, and thus engages a significant part of legal doctrine. In an article published in 1931, Hans Kelsen already highlighted the need to organize a constitutionality review in the form of a "conflict of interests", emphasizing that any constitutional trial inherently involves a confrontation between opposing legal positions (Kelsen, 2006). This proposal has found a favorable echo in West Africa, where constitutional litigation tends to incorporate the guiding principles of a fair trial, thanks to the gradual jurisdictionalization of the office of the constitutional judge. Considered a major innovation in the African constitutionalism of the 1990s[5] , constitutional courts have become, as Théodore Holo reminds us, "the keystone of the institutional edifice whose foundation remains the legalization of political life with a view to restoring democracy and the rule of law" (2025). Constituents have made these institutions guarantors of the supremacy of the Constitution, arbiters of electoral[6] disputes, and "veritable regulators of the State" (Cabanis, 2017). This dynamic of the gradual emergence of constitutional justice (see Holo, 2009) has led doctrine to take an interest in their activities (see Mborantsuo, 2007; Narey, 2015), their composition (Aïvo, 2019), their status (see Soma, 2014), as well as their regulatory roles (Kante, 2008), or simply to assess their actions[7]. This constant and renewed interest in the work of the constitutional courts has shown that these institutions "are developing a jurisprudence that demonstrates both their capacity for imagination and their independence of mind, marking the transition from the formalism to the effectiveness of a constitutionalism oriented towards pluralist democracy and the rule of law" (Mede, 2008). This trend confirms that constitutional justice is consubstantial with constitutionalism (see Holo, 2009, p. 129; Massina, 2015). In this respect, the new political and social environment, marked by the frequent invocation and evocation of the Constitution by numerous actors, makes the constitutional court a place for producing standards, regulating the activities of public authorities, and arbitrating conflicts and tensions arising from elections or political crises. The Constitutional Court seems to be taking these changes into account in its various functions, particularly in litigation. In exercising this power, it strengthens its investigative powers and attempts to turn the constitutional trial into a genuine legal trial. These considerations have undoubtedly prompted a number of authors to take a close interest in the constitutional trial (Akerekoro, 2013), the parties to the constitutional trial (Djogbénou, 2020), and even the modes of producing evidence before the constitutional judge (Sanogo, 2024). However, these developments overlook the principle of adversarial proceedings before the constitutional court, especially in its comparative dimension. However, an analysis of this principle is essential in a context where the updating of the rules governing the fair trial is expected, in order to shed light on this "black box" (Carcassonne, 1994)[8] and open the "narrow doors", to use the expression of Dean Vedel (1991) of the constitutional trial.

Consideration of the adversarial principle before constitutional courts in Côte d'Ivoire and Senegal therefore seems justified. The aim of this study is not to outline the contours of this fundamental procedural principle, but rather to highlight its reception by African constitutional judges. It is intended as a contribution to the evolution of constitutional litigation, focusing on the conduct of the trial and, more specifically, on the use of adversarial proceedings in the constitutional praetorium.

3 Procedural law is the law of the trial, which covers the rules and principles that govern all procedures. This discipline involved comparing the three main procedures: civil, criminal and administrative. It has become a general theory of procedure. It has been progressively enriched by highlighting the fundamental principles of the procedure, as well as taking into account the specific features and relationships between the different procedures. See Jeuland (2022).

4 The contradictory principle has its origins in private law, particularly civil law through the maxim *Audi alteram partem*, but there are exceptions to this rule, for example in judgments in absentia.

5 The history of the constitution in French-speaking Africa is often divided into three main periods. The first period (1958 to 1965) corresponds to the acceleration of the decolonization movement and the accession to international sovereignty. The second period, from the 1970s to the 1990s, is considered to be that of the abandonment of the liberal model, in favor of a hyper-presidentialization of regimes, described as "African presidentialism". The third period, or third wave, begins with the failure of the previous wave. This stage saw the rise of constitutionalism, with democratic gains and the establishment of the rule of law.

6 See article 69 of the Togolese Constitution of March 25, 2024, article 114 of law no. 90-32 of December 11, 1990 establishing the Constitution of the Republic of Benin, article 144 of the Constitution of July 22, 2023 of Mali, article 92 of the Constitution of Senegal of January 22, 2001. Article 152, paragraph 1 of the Constitution of Burkina Faso of June 11, 1991, revised in 2023, stipulates that the Constitutional Council is the competent institution for constitutional and electoral matters.

7 Constitutional justice is assessed in terms of its contribution to the democratization process. While some judges are described as bold and daring, others are considered timid and minimalist. See Narey (2015).

8 The image of the "black box" refers to what happens between the referral and the decision. In France, this term is used to refer to the opacity of the procedure used by the Conseil Constitutionnel to review the constitutionality of laws. See Carcassonne (1994).

Thus, if the idea of a trial and parties to the trial is difficult to conceive of in constitutional litigation, it would be even more difficult to admit recourse to the adversarial principle (Nonnou, 2020) before the constitutional judge in the countries concerned. It is all the more complex in Senegal, where the constitutional judge has been criticized for developing a jurisprudence of "incompetence and inadmissibility" (Ndiaye, 2014, p. 49), for making "a minimalist reading of its jurisdiction" (Fall, 2008, p. 13) or for showing "habitual frilosity" (Diakhaté, 2021, p. 206).

Similar criticisms are leveled at its Ivorian counterpart, which seems to make "a restricted interpretation of its attributions and produces a jurisprudence that is not very bold and oriented towards legitimizing executive power and its governance" (Kpri, 2018). With these considerations about constitutional judges in mind, it may seem pointless to discuss the principle of adversarial proceedings before the targeted jurisdictions.

However, in reality, the constitutional courts apply the adversarial principle, in an evolutionary way[9], in Côte d'Ivoire, and in a completely surreptitious way[10], in Senegal, because the procedure there is, in principle, non-adversarial. It is therefore useful to recall the content of the principle and, above all, to present the main characteristics of constitutional justice, which seems to have a different attitude to the adversarial rule.

Contradiction, it should be remembered, is a universal and transversal principle in the legal conscience. It is understood as a "truth-discovery mechanism" (Motulsky, 1961, p. 175) and therefore consubstantial with any procedure. Inherent to civil litigation, the adversarial principle is considered to be "a fundamental principle of procedure, also known as the principle of contradiction, by virtue of which the parties must have the opportunity to discuss in a fair debate the claims and arguments developed by the other parties or envisaged by the judge" (Cabrillac, 2022, p. 152). From a normative point of view, the adversarial principle is widely enshrined in human rights legislation. Article 10[11] of the Universal Declaration of Human Rights, Article 6[12] of the European Convention on Human Rights and Article 7(1) of the African Charter on Human and Peoples' Rights[13] make contradiction an essential condition for a fair trial. The African Court of Human and Peoples' Rights even proposes an extensive definition when it affirms that each party to a fair trial must have the opportunity to know, discuss, and respond to the arguments and evidence presented by the other party, under conditions of equality, during both the written and oral phases of the proceedings (see Khiessie, 2021).

From a doctrinal point of view, the principle of adversarial proceedings, also known as contradiction[14], is first and foremost «to be able to discuss everything that the adversary puts forward in fact and in law, and everything that he produces, exhibits and documents. It is also about being able to argue with the judge, to a variable extent depending on the case» (Lecucq, 2010, p. 62). The adversarial process is also an instrument for developing judgments and reinforcing the jurisdictional nature of the review of the constitutionality of laws, and in this sense, its legal value is recognized.

The French Council of State[15] established this as a general principle of law, when it censured a decree that appeared to disregard this principle "when it had not yet been expressed in a legislative text" (Gourdou et al., 2010, p. 17). Following this, the Constitutional Council made contradiction a corollary of the principles of the right to defense in a decision relating to the Finance Act[16]. These

9 Organic law 2022-222 of March 25, 2022 determining the organization and functioning of the Constitutional Council of the Republic of Côte d'Ivoire.
10 Organic Law 2016-23 of July 14, 2016 on the Constitutional Council of the Republic of Senegal, J.O. n° 6946, pp. 927 to 930.
11 Article 10 of the Universal Declaration of Human Rights (UDHR) states that: «Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him».
12 Article 6 of the European Convention on Human Rights (ECHR) on the right to a fair trial: «Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of his civil rights and obligations and of any criminal charge against him».
13 Article 7: «Everyone has the right to have his cause heard. This right includes the right to a defense, including the right to be assisted by counsel of one's own choosing».
14 The use of the terms "contradiction" and "contradictory" has long divided authors. But these two terms tend to mean the same thing. See Fare (2020, p. 28).
15 Council of State July 31, 2009, Association Aides.
16 Constitutional Council, December 29, 1989, 89 -268 DC, 1990 Finance Act, Rec, p. 110.

varied meanings reveal the theoretical and functional dimension of the adversarial principle, which is justified by the existence of a court and parties to the proceedings. This undoubtedly explains the close link between the principle of contradiction and the trial itself.

The term "constitutional judge" refers to the body responsible for dispensing constitutional justice. As Louis Favoreu has written, "the jurisdiction created to deal specifically and exclusively with constitutional litigation, located outside the ordinary jurisdictional apparatus and independent of both it and the public authorities." (Favoreu, 1986, p. 3) In modern constitutionalism, the constitutional judge is no longer confined to the mere application and interpretation of the Constitution (Soma, 2014, p. 452); he embodies the body - whether referred to as the "Court" or the "Council" – invested with the public service (Duhamel & Mény, 1992, p. 547) of constitutional justice, in that "all jurisdictional proceedings relating to constitutional matters fall within the scope of constitutional justice». Considered by Hans Kelsen as "the jurisdictional guarantee of the Constitution" (Kelsen, 1928), these institutions are the highest courts of the State in constitutional matters[17].

Like other French-speaking African countries, Senegal and Côte d'Ivoire are no exception to this trend. Indeed, as Francis Wodié reminds us, the Constitutional Council of Côte d'Ivoire is not a court like any other. The Constitution devotes a special title to it so that it can fully assume the roles (Wodié, 2013, p. 140) assigned to it. Under the Constitution, it is the body that regulates the functioning of the public authorities, judges the conformity of legislation with the Constitution, and oversees presidential and parliamentary elections[18].

As for Senegal's Constitutional Council, it is considered a special judge "first and foremost because of its remit: regulator of the functioning of public authorities, constitutionality review, judge of electoral disputes; all these remits are not only exorbitant, but also constitute situations with fundamental stakes" (Ndiaye, 2014, p. 49). These two courts are seized according to procedures that leave room for the guiding principles that are essential in a constitutional trial (Jean, 2010, p. 240).

Emphasis will be placed on the use of contradiction in both normative and electoral litigation[19]. This choice is explained, on the one hand, by the centrality of these disputes in the office of the constitutional judge and, on the other hand, by the interest in using contradiction to reinforce the superiority and stability of the constitutional norm.

Consequently, in seeking to assess the place of the adversarial principle in constitutional proceedings, we can, from a comparative perspective, ask ourselves: "What characterizes the adversarial principle in constitutional trials in the target countries?" In other words, this involves questioning the reception of the adversarial principle by Senegalese and Ivorian constitutional judges. This central question raises major issues for the understanding and practice of constitutional litigation.

On a theoretical level, adversarial proceedings before the constitutional judge highlight the relativity of the *summa divisio* between public and private law, insofar as the rules of procedural law formerly practiced in the sphere of private law disciplines are used in the field of public authorities (Baud, 2021, p. 70). In this way, it contributes to the constitutional theorization of the adversarial principle.

From a practical point of view, the interest of this reflection shows that "access to the constitutional judge's courtroom and the rules governing the various phases of the constitutional trial are more useful than ever to enable the Constitutional Council to play its true role" (Kante, 2008, p. 12), in order to bring constitutional justice closer to the litigant. At present, this reflection on adversarial proceedings before the constitutional court shows the importance of the comparative approach in understanding African constitutionalism and the reality of the borrowing of this principle in constitutional law. We can also add that, in a country like Senegal, the announced institutional

17 In Benin, Article 114 of the Constitution of December 11, 1990 stipulates that the Constitutional Court is independent of the judiciary.

18 Article 126 of the Constitution of the Republic of Côte d'Ivoire of November 08, 2016 amended by Constitutional Law No. 2020-348 of March 19, 2020.

19 The Constitutional Council is often perceived as a legal-political body, see Rousseau, 2008, p. 56. See Doumbia, 2013, https://afrilex.u-bordeaux.fr/2013/02/23/

reforms will transform the Council into a Court[20], with an extension of the jurisdiction's powers. This change will certainly have implications for the future of adversarial work in this country. It is also part of the current doctrinal debate on "the judicialization of constitutional law, which is inseparable from the rise of the constitutional judge" (Aïvo, 2012, p. 145) and the proceduralization of constitutional litigation. These two dynamics, essential to a constitutional justice system of its time, imply respect for the adversarial process as a guarantee of a fair trial.

From a methodological point of view, the approach consists of analyzing the fundamental texts, organic laws and internal regulations of the constitutional jurisdictions, consulting the legal doctrine and, above all, analyzing the case law. This exercise enabled us to assess the practice of adversarial litigation in standards and elections in Senegal and Côte d'Ivoire, and to observe developments in these legal areas.

The choice of these countries is explained first and foremost by the similarities in their institutional architectures[21] and in the "convergence of constitutional models" (Baldé, 2011), even if their political histories are different in many respects[22]. Secondly, they share the same source of inspiration: the French legal system. A dynamic and comparative analysis of the workings of these two constitutional jurisdictions shows that the adversarial principle is received and applied differently, even if it remains a guiding principle of constitutional proceedings. It has received varying degrees of recognition, while at the same time being applied with mixed results.

A Varied Consecration

There is not one, but many contradictories, or more precisely, degrees of contradictory. This is particularly true of the constitutional courts of Senegal and Côte d'Ivoire, where the principle of adversarial proceedings is subject to varying degrees of recognition. Its framing rests on distinct textual foundations and is part of a procedural variation.

Substantial Variation

Senegalese and Ivorian legislators apply the adversarial principle in different ways. In Côte d'Ivoire, the adversarial procedure provided for in the Constitutional Council's organic law and rules of procedure[23] is explicitly enshrined. In Senegal, the procedure is not adversarial[24], but the principle is timidly accepted.

• Explicit Recognition in Ivorian Law

The adversarial nature of the procedure is expressly enshrined in legal and regulatory provisions governing the organization and operation of several constitutional courts. This is the case in Mali[25], Benin[26] and Côte d'Ivoire, where the procedure before the Constitutional Court is set out in the rules of procedure of the Constitutional Council, which supplement the organic law[27]. Article 38 of the said law stipulates that "proceedings before the Constitutional Council shall be free, in writing and, where appropriate, adversarial"[28]. Paragraph 1 even grants a margin of appreciation to the

20 The national conference on the reform and modernization of the justice system held in May 2024 recommended transforming the Constitutional Council into a Constitutional Court, which would be the country's supreme jurisdiction. See the summary report available at www.droit-et-politique-en-afrique.info.

21 Both countries are former French colonies that inherited their institutions after independence. The main institutions are common to all countries that have drawn inspiration from the 1946 French Constitution.

22 Senegal and Côte d'Ivoire do not have the same political and institutional trajectory. Their stories are different in many ways. Senegal's democratic and institutional stability is marked by peaceful political changeovers. As for Côte d›Ivoire, it experienced a deep political and social crisis between 2002 and 2009, marked by violence and armed rebellion, before finding a relatively peaceful way out of these tragic events. See Gadji (2017, pp. 195-230).

23 Rules of procedure no. 001/2023 /CC/SG of January 17, 2023 of the Constitutional Council.

24 Organic law no. 2016-23 of July 14, 2016 on the Constitutional Council.

25 Article 3 of the Constitutional Court's rules of procedure, the organic law determining the Constitutional Court's operating rules and procedure no. 02-011 of March 5, 2002 specify the adversarial nature of the proceedings.

26 Article 28 of the rules of procedure of the Constitutional Court of Benin of September 16, 2005.

27 Article 59 of Organic Law 2022-22 of March 25, 2022 on the Constitutional Council refers procedures before the court to the rules of procedure. Il dispose que : « un règlement intérieur pris en application de la présente loi détermine les règles de procédure devant le Conseil constitutionnel ».

28 Article 38 of Constitutional Council bylaw no. 001/2023 /CC/SG of January 17, 2023.

Constitutional Council, which can decide to apply the contradictory procedure only when it sees fit. This discretionary power in the application of the principle may leave room for decisions to be rendered without prior adversarial debate.

While the first paragraph above may give rise to doubts as to whether the procedure is truly adversarial, the second paragraph clarifies how it is to be implemented. Implementation may consist of the exchange of documents and exhibits between the parties, and possibly debates at the hearing[29]. This clarification demonstrates the Ivorian legislator's determination to apply the adversarial principle as a guarantee and imperative of a fair constitutional trial.

These provisions confirm the assertion that "contradiction elevates litigation into a trial" (Djogbénou, 2020, p. 197) and reinforces the jurisdictionalization of proceedings. As a result, the evocation of "exhibits", the recognition of 'parties' and the possibility of "debates at the hearing", both written and oral, are evidence that contradiction is at the heart of the constitutional process.

With these clarifications, the Ivorian legislator establishes the contradictory procedure before the Constitutional Council, if we consider, in a general way, that contradiction is "the set of operations designed to ensure that all interested parties have been given the opportunity to participate in appeals brought before the constitutional courts" (ACCLF, 2018, p. 15). The explicit recognition of the adversarial nature of the procedure is also reflected in the requirement for the petitioner to "set out the facts and arguments relied upon"[30].

In addition to reinforcing contradiction, this clarification serves two purposes: to enable the appointed rapporteur to present his or her conclusions and to reply to the arguments of the petitioners. In this explicitly contradictory approach, the Constitutional Council, in a review procedure by way of exception[31], referred to the document initiating the proceedings and the oral presentation by the applicant's counsel in the following terms:

> In support of their claim, amplified by the oral presentation of their counsel, they state that in the context of a dispute with Banque Internationale pour l'Afrique de l'Ouest en Côte d›Ivoire (BIAO-CI), which they had sued for restitution of sums of money and payment of damages before the Abidjan Commercial Court[32].

In this way, the Council gives meaning to the adversarial principle by receiving the petitioner's arguments in accordance with the organic law, even if it ultimately rejects the request. In the context of review by way of action, considered to be "the pre-eminent or preponderant procedure for reviewing the constitutionality of laws in French-speaking African states" (Lath, 2015, p. 171), the Ivorian judge respects the rules of procedure, receiving the norm raised with a view to bringing it into line with the Constitution.

In electoral and referendum matters, the law provides for the invocation of pleas and the production of documents[33]. These requirements militate in favor of the adversarial approach. In short, a combined reading of the organic law and the rules of procedure of the Constitutional Court shows that the adversarial process is largely enshrined. In recent years, this openness has been progressively influenced by the demands of supranational legislation[34]. This dynamic of reinforcing

29 Paragraph 2, article 38 of the rules of procedure of the Côte d'Ivoire Constitutional Council.

30 Paragraph 1 of article 40 of the rules of procedure stipulates that "the petition shall be addressed to the President of the Constitutional Council and must contain, on pain of inadmissibility, the names of the party or parties involved, as well as a statement of the facts and arguments invoked".

31 In constitutional law, the term "review by way of exception" refers to a review of the constitutionality of a law in force which arises incidentally in the course of proceedings before an ordinary or non-constitutional court.

32 Decision No. CI-2017-305/21-03/CC/SG of March 21, 2017 on the appeal for the unconstitutionality of Articles 5 and 22 of Organic Law No. 2016-11 of January 13, 2016 amending Law No. 2014-424 of July 14, 2014 on the creation, organization and operation of commercial courts and Articles 5, 10 and 41 of Law No. 2016-1110 of December 08, 2016 on the creation, organization and operation of commercial courts.

33 Article 43 of the Organic Law on the Constitutional Council specifies the form of the petition and lays the foundations for the implementation of contradiction.

34 Modifications and the adoption of new rules of procedure for the Constitutional Council will take place in 2022 and 2023 respectively. They are seen as a new stage in the opening up of the constitutional judge's praetorium.

the adversarial aspect is also observed in Benin, where the Court made its hearings accessible to the public[35] before amending the organic law[36]. While this contradiction is explicitly enshrined in Côte d'Ivoire, in Senegal it is still mixed.

• A Relative Negation in Senegalese Law

An analysis of the consecration of the adversarial principle in the constitutional systems of French-speaking Black Africa has revealed two major trends. On the one hand, states that have expressly enshrined the principle, and on the other, countries that have deliberately established the non-adversarial nature of constitutional jurisdiction. Senegal belongs to the second category of countries where procedure "is fairly conformist and, in certain situations, far removed from the main principles of procedural law, notably the guarantee of a fair trial" (Ndiaye, 2021a, p. 187). Paragraph 1 of Article 14 of the Organic Law enshrines the absence of adversarial proceedings in the following terms: "Proceedings before the Constitutional Council shall not be adversarial"[37]. The absence of an oral phase and the opening of the trial to the public[38] are other elements of contradiction.

However, the rest of the article introduces relativity in the negation of the contradictory. In fact, the legislator sets out an attenuation right from the start of the second paragraph, thus marking the possibility of exchanges during the appraisal phase. The text specifies that:

> However, in the event of an objection of unconstitutionality, the Constitutional Council, seized in accordance with Article 74[39] of the Constitution, forwards an appeal for information to the President of the Republic, the Prime Minister and the President of the National Assembly. The latter may submit their observations to the Constitutional Council in writing.

This provision calls for two major observations. Firstly, there is a weakness in the adversarial principle before the Constitutional Council, in that it is empowered to receive submissions from the parties and to request, where appropriate, documents from the executive, legislative, or judicial bodies. Secondly, notification of petitions lodged by non-institutional parties is sent to the President of the Republic and to the President of the National Assembly, who may submit briefs for information purposes. It follows from these provisions that there is no real contradiction since the only window left for exchanges is the production of briefs.

In electoral matters, on the other hand, the text allows for adversarial debate. It specifies that: «Any appeal contesting the fairness of the operations is, as the case may be, communicated by the chief clerk to the other candidates or to the other current, who have forty-eight hours to file their response»[40]. The organic legislator chose to maintain the non-adversarial procedure, albeit with a slight attenuation, even though it had the possibility of reinforcing the Council's jurisdictionalization process. This stage necessarily involves the introduction of a constitutional process and innovations in case law.

In an analysis devoted to the adversarial principle, the former President of the Constitutional Council, Papa Oumar Sakho, spoke of the possibilities of integrating procedural rules in these terms: "in view of the evolution of its jurisprudence, the Council will gradually break with this image of a judge rendering his decision without respect for the principles on which a fair trial is based" (Sakho, 2018, p. 65). Can we expect a resounding decision to reinforce the jurisdictionalization of the Constitutional

35 Article 28 of the rules of procedure states that proceedings before the Constitutional Court are written, free and adversarial. It is public unless the Court decides otherwise.
36 Law no. 2022 -09 June 2022 on the Constitutional Council.
37 Article 14 of Organic Law 2016-23 of July 14, 2016 on the Constitutional Council.
38 Under the provisions of article 15, the sittings of the Constitutional Council are not public, subject to the provisions of article 7 of the same law, which provides for public sittings for the swearing-in of members of the court, and article 37 of the Constitution.
39 Article 74 of the Constitution of January 22, 2001: "An appeal may be lodged with the Constitutional Council to have a law declared unconstitutional: by the President of the Republic within six clear days of the transmission of the definitively adopted law, by a number of deputies at least equal to one tenth of the members of the National Assembly (...)".
40 Paragraph 4 of article 14 of the Organic Law on the Constitutional Council of Senegal.

Council? This approach is quite possible, as in the *Liberté d'association*[41] decision handed down by the French Constitutional Council. This landmark decision marked the beginning of a process of jurisdictionalization of constitutionality review, with a redefinition of its remit. A few years later[42], the procedure before the Conseil Constitutionnel was enriched with the adoption of the Question Prioritaire de Constitutionnalité (QPC)[43]. This example could inspire Senegalese constitutional judges, who are called upon to diversify their methods and adapt their procedures in a context where major reforms are announced, aimed at transforming the Council into a Constitutional Court[44]. This stage will necessarily involve changes in procedural law, including the adversarial procedure. In fact, the purpose of the adversarial process can be achieved without a formal adversarial procedure.

The window reserved for a posteriori control and control of electoral operations is not completely closed. It can influence the adaptation of the contradiction. Although the procedure is non-adversarial, the possibility of filing written submissions or receiving briefs from institutional plaintiffs is a means of investigation, even if it must be admitted that these submissions are not necessarily binding on the judge.

In addition, it is clear from the provisions of the aforementioned Article 14 that the contradictory procedure implicitly admitted is organized differently depending on the subject of the referral and the nature of the control exercised. The attenuation of the non-contradictory character is broader in electoral litigation and in the procedure of the exception of unconstitutionality, which is a concrete dispute where "a plea developed in support of the pending case" (Renoux, 1990, p. 653).

From the foregoing, it is clear that the principle of adversarial proceedings is enshrined in a variety of ways. Its reception is not uniform, but plural in the countries studied. The adversarial principle is also organized according to procedures covering referral, claimant status, and investigation.

Processual Variation

An analysis of procedures before the constitutional courts shows that there are partial differences in terms of referral procedures and convergence in terms of time limits.

• A Relatively Different Type of Referral

Application of the adversarial principle is based on a set of procedural rules covering referral to the constitutional courts and the status of petitioners. To evoke these rules is to question their impact on the adversarial nature of proceedings before the Constitutional Court. Standing is a determining factor in the application of the adversarial principle. Indeed, the more open the judge's courtroom is, the more opportunities for exchanges between the parties are guaranteed, allowing for a broad acceptance of the adversarial principle.

The starting point or trigger for any procedure is the referral, which is "the action of bringing before a body a question on which that body is called upon to rule" (Cornu, 2014, p. 938). Referral to the Constitutional Court has undergone a number of changes and has gradually become the rule for the protection of the Constitution and of rights and freedoms (Narey, 2022, p. 735). Thus, on the one hand, it concerns the protection of the supremacy of the Constitution, and on the other, the protection of fundamental rights. Referral to the constitutional court is usually made in writing.

41 The CC decision, n° 71-44 DC, July 16, 1971, Act supplementing the provisions of articles 5 and 7 of the Act *of July 1, 1901, on the contract of association* marks the unanimity of the doctrine and the real birth of the Constitutional Council; see Boudou (2014).

42 Constitutional Act no. 2008-724 of July 23 modernizing the institutions of the Fifth Republic introduced the QPC.

43 The QPC is a procedure for reviewing the constitutionality of laws that have already been enacted. Based on Article 61- 1: «When, in the course of proceedings pending before a court, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred to the Constitutional Council by the Council of State or the Court of Cassation, which shall rule within a specified period».

44 The national conference on the reform and modernization of the justice system strongly recommended reform of the Constitutional Council. In his address to the nation on April 03, 2025, the President of the Republic announced constitutional and institutional reforms. The speech is available at https://www.présidence.sn.

The written nature of the document initiating proceedings is similar in all the countries studied. In Côte d'Ivoire, the procedure before the Constitutional Council[45] remains above all written and inquisitorial[46]. This is the only way to bring a case before the court. The oral procedure is totally excluded from litigation brought before the Constitutional Court. Written referrals are also used in Senegal, where access to the Constitutional Council is mainly in writing.[47] Appeals are submitted in the form of a petition filed with the court clerk's office, which receives all documents relating to the exercise of the court's activities[48].

In constitutional matters, the legislator designates the parties to whom the matter is referred, who vary according to the type of review. However, the monopoly of referral is granted to the political powers, in particular the institutional ones, in a priori control, where the desired effect is to secure the legal order in order to prevent a legislative norm from conflicting with the Constitution (Diakhaté, 2021, p. 198). As a result, depending on the country, referrals may be open or restricted to institutions, organizations, or citizens.

Côte d'Ivoire has opted for a relatively open referral system. In addition to the institutional referrers, namely the President of the Republic, the President of the National Assembly, and the President of the Senate, legally constituted human rights associations may refer to the Constitutional Court laws relating to public freedoms[49]. This openness, while welcome, is very limited, as these associations can only refer laws relating to public freedoms to the Constitutional Council. This route is also little used for various reasons (Wodié, 2013, p. 143), including the violation of admissibility conditions. Cette voie est également peu utilisée pour diverses raisons (Wodié, 2013, p. 143), dont la violation des conditions d'admissibilité. This is what seems to emerge from the decision to postpone the vote in the plenary session of the National Assembly on the draft law on the legal status of the press in Côte d'Ivoire. Referred to by human rights associations grouped under the banner of "Ivorian civil society organizations involved in the promotion and defense of human rights", the Council declared the petition inadmissible on the grounds that the referenced text had not yet been promulgated[50]. Unlike this semi-open system, the Senegalese legislature has adopted a restricted referral system. In fact, referral is still reserved for political authorities[51], in particular the President of the Republic, and at least one-tenth of the Members of Parliament.

The Senegalese constitutional court remains closed to citizens and petitions in this particular review. With regard to the exception of unconstitutionality, the Senegalese system has been instituted[52] and consolidated[53], giving the judge the power to assess the constitutionality of laws already promulgated on the occasion of a trial. Referral to the Constitutional Council is left to the discretion of the court hearing the main case, in particular the Court of Appeal or the Supreme Court. As a result, the litigant finds himself before both the court of first instance and the court to which the referral is made.

45 Article 38 of internal regulation no. 001/2023 /CC/SG of January 17, 2023 of the Constitutional Council of Côte d'Ivoire.

46 Inquisitorial procedure is characterized by the existence of a thorough pre-trial investigation, the reliability of which is guaranteed by formal safeguards. It gives the judge an active role in finding the evidence needed to establish the truth. She is opposed to adversarial proceedings.

47 Articles 16 and 17 of the Organic Law on the Constitutional Council no. 2016-23 of July 14, 2016.

48 Article 3 of the Constitutional Council's rules of procedure.

49 The provisions of article 23 of the organic law give human rights associations the possibility of bringing cases before the court.

50 Decision No. CI-2017-310/23-05/CC/SG of May 23, 2017 on the petition filed by the associations named " Agir pour la Démocratie, la Justice et la Liberté (ADJL) ", " Ligue Ivoirienne des Droits de l'Homme (LIDHO) " and " Citoyens et Participation (CIVIS-CI) ".

51 Article 74 of the Constitution of January 22, 2001 states: «An appeal may be lodged with the Constitutional Council to have a law declared unconstitutional:
by the President of the Republic within six clear days following the transmission to him of the definitively adopted law,
by a number of deputies at least equal to one-tenth of the members of the National Assembly, within six clear days of its final adoption.»

52 The exception of unconstitutionality was instituted by law n° 92-22 of May 30, 1992, revising the Constitution. Set up at the same time as the Constitutional Council, it provides a means of defending individuals against the possible application of an unconstitutional law. See Ndiaye, 2021b.

53 Consolidated by Constitutional Law no. 2016-10 of April 05, 2016, which admitted the possibility of raising an objection of unconstitutionality before the Court of Appeal under the provisions of Article 92 of the Constitution, which states that: "The Constitutional Council shall hear (...) objections of unconstitutionality raised before the Supreme Court and the Court of Appeal".

This double movement is a very Senegalese peculiarity (Diop, 2020) of the exception of unconstitutionality, which remains a narrow path and the place where it can be invoked is too high (Fall, 2017, p. 155). While it is fair to say that the list of persons bringing cases before the Constitutional Council would seem to have expanded with this possibility, it is nevertheless little used. This undoubtedly explains the low volume of decisions handed down on exceptions of unconstitutionality in Senegal[54].

In Ivorian law, the exception of unconstitutionality is presented differently. It may be raised by any litigant before any court[55]. This provision makes the exception of unconstitutionality available to all citizens and before all levels of jurisdiction, unlike in Senegal, where this procedure is brought before the courts of second instance. The Ivorian legislature also provides that the court before which the plea of unconstitutionality is raised shall stay the proceedings. The person to whom the case is referred is not the court, but the litigant or citizen who has raised the objection of unconstitutionality. He or she may submit a petition to the Conseil Constitutionnel either directly or through a lawyer. However, they must comply with certain conditions, in particular prove his or her status as a litigant, show that the unconstitutionality of the law or of one of its provisions has been raised before the court seized, and that he or she has complied with the time limits laid down[56]. This direct referral by the citizen contributes to access to constitutional justice and reinforces the guiding principles of the process, in particular that of a fair trial.

In the electoral and referendum fields, referrals are open in the countries studied. In Senegal, the Constitutional Council is mainly consulted by those involved in the electoral process. In the case of presidential elections, the matter is referred to by the candidates; in the case of legislative elections, the matter is referred to by the representatives of the lists in the context of pre-electoral disputes or by the candidates in the event of a dispute concerning electoral operations; in the case of referendums, the matter is referred to it by the representatives of the currents of opinion[57].

Under Ivorian law, referrals are also open to private individuals, in particular to the various candidates[58] in elections and citizens with standing to challenge the fairness of the ballot. The judge also has the option of examining questions of eligibility on his or her own initiative[59]. Examination of these different referral procedures reveals a hierarchy of the adversarial principle, with access to the constitutional judge being more open in Côte d'Ivoire than in Senegal. However, there is room for improvement in both countries to enhance the fairness and transparency of constitutional litigation. Following on from the form of referral and the nature of the request, the question of deadlines deserves to be raised.

• Convergence in the Restriction of Deadlines

Constitutional justice has a complex relationship with time. This complexity lies in the fact that time is both a constraint and a resource (Kamal, 2018). The constraint is linked to the obligation placed on the constitutional judge to issue a ruling within a very short timeframe, whether in a priori litigation or in *a posteriori* review. However, the time factor in the referral of cases to the constitutional court is seen as a guarantee of legal certainty and normative stability (Narey, 2022, p. 742).

Time in a constitutional trial is all the more important from an adversarial point of view, as it can influence the possible exchanges between the parties. It can also constitute a significant limit to the room for maneuver reserved for referral staff. The latter have tight deadlines, not only to bring their case before the court, but also to produce their written brief in the absence of adversarial proceedings, or to present their defenses in the event of adversarial proceedings. This relatively short time may call into question the virtues of a fair trial.

54 In the 28 years that the exception of unconstitutionality has been in force, only eleven decisions have been handed down.
55 Article 24 of the Organic Law on the Constitutional Council stipulates that: "Any litigant may raise the objection of unconstitutionality of a law before any court."
56 These conditions are set out in paragraph 5 of article 24.
57 The organization of referrals to the Constitutional Council in electoral matters is governed by the provisions of the Electoral Code, which makes referrals open to private individuals.
58 Article 83 of the rules of procedure stipulates that "Any candidate may refer the matter to the Constitutional Council".
59 Under the terms of Article 80 of the internal regulations, the Board may verify the eligibility of candidates, regardless of any complaints.

The litigants are forced to react in a hurry, while the judge, bound by imperative deadlines, is obliged to rule within a given timeframe. As a result, time constraints are generally not conducive to the effective exercise of the adversarial principle (Fare, 2020, p. 205). This restriction on time to judgment is a reality in the countries studied. Indeed, an analysis of the time taken to process petitions submitted to the constitutional courts shows a convergence in the restriction of time limits and a variation according to the type of dispute.

Deadlines vary according to whether the control is *a priori* or *a posteriori*, with the texts distinguishing between indicative and strict deadlines. In the *a priori* control, the Ivorian judge[60] has a fifteen-day period for ordinary laws and international commitments. This period may be reduced to eight days in an emergency. His Senegalese counterpart[61] is planning two days less, precisely six days, in this course of action.

The variation according to the type of review shows a longer delay in the case of the exception of unconstitutionality. Under Ivorian law, the judge has thirty days from the date of referral [62]. The Senegalese legislature has adopted identical time limits, namely one month, but without specifying the number of days[63]. It can be seen from the above that the timeframes for the various types of disputes are between fifteen and thirty days. This variation can be explained by the relationship between deadlines and the practice of adversarial proceedings.

The long time frame gives the parties a chance to produce briefs and the judge a chance to reinforce the inquisitorial nature of the proceedings, while the tight deadlines are not conducive to established communication between the parties. There is therefore a kind of incompatibility between the introduction of contradiction and the time limits imposed on the judge (Schoettl, 2008). This relatively short timeframe raises possible constraints on the implementation of the contradiction.

Studying exhibits, briefs and external files, and hearing the parties, takes a fairly reasonable amount of procedural time. However, the judge does not have enough time to go into all the details, especially when it comes to an electoral issue or an exception of unconstitutionality. Litigation falling within the jurisdiction of the Constitutional Council does not sit well with the slowness that characterizes conventional judicial procedure (Sakho, 2018, p. 65). This speedy processing of requests is due to the often urgent nature of the issues submitted for its assessment. Consequently, a ruling "without undue delay" (Sakho, 2018, p. 67) is expected from constitutional courts, which deliver their decisions under constant time pressure.

In Senegal, as contradiction is not required, this could explain the relatively short referral and response times. How do constitutional courts manage to deliver good decisions despite time constraints? One possible answer lies in anticipation. The technique of anticipating referrals consists of starting the control work before the law is passed. This practice was raised in France by Dean Vedel. He opined that the President and Councillors could follow parliamentary debates in anticipation of referrals to the Constitutional Council. Anticipation is seen as a time-saving measure, but one that should not allow the judge to evade the real facts of the case (Vedel, 1994, p. 59, quoted in Fare, 2020). This practice could help to circumvent time constraints in the target countries, where the judge sanctions the violation of referral deadlines and referrers are obliged to react within the timeframe defined by the legislator.

60 Articles 53 and 54 respectively set 15-day referral deadlines for constitutional and organic laws.

61 Paragraph 2 of article 74 of the January 22, 2001 Constitution specifies the six-day time limit. "An appeal may be lodged with the Constitutional Council to have a law declared unconstitutional: by the President of the Republic within six clear days (...) a number of deputies at least equal to one tenth of the members of the National Assembly (...), within six clear days following its final adoption".

62 The thirty-day time limits are provided for in Article 25 of the organic law and Article 65 of the Constitutional Council's rules of procedure, which stipulate that: «The Constitutional Council, to which an appeal on grounds of unconstitutionality has been referred by way of exception, shall give its ruling within thirty days from the date of referral».

63 Article 22 of the Organic Law stipulates that «The Council makes its decision within one month of the date of referral.»

A Mixed Application

The assessment of the practice of contradiction reveals a difference depending on the type of control. The application of the adversarial principle is accentuated in electoral disputes, whereas it is timid in disputes concerning standards.

Greater Emphasis on the Adversarial Principle in Electoral Disputes

The adversarial principle in electoral litigation is reflected in the judge's power of inquiry and the rules governing communication between the parties.

• The Judge's Power of Instruction

Electoral litigation, in its broadest sense, encompasses disputes concerning preparatory operations, the electoral roll, candidacies, electoral operations and repressive litigation designed to punish acts of fraud, constituting offences, committed as part of the electoral process (Mascelet, 2001, p. 251). In a reflection on electoral litigation in Africa, Djedjro Francisco Meledje observes that «litigation appears to be the technique that ensures, as far as possible, the fairness and regularity of representation in electoral democracy. But there can be no election without litigation» (2009, p. 140). The judicial handling of electoral disputes is a guarantee of transparency in the process of appointing the President of the Republic and Members of Parliament. At every election, the constitutional judge faces a "formidable test" (Ndiaye, 2025, p. 17). Their intervention is often preceded or followed by violence[64], which attests to its truly contentious nature.

These considerations underscore the centrality of the constitutional judge, who ensures the triumph and effectiveness of electoral law by monitoring the process. This operation is often carried out in two stages. The control of laws before the vote and the control of electoral operations during and after the vote. Mentioning the adversarial principle in the control of electoral laws serves as a reminder that this is often an *a priori* control, in other words, a preventive control carried out before the law comes into force. The analysis of the adversarial principle will therefore primarily consider electoral operations[65] which frequently give rise to clashes and tensions, especially in the context of presidential elections, which are the most hotly contested (Kokoroko, 2009).

In several French-speaking African countries, the constitutional judge has the power of inquiry. This power is inherent to the exercise of the judicial function. It is both general and special (Tall, 2025, p. 324) and enables the judge to link the incidence of facts to the trial. Instruction is understood as the phase of the trial that begins with the registration of the referral and ends before deliberation. The investigation is entrusted to a rapporteur appointed by the president of the court, who acts as a "manager of proceedings" and "certifier of acts" (Aïvo, 2019, p. 796).

The appointment of the rapporteur is an important stage in the procedure, given that the advisors often possess diverse profiles and experiences. The appointed rapporteur is responsible for investigating the case and drawing up a report and a draft opinion or decision. The tasks assigned to the rapporteur are specified by the legislator. In Senegal, Article 25 of the rules of procedure requires the rapporteur to draw up a memorandum summarizing the facts and procedure, and to examine questions of form and substance[66]. Regarding to the power of the rapporteur, similarities are noted in Côte d'Ivoire, where he is also appointed by the president of the court. But his investigative powers appear to be broader than those of his Senegalese counterpart. The rapporteur is responsible for analyzing the arguments presented and proposing a legal direction before the Board deliberates.

64 In Senegal in 1993, the Vice-President of the Constitutional Council, Me Babacar Sèye, was assassinated during the legislative elections of the same year. See Coulibaly (2006). In Benin, during the 1996 presidential election, members of the Constitutional Court received death threats.

65 Electoral operations refer to acts carried out on voting day (access to the polling station, taking of ballot papers, withdrawal to the polling booth, placing of ballot papers in the ballot box) to the counting of votes, followed by the collection of ballot papers, their counting and the proclamation of results. Every aspect of the voting process can be a source of dispute over the results. See Niang (2021).

66 Article 25 of the rules of procedure of the Constitutional Council of Senegal.

The special feature before the Ivorian judge is that the rapporteur can carry out any investigative measure[67]. In practice, the advisor-rapporteur orders an investigation and obtains all documents if he considers that the information in his possession is insufficient. It may therefore request the submission of any document necessary for the handling of the dispute and may hear any person and/or institution that can provide information relevant to the subject of the referral. The law also authorizes the court to appoint deputy rapporteurs[68].

In the same vein, the rapporteur examines the Council's competence, the admissibility of the application and analyzes the parties' claims before proposing an opinion or decision[69]. These different responsibilities help to ensure transparency in the decision-making process and to keep procedures moving swiftly. In electoral matters, the judge controls incidents likely to affect the election, the eligibility of candidates, and the regularity of the election. As a result, it has the power to settle disputes concerning election results. The countries studied are no exception to this trend, which enables the judge to take strong investigative measures to encourage the organization of adversarial proceedings.

Under Ivorian law, article 47 of the organic law on the Constitutional Council stipulates that: «the Constitutional Council may, if necessary, order an inquiry, and obtain all documents and reports relating to the election. The rapporteur is appointed to receive witness statements[70]. It may also hear the parties and their witnesses[71]. The legislator is here addressing the question of the investigative measures that the constitutional judge can take. He may also send the minutes to interested parties so that they can submit their written observations within 48 hours[72].

If you systematize these points, we see that they include the investigation, the request for documents and the testimony, as well as the opportunity for the parties to file their responses. Through these various mechanisms, the application of the adversarial principle, which in the strictest sense implies claims that are often opposed before a judge, is provided for and organized. The Ivorian Constitutional Court often refers to the pleadings and arguments put forward by the parties. This was evident in decision no. CI-2022-EL-006/14-09/CC/SG of September 14, 2022 concerning Mr. N'Goran Mamadou's petition for the annulment of Mr. N'Dri Yao's election. The High Court referred to the existence of a contradiction in these terms: "whereas in its statement of defense of September 12, 2022, the Independent Electoral Commission (CEI) also concluded that the challenges raised by candidate N'GORAN Mamadou were unfounded"[73].

The judge also uses his investigative powers to request documents from the parties. The latter may, in the interests of truth-seeking, produce answers or refrain from doing so. This was the case in BLE Sailly Felix v Kouassi. He points out that "Mr. Kouassi Kouadio, who was duly informed of the proceedings and invited to submit his observations, did not react"[74]. This consideration implies that the conditions for applying the principle of contradiction are met, since the parties are called upon to know and respond to the arguments raised. However, the abstention of a party may weaken the application of the contradiction. In reality, the adversarial principle only makes sense when two or more parties put forward opposing claims before the judge (Kamto & Matringe, 2024, p. 919). In this case, the defense is silent, which undoubtedly calls into question the application of the principle of contradiction.

Under Senegalese law, the Constitutional Council "judges the regularity of national elections and referendum consultations and proclaims the results"[75]. To this end, it has broad powers in electoral matters. It has the power to carry out an in-depth investigation in this specific area. The law stipulates that "the Constitutional Council shall prescribe any investigative measures it deems necessary and

67 Paragraph 3 of Article 16 of the Organic Law on the Constitutional Council states that
68 Article 17: « The Constitutional Council may appoint deputy rapporteurs from among judges, teachers (...) to assist the Council. «
69 Article 42 of the Constitutional Council's rules of procedure.
70 Paragraph 2 of article 47 of the organic law relating to the Constitutional Council of Côte d'Ivoire.
71 Article 85 of the rules of procedure of the Côte d'Ivoire Constitutional Council.
72 Paragraph 3 of the aforementioned article 47.
73 Decision no. CI-2022-EL-006/14-09/CC/SG of September 14, 2022, in which the petitioner raised the violation of the principle of neutrality and the integrity of the vote. The Council ruled that this plea was ill-founded in view of the insufficient evidence provided by the petitioner, who was contesting the election of a deputy.
74 Decision no. CI-2021-EL-026/08-02/CC/SG of February 08, 2021 BLE Sailly Felix v. Kouassi Kouadio.
75 Article 92 of the January 22, 2001 Constitution.

shall set the deadlines within which such measures must be carried out"[76]. In application of this text, the High Court called upon to rule on the allegations calling into question the regularity of the transmission of the minutes[77], used its investigative powers by gathering information from the authorized bodies.

In case where it was to review the lists for the legislative elections of February 2024 with regard to compliance with the absolute parity between men and women, which is a constitutional and legislative obligation, the Council pointed out that "it is clear from the examination of the file, and in particular from the document submitted, that the person nominated is a woman (...); it follows that the parity between men and women provided for in article L.149 is complied with"[78]. Senegalese judges are increasingly assuming their role as electoral regulators. This undoubtedly explains why the results were not contested. The power of inquiry is complemented by the existence of rules governing communication between the parties.

• Communication Rules for the Parties

Procedural rules provide for the presence and exchanges between the parties to enrich the debate and contribute to the search for constitutional truth. The Constitutional Court applies the adversarial principle to parties involved in electoral proceedings. The communication of arguments, also known as exchanges between the parties, is an essential aspect of the adversarial principle and promotes equality of arms. In other words, each party can present its case under conditions that do not place it at a disadvantage compared to the opposing party.

In a comparative study on the adversarial principle carried out by the Association des Cours Constitutionnelles ayant en Commun la Langue Française (ACCCLF), it emerges that communication between the parties can take place in writing if the proceedings are not adversarial, or orally if the proceedings are adversarial (ACCCLF, 2018). It is also possible to combine the two approaches. The adversarial principle does not necessarily mean oral debate. Equality of arms therefore enables the parties not only to present their respective cases before the judge, but also to do so according to procedures that guarantee a near-equality of means between the parties. However, its application varies considerably from country to country.

In Senegal, the communication of arguments is more limited. The Constitutional Council often rules on the basis of an essentially written procedure, with limited adversarial exchanges. In electoral and referendum matters, the law provides for the possibility of filing reply briefs when contesting results[79]. The relativity of the negation of the adversarial principle is limited to establishing the principle of the production of briefs to institutions, without guaranteeing the interested parties a right of access and response. Can a fair constitutional trial be achieved if the fundamental rules are not guaranteed? As Dominique Rousseau reminds us in an analysis of the constitutional trial and the application of the Question Prioritaire de Constitutionnalité in France, the fair trial obeys three fundamental rules: adversarial proceedings, publicity, orality and secrecy of deliberations (Rousseau, 2011).

It is evident that orality and publicity are not applied to the Senegalese constitutional court, where ordinary[80] hearings are held on camera, and pleadings are not yet received. The exchange of parties is only partially guaranteed in electoral disputes.

In Côte d'Ivoire, communication between the parties is widely accepted and applied. Based on paragraph 2 of article 38 of the internal regulations, rules of communication between the parties are established. According to this article, "the adversarial process consists of the exchange of written

76 Paragraph 4 of article 14 of the Organic Law on the Constitutional Council.
77 Constitutional Council of Senegal, decision 96/2007-decision 96/2007-cases no. 4/E/2007 and 5/E/2007,Ousmane Tanor Dieng and Abdoulaye Bathily, seeking the annulment of the minutes of the Commission nationale de recensement des votes et du 1er retour du scrutin présidentiel du 25 février 2007 (National Commission for the Enumeration of Votes and the 1st Return of the Presidential Election of February 25, 2007)
78 Constitutional Council of Senegal, Decision no. 13 /E/2024 of October 10, 2024.
79 These are the provisions of paragraph 4 of article 14 of the Organic Law on the Constitutional Council.
80 The organic law specifies that Constitutional Council hearings are not public, subject to article 37 and article 7 of the law governing the presidential oath.

documents and exhibits between the parties and possibly during the hearing debates"[81]. As a result, we need to clarify the adversarial principle, as well as the practical details of its implementation - particularly as regards communication between the parties. These exchanges can take both written and oral forms.

Participation in ordinary[82] hearings is guaranteed to the parties or their representatives, experts, and lawyers.

However, participation in the debates is restricted to "counsel for the parties, who may present brief oral observations"[83] with the authorization of the Chairman. Communication between the parties, as provided for by law and as practiced before the Board, is an opportunity to clearly set out the points raised. As is the case in other legal systems, lawyers participate in compliance with the rules of communication by producing file documents.

Furthermore, the right of access to pleadings and procedural documents granted to the claimant enhances the transparency of the proceedings. In electoral disputes, in particular when contesting results, the candidate declared the loser of the election submits a brief containing his or her arguments and supporting evidence. The winning candidate is then allowed to inspect the brief. He may respond with a statement of defense. The Board always gives the winning candidate the opportunity to respond to his opponent's grievances (Sanogo, 2024, p. 319). This approach encourages the application of contradiction. In addition to exchanging written documents, the parties may also provide evidence of their allegations, in accordance with the plaintiff's burden of proof rule. While contradiction is effective in electoral disputes, it is only timidly applied in disputes concerning standards.

A Timid Application of the Adversarial Principle in Standards Litigation

Due to the nature of the controls carried out, the adversarial principle in the control of legal norms is not widely applied. This weakness is put into perspective by its application in a posteriori control and by the spectral presence of the adversarial principle in *a priori* control.

• The Presence of Contradiction in *a posteriori* Control

The purpose of legal constitutionality control is to protect the constitutional order against any norms that do not comply with the fundamental text. This operation is only possible in the context of a trial as a framework in which the initiative and activity of the parties take place (Jean, 2010, p. 70). In standards litigation, there are many reasons why proceedings cannot be truly contradictory, but there are ways in which proceedings can take on certain aspects of contradiction (Kamto & Matringe, 2024, p. 918).

In Senegalese law, the procedure of the exception of unconstitutionality allows a certain application of the contradiction. Because of the concrete nature of this review, it is possible for the party having raised the objection to produce its defenses before the judge on the merits, which may be taken into account by the constitutional judge. The Senegalese judge demonstrated this in the case relating to the exception of unconstitutionality of article 344 of the Customs Code submitted by the Attorney General of the Supreme Court[84]. Indeed, after examining the case, the judge reminded the Court of Appeal of "the obligation to transmit to the Constitutional Council the exception raised,

81 Paragraph 2, article 38 of the Constitutional Council's rules of procedure.
82 The law provides for two types of hearing. Ordinary and formal hearings. Ordinary hearings are always held in camera.
83 The provisions of article 43 paragraph 2 clarify the participation of lawyers in debates.
84 Constitutional Council, decision n° 5 /C/2022 of September 28, 2022 the exception of unconstitutionality of article 344 of the Customs Code transmitted by the Attorney General of the Supreme Court within the framework of the case Public Ministry against Adama Bou Labeid and Alameer Mubarak Abu Jalil Abou Ghani.

which falls within its exclusive jurisdiction"[85]. In fact, in analyzing the facts and the procedure, the judge detected breaches of jurisdiction. This often raises the question of compliance with the principle of compulsory referral of preliminary questions by the trial judge. Le Conseil a toujours réaffirmé sa compétence exclusive pour contrôler la constitutionnalité des lois, face à un « pouvoir autoproclamé d'appréciation de la pertinence de la question de constitutionnalité par les autres ordres juridictionnels » (Diop, 2020, p. 84)[86].

Under Ivorian law, the adversarial principle is applied to the exception of unconstitutionality. Indeed, several decisions mention the involvement of lawyers in initiating proceedings and producing documents. By way of illustration, in the context of an objection of unconstitutionality raised, the court recalled the lawyer's involvement in the following terms:

> Considering that the examination of the file reveals that the exception of unconstitutionality was raised during the hearing of April 14, 2023, which was held before the criminal court of Man, which, having received the request, ordered a stay of proceedings and gave the applicant 15 days in which to refer the matter to the Constitutional Council, postponing the proceedings until May 2, 2023, for the lawyer to produce proof that the matter had been referred to the Constitutional Council, as shown by the attestation in the court record[87].

The judge confirmed this in his decision of May 11, 2023, on Mr. Doua Jean-Luc's petition for a declaration of unconstitutionality of article 354 of the former Penal Code and article 182 of law no. 2018-975 of December 27, 2018, on the Code of Penal Procedure. He describes the case in the following terms:

> Considering, however, that the fairness of the trial is in no way undermined by the right of the Public Prosecutor, a party to the criminal trial, to make submissions; on the contrary, it is clear from the elements of this case that the accused appeared publicly, assisted by his counsel, before a regularly constituted court, where the principle of adversarial proceedings and the rules of procedure were respected, hence the present referral[88].

This stance is a reminder of the importance of the adversarial principle, which gives claimants the opportunity to examine the arguments presented in opposition to their claim, and to produce observations in response, with the support of counsel and experts. It is therefore up to the court to organize the different phases of the trial. Violation of this rule is punishable by law.

In comparative law, in the KRCMAR v. Czech Republic judgment of March 3, 2000, the European Court of Human Rights condemned the Czech Republic for violating the principle of equality of arms, for failing to conduct an adversarial exchange and for failing to forward to the applicant documents produced during the investigation of the preliminary question examined by the Constitutional Court[89].

This position of the European Community jurisdiction is not far from that taken by the African Court of Human and Peoples' Rights (ACHPR) in its decision APDH c/ Côte d'Ivoire dated September 28, 2017 relating to the interpretation of Article 7 of the African Charter on Human Rights. The court concluded that the constitutional appeals were not appeals within the meaning of Article 7 of the

85 In this case, seven members of a ship's crew were charged with conspiracy to commit international drug trafficking. They applied to the Dakar High Court for provisional release, which rejected their request. They appealed to the Indictment Division of the Court of Appeal, which handed down a ruling in which it accepted the appeals, ordered their consolidation and rejected the objection of unconstitutionality. This rejection was not within its competence, and the Constitutional Court recalled this in the following terms: "the Chamber is obliged to transmit to the Constitutional Council the objection of unconstitutionality thus raised and to stay the proceedings".

86 See also decision no. 1-C 2019, April 25, 2019, l'entente communauté des agglomérations de Dakar et communauté des agglomérations de Rufisque (CADAK-CAR).

87 Decision no. ci-2023-001/dcc/11-05/cc/sg of May 11, 2023 concerning the request by Mr. Hien Sansan Kouadio to verify the conformity with the Constitution of article 354 of the former Ivorian penal code as well as articles 403 and 404 of law no. 2021-893 of December 21, 2021 on the penal code and 182 of law no. 2018-975 of December 27, 2018, on the penal procedure code.

88 Decision n° ci-2023-002/dcc/11-05/cc/sg of May 11, 2023, relative to the request of Mr. Doua Jean-Luc for a declaration of unconstitutionality of article 354 of the former penal code and article 182 of law n° 2018-975 of December 27, 2018 on the penal procedure code. In this decision, the applicant charged with rape raised the objection of unconstitutionality of article 354 of the former penal code. He also claimed that the rules of fair trial had been violated. The Conseil recalled that the law is to be understood as all norms in force and that the provisions raised were not contrary to the Constitution.

89 European Court of Human Rights, KRCMAR v. Czech Republic judgment of March 3, 2000. For more information, see Abadie (2000).

African Charter, as they did not have the characteristics of a fair trial[90]. In addition, the procedural communication established before the Ivorian Constitutional Council encourages balanced debate before a decision is taken.

On the other hand, the link between the existence of the adversarial principle and the quality of decisions deserves to be raised. Can the presence of an adversarial process guarantee the quality of decisions? A fundamental question that highlights the added value of contradiction in the judge's approach and decisions. In addition to this principle, motivation is essential to the judge's work[91]. The constitutional courts in the target countries apply the adversarial principle in *a posteriori* review in different ways. The Ivorian judge seems to be ahead of the game since his powers are based on both the organic law and the rules of procedure, which give him room for progress in taking into account the claims of the parties, in particular the litigant. However, the adversarial principle is still almost non-existent in *a priori* control.

• The Absence of Contradiction in *a priori* Control

The practice of the adversarial principle in preventive control is complex and often even non-existent, depending on the country and the jurisdiction. In an analysis of *Les singularités de la procédure devant le Conseil Constitutionnel* (1996, p. 537), Doyen Vedel highlighted the difficulties associated with the application of contradiction in the *a priori* constitutionality review of laws. The major difficulty raised is the nature of this litigation, which does not favor formalizing the contradiction. *A priori* control is preventive[92], objective[93] and abstract[94]. The result is that the constitutional review of laws carried out by the constitutional court in this way is an objective dispute[95] in which the case is made, not against a person, but against the law.

For the Conseil, therefore, it is not a question of settling a conflict between parties, but rather of settling a debate between the law and the Constitution, or a debate between the legislator and the institution responsible for reviewing constitutionality (Abadie, 2000, p. 673). By its very nature, the constitutional process is not conceived as a jurisdictional procedure, but rather as a legislative one. The referral does not initiate litigation, but triggers a procedure that forms part of the law-making process (Vedel, 1996, pp. 59-60, cited by Fare, 2020), with a view to reducing the period of uncertainty surrounding laws passed by the legislature.

How can contradiction be applied in such a trial? The principle of adversarial proceedings in the strict sense implies that claims are often opposed before a judge. In fact, because of the specific nature of this control, the Constituents and organic legislators often leave no room for contradiction. The list of laws subject to the control of persons empowered to make referrals shows from the outset that the aim is to protect the supremacy of the Constitution (Diakhaté, 2021, p. 197).

In Côte d'Ivoire, the notion of party is recognized by the texts within the framework of the constitutional trial, where they have the possibility of participating in the debates[96]. The law is silent on the opportunity to file briefs in this particular review. In Senegal, the notion of parties is absent from the texts. The legislator does not refer to the parties, but rather to the authorities constitutionally empowered to intervene in this procedure. It might be possible to consider these parties as "passive" parties to the process, since *a priori* control is carried out in a non-adversarial manner, without any considerable input from the key players in the decision-making process.

The nature of *a priori* control is preventive and objective: "There are neither subjective rights in question nor parties" (Fare, 2020, p. 267) in the sense of plaintiff-defendant, but rather the constituent-legislator couple. The absence and/or silence of the parties are unfavorable to any idea

90 African Court of Human and Peoples' Rights, judgment of November 18, 2016, Actions pour la protection des droits de l'homme (APDH) v./Republique de Côte d'Ivoire, available at https://juricaf.org/.
91 See Sobzé (2020, pp. 95-144).
92 Preventive control is exercised before a law is promulgated, to protect the constitutional order from texts that do not comply with the Constitution.
93 The objective nature of this control is linked to the fact that it does not concern a subjective right.
94 It concerns the conformity of the law with the standards that make up the constitutional bloc.
95 The objective nature of this litigation is mitigated by certain jurisdictions, which take on subjective litigation based on the alleged violation of subjective rights. Benin's Constitutional Court is a case in point.
96 Paragraph 2 of article 36 stipulates that "only the parties, their representatives and experts shall take part in the debates at ordinary hearings". Law n° 2022-222 of March 25, 2025 determining the organization and functioning of the Constitutional Council.

of adversarial proceedings in a constitutional trial. If the parties are accepted in the *a posteriori* control, their presence is questioned in the *a priori* control. This is an opportune moment to recall a doctrinal debate on the existence of parties in constitutional proceedings.

The thesis of the absence of parties to the constitutional trial is supported by Dean Vedel. In defense of his position, he opines that "the government is not a party or intervener" and that "the term that would better do justice to its function is that of interlocutor" (Vedel, 1996, p. 272, quoted by Fare, 2020). He had refuted the idea of a "party" before the Constitutional Council, holding that the government could not constitute a party. In the same vein, other authors (Schrameck, 1995; 2008) have refused to grant party status to institutional players involved in the procedure. This position, while justified, is debated in procedural law, where a trilogy appears: litigation-judge-party (Rousseau, 2008, p. 51).

In any case, the contradictory principle, understood as the possibility of discussing one's arguments, is not operative in this particular control. However, the purpose of this exercise can be achieved through techniques adapted to the legislative procedure, if we bear in mind that for many Constituents, the initiative for legislation is shared between the executive and legislative branches. In the absence of a proper adversarial process, it would be fortunate to institute it as part of the exchanges between parliament and the executive to ensure effective preventive control.

Conclusion

Constitutional law has undergone profound changes in constitutional theory and constitutional litigation. We are gradually witnessing "a processualization of constitutional litigation" (Djogbénou, 2020, p. 195), the corollary of which is the introduction of procedural rules designed to guarantee a fair trial. In the light of the foregoing analyses, it is clear that the principle of adversarial proceedings before the Constitutional Court, once regarded as a kind of abuse of language or a relic of the past, has evolved in the review of the constitutionality of laws.

Legislation in the countries studied has organized this differently. In Côte d'Ivoire, the adversarial nature of proceedings before the courts has been enshrined in a variety of regulations. The Ivorian legislator organizes the adversarial process according to the nature of the control exercised. In Senegal, the procedure is still non-adversarial, with a slight attenuation in the context of the exception of unconstitutionality. However, there are similarities between these countries in terms of the procedural rules governing the adversarial process, particularly in terms of referral and deadlines.

The acceptance of this fundamental principle of procedural law, albeit variable, is unquestionable. In practice, it is more present in electoral disputes where subjective rights are at stake. The adversarial principle is also present in the review of the exception of unconstitutionality, where the judge seems to carry out a thorough investigation and receives the observations of the parties. In *a priori* control, contradiction is obstructed, hence the need to adapt or reorganize this principle for this specific type of control.

It also emerges that there is room for improvement in the application of the adversarial principle to constitutional proceedings. Procedural rules guarantee qualitative jurisprudence. Just as the existence of qualitative and quantitative jurisprudence can put the adversarial principle to the test. Furthermore, the use of the adversarial principle not only promotes fairness in the trial, but is also a powerful means of legitimizing the judge's decisions. Consequently, the work of constitutional judges must be geared toward consolidating the contribution of adversarial proceedings, defining their contours in practice, and bringing them to life in order to meet the challenges of a constitutional justice system that contributes to the consolidation of the rule of law.

This dynamic will only be possible if legislators and judges from all legal systems work together. This reinforcement of jurisdiction will certainly make the adversarial principle a procedural imperative. The new lease of life for constitutional justice in West Africa will have to be based on clearly established procedural rules that are sufficiently rooted in court practices to establish the right to a judge, the right to a fair trial, in a logic that will save the tried and tested constitutional order.

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